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JOSEPH RAZ, DENG ZHENGLAI, ZHU ZHEN^{*}

LEGAL PHILOSOPHY THROUGH THE PERSPECTIVES OF MORAL AND POLITICAL PHILOSOPHY: A DIALOGUE WITH JOSEPH RAZ

I

Question:

During an interview in 2009,¹ you summarised the turns and transitions in your academic interests: ‘my academic interest was jurisprudence in the 1970s, political philosophy in the 1980s and the theory of ethics in the 1990s’. Of course, this is a general abstraction, as in 1975 you had already published your book *Practical Reason and Norms*, which is an oft-quoted work in moral philosophy. In *Between Authority and Interpretation*, you developed your views on some of the central questions in practical philosophy: legal, political, and moral. The book provides an overview of your work on jurisprudence and the nature of law in the context of broader questions in the philosophy of practical reason. We also know that you always resist the disciplinary division and specialisation of academic research, with the focus of your research interests and topics in constant change.

For this, our questions are: first of all, what is the internal correlation between these researches in different fields? Is there a core issue that you are interested in? Or, were these changes the result of your close and constant attention to certain issue(s)? Secondly, we are quite interested in the changes in your academic interests. Can you explain why you changed from jurisprudence to political philosophy and then again to the theory of ethics?

Reply:

I tend to think of the changes in the direction of my work not so much as shifts of interest but as the fulfilment in stages of one interest, which

^{*} Editor's Note: This interview was conducted in September, 2009. We thank Professor Timothy Endicott for his help in editing and correcting errors in the text.

¹ The interview referred to was carried out by Peter Momtchiloff in 2001, and is discussed in Michael Sevel, ‘Historical Origins of Raz's Legal Philosophy’ (2024) 10 *Rechtsphilosophie* 5.

always informed everything I did, namely curiosity about the nature of normativity in its various manifestations. The attempt to clarify normativity takes one to philosophy of mind and of action, to an exploration of rationality, of reasons for action and of the various types of reasons we have, including legal reasons, political ones and moral ones. I like to think that I never gave up any of my past interests. It is just that I move on to examine other aspects of the problems involved with an attempt to explain normativity, hoping that my work gains in depth and understanding over the years.

Many philosophers today seem to think that the explanation of normativity involves one big question: how can normativity be reconciled with a naturalistic world view? By way of contrast, I think that there are many puzzling questions about normativity, not one big question. And over the years I have been exploring various of them. So there is—I believe—what you may call a loose unity in my work: most of my publications contribute to one or another question about the nature of normativity. But it is merely a loose unity, as I do not believe that all the questions about normativity are really parts of one big question. So, for example, even though my writings in philosophy of law cover many topics, their core is the relations between law and morality, which is really just another name for the question about the normativity of the law. Most recently this extended to the question of how the fact that we are subject to reasons expresses itself in the doctrine of responsibility.

There is one limit to my interest that I should mention: I do not believe that philosophy on its own can offer practical solutions to what is known as applied ethics, or real detailed policy advice in any sphere. For example, I do not believe that philosophy by itself can offer a prescription for the drafting of a good constitution. Decisions about the shaping of a constitution depend on local conditions, on local traditions, on the cultural background and on the existing legal situation. Ideas for reform should be informed in all these ways. It follows that what would be good for one country is unlikely to be good for another. Of course there are in today's world strong pressures for increased uniformity across borders. Much of this is, for reasons I cannot go into here, welcome. But it is easy to exaggerate or to misunderstand the force of these reasons and to err by thinking that there is one solution for all countries. Philosophers are particularly prone to this mistake. They tend to exaggerate what philosophy can contribute by itself, and therefore to favour universal solutions. The desire to avoid this fallacy made me cautious about engaging with concrete policy questions.

II

Question:

You have been regarded as an outstanding scholar in the Anglo-American academia of legal philosophy, moral philosophy and political philosophy. Through reading your works, it can also be seen that your research in political and moral philosophy has influenced your contribution in legal philosophy in no insignificant way. Moreover, in contemporary Anglo-American legal philosophy, these three philosophies are closely bound together. Such scholars as Dworkin, Finnis and Rawls are invariably philosophers of both law and morality. During your interview with Peter Momtchiloff, the Commissioning Editor for Philosophy at OUP, you mentioned that there is little for moral philosophy to learn from jurisprudence. Moral philosophers' attention to jurisprudence can be due to two misunderstandings: one being that moral philosophy can benefit from the relative certainties of the law and jurisprudence, while the other is that there is a shared set of terminologies such as rights and obligations between jurisprudence and moral philosophy. You have critiqued such notions, pointing out that legal philosophers have mistaken general normative concepts as certain legal concepts. Moral philosophy should study the former and it will be a mistake to use the latter as the starting point. For this reason, 'Jurisprudence has a lot to learn here from practical philosophy generally, but not much to teach it'.

So, what is your view on the relation between contemporary jurisprudence and moral philosophy? A related issue is that there are many young scholars in China dedicated to research on Anglo-American legal philosophy, especially legal positivism. Concerning the latest development in the research and understanding of contemporary legal positivism by non-Western scholars, do you have any advice for them?

Reply:

The important point is that the law is a normative system, purporting to authorise, require, or prohibit various form of conduct, purporting to endow people with rights, etc. That being so one cannot go far in legal philosophy without engaging in moral reflection. So legal philosophers must be familiar with general moral philosophy, and therefore with philosophy generally. Otherwise, legal philosophy becomes sterile. That is another of the ways much legal philosophy fails us today. The institutional division between philosophy and law departments is of course understandable, perhaps even necessary. But it is allowed to breed

intellectual dislocation and isolation—a cutting off of legal philosophy from its intellectual home in philosophy. Even young legal philosophers who come to the subject from philosophy departments, once they specialise in legal philosophy tend to neglect their familiarity with work in the rest of philosophy, to the detriment of their ability to contribute to the subject.

I do not wish to deny that there are many challenges in explaining the law which are specific to it. Many of them arise because the law is an institutionalised normative system. This gives rise to various questions regarding the analysis of systems as well as to moral issues. In recent times moral philosophy tended to ignore the effects of institutionalisation on how people should behave. Though I am glad to say that more recently interest in this has grown among philosophers. So the overall picture is, not surprisingly, complex, with parts of legal philosophy being relatively autonomous while others are, or should be treated as, thoroughly integrated with other philosophical issues and doctrines.

This view of the relations between jurisprudence and the rest of philosophy was not popular when I was a student, and in some quarters, it is not popular today. In some countries this was due to political repression and intolerance of any dissent. Treating jurisprudence as a technical, value-free subject was, in such circumstances a safe option, unlikely to attract the wrath of the authorities. Beyond that there was the deep and widespread influence of positivism, and scepticism about values, and about normative knowledge. Many legal philosophers reacted by embracing a technological, allegedly value-free approach to their subject. I am glad that as your question indicated that stage is behind us, at least in the sense that the best work in the subject rejects it.

III

Question:

In contemporary Anglo-American analytical jurisprudence, for legal positivism, the internal dispute between inclusive legal positivism and exclusive legal positivism has replaced the external dispute between legal positivism and natural law, thus becoming one of the most significant theoretical discourses. As Brian Leiter pointed out, ‘... the Hart/Raz dispute—the dispute about whether there are constraints on the content of the Rule of Recognition as positivists conceive it—is both the most important on-going debate in recent analytical jurisprudence and one that has

already moved beyond Dworkin: this debate will be settled on the terms put forth by Raz, Shapiro, W.J. Waluchow, Jules Coleman, and others.² As we can see, this dispute continues to be heatedly debated at the moment, far from its conclusion. As a leading scholar on exclusive legal positivism, you have proposed a hard version of positivism, arguing that ‘the existence and content of every law is fully determined by social sources’.³

Then, do you agree with what Brian Leiter pointed out that (1) the Hart/Raz dispute has moved beyond Dworkin and (2) the terms put forth by Raz, among other scholars, can settle this debate? If possible, please comment on this debate and its theoretical implications.

Reply:

I have to confess that I do not see the debate between so-called inclusive and exclusive positivism as particularly important. True, I have contributed to it (and my doubts about inclusive positivism are explained most clearly in Chapter Seven of my *Between Authority and Interpretation* (OUP 2009) called ‘Incorporation by law’. I am inclined to think that as between these two options the so-called exclusive positivists have the better of the argument. But that does not mean that I take this to be an important point of legal theory. I do not want here to go into the substance of the argument, but perhaps I could explain some of the background to my view. It is widely recognised that legal authorities in properly discharging their functions reach decisions based both on the law and on other reasons. It is also realised that they may make mistakes and ignore the law, or ignore other reasons which they should rely on, or that they may fail to recognise their proper significance. What jurisprudence aspires to provide is an account of the proper reasons legal authorities should rely on. It will also identify when they make mistakes. Such an account must, I think, divide the considerations or reasons legal authorities should properly rely on into three classes (with many further more subtle distinctions), namely: legal reasons, reasons binding according to law, and reasons which they properly follow even though the law prohibits that. The last category exists because the law may be imperfect in ways which justify, or even require one to disregard some aspects of it. The debate between the two kinds of so-called positivists is about the proper way to draw the line between legal reasons and reasons which are not legal reasons but which legal reasons require authorities to

² Brian Leiter, ‘Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence’ (2003) 48 *The American Journal of Jurisprudence* 17, 27.

³ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 46.

apply. A statute sets up legal reasons, prohibitions, rights, etc. But such legal reasons may refer to other reasons: for example to contracts, to rules and regulations of voluntary associations, to customs and practices of various kinds, to religious laws or to foreign laws, and instruct the authorities to apply them. The law may also instruct the authorities to follow bare moral considerations. I mean moral considerations which have not been enacted into law. For example, a law forbidding murder enacts a moral consideration into law and creates a legal reason (which is also a moral one). A law which allows legal authorities to set aside as unenforceable contracts which are immoral instructs the authorities to apply what I called bare moral considerations about the justice of contracts (though with time there may also accumulate a body of legal reasons binding on the authorities on this issue).

As I said, the dispute between the inclusivists and the exclusivists is about what constitutes the distinction between legal reasons and reasons binding according to law. To my mind recognition of the two categories and of their broad nature is more important than the determination of where the boundary between them lies. This is so because what is common to both sides is the view that the dispute is about the way the distinction is recognised in the life of the law, in the way legal arguments are conducted. But the life of the law benefits from ambiguities and unresolved disputes. It benefits from avoiding clarity when it is not needed for some purpose. This is a common feature of all interactions between people including legal ones. Therefore, it is difficult to find clear unambiguous demarcation of the distinction in the life of the law. Any suggested demarcation, such as I and other theorists have offered, must find echoes in legal discourse, but can also be expected to conflict with some features of legal discourse. In the end, as I said, what matters is recognition of the significance of the different categories rather than their precise delineation.

IV

Question:

Recently, the Raz/Alexy dispute has attracted a lot of attention. You seem to have become the major interlocutor and an Anglo-American jurisprudent who received most attention from Robert Alexy, the contemporary German jurisprudent. As you and Andrei Marmor summarised, Alexy has a core proposition that ‘The law essentially makes a claim to its moral

correctness.⁴ Obviously, Alexy's intention is to use the argument from the claim to correctness to establish the necessary connection between law and morality. Your opinion can be summarised as that the law can make a moral claim. For instance, 'the law claims to have legitimate authority'. This nonetheless is not a claim to moral correctness. Legal rules, even if incorrect, are still valid, which is the nature of authoritative rules. Moral wrong and moral validity are two separate issues.⁵

Therefore, we would like to discuss with you the issue of correctness, which has become the core distinction between positivism and non-positivism. We have noticed that the main evidence you used to refute Alexy's theory came from the authority theory of law. According to the dependence thesis and the normal justification thesis, the reasons for authority reflect a balance of first-order reasons, of which the results constitute 'the demands of right reason'. But you didn't explain in detail what the 'right reason' is. For Jules Coleman, 'the demands of right reason' point to the 'proper balance of first-order reasons', while Michael Moore argued that it is dependent upon those antecedent reasons only, regardless of its correctness.⁶ Obviously, Coleman argues for a strong sense of right reason, while Moore a weak sense.

Our question is: in your theory, in which sense is the 'right' used? What are its implications? To clarify this issue will not only help eliminate an equivocation concerning the service conception of authority, but also elucidate the discussion of the correctness of law. If used in a strong sense, your theory will approximate that of Alexy; if used in a weak sense, then your service conception of authority will be a comparatively weak justification, for law commands as practical authority will often face and deal with the more complicated and important dispute between political morality and right. Unless successfully dealing with these issues, authoritative commands will not effectively play a mediating role between reasons and agents.

Reply:

One clarification to start with: In my answers to previous questions, I followed the terminology you used, and referred to so-called positivists of the different varieties. I qualified the reference, calling them 'so-

⁴ Joseph Raz, 'The Argument from Justice, or How Not to Reply to Legal Positivism' in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007) 31.

⁵ See Raz (n 4) 31–2.

⁶ See Jules Coleman, *The Practice of Principle* (Oxford University Press 2001) 122; Michael S Moore, *Educating oneself in Public: Critical Essays in Jurisprudence* (Oxford University Press 2000) 149.

called positivists' because I have been arguing for many years that the distinction between positivism and natural law is no longer helpful, given developments in legal philosophy over the last 40 or 50 years. My point is that with the growing sophistication of the different accounts of the relations between law and morality the classification of accounts as natural law or legal positivist tends to obscure rather than to illuminate. It helps people to ignore the complexities of the issues. Alexy's writings are a case in point. His book against legal positivism was written in complete ignorance of the work in analytical jurisprudence over the last 40 years. Since then, he has been catching up, and as you say he is now familiar with some aspects of my work, and with some others.

Talk of the law's claim to moral correctness is liable to confuse two ways in which the law may relate to morality: First, if we break up the law into individual rules or doctrines then the content of each one of them, or of some of them, may be morally correct in the following sense: if the law says that P (where 'P' stands for a proposition such as 'murder is prohibited', or 'all adult citizens have a vote in the parliamentary election') then P is—in the circumstances of the country and the time in which this is the law, a morally true proposition (i.e. it is true that morally speaking murder is prohibited or that every citizen has a vote). Let me call this 'content correctness'. But the law may be morally binding even if it is not morally correct in content. It is generally recognised that even misguided, inefficient, morally deficient law may be morally binding on the people subject to it, that is they may have an obligation to obey it. Let me call that phenomenon the systemic moral validity of the law. I call it 'systemic' for what makes the law morally valid (binding) when it is not morally correct is that it is part of a legal system with certain properties, a legal system which is morally legitimate. So the moral validity of any rule or doctrine of law is systemic when it derives from properties of the legal system as a whole, i.e. from its moral legitimacy.

My view is, as you mentioned, that the systemic moral validity of the law derives from the moral legitimacy of legal authorities. My account of authority sets out the conditions under which authorities are morally legitimate. According to it the fact that the decisions of legal authorities are likely to be correct in content is relevant to their legitimacy, but the two (legitimacy and content-correctness) are logically independent. I have argued that the very fact that legal authorities maintain the law commits them to the claim that it is morally systemically valid. It does not commit them to the view that it is morally correct in the sense of having the correct content. I have known authorities which allow that the law they apply is morally deficient, but maintain that it is morally binding and ought to be

obeyed and enforced until changed by proper process of law.

You complain that I did not explain what 'right reason' is. I think that I did, at least enough to explain the nature of authority. The use of the expression 'right reason' acknowledges that the question of the moral standing of an act or a law can be complex. There may be reasons for it and reasons against it. 'Right reason' refers to the outcome of that complexity, i.e. to the standing of the act or the law which is determined in light of the fact that it is subject to all those conflicting considerations. So what have I not explained? First, I have not given you here a doctrine of normative reasoning which explains how the right reason is determined by the many reasons which affect the issue. That is a complex theoretical question much discussed, and not yet satisfactorily answered by anyone. I contributed to the discussion, but I do not have a general theory of the matter. I wish I had. The absence of such a theory is not, however, relevant to the more abstract debate about the relations of law and morality that we are now discussing. Second, I have not expressed a view of whether the Chinese government or that of any other country is legitimate, nor whether Chinese law, or that of any other country, is correct in content. I did not do so regarding this or that case because I do not know enough about most of these cases to have an opinion, and (as I explained earlier) because even when I have an opinion it is not my 'philosophical' opinion, being determined by my view of the social, cultural, and economic conditions prevailing. And therefore, it is inappropriate for me to express it as a piece of philosophical judgement. Third, I did not provide a general formula which enables one, given the facts which the formula takes to be relevant, to determine which laws are correct in content and which are systemically valid. The reason for this failure is that there is no such formula in matters moral, any more than there is one regarding factual or mathematical truths. To establish whether any law is correct in content or whether any government is legitimate one has to look at the particular case and find out what are the reasons which apply to it.

V

Question:

Most recently, the Anglo-American jurisprudential academia is in a heated discussion of methodology. Different from the German academia's attention to the method of application of law and the general methodology of social science in legal research, the Anglo-American academia has a

particular context, namely that this methodology debate started from the 'descriptive jurisprudence' thesis as proposed by Hart in the Postscript of *The Concept of Law*, which attempts to provide a general, descriptive theory on what the law is. Analytical jurisprudence is no longer satisfied with attending to such issues as how to revise or strengthen Hartian positivism as a response to Dworkin's critiques for the purpose of defending positivist traditions. Instead, the focus of the debate changed to such issues as the construction of the theory of law per se, the nature of the theory of law and further, the nature of law, i.e. with the main focus on this issue: 'how should we carry out research in jurisprudence?' This enables jurisprudence to start discussing fundamental methodological issues such as descriptability and normativity, making 'jurisprudence's ignorance in methodology history'.⁷

In fact, although you did not discuss in detail the right and wrong of the two methods of descriptability and normativity, 'the nature of law' and 'the nature of the theory of law' are the methodological issues that attracted your close attention. We are very interested in your thesis on 'how to explain the nature of law', which in fact is concerned with your own theory on explaining the nature of law, namely that 'the law will necessarily claim legitimate authority'. For you, explaining the concept of law is to explain certain inevitable or essential characteristics of law, with contexts of both history and the present day. '[T]he concept of law is not a product of the theory of law. It is a concept that evolved historically, under the influences of legal practice, and other cultural influences, including the influence of the legal theory of the day'.⁸

For this, we would like to discuss with you: (1) for you, the understanding of the nature of law and the theory of law thus constructed are bound by territory and history, for the living experiences and self-perception of the people vary considerably by times and locations. For this reason, the theory of law cannot possibly be universal. What is your view on the theoretical effort by legal positivism to construct a 'general jurisprudence'? (2) A follow-up question is: if the purpose of this theory is untenable, does there still exist a 'general' and 'descriptive' research methodology in jurisprudence? We know that the Hartian 'descriptive jurisprudence' thesis attempts to provide a general, descriptive theory on what the law is. (3) A related question is: what's your view on establishing a

⁷ Ian Farrell and Morten Ebbe Juul Nielsen (eds), *Legal Philosophy: 5 Questions* (Automatic Press/VIP 2007).

⁸ Joseph Raz, 'Two Views of the Nature of the Theory of Law: A Partial Comparison' (1998) 4 *Legal Theory* 249, 281.

globalised jurisprudence with universal values? In an age of globalisation, how can jurisprudence and legal philosophy in China construct their own theories?

Reply:

It is one of the defining marks of philosophy that it is self-reflective, that it is concerned about its own standing and method. I have discussed these matters in various places, most recently in the first chapter of my new book ('Can there be a theory of law?' in *Between Authority and Interpretation*). As I explained there legal philosophy is a general discipline, not a local discipline, and its general part studies the nature of law, that is its necessary feature—again not one which it has in one place rather than another, or at one time rather than another. The concept of law is, however, in an important sense a historical, and thus a local concept. That means that it was not a concept which people always had. All concepts are historical in that sense. That in itself tells us nothing about the science or other discipline in which they figure. For example, the concept of atomic weight is a historical concept, and has become available to people only with the rise of modern physics. But atoms had an atomic weight since the time there were atoms in the world. Of course, unlike atoms which always existed legal systems did not. They are, relatively speaking, late arrivals. But not as late as the concept of law. That is, there were legal systems in the world even when people did not think of them as such, just as there were atoms in the world even when people did not think of them. This claim is of course more controversial when made of the law than of atoms, because the existence of the law presupposes activities referring to various aspects of it. But as I have argued elsewhere, it does not require referring to the law as a separate distinct normative system, and that means that it does not require possession of the concept of law.

You ask about the possibility of something like a value-free account of the law. You did not use the term but I believe that you mean something like that. I do not believe that something like that is either possible or desirable. If I am right in saying that the law enjoys systemic validity only if legal authorities are morally legitimate (call this 'the thesis') then the statement that that is so is part of the theory of law for it states a necessary feature of it. Now the thesis does not strike me as a value-free thesis. It says something about normative matters. Given that the law is a normative system we could hardly expect that an account of it will not include normative statements. It is true that we can make true statements about normative propositions

which are not themselves normative. But we will miss important features of the law if we confine ourselves to such statements. Some writers have proposed false theses about the nature of law. For example, some think that the law is necessarily systemically valid. But what is wrong with such theses is not that they are not value-free but that they are false.

What I said earlier about the universality of jurisprudence applied to its general part, to its discussion of the nature of law. But legal philosophy is a broad subject with no generally recognised boundaries. So, to the extent that Chinese scholars are interested in the nature of law in general their being Chinese contributes little directly to the subject, just as being French does not. But I should qualify this: accounts of the nature of law identify, as I said, necessary properties of the law. There is an indefinite number of those and no writer is looking for all. Scholars are looking for those properties which help with puzzles which occupy them. What puzzles us is again a matter of historical contingency. People of different cultural backgrounds may bring with them new puzzles and enrich jurisprudence by stating them clearly and compellingly, and hopefully by solving them. Beyond that lies all the rest of jurisprudence. It includes the comparisons of types of legal systems, of different methods of adjudication, and of course of the choice of policies to be pursued by law. All these are based on universal values, but their application to different conditions yields different results.

VI

Question:

In his article ‘Thirty Years On’, Ronald Dworkin vehemently criticised your theory of authority. His first doubt was that adequate evidence is lacking to regard ‘the claim to legitimate authority’ as the essential characteristic necessary to the concept of law. This is an empirical assertion that cannot become a necessary feature of the concept. Dworkin illustrated this point with examples. Even if law officers regard law from the Holmesian realist perspective, this doesn’t mean that for them, law does not exist. Therefore, the concept of law is an evaluable and interpretative concept. Your ‘social understanding thesis’ argues that the law’s claim to legitimate authority accords with the understanding of law among members of the society, and is thereby capable of illuminating the essential feature of law. For this, you have an incisive summary: ‘We are not free to pick on any fruitful concepts. It is a major task of legal theory to advance our understanding of society by helping us understand how

people understand themselves.’⁹

Our concern is not Dworkin’s critiques per se, but a fundamental methodological issue on the construction of the theory of law as inherent in his critiques, namely that regardless of ‘social understanding’ or the ‘theoretician’s understanding of social understanding’, it is invariably an issue of construction and explanation, and a theoretical construct of social practical experiences. Then, how can we ensure the theory of law thus constructed will assert propositions that are essential rather than empirical?

Reply:

Your question raises difficult issues. I am not confident that I know the answers, and I will not be able to do more than outline my thoughts about them here. Earlier I said that the law exists in societies which do not have the concept of law. But obviously my view that the law claims legitimate authority does not allow me to say quite the same here. The claim is that necessarily in every society which has law there are authorities, which are treated as such by at least some of the people, not least by people who occupy positions of authority. Does it not follow that they have the concept of authority? If it does, and as whether or not people have the concept is a historical matter, does it not make the thesis about the relations of law and authority contingent?

The answer to the second question seems to me easy: No, it does not. It is contingent whether a culture has the concept of authority and it is contingent whether it has a legal system. It does not follow that it is contingent that it has a legal system only if it has the concept of authority. It may well be a necessary feature of the law that those who live under it, or some of them, have the concept of authority. But is it?

Before answering this question one important preliminary: possession of the concept does not require that people have a correct understanding of it. Think for example of our own societies. They clearly have the concept yet there are sharp disagreements about its nature. It is common to concede that people can have a concept which they are unable to explain. My observation goes further: they may have wrong explanations of their own concept. An account of the concept is verified not by what people think about it but by the way they distinguish between correct and incorrect applications of it. Moreover, the account singles out some features of their conduct (i.e. the way they distinguish correct from incorrect applications) for special attention. It passes over some features and makes others pivotal

⁹ Joseph Raz, ‘Authority, Law, and Morality’ in Joseph Raz, *Ethics in the Public Domain* (Clarendon Press 1994) 237.

to an understanding of the concept. In that it goes beyond the data (as all theoretical claims inevitably do). It does so in various ways. First, there is no complete uniformity in people's behaviour. It varies because many may have incomplete mastery of the concept, and contradict others, because judgements of correctness are heavily influenced by contextual features, and by pragmatic considerations. The boundary between semantics and pragmatics is itself a theoretical one. Second, the concept that I aim to explain is not the meaning of the word 'authority'. It is, you may say, the meaning of the word as used in certain contexts or for certain purposes. So I am not explaining what it is to have authority to enter into a building (roughly to have permission to do so) but what it is to have authority to make law. The very activity of fixing what is the concept, the activity of distinguishing between various uses of related words and identifying some of them as focal for the concept, is again a theoretical activity, motivated by theoretical considerations.

Now having made these points I can approach the main question: must some people, say legal officials, have the concept of authority if there is a legal system in their country? Even with all the preceding explanations the answer is not straightforward. They must, I have claimed, either have the concept of authority or have an authority—like concept, a concept very similar to it. The theoretical claim, you will remember, is that there is no law without authorities claiming moral legitimacy. The existence of authorities will manifest itself in people's discourse, as well as in other aspects of their behaviour. That requires not necessarily that they have the concept of authority, but that they have a concept sufficiently similar to it which establishes that they regard certain people or institutions as possessing authority.

I am not sure whether the above answers your questions, but perhaps I should stop here, hoping that these remarks do something to explain the complexity of the theoretical inquiry we are engaged in.

VII

Question:

Since Hart, Anglo-American analytical jurisprudence has been developed by several generations of scholars and become a mainstream school of jurisprudence. The inclusive/exclusive debate originated from the internal dispute as a result of legal positivism responding to Dworkin's critiques of Hart. How to settle this criticism in the existing framework

is a task facing legal positivism. Many positivists proposed different revisions to respond to Dworkin's critiques, while within positivism there have been many ongoing and heated debates, which on the one hand advanced the development of legal positivism, contributing to the unprecedented flourishing of analytical jurisprudence, while on the other, as certain scholars have criticised, the issues under discussions by the new generation of analytical jurists have become increasingly miniaturised, thereby restricting the depth in both theoretical perspectives and philosophy for many positivists. We have seen that contemporary Anglo-American legal positivism is still concentrated on explaining Hartian positivism, which in a certain sense reflects the absence of scholarly prowess to explore new theoretical issues. The disadvantage might have been what Brian Bix pointed out, namely that to the accompaniment of complicated revisions and clarifications of legal positivism, 'the positivists may have won the battle but lost the war'.¹⁰

We would like to ask you: what's your comment on the research and development of the contemporary Anglo-American legal positivism? What is the future of legal positivism?

Reply:

I entirely agree with your observations. Discussions of the inclusive/exclusive positivism issue have reached impressive sophistication, but some people also elevated a side issue into a major one. I hope that my preceding replies have already indicated my agreement with you, and explained why I feel that in this particular case the sophistication does not get to the heart of the matter, mistaking what is unimportant and in detail possibly irresolvable (the boundary between what is law and what is not) for what is important (that there is a fundamental distinction between the law and what is binding according to law). I do not, however, worry much about future prospects for legal philosophy. Progress does not always take the shape of better answers to known questions. Often it happens when new problems are identified or new aspects of the law become the focus of attention. It also happens through cross-fertilisation between disciplines. I would not like to predict future directions. But I feel confident that we will not be stuck in the same spot for too long.

¹⁰ Brian Bix, 'Legal Positivism' in Martin P. Golding and William A. Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005) 38.

VIII

Question:

Recently, academia, especially the legal philosophy circle, resumed the discussion of your thesis on ‘the service conception of authority’ as proposed in your article ‘Authority and Justification’ that was published in 1985 in *Philosophy and Public Affairs*.¹¹ This article proposed a justification of legitimate authority, namely the normal justification thesis. Among the critiques, one comparatively common and important critique is that your justification of authority is only a representation of the service conception. Moreover, this mode of justification has fundamentally overlooked democracy. The scholars who hold these critiques include Scott J. Shapiro and Scott Hershovitz. For Shapiro, your justification approach is an instrumental one, namely regarding authoritative commands as instrumental reasons for action. This instrumentality also determines the mediating role to be played by authority, namely mediating between agents and reasons for action, so as to attain beneficial results. Shapiro further classified the service model into a Mediation Model and an Arbitration Model, arguing that the latter is the dominant model in modern liberalism, for it is more reasonable than the former. The instrumentality as represented in the Mediation Model overlooks the internal value of democracy, while the Arbitration Model has enabled democratic rules to play an important role in legitimating authority. The legitimacy of authority lies in the liberal democratic process of constructing this authority, in which every citizen participates, thus creating a moral obligation for citizens to obey authority. It can be summarised in this way: the Arbitration Model and the Mediation Model are two different models of justification, the former on the legitimacy of procedure, while the latter only pays attention to a ‘good’ outcome, so as to solve the feasibility and justifiability of practical reasoning. Moreover, through defining self-discipline as a moral concept, Shapiro argued that the Mediation Model is incapable of solving the paradox of authority and self-discipline, as well as underestimating the internal value of democracy

¹¹ cf David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2008); Noam Gur, ‘Legal Directives in the Realm of Practical Reason: A Challenge to the Pre-Emption Thesis’ (2007) 52 *The American Journal of Jurisprudence* 129; Scott Hershovitz, ‘Legitimacy, Democracy, and Razian Authority’ (2003) 9 *Legal Theory* 201; Scott J Shapiro, ‘Authority’ in Jules L Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2002); for other working papers, see Lars Vinx, ‘Authority, Arbitration and the Claims of the Law’ (EUI MWP 2007/15); David Dyzenhaus, ‘Consent, Legitimacy, and the Foundation of Political and Legal Authority’ in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012).

and its role in preserving and advancing self-discipline. For this reason, the Mediation Model is not desirable.

It is well-known that the issue of authority is a central issue in political philosophy. It is due to your unwavering efforts that it has been re-interpreted in practical philosophy and thoroughly applied to legal philosophy. The central issue of political authority and legal authority is to justify the legitimacy of authority, or in more general terms, to justify the legitimacy of political governance. In the contemporary context of political philosophy, especially with Habermas' efforts, the justification model in favour of liberal democratic procedure has become increasingly popular. So our question is: considering these latest developments in contemporary political philosophy, what's your view on the Shapiro-led criticisms of the service conception of authority?

Reply:

As before, I will answer with no more than a sketch of a proper refutation of Shapiro's criticism, a full treatment of which will have to be longer than this. By the way, the account I outlined in the 1985 article that you mentioned has been amplified and slightly modified in later writings. Its core has not, however, changed. I want to make three points.

First, as Shapiro is aware, my account is meant to be open to various views about what justifies authority. It is not meant to be neutral, as I do not believe that neutrality is achievable. The account is merely intended to be as open as is reasonable in the following sense: supporters of different theories about what makes authority legitimate can reconcile their views with that account. They can express their theories as being about the way in which the conditions of legitimacy which I argued for are satisfied. That does not make my account neutral, for some people while able to accommodate their views about legitimacy within the terms of my account may well find alternative accounts more congenial. I think that my account of authority succeeds in that. It would have failed had it implied that authority can be legitimate only if the conditions of legitimacy which it sets out can be met only in one way, even if that turned out to be the only correct way to meet them. To repeat: it must make sense to claim that, e.g. Plato had the right theory of political authority for his preferred authority to meet conditions of legitimacy according to the service conception, and at the same time supporters of Aristotle, or of Machiavelli, or of Hobbes, or Rousseau or Kant, or Bentham etc. can use the service conception as the correct account of authority, and claim that their political theories show how its conditions of legitimacy can be satisfied. The truth or falsity of their theories depends

on independent considerations, which do not affect the soundness of the service conception.

Not all possible theories of authority can be reconciled with my account. For example, someone might claim that what endows a person or institution with authority is the quality of its pronouncements, irrespective of whether or not anyone has any reason to pay attention to them in any way. They may say that a person has authority so long as he recites the contents of the telephone directory, and nothing else, to himself every day. That view is inconsistent with my account. Its supporters cannot say: this is the correct view for a person who recites the telephone directory meets the conditions set out in the service conception. It is patently clear that he does not. You will remember that the fact that that is a false, indeed an absurd, view of authority does not matter. The service conception, as I explained, is meant to be reconcilable with false views of authority. The reason I do not mind that it is not reconcilable with this kind of account is because I believe that no sensible person ever suggested it.

Given all that, it is clear that the service conception fails if it presupposes a consequentialist account of authority since many sensible people advocated and advocate non-consequentialist theories of authority. But why think that my account is committed to consequentialism? There is a clear sense in which the opposite is the case. The service conception is anti-consequentialist inasmuch as it says that A has authority over S only if S ought to act as A directs. The authority is invested by what ought to be the case, not by what are likely to be the consequences of the authority's activities for the person who is subject to it. However, this is a misleading way to understand the objection: Shapiro and some others think that on my account S ought to do what A directs only if A's doing so will have the best consequences. But that has no support in my writings. The Normal Justification Thesis says that A has authority if by following it S will conform to reason better than if he tries to follow reason independently of A's directives. As you pointed out earlier, I do not say what reasons apply to S. So far as the service conception goes the best reason may be determined by considerations such as that one has to obey the will of god, that certain acts—like murder—are absolutely forbidden come what may, that one may only pursue public policies which are unanimously supported, etc and etc. So the allegation that there is an instrumentalist bias in the service conception is baseless (note by the way that Shapiro uses 'instrumental' in an idiosyncratic and unexplained sense). And so is the thought that the service conception does not accommodate the value of democracy. How it does the latter depends on what the value of democracy is meant to be, and

there are many mutually inconsistent views about that. But whatever it is (reasonably) supposed to be it can be represented as a way of meeting the conditions of the service conception.

It was crucial to my defence of the service conception in the preceding comments that it is not an alternative to a religious, or a democratic, or a utilitarian etc. theory of politics. It is an account not of the goals of political action, etc., but of the concept of authority. That is why it succeeds only if it accommodates different approaches to ethics and to political action. So in a way my response to your question is now complete. But as you mentioned the way some writers refer to democracy, let me briefly say something about that. I live in a democratic country (Britain) and would have it no other way. But I feel that there is a good deal of thoughtless veneration of democracy in the writings of many political philosophers today. This of course has not always been so. Plato and Aristotle were not enthusiasts, nor were many of their successors. One of the father figures of liberalism, whose views I find most congenial, John Stuart Mill, cautioned that democracy is apt for people under certain conditions. It is not, in other words, the only acceptable political regime, and under some conditions it may not be acceptable at all. Moreover, as the best political scientists have always known, democracy is not the name of one type of government. There are many different types of democratic regimes. And the differences among them can be huge. They can be even greater than the differences between some of the democratic regimes and some of those not considered in—say—the U.S. as democratic. What is common to all democratic regimes is (a) that they institutionalise ways in which government is responsive to the views of the governed, and (b) they institutionalise ways in which people can actively participate in public life, and thus encourage identification with the collective. Both are among the main virtues of any political system, but they can be achieved in a variety of ways, not all of them normally regarded as democratic in some circles, and they can be achieved, and to be successful have to be achieved, in informal, that is uninstitutionalised ways as well.

Many democratic enthusiasts will say that these comments leave out what are the most important things about democracy: that it is self-rule, a system where no one is ruled by anyone else, or that it is a system in which everyone has equal political power, etc. All these are fantasies, not realisable, and of dubious value. The two virtues I mentioned are hard enough to realise to an adequate degree. But, as we are becoming more aware every day, the actions of governments of some countries have enormous effects on people in countries other than their own. Democracy, in the sense I identified, is not enough. In fact, it never was. We are facing the challenge

of articulating ideals about the ways politics should be responsive to considerations other than those of direct concern to their own citizens. We are some ways away from having adequate theories of that aspect of politics.

IX

Question:

It is generally held that reasons for action concern two aspects. As is pointed out by Robert Audi, 'there are at least two quite different though overlapping kinds of reasons: motivational reasons, roughly the kind that explain why an agent does a particular thing, and normative reasons, roughly the kind that indicate what an agent ought to do'.¹² Bernard Williams' differentiation of internal reasons and external reasons has transformed the discussion on reasons in academia. For him, reason is the cause of actions. A presentation of reason, if true, should be linked to the internal motivations of agents. Motivation is a fundamental aspect of the structure of practical reason, while reasons for action, should they have significance for actions, should have subjective application conditions, referred to as the 'subjective motivational set' by Williams. The concept of 'internal reasons' directly represents this subjectivity.¹³ Your categorisations of reasons did not give a sufficient amount of attention to the motivational reasons, but instead, regarded reasons as a matter of fact, arguing that only the reasons understood as facts can determine what ought to be done. Therefore, you define practical authority as a content-independent and peremptory reason for action or content-independent and exclusionary reason for action.

Compared to Shapiro's criticism, our understanding is that the role of mediating between reasons and agents is to be played by authoritative commands. This instrumental function is more profoundly rooted in your conceptual analysis of the reasons for authority, which may have fundamentally influenced the approach to the justification of authority. Your conceptual analysis of authority as reason only considers the external rather than its internal aspects. That is, your analysis of reasons fundamentally fails to pay much attention to the internal motivation and acceptance of agents, so that agents are absent from your conceptual analysis of reasons. The existence and thoughts of an agent are immaterial,

¹² Robert Audi, 'Moral Judgment and Reasons for Action' in Garrett Cullity and Berys Gaut (eds), *Ethics and Practical Reason* (Clarendon Press 1997) 125.

¹³ See Bernard Williams, 'Internal and External Reasons' in Bernard Williams, *Moral Luck* (Cambridge University Press 1981) 101–13.

so that agency is absent from the justification of authority. As long as authoritative commands can bring good outcomes, for them this shall be enough.

Since the publication of Williams' article 'Internal and External Reasons', the discussion of this issue has become popular among the circle of moral philosophy. In combination with the aforementioned literature, our question is: (1) what's your comment on the classification of reasons for action as proposed by Williams, among others? (2) how can your conceptual analysis of practical authority deal with the internal aspects of reason? (3) we have noticed that you have published two articles on reasons respectively in two books that were published this year.¹⁴ Would you please briefly introduce your latest thoughts on reasons?

Reply:

I am afraid that I disagree with some of your observations here. You say that I neglected to discuss motivational reasons. But there is not category of reasons which could be described as motivational reasons. The word 'reasons' has two senses. We distinguish between them by using the pair 'explanatory reasons' and 'normative reasons'. The explanatory reasons of X are those facts which figure in the explanation of X. For example: 'The lightning is the reason for the fire' says that the explanation of the fire includes the occurrence of the lightning. Needless to say, social and individual behaviour can also be explained. So we may say, for example, that the incomprehension by bank managers of the risks they were running was one of the reasons for the banking collapse last year. Some explanations of conduct refer to motives: for example, the reason he shot his brother was that he was very jealous of him. Here jealousy is the motive which explains the action, and is therefore the reason for it. Some explanations of conduct refer to normative reasons, as for example when one says that the reason John bought the medicine is that his mother is very ill. Some explanations proceed not by reference to reasons, but to people's belief that there are some reasons, as when one says that the candidate forged the election results because he believed that he alone can save his country.

By and large philosophers do not say much about explanatory reasons. They have much to say about explanations, and there is little that needs saying about explanatory reasons once we have an account of explanations.

¹⁴ Joseph Raz, 'Reasons: Explanatory and Normative' in C Sandis (ed), *New Essays on the Explanation of Action* (Palgrave/McMillan 2009); Joseph Raz, 'Reasons: Practical & Adaptive' in David Sobel and Stephen Wall (eds), *Reasons for Action* (Cambridge University Press 2009).

Philosophers are, however, interested in normative reasons. Bernard Williams reminded us that necessarily if that P is a normative reason for X, then that P must be capable of explaining some occurrences of X. In particular that if that P is a reason for someone to do A, and if that person does A for the reason that P then that P can explain his doing A. That point is generally accepted, and probably always was. But after Williams's reminder of it philosophers started debating in greater detail the way in which normative reasons can feature in the explanation of behaviour. Williams had one view of that, which led to his slogan that all reasons are internal reasons. As you mention, that view has been much discussed, and much criticised. But we cannot enter into that debate here. It requires too detailed an examination.

It is important, however, to realise, that whatever view one takes about the nature of normative reasons has no effect on the service conception of authority. The service conception explains authority in terms of reasons. But it is committed to no particular view of the nature of reasons and is compatible with any plausible view of their nature, including with the view that all reasons are internal, or that not all reasons are internal, to use Williams' terminology. You say that my account of authority neglects the internal aspects of reasons. But it no more neglects the internal than it does the external aspects of reasons. It neglects—if you like—both, for it is not an account of reasons, and is compatible with whatever is the truth about reasons, as well as with many false views about reasons. Of course, people with different views about reasons, when applying these views to the service conception of authority will come to different conclusions about when people are subject to legitimate authority. But as I explained in answer to other questions, that is the aim, and the strength of the service conception. It is consistent with a variety of view regarding what reasons are as well as with a variety of views about what reasons we have.

It was kind of you to refer to my recent articles on reasons. In fact, my interest in authority derives from my interest in normative reasons generally. Starting with my book *Practical Reason and Norms*, I argued that we understand the law and legal authorities by understanding that they provide special kind of reasons. That thesis has been further developed in my later work, and so have my suggestions about the nature of reasons, which have been explored further in *Engaging Reason*, as well as in the recent articles you mentioned. At the same time, I also made some suggestions regarding what constitute normative reasons for actions, in the short books *Value, Respect and Attachment* and *The Practice of Value*, as well as in some chapters in *Engaging Reason*. I hope to be able to continue to develop

these ideas.

Finally, let me correct one point you make. You say that according to my writings an authority is legitimate so long as it 'can bring good outcomes, for them', its subjects. But that is not my view. My view is that it is legitimate if following it enables people to conform to right reasons. It may be your view, or that of some other people, that the right reasons for an agent are those which secure what are for him good outcomes, but that is not part of the service account of authority.

X

Question:

We can see that your justification of the legitimacy of authority is fundamentally related to the understanding of such political philosophical concepts as autonomy, neutrality, coercion and perfectionism. Among these the most important is the understanding of autonomy, which results in your placing emphasis, in the justification of authority, upon how authority can provide right reasons—in other words, how the reasons for authority can provide conditions for advancing autonomy. The importance of this issue lies in the fact that the justification of authority has to face the paradox of authority and autonomy. Autonomy as commonly accepted is a Kantian notion and a moral concept. Autonomy has two aspects: the first is free will, which as a legislation capacity, is not conditioned on external factors and means autonomy. The second aspect is that the agent applies moral laws to itself, meaning self-discipline. Your understanding of autonomy can be summarised in these few propositions: (1) self-discipline is not defined in a moral sense, but as a principle of practical rationality. *The Authority of Law gives this explanation*, 'It is clear that this principle of autonomy is not really a moral principle but a principle of rationality'.¹⁵ (2) Autonomy is regarded as part of human well-being, which 'holds the free choice of goals and relations as an essential ingredient of individual well-being'.¹⁶ (3) Compared with Kantian absolute autonomy, more emphasis has been placed upon the 'conditions of autonomy', namely appropriate mental abilities, an adequate range of options and independence. In this sense, it can be seen that authority can promote the conditions to create autonomy, and further to promote freedom. Authoritative commands complement autonomy and freedom,

¹⁵ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 27.

¹⁶ Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 369.

rather than conflict with them.

So our question is: (1) if autonomy can be mainly understood as a concept of rationality rather than of morality, then this might result in a deliberate avoidance of one important aspect of autonomy, namely self-determination in the sense of free will. A man in action cannot be subject to self-determination and authoritative determination at the same time, as these two are in mutual conflict. Moreover, as Scott J. Shapiro has pointed out, man should be encouraged to act according to his own judgment, for without this process, a man will not be able to develop his own necessary capacity for autonomous actions. Then the next question is (2) how can the justification of authority deal with autonomy in the moral sense? (3) Your understanding of autonomy has an inherent emphasis upon strengthening the positive role to be played by government, which will necessarily involve power and coercion. You argue that coercion is necessary for a liberal democracy, which does not necessarily mean a violation of personal autonomy. 'Coercion can be genuinely for the good of the coerced and can even be sought by them.'¹⁷ As has been argued, your understanding of autonomy and coercion has gone beyond the bottom-line of liberalism and become a defence for state legitimacy of any kind, as a state of any kind will invariably propose a promotion of autonomy.¹⁸ If autonomy is indeed understood as mainly conditional, then will the constraint of state power that depends upon holding certain ideals confine power more reliably than traditional liberal use of right (autonomy)? Perhaps your argument is founded on a more problematic base.

Reply:

I am afraid that I do not share the view of autonomy that you attribute to me. That people have free will (in whatever sense they have it) is a fact about people, not a moral or political value. Similarly, that people have rational powers, and do form beliefs and intentions, is a fact about them, not a value. So when I write about autonomy I never have these facts in mind, as I write only about autonomy as a valuable condition or capacity. I do not believe that there is any substance to the Kantian idea of autonomy as moral self-legislation, and it too does not feature in my writing. Finally, I do not believe that there is a conflict between legitimate authority and personal autonomy. There is certainly no conflict due to the

¹⁷ Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 157.

¹⁸ Dazhi Yao, *What Is Justice? Contemporary Political Philosophy Research in the West* (People's Publishing House 2007) 191 (姚大志:《何為正義:當代西方政治哲學研究》,人民出版社2007年版,第191頁).

fact that when people are subject to authority, they cannot form their own judgements, or that they cannot act upon them. They can do both, and in particular they can examine the question whether the putative authority is really a legitimate one, and to what extent it should be obeyed. Nor do I take the view that the principle of autonomy is a principle of rationality, not of morality. I take the opposite view. I believe that you attributed to me these views which I do not hold for two reasons: First, in *The Authority of Law*, in the passage you quoted from and the text around it, I describe the views of Robert Paul Wolff, not my own views. Indeed, having described them I proceed to repudiate them. Second, you were misled by the somewhat misleading discussion of authority, and of my views on it, by Scott Shapiro.

So, in *The Authority of Law* I discuss autonomy as a power to choose one's own course in life, and as the autonomous life is a life in which that capacity is used, to chart one's course in life. That, I say, for reasons I return to in my answer to your next question, is a local value, that is, possession of the capacity and the opportunity to use it are valuable in most contemporary societies, having become a condition for having a successful life in those societies. It was not always so, though some aspects of autonomy in that sense were always valuable and important. My view was, and is, that contemporary governments can and should secure the conditions which make the autonomous life possible. But I do not believe that that is their only function or goal. Explaining this point takes us to your next question.

XI

Question:

Your liberalism differs from the contemporary mainstream liberalism (as defended by Rawls and Nozick), and it critiques Hayekian liberalism, as both of them are anti-perfectionist: they hold that government should maintain neutrality among conceptions of good. Any conception of the good, however beneficial, cannot become the reason for state coercion, which may violate personal freedom and make a particular conception of the good dominant. The principle of autonomy is the core of Razian liberalism. Autonomy needs conditions and valuable opportunities, which means that 'the autonomy principle is a perfectionist principle'. Therefore, 'the autonomy principle permits and even requires governments to create

morally valuable opportunities.¹⁹ From this, it can be seen that your view of freedom places more emphasis on positive freedom and the role to be played by government in promoting conceptions of the good. It is perfectionist liberalism, by which the state is responsible for creating autonomous conditions to promote freedom.

As far as your view of liberalism is concerned, our question is: it has been suggested that your liberalism is somewhere in between liberalism and communitarianism, different from the former in that it is perfectionist, and different from the latter in that it emphasises autonomy and competitive pluralism without supporting stronger government. Do you have any comment on the significance and implication of your perfectionist liberalism in explaining and resolving the liberalism/communitarianism dispute?

Reply:

Rawls was steeped in the knowledge of the history of moral and political philosophy, but I cannot help but feel that the enormous popularity of his work was and is due in no small measure to ignorance of that history among students and young scholars. The appeal of his work was in part that it offered a way out of value scepticism into constructing a theory of justice based on the compelling doctrines of decision theory, that it promised to overcome the deep schisms and disagreements in contemporary societies by resting all political action on unanimous agreement to the principles on which it is based, by seeming to vindicate the beliefs of idealistic Americans in the ideas which inform their society anyway, in espousing a theory of politics which would be justified if all problems of social life were resolved on the individualistic assumption that the only problem really is how to divide benefits in ways which equitably promote the self interests of all citizens, and so on. Some of these were sentiments shared by Rawls but inevitably the popularity of his views rested on more simplified variations of them. The central tenets of this creed became that government is legitimate only if the governed (if they are reasonable) agree to the principles on which it is based. Second, that political action can be justified only by considerations which form part of the public culture, shared by all reasonable citizens, and that politics is a matter of regulating the production and distribution of benefits for the equitable promotion of self-interest. All these are based on bad arguments and on misunderstanding the nature of both individual

¹⁹ Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 417.

and social life. Rawls, and to an extent his followers, recognised the problematic nature of social bonds, of feelings of belonging together which are needed for societies to function well together in spite of the fact that some of their members are required to forego benefits or make sacrifices for the sake of others, for the sake of people whom they do not know. But they mistakenly exaggerated the degree to which these social bonds rest on common belief in the truth of principles of government. Social bonds have a lot to do with sentiments, with a deep-rooted sense of identity, and little with intellectual beliefs. A long time ago I argued in a paper written together with my friend Prof. Margalit that that is a great virtue of social bonds. They are like family bonds—ties which transcend (up to a point) ideology and beliefs. This is a presupposition of the ability of our societies to sustain pluralistic cultures with a good deal of disagreement. Common beliefs help to strengthen social ties, but in thinking of ways of maintaining or strengthening them, the importance of common beliefs should not be exaggerated.

As to the goals of government or of political action generally the clue is in the nature of decent, or better than that, life which individuals deserve. The crucial point about the decent or good life is that (a) it is a life which individuals are keen on, a life in which they invest themselves, pursuing it by their own judgment and will-power; (b) the good or decent life has to be filled with the pursuit of worthwhile relationships and various worthwhile ambitions.

You will notice that I did not say that people must have a free choice in navigating their life. What matters, morally speaking, is their whole-hearted engagement in worthwhile relationships and pursuits. But in today's economic conditions which require a high degree of social mobility, and capacity to retrain and relocate in adult life, people need to prospect, to have significant choices among worthwhile options.

All of that requires on the one hand that they have the psychological stability, the self-discipline, the sense of self esteem, to be able to conduct their own life independently in a relatively fast changing world, and that the society in which they live will enjoy a sense of pride in its history and cultural identity, and that in spite of all the evils which we find everywhere it will also have enough valuable opportunities to offer its people. The role of government is to protect people's enjoyment of such opportunities, but also to make sure that they have access to them in the first place. Deprivation and repressive discrimination are the great evils of our time. Many people are denied a chance to have a decent life through poverty and disease, and lack of educational and psychological preparation needed

to cope with the conditions of their societies, and many others are denied the chance of a decent life, or have it greatly restricted through repressive discrimination. The task of government is to secure conditions in which these phenomena do not occur.

XII

Question:

Finally, in the age of globalisation, do you have any advice on the development of legal philosophy, political philosophy and moral philosophy? In your point of view, are there issues of globalisation to which we need to pay special attention? Moreover, in legal philosophy, political philosophy and moral philosophy, is there any knowledge that urgently needs to be critically reviewed?

Reply:

Obviously changes are opportunities and challenges. I intimated one or two such challenges in the previous responses. And I am happy to leave it with the general remark that as new forms of economic powers emerge or grow in importance in the world of globalised economy, politics and the theory of it encounter new challenges of political regulation and control, and as new forms of legal organisation emerge under that pressure and the pressure for co-ordination and harmonisation, there are new challenges in understanding the potential and pitfalls of political power. New forms—mostly IT dependent—of social interaction, new forms of sociability and interpersonal relations, as well as new forms of congregation and organisation pose perhaps even more fundamental questions about the nature of social relations and of cultural products. In all these developments philosophy must take a back seat, but should be a keen observer, commentator, and advisor.

Thank you very much!

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MARTIN KRYGIER

WHY DO WE WANT THE RULE OF LAW?

Thanks very much for your conversation with Thomas.¹ I went on to read his piece on the rule of law and respect,² and I liked it and will use it. Even though we're interested in different things, have different priorities, and think in very different ways, I found it very interesting and it provoked me to some thought.

I'll just pick up a few points in the conversation that relate to where I come from and in; a lot that interests Oxford is not really my thing. Which is not to say that I think it is not A thing, but I'm not interested in some things they are, and I don't find them always interesting for the things that matter to me. And I'll speak from the heart or stomach rather than the head. I'm just not in, and don't always find appealing, the business of analytical legal philosophy at all; the questions that matter to me, and the answers likeliest to satisfy me, come within what Philip Selznick used to call normative social theory, where conceptual precision matters less than what works, and why it does.³ But that requires investigation not merely intuition plus cleverness. There! A defiantly sloppy beginning!

I

At p.5 you argue that the idea that 'the rule of law's point is to temper or constrain arbitrary power' is self-defeating, because, depending upon your understanding of arbitrary power, there might be more effective or better ways to temper arbitrary power than the rule of law, as Krygier himself confesses: 'after a very long time of being called a "rule of law" guy, I've decided to come out. I am really a "well-tempered power guy"'; and in the same article, he says, 'if we thought we could get there [have power well-tempered] by praying...we should pray more and worry about

¹ This is Professor Krygier's letter to Xiaobo Zhai. The conversation refers to Thomas Adams and Xiaobo Zhai, 'A Conversation on the Rule of Law' (2024) 1 *Macau Journal of Global Legal Studies* 67–76.

² Thomas Adams, 'The Rule of Law and Respect for Persons' in Genevieve Cartier and Mark D Walters (eds), *The Promise of Legality: Critical Reflections on the Work of TRS Allan* (Hart Publishing 2025) 103–16.

³ See Martin Krygier, *Philip Selznick: Ideals in the World* (Stanford University Press 2012).

law less.⁴

I agree that there might be more effective ways, but don't see why it's self-defeating to recognize it. I'd call mine an acknowledgement rather than a confession, and a reason not to abandon the rule of law but contemplate de-centring it. And here I think what really matters is why we think it's important to think about the rule of law at all. Adams and Oxford start with a lawyer's/legal philosopher's descriptive anatomy—the rule of law is a bunch of formal legal attributes, a, b, c—and then ask why something that has such attributes might be valuable, what it might be valuable for etc. But the rule of law is not a found object; it's a normative concept, which many used long before anyone came up with the Harvard/Oxford lists (though as you know better than me, Bentham already had them). But when Magna Carta was taken up over centuries as something valuable done with law (even though originally it was unlikely that that was what the barons were after), when the common lawyers attacked James I and decapitated Charles I for defying the supremacy and rule of law, and when the Americans thought the English had abused the supremacy of law by treating them arbitrarily, they didn't have Fuller or Raz in mind, nor did many of the laws they valued conform to their lists.

My vulgar question is: why should anyone outside Oxford philosophy start with such lists? Or more specifically, what is the citizen's, rather than the lawyer's or philosopher's interest in looking into the rule of law? Is it to decide how much vagueness Fuller's list can tolerate? Or how much inconsistency is consistent with Raz's? I reckon it's not the anatomy but the payoff, and that, many have associated with reduction in the availability of arbitrariness in the exercise of power. Why should we restrict ourselves to the analytics' lists? The seventeenth century appeals, and the Americans' complaints were not about the forms of law, but about the 'sovereigns' determination to ignore it;⁵ the anatomies, I again vulgarly surmise, were after-the-event attempts to find legal features that (usually purely by intuition) lawyers and philosophers imagine might lead to virtues claimed for law by generations of people who have worried about arbitrary power before them.

I endorse Waldron's comment that 'we want the rule of law' not just for lawyers and philosophers in legally well endowed positions and societies, but for new societies and old societies, for those in any society

⁴ Martin Krygier, 'Well-Tempered Power: "A Cultural Achievement of Universal Significance"' (2024) 16 *Hague Journal on the Rule of Law* 479, 487.

⁵ See in particular John Phillip Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (Northern Illinois University Press 2004); Quentin Skinner, *Liberty as Independence* (Cambridge University Press 2025).

who are at the margins, for those in the 'dark corners of governance', and for those where the rule of law is not 'a familiar presence'.⁶ As a result, he rightly suggests that the typical analytical philosophers' lists of elements of the rule of law are far from many people's worlds or concerns. He claims to reach those worlds and concerns with his analysis of the importance of adjudicative procedures. But what he then offers to add to a Fullerian/Razian focus on the formal character of legal rules, is another list focused on procedures to accord litigants a respectful hearing in court. This makes an important dignitarian addition to standard lists legal philosophers compile, but, surprisingly given his laudable wide-ranging ambitions, it does not deviate from the institutional assumptions on which they are based. The big shift in institutional focus between Fuller and Waldron is from official legislatures to official courts. That is not an enormous distance to travel. Yet in many societies and among many of the people he wants the rule of law to reach, virtually no one thinks of going to courts or of what goes on there, but they do worry when the cops are corrupt or beat them up for fun and/or money, local notables can do what they want, mafias and soldiers roam the streets, etc. The weaknesses of the rule of law that citizens confront frequently have nothing much to do with formal infelicities in the rules or procedural inadequacies in courts, though if they ever got to court they would probably find both in abundance. The more immediate problems arise from the pervasive reality that where they encounter power, the law very rarely counts for much, and even more rarely does it count for them or in their favour. That's one reason why I think standard approaches are an inadequate way to approach a precious social achievement, that well-tempered power, with, through, and beyond the law, represents. So I started with the rule of law because I thought it was important for an important value, and I called that value its purpose, which I still think makes sense. But I think that if that purpose matters, we can't stop there, or indeed with the rule of law, but realize that its significance is likely to vary, so too how it will need to be configured to help attain its end, and it will never do much on its own, so we have to look beyond the rule of law in particular and law more generally. Not my fault; the world's a complex place!

II

'A subject not committed to upholding their contracts is no problem for

⁶ Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James Fleming (ed), *Getting to the Rule of Law* (New York University Press 2011) .

the rule of law, but a government not committed to keeping within its legal powers is.’ That’s an argument the chapter I’m writing presently is devoted to.⁷ I’ve attached something I published on that,⁸ but I think the issues are more complicated than I then saw. I think the state is special, both for the rule of law and tempering power, but it’s not the only game in town even for the former, and very clearly not for the latter. If the problem is arbitrary exercise of significant power, there are many sources of that around.

III

‘By honouring it you do not necessarily do right to those subject to the law, but by breaching it you necessarily do them wrong.’ I think that’s right. That it is not necessarily a way of doing right is plain from phenomena like ‘abusive constitutionalism’ and ‘autocratic legalism’ as practised by many populist regimes, which in many ways use legality as a weapon, not just a sham or camouflage, and to other autocratic regimes that have found that clear stable prospective comprehensible laws are good ways of maintaining order and efficiency, combating bureaucratic insubordination by local officials etc., so long as it is combined with escape hatches to ensure the leaders aren’t themselves restrained, and places no constraint on what goes into the laws. Ernst Fraenkel called this a ‘dual state’ when writing about Nazi Germany—normative state for non-enemy subjects doing non-political things; prerogative state for the rulers and whatever is deemed of interest to them;⁹ as you know that model has been applied elsewhere. OK the prerogative part violates Fuller/Oxford, but the normative elements can serve the rulers well, without showing any respect at all for subjects. I actually think Weber knew all this, and I’m trying to draw that out of him at the moment. Everything Adams says on p.7 seems right to me.

IV

(p.9) ‘it is worth recognising that law itself could never be the remedy

⁷ Martin Krygier, *Tempering Power. Beyond the Rule of Law* (Cambridge University Press, forthcoming) ch 7.

⁸ Martin Krygier, ‘The Ideal of the Rule of Law and Private Power’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar 2023) 14–29.

⁹ Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (EA Shils tr, Oxford University Press 2017).

to political power because it is a particular institutionalized form of this power. The rule of law, by way of contrast, can be the remedy to certain of the dangers of legal power because it functions as a constraint on its exercise.' This doesn't make sense to me. If you have wildly arbitrary political power, and you say it would be nice to channel it through law (of a Fullerian sort, or whatever seems to you contrary to free arbitrary exercise, which, in my rendition, is uncontrolled, unpredictable, unrespectful, ungrounded), yes it still will be power but the channelling is intended to make it less arbitrary. This is a remedy to arbitrariness of political power (though of course it's still political power), not just a remedy 'to certain of the dangers of legal power.'

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MAURO BUSSANI

**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 Zhai¹ 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 attitude⁵ 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

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 Law: 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 & Row 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-Western¹²) 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,

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 State¹⁹ 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

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.

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 surdétermination, 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

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](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

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 definition³⁷—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

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 Commission 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 exercised 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 investment⁴⁶—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

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. Hammegren, '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?

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), *prééminence 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,

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

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 Kögler, C. Wright Mills, Talcott Parsons, Max Rheinstein, Günther Roth, Edward Shils, 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 citizens⁵⁸ 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’: Convergence (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 indicators⁶³), 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 institutions⁶⁴—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

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, *ibid.* 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.

DÁRIO MOURA VICENTE *

CONTRACT LAW IN THE CISG: CIVIL LAW, COMMON LAW OR A THIRD WAY?

ABSTRACT: The CISG is unquestionably one of the most successful contemporary instruments of International Trade Law: less than half a century after its adoption, it has secured the accession or ratification of nearly one hundred countries, among them several of the main trading nations of the world. The Convention's approach to the unification of the law on contracts for the international sale of goods is based on a compromise between the Common Law and Civil Law traditions, albeit with a predominance of the former, combined with the applicability of the domestic laws of the Convention's contracting states to matters in respect of which such a compromise could not be reached. This approach is one of the Convention's strengths, since it has succeeded in mitigating the existing legal barriers to cross-border trade. But it also constitutes a clear limitation to the uniformity of international sales law that the Convention was intended to provide. Extending the scope of the Convention's provisions to issues on which no consensus was reached during its negotiations is perhaps one of the main challenges faced by UNCITRAL as the centenary approaches of the launch of the work that led, on Ernst Rabel's initiative, to the conclusion of the Convention.

KEYWORDS: CISG, Civil Law, Common Law, Conflict of Laws, Contract Law, Unification of Private Law

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I. FRAMING THE ISSUE

As is well known, the preparatory work on the United Nations Convention on Contracts for the International Sale of Goods (hereafter CISG) started in 1968, and the Convention was adopted at a diplomatic conference held in Vienna in 1980 under the aegis of the United Nations Commission on International Trade Law (hereafter UNCITRAL). It entered into force in 1988, with eleven ratifications. The roots of the movement for the international unification of the legal rules on the sale of goods contracts can, however, be traced back much further.¹ Prominent among them, in the 1930s, was the draft of a uniform law on sales whose primary driving force was Ernst Rabel.² This draft did not, however, come to fruition, due to the subsequent chain of events across Europe, which hampered international efforts to unify private law. Several initiatives were launched after the Second World War with the same fundamental aim. By far, the most successful one was the CISG, which now has 97 contracting parties.³

Portuguese-speaking countries and territories only belatedly started joining the Convention, although it had long been the object of considerable attention in Brazilian and Portuguese literature.⁴ In Brazil,

¹ On the origins and evolution of the CISG, see Peter Huber, 'Some Introductory Remarks on the CISG' (2006) *Internationales Handelsrecht* 228ff; Ulrich Schroeter, 'Gegenwart und Zukunft des Einheitskaufrechts' (2017) 81(1) *RabelsZ* 32–76; Steffan Kröll and others, 'Introduction to the CISG' in Stefan Kröll and others (eds), *UN Convention on Contracts for the International Sale of Goods—A Commentary* (Munich, 2nd edn, Bloomsbury Publishing 2018) 3ff; G C Cerqueira, 'Les 40 ans de la Convention de Vienne sur la vente internationale de marchandises' (2020) *Actualité Juridique Contrat* 507ff; John O Honnold and Harry M Fletcher, *Honnold's Uniform Law for International Sales under the 1980 United Nations Convention* (5th edn, Alphen aan den Rijn, Wolters Kluwer Law & Business 2021) 5ff; and Ulrich G Schroeter, *Internationales UN-Kaufrecht* (7th edn, Tübingen, Mohr Siebeck 2022) 1ff.

² See Ernst Rabel, 'Der Entwurf eines einheitlichen Kaufgesetzes' (1935) 9 *RabelsZ* 1–79; and Rabel, 'L'unification du droit de la vente internationale. Ses rapports avec les formulaires ou contrats-types des divers commerces' in *Introduction à l'étude du Droit Comparé. Recueil d'Études en l'honneur d'Édouard Lambert* (vol. II, Paris, 1938) 688ff.

³ See the state of ratifications at <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg>, last accessed on September 9, 2025.

⁴ See, for example, Maria Ângela Bento Soares and Rui Moura Ramos, *Contratos Internacionais: Compra e Venda, Cláusulas Penais, Arbitragem* (Coimbra, Livraria Almedina 1986); Dário Moura Vicente, 'A Convenção de Viena Sobre a Compra e Venda Internacional de Mercadorias: Características Gerais e Âmbito de Aplicação' in Dário Moura Vicente, *Direito Internacional Privado. Ensaios* (vol. II, Coimbra, 2005) 39ff; Dário Moura Vicente, *Direito Comparado* (vol II, Coimbra, 2017) 591ff; Luís de Lima Pinheiro, *Direito Comercial Internacional* (Coimbra, 2005) 259ff; Rui Moura Ramos, 'A Convenção de Viena de 1980 Sobre o Contrato de Compra e Venda Internacional de Mercadorias Trinta e Cinco Anos Depois' XCII (1) *Boletim da Faculdade de Direito da Universidade de Coimbra* (2016) 1ff; Paulo Nalin and Renata Steiner, *Compra e Venda Internacional de Mercadorias, A Convenção das Nações Unidas Sobre Compra e Venda Internacional de Mercadorias (CISG)* (Belo Horizonte, 2016); Ingeborg Schwenzer and others (eds), *A CISG e o Brasil. Convenção das Nações Unidas para os Contratos de Compra e Venda Internacional de Mercadorias* (Madrid, MARCIAL PONS BRASIL 2015); Alexandre de Soveral Martins, *Compra e Venda Internacional de Mercadorias: a CISG. Primeiros Comentários* (Coimbra, Almedina 2021) 9ff; and Ingeborg Schwenzer and others (eds.), *CISG, Brasil e Portugal. Convenção das Nações Unidas para os Contratos de Compra e Venda Internacional de Mercadorias* (São Paulo, Almedina Brasil 2022).

the Convention was promulgated in 2014.⁵ Portugal became its 94th contracting state in 2020.⁶ Macau has not yet achieved this status but is expected to do so in the near future, considering that Mainland China acceded to the CISG in 1986 and that it was extended to Hong Kong in 2022.⁷

As stated in its Preamble, the premise of the Convention is that, ‘the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States’, and that ‘adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade’.

According to Article 1, the CISG applies to ‘contracts of sale of goods between parties whose places of business are in different States’. It therefore concerns primarily international contracts; it is not an instrument for unifying domestic laws, but instead sets out to institute specific rules for those contracts. These rules, moreover, are limited to the formation of the contract, and the rights and obligations that arise from it between the parties (Article 4), the interpretation of the contract (Article 8) and its form (Article 11).

The Convention has nevertheless exerted undeniable influence both on other international instruments in the field of contracts (most significantly the *UNIDROIT Principles on International Commercial Contracts*, the latest version of which was published in 2017),⁸ and on the legal acts of the European Union (notably Directives 1999/44 and 2019/771 on the sale of consumer goods)⁹ and the Organisation for Harmonisation of Business Law in Africa (such as its Uniform Act relating to General Commercial Law).¹⁰ These instruments effectively

⁵ See the President Dilma Rousseff, ‘Presidential Decree no. 8.327’, 16 October 2014.

⁶ The Convention was approved for accession by the Decree of the Portuguese Government no. 5/2020, of 7 August, and took effect for the Portuguese Republic on 1 October 2021.

⁷ See Zeyu Huang and Wenhui Chi, ‘The CISG Applies to Hong Kong and Mainland China: Shall Macau Follow Suit?’, available at <<https://conflictoflaws.net/2022/the-cisg-applies-to-hong-kong-and-mainland-china-now-shall-macau-follow-suit/>>, last accessed on September 8, 2025.

⁸ See International Institute for the Unification of Private Law, ‘UNIDROIT Principles of International Commercial Contracts 2016’, (Rome, UNIDROIT, 2016) <<https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf>>, last accessed on September 8, 2025.

⁹ Published, respectively, in the *Official Journal of the European Communities*, no. L 171 of 7 July 1999 12ff, and in the *Official Journal of the European Union* no. L 136 of 22 May 2019 28ff.

¹⁰ Reproduced in Dário Moura Vicente (ed.), *OHADA – Tratado, Regulamentos e Actos Uniformes* (2nd edn, Coimbra, Almedina 2019) 31ff.

echo concepts and rules enshrined in the CISG, which have thus found their way into national legal systems, including in states not party to the Convention.¹¹ In addition, the Convention has inspired major legislative reforms undertaken in a number of countries in the field of sale of goods and of contracts in general: this was the case in the Netherlands in 1992, in Russia in 1994, in China in 1999 and 2020 and in Germany in 2001.¹²

The growing international acceptance of the CISG stands in stark contrast, however, to the limited degree to which it has been adopted in the contractual practice of several countries.¹³ This is notably the case in Germany, where a recent survey showed that 52.9% of lawyers regularly exclude its application to the contracts they draft, relying on the opting out provision contained in Article 6 of the Convention.¹⁴

For its part, the United Kingdom has so far not engaged in this process of rapprochement between national legal systems. Although it took part in the CISG negotiations, it has neither ratified nor replicated it within its domestic law, opting instead for a policy of competition with other legal systems. This policy has proven largely successful, especially in the field of international arbitration, as is shown by the frequent choice of English law to govern international contracts.¹⁵ India has followed the United Kingdom's stance on this issue and has so far refrained from ratifying the Convention.

To understand the abovementioned phenomena, an enquiry is necessary into the Convention's underlying concept of contract and, in particular, into whether it reflects those of the prevailing legal traditions in contemporary international trade, or whether, instead, it should be seen as a *tertium genus*, independent of any of these traditions. Such is the essential purpose of this paper, which also seeks to determine, in the light of the outcome of that enquiry, the extent to which the Convention

¹¹ This was the case of Portugal before 2020, which through the transposition of Directive 1999/44/EC received into its legal system the concept, originating in the Vienna Convention, of an obligation of conformity of the goods sold with the contract: see below, section II.G.

¹² See, on the CISG's role as a model for law reform, Angelo Chianale, 'The CISG as a Model Law: A Comparative Law Approach' (2016) *Singapore Journal of Legal Studies* 29ff; Ulrich G Schroeter, 'Does the 1980 Vienna Sales Convention Reflect Universal Values? The Use of the CISG as a Model for the Law Reform and Regional Specificities' (2018) 41 *Loyola of Los Angeles Intl. and Comp. L. Rev.* 1ff.

¹³ See, Ingeborg Schwenzer and Pascal Hachem, 'The CISG – Successes and Pitfalls' (2009) 57(2) *American Journal of Comparative Law* 457ff (acknowledging, at p. 463, that 'there still seems to be a tendency to recommend the exclusion of the Convention, especially in the commodities trade').

¹⁴ Justus Meyer, 'Die praktische Bedeutung des UN-Kaufrechts in Deutschland' (2021) 85(2) *RabelsZ* 357.

¹⁵ Clayton P Gillette and Robert E Scott, 'The Political Economy of International Sales Law' (2005) 25(3) *International Review of Law and Economics* 446 ff; Gilles Cuniberti, 'The International Market for Contracts: The Most Attractive Contract Laws' (2014) 34(3) *Northwestern Journal of International Law & Business* 455ff.

has lived up to its aims as it reaches 45 years of age.

II. FUNDAMENTAL TRAITS OF THE RULES ON CONTRACTS IN THE CISG

A. Contracts' constitutive elements

In Article 14.1, the CISG requires the intention to be bound as a constitutive element of the contract. In contrast to Common Law systems, it does not demand consideration as an essential element for the effectiveness of the contract. This follows in particular from: (a) the irrevocability of the proposal during the period indicated for this purpose by the proponent, even if there is no corresponding *quid pro quo* (Article 16.2); and (b) the possibility of modifying the contract by simple agreement of the parties, without the need—as is required, for example, in English law—for the beneficiary thereof to provide any consideration for such modification (Article 29.1). Neither is there a requirement of cause, as demanded by, among others, the French system (until the 2016 reform of the Civil Code), and those of Italy, Spain, Quebec, and Argentina.¹⁶

The omission from the Convention of any express reference to these contractual elements is understandable. It results from the fact that, as mentioned above, the CISG aspires to institute uniform rules for the international sale of goods, in the context of which neither cause nor consideration would serve any useful purpose, in view of the manifest divergence on these concepts between the Civil and Common Law systems.

It should however be recalled in this respect that, since the validity of the contract is excluded from the sphere of application of the Convention (Article 4a)), it is governed by its contracting states' domestic laws. The abovementioned concepts may therefore still prove relevant through the law applicable to this matter (for instance, in the event of a contract being invalid due to having an unlawful cause). This point will be returned to below.¹⁷

B. Formation of contracts

The CISG contains detailed rules on the formation of contracts between absent parties, which have to an extent served as a model for the

¹⁶ See, on the notions of consideration and cause, Dário Moura Vicente, *Comparative Law of Obligations* (Cheltenham, Edward Elgar 2023) respectively 38ff and 26ff, as well as the literature cited there.

¹⁷ See section V below.

subsequently adopted international instruments referred to above.¹⁸ These rules presuppose the formation of the contract by means of an offer and an acceptance. In this regard, it may be extracted from Article 14.1 that a declaration in the context of a negotiation, with a view to the conclusion of the contract, will be deemed to be an offer, provided: (a) it is addressed to one or more specific persons; (b) it is sufficiently definite; and (c) it indicates the offerer's intention to be bound in case of acceptance. The offer is sufficiently definite when 'it designates the goods and, expressly or implicitly, fixes or makes provision for determining the quantity and the price.'

Pursuant to Article 14.2, an offer addressed to indeterminate persons is deemed by the Convention to be a mere 'invitation to make offers', unless the person making the proposal has unequivocally indicated otherwise.

As for whether the proponent is bound by the offer, the CISG enshrines a compromise solution between the legal systems of its contracting states.¹⁹ It establishes, in effect, that until the moment of conclusion of a contract, a contractual offer may be revoked, provided the revocation reaches the offeree before it has dispatched its acceptance (Article 16.1); but the Convention immediately adds that the contractual offer will be irrevocable if it so indicates in any way or if, in the disputed situation, it would be reasonable for the offeree to rely on the offer being irrevocable and acted accordingly (Article 16.2).

The contract is concluded at the moment when the statement of acceptance of the contractual offer takes effect in conformity with the Convention's provisions (Article 23). In this regard, the CISG adopts the 'theory of reception', as also enshrined in German and Portuguese law, whereby that declaration takes effect on reaching the offerer (Article 18.1).

The Convention's preparatory works suggest that it deliberately excluded *culpa in contrahendo* from its scope, because a proposal from the (then existing) German Democratic Republic to include it was rejected. This proposal sought to establish that '[i]f one of the parties breaches the usual duties of care in preparation and formation of a contract of sale, the other party may demand compensation for the costs it has incurred'.²⁰ Also rejected was Article 5 of the preliminary draft prepared in 1977 by the

¹⁸ See Reiner Schulze, 'Formation of Contract' in Larry A DiMatteo and others (eds), *International Sales Law—Contract, Principles & Practice* (Baden-Baden, 2016), 203–41.

¹⁹ See Steffan Kröll and others (n 1), art16 nos1.

²⁰ See United Nations Commission on International Trade, *Uncitral Yearbook* (vol. IX, 1978) 66.

UNCITRAL, which stated: ‘In the formation of the contract, the parties must act loyally and in good faith.’²¹

The latter formulation was objected to as being too vague, so that differences could arise as to its interpretation. It was also contended that, insofar as it failed to specify the consequences of not complying with the said provision, legal uniformity in this area would be undermined, because the matter would have to be governed by national laws.²²

The choice made in this regard was also influenced by the fact that in Common Law countries the principle of good faith is not enshrined with regard to the formation of contracts, while in Civil Law countries the reach of this principle varies greatly.²³

In any case, Article 7 of the Convention established that:

1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

This provision—seen by some as the most significant one in the Convention, given that its success depends essentially upon the direction taken by courts and arbitral tribunals with respect to its interpretation²⁴—again adopts a compromise solution, this time between the position of states that called for the enshrinement of a general duty of good faith to be observed by the parties in the contract’s formation and performance and those that opposed any explicit reference to this principle in the text of the Convention,²⁵ a difference in positions that persists to this day.²⁶ Under that compromise, good faith was accorded express recognition in the Convention, but only as a criterion for the interpretation of its

²¹ *ibid* 35.

²² Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Milan, Giuffrè 1987) 68ff.

²³ *ibid* 85ff.

²⁴ See, to this effect, Steffan Kröll and others (n 1) art7 nos2.

²⁵ C Massimo Bianca and Michael Joachim Bonell (eds) (n 22), 83ff; John O Honnold and Harry M Fletcher (n 1) 161.

²⁶ For a recent rejection of good faith as a general principle of Contract Law, see the judgement of the English Court of Appeal in *MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt* [2016] EWCA Civ 789, in which Lord Moore-Brick stated: ‘There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement’.

provisions, and not as a rule of conduct for the parties.²⁷

Liability arising from the breach of duties of conduct binding on the parties in the negotiation and conclusion of contracts for the international sale of goods is accordingly determined, pursuant to Article 7.2 of the Convention, by the domestic law applicable under the conflict-of-laws rules in force in the state of the forum.²⁸ This is undisputed with regard to the breach of duties of protection and care, which, because of their tortious nature, fall outside the scope of the Convention; but the same solution should apply in the case of pre-contractual duties of disclosure intended to ensure the proper formation of the will to contract, insofar as the Convention does not deal with the lack of, or flaws in, the parties' will, which is subject to contracting states' laws.²⁹

C. Contractual form

On matters of form, the CISG enshrines the principle of freedom now adopted by a large number of national legal systems: Article 11 lays down that a contract of sale, 'need not be concluded in or evidenced by writing and is not subject to any other requirements as to form'; and Article 29.1 adds that a contract, 'may be modified or terminated by the mere agreement of the parties'.

However, here too, the Convention had to adopt a compromise solution because, at the time of its signing, a considerable number of countries, including the former Soviet Union, required international contracts of sale to be concluded in writing, in order to facilitate official control of foreign trade. This is why Article 12 of the Convention provides that Articles 11 and 29 will not apply when one of the parties to the contract has its place of business in a contracting state which has made an opt-out declaration under Article 96.³⁰

²⁷ See, to this effect, Franz Jürgen Säcker and others (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (7th edn, Munich, C. H. Beck 2015) art7 CISG nos32ff; Ulrich G Schroeter (n 12), 25ff; Ulrich G Schroeter, *Internationales UN-Kaufrecht* (7th edn, Tübingen, Mohr Siebeck 2022) 61ff; John O Honnold and Harry M Fletcher (n 1) 163ff.

²⁸ This is also the view taken by Peter Huber, 'Some Introductory Remarks on the CISG' (2006) IHR 228ff; see also Franz Jürgen Säcker and others (eds) (n 27) art 4 CISG nos29ff.

²⁹ See, to this effect, Ulrich G Schroeter, *Internationales UN-Kaufrecht* (7th edn, Tübingen, Mohr Siebeck 2022) 83ff.

³⁰ Although seven states made such a declaration (Argentina, Belarus, Chile, Paraguay, the Russian Federation, Ukraine and Vietnam: see <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg>, last accessed on September 9, 2025), that will have practical effect in only a few cases today, given that most of them have since switched to freedom of form, even in the case of international contracts.

D. Interpretation and supplementation of contracts

Regarding contractual interpretation, the CISG seeks to strike a compromise between the subjectivist and objectivist approaches, with the former slightly predominating. In fact, Article 8 provides that the statements and other conduct of a party will in principle be interpreted in accordance with his intent, where the other party knew or could not have been unaware what that intent was. When that intent cannot be determined, the statements and other conduct of a party are interpreted in accordance with the meaning that a reasonable person of the same kind as the other party would assign to them in view of the circumstances. This last rule corresponds to that which Article 236.1 of the Portuguese Civil Code establishes with regard to the interpretation of contractual statements. However, as in Portuguese law, that rule operates subject to the proviso that, if one of the parties had assigned a particular meaning to the contract and the other knew or could not have been unaware of this at the time of its conclusion, the contract is to be interpreted in accordance with that meaning (*falsa demonstratio non nocet*).

The CISG deems parties to be bound by any usage to which they have agreed or by any practices established between themselves (Article 9.1); and it determines that the contract is subject to the usages of international trade (sometimes referred to as *lex mercatoria*) of which the parties knew or ought to have known, and which in international trade are widely known to, and regularly observed by, parties to contracts of the same type, involved in the particular trade concerned (Article 9.2). Failing a stipulation to the contrary, such usages are therefore deemed tacitly incorporated in the contract.

E. Effects of contracts

A reference should also be made to the effects of contracts on relations between the respective parties. One of the differences that distinguish Latin from Germanic legal systems is the transfer of ownership of the thing sold as a consequence of conclusion of the contract of sale, which the former admit³¹ (with the exception of Brazil),³² but the latter reject, in keeping with the principle of separation between contractual transactions that create obligations (*Verpflichtungsgeschäfte*) and transactions that

³¹ See, for example, Article 879(a) of the Portuguese Civil Code (*Código Civil português*, approved by Decree-Law No. 47344 of 25 November 1966).

³² See Article 481 of the Brazilian Civil Code (*Código Civil brasileiro*, approved by Law No. 10.406 of 10 January 2002).

operate the transfer of property (*Verfügungsgeschäfte*).³³ This is perhaps why the CISG eschews any rules on this matter, which accordingly is left to domestic legal systems (Article 4 (b)).

However, the Convention does regulate the obligations of the seller and the buyer in Articles 30 and 53, the former being required to transfer ownership and deliver the goods sold to the latter, which is required to pay the price and receive the goods.

F. Change of circumstances

Let us now consider the change of the circumstances on which the parties based their decision to conclude a contract, a matter where domestic legal systems also diverge widely.

The CISG contains no particular rule on this question. To be sure, Article 79.1 provides for certain instances where the debtor is released in the event of non-performance if this is due to an impediment beyond his control. However, these do not include, at least expressly, hardship due to a supervening change of circumstances.

The CISG's omission in this respect reflects the lack of consensus between its contracting states on the matter, particularly because under English law, absent a hardship clause, a change of circumstances does not, in principle, constitute sufficient ground for modifying or terminating a contract.³⁴

Several authors have nonetheless admitted the application by analogy of Article 79.1 to such situations.³⁵ The CISG Advisory Council has opined that the Convention governs cases of hardship.³⁶

In case law, this solution was adopted, for instance, by the Belgian Court of Cassation, which ruled, with regard to a supply contract for steel piping, that an unexpected 70% increase in the steel price constituted an impediment to performance of the seller's obligation within the meaning

³³ See, respectively, §§ 433 and 929 of the German Civil Code (*Bundesgesetzbuch*, in the version promulgated on 2 January 2002).

³⁴ Hannes Rösler, 'Hardship in German Codified Private Law: In Comparative Perspective to English, French and International Contract Law' (2007) 15 *European Review of Private Law* 483ff.

³⁵ See Steffan Kröll and others (n 1) art79 nos78–86; and Larry DiMatteo, 'Excuse: Impossibility and Hardship' in DiMatteo and others (eds), *International Sales Law. Contract, Principles & Practice* (Baden-Baden, 2016) 665–712.

³⁶ See the CISG Advisory Council Opinions Nos. 7 and 20, available at <<https://ciscgac.com/opinions/>>, last accessed on September 8, 2025. For a critical assessment of the latter opinion, see Hüseyin Can Aksoy, 'Elephant in the Room: CISG, Hardship, and Uniform Application' (2023) 34(3) *European Business Law Review* 463ff.

of that provision.³⁷

There is no strict separation between an impediment in the strict sense, which refers to an impossibility to perform, and a situation of hardship. Instead, these notions reflect a continuum of circumstances that represent varying degrees of difficulty for the party required to perform. However, it remains unclear whether the impediment described in Article 79.1 sufficiently resembles hardship situations to warrant its application in such situations.

Furthermore, it remains unclear what effects should be assigned, under the Convention, to the occurrence of situations of this kind. Article 79.1 does not seem to provide sufficient grounds for imposing a duty to renegotiate the contract, or for empowering courts or arbitral tribunals to adapt or terminate the contract,³⁸ as was acknowledged by the CISG Advisory Council.³⁹

A debtor facing a hardship situation is thus left, under the CISG, with a sole remedy: the temporary exemption from liability for non-performance, as outlined in Article 79.1. Its counterparty may, in turn, terminate the contract, pursuant to Article 79.5, provided that the Convention's requirements for such termination are satisfied. It remains however to be demonstrated that: (a) this approach is the most suitable one for hardship situations, particularly when compared to the broader range of solutions provided by Civil Law systems, which include the renegotiation and adaptation of contracts; and (b) that such an approach is even compatible with the Convention's general preference for the preservation of contracts over their termination.

In light of the above, it comes as no surprise that one of the Convention's architects, the late John Honnold, characterised Article 79 as 'the least successful component of the half-century of work towards international uniformity that culminated in approval of the text of the CISG'.⁴⁰

G. Performance and non-performance

In the CISG, the concept of 'breach of contract' includes failure, by

³⁷ See the judgment of 19 June 2009, *Scaфом International B.V. c. Lorraine Tubes S.A.S.* C.07.0289.N, available at <https://cisg-online.org/files/cases/7880/translationFile/1963_18923774.pdf>, last accessed on September 8, 2025. For criticism of this decision, see John O Honnold and Harry M Fletcher (n 1) 842 (classifying it as the 'most wrong-headed decision on this issue to date'); and Ulrich G Schroeter (n 29) 321.

³⁸ To this effect, John O Honnold and Harry M Fletcher (n 1) 842; Ulrich G Schroeter (n 29), 321.

³⁹ See CISG Advisory Council, *CISG Advisory Council Opinion No. 20* (CISG 2020) ss 11–3.

⁴⁰ John O Honnold and Harry M Fletcher (n 1) 819.

either the seller or the buyer, to perform any of their obligations arising under the contract or the Convention (Articles 45 and 61).⁴¹ In the event of non-performance by the seller, the buyer is in principle entitled to require performance of its obligations (Article 46.1). However, Article 28 significantly curtails specific performance, by determining that:

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

The admissibility of specific performance of contractual obligations is therefore subject to the *lex fori*. This, of course, reflects the different approaches taken on this matter by national legal systems and the unfeasibility of establishing an autonomous substantive rule in the Convention. By virtue of Article 28, the differences between national legal systems in respect of this matter have therefore been preserved. In particular, the admissibility of an efficient breach of contract, as enshrined in certain Common Law systems, is retained.

In any case, under the Convention the buyer cannot require specific performance by the seller of its obligations whenever it 'has resorted to a remedy which is inconsistent with this requirement' (Article 46.1, in fine). This would be the case, for example, of termination of contract, compensation of the buyer's expectation interest or reduction of the agreed price.⁴²

If the seller fails to perform any of his obligations under the contract of sale or the CISG, the buyer is entitled, in addition to requiring performance of the obligation on the terms described, to exercise the rights of substitution and repair of the goods, to a reduction in the price and, when the respective pre-conditions are met, to the avoidance of the contract, as well to claim compensation for damages (Articles 45 to 52).

If the buyer fails to perform any of his obligations, the seller is in turn entitled to require him to pay the price, to take delivery of the goods or to perform his other obligations, to the avoidance of the contract if the respective pre-conditions are met, to specify the form, measurement or other features of the goods himself, and to claim compensation for damages (Articles 61 to 65).⁴³

Under the CISG, damages payable for non-performance include both the loss caused to the other party by the defaulting party and the

⁴¹ Jürgen Basedow, 'Towards a Universal Doctrine of Breach of Contract: The Impact of the CISG' (2005) 25(3) *International Review of Law and Economics* 487.

⁴² See Steffan Kröll and others (n 1) nos 13–16.

⁴³ See, on this matter, Peter Huber, 'CISG—The Structure of Remedies' (2007) 71(1) *RabelsZ* 13–34.

lost profits which the former suffered as a consequence of breach of contract (Article 74). The Convention therefore enshrines the principle of full compensation (*Totalreparation*).⁴⁴ However, damages payable are purely compensatory: there is no place, under the Convention, for the imposition of restitutionary damages, based on profits earned by the defaulting debtor, still less for punitive damages intended as a penalty for non-performance.⁴⁵

Except in the situation envisaged in Articles 79 and 80, the duty to pay compensation is independent of the debtor's fault. The Convention accordingly enshrines a strict liability of the defaulting debtor, in line with the solution generally adopted by Common Law systems.⁴⁶ This circumstance, among other things, may explain the abovementioned tendency observed in certain European countries for parties to exclude, under Article 6, the applicability of the Convention to contracts for the international sale of goods.⁴⁷

With regard to the causal link required in order for compensation for non-performance of the contract to be awarded, the CISG adopts the foreseeability test enshrined in English and United States law. Under Article 74 of the Convention, compensation may not therefore exceed the loss suffered and the loss of profit that the defaulting party foresaw or ought to have foreseen upon concluding the contract as possible consequences of his breach, taking into account the facts of which he was or ought to have been aware.

The CISG accordingly excludes compensation of consequential losses (*Folgeschäden*) resulting from non-performance of the contract, not foreseen or foreseeable at the time of conclusion of the contract (for example, the complete destruction of the buyer's factory or other goods as a result of a defect existing in a machine installed there by the seller).

As for the defective performance of the contract, the CISG's rules are based on the idea that the qualities of the thing sold, guaranteed by the seller or presupposed by the buyer, are part of the contractual agreement, meaning that the Convention does not differentiate between delivery of defective goods and delivery of an *aliud*.⁴⁸

To this effect, Article 35.1 of the Convention enshrines the seller's

⁴⁴ See, to this effect, Ulrich G Schroeter (n 29) 326.

⁴⁵ See, to this effect, Michael Bridge, 'Remedies and Damages' in Larry A DiMatteo and others (eds), *International Sales Law—Contract, Principles & Practice* (Baden-Baden, 2016).

⁴⁶ See, to this effect, Ingeborg Schwenzer and others (eds), *Kommentar zum Einheitlichen UN-Kaufrecht* (6th edn, Verlag C. H. Beck München & Helbing Lichtenhahn Verlag Basel 2013) 1012.

⁴⁷ See, to this effect Steffan Kröll and others (n 1) art74 nos11.

⁴⁸ Expressly in this sense, see the *Cobalt sulphate case* VIII ZR 51/95 (1996) Bundesgerichtshof.

obligation to deliver goods ‘of the quantity, quality and description required by the contract’; and Article 36.1 determines that the seller is liable for any ‘lack of conformity’ that exists at the moment when risk passes to the buyer.⁴⁹

Accordingly, if the goods do not conform with the contract, Article 46.2 entitles the buyer to require the seller to deliver substitute goods, if such a lack of conformity constitutes a ‘fundamental breach of contract’: within the system of the Convention, such non conformity is a form of non-performance. The buyer may also require the seller, under Article 46.3, to remedy the lack of conformity by repair, unless this is unreasonable, having regard to all circumstances.

This is a very different system from the rules laid down, for example in Articles 913 *et sequitur* of the Portuguese Civil Code for the sale of defective things, which are based, as regards the sale of specific things, on the voidability of the contract on the grounds of error or deceit (*dolus*). Under Portuguese law, the buyer is also entitled to demand that the seller repair the thing or, if necessary and if it is fungible in nature, to replace it; but this obligation does not exist, as established in Article 914, ‘if the seller was unaware, through no fault of his own, of the defect in the thing, or its lack of quality’.

In the European Union, the rules on the sale of consumer goods and the related guarantees, established in Directive 1999/44/EC, subsequently replaced by Directive (EU) 2019/771, approximate in several regards to the rules in the CISG just described.⁵⁰ One of the core points of the Directives is the seller’s ‘obligation of conformity’, requiring the goods sold to conform with the contract.⁵¹ As a consequence of this obligation, the delivery of defective goods by the seller constitutes a form of

⁴⁹ See Bruno Zeller, ‘Conformity of Goods’ in Larry A DiMatteo and others (eds), *International Sales Law—Contract, Principles & Practice* (Baden-Baden, 2016) 379–403.

⁵⁰ See, to this effect, Jürgen Basedow, *EU Private Law. Anatomy of a Growing Legal Order* (Cambridge, 2021) 101. On Directive 1999/44/CE and its transposition, see, Dirk Staudenmayer, ‘Die EG-Richtlinie über den Verbrauchsgüterkauf’ (1999) NJW 2393ff; Dirk Staudenmayer, ‘The Directive on the Sale of Consumer Goods and Associated Guarantees—a Milestone in the European Consumer and Private Law’ (2000) Eur. Rev. Priv. Law 547ff; Paulo Mota Pinto, ‘Conformidade e Garantias na Venda de Bens de Consumo. A Directiva 1999/44/CE e o Direito Português’ (2000) Estudos de Direito do Consumidor 197ff; and Claus-Wilhelm Canaris, ‘A Transposição da Directiva Sobre a Compra de Bens de Consumo Para o Direito Alemão’ (2001) 3 Estudos de Direito do Consumidor 49ff. With regard to Directive (EU) 2019/771 of 20 May 2019, see, Jorge Morais Carvalho, ‘Sale of Goods and Supply of Digital Content and Digital Services—Overview of Directives 2019/770 and 2019/771’ (2019) 8(5) Journal of European Consumer and Market Law 194–201; and Mafalda Miranda Barbosa, ‘O futuro da compra e venda (de coisas defeituosas)’ (2019) 79 III-IV Revista da Ordem dos Advogados 723–52.

⁵¹ Directive 1999/44/EC of 25 May 1999 art2 para1; Directive (EU) 2019/770 of 20 May 2019 art5.

contractual non-performance, for which the seller is liable.⁵² This solution is based on the idea, which was also adopted in the Convention, whereby the qualities of the thing sold, guaranteed by the seller or presupposed by the buyer, are part of the contractual agreement. In this regard, the rules adopted by the Directives can be traced directly back to the CISG.⁵³

This explains why in Portugal, Article 2.1 of Decree-Law 67/2003, of 8 April, which transposed Directive 1999/44/EC, enshrined rules on the sale of consumer goods much closer to those of the Convention than to the country's own domestic law, by providing that '[t]he seller has the duty to deliver to the consumers goods which conform with the contract of sale.' In turn, Decree-Law 84/2021, of 18 October, which transposed Directive (EU) 2019/771, lays down in Article 5 that '[t]he professional must deliver to the consumer goods that comply with the requirements of Articles 6 to 9, without prejudice to the provisions of Article 10'. It is further established, in Article 6 of the same Decree-Law, that goods conform with the contract of sale when: (a) they correspond to the description, type, quantity and quality, and present the functional capabilities, compatibility, interoperability and other characteristics established in the contract of sale; (b) they are suitable for any specific purpose to which the consumer puts them, in accordance with the agreement previously reached between the parties; (c) they are delivered together with all accessories and instructions, including for installation, as stipulated in the contract of sale; and (d) they are supplied with all updates, as stipulated in the contract of sale'. Similar solutions have in the meantime been enshrined in the legal systems of several other European countries.⁵⁴

Under the CISG, termination due to non-performance (termed 'avoidance' in the English language version) is only admitted in cases of fundamental breach of contract, and may take place by mere declaration

⁵² Directive 1999/44/EC of 25 May 1999 art3 para1; Directive(EU) 2019/770 of 20 May 2019 art10 para1.

⁵³ For further reading on this point, see Moura Vicente, 'Desconformidade e garantias na venda de bens de consumo: a Diretiva 1999/44/CE e a Convenção de Viena de 1980' (2001) 2(4) Themis 121–44.

⁵⁴ See, for example, the Dutch Civil Code (*Burgerlijk Wetboek*), Article 7:17: 'The thing delivered must conform with the contract'; the German Civil Code (*Bundesgesetzbuch*), § 433: 'The seller is to procure the thing for the buyer free from material defects and defects of title', and § 434 (1): 'The thing is free from material defects if, upon the devolution of the risk, if it has the agreed quality. If the quality has not been agreed, the thing is free of defects 1. If it is suitable for the use presupposed in the contract, or 2. If it is suitable for the usual use and is of the quality which is usual in things of the same kind and which the buyer may expect by virtue of its nature'; and the Italian Consumer Code (*Codice del Consumo*, approved by decreto legislativo of September 6, 2005, No. 206), Article 129 (1): 'The seller is obliged to deliver to the consumer goods that conform with the contract of sale'.

by one of the parties to the other.⁵⁵

A breach of contract is deemed to be fundamental, according to Article 25 of the Convention, ‘if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result’.

This concept is notoriously vague. Two elements may nevertheless be gleaned from it: (a) causation of harm resulting in ‘substantial deprivation’ of that which one of the parties could have expected from the contract; and (b) the ‘foreseeability’ of that result. The former should be deemed to occur when the creditor loses interest in the performance by virtue of the breach of contract; the latter, when a trader reasonably familiar with the market, placed in the same circumstances, would have foreseen the result of the breach of contract that occurred.⁵⁶

Court decisions have distinguished between several types of cases with regard to application of this concept.⁵⁷ Definitive non-performance of the obligation and refusal to perform are generally deemed to be a fundamental breach of contract.⁵⁸ But mere late performance will only be classified as such if the moment when performance was due was essential by virtue of a stipulation by the parties or the circumstances of the contract.⁵⁹ Delivery of defective goods only constitutes a fundamental breach if they cannot be used by the buyer, even if they have to be repaired for this purpose.⁶⁰ The impossibility of transferring ownership of the goods sold, for example because they were stolen, also constitutes a fundamental breach of contract.⁶¹

The CISG therefore sets the bar rather high for a situation to be classified as a fundamental breach of contract; avoidance of the contract is accordingly envisaged as an *ultima ratio*.⁶²

The restriction on the exercise of the right to avoidance resulting from

⁵⁵ See Articles 49.1 and 64.1 of the CISG, available at <<https://ciscg-online.org/ciscg-article-by-article>>, last accessed on September 8, 2025.

⁵⁶ See Steffan Kröll and others (n 1) art 25 nos 20–6.

⁵⁷ See Ulrich Magnus, ‘Performance and Breach of Contract’, in Larry A DiMatteo and others (eds), *International Sales Law—Contract, Principles & Practice* (Baden-Baden, 2016) 467–98, at 472f.

⁵⁸ See the decision of the Oberlandesgericht München 7 U 2959/04 (2004).

⁵⁹ See the decision of the *Diversitel Communications Inc. v. Glacier Bay Inc.* [2003] Ontario Judgments No. 4025.

⁶⁰ See, declining the application of Article 25, the German Supreme Court’s decision cited above (n 48).

⁶¹ For a case where the issue arose see, Stolen car case VIII ZR 268/04 (2006) Bundesgerichtshof.

⁶² See Peter Huber (n 43) 18; Ulrich G Schroeter (n 29) 166ff; Alexandre de Soveral Martins, *Compra e venda internacional de mercadorias: a CISG* (Almedina 2021) 84.

this approach reveals the *favor contractus* underlying the Convention.⁶³ This is justified by the concern to avoid the waste of economic resources involved, for example in the termination of the contract and the delivery of substitute goods. This is why, under the Convention, priority is given to the repair of the goods sold, the compensation of the buyer and the reduction of the agreed price.⁶⁴

The CISG admits immediate avoidance of the contract in the event of an anticipatory breach or anticipatory non-performance by one of the parties, deeming such a situation to be equivalent, in terms of its effects, to the non-performance of the contract, provided the requirements for fundamental breach are met. Article 72.1 makes this clear: 'If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided'.

It should be noted that the Convention does not here call for certainty that the contract will not be performed, resulting, for instance, from a statement by the debtor that he will not perform the obligation: a reasonable degree of likelihood that this will happen is sufficient. For this reason, at least potentially, this is a very far-reaching provision.

At the request of certain developing countries, however, steps were taken to mitigate the more serious effects of this provision, by laying down in para. 2 of Article 72 that, if it has the necessary time, the party seeking to avoid the contract must first notify the other of this, in order to permit him to provide adequate assurances of the correct performance of his obligations. This proviso does not apply, nonetheless, if the debtor has stated that he will not perform his obligations. This rule is therefore yet another example of a compromise solution.

H. Impossibility of performance

We shall now consider the situation of a supervening impossibility of performance of contract. In this regard, Article 79.1 of the CISG lays down that:

A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of conclusion of the contract or to have avoided or overcome it, or its consequences.

This provision encompasses situations of non-performance by the debtor through no fault (*lato sensu*) of his own, in particular due to

⁶³ See also, to this effect, Joana Campos Carvalho, 'Fundamentos e resolução por incumprimento: comparação entre o Direito português e a Convenção de Viena Sobre os Contratos de Compra e Venda Internacional de Mercadorias' (2015) 16 *Themis* 175–242, at 183.

⁶⁴ See Steffan Kröll and others (n 1) art46 no33.

unforeseeable circumstances or force majeure, a third-party fact or the application of legal rules.⁶⁵ Hardship, according to the point of view expressed in a significant part of legal literature, is not included here.⁶⁶

The provision in question lays down an exception to the principle of strict liability adopted in the Convention. In practice, however, this means little, as the courts have only rarely excused a debtor on these grounds.⁶⁷ This is partly because the preconditions for such an excuse are very strict. They include: (a) the occurrence of an impediment beyond the debtor's control (a natural disaster, an act of violence, a strike, an embargo, etc.); (b) the unforeseeability of that impediment at the time of conclusion of the contract; (c) the inevitability and insuperability of that impediment through measures the debtor can reasonably be expected to take; and (d) a causal link between the impediment and non-performance of the obligation.

It should moreover be noted that, under Article 79.5 of the Convention, the debtor remains obliged to perform its obligation, and is only released from the duty to pay compensation to the creditor. It may therefore be required to perform that obligation, if in the meantime that becomes possible.

The maxim *impossibilium nulla obligatio est*⁶⁸ does not therefore apply within the scope of the Convention.⁶⁹

III. THE CONCEPT OF CONTRACT THAT EMERGES FROM THE CISG

In view of the above, it can be seen that, in cases of non-performance, the CISG enables the creditor to hold the debtor liable for such non-performance, irrespective of fault, except in the event of *force majeure* and provided the requirements for this to be deemed relevant are met; it likewise admits avoidance of the contract in the event of a fundamental non-performance, by mere declaration by one of the parties to the other, without granting the defaulting party a period in which to remedy the

⁶⁵ See Maria Ângela Bento Soares and Rui Moura Ramos (n4) 214.

⁶⁶ See section II.F above. To this effect, see also Sánchez Lorenzo, 'La frustración del contrato', in Sixto Sánchez Lorenzo (ed), *Derecho Contractual Comparado. Una Perspectiva Europea y Transnacional vol II* (3rd edn, Madrid, Civitas 2016) 742ff.

⁶⁷ See, to this effect, Franz Jürgen Säcker and others (eds) (n 27) art 79 CISG no1.

⁶⁸ This maxim was adopted, for example, in Article 790(1) of the Portuguese Civil Code, pursuant to which: 'The obligation is extinguished when performance becomes impossible for reasons not attributable to the debtor.'

⁶⁹ See also to this effect, Ulrich G Schroeter (n 29) 171.

situation.⁷⁰

The CISG imposes a further significant restriction on specific performance of the defaulted obligation, namely in cases where the creditor can, on reasonable terms, obtain from a third party the performance which has not been rendered, thereby opening the door, whenever the *lex fori* so permits, to an 'efficient breach of contract' by the party which has an economically more favourable alternative.

In view of this normative framework, one may conclude that, in respect of non-performance, the CISG predominantly reflects a Common Law concept of contract.⁷¹ The 'moral vision of the contract' (as it has been called)⁷² adopted in Civil Law systems gave way to a vision more centred on its economic effects, such as that underpinning Common Law systems.

It is that same concept that underlies, as we have seen, the Convention's rules on the formation of contracts, in particular in view of the rejection of admissibility of liability based on culpa in contrahendo; it likewise informs the Convention's approach to the relevance of changed circumstances as grounds for adaptation or avoidance of the contract. It has been contended that this is not unrelated to the influence exerted by the United States of America on the formation of the CISG, which in various aspects presents substantial similarities with the rules on sale contained in the US Uniform Commercial Code.⁷³

IV. THE LIMITS ON THE UNIFICATION UNDERTAKEN BY THE CISG AND ITS VARIABLE GEOMETRY

Despite the unequivocal progress it represents in terms of a rapprochement

⁷⁰ Subject, however, to the rule laid down in Article 72(2), as discussed above in section II.G, *in fine*.

⁷¹ See, acknowledging that the rules on non-performance of contract contained in the Vienna Convention and, in its wake, in the *UNIDROIT Principles*, in the *Principles of European Contract Law* and in the *Draft Common Frame of Reference*, were shaped in the image of Common Law systems, Ole Lando, 'Non Performance (Breach) of Contracts' in Arthur S Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer Law Intl' 2010) 681ff. See also, to this effect, Ulrich Drobnig, 'General Principles of European Contract Law' in Petar Sarcevic and Paul Volken (eds), *International Sale of Goods: Dubrovnik Lectures* (New York, Oceana 1986) 305ff (with regard to the Vienna Convention); Filippo Ranieri, *Europäisches Obligationenrecht* (Springer Vienna 2009) 709 (stressing the 'function of model' – '*Vorbildfunktion*' – performed by English Law in the shaping of European Civil Law); Jean-Frédéric Carter, *Le traitement de l'inexécution (La breach of contract)* (thesis submitted to the Université de Lille, 2003, available at <<http://edoctore74.univ-lille2.fr>>, last accessed on September 9, 2025); and Carmen Vaquero López, 'La mora en los contratos' in Sixto Sánchez Lorenzo (ed), *Derecho Contractual Comparado. Una Perspectiva Europea y Transnacional vol II* (3rd edn, Madrid, Civitas 2016) 820ff.

⁷² See, to this effect, Rémy Cabrillac, *Droit européen comparé des contrats* (Paris, 2012) 156. For a detailed exposé of that vision, see Georges Ripert, *La règle morale dans les obligations civiles* (4th ed., Paris, 1949).

⁷³ See, to this effect, in the more recent literature, Arnald J. Kanning, 'Unification of Commercial Contract Law: The Role of the Dominant Economy' (2021) 85(2) *RabelsZ* 326–56, at 354.

between different legal traditions, there are significant limits to how far the CISG has been able to unify the international rules on the sale of goods.

These limits arise, *inter alia*, from: (a) the restrictions imposed by the Convention itself on the matters it regulates; (b) the possibility of the parties excluding the applicability of its provisions; (c) the reference to the law applicable by virtue of the private international law rules in force in each contracting state in order to resolve issues not expressly regulated by the Convention; (d) the widespread use, in its text, of indeterminate concepts, such as 'reasonable person', 'reasonable period' and 'fundamental breach'; and (e) the absence of any supranational authority for the interpretation of the Convention.

In addition, the Convention presents a 'variable geometry', in the sense that it establishes a flexible framework that does not apply uniformly to all contracting states due to the reservations made by some of them.

The most significant of these reservations are provided for in Article 92.1, which permits any contracting state to declare, on signing, ratifying, accepting, approving or acceding to the Convention, that it will not be bound by the provisions of Part II with regard to the formation of contracts, or by Part III, relating to the rights and obligations of the parties.

V. CONCLUSION: THE INEVITABLE RECOURSE TO DOMESTIC LAWS AND THE EMERGENCE OF A THIRD WAY FOR REGULATING THE INTERNATIONAL SALE OF GOODS

A contractual party established in a state which has made a reservation under the said Article 92 is deemed as based in a non-contracting state with regard to the excluded provisions of the Convention; recourse is therefore needed to rules of private international law in order to determine the applicable legal rules.

Similarly, matters not covered by the Convention (its 'external gaps'), which include, according to Article 4, the validity of the contracts and transfer of ownership over the goods sold, as well as issues included within its material scope of application but which are not resolved by its provisions (its 'internal gaps'), are regulated (in the latter case, only if it is not possible to have recourse, for this purpose, to the general principles inspiring the Convention) by the law applicable in accordance with the conflict of laws rules of the forum state, as determined in Article 7.2.

The Convention accordingly enshrines a *mitigated unification* of

the rules on the international sale of goods, which does not dispense with recourse to the national laws designated by the rules of private international law.⁷⁴

Rather than an all-embracing compromise between the Common Law and Civil Law traditions, which in certain fields is practically impossible to reach, the CISG adopts a ‘third way’ as regards regulation of the matters within its scope, based on combining uniform rules with the domestic legal regimes on sale of goods.

Whilst this approach is perhaps one of the CISG’s main advantages, given the neutrality successfully achieved in the provisions of the Convention and the level playing field accordingly enjoyed by parties to international contracts, it is nonetheless a clear limitation imposed on the uniformity of the rules on the international sale of goods, which the Convention’s Preamble proclaims as one of its fundamental aims, and on the reduction of the costs and risks involved in the applicability of different laws to international contracts.

It is true that, since the conclusion of the Convention, a substantial amount of literature and case law has developed to interpret its provisions and address its internal gaps, guided by the general principles that underpin it. This has effectively lessened the impact of the said limitation. However, relying on such principles to find solutions that are not explicitly mentioned in the Convention also has its limits.

As it reaches 45 years of existence and nearly 100 contracting states, the CISG may be ripe for higher aspirations, which include further unification of issues of general contract law in respect of which no consensus could be reached between its contracting states almost half a century ago.⁷⁵ Such, it is submitted, is UNCITRAL’s greatest challenge for the future in respect of the CISG.

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⁷⁴ See, to this effect, Franco Ferrari, ‘CISG’ in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (vol 1, Cheltenham, Edward Elgar 2017,) 337ff (341); Franco Ferrari, *Forum Shopping Despite Unification of Law* (Leiden and Boston, Brill 2021), noting, at 173, that ‘Private International Law and uniform substantive law created through conventions can and indeed do, coexist’. See also Jürgen Basedow, *Uniform Law* (Tübingen, Mohr Siebeck 2024) 279, acknowledging both that ‘[d]ue to its fragmentary nature, uniform substantive law is always embedded in national law’, and that ‘[t]he legal analysis of any dispute falling into the remit of an international instrument therefore invariably entails a combination of uniform substantive law and national rules as designated by private international law’.

⁷⁵ As was suggested in the Proposal by Switzerland on possible future work in the area of international contract law, document No. A/CN.9/758 of 8 May 2012, available at <<https://digitallibrary.un.org/record/729645?v=pdf>>, last accessed on September 8, 2025.

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A Future European Union ‘Quantum Act’? Critical Lessons from the Global AI Governance Debate

ABSTRACT: The year 2025 was officially designated by the United Nations as International Year of Quantum Science and Technology (IYQ) to commemorate the 100 years since the initial formulation of quantum theories. In July 2025, the European Union (EU) released its ‘Quantum Europe Strategy: Quantum Europe in a Changing World’, which recognizes that ‘today we stand at an inflection point, as the global race to harness quantum technologies accelerates, moving beyond the labs and entering real-world applications’. The same strategy also includes the goal to present a proposal for an EU Quantum Act in 2026, similar to the draft AI Act first released in 2021. With many more countries preparing quantum strategies or laws and working on quantum technologies, the terminology of a ‘regulatory race’ is reminiscent of the language used in the current global artificial intelligence (AI) debate. Debates about AI have revealed several critical shortcomings that have hindered the development of consistent and adequate legal frameworks governing AI and related technologies at the national, regional and global levels. This article seeks to point out the major shortcomings underlying the present AI governance and regulatory debates and identify the lessons that can be learned for future regulatory debates on quantum technologies and a possible draft ‘EU Quantum Act’. In essence, it argues that it is necessary to first develop ‘quantum intelligence’ or ‘quantum literacy’—understood as the conceptual and cognitive skills adequate to the challenges posed by quantum technologies—before adopting new laws.

KEYWORDS: EU Quantum Act, Quantum Revolutions, Quantum Technologies, Global AI Governance Debate, EU AI Act, Space-Time, Future of Law

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I. INTRODUCTION

Those who are not shocked when they first come across quantum theory cannot possibly have understood it.
Niels Bohr¹

The year 2025 was designated as the International Year of Quantum Science and Technology (IYQ) by the United Nations General Assembly (UNGA) in order to recognize ‘the 100th anniversary of the development of the methods of quantum mechanics.’² In July, the European Union (EU) released its ‘Quantum Europe Strategy’ to recognize that ‘advances in quantum science represent some of the most transformative developments in technological history.’³ The same strategy also foresees the creation of a EU-level governance framework in the form of a proposal for a Quantum Act to be presented in 2026.⁴ Many other jurisdictions have already adopted similar quantum strategies or even binding laws as a means to address the consequences of the development of quantum technologies.⁵ The recent rise of quantum technologies has been dated to the beginning of the new millennium and has been termed the ‘second quantum revolution.’⁶ The second quantum revolution is now starting to achieve the potential promised by the revolutionary theoretical breakthroughs of the first quantum revolution that took place more than 100 years ago, which was said to have given us ‘new rules that govern physical reality.’⁷

During the past hundred years, representatives of the so-called ‘hard sciences,’ economists and developers of various new technologies

¹ Alan A Grometstein, *The Roots of Things: Topics in Quantum Mechanics* (Springer 1999) 4.

² United Nations General Assembly (UNGA), ‘Resolution adopted by the General Assembly on 7 June 2024: International Year of Quantum Science and Technology, 2025’ (19 June 2024) A/RES/78/287.

³ European Commission, ‘Communication from the Commission to the European Parliament and the Council: Quantum Europe Strategy: Quantum Europe in a Changing World’, COM (2025) 363 final (2 July 2025) (EU Quantum Strategy).

⁴ *ibid* 4 and 15.

⁵ See eg US National Quantum Initiative Act (2018) 132 Stat. 5092 Public Law 115–368 (21 December 2018); See also Government of India, Department of Science & Technology, ‘National Quantum Mission (NQM)’ <<https://dst.gov.in/national-quantum-mission-nqm>> accessed 7 November 2025; Cabinet Office of the Government of Japan, ‘Quantum Technology Innovation’ <<https://www8.cao.go.jp/cstp/english/quantum/index.html>> accessed 7 November 2025; Singapore National Quantum Office, ‘Singapore’s National Quantum Strategy’ (30 May 2024) <<https://nqo.sg/nqs/>> accessed 7 November 2025; The State Council of the PRC, ‘Quantum Tech, Embodied AI, Biomanufacturing—China Doubles Down on Emerging Industries’ (28 December 2024) <https://english.www.gov.cn/news/202412/28/content_WS676f38b1c6d0868f4e8ee534.html> accessed 7 November 2025.

⁶ Lars Jaeger, *The Second Quantum Revolution: From Entanglement to Quantum Computing and Other Super-Technologies* (Springer 2018) 13.

⁷ Jonathan P Dowling and Gerard J Milburn, ‘Quantum Technology: The Second Quantum Revolution’ (2003) 361(1809) *Philosophical Transactions: Mathematical, Physical and Engineering Sciences* 1655, 1674.

have capitalized widely on the seemingly 'spooky at a distance'⁸ and 'paradoxical'⁹ observations from the quantum world and turned their theories into real-life practical phenomena, as described in the following quote:

*From modern chemistry to solid state physics, from signal processing to medical imaging systems—today we encounter quantum physics everywhere. We trust its laws when we get into a car (and rely on on-board electronics), power up our computer (which consists of integrated circuits, i.e., electronics based on quantum phenomena), listen to music (CDs are read by lasers, a pure quantum phenomenon), undergo X-ray or MRI scans of our bodies, let ourselves be guided by GPS, or communicate via mobile phone. According to various estimates, between one-quarter and one-half of the gross national product of industrialized nations today is directly or indirectly based on inventions that have their foundation in quantum theory.*¹⁰

Given the present pace of technological innovation, many more 'spooky technical gadgets' using quantum technologies will soon follow suit and invade markets and lives. Already, there are signs for many promising applications of quantum technologies, such as quantum computers using 'entangled states to perform complex calculations at speeds unattainable by classical computers', quantum communication developing highly secure communication systems, like quantum cryptography, or quantum sensors being used as highly sensitive diagnostic tools with the potential for 'for early and more accurate disease detection, revolutionary imaging techniques, accelerated drug discovery, and the advent of personalised medicine.'¹¹

Meanwhile, policymakers and lawmakers—aside from a few notable exceptions—seem far from grasping the implications of this accelerating trend and remain desperately clinging to the 'laws' formulated by the classical physics of the pre-quantum era. They seem to have a blind spot for the fact that relativity theory and quantum physics 'undermined the classical physics and introduced new concepts that not only changed physics but also pervaded and gave shape to the modern culture.'¹² There

⁸ *The Born-Einstein Letters; Correspondence Between Albert Einstein and Max and Hedwig Born From 1916 to 1955* (Walker 1971) 159.

⁹ Kelvin J McQueen and Lev Vaidman, 'How the Many Worlds Interpretation Brings Common Sense to Paradoxical Quantum Experiments' in Rik Peels, Jeroen de Ridder and René van Woudenberg (eds), *Scientific Challenges to Common Sense Philosophy* (Routledge 2020) 40.

¹⁰ Jaeger (n 6) 13; Michele Grossi, Alberto Di Meglio and Sofia Vallecorsa, 'Spooky Quantum Action: From Thought Experiments to Real World Quantum Technology Application' in Marilena Streit-Bianchi and Vittorio Gorini (eds), *New Frontiers in Science in the Era of AI* (Springer 2024) 35, 41 and 45; Kelvin Mpofo and Patience Mthunzi-Kufa, 'Quantum Technologies Are Coming to Change Your Future (Fast)' (2024) 20(2) *Quest* 25, 30, <<https://hdl.handle.net/10520/ejc-quest-v20-n2-a8>> accessed 7 November 2025.

¹¹ Michele Grossi, Alberto Di Meglio and Sofia Vallecorsa, 'Spooky Quantum Action: From Thought Experiments to Real World Quantum Technology Application' in Marilena Streit-Bianchi and Vittorio Gorini (eds), *New Frontiers in Science in the Era of AI* (Springer 2024) 35, 41 and 45; Kelvin Mpofo and Patience Mthunzi-Kufa, 'Quantum Technologies Are Coming to Change Your Future (Fast)' (2024) 20(2) *Quest* 25, 30, <<https://hdl.handle.net/10520/ejc-quest-v20-n2-a8>> accessed 7 November 2025.

¹² Pedro Pereyra, *Fundamentals of Quantum Physics: Textbook for Students of Science and Engineering* (Springer 2012) 1.

is a lack of consideration for the foundation of law in science,¹³ or the ‘interrelation between human laws and the laws of nature.’¹⁴ Even if human laws are not be consistent with the laws of nature, humans should at least strive to act consistently with the their own findings as observed and formulated by science.

Thus, while quantum technologies are rapidly advancing to transform the world, prevailing legal understanding and reasoning remain seemingly stuck in a pre-quantum age. The prevalence of outdated modes of (legal) thinking means that there is a serious danger to merely supplant future quantum laws with remodelled versions of existing laws or institutions without adequate creative efforts to foster new modes of legal thinking in line with the scientific foundations on the basis of which new technologies have been developed. Instead, new laws are proposed to regulate novel technologies but they are based on old (and scientifically obsolete) thinking. This trend has already been witnessed in the present hype shaping the public and regulatory debates regarding artificial intelligence (AI) technologies. The same old mistakes are already beginning to emerge in the ideas and language underlying ‘new’ proposals for an EU Quantum Act. They apply the same terminology of a regulatory race, divide even the entangled global reality of the quantum world into one of ‘like- and non-like-minded countries’ or propose institutional frameworks merely copy-pasted from the International Atomic Energy Agency or EU AI Office.¹⁵

The paradoxical and seemingly spooky nature of quantum mechanics—manifested, for instance, in ‘no-go theorems’ that describe states appearing physically impossible—¹⁶calls for bolder, more innovative and more comprehensive steps. The future regulation of quantum technologies, it is argued, cannot be achieved by the simple adoption of a new act or a series of new acts compiled from bits and pieces eclectically selected from existing examples. It needs sound preparatory, parallel and, most of all, farther-reaching, efforts, such as to renew a constructive quest for humanity’s long-range goals ‘in light of the scientific discoveries of

¹³ Roscoe Pound, ‘The Foundation of Law’ (1961) 10(2) American University Law Review 124, 142.

¹⁴ Gian Marco Solas, ‘Interrelation of Human Laws and Laws of Nature? Codification of Sustainable Legal Systems’ 2025(2) Journal of Law, Market & Innovation 165.

¹⁵ See eg Mauritz Kop, ‘Towards a European Quantum Act: A Two-Pillar Framework for Regulation and Innovation’ (2025) arXiv:2509.14262, 1, 11, 19 and 45, <<https://doi.org/10.48550/arXiv.2509.14262>> accessed 7 November 2025.

¹⁶ See eg Christof Wetterich, *The Probabilistic World: A Fundamental Approach to Quantum Mechanics and Probabilistic Computing* (Springer 2025) 495.

the past few hundred years'.¹⁷ This also implies creative ideas about future multi-level governance models for society matching a networked 'world brain',¹⁸ which shall be accompanied by the gradual realization of 'the necessity and to feel the urgency of forming one single body coextensive with itself'.¹⁹ Last, but not least, it also means the courage to critically question existing patterns of thoughts or biases, to transcend boundaries drawn a long time ago and to train and learn new modes of thinking based on a new logic.

Put simply, these multiple challenges can only be successfully tackled by the development and training of novel cognitive skills. In accordance with the two quantum revolutions, these cognitive skills are called 'quantum intelligence', which has been said to entail the following:

*The journey of quantum intelligence is an invitation to embark on a transformative odyssey, where we transcend the limitations of our current existence and step into the boundless realm of possibility.*²⁰

Aiming to transform the present states of uncertainty into possibility, this article aims to highlight the various shortcomings in the present global AI governance to avoid similar errors being made and more valuable time being lost in addressing the opportunities and risks related to quantum technologies. Future quantum technologies are expected to bring even more unprecedented transformations to the world, more revolutionary than those of 'the agrarian, industrial, and computer revolutions combined'.²¹ Most of all, this article criticizes the dominant narrative of the debate to ensure that, unlike the way in which the global AI governance debate evolved, the coming regulatory debates on quantum technologies will be based on a strong 'quantum literacy' or well-informed public. These conditions are necessary to guarantee that the future regulation of quantum technologies will be met by adequate legal instruments and institutional frameworks, *before* their derivative products hit the markets.

To this end, the article first sheds light on the current status quo of quantum technologies and advocates for the gradual emergence of a global discussion of a future 'quantum law' (Section 2). To this end, it draws lessons from the flawed narrative dominating the AI debates and the missed opportunities arising from this (Section 3). The next section uses the European Union to further exemplify the serious consequences

¹⁷ Gerald Feinberg, *The Prometheus Project: Mankind's Search for Long-Range Goals* (Garden City 1968) 13.

¹⁸ Herbert G Wells, *World Brain* (MIT Press 2021).

¹⁹ Pierre Teilhard de Chardin, *Activation of Energy* (A Harvest Book 1978) 15.

²⁰ Pasquale De Marco, *The Quantum Intelligence* (Pasquale De Marco 2025) 166.

²¹ Hilary G Escajeda, 'The Vitruvian Lawyer: How to Thrive in an Era of AI and Quantum Technologies' (2020) 29(3) *Kansas Journal of Law & Public Policy* 421.

of obsolete modes of thinking about, and framing, legal problems, as the EU's unique role as a supranational organization also allows its findings to be applied, *mutatis mutandis*, to the present international legal system (Section 4). Finally, the article offers a brief outlook on the legal preparations that should be undertaken in law and legal thinking under the banner of 'quantum literacy' or, more broadly, 'quantum intelligence.' In clear distinction from the term 'AI', quantum intelligence should not be understood as a form of super-intelligent technology, as the uncritical use of the term 'AI' often suggests. It is indeed understood as a 'transformative journey', but one that seeks to close the present gap between human-made laws and the laws of nature in order to successfully tackle the regulatory challenges arising from the transformative and disruptive effects of quantum technologies (Section 5).

II. THE FUTURE REGULATION OF QUANTUM TECHNOLOGIES: ANOTHER GLOBAL RACE?

There are numerous reasons why the status quo of the regulation of quantum technologies is best described by the common adage 'the future is now'. It has also been called the 'next big thing'²² and described as a 'quantum race' that will reshape war, peace and the world order in the twenty-first century.²³ The reason is that knowledge of the quantum world is already more than a century old, as is recognized by the year 2025 being called the IYQ. The related United Nations General Assembly resolution stresses that quantum science and technology, particularly through 'global cooperation, awareness and education', is capable of addressing some of the most important global governance challenges, and helping to improve 'the quality of life in countries around the world.'²⁴ Similarly, in close alignment with relativity theory, the UN Summit of the Future acknowledged the need to understand 'the interconnectedness of past, present and future' in efforts to 'ensure a more sustainable, just and equitable world for present and future generations.'²⁵ For reasons that seem illogical—or perhaps symptomatic for the fragmentation of the presented international legal system—other outcome documents from the

²² Gary Marchant and others, 'Learning from Emerging Technology Governance for Guiding Quantum Technology' (2025) 31(2) *Richmond Journal of Law & Technology* 266, 267.

²³ James Der Derian and Stuart Rollo, "'Quantum 3.0': What Will It Mean for War, Peace, and World Order?" (2024) 5(1) *Global Perspectives* 1, 1 <<https://doi.org/10.1525/gp.2024.93888>>.

²⁴ UNGA (n 2).

²⁵ United Nations, 'Pact for the Future' (October 2024) <<https://www.un.org/sites/un2.un.org/files/soft-pact-for-the-future-December-k.pdf>> accessed 7 November 2025.

same summit, such as the *Pact for the Future*, the *Global Digital Compact*, and the *Declaration on Future Generations*,²⁶ remain completely silent on quantum technologies and solely focus on AI and related technologies.²⁷

Even if one argued that the future is not here yet, it is approaching at a breakneck and still accelerating speed. The acceleration of change is reflected in the denotation of the present era as the Anthropocene, or a period in which humans have become the dominant force shaping the Earth's ecosystems,²⁸ which is also referred to as the 'great acceleration'.²⁹ At this point in history, the level of global cooperation in a number of fields, such as climate change, technology in general as well as quantum technologies in particular will largely determine 'whether Homo sapiens can navigate the challenges of the Anthropocene successfully'.³⁰ Already, the acceleration of change and its effects are being noted everywhere.³¹ The global effects have been said to be experienced as a psychobiological condition or as a 'future shock', with change being its disease.³² The description of change as a disease matches the connection between the acceleration of change and a rise in the use of oxymora and paradoxes as the linguistic symptoms through which the trauma of the future shock manifests itself.³³ The linguistic rise of oxymora (eg AI, virtual reality, or synthetic biology), portmanteau words (eg nutraceutics) and paradoxes (eg privacy paradox) is strongly correlated with the ongoing trends of technological convergence.³⁴ These rhetorical figures of speech account for the fact that former classifications and lines of distinctions are becoming increasingly blurred. More profoundly still, they pose significant challenges, which is why they warrant a new mind set and a

²⁶ United Nations, 'Summit of the Future Outcome Documents: Pact for the Future, Global Digital Compact and Declaration on Future Generations' (September 2024) <https://www.un.org/sites/un2.un.org/files/sotf-pact_for_the_future_adopted.pdf> accessed 7 November 2025.

²⁷ See also AI Advisory Board, 'Governing AI for Humanity: Final Report' (United Nations 2024) 8.

²⁸ Will Steffen and others, 'The Anthropocene: Conceptual and Historical Perspectives' (2011) 369(1938) *Philosophical Transactions of the Royal Society* 842, 843.

²⁹ Will Steffen and others, 'The Trajectory of the Anthropocene: The Great Acceleration' (2015) 2(1) *The Anthropocene Review* 81, 82.

³⁰ Sangaralingam Ramesh, *The Political Economy of Contemporary Human Civilisation, Volume II: From Quantum Computing and Nuclear Fusion to War and Conflict* (Palgrave Macmillan 2025) 299.

³¹ James Gleick, *Faster: The Acceleration of Just About Everything* (Vintage Books 2000) 6; Hartmut Rosa, *Social Acceleration: A New Theory of Modernity* (Columbia University Press 2013) 97–99.

³² Alvin Toffler, *Future Shock* (Pan Books 1971) 12 and 19.

³³ Rostam J Neuwirth, *Law in the Time of Oxymora: A Synaesthesia of Language, Logic and Law* (Routledge 2018) xiii; See also Rosalie Littell Colie, *Paradoxia Epidemica: The Renaissance Tradition of Paradox* (Princeton University Press 1966) 508.

³⁴ Rostam J Neuwirth, 'Essentially Oxymoronic Concepts' (2013) 2(2) *Global Journal of Comparative Law* 147, 152.

closer consideration of science in law backed by more transdisciplinary research.³⁵

Both trends, change and its acceleration, have long affected, if not driven, the field of law. Change has repeatedly been identified as a fundamental problem for law, and the rule of law in particular.³⁶ Its acceleration, notably in the form of a faster pace of technological innovation, continues to add new concrete problems of regulation, such as an urgent need for laws to be better future-proofed as a way to contain the resulting disruptive effects and uphold the rule of law. Convergence adds to this fundamental problem as it challenges existing legal classifications, categories, and concepts.³⁷ In the wake of the digital revolution, various novel convergence products, from minivans to ebooks, and from cosmeceuticals to the smartphone, have rendered numerous former legal classifications obsolete. The fact that these new technologies are often described by way of oxymora³⁸ creates concrete conceptual problems for their legal qualification, as regards their tariffification and their classification as a good or a service, a personal car or a van, a cosmetic or a medicinal product, and so on.³⁹

The latest addition to the serious legal challenges posed by convergence products is derived from various smart technologies, such as those of AI or large language models. A recent WTO report on AI and large language models also indirectly recognized these problems by noting the ‘broad spectrum of technologies with numerous applications’, such as ‘general-purpose technology’.⁴⁰ AI technologies in combination with virtual, augmented or extended realities (VR, AR, or XR), which are also already

³⁵ Richard Huggett and Raymond M Lee, ‘Problems and Prospects of Portmanteau Titles and Other Neologisms for Interface Disciplines in the Earth and Life Sciences’ (2024) 48(4) *Progress in Physical Geography* 551.

³⁶ International Court of Justice, *North Sea Continental Shelf*, [1969] ICJ Rep 3; Manfred Lachs, ‘Thoughts on Science, Technology and World Law’ (1992) 86(4) *The American Journal of International Law* 673, 698; Mark L Johnson, ‘Mind, Metaphor, Law’ (2007) 58(3) *Mercer Law Review* 845, 845.

³⁷ Sang M Lee and David L Olson, *Convergenomics: Strategic Innovation in the Convergence Era* (Gower 2010); Iris Eisenberger, ‘Technik der Grundrechte—Grundrechte der Technik’ in Michael Holoubek, Andrea Martin and Stephan Schwarzer (eds), *Die Zukunft der Verfassung—Die Verfassung der Zukunft? FS Karl Korinek* (Springer 2010) 115, 127 ff.

³⁸ Rostam J Neuwirth, ‘The “Letter” and “Spirit” of Comparative Law in the Time of “Artificial Intelligence” and other Oxymora’ (2020) 26(1) *Canterbury Law Review* 1.

³⁹ Rostam J Neuwirth, ‘Global Market Integration and the Creative Economy: The Paradox of Industry Convergence and Regulatory Divergence’ (2015) 18(1) *Journal of International Economic Law* 21, 31 and 41; Rostam J Neuwirth, ‘The WTO in the Digital Age of Artificial Intelligence and the Future of Global Trade Governance: Some Fundamental Considerations’ in Massimo Durante and Ugo Pagallo (eds), *The De Gruyter Handbook on Law and Digital Technologies* (De Gruyter 2025) 123, 131–33.

⁴⁰ WTO, ‘Trading with Intelligence: How AI Shapes and Is Shaped by International Trade’ (November 2024) 14–15.

intertwined in a process of mutual fusion with the Internet of Things or robotics, will carry this process further and intensify the problems.⁴¹ Robotics has already been identified as an emerging area of research and brought into contact with quantum technologies.⁴² As the next big step, AI and other existing technologies will converge with quantum technologies, resulting in 'accelerated growth effects in technological evolution'.⁴³ Already, the relation between quantum computing and AI technologies has been characterized as 'a ground-breaking intersection that promises unparalleled computational prowess and advanced intelligence' which 'holds transformative potential for a multitude of sectors, collectively encapsulated under the Industry 4.0 umbrella'.⁴⁴ As an example, quantum computing has been said to have the potential to render AI even more efficient but in some ways also more disturbing, which underscores the urgent need to ponder different ways 'to control any side effects of the powerful technologies we will have to deal with in the future'.⁴⁵

Overall, the present state of technological development and convergence between different sectors, industries and technologies has been aptly summarized as follows:

*The number of research fields developed by leaps and bounds, and they all exchanged more and more ideas with each other ranging from new quantum technologies to optimisation algorithms, from nanochemistry to reproductive genetics, from artificial intelligence to robotics, from atomic physics in imaging techniques to brain and consciousness research. Countless fields of science are today closely intertwined in a very complex way; together they form a perfect breeding ground for the emergence of new key technologies.*⁴⁶

In their mutual creative combination, these technologies, and quantum technologies in particular, will accelerate the pace of change and amplify the disruptive effects already felt since the advent of digitization and AI technologies.⁴⁷ To best prepare for the future developments in the field of quantum technologies through law and regulation, a closer look at the present debate about the definition and status quo of the term 'quantum

⁴¹ Vladimir Geroimenko (ed), *Augmented Reality and Artificial Intelligence: The Fusion of Advanced Technologies* (Springer 2023).

⁴² Prateek Tandon and others (eds), *Quantum Robotics: A Primer on Current Science and Future Perspectives* (Morgan & Claypool 2017) 1–2.

⁴³ Mario Coccia, 'Converging Artificial Intelligence and Quantum Technologies: Accelerated Growth Effects in Technological Evolution' (2024) 12(5) *Technologies* 1.

⁴⁴ Meng-Leong How and Sin-Mei Cheah, 'Forging the Future: Strategic Approaches to Quantum AI: Integration for Industry Transformation' (2024) 5 *AI* 290, 290.

⁴⁵ Carmine Granata, *A Journey into Modern Physics: From Relativity to Quantum Technologies* (Springer 2025) 167.

⁴⁶ Lars Jaeger, 'History of Technology and Its Future in the Context of Human Development' in Herman Bril, Georg Kell and Andreas Rasche (eds), *Sustainability, Technology, and Finance: Rethinking How Markets Integrate ESG* (Routledge 2022) 25.

⁴⁷ Mario Coccia, 'Disruptive Innovations in Quantum Technologies for Social Change' (2022) 9(1) *Journal of Economics Bibliography* 21, 22.

technologies' is also required.

A. Conceptual Challenges Posed by Quantum Technologies

The profound and truly universal nature of the findings of the first quantum revolution make them potentially relevant for all areas of human thought and action. This is already reflected in their growing relevance for a wide range of scientific fields, such as biology,⁴⁸ 'philosophy',⁴⁹ 'psychology',⁵⁰ and even 'theology',⁵¹ to mention but a few. The multifaceted aspects of quantum theories are now being rapidly translated into quantum technologies, and are expected to be more powerful than their classical counterparts.⁵² This fact exacerbates the existing difficulties in defining or confining quantum technologies. Most research initiatives, like the recent EU Quantum Strategy, identify, as the most promising technological fields, those of 1) quantum computing, 2) quantum communication, and 3) quantum sensing.⁵³ The EU strategy, which also aims to propose a draft EU Quantum Act in 2026, does not define 'quantum technologies'. Instead, it offers the following superficial, illustrative list of quantum technologies that are beginning to make their impact felt:

*From Magnetic Resonance Imaging (MRI) scanners in healthcare and material advances in energy, to gravimeter sensors for geophysics and navigation, secure communications, and quantum computing solving complex problems in logistics and finance, these breakthroughs are beginning to reshape key industries and societal infrastructure.*⁵⁴

Complementing the list, the EU Quantum Strategy, published in July 2025, equally provides a few wider array of considerations by singling out the following five interconnected areas:

- **Area 1 Research and Innovation:** Consolidating excellence across Europe to lead in quantum science and its industrial transformation.
- **Area 2 Quantum Infrastructures:** Developing sustainable, scalable, coordinated infrastructure hubs to support production, design, and application development.
- **Area 3 Strengthening the EU Quantum Ecosystem:** Securing supply chains and the industrialisation of

⁴⁸ Markus Arndt, Thomas Juffmann and Vlatko Vedral, 'Quantum Physics Meets Biology' (2009) 3(6) HFSP Journal 386, 397.

⁴⁹ Alfred Landé, 'Quantum Physics and Philosophy' (1958) 27(3) Current Science 81; Alberto Cordero, *Philosophers Look at Quantum Mechanics* (Springer Nature 2019).

⁵⁰ Daniel M Campagne, 'Quantum Physics and the Future of Psychology' (2019) 40(3/4) The Journal of Mind and Behavior 213.

⁵¹ John C Polkinghorne, *Quantum Physics and Theology: An Unexpected Kinship* (Yale University Press 2007).

⁵² Ryota Katsumi, Yasutomo Ota and Mohamed Benyoucef, 'Telecom-Band Quantum Dots Compatible with Silicon Photonics for Photonic Quantum Applications' (2024) 8(2) Advanced Quantum Technologies 1.

⁵³ EU Quantum Strategy (n 3) 5–11.

⁵⁴ *ibid* 1.

quantum technologies through investments in startups and scaleups.

• **Area 4 Space and Dual-Use Potential Quantum Technologies (Security and Defence):** Integrating secure, sovereign quantum capabilities into Europe's space, security and defence strategies.

• **Area 5 Quantum Skills:** Building a diverse, world-class workforce through coordinated agile education.⁵⁵

In the recent debates, there had already been wider taxonomies been proposed, such as the fields of 'quantum simulation, quantum sensing and metrology, quantum computation, and quantum communication'.⁵⁶ However, there are great terminological disparities found in the different national quantum strategies. A strategy from the United States, for instance, uses the term 'quantum information science', which it defines as the application of 'the best understanding of the sub-atomic world—quantum theory—to generate new knowledge and technologies'.⁵⁷ No definition of quantum technologies can be found in this document, but national security and economic growth are identified as the priority goals.⁵⁸ A related law, the National Quantum Initiative Act, adopts similar language when it seeks to support research in 'quantum information science and its technology applications'.⁵⁹

The present five year plan (2021–2025) of the People's Republic of China (PRC) merely mentions quantum computing together with aerospace, biotech, neuroscience, artificial intelligence, and semiconductors as priority areas of innovation for the goal of modernization.⁶⁰ In concretizing the goals, another document widely uses the term 'quantum information'.⁶¹ A recent Action Plan to Develop Informatization Standards (2024–2027) stipulates that 'research shall be conducted on key technical standards for quantum computing, quantum communication, and quantum measurement'.⁶² Singapore has also adopted several national-level quantum programs to drive research activities in the three areas of 1) 'quantum communication

⁵⁵ *ibid* 2.

⁵⁶ Mateo Aboy, Timo Minssen and Mauritz Kop, 'Mapping the Patent Landscape of Quantum Technologies: Patenting Trends, Innovation and Policy Implications' (2022) 53 *International Review of Intellectual Property and Competition Law* 853, 853.

⁵⁷ United States National Science & Technology Council, 'National Strategic Overview for Quantum Information Science' (September 2018) <https://www.quantum.gov/wp-content/uploads/2020/10/2018_NSTC_National_Strategic_Overview_QIS.pdf> accessed 7 November 2025.

⁵⁸ *ibid* 11; See also Government of the United States (US), Office of the President (2025), Executive Order 14306 of June 6, 2025, 90 Fed Reg 111.

⁵⁹ US National Quantum Initiative Act (2018) 132 Stat. 5092 Public Law 115–368 (21 December 2018).

⁶⁰ Asian Development Bank, *The 14th Five-Year Plan of the People's Republic of China—Fostering High-Quality Development* (Asian Development Bank 2021) 3.

⁶¹ See 'Outline of the People's Republic of China 14th Five-Year Plan for National Economic and Social Development and Long-Range Objectives for 2035' <https://cset.georgetown.edu/wp-content/uploads/t0284_14th_Five_Year_Plan_EN.pdf> accessed 7 November 2025.

⁶² See 'Action Plan to Develop Informatization Standards (2024–2027)' <<https://www.lawinfochina.com/display.aspx?id=43086&lib=law>> accessed 7 November 2025.

and security’, 2) ‘quantum processor, computation and simulation’, and 3) ‘quantum sensing and metrology’.⁶³

Overall, among various several stakeholders, quantum computing currently appears to be prioritized as the most important future quantum technology. This can also be seen from a related report released by the World Economic Forum (WEF) in 2022, which predicts that quantum computers will give rise to a new ‘information-processing paradigm’ through their ability to harness the fundamental principles of quantum physics.⁶⁴ The WEF report remains fairly general and proposes seven governance principles for quantum computing, which include the need for quantum computing to serve the ‘common good’ of humanity, to ensure ‘human accountability’, to secure ‘inclusiveness’ by way of a dialogue involving a truly diverse range of stakeholder perspectives, to pursue ‘equitability’ as a means to guarantee the fair and even distribution of quantum computing-based technologies, and to safeguard the ‘non-maleficence’, ‘accessibility’, and ‘transparency’ of quantum computing technology.⁶⁵

The interconnectedness and accelerating pace of convergence between existing technologies makes it increasingly difficult for the law to arrive at a comprehensive and yet concise definition of them. The same questions will only reach greater relevance in the context of quantum technologies. Thus far, the term ‘quantum technologies’ can be regarded as an essentially contested concept,⁶⁶ which, however, requires clarification through constructive debates about their characteristics, risks and impacts. At present, and in view of the variety of conflicting interests in and classifications of technologies, it is likely to be best to adopt a broad and open-ended definition for future regulatory debates too. As a useful working definition, a quantum technology has been defined as a technology that ‘harnesses quantum mechanical effects for its core operation’.⁶⁷ Similarly, these technologies have been defined by ‘their ability to harness quantum mechanical effects in order to achieve performances that cannot be attained within the boundaries of classical

⁶³ Singapore National Quantum Office, ‘Singapore’s National Quantum Strategy’ (30 May 2024) <<https://nqo.sg/programmes/>> accessed 7 November 2025.

⁶⁴ World Economic Forum, ‘Quantum Computing Governance Principles: Insight Report’ (January 2022) 4.

⁶⁵ *ibid* 9.

⁶⁶ Walter B Gallie, ‘Essentially Contested Concepts’ (1956) 56 *Proceedings of the Aristotelian Society* 167.

⁶⁷ Jeremy L O’Brien, Akira Furusawa & Jelena Vučković, ‘Photonic Quantum Technologies’ (2009) 3 *Nature Photon* 687, 687.

physics'.⁶⁸ One proposal for a more restrictive definition of quantum technologies was formulated as 'the ability to harness purely quantum-mechanical phenomena to obtain a qualitative advantage over other technologies in performing certain tasks'.⁶⁹

Spending too much time seeking a definition of quantum technologies seems a waste of time. Instead, it is important to engage in wide and inclusive debates in order to develop a 'common language' and to take preparatory steps so that a wide consensus can emerge in the future and in a future global legal order.⁷⁰ In this process, questions about the definition, meaning and scope of quantum technologies must be carefully weighed against the proposed regulatory approaches. Combinations of different regulatory approaches should be considered, as there is not merely an exclusive choice between a comprehensive (horizontal) and a sectoral (vertical) approach, or between a top-down and a bottom-up one. Instead, middle ways should also be considered.⁷¹ Better still, entirely new models of governance need to be formulated in the context of increasing complexity and faster change, which—as indicated by the rise of oxymora—should seek a greater union of the senses to combine different approaches on the basis of their complementarity.⁷² These are considered important preconditions for the successful bridging of the divide in global AI and quantum regulations in order 'to materialize a globally interoperable regulatory framework'.⁷³

This regulatory balancing act has been known about for a long time, from the regulation of digital products to AI technologies.⁷⁴ Overall, the two major revolutionary theories introduced by physicists in the early

⁶⁸ Inigo Liberal and Richard W Ziolkowski, 'Quantum Antenna Arrays' in Y Jay Guo and Richard W Ziolkowski (eds), *Antenna and Array Technologies for Future Wireless Ecosystems* (Wiley 2022) 419.

⁶⁹ Iulia Georgescu and Franco Nori, 'Quantum Technologies: An Old New Story' (2012) 25(05) *Physics World* 15, 16.

⁷⁰ Andrew Halpin and Volker Roeben, 'Introduction' in Andrew Halpin and Volker Roeben (eds), *Theorising the Global Legal Order* (Hart 2009) 6.

⁷¹ See eg Ugo Pagallo, Pompeu Casanovas and Robert Madelin, 'The Middle-Out Approach: Assessing Models of Legal Governance in Data Protection, Artificial Intelligence, and the Web of Data' (2019) 7(1) *The Theory and Practice of Legislation* 1, 1.

⁷² See also Rostam J Neuwirth, 'Law, Artificial Intelligence, and Synaesthesia' (2024) 39(3) *AI & Society* 901, 906.

⁷³ Sangchul Park, 'Bridging the Global Divide in AI Regulation: A Proposal for a Contextual, Coherent, and Commensurable Framework' (2024) 33(2) *Washington International Law Journal* 216, 220.

⁷⁴ Rostam J Neuwirth, 'The "Culture and Trade Debate" Continues: The UNESCO Convention in Light of the WTO Reports in China—Publications and Audiovisual Products: Between Amnesia or Déjà Vu?' (2010) 44(6) *Journal of World Trade* 1333, 1335; Iris Eisenberger, *Innovation im Recht* (Verlag Österreich 2016); Rostam J Neuwirth, 'Prohibited Artificial Intelligence Practices in the Proposed EU Artificial Intelligence Act (AIA)' (2023) 48 *Computer Law & Security Review* 1, 2.

twentieth century, namely relativity and quantum theory,⁷⁵ strongly suggest that there is also a need to fundamentally rethink the nature, role and foundations of law for the future. In this regard, the narrower field of quantum computing technology was alone predicted to enhance the possibilities of the emerging field of computational law.⁷⁶ However, the implications of the quantum revolution for the future of law are wider, as was aptly summarized in the following paragraph:

*Quantum logic, quantum algorithms, and quantum computing—together with our now well-established quantum understanding of the universe—can trigger quantum imaginings of law, opening up new possibilities for quantum rules, quantum adjudication, and quantum order.*⁷⁷

Based on the available information, it is safe to argue that there will need to be more than just new laws added to an already overly complex legal system. Based on the quantum phenomena of entanglement and non-locality, it is accurate to state that, the quantum era will require entirely new philosophies.⁷⁸ However, it does not suffice to talk or philosophize about them but they need to be actively prepared by novel modes of thinking. For law, it means that a whole new dimension of legal thinking and especially ‘legal imagination’ will be required to effectively address the ‘new legal, ethical, and distributional challenges’ deriving from quantum phenomena.⁷⁹

This legal imagination must be able to cope with the profound spooky, paradoxical and ‘shocking’ nature of quantum theories, which manifest themselves especially in the phenomena of quantum entanglement, superposition and non-locality. The quantum revolutions have created a reality, in both theoretical and practical terms, in which it no longer suffices merely to adopt new laws dedicated to the regulation of quantum technologies alone. Evidently, it will take a more radical effort, one that adapts the entire legal system to the new realities shaping the future political, economic, and social order. To tackle such a gargantuan task of holistic legislative and institutional reform, the law is required to integrate the latest scientific findings into the process of legal thinking. To put it simply, for an adequate ‘quantum law’ to emerge, it will not suffice to adopt new laws based on old thinking; instead, new modes of thinking supportive of quantum knowledge and skills will need to be promoted. Such quantum skills, however, should not merely be regarded as a means

⁷⁵ Richard Healey, *The Quantum Revolution in Philosophy* (OUP 2017) 1.

⁷⁶ Jeffery Atik and Valentin Jeutner, ‘Quantum Computing and Computational Law’ (2021) 13(2) *Law, Innovation and Technology* 302, 302.

⁷⁷ Jeffery Atik, ‘Quantum Computing and the Legal Imagination’ (2022) 39(4) *GP Solo* 60, 60.

⁷⁸ Kop, ‘Towards a European Quantum Act (n 15) 54–56.

⁷⁹ Atik (n 77) 60.

to nurture a competitive and future-ready workforce.⁸⁰ To the contrary, quantum skills leading to quantum intelligence should allow for the democratic role of education in any society.⁸¹ In this regard, a warning has been given that various '[U]ses of quantum sensing and computing to govern human activity could displace democratic processes and become laws unto themselves.'⁸² As it is well known that technological progress never automatically benefits everyone in a society,⁸³ it is necessary to nurture an informed citizenship who are capable of tackling democratic transformations and global challenges such as those posed by the quantum revolutions.⁸⁴ This is equally a prerequisite for the formulation and adoption of a new field of law called 'quantum law'. It is an area of law that is not simply limited to the regulation of quantum technologies.

B. The Emergence of 'Quantum Law'?

Although quantum technologies may still be in a nascent stage, there exist a few pioneering works that propose addressing the imminent regulatory challenges posed by the two quantum revolutions under the notion of 'quantum law'. The first feature of the emerging quantum law is its universal and ubiquitous nature. This leads to the need to regulate various matters regardless of location, which requires a rethinking of the 'concepts of how to construct and sustain the rule of law in order to achieve and preserve civil, social order within a digitally wired, global human population.'⁸⁵ Applied to the issue of legal enforcement, it has been predicted that, in the future, quantum law compliance would be not judged, but measured.⁸⁶ This difference is, in my view, not meant to be taken literally, but rather read as to serve as a reminder that the entire perception of space and time is already changing. The change was observed by a recorded feeling of a shrinking time or 'differential collapse in time-

⁸⁰ Ling Li, 'Reskilling and Upskilling the Future-ready Workforce for Industry 4.0 and Beyond' (2024) 26 Information Systems Frontiers 1697.

⁸¹ John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (Macmillan 1923).

⁸² Chris Jay Hoofnagle and Simson I. Garfinkel, *Law and Policy for the Quantum Age* (CUP 2021) 350.

⁸³ Daron Acemoglu and Simon Johnson, *Power and Progress: Our Thousand-Year Struggle Over Technology and Prosperity* (PublicAffairs 2023) 4–5.

⁸⁴ Tetyana Hoggan-Kloubert and others, 'Civic Lifelong Education: Fostering Informed Citizenship Amidst Global Challenges and Democratic Transformations' (2023) 42(4) International Journal of Lifelong Education 335.

⁸⁵ Jeffrey Ritter, 'The Birth of Quantum Law: A Concept Paper' (2015) 2 <<https://doi.org/10.13140/RG.2.1.4263.7285>>.

⁸⁶ *ibid.*

space' as a result of faster transportation.⁸⁷ The internet, cyberspace, or virtual reality can also be seen as tools to alter perceptions of space and time, for instance by creating a sense of a ubiquitous, non-local conscious presence in real-time.

Equally, quantum law has been referred to as the 'law of the future' and defined as the 'study of quantum phenomena and features of quantum technologies determining the risks and challenges associated with the emergence of these technologies'.⁸⁸ Another commentator has described quantum law as covering 'the legal issues and challenges that stem from the unique properties and capabilities of quantum technologies, as well as the adaptation of legal theories and practices to accommodate these advancements'.⁸⁹ So far, the emerging legal commentaries, however, focus on narrower aspects, addressing more specific issues related to individual quantum technologies, such as the protection of privacy. For instance, the ability of quantum computers to efficiently solve complex factorization problems was said to pose 'a threat to current cryptographic systems and, consequently, to the data protection and privacy capabilities they offer'.⁹⁰

Other scholarly writings have focused more on specific quantum technologies as seen from the perspective of existing areas of law. Particular attention has been paid to the issue of cybersecurity, as it is predicted that advances in quantum technologies will affect computing, cryptography and metrology. They will pose new dangers in the form of cyberattacks, broader surveillance, or other factors destabilizing national security.⁹¹ Other specific concerns relate to the impact of quantum computing on data protection and privacy.⁹² Quantum technologies have also been discussed in the context of other legal areas, such as intellectual property law and antitrust regulation.⁹³ In summary, it has been observed that quantum computing affects different areas of law and raises serious

⁸⁷ Richard D Knowles, 'Transport Shaping Space: Differential Collapse in Time-Space' (2006) 14 *Journal of Transport Geography* 407, 407–408.

⁸⁸ Elizaveta A Gromova and Sergey A Petrenko, 'Quantum Law: The Beginning' (2023) 1(1) *Journal of Digital Technologies and Law* 62, 62.

⁸⁹ Islombek Abdikhakimov, 'The Emergence of Quantum Law: Navigating the Intersection of Quantum Computing and Legal Theory' (2024) 2(2) *Elektron ilmiy jurnal* 49, 50.

⁹⁰ See eg Luigi Bruno and Isabella Spano, 'Post-Quantum Encryption and Privacy Regulation: Can the Law Keep Pace with Technology?' (2021) 2021(1) *European Journal of Privacy Law & Technologies (EJPLT)* 72, 72 and 76.

⁹¹ Walter G Johnson, 'Governance Tools for the Second Quantum Revolution' (2019) 59 (4) *Jurimetrics* 487, 487.

⁹² Bruno and Spano (n 90) 72.

⁹³ Kaya DeRose, 'Establishing the Legal Framework to Regulate Quantum Computing Technology' (2023) 31(2) *Catholic University Journal of Law and Technology* 145, 170–71.

ethical considerations.⁹⁴ These considerations include but are not limited to increased inequality, the breaking down of current cryptography endangering safe modes of communication, money transfers or the electronic signature of documents.⁹⁵ There are, in fact, good reasons why certain advances in quantum applications may pose unacceptable risks, similar or even more serious than those associated with AI systems, such as threats to cognitive liberty, mental privacy and freedom of thought.⁹⁶ It was already suggested that similar quantum technologies may also have to be prohibited.⁹⁷ Yet, even possible prohibitions of future quantum applications need to be based on a more profound understanding of human nature, the human senses and formulated based on a new cognitive mindset.⁹⁸ For the field of quantum communications, a field offering unparalleled security and efficiency in data transmissions, a global approach based on the comparative method has been recommended.⁹⁹

Lastly, the increasing fusion between AI and quantum technologies will bring about further radical transformations, the effects of which have been described as 'fundamental and far-reaching as the discovery of fire'.¹⁰⁰ These effects will also affect the legal profession and their unpredictable consequences underscore the need for the acquisition of new human legal skills.¹⁰¹ Overall, the effective global regulation of quantum technologies requires more than traditional legal skills. It also requires a sound understanding of the basic principles of the quantum world through training in 'quantum intelligence' for lawyers and everyone.¹⁰² By the same token, future work on quantum law will require the principal elements of quantum physics to be extracted so that their relevance for law in general

⁹⁴ Kasim Balarabe, 'Quantum Computing and the Law: Navigating the Legal Implications of a Quantum Leap' (2025) 16(2) *European Journal of Risk Regulation* 794, 794.

⁹⁵ Ronald de Wolf, 'The Potential Impact of Quantum Computers on Society' (2017) 19 *Ethics and Information Technology* 271, 273.

⁹⁶ Rostam J Neuwirth, *The EU Artificial Intelligence Act: Regulating Subliminal AI Systems* (Routledge 2023) 2 and 101.

⁹⁷ Kop, 'Towards a European Quantum Act' (n 15) 61.

⁹⁸ Neuwirth, *The EU Artificial Intelligence Act* (n 96); Neuwirth, 'Prohibited Artificial Intelligence Practices in the Proposed EU Artificial Intelligence Act (AIA)' (n 74); Rostam J Neuwirth, 'Prohibited AI Systems Revisited' in Vera Lúcia Raposo (ed), *The European Artificial Intelligence Act: Promises and Perils?* (Springer 2025) 131.

⁹⁹ Dmitry A Kuleshov, 'The Global Approaches to the Regulation of Quantum Communication' (2023) 4(4) *Digital Law Journal* 54, 56.

¹⁰⁰ Greg Viggiano, *Convergence: Artificial Intelligence and Quantum Computing: Social, Economic, and Policy Impacts* (Wiley 2023) xi.

¹⁰¹ Escajeda (n 21).

¹⁰² See eg Mircea-Aurel Niță, 'From Emotional to Spiritual Intelligence in Public Administration' (2014) 56(1) *Curentul Juridic–Juridical Current* 165, 171; See also Rostam J Neuwirth, *A Quantum of Future Law: AI Technologies, Intelligence Augmentation and Four-Dimensional Thinking* (forthcoming 2026).

and quantum law in particular can be examined. To this end, it is helpful to revisit the present global debate on AI governance in order to draw some important lessons from both its important achievements and its missed opportunities.

III. LESSONS AND MISSED OPPORTUNITIES FROM THE GLOBAL AI GOVERNANCE DEBATE

AI technologies have been around for more than half a century.¹⁰³ However, the present global AI governance debate only officially started a couple of years ago. It was likely the European Commission's proposal for a comprehensive AI Act in April 2021 that sparked awareness around the world about the need to address the rising concerns posed by AI technologies.¹⁰⁴ Likely, it is among the AI Act's most important achievements to have raised wider ethical and legal concerns about the serious risks and dangers associated with these emerging technologies. A second achievement was to have dispelled remaining doubts about the ability of various soft law tools, like ethical principles or guidelines, to effectively constrain the potential risks and dangers posed by AI technologies or new technologies in general.¹⁰⁵

Nevertheless, these soft law tools helped establish the issue of AI technologies as a global concern, as two recommendations released by the OECD in 2019 and UNESCO in 2021 confirmed.¹⁰⁶ The UNESCO Recommendation on the Ethics of Artificial Intelligence was adopted by the 193 UN members and acknowledged the complex challenges posed by AI technologies as follows:

*Recognizing the profound and dynamic positive and negative impacts of artificial intelligence (AI) on societies, environment, ecosystems and human lives, including the human mind, in part because of the new ways in which its use influences human thinking, interaction and decision-making and affects education, human, social and natural sciences, culture, and communication and information.*¹⁰⁷

This paragraph fittingly summarizes the complex challenges posed by

¹⁰³ Robert Cordeschi, 'AI Turns Fifty: Revisiting Its Origins' (2007) 21(4–5) Applied Artificial Intelligence 259.

¹⁰⁴ Commission, 'Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act)', COM (2021) 206 final.

¹⁰⁵ Brent Mittelstadt, 'Principles Alone Cannot Guarantee Ethical AI' (2019) 1(11) Nature Machine Intelligence 501 <<https://doi.org/10.1038/s42256-019-0114-4>>, and Luke Munn, 'The Uselessness of AI Ethics' (2023) 3 AI Ethics 869 <<https://doi.org/10.1007/s43681-022-00209-w>>.

¹⁰⁶ Organisation for Economic Co-operation and Development, 'Recommendation on Artificial Intelligence' (OECD 2019) 6 (Recital 5).

¹⁰⁷ United Nations Educational, 'Scientific and Cultural Organization, Recommendation on the Ethics of Artificial Intelligence' (UNESCO 2022) 5 (Recital 1).

AI. It also highlights its profound impact on the human mind. Implicitly, it challenges some of the traditional modes of legal thought, such as dualistic thinking and its frequent use of dichotomies, by recognizing the simultaneous positive and negative impacts of AI, for instance. In this regard, the inadequacy of dualistic thinking can be illustrated by the question whether technologies are neutral. Framed as a dichotomy, this question asks whether technology is good or bad, or morally and politically neutral.¹⁰⁸ In line with the first Kranzberg law of technology, however, the answer is that technology is to be considered as 'neither good nor bad; nor is it neutral'.¹⁰⁹ This means that the question of the neutrality of technologies defies the purely binary logic laid down in the interpretative maxim *expressio unius est exclusio alterius* (the choice of one alternative excludes the other).¹¹⁰ This is why attempts to apply dualistic thinking to the classification of these technologies into 'good AI' and 'bad AI' are doomed to fail,¹¹¹ particularly in view of the growing awareness about the dual-use nature of both AI and quantum technologies.¹¹² Even before this, dualistic thinking alone proved unable to match the reality of digital products, namely that they could 'conceivably be both a good and service at the same time'.¹¹³ The same kind of thinking is likely to be even less adequate for the new realities created by quantum technologies, given their deep roots in paradoxes. The shortcomings inherent in an exclusively dualistic thinking also appear in other aspects of the present debates, and notably in the flawed narrative of AI governance.

¹⁰⁸ Boaz Miller, 'Is Technology Value-Neutral?' (2021) 46(1) *Science, Technology, & Human Values* 53, 53.

¹⁰⁹ Melvin Kranzberg, 'Technology and History: "Kranzberg's Laws"' (1986) 27(3) *Technology and Culture* 544, 545.

¹¹⁰ Alexandre Senegacnik, 'Expressio Unius (Est) Exclusio Alterius' in Hélène R Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2018) para 1.

¹¹¹ Orly Lobel, 'The Law of AI for Good' (2023) 75(6) *Florida Law Review* 1073; Andrew W Torrance and Bill Tomlinson, 'Governance of the A.I., by the A.I., and for the A.I.' (2023) 93(1) *Mississippi Law Journal* 107, 139; Arshin Adib-Moghaddam, *The Myth of Good AI: A Manifesto for Critical Artificial Intelligence* (Manchester UP 2025) 10.

¹¹² See e.g., Andreas Brenneis, 'Assessing Dual Use Risks in AI Research: Necessity, Challenges and Mitigation Strategies' (2024) 21(2) *Research Ethics* 302, 303 <<https://doi.org/10.1177/17470161241267782>>; Michal Krelina, 'Quantum Technology for Military Applications' (2021) 8 *EPJ Quantum Technology* 1, 1, <https://doi.org/10.1140/epjqt/s40507-021-00113-y>.

¹¹³ Neeraj R S, 'Trade Rules for the Digital Economy: Charting New Waters at the WTO' (2019) 18(S1) *World Trade Review* s121, s122 <<https://doi.org/10.1017/S1474745618000423>>; Rostam J Neuwirth, 'Artificial Intelligence in the Digital Economy: Multilateral and Regional Legal Challenges from the Perspective of the Indo-Pacific' (2025) 26(1) *The Journal of World Investment & Trade* 712, 726 <<https://doi.org/10.1163/22119000-12340374>>.

A. *The Flawed Narrative of AI Governance*

The dominant narrative of AI governance around the world has been summarized as one of a ‘global race to AI regulation.’¹¹⁴ Others have even compared the regulation of technologies to a ‘battle.’¹¹⁵ This narrative was driven by the fierce competition in the development of technologies to achieve economic and military supremacy among the leading states and economies.¹¹⁶ The narrative, however, also disregards some of the fundamental insights about the value of cooperation in economics, as reflected, for instance, in the theory of comparative advantage,¹¹⁷ which was translated into international trade law through the concept of ‘reciprocal and mutually advantageous arrangements.’¹¹⁸ Overall, there are more and more reasons to expand dualistic reasoning to ‘both/and thinking’ to navigate polarities, and to adopt ‘fuzzy logic’ or ‘social fuzziology’ as a framework for the new millennium.¹¹⁹ Perhaps dualism is not entirely dead,¹²⁰ but it should be complemented by other modes of thinking, such as oxymoronic thinking, dialetheism and polyvalent logic.¹²¹

The present narrative also disregards the power of language to shape reality. Grossly negligent, it disregards two important facts, namely that language constitutes one of the main media through which law acts and that, in law, language is also a form of power.¹²² Consequently, applying divisive, martial or aggressive language will not help in attempts to find global consensus on a variety of urgent global issues. Aggressive language, even if applied subliminally, is known to result in significantly

¹¹⁴ Nathalie A Smuha, ‘From a “Race to AI” to a “Race to AI Regulation”: Regulatory Competition for Artificial Intelligence’ (2021) 13(1) *Law, Innovation and Technology* 57 <<https://doi.org/10.1080/17579961.2021.189830>>.

¹¹⁵ Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (OUP 2023).

¹¹⁶ See e.g., Alfred D Hull and others, ‘Why the United States Must Win the Artificial Intelligence (AI) Race’ (2022) 7(4) *The Cyber Defense Review* 143.

¹¹⁷ T G Williams, *The History of Commerce* (Sir Isaac Pitman & Sons 1926) 1.

¹¹⁸ Recital 3 of the WTO Agreement, *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

¹¹⁹ Brian Emerson and Kelly Lewis, *Navigating Polarities: Using Both/And Thinking to Lead Transformation* (Paradoxical Press 2019); Vladimir Dimitrov and Victor Korotkich (eds), *Fuzzy Logic: A Framework for the New Millennium* (Physica Heidelberg 2013).

¹²⁰ Mireille Hildebrandt, ‘Dualism is Dead. Long Live Plurality (Instead of Duality)’ in Luciano Floridi (ed), *The Onlife Manifesto: Being Human in a Hyperconnected Era* (Springer 2015) 27, 27.

¹²¹ Neuwirth (n 33) 180.

¹²² See Brian Bix, *Law, Language, and Legal Determinacy* (Clarendon Press 1993) 1; Pablo Meix Cereceda, *Lenguaje, poder y derecho en la edad de la información* (Iustel 2025) 103.

more aggressive behaviour.¹²³ It is known, too, that wars start in the minds of humans;¹²⁴ hence, war rhetoric likely follows similar dynamics and allows for simplified policy agendas.¹²⁵ The same has been recognized for so-called 'engineering metaphors', which helps to explain how the use of language determines final outcomes.¹²⁶ The power of metaphors to shape both thoughts and actions has been known for a long time.¹²⁷ It is, perhaps, less well known that engineering metaphors have also been found to be useful for ethical and regulatory discourses.¹²⁸ When it comes to the establishment of a future global regulatory framework for emerging technologies, the metaphor of a regulatory race therefore proves to be highly destructive, as former examples like the space race or the arms race have shown.¹²⁹ In sum, a warning has been given, especially for the military context, that a 'race to use AI to harm will not serve humanity well'.¹³⁰

The terminology of a regulatory race is also based on an incomplete understanding of time in its relation to space and to law. Racing also suggests rushing things, which may be good in sports but rarely leads to optimal outcomes in the field of law. In the regulation of new technologies, timing is crucial and also confronts the paradox reflected

¹²³ Robert Cialdini, *Pre-Suasion: A Revolutionary Way to Influence and Persuade* (Simon & Schuster 2016) 357; Alexander Todorov and John A Bargh, 'Automatic Sources of Aggression' (2002) 7 *Aggression and Violent Behavior* 53, 56; Baptiste Subra and others, 'Automatic Effects of Alcohol and Aggressive Cues on Aggressive Thoughts and Behaviors' (2010) 36(8) *Personality and Social Psychology Bulletin* 1052, 1055.

¹²⁴ Recital 1 of the Preamble of the Constitution of the United Nations Educational, Scientific and Cultural Organization UNESCO, 16 November 1945, 4 U.N.T.S. 275 (entry into force: 4 November 1946).

¹²⁵ Lori Hartmann-Mahmud, 'War as Metaphor' (2002) 14(4) *Peace Review* 427, 427 <<https://doi.org/10.1080/1040265022000039213>>.

¹²⁶ Maarten Boudry and Massimo Pigliucci, 'The Mismeasure of Machine: Synthetic Biology and the Trouble With Engineering Metaphors' (2013) 44 *Studies in History and Philosophy of Biological and Biomedical Sciences* 660, 660.

¹²⁷ George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press 1980) 3.

¹²⁸ Mark Coeckelbergh, 'Engineering Good: How Engineering Metaphors Help us to Understand the Moral Life and Change Society' (2010) 16 *Science and Engineering Ethics* 371, 371.

¹²⁹ Stuart Armstrong and others, 'Racing to the Precipice: A Model of Artificial Intelligence Development' (2016) 31 *AI & Society* 201, 201 <<https://doi.org/10.1007/s00146-015-0590-y>>; Inga Ulicanic, 'Against the New Space Race: Global AI Competition and Cooperation for People' (2023) 38 *AI & Society* 681, 681 <<https://doi.org/10.1007/s00146-022-01423-0>>; see also Tiffany C Li, 'Ending the AI Race: Regulatory Collaboration as Critical Counter-Narrative' (2024) 69(5) *Villanova Law Review* 981, 981.

¹³⁰ Denise Garcia, *The AI Military Race: Common Good Governance in the Age of Artificial Intelligence* (OUP 2023) 4.

in both Amara's Law¹³¹ and the Collingridge Dilemma.¹³² The dilemma consists of the following challenge:

*If a technology can be known to have unwanted social effects only when these effects are actually felt, what is needed is some way of retaining the ability to exercise control over a technology even though it may be well developed and extensively used.*¹³³

This dilemma can already be observed in the present context of AI regulation, where it gives rise to an operational paradox arising from the growing adoption of AI technologies and 'a growing need for focused direction of AI policy to advance metapolicies addressing issues like increasing geopolitical competitive concerns'.¹³⁴ In many ways, the regulation of various AI technologies has arrived or will be adopted too late, as many of their products, like large language models, had already hit the market long before the relevant laws or regulations were in place.¹³⁵ The same is likely to happen with quantum technologies unless preparations are made to enhance both quantum literacy and intelligence before regulatory debates begin.

Against the backdrop of rising geopolitical tensions, an ongoing erosion of the multilateral legal system, and growing awareness of the cross-boundary nature of AI technologies, the emphasis should not have been put on a 'global race to regulate AI'; it would be more appropriate to talk instead about joint efforts to 'globally regulate AI'.¹³⁶ At the very least, concerted actions, even if only to coordinate the emerging national or supranational laws at the global level, would have been preferable. These trends mark a serious concern, as the same narrative already appears to be being applied to the regulation of quantum technologies. Here, in spite of scientific evidence pointing at their mutual 'economic entanglement', countries are portrayed as trying 'to outcompete each other as they vie for the technology that will shape the future of warfare, information

¹³¹ Thomas H Davenport, *The AI Advantage: How to Put the Artificial Intelligence Revolution to Work* (MIT Press 2018) 7 ('We tend to overestimate the effect of a technology in the short run and underestimate the effect in the long run').

¹³² David Collingridge, *The Social Control of Technology* (Frances Pinter 1980) 11.

¹³³ *ibid.*

¹³⁴ Matthew R Gaske, 'The Operational Paradox of Centralized Artificial Intelligence Regulation' (2024) 2 Michigan State Law Review 367, 367.

¹³⁵ See also Iris Eisenberger and Franz Merli, 'Automatisierung, Algorithmen und künstliche Intelligenz in der öffentlichen Verwaltung. Eine Positionsbestimmung' (2023) 31 Journal für Rechtspolitik 25 <<https://doi.org/10.33196/jrp202301002501>>.

¹³⁶ Rostam J Neuwirth, 'The Global Institutional Governance of AI: A Four-Dimensional Perspective' (2024) 1(1) International Journal of Digital Law and Governance 113, 113 <<https://doi.org/10.1515/ijdlg-2024-0004>>.

technology, and arguably, the new global order'.¹³⁷ The 'quantum arms race' has already begun a while ago.¹³⁸ A similar concern emerges from the EU Quantum Strategy, which reads:

*Today we stand at an inflection point, as the global race to harness quantum technologies accelerates, moving beyond the labs and entering real-world applications.*¹³⁹

A coherent and future-proof global coordination of emerging AI and quantum laws and regulations, however, would require the existence of an adequate international institutional framework. In this regard, the necessity to 'disincentivize a quantum arms race' and 'to align quantum advancements with global imperatives such as the UN Sustainable Development Goals (SDG)' has been mentioned.¹⁴⁰ Regrettably, the world is far from addressing the issue of the reform of the international legal system, as this system, which was established in 1945, has barely been reformed or updated since.¹⁴¹ On the contrary, it is currently even being eroded further.

In this regard, the global debate about the regulation of AI could have prompted new reform initiatives. These new technologies offer many new possibilities, which could also provide a turning point in the history of international law. Instead of merely adding old governance models to a deeply fragmented international legal framework, entirely new governance models should have been considered. For instance, the main suggestions for the institutional global governance of AI relied on proposals for a World AI Organization, modelled on the International Atomic Energy Agency (IAEA) or the Internet Corporation for Assigned Names and Numbers (ICANN) (which would at least recognize that AI

¹³⁷ Isabella Willhite, 'Economic Entanglement: The Quantum Race Between the United States and China' (2024) 1124 Regis University Student Publications 7, 7 <<https://epublications.regis.edu/theses/1124>> accessed 7 November 2025.

¹³⁸ Martin Giles, 'The US and China are in a Quantum Arms Race that Will Transform Warfare', *The MIT Technology Review* (3 January 2019) <<https://www.technologyreview.com/2019/01/03/137969/us-china-quantum-arms-race/>> accessed 7 November 2025.

¹³⁹ EU Quantum Strategy (n 3) 1.

¹⁴⁰ Mauritz Kop, 'Towards an Atomic Agency for Quantum-AI' (2025) arXiv:2505.11515 (physics.soc-ph) 1, 2 <<https://doi.org/10.48550/arXiv.2505.11515>>.

¹⁴¹ See e.g., Joost Pauwelyn, 'The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO' (2005) 8(2) *Journal of International Economic Law* 329; Neuwirth (n 136) 124; Oona A Hathaway and others, 'Crisis and Change at the United Nations: Non-Amendment Reform and Institutional Evolution' (2025) 46(1) *Michigan Journal of International Law* 1, 7.

involves more stakeholders than just sovereign states).¹⁴² Common to most proposals is that they rely primarily on replicating existing governance models or structures. It is surprising that, in spite of network effects of new information technologies, most governance structures remain hierarchical, rather than adopting alternative models such as overarchy or holarchy.¹⁴³ As will be shown below, the debate also generally disregards the application of novel modes of thinking to the institutional governance of new technologies; such novel modes proposes ‘fuzzy logic governance’ inspired by computer science,¹⁴⁴ or ‘four-dimensional thinking’ derived from the theory of relativity,¹⁴⁵ for example. Overall, most proposals merely suggest copying and pasting from one legal field to another or from the national or regional to the global level.

Reflecting both the flawed narrative and the absence of efforts to establish a more coherent global legal framework based on inclusive debates in the future is the frequent use of the hegemonic term ‘Brussels effect’ or its counterparts from ‘Washington’ or ‘Beijing’.¹⁴⁶ This same terminology is already being applied to the emerging debate on quantum technologies, in both substantive and institutional terms.¹⁴⁷ In both cases, this terminology is flawed, as it treats cyberspace, often referred to as a ‘placeless place,’¹⁴⁸ as if it were strictly contained within national territorial boundaries. In the case of the non-locality or entanglement governing the quantum world, this approach seems even more old-fashioned. The approach should have been made in the spirit of ‘persuasive authority’ as a means to find the optimal solution to a case or problem.¹⁴⁹ It should not be framed as a race to see who has greatest regulatory power to coerce other jurisdictions into an involuntary acceptance of their domestic or

¹⁴² Olivia J Erdélyi and Judy Goldsmith, ‘Regulating Artificial Intelligence: Proposal for a Global Solution’ (2018) AIES ‘18: Proceedings of the 2018 AAAI/ACM Conference on AI, Ethics, and Society 95, 95 <<https://doi.org/10.1145/3278721.3278731>>; Jacob Turner, *Robot Rules: Regulating Artificial Intelligence* (Palgrave Macmillan 2019) 240–242; Simon Chesterman, ‘Weapons of Mass Disruption: Artificial Intelligence and International Law’, (2021) 009 NUS Law Working Paper 1 <https://law.nus.edu.sg/wp-content/uploads/2021/05/009_2021_SimonC.pdf> accessed 7 November 2025; Eugenio V Garcia, ‘Multilateralism and Artificial Intelligence: What Role for the United Nations?’ in Maurizio Tinnirello (ed), *The Global Politics of Artificial Intelligence* (CRC Press 2022) 57, 70.

¹⁴³ Hosny A Abbas, ‘Exploiting the Overlapping of Higher Order Entities within Multi-Agent Systems’ (2014) 6(3) International Journal of Agent Technologies and Systems 32, 35.

¹⁴⁴ Max Parasol, *AI Development and the ‘Fuzzy Logic’ of Chinese Cyber Security and Data Laws* (CUP 2021) 11.

¹⁴⁵ Neuwirth (n 136) 28.

¹⁴⁶ Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020) 15.

¹⁴⁷ See e.g., Kop (n 140) 1; Kop (n 15) 47.

¹⁴⁸ Pierre Levy, ‘Collective Intelligence, a Civilisation: Towards a Method of Positive Interpretation’ (2005) 18(3/4) International Journal of Politics, Culture, and Society 189, 197.

¹⁴⁹ H Patrick Glenn, ‘Persuasive Authority’ (1987) 32 McGill Law Journal 261, 293.

regional standards.

The same mistake was carried over to the optimal regulatory method for AI technologies. Instead of being based on a thorough comparative analysis including the wider regulatory context and vested interests, the discussion largely proceeded by using a superficial and stereotypical classification of the EU, the US and the PRC as following, respectively, a rights-driven, a market-driven, and a state-driven regulatory approach.¹⁵⁰ By contrast, for serious work on a consistent future global regulatory framework a wider analysis is warranted, one which reflects the world's great diversity of legal traditions as a means to bolster the efficiency, legitimacy, and sustainability of the law itself.¹⁵¹ By the same token, a constructive legal debate requires the consideration of more regulatory options, such as those involving principles, risks, and standards, or else more agile, experimentalist, and enabling approaches.¹⁵² In contrast to the competitive and divisive race narrative, a more thorough comparative analysis would have revealed more commonalities. For instance, it would have shown that the differences in AI regulation between China and the EU are very often merely symbolic or of a temporal kind, in the sense that the former opted for a sectoral approach first while the EU prioritized a comprehensive and horizontal view. Eventually, China may contemplate adopting a more comprehensive AI Code, while the EU may address different AI issues through separate and more specific instruments, such as through the proposal for an AI liability directive (which, however, was later shelved).¹⁵³ In China, meanwhile, a second version of a comprehensive draft Model AI Law was circulated in June 2025 for further discussions.¹⁵⁴ Similarly, the development of AI in the US is not operating in a legal void, but shows elements of a decentralized

¹⁵⁰ Bradford (n 115) 33–145.

¹⁵¹ H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (3rd edn, OUP 2007) 359.

¹⁵² UNESCO, 'Consultation Paper on AI Regulation: Emerging Approaches Across the World', CI/DIT/2024/CP/01 <<https://unesdoc.unesco.org/ark:/48223/pf0000390979>> accessed 7 November 2025.

¹⁵³ Commission, 'Annexes to the Commission Work Programme 2025', COM (2025) 45 final; See also Guido Noto La Diega and Leonardo C T Bezerra, 'Can There Be Responsible AI Without AI Liability? Incentivizing Generative AI Safety Through Ex-Post Tort Liability Under the EU AI Liability Directive' (2024) 32 *International Journal of Law and Information Technology* 1, 1 <<https://doi.org/10.1093/ijlit/eaee021>> accessed 7 November 2025.

¹⁵⁴ Hui Zhou and others, *Model Artificial Intelligence Law 3.0 (MAIL 3.0)* <<https://zenodo.org/records/15761453>> accessed 7 November 2025.

regulatory landscape with several laws adopted at the state level.¹⁵⁵ In sum, global cooperation should be intensified and more profound comparative studies of the respective legal systems as a whole are needed.¹⁵⁶ In these dialogues, ill-informed and preconceived opinions expressed through contested concepts should be duly avoided and instead new meaning be given to them as the result of the consensus reached through these deliberations.

The present narrative also fails to take into account the wider context in which the law operates. A wider angle reveals that the different national regulatory approaches were motivated not solely by legal and societal considerations, but more often by economic and geopolitical ones. Even a brief look at the history of technology would have helped to give an understanding that new technologies have never instantly and unconditionally (and, most of all, without adequate regulatory actions) brought greater prosperity to all.¹⁵⁷ In this regard, the damage caused by the overemphasis on the so-called ‘Brussels’, ‘Washington’, and ‘Beijing effects’ has already been mentioned. This emphasis has helped to obscure the existence of the more relevant so-called ‘Silicon Valley effect’.¹⁵⁸ This term reveals the fact that has been overlooked, namely that the ‘most influential Artificial Intelligence (AI) companies are shaping AI’s legal order and regulatory discourse to protect their business interests and shift focus away from how their practices harm human beings’.¹⁵⁹ The capture of regulatory discourses and practices by these companies also explains the past failure of competition rules to prevent the emergence of dominant actors in the field.¹⁶⁰ It may also prevent competition rules, which would ensure equal access to their services for all, being enforced in the future.¹⁶¹

¹⁵⁵ Tatevik Davtyan, ‘The U.S. Approach to AI Regulation: Federal Laws, Policies, and Strategies Explained’ (2025) 16 Case Western Reserve Journal of Law, Technology & the Internet 223, 248 <<https://scholarlycommons.law.case.edu/jolti/vol16/iss2/2>> accessed 7 November 2025; Srinivas Parinandi and others, ‘Investigating the Politics and Content of Us State Artificial Intelligence Legislation’ (2024) 26(2) Business and Politics 240 <<https://doi.org/10.1017/bap.2023.40>>.

¹⁵⁶ See e.g., Katrin Blasek, *Rule of Law in China: A Comparative Approach* (Springer 2015).

¹⁵⁷ Acemoglu and Johnson (n 83) 4–5.

¹⁵⁸ James Mahoney and Daniel Schensul, ‘Historical Context and Path Dependence’ in Robert E Goodin and Charles Tilly (eds), *The Oxford Handbook of Contextual Political Analysis* (OUP 2006) 454, 457.

¹⁵⁹ Chinmayi Arun, ‘The Silicon Valley Effect’ (2025) 61(1) Stanford Journal of International Law 55, 55.

¹⁶⁰ Ernesto Dal Bó, ‘Regulatory Capture: A Review’ (2006) 22(2) Oxford Review of Economic Policy 203, 203 <<https://doi.org/10.1093/oxrep/grj013>>.

¹⁶¹ See e.g., Max von Thun and Daniel Hanley, ‘Stopping Big Tech from Becoming Big AI: A Roadmap for Using Competition Policy to Keep Artificial Intelligence Open for All’, *Open Markets Institute* (2024) <<http://dx.doi.org/10.2139/ssrn.4990780>>.

B. Inadequate Governance Frameworks and Path Dependence

The flawed narrative of the AI governance debate is obviously not only attributable to a single factor, such as the Silicon Valley effect. It is to a large extent 'systemic'. This can possibly be explained by a path dependence caused by an inadequate legal and institutional governance framework, which made it difficult to deviate from the established path even if better alternatives existed. Nonetheless, path dependence also has a cognitive dimension.¹⁶² This surfaces, for instance, in the concept of time as it is based on 'the idea that the most important effects of a given event may be 'temporally lagged'—i.e. not initially felt but clearly visible at a later point in time.'¹⁶³ So it is necessary to ask what happened, or where the EU took a wrong turn. This is certainly not an easy question to answer, because history, and especially its 'decisive moments', is not the result of a single action (or failure to act) but the result of the 'millions of idle human hours' that must always pass, as Stefan Zweig eloquently wrote.¹⁶⁴

The quest for the causes of suboptimal outcomes is difficult because such outcomes are usually the result of complex dynamics and cannot easily be attributed to a sole factor. However, one important factor is the decisions made; these decisions are regularly taken at the outset of results just as thoughts precede actions. Decisions, too, operate in complex environments, as they are generally not taken independently from other decisions, are made in a changing environment, and depend on being pursued in a consistent manner over time.¹⁶⁵ Before that, decisions require reliable data and sound information to yield optimal results. With regard to the quality of information, the institutional setting in place is crucial. For this reason, the most serious and likely the principal flaw in the present EU architecture is attributable to the failure of the EU to adopt a constitution and make related reforms. In hindsight, this clearly marks the missed opportunity for a 'constitutional moment'.¹⁶⁶ The replacement of the constitution, the Lisbon Treaty of 2007, is, at best, a sad reminder

¹⁶² Sabrina Fredin, 'Breaking the Cognitive Dimension of Local Path Dependence: An Entrepreneurial Perspective' (2016) 98(3) *Geografiska Annaler: Series B, Human Geography*, 239.

¹⁶³ Katharina Kausche and Moritz Weiss, 'Platform Power and Regulatory Capture in Digital Governance' (2024) 27(2) *Business and Politics* <<https://doi.org/10.1017/bap.2024.33>>; Kevin Wei and others, 'How Do AI Companies "Fine-Tune" Policy? Examining Regulatory Capture in AI Governance' (2024) 7(1) *Proceedings of the AAAI/ACM Conference on AI, Ethics, and Society* 1539 <<https://doi.org/10.1609/aies.v7i1.153745>>.

¹⁶⁴ Stefan Zweig, *Decisive Moments in History: Twelve Historical Miniatures* (Ariadne Press 1999) 5.

¹⁶⁵ Berndt Brehmer, 'Dynamic Decision Making: Human Control of Complex Systems' (1992) 81 *Acta Psychologica* 211, 211.

¹⁶⁶ Jacques Ziller, 'The Constitutionalization of the European Union: Comparative Perspectives' (2009) 55(3) *Loyola Law Review* 413, 413.

of a 'future that once was' or of many 'roads not taken', as it would have helped to address the problems of a democratic deficit and the 'no demos' hypothesis, or at least to reverse the growing trends of the degradation of the quality of democracy and the increasing gap between citizens and institutions.¹⁶⁷

What has ensued since then is a story of lost opportunities: moments when alternative and better options were available but were—for some reason—not taken and therefore missed. The reason is that a constitution is not only of symbolic value, but has a concrete impact on cognition, similar to that of semantic or other primes, such as national flags.¹⁶⁸ Even the symbolic value of constitutions has been found to reveal that 'fundamental political and legal matters are closely integrated with cultural processes related to affective responses and identification'.¹⁶⁹ Constitutions also allow people to disagree, to express differing views or to dissent.¹⁷⁰ Dissent is a safeguard of democracy.¹⁷¹ However, it is not the only safeguard, and it is one that needs to be placed in a context of seeking consensus based on consent. When applied within a unitary framework allowing equal opportunities to be heard, dissent is a tool for enhancing decision making, because it stimulates original thought and cognitive activity.¹⁷² Most, if not all, conflicts have a cognitive origin, as they are considered to be 'a category of man's mind, not in itself an element of reality'.¹⁷³

These observations can also help to mitigate or resolve conflicts between opposing viewpoints or interests. This function of constitutions and constitutionalism is known from the area of trade regulation under the notion of 'trade and ... problems' or the 'trade linkage debate', which seeks to overcome and reconcile trade concerns with what appear to be 'non-trade concerns', such as human rights, environmental protection,

¹⁶⁷ Cristina Blanco Sío-López, 'The Future that Once Was: 1989, EU's Enlargement and the Free Movement of Persons' in Eleni Braat and Pepijn Corduener (eds), *1989 and the West: Western Europe since the End of the Cold War* (Routledge 2020) 169, 181.

¹⁶⁸ Ran R Hassin and others, 'Subliminal Exposure to National Flags Affects Political Thought and Behavior' (2007) 104(50) PNAS 19757, 19760.

¹⁶⁹ Terje Rasmussen, *The Sociology of Sovereignty: Politics, Social Transformations and Conceptual Change* (Manchester UP 2003) 9.

¹⁷⁰ *Cf Roe v Wade* 410 US 113, 163-64(1973), stating that '[The Constitution] is made for people of fundamentally differing views ...'.

¹⁷¹ William O Douglas, 'The Dissent: A Safeguard of Democracy' (1948) 32(4) *Journal of the American Judicature Society* 104.

¹⁷² Charlan Jeanne Nemeth, 'Improving Decision Making by Means of Dissent' (2001) 31(1) *Journal of Applied Social Psychology* 48, 48-49 <<https://doi.org/10.1111/j.1559-1816.2001.tb02481.x>>.

¹⁷³ Constantin Virgil Negoita, 'Cybernetics and Society' (1982) 11(2) *Kybernetes* 97, 98.

cultural diversity, or national security.¹⁷⁴ In attempts to reconcile these apparently divergent interests, a 'constitutional moment' has been said to be necessary to allow 'regulatory competition to develop a stable, and efficient, equilibrium'.¹⁷⁵ The problem of such an equilibrium, which is a guarantee of greater coherence in political decision making and greater consistency between different laws and norms, was indirectly addressed by the Maastricht Treaty's inclusion of so-called 'integration or cross-section clauses' as an innovation of, and complement to, exception clauses.¹⁷⁶ Instead of separating different policy areas, these clauses seek to integrate them with a view to obtaining greater policy coherence and avoiding conflicts or unnecessary duplication. Since the failure of the Havana Charter to establish an International Trade Organization in 1947, the same challenge continues to persist globally with regard to the relationship between the WTO regime and the general public international law system established under the United Nations Charter.¹⁷⁷ In this context, 'linkage', seeking ways to reconcile trade with other policies, has become an 'alternative framework for thinking' about the relationship between multiple legal regimes.¹⁷⁸

Unfortunately, no useful lessons for the regulation of AI technologies were drawn from the earlier challenges posed by the convergence of various industries before and notably since digitization. This is why the regulatory approach to AI today is still largely fragmented along the lines of existing legal fields, such as human rights law, technology law, competition law, and intellectual property law. This fragmented approach clashes with the cross-cutting nature or multi-purpose use of AI, which requires a novel and integrated regulatory approach. Generally, the trend of a brutal 'Act-ification' of EU law means that there are too many specific laws that are far too long and detailed and fail to consider their mutual

¹⁷⁴ Frank J Garcia, 'The Trade Linkage Phenomenon: Pointing the Way to the Trade Law and Global Social Policy of the 21st Century' (1998) 19(2) *University of Pennsylvania Journal of International Economic Law* 201; Rostam J Neuwirth, 'WTO and Intellectual Property Law in the Creative Economy' in Julien Chaisse and Cristián Rodríguez-Chiffelle (eds), *The Elgar Companion to the World Trade Organization* (Edward Elgar 2023) 169, 174.

¹⁷⁵ Joel P Trachtman, 'Institutional Linkage: Transcending "Trade and..." (2002) 96(1) *The American Journal of International Law* 77, 92.

¹⁷⁶ Robert Lane, 'New Community Competences under the Maastricht Treaty' (1993) 30(5) *Common Market Law Review* 939; Rostam J Neuwirth, 'The Future of the Culture and Trade Debate: A Legal Outlook' (2013) 47(2) *Journal of World Trade* 391, 403–05.

¹⁷⁷ Rostam J Neuwirth, 'GAIA 2048—A "Glocal Agency in Anthropocene": Cognitive and Institutional Change as "Legal Science Fiction"' in Meredith Kolsky Lewis and others, *A Post-WTO International Legal Order: Utopian, Dystopian and Other Scenarios* (Springer 2020) 71, 73.

¹⁷⁸ Oren Perez, 'Multiple Regimes, Issue Linkage, and International Cooperation: Exploring the Role of the WTO' (2005) 26(4) *University of Pennsylvania Journal of International Economic Law* 735, 735.

relationship, which makes them prone to conflict or irrelevance.¹⁷⁹

In this regard, the issue of the global regulation of AI and digital technologies provides a sound argument for constitutionalism, because of the complex, dual-use and cross-cutting nature of AI technologies.¹⁸⁰ Because of their cross-cutting nature, AI technologies also have close links with a long list of other policies, such as those summarized by the Sustainable Development Goals (SDGs), which could also benefit from integration through constitutionalisation.¹⁸¹ Unfortunately, and paradoxically, the opposite is occurring, as there are currently mutually opposed forces at work. On the one hand, there are centripetal forces in the form of technological convergence and increased concentration and oligopolistic behaviour by corporations, whereas, from a societal and legal perspective, there is a centrifugal force of fragmentation, incoherence and conflict.¹⁸² These mutually opposed trends are aggravated by strong pushes for unilateral renationalization, regionalization, de-coupling and de-globalization.¹⁸³

In short, the former process of European integration has lost its momentum, just as has the wide support for globalization. In Europe, Brexit, meaning the withdrawal of the United Kingdom from the European Union in 2020 following the introduction of a withdrawal clause, not only serves as an example of poor legal draftsmanship¹⁸⁴ but also constituted an open breach of the spirit of the underlying treaties.¹⁸⁵ If one tries to search for the positive out of a mistake, the Brexit crisis could have provided an opportunity by allowing the remaining EU member states to reform the

¹⁷⁹ Vagelis Papakonstantinou and Paul De Hert, *The Regulation of Digital Technologies in the EU Act-ification, GDPR Mimesis and EU Law Brutality at Play* (Routledge 2024); see also Iris Eisenberger, 'Technology's Self-Governance' in Roger Brownsword and Larry A. DiMatteo (eds), *The Cambridge Handbook of the Governance of Technology* (CUP 2025).

¹⁸⁰ Rostam J Neuwirth, 'The Global Institutional Governance of AI: A Four-Dimensional Perspective' (n 136) 121; Rostam J Neuwirth, 'AI and Related Technologies in the Digital Economy' (n 113) 713.

¹⁸¹ Xinyan Zhao, *Integrating the UN SDGs into WTO Law* (Springer 2025) 149ff.

¹⁸² Rostam J Neuwirth, 'Global Market Integration and the Creative Economy' (n 39); Ricardo De Querol, *La Gran Fragmentacion* (ARPA 2023); Miguel Del Moral Sanchez, 'The Devil is in the Procedure: Private Enforcement in the DMA and the DSA' (2024) 9(1) *University of Bologna Law Review* 7, 9 <<https://doi.org/10.6092/issn.2531-6133/19638>>.

¹⁸³ Christian Suter and Patrick Ziltener, 'Towards Deglobalization? Studying World Society in the 21st Century' in Christian Suter and Patrick Ziltener (eds), *After Globalization: The Future of World Society* (LIT 2024) 1; Christian Kreuder-Sonnen and Bernhard Zangl, 'The Politics of IO Authority Transfers: Explaining Informal Internationalisation and Unilateral Renationalisation' (2025) 32(4) *Journal of European Public Policy* 954, 954 <<https://doi.org/10.1080/13501763.2024.2325008>>.

¹⁸⁴ Hannes Hofmeister, '"Should I Stay or Should I Go?" — A Critical Analysis of the Right to Withdraw from the EU' (2010) 16(5) *European Law Journal* 589, 602.

¹⁸⁵ Rostam J Neuwirth, 'The European Union as an Oxymoron: From Contest via Contradiction to Constitution?' in Julien Chaisse (ed), *Sixty Years of European Integration and Global Power Shifts: Perceptions, Interactions and Lessons* (Hart 2019) 51, 64.

EU and bring the constitutional project back on track.¹⁸⁶ Unfortunately, official voices to support a new push for an EU constitution have remained silent.¹⁸⁷ Instead of internal reforms and visionary policies to tackle the current political, economic and social challenges,¹⁸⁸ the EU is actively and effectively seeking to 'rearm' itself.¹⁸⁹ It is doing this instead of seeking global disarmament, exporting peace, and proposing constructive solutions to an intensifying human and planetary crisis. This move means the transformation from a unique supranational project 'furthering and strengthening the works of peace',¹⁹⁰ which was awarded the Nobel Peace Prize in 2012 'for over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe',¹⁹¹ into a 'war economy' of its own.¹⁹² Once described as an economic giant and military dwarf,¹⁹³ the EU seems to be aspiring to become an economic dwarf and military giant, with waning political international weight due to an 'organized hypocrisy and logic of coloniality' vis-à-vis grave violations of international law.¹⁹⁴ Globally, the EU's waning political weight is largely matched by its diminishing persuasive authority in legal matters. Hence, the so-called 'Brussels effect' is now becoming reduced to mere wishful thinking, as can be seen from the field of AI and other sectors, where European competitiveness is slumping. In short, what once rose from the ashes of war risks returning there, if no corrective change in

¹⁸⁶ Christian Calliess, 'The Future of Europe after Brexit: Towards a Reform of the European Union and its Euro Area' (2021) 40(1) Yearbook of European Law 3 <<https://doi.org/10.1093/yel/yeaa014>>.

¹⁸⁷ Alberto Alemanno and Kalypso Nicolaïdis, 'Citizen Power Europe: The Making of a European Citizens' Assembly' (2021) 2(2) Revue Européenne du Droit 7, 13.

¹⁸⁸ 'The Draghi Report: The Future of European Competitiveness' (Publications Office of the European Union, 2025) <https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en> accessed 7 November 2025.

¹⁸⁹ European Commission, *Joint White Paper for European Defence Readiness 2030*, JOIN(2025) 120 final (19 March 2025) 2, 16, 21; William I Robinson, *Global Capitalism and the Crisis of Humanity* (CUP 2014) 149.

¹⁹⁰ Treaty Establishing the European Coal and Steel Community (signed in Paris 18 April 1951) 261 U.N.T.S. 142 recital 4 (1951); Treaty Establishing the European Economic Community (signed in Rome 25 March 1957) 294 U.N.T.S. 5 recital 8 (1957).

¹⁹¹ The Nobel Peace Prize 2012, 'Nobel Prize Outreach 2025' (22 August 2025) <<https://www.nobelprize.org/prizes/peace/2012/summary>> accessed 7 November 2025.

¹⁹² Piotr Żuk, 'The War in Ukraine: Consequences for the Economy, Labour Class and Equitable Development in Europe and Beyond' (2023) 34(2) The Economic and Labour Relations Review 343, 343 <<https://doi.org/10.1017/elr.2023.18>>; Pere Brunet and others (eds), *Peace and Disarmament in Europe: For Shared Détente, Peace and Security* (Centre Delàs d'Estudis per la Pau 2024).

¹⁹³ Laura Chappell and others, 'Uncovering EU Strategy in Its Security Policy: An (In)coherent Actor?' in Laura Chappell and others (eds), *The EU, Strategy and Security Policy: Regional and Strategic Challenges* (Routledge 2016) 202, 202.

¹⁹⁴ Daniela Verena Huber, 'Organized Hypocrisy and the Logic of Coloniality. Explaining the EU's Divergent Response to Grave Violations of International Law in Russia/Ukraine and Israel/Palestine' (2025) 63(5) Journal of Common Market Studies 1638, 1638 <<https://doi.org/10.1111/jcms.13737>>.

direction occurs.

Regrettably, the present path threatens to confirm the sad and paradoxical observation made by Gordon W. Allport in 1954, that the discrepancy between the human mastery over technology and nature and the human mastery over human relations means that the 'surplus in wealth accumulating to the human race through applied natural science is virtually canceled by the costs of armaments and war'.¹⁹⁵ In view of such developments, drastic reforms leading to new institutions are needed. Based on past observations, however, such institutional reforms can only materialize when a cognitive change giving birth to new modes of thinking has taken place. The reason is that transformational change to law and its institutions arises 'not only from changes in the interests and resources of relevant actors but also from changing structures of meaning'.¹⁹⁶ In short, cognitive change is required because such reform or transformation usually 'goes hand in hand with *cognitive* change'.¹⁹⁷ Cognitive change, on the other hand, can come in two different ways. First, it is possible to notice changes in the environment and try to adapt to them with new and more appropriate modes of thinking. Otherwise, if no adaptation takes place, the situation deteriorates and 'systemic chaos',¹⁹⁸ or worse scenarios, regularly ensue. Exemplified by the lagging reform of the United Nations international organizations, we have reached this latter situation, with it becoming realistic to think that 'only a World War III might provide enough shock, awe, and vision to equip the UN for the future'.¹⁹⁹ If no change in direction in EU policies takes place, the EU, too, will face increasing dangers and possible disasters.

For the international legal system, cognitive change means deciding whether we are willing to continue with the ongoing 'crisis of international

¹⁹⁵ Gordon W Allport, *The Nature of Prejudice* (Addison-Wesley 1954) xiii.

¹⁹⁶ Andrew T F Lang, 'Reflecting on 'Linkage': Cognitive and Institutional Change in the International Trading System' (2007) 70(4) *Modern Law Review* 523, 527 <<https://doi.org/10.1111/j.1468-2230.2007.00651.x>>.

¹⁹⁷ *ibid* [529]; see also Emanuel Adler, *World Ordering: A Social Theory of Cognitive Evolution* (CUP 2019) 3.

¹⁹⁸ Giovanni Arrighi, *The Long Twentieth Century: Money, Power, and the Origins of Our Times* (Verso 2010) 31.

¹⁹⁹ Antonio Donini, 'Crashing Waves and Rising Tides: The Case for UN 2.0' (2020) 62 *Global Governance* 262, 267.

law'²⁰⁰ and let crises rule the fate of international law.²⁰¹ Alternatively, cognitive change allows a change of mind and work to take place towards the development of a future global law framework which is able to prevent and solve international crises. The same goes for the EU, which is increasingly shifting from a system of the EU governance of crisis to a deepening 'crisis of EU governance'.²⁰² To reverse the dependence of this dangerous path, it is necessary to change our minds, which is known to be a difficult task, as 'old habits' are known to 'die hard'. This has also been found to be a problem for dualistic thinking, because 'it is innate and modular, and innate modular beliefs are extremely hard to shift'.²⁰³ For cognitive change to come about before disaster forces a change in minds, only learning offers a viable alternative. For learning, it is deemed to be helpful to identify and understand the underlying causes of the imminent demise.

IV. CAUSES OF THE EU GOVERNANCE CRISIS AND DEFICIENCIES IN AI REGULATION

Naturally, there exist a myriad of possible causes of the current and mounting crisis of EU (and international) governance. As possible causes of the crisis, writers mention a democratic deficit,²⁰⁴ the rise of populism, misinformation, fake news and manipulation,²⁰⁵ developed

²⁰⁰ See eg Miodrag Sukijasovic, 'A Cause of the Present Crisis of International Law' (1971) 65(2) *American Journal of International Law* 378; Rafael Domingo, 'The Crisis of International Law' (2009) 42(5) *Vanderbilt Journal of Transnational Law* 1543; Richard Goldstone, 'The Crisis in the Implementation of International Law' (2011) 44(1-2) *Case Western Reserve Journal of International Law* 13; David M Crane, 'An Age of Extremes: International Law in Crisis: Eight Challenges' (2011) 44(2) *Case Western Reserve Journal of International Law* 47; Joel P Trachtman, 'The Crisis of International Law' (2011) 44(1-2) *Case Western Reserve Journal of International Law* 407; L A Musayelyan, 'The Crisis of International Law: Civilizational and Geopolitical Factors' (2014) 26 *Perm University Herald Juridical Sciences* 211; Philippa Webb, 'From Crisis to Epoch: How to Understand This Era of International Law?' (2024) 25(1) *Melbourne Journal of International Law* 1.

²⁰¹ Pierre Auriel and others (eds), *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law* (Springer 2018).

²⁰² Tanja A Börzel, 'From EU Governance of Crisis to Crisis of EU Governance: Regulatory Failure, Redistributive Conflict and Eurosceptic Publics' (2016) 54 *Journal of Common Market Studies* 8, 8 <<https://doi.org/10.1111/jcms.12431>>.

²⁰³ Gabriel Segal, 'Poverty of Stimulus Arguments Concerning Language and Folk Psychology' in Peter Carruthers and others, *The Innate Mind: Foundations and the Future* (vol 3, OUP 2008) 90, 101.

²⁰⁴ See eg Roila Mavrouli and Arnaud Van Waeyenberge, 'EU Responses to the Democratic Deficit and the Rule of Law Crisis: Is It Time for a (New) European Exceptionalism?' (2023) 15 *Hague Journal on the Rule of Law* 405 <<https://doi.org/10.1007/s40803-023-00198-w123>>.

²⁰⁵ John Erik Fossum, 'The Context of Fake News, Disinformation, and Manipulation' in Maximilian Conrad and others (eds), *Europe in the Age of Post-Truth Politics: Populism, Disinformation and the Public Sphere* (Palgrave Macmillan 2022) 31.

country syndrome and colonial logic,²⁰⁶ Eurocentrism and transatlantic obedience,²⁰⁷ elitism, corruption or lack of meritocracy,²⁰⁸ and external shocks of various kinds.²⁰⁹ These are just a few selected examples and many more exist; they merely represent the tip of the iceberg, meaning they only describe the visible symptoms and not necessarily the deeper causes, which often remain hidden at first sight.

Generally, full knowledge of the actual deeper causes of one's own individual fate is shrouded in mystery and likely constitutes life's most important but also difficult research question. The same goes for the causes of the destiny and failure of institutions governing entire countries, nations, empires, regions, or continents.²¹⁰ It can be technology, education, the economy, or the political and the legal system that makes the difference between rise or demise. Or is it that each place on Earth must traverse a series of stages to rise to fame and make an important contribution to humanity, before it makes place for the next one to follow?²¹¹ For a complete understanding of the law of cause and effect, humans may still lack crucial pieces of information. Is it coincidence, we must ask, that science estimates that it cannot locate 95% of the matter in the universe and that humans are equally up to 95% in the dark about their own cognitive processes?²¹² This means that we are likely aware of only 5% of ourselves and our environment, whereas the rest remains 'dark matter' or hidden in the unfathomable labyrinths of the subliminal world. In the complexity of the present time, science holds a paradox that

²⁰⁶ Rostam J Neuwirth, 'Global Law and Sustainable Development: Change and the "Developing-Developed Country" Terminology' (2017) 29(4) *European Journal of Development Research* 911, 918 <<https://doi.org/10.1057/s41287-016-0067-y>>; Daniela Verena Huber (n 194) 1.

²⁰⁷ See eg Audrey Alejandro, 'Eurocentrism, Ethnocentrism, and Misery of Position: International Relations in Europe—A Problematic Oversight' (2017) 4(1) *European Review of International Studies* 5; Sarah M H Nouwen, 'Exporting Peace? The EU Mediator's Normative Backpack' (2024) 1(1) *European Law Open* 26 <<https://doi.org/10.1017/elo.2022.9>>; Jeffrey Anderson and Federico Steinberg, "'The Unbalanced Transatlantic Relationship: Understanding Us Influence in Europe'" (2025) 47 *Journal of European Integration* 885 <<https://doi.org/10.1080/07036337.2025.2537377>>.

²⁰⁸ See eg Savvas Voutyras, 'Anti-Populism, Meritocracy and (Technocratic) Elitism' in Yannis Stavarakakis and Giorgos Katsambekis (eds), *Research Handbook on Populism* (Edward Elgar 2024) 35.

²⁰⁹ See eg Roberto Cortinovia, 'Forced Displacement and EU External Action: Exogenous Shocks, Policy Frames and Institutional Dynamics' (2017) 22(4) *European Foreign Affairs Review* 473 <<https://doi.org/10.54648/eerr2017036>>.

²¹⁰ See eg Daron Acemoglu and Simon Johnson (n 83); Julia Gray, 'Life, Death, or Zombie? The Vitality of International Organizations' (2018) 62(1) *International Studies Quarterly* 1, 1 <<https://doi.org/10.1093/isq/sqx086>>; Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (Yale University Press 2022) 1.

²¹¹ See also Oswald Spengler, *The Decline of the West* (A A Knopf 1926) 3.

²¹² Cf Eugene Oks, 'Brief Review of Recent Advances in Understanding Dark Matter and Dark Energy' (2021) 93 *New Astronomy Reviews* 1387, 1387; Leonard Mlodinow, *Subliminal: How Your Unconscious Mind Rules Your Behaviour* (Vintage Books 2012) 34; John A Bargh and Tanya L Chartrand, 'The Unbearable Automaticity of Being' (1999) 54 *American Psychologist* 462, 462.

tells us that we know very little of what is to be known;²¹³ what is worse, we also refuse to consistently apply what we have scientifically explored and therefore already do know. In short, there is a strong tendency to disregard or ignore the role and findings of science in law and policymaking.

A. Inadequate Consideration of Science

For some time, EU governance and its underlying public discourses have displayed a lack of consideration of the existing findings of science. A first obstacle to the due consideration of science for law and policymaking is the dominant paradigm of specialization, which obscures and further erodes the former unity of science (and art).²¹⁴ Yuval N. Harari aptly summarized the problem of specialization as follows:

*Firstly, nobody knows where the brakes are. While some experts are familiar with developments in one field, such as artificial intelligence, nanotechnology, big data or genetics, no one is an expert on everything. No one is therefore capable of connecting all the dots and seeing the full picture.*²¹⁵

The same problem was also highlighted by the observation that, from the thirteenth century to 2012, the number of disciplines offered by universities increased from seven to more than 8,000. This means that a graduate is a specialist in one discipline but 'totally ignorant in more than 7999 disciplines'.²¹⁶ The bad news for specialization is that, in an age of growing complexity, most contemporary problems can no longer be effectively solved within an artificial silo of a single lab, single policy, single scientific discipline, or single law. They require a holistic approach or, better, a 'holonistic' one. A holonistic approach is derived from the concept of a holon, and means 'to supply the missing link between atomism and holism, and to supplant the dualistic way of thinking in terms of 'parts' and 'wholes', which is so deeply engrained in our mental habits, by a multi-levelled, stratified approach'.²¹⁷

Underlying this problem is the refusal to change one's mind (before changes are forced upon it). To give one principal example, the refusal finds its expression in the snubbing of new ideas and proposals to expand the dominant mode of dualistic thinking and binary logic to more flexible forms of paradoxical or lateral thinking using a polyvalent and fuzzy

²¹³ Kenneth L Mossman, *The Complexity Paradox: The More Answers We Find, the More Questions We Have* (OUP 2014).

²¹⁴ Neuwirth, *Law in the Time of Oxymora* (n 33) 22.

²¹⁵ Yuval N Harari, *Homo Deus: A Brief History of Tomorrow* (Harper 2017) 51.

²¹⁶ Basarab Nicolescu, 'The Need for Transdisciplinarity in Higher Education in a Globalized World' (2012) 3 *Transdisciplinary Journal of Engineering & Science* 11.

²¹⁷ Arthur Koestler, 'Beyond Atomism and Holism—The Concept of the Holon' (1970) 13(2) *Perspectives in Biology and Medicine* 131, 136; see also Hillary S Webb, 'Dualism' in David A. Leeming (eds), *Encyclopedia of Psychology and Religion* (3rd edn, Springer 2020) 702.

logic.²¹⁸ This also stands in stark contrast to the scientific findings made in quantum theory and their realization through quantum technologies, such as quantum computers. Compared to classical computers, quantum computers apply a more fuzzy logic, as they function not only with '0' or '1' but also with both '0' and '1'.²¹⁹ The same logic finds expression in the novel laws and institutional frameworks governing cyberspace that are inspired by information science as applied by the Cyberspace Administration of the PRC.²²⁰

Another fundamental disregard of science that emerges from the field of physics relates to the concept of time, or 'space-time' to be more precise. While the EU's Quantum Strategy brags by calling Europe the 'quantum continent',²²¹ it fails to conform to the scientific hypotheses and observations it carries in its new normative framework. The application of an outdated scientific paradigm as the foundation for law and policymaking can be seen to flow from an outdated understanding that space and time are absolute and independent of each other. The separate conception of space and time still continues widely today, more than a century after Hermann Minkowski's famous finding that 'space by itself, and time by itself, are doomed to fade away into mere shadows, and only a kind of union of the two will preserve independence'.²²² It completely ignores the reality of a 'four-dimensional space-time continuum', as Albert Einstein described it.²²³

In other words, space-time is still considered an oxymoron, because time is considered to be a dimension separate from the three dimensions of space.²²⁴ Similarly, most legal dictionaries today still define 'time' with no reference to its relationship to space,²²⁵ even though black holes and the deeper mysteries of quantum physics have reached the courts for

²¹⁸ See eg Hildebrandt, (n 121) 27; H Patrick Glenn and Lionel D Smith (eds), *Law and the New Logics* (CUP 2017); Neuwirth, *Law in the Time of Oxymora* (n 33) 22.

²¹⁹ Rosario Girasa and Gino J Scalabrini, *Regulation of Innovative Technologies: Blockchain, Artificial Intelligence and Quantum Computing* (Palgrave Macmillan 2022) 8.

²²⁰ Parasol (n 144) 12.

²²¹ EU Quantum Strategy (n 3) 1.

²²² Hermann Minkowski, 'Raum und Zeit' (1909) 18 Jahresbericht der Deutschen Mathematiker-Vereinigung 75, 75; H Minkowski, 'Space and Time' in H A Lorentz, A Einstein, H Minkowski, and H Weyl, *The Principle of Relativity* (Dover Publications 1952) 75.

²²³ Albert Einstein, *Relativity: The Special and General Theory* (H Holt & Company 1920) 379.

²²⁴ Joseph Mazur, *The Clock Mirage: Our Myth of Measured Time* (Yale University Press 2020) 115.

²²⁵ See eg Bryan A Garner (ed), *Black's Law Dictionary* (9th edn, West Group 2009) 1620; see also Günther Drosdowski (ed), *Das große Wörterbuch der deutschen Sprache: Band 6: Sp-Z* (Dudenverlag 1981) 2924 ('Ablauf, Nacheinander, Aufeinanderfolge der Augenblicke, Stunden, Tage, Wochen, Jahre').

fear of the end of the world.²²⁶ More precisely, the application of a three-dimensional framework of space ignores important scientific observations made a long time ago about a fourth dimension of space, such as the following:

*The conception of a four-dimensional manifold in which occur the events that are now becoming the focus of scientific thinking has brought space-time as the successor to the preceding conception of three-dimensional space and single dimensional time. This space-time is not merely three dimensional space, with an added dimension of time, but an integral fusion of space and time, since three dimensions of space, to exist anywhere, must exist in a time continuum.*²²⁷

It is a sad irony that a strategy boasting about future technologies completely ignores basic theoretical and cognitive underpinnings and widely ignores the fact that a new scientific paradigm, manifest in a novel mode of four-dimensional thinking, is already being applied in the design and development of a growing number of new and cutting-edge technologies.²²⁸ This was well summarized in the following paragraph:

*Fourth dimension thinking is the core alphabet of new cybernetic innovations in areas ranging from medical anatomical modelling, genetic sequencing of cellular development, and seemingly everywhere in large-scale construction projects where long-range planning requires tracking the future in terms of work schedules, material requirements, and financing.*²²⁹

Even at the micro-level of decision making, such as in the context of the regulation of AI through the AI Act, the refusal to engage seriously with the scientific and academic community becomes evident. This is another result of the 'race narrative', which aims to rush matters and still fails to succeed. Paradoxically, sometimes going slow is going fast, or *festina lente* (make haste slowly). This supports a paradoxical understanding of time and claims that cognitive change is preferable to new laws based on old thinking.²³⁰ To give but one example, the regulation of 'subliminal AI systems' enshrined in Art. 5(1)(a) AI Act, was, from the time of the release of the draft proposal until its final enactment and entry into force, conducted without a serious consideration of the existing and rapidly

²²⁶ For the United States, see *Sancho v. United States Dept. of Energy* 578 F Supp 2d 1258, 1259 (D. Haw. 2008), *affid* 392 F. App'x 610 (9th Cir. 2010). For Germany, see Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Feb. 18, 2010, 2 BVERFGE 2502/08, 2010 (Ger.). For Austria and 19 other countries, see *Goritschnig v. Austria* App no 41028/08 (Eur. Ct. H.R. 2010) (on file with the author).

²²⁷ Lawrence K Frank, 'Time Perspectives' (1939) 4(4) *Journal of Social Philosophy* 293, 293.

²²⁸ See also Neuwirth, *A Quantum of Future Law* (n 102).

²²⁹ Arthur Kroker and David Cook, *The Quantum Revolution: Art, Technology, Culture* (University of Toronto Press 2023) 293.

²³⁰ See also Koen Lemmens, 'The Slow Dynamics of Legal Language: *Festina lente*?' (2011) 17(1) *Terminology* 74.

growing scientific literature on subliminal perception.²³¹ Far too late, a first effort to define the term ‘subliminal’ was published in the form of additional guidelines after the day this provision had entered into force.²³² This practice not only marks a terrible failure in temporal terms when it comes to the need for future-proofing legislation, but also fails to recognize that time and space are common sensibles,²³³ or attributes of objects or events that ‘really can manifest itself through all of the senses.’²³⁴ The initial draft of the EU AI Act completely lacked considerations of the possible dangers that temporal and spatial aspects bear for the multisensory, or synesthetic, as well as transliminal (i.e. both below and above the threshold of awareness) manipulation of human thoughts and actions.²³⁵ To put it briefly, information flows ubiquitously in space and in ‘real-time’. There are further fundamental implications of the failure to give up a separate consideration of space and time in favour of a four-dimensional conception of reality, which will be outlined in the next section.

B. ‘No Demos’, ‘No Deus’ and No Constitution

Before the skill is acquired, it is difficult to assess the full scope of four-dimensional thinking. For the present purposes, it can be understood to mean attempts to integrate the temporal aspect into spatial planning. As a precondition for four-dimensional thinking, it is necessary to move from an exclusively dualistic and dialectic mode of thinking into one of dialetheism. Dialetheic thinking means accepting that there are also contradictions which are true and possible.²³⁶ Framed differently, it can also mean complementing ‘either/or’ thinking with ‘both/and’ thinking so as to navigate polarities.²³⁷ The need for dialetheic or oxymoronic thinking is indicated by the rise in oxymora and paradoxes, which demands that dichotomies as antagonistic pairs are regarded not as mutually exclusive but as complements to each other. The dissolution of the apparent

²³¹ Neuwirth, *The EU Artificial Intelligence Act* (n 98); Neuwirth, ‘Prohibited Artificial Intelligence Practices in the Proposed EU Artificial Intelligence Act (AIA)’ (n 74); Christian Montag and Michèle Finck, ‘Successful Implementation of the EU AI Act Requires Interdisciplinary Efforts’ (2024) 6 *Nature Machine Intelligence* 1415.

²³² European Commission, ‘Commission Guidelines on prohibited artificial intelligence practices established by Regulation (EU) 2024/1689 (AI Act)’ C(2025) 5052 final (29 July 2025).

²³³ Casey O’Callaghan, *A Multisensory Philosophy of Perception* (OUP 2019) 126.

²³⁴ Lawrence E Marks, *The Unity of the Senses. Interrelations Among the Modalities* (Academic Press 1978) 32.

²³⁵ European Commission (n 232).

²³⁶ See Graham Priest, ‘Dialectic and Dialetheic’ (1990) 53 *Science and Society* 388, 388.

²³⁷ Emerson and Lewis (n 119) 13 and 15.

contradiction between opposites presupposes that a higher dimension of the quality of their mutual relationship has been found and accessed.²³⁸ In other words, this means gradually realizing that dichotomies are largely false and merely mean that 'we forget the middle and think in extremes, missing important alternatives in the process.'²³⁹ It marks the ability to seek complementarity between opposites rather than resign before their apparent contradiction. Once the *coincidentia oppositorum* (coincidence of opposites) has been achieved,²⁴⁰ it is also possible to apply oxymoronic thinking to the relationship between space and time, whence comes the conception of 'space-time' as an oxymoron, which then opens the door to four-dimensional thinking.

The lack of four-dimensional thinking in EU law and policymaking can be exemplified by looking at the field of AI regulation and the Brussels effect. First, there is a general tendency for the EU to neither remember the past nor look to the future or, in particular, to consider the need for time consistency in planning. In concrete terms, this means that there is no guarantee that the past achievements of EU integration, which established a vast internal market of 500 million citizens, will ensure a prosperous future. This is the result of a glorification of the regulatory power of the EU based on past achievements, such as the regulation of environmental standards and data protection, without paying sufficient attention to the underlying social, economic, educational, and also technological conditions. These conditions need to be put in place in order to secure not only the future competitiveness of the underlying industries, but also the technological know-how to support the drafting of excellent laws and regulations. As in the electric vehicle and battery industry,²⁴¹ in the field of AI the EU has already lost out to the US and China in the development of AI technologies.²⁴² It is also soon expected to lose the AI regulation race, if it continues to follow the race narrative and

²³⁸ Neuwirth, *A Quantum of Future Law* (n 102).

²³⁹ Trudy Govier, 'Problems with False Dichotomies' (2003) 35(146) *Humanist in Canada* 31, 31.

²⁴⁰ Jasper Hopkins, *Nicholas of Cusa on Learned Ignorance: A Translation and an Appraisal of de Docta Ignorantia* (The Arthur J. Banning Press 1981) 6.

²⁴¹ Andre Hemmelder and others, 'The Geostrategic Race for Leadership in Future Electric Vehicle Battery Technologies' (2025) 18 *Energy and Environmental Science* 6117, 6128; Dan Curia, 'Electric Vehicles: The Economics, the Geopolitics, and the Policy Lemmas Facing Europe', Ciuriak Consulting INC. Working Paper (July 2025) 10 <<http://dx.doi.org/10.2139/ssrn.5327778>>.

²⁴² See also the World Intellectual Property Organization (WIPO), 'Global Innovation Index 2025' (16 Sep 2025) <<https://www.wipo.int/en/web/global-innovation-index/w/news/2025/save-the-date-gii-2025>> accessed 7 November 2025.

apply outdated zero-sum thinking to the matter.²⁴³

Among other reasons, this is also caused by a flawed understanding of time as the unit for the measurement of change. It surfaces in what I have called ‘ignorant arrogance’ on the part of so-called ‘developed countries.’²⁴⁴ The arrogance is derived from the false belief that it is enough to have become developed and that one will then remain so forever without the struggle of developing the political, economic or legal system further.²⁴⁵ This misinterpretation itself originates from the false dichotomy of ‘developing and developed countries’, which fails to recognize the difference between the verb ‘developing’ and the adjective ‘developed’. Or else, the same problem was described by the failure to consider the paradoxes of development.²⁴⁶

The same also matters for democracy. Democracy, to flourish, not only needs constant attention;²⁴⁷ it also needs to continue ‘developing’ if it wants to maintain its value and not paradoxically die even at the hands of those who are democratically elected.²⁴⁸ In this context, it seems to have been forgotten that ‘democracy does not exist in a vacuum,’²⁴⁹ just as ‘pure law’ has been classed as an oxymoron ‘since the law always needs a context within which it is to be considered.’²⁵⁰ Even across different cultures, to gain an ‘adequate understanding of the legal tradition of a given society, one must go beyond the law itself’, as law needs to ‘be understood in the context of a larger normative framework.’²⁵¹ This is why democracy is closely related to everything and everyone. It elucidates why education matters so much to democracy, because democracy is not merely a ‘form of government, but primarily a mode of associated living, of conjoint

²⁴³ See also Tiffany C Li, ‘Ending the AI Race: Regulatory Collaboration as Critical Counter-Narrative’ (2024) 69(5) Villanova Law Review 981, 981.

²⁴⁴ Rostam J Neuwirth, ‘A Constitutional Tribute to Global Governance: Overcoming the Chimera of the Developing-Developed Country Dichotomy’ European University Institute (EUI) Working Paper LAW 2010/20 (2010) 7 ff <<https://hdl.handle.net/1814/15704>> accessed 7 November 2025.

²⁴⁵ Rostam J Neuwirth, ‘Global Law and Sustainable Development: Change and the “Developing-Developed Country” Terminology’ (n 206).

²⁴⁶ See eg Eve Bratman, ‘Development’s Paradox: is Washington DC a Third World city?’ (2011) 32(9) Third World Quarterly 1541, 1541 ; see also Arno Beisser, ‘A Paradoxical Theory of Change’ in Joen Fagan and Irma Lee Shepherd (eds) *Gestalt Therapy Now: Theory, Techniques, Applications* (Science and Behavior Books 1970) 70, 77.

²⁴⁷ Ben Berger, *Attention Deficit Democracy: The Paradox of Civic Engagement* (Princeton University Press 2011) 3.

²⁴⁸ Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown Publishing 2018) 3.

²⁴⁹ Joseph H H Weiler, ‘Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision’ (1995) 1(3) *European Law Journal* 219, 222.

²⁵⁰ *Silveira v. Ontario (Minister of Transportation)*[2011] (Ontario Superior Court of Justice, OJ) , 22.

²⁵¹ Xingzhong Yu, ‘Normative Dualism: A New Interpretation of Chinese Legal Tradition’ (2024) 1 Macau Journal of Global Legal Studies 41, 65.

communicated experience'.²⁵² How the collective experience from every individual is generated is largely a cognitive process, which also lies at the heart of research, learning and education. The essential role of education is explained by the Böckenförde Paradox, which, when applied to democracy, means that democracy itself 'is sustained by conditions it cannot itself guarantee'.²⁵³ In turn, the conditions sustaining democracy are largely a cognitive process, which ideally is primarily the role of education and research as well as the media. The many novel means for individually targeting persons with specific content, even subliminally, may undermine the important role of both educational institutions and the media.

The careful cultivation of democracy appears to be like the oxymoron of 'sustainable development'.²⁵⁴ It can also be described by reference to the Lampedusa Paradox, which holds that for 'things to stay as they are, things will have to change'.²⁵⁵ Like freedom,²⁵⁶ democracy is best addressed through the banner of paradoxes.²⁵⁷ This subtle trend of the rise of oxymora and paradoxes underscores the need for a new mode of thinking, applied not only to the design of new quantum technologies but also to the old institutions of democracy and of law. There are thus good reasons why education has been called not only a necessity of life but, more importantly, a critical requisite of democracy.²⁵⁸ It also explains why the 'devotion of democracy to education is a familiar fact'.²⁵⁹ In this regard, Europe seems to have lost its intellectual momentum. European debates cling to too many past and by now outdated thoughts and concepts. The same goes for law, the fundamental problem of which has also been designated as change.²⁶⁰ In various public and even academic discourses, no daring efforts of creative thinking are allowed or encouraged that would enable us to imagine a new society, a new model of governance, or new foundations for a future law and legal order. The European nations'

²⁵² Dewey (n 81) 101.

²⁵³ Ernst-Wolfgang Böckenförde, 'The Rise of the State as a Process of Secularization' in Mirjam Künkler and Tine Stein (eds), *Religion, Law, and Democracy: Selected Writings* (OUP 2020) 152, 167.

²⁵⁴ Michael Redclift, 'Sustainable Development (1987–2005): An Oxymoron Comes of Age' (2005) 13 *Sustainable Development* 212.

²⁵⁵ Giuseppe Tomasi Di Lampedusa, *The Leopard* (Vintage Classics 2007) 19.

²⁵⁶ Karl R. Popper, *The Open Society and Its Enemies: The Spell of Plato* (vol 1, Routledge 1947) 109.

²⁵⁷ See also Martyn Griffin, Daniel King and Patrick Reedy, 'Learning to Live the Paradox in a Democratic Organization: A Deliberative Approach to Paradox Mindsets' (2022) 21(4) *Academy of Management Learning & Education* 624.

²⁵⁸ Dewey (n 81) 1.

²⁵⁹ *ibid* 101.

²⁶⁰ See also Lachs (n 36) 698; Johnson (n 36) 845.

(selective) belief in their glorious past prevents them from realizing a more glorious and bright future together and in unison with other continents.

These critical observations can be well exemplified precisely by the case of quantum and related scientific theories. While the 2025 EU Quantum Strategy celebrates quantum theory as a ‘European thing’ developed more than a century ago, it still today completely fails to live up to the theory’s own observations, such as the idea of ‘quantum consciousness’. The latter term inspired the physicist Erwin Schrödinger to state that ‘in truth there is only one mind’ but we are still ‘not able even to imagine a plurality of consciousnesses in one mind.’²⁶¹ By now, it should be clear that ‘[H]uman thinking is in need of a new model that constructs the human being and consciousness within an energetic universe that is compatible with both modern science and spiritual teachings.’²⁶² However, developing quantum consciousness will also require us to learn the language and logic of quantum mechanics, which are oxymoronic concepts.²⁶³ As a matter of fact, the EU and the whole world—reflected in the concept of *discordia concors*—have traits of an oxymoron.²⁶⁴ However, the EU currently fails to live up to its nature as the highly innovative concept of a supranational entity.

The lack of consistency with insights from science also emerges in the context of the arguments that the predecessor of the EU had suffered from a birth defect in the form of an incomplete political union and democratic deficit.²⁶⁵ This can also be linked to a flawed understanding of space-time, which manifests itself in time inconsistencies. In constitutional law, time inconsistency is understood as a lack of balance between the views of the founders of a constitution and those of subsequent generations.²⁶⁶ Hence, whether the EU suffered from a democratic deficit at the outset is debatable. It certainly seems deplorable that, since then, and particularly since the failure of the EU constitutional treaty, no further actions have

²⁶¹ Erwin Schrödinger, *What Is Life?: The Physical Aspect of the Living Cell; With, Mind and Matter & Autobiographical Sketches* (CUP 1967) 130.

²⁶² Kingsley L Dennis, ‘Quantum Consciousness: Reconciling Science and Spirituality Toward Our Evolutionary Future(s)’ (2010) 66(7) *World Futures* 511.

²⁶³ David Overstreet, ‘Oxymoronic Language and Logic in Quantum Mechanics and James Joyce’ (1980) 9(3) *SubStance* 37.

²⁶⁴ Werner Kaegi, ‘Discordia Concors: Vom Mythos Basels und von der Europa-Idee Jacob Burckhardts’ in Marc Sieber (eds), *Discordia Concors—Festgabe für Egar Bonjour zu seinem siebzigsten Geburtstag am 21. August 1968* (vol 1, Helbing & Lichtenhahn 1968) 131, 136–52; Littell Colie (n 33) 304.

²⁶⁵ Jürgen Habermas, *The Crisis of the European Union: A Response* (Polity Press 2012) 121.

²⁶⁶ George Tsebelis, ‘The Time Inconsistency of Long Constitutions: Evidence From the World’ (2017) 56(4) *European Journal of Political Research* 820, 820–821.

been taken to address the issue. The same applies, *mutatis mutandis*, to the adoption of the UN Charter as the world constitution.²⁶⁷

The same flaw in temporal and spatial thinking can be exemplified by the 'no demos' thesis.²⁶⁸ For several reasons, this thesis is also the result of a failure to apply a proper spatio-temporal framework because of a lack of four-dimensional thinking. As a first reason, the 'no demos' thesis is framed too narrowly and follows an outdated idea of a nation state. In truth, the term 'nation state' is an oxymoron, and is outdated, given that 'many "states" (countries) are composed of two or more ethnic "nations," and some ethnic "nations" are spread among more than one "state"'.²⁶⁹ Moreover, from a scientific perspective of recent human evolutionary history, biologists and anthropologists have overwhelmingly rejected 'the partitioning of modern humans into biological "races"'.²⁷⁰ From a psychological viewpoint, the concept of race has also been linked to dichotomous, or 'black and white' thinking, which was explained as follows:

*'Black and White thinking', our concept of race emerges from dichotomized thinking. Race is a social construction. Race does not exist per se in nature, in the sense that skin color or the shape of certain facial features can be said to exist independently of our concepts.*²⁷¹

In view of these scientific observations, one is led to ask why the law continues to operate with these false assumptions, especially when it seeks to establish a fair and equal treatment of everyone, free from discrimination based on race and other social constructs. Paradoxically, the perpetuation of discrimination today appears, to a large extent, to be carried out under the banner of 'political correctness'.²⁷² More accurate than the idea of a single demos appears to be the idea of a 'demoicracy', or 'a Union of peoples, understood both as states and as citizens, who govern together but not as one'.²⁷³ However, this merely constitutes a beginning. If the EU and a future global legal order is to succeed, it must therefore continue its original efforts and work to 're-construct government and democracy

²⁶⁷ See eg Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff 2009) 1.

²⁶⁸ Weiler (n 249).

²⁶⁹ Uri Raanan, 'Nation and State: Order out of Chaos' in Uri Raanan and others (eds), *State and Nation in Multi-Ethnic Societies* (Manchester UP 1991) 3, 4–7.

²⁷⁰ Fatimah Linda Collier Jackson, 'Race and Ethnicity as Biological Constructs' (1992) 2(2) *Ethnicity & Disease* 120, 120.

²⁷¹ Neil Altman, 'Black and White Thinking: A Psychoanalyst Reconsiders Race' (2000) 10(4) *Psychoanalytic Dialogues* 589, 589.

²⁷² Rostam J Neuwirth, 'Equality in View of Political Correctness, Cancel Culture and Other Oxymora' (2023) 8(10) *International Journal of Legal Discourse* 1, 9 <<https://doi.org/10.1515/ijld-2023-2003>>.

²⁷³ Kalypso Nicolaidis, 'European Demoicracy and Its Crisis' (2013) 51(2) *Journal of Common Market Studies* 351, 351 <<https://doi.org/10.1111/jcms.12006>>.

above the nation state.²⁷⁴

As a second reason, the no demos thesis is oblivious to the ‘paradox of the founding’, which consists in the fact that the foundation of a democratic constitution cannot be based on democratic principles, because ‘the procedures needed to secure its legitimacy cannot be spontaneously self-generated’.²⁷⁵ The same has also been called the ‘demos paradox’, which holds that ‘the composition of a demos could never secure democratic legitimacy because the composition of a demos cannot itself be democratically decided’.²⁷⁶ Without seeking to resolve the paradox on the basis of a different conception of time beyond linearity, all constitutional democracies would be doomed to fail, ‘provided one conceives the constitution as a project that makes the founding act into an ongoing process of constitution-making that continues across generations’.²⁷⁷ The same applies mutatis mutandis to the establishment of a future global legal order.

To put it simply, no egg is, or can be, a chicken instantly. This paradoxical truth was recognized in the spirit of the EU’s founding treaties, when they expressed the commitment to ‘give direction to a destiny henceforward shared’²⁷⁸ and ‘to lay the foundations of an ever closer union among the peoples of Europe’.²⁷⁹ However, this requires a vision of and for the future as a part of forecasting.²⁸⁰ This insight was also known to the founding fathers, who therefore had the following belief: ‘Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity’.²⁸¹ From this perspective, a constitution can be compared to a hysteron proteron, or a reversal of what has been perceived as the natural order of time. Theoretically, the acceptance of retrocausality or the challenge of an exclusively linear conception of time may certainly

²⁷⁴ Robert Schütze, ‘Demoiracy in Europe: Some Preliminary Thoughts’ (2022) 47(1) *European Law Review* 24, 50.

²⁷⁵ Kevin Olson, ‘Paradoxes of Constitutional Democracy’ in Hugh Baxter (ed), *Habermas and Law* (Routledge 2017) 251, 252.

²⁷⁶ Aaron Maltais, Jonas Hultin Rosenberg and Ludvig Beckman, ‘The Demos and Its Critics’ (2019) 81 *The Review of Politics* 435, 435.

²⁷⁷ Jürgen Habermas, ‘Constitutional Democracy: A Paradoxical Union of Contradictory Principles?’ (2001) 29(6) *Political Theory* 766, 768 <<https://doi.org/10.1177/0090591701029006002>>.

²⁷⁸ Treaty Establishing the European Coal and Steel Community (signed 18 April 1951) 261 UNTS 140, recital 5.

²⁷⁹ Treaty Establishing the European Economic Community (signed 25 March 1957) 294 UNTS 5, recital 1.

²⁸⁰ *ibid.*

²⁸¹ European Commission Directorate-General for Communication, *The Schuman Declaration of 9 May 1950* (Publications Office 2015) <<https://data.europa.eu/doi/10.2775/065>> accessed 7 November 2025.

provide a useful input in the quest for new governance models.²⁸² Backed by quantum science, retrocausality, or the view that the future is not separate from the present or the past, should at least be pondered as possible.²⁸³ Hans Kelsen too addressed this question and rightly wrote that 'the people—from whom the constitution claims its origin—comes into existence first through the constitution.'²⁸⁴

Perhaps it would be more adequate to invoke a 'no deus' thesis in an age in which humanity transitions from *homo sapiens* to the next stage, in which fiction has been said to perform a crucial role.²⁸⁵ However, 'fiction' should be understood in a scientific way through the oxymoron of 'science fiction' rather than in its stark opposition to fact. In this regard, the EU currently appears to be suffering from a double deficit. First, it suffers from a spiritual deficit,²⁸⁶ which has been shown to being filled by an overly zealous belief in technology and AI.²⁸⁷ A second related deficit is an information deficit, which appears ironic in the age of the information glut,²⁸⁸ and which manifests itself less in a plurality of opinions but more in the form of misinformation, predictive programming and transliminal manipulation.²⁸⁹ In this regard, the general impact and possibility of social media and now, more and more, AI through language models, offer unprecedented ways, in terms of efficiency, of manipulating the minds of the individuals and masses alike.²⁹⁰ They have also been found capable of influencing cultural bias.²⁹¹

²⁸² See eg Jordi Vallverdú, *Causality for Artificial Intelligence: From a Philosophical Perspective* (Springer 2024) 85.

²⁸³ Jai Paul Dudeja, 'Future Is Not Separate From the Present or the Past: Can Temporal Nonlocality in Quantum Entanglement Explain Retrocausality (Effect Preceding the Cause), Precognition and Déjà Vu?' (2019) 6(5) *Journal of Emerging Technologies and Innovative Research* 304, 304.

²⁸⁴ Hans Kelsen, *General Theory of Law and State* (Russell & Russell 1961) 261.

²⁸⁵ Yuval N Harari, *Homo Sapiens: A Brief History of Mankind* (Harper Collins 2015) and Harari, *Homo Deus* (n 215) 152.

²⁸⁶ George Pennington, *Die Tafeln von Chartres* (Patmos 2023) 117.

²⁸⁷ Claudia Paganini, *Der neue Gott. Künstliche Intelligenz und die menschliche Sinnsuche* (Herder 2025) 8.

²⁸⁸ Mark Andrejevic, *InfoGlut: How Too Much Information Is Changing the Way We Think and Know* (Routledge 2013).

²⁸⁹ See eg Elisabeth Wehling, *Politisches Framing. Wie eine Nation sich ihr Denken einredet und daraus Politik gemacht wird* (Halem Verlag 2016), Maria Luisa Stasi and Pier Luigi Parcu, 'Disinformation and Misinformation: The EU Response' in Pier L Parcu and Elda Brogi (eds), *Research Handbook on EU Media Law and Policy* (Edward Elgar 2018) 704, and Rostam J Neuwirth, 'The Global Regulation of "Fake News" in the Time of Oxymora: Facts and Fictions about the Covid-19 Pandemic as Coincidences or Predictive Programming?' (2021) 35(3) *International Journal for the Semiotics of Law* 831 <<https://doi.org/10.1007/s11196-021-09840-y>>.

²⁹⁰ See also Gilad Abiri, 'Public Constitutional AI' (2025) 59(2) *Georgia Law Review* 601, 612.

²⁹¹ Zhaoming Liu, 'Cultural Bias in Large Language Models: A Comprehensive Analysis and Mitigation Strategies' (2024) 3(2) *Journal of Transcultural Communication* 1, 1 <<https://doi.org/10.1515/jtc-2023-0019>>.

The EU encounters another hysteron proteron, or is caught in a dilemma of an entangled loop from which, at first, no escape seems possible. Generally, the rise of the ‘platform federation’ has been announced as it was found that large open (digital) platforms ‘wield growing power over our public sphere—and yet our politics and public debates remain stubbornly state-based.’²⁹² Meanwhile, generative AI and large language models offer more efficient possibilities that further blur the fragile lines between the virtual and the real worlds and open the door to far more nefarious applications.²⁹³ Worse for the EU is that, compared to the US and China, the main competitors in AI, digital and various other technologies, the EU has largely failed to avail itself of a genuine European digital platform. This means that the EU faces further headwinds in forming a demos, as it lacks reliable and genuine digital sources of information for Europeans. There is thus a real risk that the EU may be completely misinformed and even intentionally manipulated, as European political deliberations take place on primarily US-owned and US-controlled platforms based on algorithms and big data. The risks become aggravated by the primary focus of European educational and political institutions on the transatlantic agenda, which leads to a neglect of important developments in other parts of the world such as, notably, Asia, the BRICS countries, the Asia-Pacific and Africa. It also carries the risk that when engagement with these countries or regions takes place, it is often already distorted by the bias caused by these factors. This is why interesting developments in single countries, such as the development of a ‘democratic localism’ including the use of AI technologies in the PRC, are not sufficiently studied in Europe.²⁹⁴

The accelerated transformations of the digital environment have profound effects on the global economy as much as on the distribution of information through the online sphere.²⁹⁵ In this regard, the recurring imposition of fines, or even mega-fines, on some of the major digital market players in both the US and the EU should not deceive us into

²⁹² Gilad Abiri and Sebastian Guidi, ‘The Platform Federation’ (2024) 26(2) *Yale Journal of Law and Technology* 240, 240.

²⁹³ Emilio Ferrara, ‘GenAI Against Humanity: Nefarious Applications of Generative Artificial Intelligence and Large Language Models’ (2024) 7 *Journal of Computational Social Science* 749, 749 <<https://doi.org/10.1007/s42001-024-00250-1>>.

²⁹⁴ See eg Zhengxu Wang, Jianxiong Liu and Dragan Pavličević, ‘Democratic Localism: The Case of Grassroots Self-Governance in Urban China’ (2018) 3 *Chinese Political Science Review* 129 <<https://doi.org/10.1007/s41111-018-0097-z>>, and Yiran Li, Yingying Fan and Lin Nie, ‘Making Governance Agile: Exploring the Role of Artificial Intelligence in China’s Local Governance’ (2025) 40(2) *Public Policy and Administration* 276 <<https://doi.org/10.1177/09520767231188229>>.

²⁹⁵ RD Vidican and RA Hepes, ‘Competition Law in the Digital Era: Legal and Jurisprudential Challenges in Digital Markets’ (2025) 19(1) *AGORA International Journal of Juridical Sciences* 133, 133.

believing that the problem of information deficit and bias is being solved.²⁹⁶ It largely constitutes mere 'performative governance' or so-called 'theatrical deployment of language, symbols, and gestures to foster an impression of good governance among citizens'.²⁹⁷ It equates to a cosmetic legal treatment using 'mock trials', addressing the symptoms and not the causes of the problem.²⁹⁸

Consequently, the EU needs to address these risks, based on its quest for 'AI sovereignty', to ensure a pluralistic but accurate source of information.²⁹⁹ It marks a problem that is part of the debate about the regulation of fake news at the international level, which began in the 1950s with the Convention on the International Right of Correction.³⁰⁰ The global AI sovereignty debate, however, also meets with a paradox, the 'sovereignty-internationalism paradox', which highlights the apparent contradiction of 'state control over algorithmic systems and the necessity of transnational collaboration to regulate borderless technologies'.³⁰¹

As can be seen, very different legal problems, when investigated further, reveal 'powerful tensions, profound contradictions, and perplexing paradoxes', as James N. Rosenau described the major policy challenges of the twenty-first century.³⁰² Put briefly, the age of the paradox has arrived, or the cliché has become reality, as all of society has become 'paradoxical'³⁰³ and everything else 'oxymoronic'.³⁰⁴ This is neither a surprise nor a coincidence, given that the quantum world, which has long cast its shadow over technological and societal development, has been said to use

²⁹⁶ Umberto Nizza and Cristina Poncibò, 'Antitrust Mega Fines in Digital Markets and Their Impact on Compliance: An Overview of EU and US Approaches' *Stanford-Vienna TTLF Working Paper No 115* (2024) <<http://tulf.stanford.edu>> accessed 7 November 2025.

²⁹⁷ Iza Ding, 'Performative Governance' (2020) 72(4) *World Politics* 525 <<https://doi.org/10.1017/S0043887120000131>>.

²⁹⁸ Rostam J Neuwirth, 'Intellectual Property Law and Generative Artificial Intelligence: Fair Remuneration, Equality or "My plentie Makes Me Poore"' (2025) 00 *Journal of Intellectual Property Law & Practice* 1, 9 <<https://doi.org/10.1093/jiplp/jpaf029>>.

²⁹⁹ Daniel Mügge, 'EU AI Sovereignty: For Whom, to What End, and to Whose Benefit?' (2024) 31(8) *Journal of European Public Policy* 2200, 2200 <<https://doi.org/10.1080/13501763.2024.2318475>>.

³⁰⁰ Björnstjern Baade, 'Fake News and International Law' (2019) 29(4) *The European Journal of International Law* 1357, 1357 <<https://doi.org/10.1093/ejil/chy071>>.

³⁰¹ Artur Ishkhanyan, 'The Sovereignty-Internationalism Paradox in AI Governance: Digital Federalism and Global Algorithmic Control' (2025) 5 *Discover Artificial Intelligence* 123, 123 <<https://doi.org/10.1007/s44163-025-00374-x>>.

³⁰² James N Rosenau, 'Governance in the 21st Century' (1995) 1(1) *Global Governance* 13, 13.

³⁰³ Charles Handy, *The Age of Paradox* (Harvard Business School Press 1995) x, and Vincent de Gaulejac, 'Vivre dans une société paradoxante' (2017) 2(24) *Nouvelle revue de psychosociologie* 27, 28 ('C'est la société tout entière qui devient paradoxante').

³⁰⁴ Warren Bennis, *The Essential Bennis* (Jossey-Bass 2009) 403, and Neuwirth, *Law in the Time of Oxymora* (n 33).

oxymora and paradoxes as its language and logic.³⁰⁵ Moreover, the entire realm of quantum theories has been called ‘spooky’³⁰⁶ and associated with many paradoxes.³⁰⁷ At the same time, paradoxes have been used in order ‘to understand quantum mechanics better’.³⁰⁸ This can be read to mean that training in quantum intelligence must accompany the successful governance of quantum technologies in the future.

V. OUTLOOK FOR THE GLOBAL GOVERNANCE OF QUANTUM TECHNOLOGIES

The analysis of the global AI governance debate, when contrasted with the evolution of European and international law, reveals an important insight for the regulation of new technologies. It shows that the goal of the adoption of future-proof and adequate regulations or laws is best achieved by way of cognitive change preceding changes in law rather than the other way round. This is supported by the rising number of paradoxes and oxymora, which are also the dominant language of the growing world of quantum technologies. This trend indicates the urgent need for new ways of thinking rather than the adoption of ‘new laws based on old ideas’, which is equivalent to serving ‘old wine in new bottles’. The same is reflected in George P. Fletcher’s work on the role of paradoxes in legal thought: he stresses the importance of developing ‘a deeper understanding of the legal premises that guide our thinking’.³⁰⁹

In this regard, science is asked to perform a crucial role. First, it must address the Allport Paradox and guarantee that future law is based on sound scientific knowledge and the most accurate and complete account possible of human nature, the senses, and the human mind.³¹⁰ Second, it needs to integrate all scientific theories into a more consistent and up-to-date scientific paradigm supporting legal science and law and policymaking for the benefit of everyone, following the motto ‘all of science for all’. This means addressing the negative aspects

³⁰⁵ Overstreet (n 262).

³⁰⁶ Max Born and Hedwig Born (eds), *The Born-Einstein Letters: Correspondence Between Albert Einstein and Max and Hedwig Born 1916–1955* (Walker 1971) 159.

³⁰⁷ Peter Gibbins, *Particles and Paradoxes: The Limits of Quantum Logic* (CUP 1987) 3.

³⁰⁸ Yakir Aharonov and Daniel Rohrlich, *Quantum Paradoxes: Quantum Theory for the Perplexed* (Wiley-VCH 2012) 1.

³⁰⁹ George P Fletcher, ‘Paradoxes in Legal Thought’ (1985) 85(6) *Columbia Law Review* 1263, 1292.

³¹⁰ Malik Bozzo-Rey, ‘Indirect Legislation: It Is Just a Question of Time’ (2016) 43(1) *History of European Ideas* 106<<https://doi.org/10.1080/01916599.2016.1251722>>, and Rostam J Neuwirth, ‘Future Law, the Power of Prediction, and the Disappearance of Time’ (2022) 4(2) *Law, Technology and Humans* 38, 48<<https://doi.org/10.5204/lthj.2376>>.

of specialization and transforming 'interdisciplinarity' from mere lip service to grant authorities and publishers into an effective mode of policymaking.

Both goals require the use of paradoxical thinking, as the related steps must simultaneously address the realms of law and of human (legal) thinking. Because of restrictions resulting from our modern language's linear conception of temporality,³¹¹ these steps will be outlined one after the other, first under the heading of 'quantum law' and then as 'four-dimensional thinking'.

A. Legal Preparations: Towards Quantum Law

As jurisdictions around the world are preparing their national quantum strategies, and another flawed narrative of a global race in the development and the regulation of quantum technologies appears on the horizon,³¹² serious efforts should be dedicated to a better understanding of the scientific implications of quantum theories, and their manifestation through quantum technologies, for life and for lawyers as 'the chief architects of our [future] legal, political, and economic order'.³¹³

Fortunately, the first serious discussions of the implications of quantum theories for law have been initiated and 'quantum law' has been born and is real.³¹⁴ Some features of quantum law are that it measures and does not judge compliance, and that it is generally concerned with the deconstruction of rules into smaller and smaller units.³¹⁵ The rising significance of quantum law has been recognized as a consequence of revolutionary and disruptive developments in the field of quantum technologies; these developments should be met by anticipatory actions that address their expected ethical, legal, social, and policy implications.³¹⁶ At this early stage, it is difficult to define 'quantum law' or to concretize its major principles and features. Great efforts are still required for its further clarification and development. However, it is clear that societal and planetary concerns should form the basis for the formulation of quantum law as the law of the future. To root it in scientific findings, a good working definition of quantum law is that it should rely on 'the study of quantum phenomena and features of

³¹¹ See Carlo Rovelli, *The Order of Time* (Riverhead Books 2018) 111.

³¹² EU Quantum Strategy (n 3) 1.

³¹³ Lon L Fuller, 'On Teaching Law' (1950) 3(1) *Stanford Law Review* 35, 37.

³¹⁴ Ritter (n 85) 1.

³¹⁵ *ibid.*

³¹⁶ Eline de Jong, 'Own the Unknown: An Anticipatory Approach to Prepare Society for the Quantum Age' (2022) 1 *Digital Society* 1, 1 <<https://doi.org/10.1007/s44206-022-00020-4>>.

quantum technologies.’³¹⁷ In the meantime, the ‘transformative potential of quantum computing for the legal system’ is being recognized.³¹⁸ This means that legal science needs to engage in the ‘proactive legal adaptation and the development of new legal theories, methodologies, and practices that are responsive to the unique characteristics and capabilities of quantum technologies.’³¹⁹

The overall complexity, cross-cutting, cross-boundary, cross-cultural and ‘transformative power’ of quantum technologies warrants renewed and collaborative efforts between lawyers of all jurisdictions. It also requires a strong effort by national governments and diplomats, who should enhance ‘quantum diplomacy’, especially in the international year of quantum science and technology and also in the quest for a successor for the SDGs.³²⁰ Last, efforts are needed to ensure that the potential benefits of quantum technologies are shared among all humans, and that scientific progress is not slowed down or rendered impractical by national laws and policies restricting freedom of research, scientific exchanges, and collaborations. These giant tasks at the quantum level first require a new and more open human mind-set, one leading to a transformative odyssey towards ‘quantum intelligence’ as outlined above.³²¹

Unlike the use of ‘AI’, the term ‘quantum intelligence’ should be reserved for efforts to enhance human intelligence and not as a descriptor of the efficacy of machines.³²² This is particularly true as human intelligence has many facets, meaning also that people have ‘different cognitive strengths and contrasting cognitive styles.’³²³ Moreover, technologies are not mere tools or utensils to shape the external world; they are also mirrors or windows to the complicated inner workings of the human brain and skills stored therein. This is why it is necessary to actively promote quantum intelligence as a way to enhance human (legal) thinking in order to put this on equal terms with the creative efforts that have helped both to formulate quantum theories and to realize them in the form of quantum technologies. This novel mode of thinking will be briefly outlined with

³¹⁷ Gromova and Petrenko (n 88) 62.

³¹⁸ Abdikhakimov (n 89) 59.

³¹⁹ *ibid.*

³²⁰ Mhlambululi Mafu and Makhamisa Senekane, ‘Quantum Technology for Development Framework as a Tool for Science Diplomacy’ (2023) 8 *Frontiers in Research Metrics and Analytics* 1, 2 <<https://doi.org/10.3389/frma.2023.1279376>>.

³²¹ De Marco (n 20) 166.

³²² Xabier E Barandiaran and others, *Decidim, a Technopolitical Network for Participatory Democracy* (Springer 2024) 55 [Italics added].

³²³ Howard Gardner, *Multiple Intelligences: New Horizons* (Basic Books 2006) 5.

the help of the term 'four-dimensional thinking'.

B. Cognitive Preparations: From AI to Four-Dimensional Thinking

The term 'four-dimensional thinking' is proposed here as it offers a timely concept to allow us to integrate into human cognition the basic scientific findings of the past century. It equally pays homage to Albert Einstein's description of the world as a 'four-dimensional space-time continuum'.³²⁴ It also acknowledges that the three dimensions of space and one dimension of time, combined, likely constitute the ultimate normative framework for orientation in reality and for guiding human decision making and behaviour. It is also a transdisciplinary concept, as numerous people from different backgrounds have shown an interest in the fourth dimension as a stepping stone to the perception of a higher dimension (of space).³²⁵

In law and the legal sphere, its prior use has been extremely rare. I first used it in the context of the urgent quest for an adequate global institutional framework to govern AI beyond the boundaries of existing institutions and traditional modes of thinking.³²⁶ I saw it, in particular, as a way to 'transcend the present perception of three-dimensional space based on a greater unity of the senses (synaesthesia) and a more flexible logic'.³²⁷ The recognition of the need for four-dimensional thinking in law, however, came earlier and was pioneered in an article entitled 'Flatlaw' by Timothy D. Terrell which was published in 1984.³²⁸ His article was inspired by the novel *Flatland*, which used an analogy to enhance the ability to imagine the existence of a higher dimension.³²⁹ It also recognized the need to enhance legal reasoning with the help of a fourth-dimensional perspective in order 'to explain, if not fill in, the gaps in scientific knowledge'.³³⁰ The idea also provides many useful illustrations that are deemed useful for expanding one's imagination as the primary requirement to gradually gain access to higher dimensional thinking.

³²⁴ Einstein (n 223) 379.

³²⁵ See eg Charles H Hinton, *The Fourth Dimension* (Swan Sonnenschein & Co. 1901), Linda Dalrymple Henderson, 'The Image and Imagination of the Fourth Dimension in Twentieth-Century Art and Culture' (2009) 17(1–2) *Configurations* 131 <<https://doi.org/10.1353/con.0.0070>>, and Mark Blacklock, *The Emergence of the Fourth Dimension: Higher Spatial Thinking in the Fin de Siècle* (OUP 2018).

³²⁶ Neuwirth (n 136) 38.

³²⁷ *ibid.*

³²⁸ Timothy P Terrell, 'Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles' (1984) 72(3) *California Law Review* 288, 336; see also Timothy P. Terrell, *The Dimensions of Legal Reasoning: Developing Analytical Acuity from Law School to Law Practice* (Carolina Academic Press 2016).

³²⁹ Edwin A Abbott, *Flatland: A Romance of Many Dimensions* (Seeley 1884).

³³⁰ Terrell (n 327) 336.

To provide further information about the concrete skills developed with four-dimensional thinking and its training, more space is required. For the present purpose, it suffices to outline the following contours:

Four-dimensional thinking, first of all, means knowing the concepts of oxymora and paradoxes or ‘essentially oxymoronic concepts’. These concepts help to overcome the limitations inherent in dualistic thinking, dichotomies and binary logic, and to learn to regard the contradictions expressed by the juxtaposition of antagonistic concepts not merely as impossibilities but as a quest for complementarity in their mutual relations. It also means expanding the application of binary logic to a polyvalent or ‘fuzzy logic’. Applied to space and time, it means that they do not exist in absolute isolation from each other but form one coherent whole. Various insights gained from lateral thinking, as a tool to restructure one’s existing patterns of thought, are of great use in this context.³³¹

A second essential trait of four-dimensional thinking is the critical reconceptualization of the number of the human senses and a parallel reconsideration of their relationship. This means focusing on any individual sense and all the remaining senses at the same time, so as to interpret the world through a multisensory approach. This has been described using the notion of synaesthesia, or the ‘union of the senses’, which has rightly been described as the ‘rule’ and not the exception of human perception.³³² The role of the senses is also crucial because ‘time’ is a so-called ‘common sensible’, meaning that it is an attribute of objects or events ‘that really can manifest itself through all of the senses’.³³³ The combined study of individual senses and their union also allows for the discovery or development of new senses or sensory skills.

The next step is to conceptualize the full integration of spatio-temporal qualities by trying to perceive time as a fourth dimension of space. In this regard, the contemplation of different kinds of works of art, not just visual art, is deemed helpful. Many useful illustrations of four-dimensional shapes can be found in the book *Surfing Through Hyperspace* by Clifford A. Pickover.³³⁴ Four-dimensional thinking can be further trained with the help of virtual and augmented reality tools and generative AI. Their

³³¹ Edward De Bono, *Lateral Thinking: Creativity Step by Step* (Harper & Row 1970) 167.

³³² Maurice Merleau-Ponty, *Phenomenology of Perception* (Routledge & Keagan Paul 1962) 229, and Noam Sagiv, Roger T. Dean, and Freya Bailes, ‘Algorithmic Synesthesia’ in Roger T. Dean (ed), *The Oxford Handbook of Computer Music* (OUP 2009) 294, 294.

³³³ Marks (n 234) 32.

³³⁴ Clifford A. Pickover, *Surfing Through Hyperspace: Understanding Higher Universes in Six Easy Lessons* (OUP 1999) 137.

simulations have been found to be able to help 'to lift an observer into the higher dimensional space, so that he or she can directly experience it [the fourth dimension] perceptually'.³³⁵

These few steps should provide a first small set of useful tools to prepare humans cognitively for the advent of the quantum age and for work on quantum laws with the help of four-dimensional thinking or human 'quantum intelligence'. A few more useful principles have been formulated in an article that summarized the main points to consider for education for the fourth dimension, as follows:

1. *The universe in which we live is an intricate web of dynamic interrelationships between and among time-space-energy-matter and behaves as a totality undefined as yet. It cannot be viewed, measured, or studied as an entity apart from ourselves. We are part of the universe. The universe is part of us. We are one.*
2. *Human beings perceive their universe through limited instrumentalities. Their findings and conclusions must reflect these limitations.*
3. *Since human beings are part of nature and not aloof from it, their measurements and observations modify nature in ways unknown.*
4. *Through careful observation and measurement, and within limitations of specific space-time orientations, we may predict, with much precision, many significant events.*
5. *How our universe maintains and controls itself, however, and the nature of our involvement with the universe is, at present time, a profound mystery.*
6. *Certitude, therefore, is beyond the scope of contemporary science.*³³⁶

Even if, at present, we seem to have many unanswered questions,³³⁷ there is still a lot that we do know as a result of scientific endeavours. Furthermore, it is as a result of technologies that many quantum theories have now become accessible and real. They should encourage law and policymakers to put science in the service of humanity again, and not to waste its many useful applications in technologies on an arms race. In this regard, technologies not only provide a unique opportunity to do things but also offer a means to reflect upon human nature. Moreover, they allow the human being to be 'the artifex of his destiny'.³³⁸

The chance to actively shape destiny, however, also carries a responsibility and a moral weight. In this regard, science and technology offer opportunities to learn about morality and to change society.³³⁹ One example from quantum science and technology which may have significant repercussions for a future social and legal order is the quantum insight that 'everything is connected to everything, everything

³³⁵ Michael S Ambinder and others, 'Human Four-Dimensional Spatial Intuition in Virtual Reality' (2009) 16(5) *Psychonomic Bulletin & Review* 818, 818 <<https://doi.org/10.3758/PBR.16.5.818>>.

³³⁶ James Thompson, 'Education for the Fourth Dimension' (2008) 48(3) *The Educational Forum* 335, 341–2 <<https://doi.org/10.1080/00131728409335912>>.

³³⁷ Mossman (n 213).

³³⁸ Gaius Sallustius Crispus, *Coniuratio Catilinae Et Bellum Jugurthinum* (Aldus 1563) 95, and Henryk Hoffmann, *Latin in Modern Fiction: Who Says It's a Dead Language?* (Vernon Press 2021) 261.

³³⁹ Coeckelbergh (n 128) 371.

is part of everything, that there really are no others.’³⁴⁰ This thought, when developed further, may help to foster the emergence of an awareness of ‘quantum morality’, which has been said to lead ‘to the simple, guiding principle of quantum morality that itself mirrors the Golden Rule: When in any relationship, do unto others as you would have them do unto you—because those “others” are you.’³⁴¹ If this moral rule were fostered by a scientific observation and implemented through new technologies, would it not drastically change the world and the laws governing it? Perhaps, although it sounds like science fiction, these scientific observations were already made more than a century ago in what we are now celebrating the first quantum revolution. With the advent of the second quantum revolution, law and policymakers, as well as other stakeholders, now have both the chance and the responsibility to make sure that the development of the technologies issuing from these theories will be met by an adequate human understanding of human nature and social relations.

VI. CONCLUSION

*The path which opens immediately before us in the future is that of applying the conception of four-dimensional space to the phenomena of nature, and of investigating what can be found out by this new means of apprehension.*³⁴²

At the dawn of the second quantum revolution, which is witnessing an accelerated pace of development of quantum technologies, many new and exciting possibilities are arising. As usual, however, so are serious challenges, risks and dangers, as was recently also experienced with the global hype about the recent advent of AI technologies. The regulatory debates centred around AI brought to light important features. Nonetheless, they were also deeply flawed, as can be seen from the dominant narrative of a ‘global race or battle to regulate AI’. This is not the first time in history that, in dealing with new technologies, humans have fallen victim to hype and a false belief that a new technology will automatically improve everyone’s life, solve all problems and determine humanity’s destiny. The misjudgement of technology seems to derive from a one-sided perspective that regards technologies merely as tools to shape the external world. This perspective is oblivious to the deeper purpose of technologies, which is their function as a window onto the internal world

³⁴⁰ Dana Zohar, *Zero Distance: Management in the Quantum Age* (Palgrave Macmillan 2022) 107.

³⁴¹ *ibid.*

³⁴² Charles Howard Hinton, *A New Era of Thought* (Swan Sonnenschein 1888) 7.

of humans.³⁴³ Such a one-sided perspective is also aided by outdated forms of thinking, such as dualistic or dichotomous thinking, as is expressed in the views on technologies contested by technophiles and technophobes.³⁴⁴

Against the backdrop of the rapid rise of quantum technologies as the next big thing and concrete proposals to regulate them through specific laws, such as a future EU Quantum Act, this article has argued for the need to learn from the shortcomings inherent in the global AI governance debate and especially warned about the negative effects of its dominant narrative as a global race to regulate AI. It also aimed to show that the regulation of quantum technologies based on existing legal instruments will not suffice, or that efforts to copy laws from one legal field to another or from the national or regional to the global level will fail. In contrast, the article stresses the need for a better integration of the latest scientific discoveries into the sphere of law and policymaking, which in the case of quantum technologies resides in the development of adequate levels of human 'quantum intelligence'. In the present context, this term is to be understood as a mandate for developing a new cognitive mind-set, one capable of producing the regulatory instruments for new technologies that are commensurate with the dangers that these threaten to bear, to paraphrase an important way of critical thinking expressed both in the constitution of UNESCO and in one of the founding treaties of the EU.³⁴⁵ Quantum intelligence is also considered essential for the future development of 'quantum law', which not only refers to regulatory acts focusing on quantum technologies but applies to all laws and all legal systems in the coming quantum age.

In an allusion to the scientific description of reality as a 'four-dimensional space-time continuum', the new cognitive mind-set underlying quantum intelligence has been called 'four-dimensional thinking'. This is based on the ability to transcend dualistic thinking by complementing binary logic with polyvalent or fuzzy logic, which is supported both by linguistic trends, in the rise of oxymora and paradoxes, and by the parallel trends of technological convergence. It also means enhancing the human ability to make forecasts as an essential feature of planning. In law, it is deemed essential for the future-proofness or 'time consistency' of future laws that

³⁴³ Norm Friesen, 'Mind and Machine: Ethical and Epistemological Implications for Research' (2010) 25 *AI & Society* 83, 83 <<https://doi.org/10.1007/s00146-009-0264-8>>.

³⁴⁴ Maria-Elena Osiceanu, 'Psychological Implications of Modern Technologies: "Technophobia" Versus "Technophilia"' (2015) 180 *Procedia-Social and Behavioral Sciences* 1137 <<https://doi.org/10.1016/j.sbspro.2015.02.229>>.

³⁴⁵ Treaty Establishing the European Coal and Steel Community (signed 18 April 1951) 261 UNTS 140, recital 1.

they are based on the integration of time as the fourth dimension into the known three dimensions of space. Moreover, four-dimensional thinking may open the door to the perception of a higher dimension of reality, behind which further miraculous scientific discoveries may loom.

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RUMINATIONS ON COMPARATIVISM, MIXITY, AND BIJURALISM IN LEGAL EDUCATION

In addressing the biannual *Conference of Juris Diversitas*, it would be ‘carrying coals to New Castle’ to waste time in making the case for comparative law as having strong benefits for the study and teaching of law;¹ for Juris Diversitas members well know that ‘comparison’ is a natural human tendency that manifests itself in the evaluation of both football teams and legal systems.² Various historical circumstances, however, can impede the comparativist human instinct; so in this Article, I should like to focus on Anglophone jurisdictions, like the United States (U.S.), where the educational benefits of comparative legal education may not be so obvious—and where there are numerous institutional and academic obstacles to the achievement of these benefits.

What, then, are some of the obstacles to a comparative or transnational legal education in jurisdictions like the U.S.? First and foremost, there is the obstacle posed by modern law students who, in large, tend to resist serious and demanding pedagogy. This resistance was early diagnosed and described by Anthony D’Amato in his ground-breaking 1987 study of ‘law student consumerism,’³ wherein Professor D’Amato diagnosed, in its early

* This Article is based on the author’s Keynote Address delivered in Macau University at the 9th General Conference of Juris Diversitas, *Crossing Boundaries*. I should like to thank all those involved in this Conference for their hospitality and their encouraging comments. Also, for their kind invitation to deliver the opening address and for their extraordinary solicitude at the Conference, my special gratitude to Professors Olivier Moréteau and Rostam Neuwirth. Finally, my gratitude to Research Assistant Shireen Knowles (Loyola J.D., Dec. 2025), who lived and learned, in the most diligent and uncomplaining fashion, comparativism and mixity during the summer of 2025.

¹ Juris Diversitas, *Crossing Boundaries* (9th General Conference, October 24–25, 2024) (identifying different legal problems by comparing and contrasting their underlying causes, thereby enabling respectful applications of different legal frameworks in harmony with the goal ‘of peaceful co-existence, in spite of differences’), available at <https://jurisdiversitas.blogspot.com/p/blog-page.html> (last visited Aug. 3, 2025). But if any persuasion as to the pedagogical value of comparative law is required, see generally Augustin Parise, *Legal Education in Argentina: A Plea for Comparative Law in a Multicultural Environment*, 81 LA. L. REV. 1275 (2021).

² See Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUMAN RELATIONS 117, 140 (1954).

³ See Anthony D’Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 462 (1987).

stages, the student *laissez-nous-faire* syndrome,⁴ which has metastasized during the ensuing decades. For example, the Loyola University (New Orleans) College of Law, for some seventy or so years, commencing in the early 1960s, maintained a ‘perspectives course’ requirement that all Juris Doctor candidates had to satisfy by passing one of five courses, ‘Jurisprudence, Comparative Law, Western Legal Tradition, American Legal History, or European Union Law.’⁵ The ‘perspectives’ course requirement aims to give Loyola law students a broader, more cosmopolitan perspective on the municipal law being studied in the rest of the curriculum.⁶

Then, in the mid-1980s, a new, ‘current events’ focused course was added to Loyola’s law curriculum as a requirement for graduation. It was denominated ‘Law and Poverty’⁷ and was eventually supplemented by ‘Street Law,’⁸ making the requirement sound action-packed, like an American

⁴ *ibid* 474-75, 483-85 (explaining that when law professors changed their teaching style to a less demanding approach in order to accommodate student preferences, they necessarily ceased encouraging the formation of new mental pathways or multifactorial perspectives in legal analysis). For further detail on the negative effects of such libertarian or *laissez-nous-faire* (leave us to do as we please) modes of teaching, see *below* text accompanying notes 10-11. See also Sarah Lee, *Laissez-Faire Leadership in Education: A Comprehensive Guide to Hands-Off Management in Schools*, NO. ANALYTICS (May 24, 2025) (discussing challenges of laissez-faire style teaching such as lack of clear guidance and supervision, inconsistent issue resolution, and limited student accountability), available at <https://www.numberanalytics.com/blog/laissez-faire-leadership-education-guide> (last visited Aug. 2, 2025); see also Clever B Makundi, Juliet Ntimba, *Effects of Head of Schools’ Laissez-Faire Leadership Style on Teacher’s Professionalism in Public Secondary Schools in Temeke Municipality, Tanzania*, 4 INT’L J. OF MULTIDISCIPLINARY RSCH. & GROWTH EVALUATION 513, 517 (2023) (arguing that laissez-faire leadership takes a ‘hands off’ approach, while lacking a ‘clear vision’ and goals for ‘intellectual growth,’ and leads to negative effects on performance and attitudes).

⁵ See, e.g., LOYOLA UNIVERSITY NEW ORLEANS LAW BULLETIN 2003-2004, at 35 (explaining the perspectives-course requirement, which mandates that students take one of the five philosophical or historical courses, namely, Jurisprudence, Western Legal Tradition, Comparative Law, American Legal History, or Law of European Communities); LOYOLA UNIVERSITY NEW ORLEANS LAW BULLETIN 2004-2005, at 38 (2004) (same). These five courses eventually, by the late 20th century, constituted the optional ‘required perspectives courses,’ but originally, there was only *one* required ‘perspectives’ course. See MARIA I. MEDINA, LOYOLA UNIVERSITY NEW ORLEANS COLLEGE OF LAW: A HISTORY 123 (La. State Univ. Press 2016) (mentioning that Jurisprudence first became a required course in 1965). In creating this required course in 1965, the Loyola faculty was perhaps inspired by LSU’s having made Jurisprudence a required course in 1953. See W. LEE HARGRAVE, LSU LAW: THE LOUISIANA STATE UNIVERSITY LAW SCHOOL FROM 1906 TO 1977, at 144-45 (La. State Univ. Press, 2004).

⁶ See, e.g., LOYOLA UNIVERSITY NEW ORLEANS LAW BULLETIN 2010-2011 (describing the purpose of the perspective courses as providing historical and philosophical perspectives on law), available at https://2010bulletin.loyno.edu/print/law.html#persp_crse (last visited on Aug. 2, 2025).

⁷ See MEDINA, above note 5, at 144 (stating that in academic year 1986-1987, the law school adopted a mandatory ‘law and poverty’ course requirement, designed to introduce all students ‘to the detrimental effects of poverty on society and poor people’ through ‘a critical examination of the legal system’s response to the economic, social and human problems of poverty, particularly in the fields of social security, welfare, unemployment and workmen’s compensation’).

⁸ *ibid* 148 (noting that newly hired Assistant Professor Catherine Clark in 1989 instituted the ‘street law’ program/course to teach local public-school students about their rights, responsibilities, and legal problems and that this course satisfied the poverty-law requirement); see also *below* note 14.

television police drama.⁹ About a decade after the adoption of the ‘Street Law’ requirement, Loyola students and some professors started arguing for fewer required courses in order to make room for elective courses¹⁰ which, as one might expect of student-preferred courses,¹¹ were not as intellectually demanding as, say, Comparative Law or Jurisprudence.¹²

In response to this bout of student consumerism, did the Loyola faculty abandon the mandatory ‘Street Law/Poverty Law’ requirement, along with the perspectives requirement of Jurisprudence, Legal History, etc.? Sadly, no: at a faculty meeting during the spring semester of 2013, the five perspectives courses *only* were demoted to elective status.¹³ And since then,

⁹ For example, see the popular television police procedurals ‘Hill Street Blues’ (NBC, 1981-1987), ‘Streets of San Francisco’ (ABC, 1972-1977), and ‘21 Jump Street,’ (FOX, 1987-1991), which are described in Wikipedia, https://en.wikipedia.org/wiki/Hill_Street_Blues; [https://en.wikipedia.org/wiki/The_Streets_of_San_Francisco#:~:text=The%20Streets%20of%20San%20Francisco%20premiered%20on%20ABC%20on%20Saturday,and%20The%20Bob%20Newhart%20Show](https://en.wikipedia.org/wiki/The_Streets_of_San_Francisco#:~:text=The%20Streets%20of%20San%20Francisco%20premiered%20on%20ABC%20on%20Saturday,and%20The%20Bob%20Newhart%20Show;); https://en.wikipedia.org/wiki/21_Jump_Street (last visited Aug. 3, 2025); see also SHEREEN HASSAN ET AL, INTRODUCTION TO CRIMINOLOGY 353 (Kwantlen Polytechnic Univ., 2023) (describing popular crime television dramas as shaping, while simultaneously amplifying and distorting, the public perception of crime, ultimately giving rise to reality police programs that influence the beliefs of ‘police, suspects and the general public’ by promoting the notion that effective law enforcement involves ‘high-speed chases, blocking and tackling, drawn weapons, and a shoot-first, think-later mind set’).

¹⁰ See MEDINA, above note 5, at 211-14 (explaining that in the aftermath of Hurricane Katrina, the law school reformed the curriculum, between 2006-2008, with a focus on expense, enrollment, and staffing). For a discussion of the recent trend toward undemanding collegiate and law-school courses, see D’Amato, above note 3, at 464-65, 485-88, 493-94.

¹¹ On the modern trend toward undemanding ‘boutique’ electives, see D’Amato, above note 3, at 461 (‘Elective curricula means that the popular professors are supported by student attendance, putting pressure upon the unpopular professors to become popular.’); *ibid* 493-94 (stating that while law schools owe the student ‘consumer’ a challenging legal education that stimulates the student to develop new paths of thinking and arguing, instead, most law teachers are ‘pushovers’ who opt to please their students rather than promoting the mental ability to cope with legal problems); see also James Étienne Viator, *Legal Education’s Perfect Storm: Law Students’ Poor Writing and Legal Analysis Skills Collide With Dismal Employment Prospects, Creating the Urgent Need to Reconfigure the First-Year Curriculum*, 61 CATH. UNIV. L. REV. 735, 742-743 (2012) (pointing out the academic declension occurs after the intellectually demanding ‘hard courses’ are replaced by ‘softer, easier courses’).

¹² Compare BART WAUTERS & MARCO DE BENITO, *THE HISTORY OF LAW IN EUROPE 6-8* (Edward Elgar Publ’g Ltd., 2017) (explaining that an understanding of Roman Law requires a historical analysis, abstract reasoning, and integration based on multiple legal texts), with Medina et al., above note 7, at 27 (citing LAW BULLETIN 1998-1999, and explaining that the Street Law course satisfies the Law and Poverty requirement necessary for graduation); see also LOYOLA UNIVERSITY NEW ORLEANS LAW BULLETIN 2004-2005, at 102 (describing Street Law as a course designed to teach ‘inner-city middle school and high school students about law related issues’); above note 8.

¹³ *Academic Regulations*, LOYOLA UNIVERSITY NEW ORLEANS LAW BULLETIN 2024-2025 [hereinafter LOYOLA LAW BULLETIN 2024] (showing that as of 2024-2025, Loyola’s College of Law J.D. program required Law and Poverty, though not any perspective courses), available at <https://lawbulletin.loyno.edu/regulations/academic-regulations> (last visited June 29, 2025). Compare LOYOLA UNIVERSITY NEW ORLEANS LAW BULLETIN 2012-2013 (demonstrating a perspectives-course requirement for a J.D. during the 2012-2013 academic school year), available at <https://2012bulletin.loyno.edu/law/juris-doctor.html> (last visited June 29, 2025), with LOYOLA UNIVERSITY NEW ORLEANS LAW BULLETIN 2013-2014 [hereinafter LOYOLA LAW BULLETIN 2013] (showing that as of academic calendar year 2013-2014, perspectives courses are no longer required and are offered only as electives), available at <https://2013bulletin.loyno.edu/law/juris-doctor.html> (last visited June 29, 2025).

these five have been taught only sporadically in low-enrollment seminars, whereas Street Law and Law and Poverty still constitute and satisfy a graduation requirement.¹⁴

Moreover, the decline of required historical and comparative courses has been accelerating throughout American law schools.¹⁵ For example, the North Dakota University School of Law—atypically, as a Field Code state—had a required Roman-Law requirement in its curriculum for decades.¹⁶ That all changed, however, when, commencing in the 1980s, Roman Law

¹⁴ See LOYOLA LAW BULLETIN 2024, above note 13 (showing that a 'law and poverty' course is required for the J.D., which both Law and Poverty and Street Law satisfy); see also LOYOLA LAW BULLETIN 2013, above note 13. Compare General Law Electives, LOYOLA UNIVERSITY NEW ORLEANS LAW BULLETIN 2017-2018 (explaining that the Jurisprudence elective course focuses on the 'natural law basis of the principal juridical institutions in the Roman and Anglo-American legal systems'), available at <https://2017bulletin.loyno.edu/law/general-law-elective-courses.html> (last visited July 10, 2024), with Spring 2025 Course Description, LOYOLA LAW BULLETIN 2025 (last updated Nov. 12, 2024) (indicating that during the spring semester 2025, no courses included instruction in Roman law or natural law), available at https://law.loyno.edu/sites/default/files/s25_course_descriptions_updated_11-12-24.pdf (last visited Aug. 3, 2025), and Fall 2025 Loyola University, LOYOLA LAW BULLETIN 2025 (last updated June 3, 2025) (indicating that during the fall semester of 2025, none of the courses offered included instruction on Roman law), available at https://law.loyno.edu/sites/default/files/f25_course_descriptions_6.3.25.pdf (last visited August 2, 2025).

¹⁵ See A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1942, at 2000-01 (2012) (explaining that in 1922, the American Bar Association approved a required unitary set of educational standards for all law-schools), and SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 1992-2002, at 25 (American Bar Association, 2004) (noting that in 2004, most law schools offered 'roughly the same basic set of doctrinal' and legal research and writing requirements followed by electives at the discretion of the student, and that course loads are traditionally 'organized around tracks or concentrations'), available at https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/1992_2002_survey_of_law_school_curricula.authcheckdam.pdf (last visited Aug. 18, 2025); Michael H. Hoeflich, *Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey*, 1984 UNIV. ILL. L. REV. 719, 719, 721-22 (noting that American legal education has neglected Roman Law and that a '1963-64 . . . survey of American law school curricula revealed that only seven schools taught Roman law, or Roman and comparative law').

¹⁶ See Micheal H. Hoeflich, *Bibliographical Perspectives on Roman and Civil Law*, 89 LAW LIBRARY J. 41, 50 (1997) [hereinafter Hoeflich, *Perspectives*] ('Roman law . . . was of great interest to American lawyers and judges from the beginnings of our Republic. The study of Roman law was included in the curriculum of most university law schools. Court decisions at both the state and federal levels are replete with references to Roman law in certain areas, such as commercial law and admiralty'); Charles L. Crum, *The History of the University of North Dakota School of Law*, 35 N. DAKOTA L. REV. 5, 19-20 (1959) (stating that under O.H. Thormodsgard, who was named dean in 1932, the curriculum, which included Legal History, was an 'inheritance [from earlier deanships] in many respects, and was designed to give the students a solid coverage of those subjects considered of a basic and essential character'); Orrin K. McMurray, *The Teaching of Legal History in the American Law School*, 7 AM. L. SCH. REV. 1122, 1122-23 (1934) (stating that legal history course descriptions varied among law schools and that generally the study of legal history was not encouraged in American law schools and further noting that as of 1932-1933, courses encompassing legal history remained limited, and the University of North Dakota Law School was one of the few schools offering such a course); Dean O. H. Thormodsgard, *Law School News*, 26 N. DAKOTA L. REV. 65, 65-66 (1950) (explaining that in 1950-1951, the University of North Dakota Law School implemented a required 'pre-law program' requirement for admission, which included English-European History). See also above note 15.

made only rare appearances as an elective course at North Dakota Law.¹⁷ One of the few American law schools that has not surrendered to the imperatives of student consumerism is the Washington and Lee University School of Law, where Professor Mark Drumbl's first-year required course in transnational law endures still.¹⁸

To be sure, particular Roman or Comparative Law requirements, now discarded in virtually every law school, were not much, but they were something. That is to say, even though in the typical American law school students tend to learn foreign law the way Americans learn foreign languages—namely, at the dilettante level, a little grammar, some vocabulary, no fluency¹⁹—nonetheless, some study or familiarity is better than none.²⁰

This primary obstacle to the comparativist pedagogy in the U.S. calls to mind the old, but still true, joke that Americans are a people who speak, at most, one language. And this old joke limns the second great obstacle to a comparative- or transnational-law curriculum, namely, monolingualism; for unless American law students are fluent in (at least) two languages,

¹⁷ *Academics: Curriculum and Courses*, UNIV. OF N. DAKOTA SCH. OF L. (November 15, 2021) (showing that neither Legal History nor any other course based in Roman law is currently offered at University of North Dakota School of Law), available at <https://law.und.edu/academics/courses.html#d65e288--2> (last visited Aug. 2, 2025).

¹⁸ See *Degree Requirements: Juris Doctor (J.D.) Degree Requirements*, WASH. & LEE UNIV. (identifying Transnational Law as a required 1L law course at the university), available at <https://law.wlu.edu/students/law-registrar/academic-policies/degree-requirements#:~:text=Required%20Courses%3A%20In%20addition%20to,candidates%20must%20successfully%20complete%20Professional> (last visited June 18, 2025); see also *Faculty Page, Mark A. Drumbl*, WASH. & LEE UNIV. (identifying Mark Drumbl as the Faculty Alumni Professor of Law and Director of the Transnational Law Institute), available at <https://law.wlu.edu/faculty/full-time-faculty/mark-drumbl> (last visited June 19, 2025).

¹⁹ See Matthew Rampe, *The US Needs to Improve Foreign Language Education*, THE TUFTS DAILY (October 27, 2023) (noting that only 10% of people in the U.S. speak foreign languages proficiently compared to 65% of Europeans and opining that the American education system contributes by not requiring foreign language education nor follow through with advanced study), available at <https://www.tuftsdaily.com/article/2023/10/the-us-needs-to-improve-foreign-language-education> (last visited Aug. 2, 2025); see also below note 20.

²⁰ Of course, translations of Roman law and civil law doctrine and laws provide a way to ameliorate the pitiful condition of foreign-language proficiency in American law schools. Unfortunately, quality Roman and civil law translations are less available and far more expensive today than during the antebellum period in America. See Hoeflich, *Perspectives*, above note 16, at 52 ("There can be no doubt that demand for [Roman and civil law translation] volumes, particularly in the antebellum period, was sufficiently high to warrant the maintenance of a trade in such books between Europe and America. Indeed, it is perhaps ironic to note that it was easier to purchase a basic library on Roman law in 1856 than it is today in 1996. It was also a good deal cheaper."). Cf. David J. Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law*, 75 TUL. L. REV. 949, 967 (2001) (explaining that more than merely the literal meaning of the target language must be understood in order to competently apply legal principles across linguistic borders); RUDOLPH B. SCHLESINGER, *COMPARATIVE LAW CASES: TEXT AND MATERIALS* 478-81 (Foundation Press, 2d ed. 1959) (explaining that true comprehension of foreign laws requires more than just a bare translation of words).

comparative law instruction and scholarship obviously cannot flourish.²¹ And from an already very low historical baseline, foreign language study in the U.S. has recently gone into a precipitous decline²²—largely due, it would seem, to the ubiquitous triumph of student consumerism on undergraduate campuses.²³ In the twelve years from 2009 to 2021, the number of college students enrolled in foreign-language courses fell overall by over 29.3%.²⁴ Between 2016 and 2021, the number of students enrolled in Chinese courses declined by 14.3%; German study dropped by 33.6%; Spanish enrollment fell by 18%, French by 23.1%, and Russian by 13.5%.²⁵ Moreover, by expanding the temporal vista to 2009 though 2021, one will discover the egregious decline in Latin enrollment of 40%.²⁶

All of these languages are affiliated with significant legal systems, and therefore any comparative-law student should know or learn some of

²¹ See Anthony D'Amato, *The Path of International Law, Faculty Working Papers*, PAPERS NO. 97, NW. UNIV. SCH. OF L. SCHOLARLY COMMONS 5–7 (2010) (explaining the need for an understanding of foreign language in order to be effective in international law and the resulting monolingual limitations identified in American lawyers), available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1096&context=facultyworkingpapers> (last visited Aug. 2, 2025); see also Gerber, above note 20, at 967 ('Language is necessarily a key factor [in learning a different legal order] . . . Yet, despite the obvious centrality of language, comparative law scholarship has paid relatively little attention to its roles.').

²² See NATALIA LUSIN ET AL., ENROLLMENTS IN LANGUAGES OTHER THAN ENGLISH IN U.S. INSTITUTIONS OF HIGHER EDUCATION, FALL 2021, at 4 (Mod. Language Ass'n of Am., 2023) [hereinafter LUSIN, LANGUAGE ENROLLMENT] (documenting that the overall decline in language enrollment in colleges has fallen by almost 30% since 2009); see also Ryan Quinn, *Foreign-Language Enrollment Sees Steepest Decline on Record*, INSIDE HIGHER ED (Nov. 11, 2023) (detailing the fall of foreign-language study between 2016–2021 and linking it to preferences for practical 'job training' rather than language education, which has resulted in decreased funding and enrollment), available at <https://www.insidehighered.com/news/faculty-issues/curriculum/2023/11/16/foreign-language-enrollment-sees-steepest-decline-record#:~:text=> (last visited on Aug. 2, 2025).

²³ See, e.g., RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* 35–37, 70 (Univ. of Chicago Press, 2001); Francis J. Mootz III, *Vico's 'Ingenious Method' and Legal Education*, 83 CHI.-KENT L. REV. 1261, 1301 (2008) ('All too often students arrive at law school lacking basic communication skills because they have not been provided a rigorous [undergraduate] education'); cf. D'Amato, above note 3, at 461–62 (noting that law student consumerism is at the root of the decline in the number of professors who challenge modern students, who by collegiate experience and conditioning are prone to resist anything that challenges their way of thinking). And yet, while college students have measurably been learning less, their grades have been soaring—so grade inflation is both a cause and a result of the prevailing undergraduate atmosphere of student consumerism. See also ROGER L. GEIGER, *AMERICAN HIGHER EDUCATION SINCE WORLD WAR II* 135 (Princeton Univ. Press, 2019) (dating collegiate grade inflation to the 1960s, the same decade when, academically, 'college became easier'); Viator, above note 11, at 742–45 (linking grade inflation in modern law schools to the prevalence of programmatic, written evaluations of law professors and law courses); *ibid* 751–54 (concluding that modern colleges endeavor to attract and retain students by 'softening' their curricula with the result that neither colleges nor their students treat classroom learning as 'job number one'); Anthony Grafton, *Our Universities: Are they Failing?*, N.Y. REV. BOOKS, Nov. 24, 2011, at 38–39 (concluding that the easy curricula of modern colleges, created to attract and retain students, have resulted in a campus environment where neither college professors nor their students appropriately prioritize classroom learning).

²⁴ LUSIN, LANGUAGE ENROLLMENT, above note 22, at 4.

²⁵ *ibid* 5–6, 10

²⁶ *ibid* at 21.

them.²⁷ Furthermore, whenever the U.S. has contained a critical mass of elite, multi-lingual lawyers—whether composed of native or foreign émigré legal scholars—such are the eras when comparative law has flourished.²⁸ One such fertile era for American comparativism was the first half of the nineteenth-century. Indeed, as legal historian Michael Hoeflich has phrased it, between 1800 and 1850, America was ‘awash with foreign law,’²⁹ partly because even some four decades after separation from Britain, American law was still in its infancy; therefore, the task of elite lawyers like Joseph Story and Rufus Choate was to develop a unique American law based mainly on the common law, but with supplementation and improvement from European civil law.³⁰

Moreover, early nineteenth-century America was a rising commercial nation eager to share in the bounty of transatlantic and transpacific commerce, which meant Americans needed to know the languages and

²⁷ See VERNON PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* 41–42 (Cambridge University Press, 2001) (explaining five reasons for the importance of language and linguistics in mixed jurisdictions: (1) foundational considerations for the written law available in an understandable language; (2) ‘mother language’ is a key predictor in basic orientation and perspective; (3) complex multilingual publications of laws and legal operations involve complex legislative dimensions; (4) an absence of linguistic fluency would leave jurists cut off from contemplated jurisdictions; (5) extinctions in literacy of foreign writings hinders familiarity with other-language traditions); see also JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* 114–20 (Carolina Academic Press, 2014); Hoeflich, *Perspectives*, above note 16, at 52; Gerber, above note 20, at 967.

²⁸ M.H. Hoeflich, *Comparative Law in Antebellum America*, 4 WASH. UNIV. GLOBAL STUDIES L. REV. 535, 541–45 (2005) [hereinafter Hoeflich, *Comparative Law*] (arguing that the proliferation of comparative law in the United States during the antebellum era is a result of independence from England and its laws, the rise of university-based legal education which encouraged comparativist study, the rise and marketing of university-based law schools, legal-science advances in European universities, and the rise of European colonization).

²⁹ See Hoeflich, *Comparative Law*, above note 28, at 537, 541–45 (observing that foreign laws and foreign thinking affected almost every aspect of early American legal culture, and thus antebellum America was ‘awash with foreign law and interest in foreign law’); see also Yoni Wilkenfeld, *First U.S. China Trade Deal—the Treaty of Wanghia Formalized the Burgeoning Ties Between the Two Countries, Opening the Door to New Commercial and Cultural Exchanges*, JSTOR DAILY (Oct. 23, 2019) (explaining that in the 1840s, President John Tyler believed the way to protect America and its national interests was through foreign trade and that during his administration the U.S. negotiated a treaty with China, which was the first Western commercial treaty forged without military conflict), available at <https://daily.jstor.org/the-first-us-china-trade-deal/> (last visited on Aug. 2, 2025).

³⁰ See Hoeflich, *Comparative Law*, above note 28, at 537–38, 541–45 (explaining that the basic concepts of Roman Law in its classical republican context served as the contextual framework for early American legal education and that along with European civil law, it provided the basic principles and rules of foreign commerce); JEAN V. MATTHEWS, RUFUS CHOATE: THE LAW AND CIVIC VIRTUE 105–46 (Temple Univ. Press, 1980); see also below note 35.

laws of their potential trading partners.³¹ In the 1830s, then, the works of Domat and Pothier became standard authorities for American lawyers and judges;³² and in this context, it should be no surprise that elite lawyers like Thomas Jefferson,³³ Joseph Story,³⁴ Rufus Choate,³⁵ and Caleb Cushing³⁶

³¹ See Hoeflich, *Comparative Law*, above note 28, at 538. See also, e.g., DAVID HACKETT FISCHER, *THE GREAT WAVE: PRICE REVOLUTIONS AND THE RHYTHM OF HISTORY* 3–9, 117–56 (Oxford Univ. Press, 1996); SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 284 (Holt, Rinehart & Winston, 5th ed. 1936) (noting that during the first half of the nineteenth-century, America's overseas commerce was expanding); RICHARD K. VEDDER, *THE AMERICAN ECONOMY IN HISTORICAL PERSPECTIVE* 206–16 (Wadsworth Publ'g Co., 1976) (same); JOHN M. BELOHLAVEK, *BROKEN GASS: CALEB CUSHING AND THE SHATTERING OF THE UNION* 151 (Kent State Univ. Press, 2005) ('The orient posed its own set of opportunities for American farmers, merchants and ship owners. They realized the commercial possibilities . . . of carrying their goods to Far Eastern markets. American vessels had plied the China trade since the 1780s without a treaty . . .'); Wilkenfeld, above note 29 (explaining that during the antebellum era (circa 1825–1860) the prevailing American view was that the surest path to national prosperity was along international trade routes).

³² See MARK F. HERNANDEZ, *FROM CHAOS TO CONTINUITY: THE EVOLUTION OF LOUISIANA'S JUDICIAL SYSTEM, 1712–1862*, at 34 (La. State Univ. Press, 2002); Michael H. Hoeflich, *Savigny and His Anglo-American Disciples*, 37 AM. J. COMP. L. 17, 23 n.34 (1989). See also M.H. HOEFLICH, *ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY* 56, 57, 62 (Univ. of Ga. Press, 1997).

³³ See DUMAS MALONE, *JEFFERSON AND HIS TIME: THE SAGE OF MONTICELLO* 172 (Little, Brown & Co., 1981) ('The [Library of Congress] collection consisted of perhaps three thousand volumes when the British invaders destroyed it in the late summer of 1814. . . . [Jefferson] promptly offered to sell to Congress his own library, which turned out to be more than twice the size of the one that was lost'); *ibid* 173 (noting that contemporary observers described Jefferson's proffered library as 'without a question the most valuable in the world,' composed of titles 'in diverse tongues'). See also *Thomas Jefferson 1828 Catalogue*, ARTHUR J. MORRIS UNIV. OF VA. L. LIBR., SPEC. COLLECTIONS (2019) (noting that the 1828 Jefferson catalogue law-book collection highlights Jefferson's books on international, commercial, and public law), available at <https://digitalhistory.law.virginia.edu/catalogue/catalogue/collections/1828-catalogue?page=4> (last visited Aug. 2, 2025); FRANK L. DEWEY, *THOMAS JEFFERSON: LAWYER* 65–66 (Univ. of Va. Press, 1986) (observing that in working on a divorce case, Jefferson used several foreign-language legal treatises housed in his personal Monticello library, namely, Samuel Pufendorf's *The Law of Nature and Nations* (1707 French translation from Latin) and the Complete Works of John Selden (Latin)); DOUGLAS L. WILSON, *JEFFERSON'S BOOKS* (Thomas Jefferson Memorial Foundation, 2002); THOMAS JEFFERSON'S LIBRARY: A CATALOG WITH THE ENTRIES IN HIS OWN ORDER 56–58, 74–79 (Lawbook Exchange, Ltd., James Gilreath & Douglas L. Wilson eds. 1989) (listing numerous Roman-law and civilian jurisprudential works).

³⁴ See DANIEL R. COQUILLETTE & BRUCE A. KIMBALL, *ON THE BATTLEFIELD OF MERIT: HARVARD LAW SCHOOL, THE FIRST CENTURY* 135 (Harv. Univ. Press, 2015) (describing Story's sale in 1831 of his large personal library to the Harvard Corporation, which 'greatly advanced the law school library'); see also Corydon Ireland, *Evidence of Greatness: HLS Showcases Life and Work of Joseph Story*, HARV. L. TODAY (originally published in the Harvard Gazette, Nov. 19, 2012) (describing the 2012 Joseph Story exhibit at Harvard Law School, which included some pages from his digest of American and transnational law and official papers which provided a rare glimpse into the works and workings of the early federal courts), available at <https://hls.harvard.edu/today/evidence-of-greatness-hls-showcases-life-and-work-of-joseph-story/#:~:text=The%20Caspersen%20Room%20exhibit%2C%20in,%2C%20according%20to%20the%20exhibit.> (last visited Aug. 3, 2025).

³⁵ See 1 SAMUEL GILLMAN BROWN, *THE WORKS OF RUFUS CHOATE WITH A MEMOIR OF HIS LIFE* 221–22 (Little, Brown & Co., 1862) (noting that in the 1850s Rufus Choate's voluminous library included English and foreign language literature and historical works, which numbered 7000 volumes, and 3000 volumes in the library were dedicated to law, which constituted one of the best professional law libraries in the state of Massachusetts); see also MATTHEWS, above note 30, at 105–46.

³⁶ Dong Leshuo, *World's Biggest Library Grows with China*, CHINA DAILY USA 12 (Nov. 4, 2016) [hereinafter Dong Leshuo, *Library*] (noting that Caleb Cushing's donations helped to make the Asian division of the Library of Congress the largest collection of Chinese-language volumes outside of China, though his donations included not just works in Chinese, but also included works in the languages of the Manchus and the Asian Moslems).

all had voluminous libraries of foreign literature and law.³⁷ Thus, in 1843 when President John Tyler and Secretary of State Daniel Webster needed a commissioner to negotiate a trade agreement between the U.S. and Imperial China, Caleb Cushing was chosen,³⁸ in large measure because he was known to be a gifted linguist and to have a voluminous private library of books on Chinese culture, law, and government.³⁹

A brief side-bar—given that nowadays so many law schools are striving to imitate Harvard Law School, there is an antique Harvard academic feature that could help advance comparativist legal education. In its newspaper advertisements in the 1830s and 1840s, the Harvard Law School trumpeted that its students could take courses in the Harvard University foreign language department ‘for the additional fee of \$10 a year for each language studied.’⁴⁰ If modern U.S. law schools were to revive that antebellum Harvard practice, it would provide both symbolic and practical support for a more cosmopolitan legal pedagogy; and although that revival would be a good first step, it would merely seed a linguistic crop for a future comparativist

³⁷ See above notes 33–36.

³⁸ See SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 345 (Holt, Rinehart & Winston, 5th ed. 1965) (‘[T]he essential cause [of the First Anglo-Chinese Opium War of 1839–1842] was the desire of the British merchants for favorable treaty guarantees for their trade. The American traders petitioned their government to protect their interests against any . . . possible [British-inspired trade] exclusion. President Tyler sent out a plenipotentiary, Caleb Cushing, a member of the Committee of Foreign Affairs of the House of Representatives.’); see also Dong Leshuo, *Library*, above note 36, at 12 (noting that Caleb Cushing was appointed U.S. plenipotentiary to negotiate the first treaty between the U.S. and China, the Treaty of Wanghia (1844)); see also BELOHLAVEK, above note 31, at 171, 183 (describing the successful negotiation of the Sino-American commercial treaty in the Buddhist Temple in the town of Wanghia, just a few miles north of Macau, and the treaty’s unanimous ratification by the Senate in January 1845).

³⁹ See THOMAS BAILEY, *A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE* 325, 325 n.12 (Appleton-Century-Crofts, 4th ed. 1950) (explaining that even before the First Opium War, ‘Cushing had, in fact, already become interested in the China Trade, and had acquired a considerable store of information about the Celestial Empire’ and that Cushing was ‘a remarkable linguist’ and a dedicated student of Chinese culture and politics); see also Dong Leshuo, *Library*, above note 36, at 12 (noting that gifts and donations from Caleb Cushing and other diplomats helped expand and increase the Asian Division at the Library of Congress from 933 volumes in 1869 to 16,900 in 1912, and that the Asian Division now holds the largest collection of Chinese works outside the Chinese mainland).

Although Cushing mastered, in addition to Latin and Greek, several modern European languages, see 2 CLAUDE M. FUESS, *THE LIFE OF CALEB CUSHING* 406 (Harcourt, Brace & Co., 1923) (‘Before [Caleb Cushing] was twenty-five, he had mastered French, Spanish, Italian and Danish. Both Latin and Greek were for him as simple as English . . .’), and although he assiduously studied Mandarin for many months before arriving in China, he acquired but ‘an imperfect knowledge of it.’ 1 *ibid* 426. Cushing therefore hired two veteran American missionaries in China as interpreters and translators for his diplomatic mission. 2 *ibid* 416, 426–27. See also BELOHLAVEK, above note 31, at 163 (detailing Cushing’s unsuccessful efforts to achieve fluency in Mandarin, but his greater success in mastering the imperial Manchu language).

⁴⁰ For representative Harvard advertisements, see Simon Greanleaf, *Law Institution of Harvard University*, VERMONT PHOENIX, July 24, 1840, at col. 47 (trumpeting the attention Harvard Law School gave to foreign jurisprudence, and declaring that foreign language instruction was an option even in its law-degree program); *The School of Harvard University*, NATIONAL WEEKLY INTELLIGENCER, February 12, 1848, at 7 (same); *Harvard University*, MOBILE REGISTER & JOURNAL, February 13, 1845, at 2 (same).

harvest. But to quote Lenin, ‘What is to be done now?’⁴¹ Part of the answer may lie in the successful bijural curricula of the three representative law schools with which I am familiar by study, matriculation, or teaching—namely, McGill University in Montreal, Canada; the Louisiana State University Law Center in Baton Rouge, Louisiana; and the Peking University School of Transnational Law in Shenzhen, China.

In recent years, all three of these law schools have awarded two law diplomas, one for each half of their bijural curricula.⁴² And each of these three programs is worth detailed examination, far more examination and rumination than this Article can offer; but let me touch on some salient features, for the three bijural programs have gone about teaching two legal systems in slightly different ways. First, the demographic-cultural predicates for a bijural legal education are quite similar for McGill and LSU, namely, historical bi-ethnic settlement patterns from France and Great Britain.⁴³ Akin to Louisiana, Canada is a polity where two systems of private law obtain—a civilian regime in Quebec and common-law systems in the provinces beyond Quebec.⁴⁴ These two different legal systems have co-existed in Canada, ‘with greater or less felicity since the late eighteenth

⁴¹ Ronnie Flores, *Grappling with the Real Lenin*, 107 INT’L SOCIALIST REV. (reviewing MARCEL LIEBMAN, LENINISM UNDER LENIN (2017)), available at [https://isreview.org/issue/107/grappling-real-lenin/index.html#:~:text=Lenin%20\(%20Vladimir%20Lenin%20\)%20was%20simply,required%20to%20commit%20it%20to%20revolutionary%20socialism](https://isreview.org/issue/107/grappling-real-lenin/index.html#:~:text=Lenin%20(%20Vladimir%20Lenin%20)%20was%20simply,required%20to%20commit%20it%20to%20revolutionary%20socialism). (last visited July 7, 2025).

⁴² John J. Costonis, *Introduction: Global Law and the Law School Curriculum*, 52 J. LEGAL EDUC. 1, 1 (2002) [hereinafter Costonis, Introduction] (observing that only two North American schools impose a comprehensive program of both common- and civil-law for all 1L students, namely, LSU and McGill); Michel Bastarache, *Bijuralism in Canada: Bijuralism and Harmonization—Genesis*, GOV. OF CAN. (Feb. 4, 2000) (noting that McGill University offers both civil and common law degrees in English), available at https://justice.canada.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b1-f1/bf1g.html?utm_source=chatgpt.com (last visited Aug. 2, 2025); Rosalie Jukier, *From La Beauce to Le Bayou: A Transsystemic Voyage*, 12 J. CIV. L. STUD. 1, 10 (2019) (explaining that post-1999 McGill ‘would teach private law in an integrated manner and all graduates would obtain both civil law and common law degrees’); *Juris Doctor and Optional Graduate Diploma in Comparative Law Degrees*, LSU L. (2025) (offering an optional comparative-law masters diploma as a part of the Juris Doctor degree program), available at <https://law.lsu.edu/academics/curriculum/jdcl/> (last visited June 29, 2025); *Juris Doctor and Optional Graduate Diploma in Comparative Law Degrees*, PEKING UNIV. SCH. OF TRANSNAT’L L., available at <https://stl.pku.edu.cn/academics/55/55.html> (last visited June 29, 2025).

⁴³ See, e.g., ALFRED OLIVIER HERO, JR., *LOUISIANA AND QUEBEC: BILATERAL RELATIONS AND COMPARATIVE SOCIO-POLITICAL EVOLUTION, 1673-1993*, at 39–67 (Univ. Press of America, 1995); FRENCH AMERICA: MOBILITY IDENTITY, AND MINORITY EXPERIENCE ACROSS THE CONTINENT (La. State Univ. Press, D.R. Loudon & E. Waddell eds. 1983); JOE GRAY TAYLOR, *LOUISIANA: A BICENTENNIAL HISTORY* 3–29, 42–56 (W. W. Norton & Co., 1976); BENNETT H. WALL ET AL., *LOUISIANA: A HISTORY* 91–176 (Forum Press, 2d ed. 1990); LILIANE CRÉTÉ, *DAILY LIFE IN LOUISIANA, 1815-1830*, at 68–95 (La. State Univ. Press, Patrick Gregory trans., 1981); Jukier, above note 42, at 2 (referring to Louisiana and Quebec as ‘sister jurisdictions, sharing a common mixity in their legal systems’).

⁴⁴ See Yves-Marie Morissette, *McGill’s Integrated Civil and Common Law Program*, 52 J. LEGAL EDUC. 12, 13–14 (2002); *ibid* 12–14 (describing the multicultural influence seen in McGill’s curriculum with Quebec holding fast to its French roots in civilian private law, but also influenced by common law). See also Jukier, above note 42, at 5–6.

century.⁴⁵

It was, then, this historical, dual-system province—embedded within a parliamentary confederation—that provided McGill, eventually, with the opportunity to shift its curriculum—to blended or integrated bijural courses on each private law topic,⁴⁶ denominated ‘transsystemic education’ by the McGill Faculty.⁴⁷ Thus, after 1999, in the McGill law school there would be only one course on each private-law topic, covering both legal systems.

The pre-1999 McGill ‘dual course’ curriculum closely resembled the LSU law school’s bijural curriculum that had been in place, in fully developed form, since at least 1950.⁴⁸ But McGill’s 1999 shift to integrated bijural courses inspired the LSU faculty in 2002 (during the deanship of John Costonis) to imitate the McGill integrated or ‘transsystemic’ bijural curriculum.⁴⁹ Moreover, Louisiana may provide an even more favorable environment than Canada for the integrated teaching of common and civil law, because the state of Louisiana—ever since Napoleon sold it to the

⁴⁵ See Morissette, above, note 44, at 14.

⁴⁶ *ibid* 15–17 (explaining that the ‘National Program,’ which offered civil and common law topics in discrete courses that awarded diplomas for the two different legal systems, was in effect from 1925 to 1968).

⁴⁷ *ibid* 27–28 (explaining that the *seriatim* treatment of heritage courses, compare and contrast similarities and dissimilarities in both types of law had helped to facilitate teaching discrete private-law courses in bijural fashion post-1999, leading to one integrated dual system diploma—that is, all students learn both systems).

⁴⁸ See HARGRAVE, above note 5, at 62–63, 143–44 (demonstrating that the 1933 curriculum manifested LSU’s comparative-law pedagogical commitment by requiring, of all students, both civil- and common-law courses in the fundamental private law topics and that this comparativist approach was made more thorough-going in the 1950 curriculum); see also John J. Costonis, *The Louisiana State University Law Center’s Bijural Program*, 52 J. LEGAL EDUC. 5, 9 (2002) [hereinafter Costonis, *LSU Bijural Program*] (explaining that the longstanding LSU curriculum separated common and civil law courses into separate classes, but every student had to take all these discrete courses); *id.* n.2 (‘From its earliest days, in fact, LSU never bifurcated either its curriculum or its students on the basis of a common law and civil law track.’) see also Morissette, above note 44, at 18–19 (indicating that with the inception of the 1968 McGill dual course program, law students took discrete common and civil law classes in separate academic semesters and were graduated with a joint Juris Doctor-Bachelor of Civil Law diploma); Costonis, *LSU Bijural Program*, above, at 6 (noting that McGill awarded ‘a joint Juris Doctor/Bachelor of Civil Law degree’).

⁴⁹ See Costonis, *Introduction*, above note 42, at 2–3 (noting that McGill implemented their ‘transsystematic’ bijural program in 1999, which was partially and experimentally adopted by LSU in 2001, to commence in Fall Semester 2002); *Historical Highlights*—LSU Law Center, LSU L. [hereinafter *LSU Highlights*] (stating that ‘in 2002, the Law Center became the sole U.S. law school, and one of only two in the Western Hemisphere, to concurrently award both the Juris Doctor and the Bachelor of Civil Law, recognizing the education that LSU students receive in both the civil law and common law traditions’), available at <https://law.lsu.edu/aboutlsulaw/history/timeline/> (last visited July 20, 2025).

United States in 1803⁵⁰—has enjoyed, in contrast to the nation of Canada, an exclusive and internally integrated regime of Franco-Hispanic civil law and Anglo-American common law.⁵¹ Unlike McGill, then, LSU has no interprovincial distinction and separation in legal systems to account for—in Louisiana it is intrastate hybrid private law, all the way down—and Louisiana therefore enjoys, it seems, a law market innately fit for integrated teaching.⁵² For various academic and institutional reasons, however, the LSU faculty was unable to duplicate the McGill's success in creating courses of fully integrated civil-law and common-law content.⁵³ Thus, after a few years of effort toward implementing blended common law-civil law courses, the LSU Law Center returned to its historical bijural curriculum of paired and discrete civil-law and common-law courses taught sequentially.⁵⁴ Perhaps, therefore, LSU's confident adoption, followed soon by informal abandonment, of the McGill-style integrated curriculum contains practical lessons for law faculties that might be considering the adoption of a transnational or a comparativist dual-degree program.⁵⁵

Indeed, the practical wisdom of LSU's original, traditional approach to

⁵⁰ See WILFRED MCCLAY, *THE LAND OF HOPE: AN INVITATION TO THE GREAT AMERICAN STORY* 97–99 (Encounter Books, 2019) (discussing the U.S. government's purchase of France's Louisiana colony); EDWIN ADAMS DAVIS, *LOUISIANA: A NARRATIVE HISTORY* 260–68 (Claitor's Publ'g Co., 3d ed. 1971) (same); James Étienne Viator, *Book Review*, 33 AM. J. LEGAL HIST. 368, 368–69 (1989) (reviewing RICHARD HOLCOMBE KILBOURNE, JR., *A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803–1839* (Paul M. Herbert L. Ctr. Publ'n Inst., 1987)) (same).

⁵¹ See Morissette, above note 44, at 12 (noting that the Canadian landscape includes both French civil law traditions and Anglo-Canadian common law traditions).

⁵² Dean Costonis offered another reason why LSU possessed 'greater facility than McGill in adopting a bijural curriculum,' namely, 'the far greater percentage of LSU students who derive from and will practice in their home jurisdiction.' Costonis, *Introduction*, above note 42, at 9 n.2.

⁵³ See *LSU Highlights*, above note 49. See also HARGRAVE, above note 5, at 228 (stating that '[successful curricular reform] occurs only when it does not drastically alter the affairs of those who are not in full accord with the provision' (quoting P. Michael Hebert, *Curriculum Study, as reported to LSU Law Faculty* (Sept. 11, 1974))); Morissette, above note 44, at 22 (pointing out that important considerations in curricular reform are the extent to which 'faculty [are] prepared to collaborate in the design of new courses, to teach together, to participate in team teaching, to share course evaluations').

⁵⁴ *LSU LAW BULLETIN* 2004–2005, at 20–21, 23 (Paul M. Hebert L. Ctr. 2004) (showing that by academic year 2004–2005, LSU had separate civil and common law courses in its dual-degree bijural program). See above note 48.

⁵⁵ Recently, however, LSU appears poised to make another try at the implementation of the McGill-like integrated bijural curriculum that LSU had originally tried to implement in 2002. Compare Costonis, *Bijural Program*, above note 48, at 9, and *LSU Highlights*, above note 49, with Steve Sanoski, *LSU Law Faculty Unanimously Approves Sweeping Changes to First-Year Curriculum*, LSU L. (June 9, 2025) [hereinafter Sanoski, *LSU 2025*] (announcing that in the 2026–2027 academic year, LSU will be making sweeping changes to its bijural program and that the keynote of 'the new first-year curriculum will be an intensive, year-long, five-credit comparative course that explores common law contracts and civil law obligations, with a separate companion course in comparative methodology and legal systems'), available at <https://law.lsu.edu/news/2025/06/09/lsu-law-faculty-unanimously-approves-sweeping-changes-to-first-year-curriculum/> (last visited Aug. 3, 2025). Obviously, this 2026–2027 LSU bijural curriculum, like LSU's 2002 predecessor, will be less extensive than the McGill transsystemic curriculum of 1999. See above text accompanying notes 44–48.

teaching the civil-law of Louisiana and common-law in discrete sequential courses⁵⁶ may have been ratified by the similar manner in which the Peking University School of Transnational Law (STL) teaches American common law and Chinese law in its dual-degree program.⁵⁷ In the STL program, students earn a Juris Doctor (J.D.) in American law and a Juris Master (J.M.) in Chinese law;⁵⁸ and STL's manner of teaching resembles not at all the McGill transsystemic approach,⁵⁹ but looks very much like the traditional LSU curriculum of paired but separate courses in each basic civil-law and common-law topic.⁶⁰ The STL degree program is about equally divided between courses dedicated to the basic American law school courses in both public and private law—taught in English and mostly during the first year of the 4-year program—followed by approximately two years of courses in Chinese law (taught in Mandarin) and American-law electives (taught in

⁵⁶ See above note 48 and accompanying text.

⁵⁷ Compare *LSU Highlights*, above note 49 (pointing out that LSU (2002-2008) offered two degrees, a Juris Doctor (J.D.) and a Bachelor of Civil Law (B.C.L.), thereby certifying instruction in both common law and civil law), and *ibid* (noting that the B.C.L. 'degree changed to diploma in civil law (D.C.L.) in 2008'), with *J.D. and J.M. Admissions*, PEKING UNIV. SCH. OF TRANSNAT'L L. [hereinafter *STL J.D./J.M.*] (showing that Peking University School of Transnational Law (STL) awards to every graduate a dual degree which is a 'fusion of an American-style Juris Doctor degree (J.D.) and a China law Juris Master degree (J.M.)'), available at <https://stl.pku.edu.cn/admissions/admissions/jd.html> (last visited June 29, 2025). See below note 58.

⁵⁸ See *Curriculum and Course Offerings*, PEKING UNIV. SCH. OF TRANSNAT'L L. (indicating that 'STL offers an American-style J.D. degree taught in English alongside a Chinese J.M. degree as well as an LL.M. degree taught in English'), available at <https://stl.pku.edu.cn/academics/55/55.html> (last visited June 29, 2025).

⁵⁹ See *Required and Complimentary Courses*, MCGILL STUDENT AFF. OFF.: FAC. OF L. (demonstrating that although similar in some respects, McGill University diverges from both LSU and STL because McGill teaches private-law topics simultaneously, blending common- and civil-law sources, specifically in contractual obligations, legal foundations, property, and criminal law), available at <https://www.mcgill.ca/law-studies/bcljdstudies/structure/courses> (last visited July 7, 2025).

⁶⁰ Compare *JD and J.M. Curriculum*, PEKING UNIV. SCH. OF TRANSNAT'L L. [hereinafter *STL Curriculum*] (showing that STL's J.D./J.M. program requires first year law students to take foundational American and Chinese law courses and in the subsequent years to take Chinese law and comparative-law courses), available at <https://stl.pku.edu.cn/academics/academics/JDandJMCurriculum.html> (last visited June 29, 2025), and *Core Foundation Courses*, PEKING UNIV. SCH. OF TRANSNAT'L L. (demonstrating that Chinese and American law courses are offered separately in civil procedure, constitutional law, contracts, criminal law, and legal writing and research), available at <https://stl.pku.edu.cn/academics/65/65.html> (last visited June 29, 2025), and *STL J.D./J.M.*, above note 57 (explaining that the dual J.D./J.M. program can be completed in 4 years), with *Juris Doctor and Optional Graduate Diploma in Comparative Law Degrees*, LSU LAW (2025) (indicating that in recent years, 2015-2025, LSU pairs the J.D. with a Diploma in Comparative Law (D.C.L.) which requires an additional 15 credit hours of comparative law and that for 1L students 'Contracts, Torts, Federal Civil Procedure, Criminal Law, Criminal Procedure, and Legal Writing and Research are required, as well as Obligations, Civil Law Property, and Legal Traditions, a study of the traditions and methodologies of the civil law and common law system' and that thereafter students may select from 15 hours of other various global, comparative, or civil-law electives), available at <https://law.lsu.edu/academics/curriculum/jdcl/> (last visited June 29, 2025), and *LSU Highlights*, above note 49, and *BCL/JD Program Structure and Requirements*, MCGILL STUDENT AFF. OFF.: FAC. OF L. (explaining that McGill University offers a dual degree program in comparative law, Bachelor of Civil Law (B.C.L.) and J.D., which can be completed in 3.5 to 4 years), available at <https://www.mcgill.ca/law-studies/bcljd-studies/structure> (last visited July 7, 2025). See also above note 48 and accompanying text.

English).⁶¹

What I suggest, then, is that any faculty contemplating a transnational or bijural degree program might want to favor the traditional LSU post-1950, and current STL, approach;⁶² for it seems more compatible with faculty teaching habits and preferences⁶³ and also with the learning capacities and inclinations of most law students—who typically find it daunting enough to learn, for example, one system of property law at a time, and therefore likely will be confused and overwhelmed by trying to learn common-law and civil-law property simultaneously in one integrated class. And one final observation or, better said, hypothesis: the McGill-style fully integrated bijural curriculum may be more suited to law schools located in strong ‘code jurisdictions’ that are situated in a legislative-supremacy polity, especially if those polities have remained largely untouched by American-style judicial-supremacy,⁶⁴ American Legal Realism,⁶⁵ and American student consumerism.⁶⁶ The name of one such nubile polity is the modern, Blackstonean United Kingdom.⁶⁷

The innate compatibilities and affinities of such ‘strong code,’ legislative-

⁶¹ See *STL Curriculum*, above note 60 (stating that the J.D. portion of the dual J.D./J.M. degree, encompassing almost the entire first year, is taught completely in English); see also *Program Structure and Curriculum*, PEKING UNIV. SCH. OF TRANSNAT’L L. (demonstrating that STL offers the J.D./J.M. degree in a four-year program with bilingual curriculum), available at <https://stl.pku.edu.cn/admissions/admissions/jd.html> (last visited on Aug. 3, 2025). The third and fourth years of the STL dual-degree program allow for electives plus extramural clerkships and externships. See PEKING UNIVERSITY SCHOOL OF TRANSNATIONAL LAW ACADEMIC HANDBOOK 2024-2025, at 55, available at https://stl.pku.edu.cn/upload/s/202411/26100406_21647_39060313%5B-%5D%E3%80%90stushiwu%E3%80%91SchoolofTransnationallLawAcademicHandbook2024-2025.20241126.pdf (last visited Aug. 2, 2025).

⁶² For the traditional LSU Law curriculum, see above note 48 and accompanying text.

⁶³ See above note 53.

⁶⁴ For the errors in the conventional understanding of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), as having established not only judicial review of congressional legislation, but also the primacy of the Supreme Court’s constitutional ‘opinions,’ see James Étienne Viator, *Marbury and History: What Do We Really Know About What Really Happened?*, 37 REVUE JURIDIQUE THÉMIS 329 (2003). For thoughtful analysis and critique of juristocracy, see generally *COURTS AND THE CULTURE WARS* (Lexington Books, Bradley C. S. Watson ed. 2002).

⁶⁵ For Anglo-European rejection of American Legal Realism’s assault on legal doctrine and the autonomy of law, see Dan Priel, *The Law and Politics of Unjust Enrichment*, 63 UNIV. TORONTO L.J. 533, 561–64 (2013). See also WILFRID E. RUMBLE, *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* (Cornell Univ. Press, 1968); Wilfrid E. Rumble, *Legal Realism*, in 4 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1580, 1580* (Macmillan Ref. USA, Leonard W. Levy et al. eds., 2d ed. 2000) (noting that the ‘rule-skepticism’ of the American Legal Realists contained antinomian tendencies which necessarily depreciated the value and role of legal doctrine in judicial decision-making).

⁶⁶ See above notes 3–10 and accompanying text.

⁶⁷ See JOHN PHILLIP REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 80–81, 93–94* (N. Ill. Univ. Press, 2004) (discussing the development of parliamentary supremacy and sovereignty in eighteenth-century Britain); WILLIAM SELINGER, *PARLIAMENTARISM: FROM BURKE TO WEBER* passim (Cambridge Univ. Press, 2019) (arguing that the classic parliamentary form of government is defined by four characteristics: an elected and powerful, even sovereignly supreme, legislature; ministers who can remain in office only with parliamentary support; a constitutional monarch without constitutional prerogatives; and a system of multi-party competition for seats in parliament).

supremacy polities with the integrated bijural curriculum may be part of the explanation for why the integrated-course approach thrives in universities like McGill, and the University of Luxembourg, and Maastricht University in the Netherlands⁶⁸—all schools where English, not American, common law is the second system to be taught and where there is little to no influence of American legal realism or American-style judicial supremacy.⁶⁹

Given this Article's attention to Peking-STL and given the *Juris Diversitas* connection with Macau University, it is appropriate, I think, to close with a reference to Lu Chi, a Chinese soldier-poet of the third century C.E. Lu Chi produced a primer to teach others how to write belletristic literature; his primer is entitled *Wen Fu*, which translates freely as 'the art of literary composition.' In the preface to his primer, Lu Chi wrote a passage to both encourage and console the student, which passage might provide the same consoling encouragement to law professors and *Juris Diversitas* members, as we strive to explain and teach comparative law. Lu Chi wrote: 'Still the beautiful can be distinguished from the common, the good from the mediocre. . . . Each writer finds a new entrance into the mystery, and it is difficult to explain. Nonetheless, I have set down my thinking as clearly as I can.'⁷⁰

Thus, in the spirit of Lu Chi, I close with the hope that you will deem my ruminations clear enough to provide a fitting preface to the Macau University *Juris Diversitas* Conference.

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⁶⁸ See Jukier, above at note 42, at 11–12, 18–19 (describing a transsystemic approach as one which 'blends indigenous legal traditions as well as those of the civil and common law' and noting that the University of Luxembourg emulated McGill's transsystemic approach and 'adopted a version that might be called a close cousin'); see also *Faculty of Law, Bachelor European Law 2023-2024*, MAASTRICHT UNIV. 3-7 (indicating that as of the 2024–2025 academic year, Maastricht University's Bachelor in European Law curriculum comprised several required courses in which legal concepts were taught through a comparative methodology involving the concurrent analysis of multiple jurisdictions), available at <https://www.maastrichtuniversity.nl/file/curriculum-law-bachelor-european-law-school-2024-2025pdf> (last visited Aug. 5, 2025); see Morissette, above note 44, at 18 (describing McGill's transsystemic approach to bijural legal education as one that presents courses as 'a unified field across the divide between legal traditions' of civil law and common law, engaging both systems simultaneously to create an 'amalgamated whole').

⁶⁹ See above notes 64 & 65.

⁷⁰ LU CHI, *WEN FU: THE ART OF WRITING* 3-5 (Milkweed Editions, Sam Hamill trans., rev. ed. 2000).

ANDREA PRADI SARA HEJAZI RICHARD HALL-WILTON

RETHINKING THE HUMAN—THING RELATIONSHIP A CONVIVENCIA TOWARDS INTERDISCIPLINARY RESEARCH *

ABSTRACT: This article offers a critical re-examination of the human–thing relationship through an interdisciplinary lens, tracing the anthropocentric and deterministic assumptions that have shaped Western legal and scientific thought since the rise of modernity. The first part reconstructs the epistemological foundations of this worldview, rooted in seventeenth-century mechanistic science, which positioned the human subject as external to and sovereign over a passive, fully knowable world. This logic deeply informed the legal architecture of modernity, particularly through the doctrines of sovereignty and private property, which became central tools for asserting human control over the material world. The second part explores how this paradigm has been challenged by developments in contemporary physics—especially the relational ontology of quantum theory—as well as by anthropological and ethnographic research that reveals the co-constitutive nature of human and non-human agency. These shifts call into question the presumed neutrality and universality of legal categories. Drawing on the methodology of comparative law, the final part argues for a reorientation of legal thinking: away from abstraction and control, and toward a plural, situated, and relational model of normativity. In this light, law is no longer a neutral framework imposed from above, but a cultural practice embedded in material, ecological, and symbolic relations. The article concludes by proposing the notion of a *convivencia* of things as a heuristic for reimagining legal institutions capable of responding to the complexity of a shared, entangled world.

KEYWORDS: Epistemology of Modernity, Subject, Object Dualism, Quantum Paradigm Shift, Relational Ontologies, Comparative Law and Interdisciplinarity

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I. INTRODUCTION

The dominant narrative of modernity has long placed the human being at the center of the universe. In this vision, nature and society alike are seen as external realms over which humans, through knowledge and will, exercise control in pursuit of material ends and desires. This anthropocentric perspective has not only shaped the epistemological frameworks of modern science but has also deeply informed the structure of legal systems. However, a growing body of interdisciplinary research—from quantum physics to comparative law—is beginning to dismantle this narrative. What emerges from the process is a vision of the world, and of the legal order, as a dynamic, plural, and relational reality.

II. MODERNITY AS AN ANTHROPOCENTRIC ORDER

Modernity has been characterised by a narrative in which the relationship between humans and things is fundamentally hierarchical. At the heart of this configuration lies the presumption that the human subject stands outside and above the natural and social order, as the only being capable of quantifying, observing, understanding, measuring and ultimately mastering reality. This perspective has served as the conceptual cornerstone for an order premised on predictability, mastery, and control. The intellectual roots of this paradigm lie in the scientific revolution of the seventeenth century and its consequent understanding of reality. In the cosmology of Newton and Descartes, the universe was conceived as a vast and perfectly intelligible and deterministic machine.¹ This mechanistic worldview entailed a sharp epistemological division between the subject and the object: the observer and the observed. From Descartes' dualism and Newtonian physics, a model of reality emerged in which all phenomena were seen as determined, measurable, mechanistic, and reducible to causal chains.

This model did not remain confined to natural sciences but spread to knowledge at large. In the era defined as 'modernity', it permeated all domains of scientific investigation, extending its influence on the social sciences as well. The result was an epistemic environment that favoured progressive domination of the human over the non-human: an order of

¹ René Descartes, *Discourse on the Method of Rightly Conducting One's Reason and of Seeking Truth in the Sciences* (first published 1637, Ian Maclean tr, Penguin Classics 2003). Originally written as an introduction to his scientific treatises (Dioptrics, Meteorology, and Geometry), the Discourse aimed to present a new rational method for attaining certain knowledge and to provide a philosophical foundation for the emerging modern sciences.

things emerged around the sovereign capacity of human agency to direct, shape, and govern reality.²

However, it was not a merely metaphorical extension. The very language of science—its metaphors of force, equilibrium, causation, and system—was transplanted into analyses of society and human behaviour. Human collectives came to be viewed as systems; their behaviours as determined by laws; their outcomes as predictable if properly measured. In this context, the idea of the autonomous, rational subject gained institutional form: the subject who, standing apart from the world, could model it, control it, and render it intelligible through increasingly sophisticated tools of measurement and administration.³

Thus, the paradigm of the machine extended far beyond its original terrain. In its path, it reconfigured the status of things—not as interlocutors or participants in human life, but as neutral substrates to be acted upon. And it redefined the role of knowledge—not as situated or relational, but as the cumulative mastery of an external reality through abstract principles. The modern sciences, both natural and social, were thereby enlisted in a larger project: the rationalization of the world under the sign of human control.

III. LEGAL TRANSPOSITIONS: POSITIVISM, SOVEREIGNTY, AND PROPERTY

The diffusion of the mechanistic and deterministic model across the sciences did not spare legal thought. As disciplines internalised the epistemic grammar of modernity—founded on observation, classification, and control—law too redefined its relationship with reality. It did so by adopting a rationalist model of normativity grounded in clarity, systematisation, and formal coherence. Within this paradigm, the separation of humans and things—epistemologically inherited from Cartesian dualism—became the conceptual device that enabled jurists to transpose into the institutional framework of modernity the positivistic vision of the world as fully knowable, and thus fully governable.

² As Michel Foucault explains, each historical period is governed by a specific episteme—a shared set of underlying assumptions that determine what can be known, how knowledge is structured, and what counts as valid explanation across all disciplines. See Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Vintage Books 1970) 168.

³ Émile Durkheim, *The Rules of Sociological Method* (William David Halls tr, Free Press 1982) 50. In this pioneering work, Durkheim explicitly argued that social facts should be studied ‘as things’ applying the model of natural science to social phenomena. He sought objective, generalisable laws—mirroring Newtonian ideals of system, causality, and external observation.

Legal scholars actively contributed to the construction of a normative architecture capable of transforming things into objects. In this framework, private property emerged as the privileged device for structuring the relationship between humans and the material world—no longer a plural and historically embedded institution, but a relationship reimagined as one of dominion, use, and exclusion.⁴

This vision reached its most emblematic codification in the Napoleonic Code—particularly article 544—and was later systematised by the Pandectist tradition, which elevated private property to the apex of subjective rights.⁵ Anchored in natural law justifications, especially Locke's labour theory, property was conceived as a natural extension of personhood and productivity,⁶ becoming the juridical expression of human sovereignty over the non-human.⁷

Its structural simplicity and its conceptual abstraction have determined the success of the property rights paradigm and the seeds of its rapid diffusion.⁸ Detached from specific social or material contexts, the proprietary form could circulate across legal traditions, cultures, and economies, becoming the backbone of the market economy along which an impressive number of new situations were transformed by law into commodities.⁹

Thus, private property—constructed as an exclusive, absolute right—became the dominant legal device through which modernity mediated the human-thing relationship. And in so doing, it prepared the ground for an unprecedented expansion of commodification: a process that extended property regimes to domains such as air, water, culture, genetic resources, and personal identity—realms which, by their very nature, resist being owned.¹⁰

IV. THE BIAS OF ANTHROPOCENTRISM

Despite its pervasiveness, the anthropocentric stance that underpins

⁴ Antonio Gambaro, 'Ownership and Modern Legal Systems' in Antonio Gambaro and Alfredo Mordechai Rabello (eds), *Essays on Italian Law* (Giuffrè 2003) 23.

⁵ James Gordley, 'Myths of the French Civil Code' (1994) 42(3) *American Journal of Comparative Law* 459.

⁶ John Locke, *Two Treatises of Government* (Peter Laslett ed, Cambridge University Press 1988).

⁷ Paolo Grossi, *La proprietà e le proprietà nell'officina dello storico* (Editoriale Scientifica 2006).

⁸ Duncan Kennedy, 'Two Globalizations of Law and Legal Thought: 1850–1968' (2003) 36(3) *Suffolk University Law Review* 631, 648 ff.

⁹ Charles A Reich, 'The New Property' (1964) 73(5) *Yale Law Journal* 733.

¹⁰ Ugo Mattei and Andrea Pradi, 'Property Rights: A Comparative Law and Economics Perspective in the Global Era' in Donatella Porrini and Giovanni Battista Ramello (eds), *Property Rights Dynamics: A Law and Economics Perspective* (Routledge 2007).

modern legal and scientific rationality is far from neutral. It is a historical construct, rooted in the epistemological and political paradigms of early modernity, and carries with it a set of biases that limit its explanatory and normative reach.

On the one hand, this perspective fails to account for the paradigmatic transformation introduced by developments in contemporary physics—particularly the quantum turn of the twentieth century—which has fundamentally challenged the Newtonian worldview on which the anthropocentric order was built. In the classical model, the human subject stands outside of and above the natural world, capable of observing and determining it without interference. The insights of quantum mechanics have unsettled this position: reality is no longer conceived as fixed, linear, and separable, but as relational, indeterminate, and shaped by the very act of observation. In this framework, the observer is no longer detached but entangled with the system observed, undermining the metaphysical foundations of the subject-object divide.¹¹

On the other hand, the anthropocentric model obscures the co-constitutive relationship between humans and things that characterised much of human history. It imposes a retrospective illusion of separation and mastery, ignoring that for millennia human agency has developed through mutual adaptation with the material environment. Recent advances in anthropology, ethnography, archaeology, and genetics¹² have revealed that human identity and social organisation are not pre-existing and autonomous, but rather emergent properties of situated relations with things—tools, land, animals, and built environments.¹³

From the earliest forms of collective appropriation and ritualised land use to the technical and symbolic infrastructures of agrarian and urban societies, the human has always been shaped by the non-human. Material culture is not a passive backdrop to human history, but an active force in its production, conditioning forms of perception, memory, cooperation, and conflict.¹⁴

V. THE QUANTUM TURN: FROM MECHANISM TO NETWORK

Quantum physics and relativity are cornerstones of what is often termed

¹¹ Werner Heisenberg, *Physics and Philosophy: The Revolution in Modern Science* (Harper & Row 1958).

¹² Luigi Luca Cavalli-Sforza, *Genes, Peoples and Languages* (Penguin Books 2000).

¹³ Ian Hodder, *Entangled: An Archaeology of the Relationships between Humans and Things* (Wiley-Blackwell 2012).

¹⁴ Tim Ingold, *The Perception of the Environment: Essays on Livelihood, Dwelling and Skill* (Routledge 2000).

modern physics.¹⁵ The effects of both theories can be very weird compared to our everyday understanding of the world around us—as beautifully illustrated by G. Gamow’s *Mr Tompkins* series.¹⁶ Simply put everything is relative. The weirdness introduced is that of a perspective, that of probability, of extreme observer subjectivity in interactions and lack of objectivity, and that change is observed, not stasis. These all cry out against naive expectations for how things work, like Einsteins ‘god does not play dice’¹⁷ protest against the randomness of quantum mechanics and its wave mechanics implying probability fields describing objects, until they are observed.

In the well-known thought experiment of Schrödinger’s cat¹⁸ conceived in a time more permissive of animal cruelty, the cat in the box is considered neither alive nor dead until it is observed: instead, the interpretation is that the cat exists in a superimposed state—both dead and alive simultaneously—until observation resolves its state. A less frequently considered perspective is that the cat likely believes it is alive until it is not, after which it’s unlikely to think.

This scenario vividly illustrates the stark contrast between quantum physics concepts and our everyday experiences. The analogy aims to convey that the quantum world is best described as a series of probability fields, indicating the likelihood of an entity being in one place or another. These probability fields can be represented by wavefunctions, which ‘collapse’ into a discrete solution upon observation, manifesting as a particle or object. This collapse implies a discrete interaction, suggesting that we perceive interactions or changes rather than stability; we observe only change.

This focus on observing change offers an interesting perspective on the classic philosophical question: ‘If a tree falls in a forest and no one is around to hear it, does it make a sound?’¹⁹

This wave-particle duality pervades the quantum physics description. The Standard Model, our most comprehensive fundamental description of the universe—encompassing the strong, weak, and electromagnetic

¹⁵ Richard Phillips Feynman, Robert Benjamin Leighton and Matthew Sands, *The Feynman Lectures on Physics: Volumes I, II, III* (New Millennium edn, Pearson/Addison-Wesley 2006).

¹⁶ George Gamow, *Mr Tompkins in Wonderland* (Cambridge University Press 1940).

¹⁷ Max Born, *The Born–Einstein Letters: Correspondence between Albert Einstein and Max and Hedwig Born from 1916–1955, with Commentaries by Max Born* (Macmillan 1971).

¹⁸ Erwin Schrödinger, ‘Die Gegenwärtige Situation in der Quantenmechanik’ (1935) 23 *Die Naturwissenschaften* 807–812, 823–828, 844–849.

¹⁹ George Berkeley, *A Treatise Concerning the Principles of Human Knowledge* (Oxford University Press 1998).

forces but not yet including gravity—exhibits both wave and particle characteristics. It includes a quantum field theory description—the Standard Model equation, which could be viewed as our current best attempt at an equation of ‘life, the universe, and everything’²⁰—and a particle description, consisting of 12 particles, their corresponding antiparticles, and 5 force-carriers.

In this framework, the field defines the probability of a particle being at a certain point. A particle is essentially a collapsed wave function. The field materializes into a particle upon interaction, i.e., when it is observed. Thus, what you observe depends on your perspective. Moreover, the manner and energy with which you observe the field can reveal finer details.²¹ Again, observation is subjective.

This underscores the centrality and significance of observation, a subjective process that influences the system. Without affecting the system, even slightly, there can be no observation. We inhabit a subjective world.

It has been noted that this perspective might represent a return to the centrality of humans in the world—not as the center of the universe, but as the center of a subjective universe based on observation.²²

This complementary reframing offers opportunities for new perspectives.²³ Can this centrality and language be useful from an anthropological or legal perspective, not just a physical one?

While the scientific revolution inaugurated by Descartes and Newton introduced a mechanistic worldview grounded in determinism and separability, it also entrenched a sharp epistemological divide between subject and object—between the observer and the observed. This division enabled the human subject to place itself outside the system, assuming the role of a neutral observer capable of decoding and mastering the universe conceived as a vast, intelligible machine. Reality, under this paradigm, was presumed to be composed of discrete, stable ‘things,’ governed by universal laws and independent of perspective.

The quantum turn dismantles this edifice. At its core lies a radical shift of metaphor: from understanding the world as a machine to conceiving

²⁰ Douglas Adams, *Life, the Universe and Everything* (BBC Books 1982).

²¹ Richard Hall-Wilton, *Diffraction and Non-Diffractive Charm Production in Deep Inelastic Scattering at HERA* (PhD thesis, University of Bristol 1999).

²² Sara Hejazi, ‘Awe of Displacement: Recentering Humans in a Post-Quantum Era’ (2025) 26 *Annali di Studi Religiosi* 237.

²³ Sara Hejazi, Richard Hall-Wilton and Massimo Leone, ‘Introduzione’ (2025) in Richard Hall-Wilton, Sara Hejazi and Massimo Leone (eds), *La Rivoluzione Quantistica* (Fisica, Antropologia, Religione 2025) *Humanitas*.

it as a network of relations, interdependencies, and probabilities. In this new paradigm, the very question ‘what is a thing?’ becomes destabilized. Quantum physics reveals that matter is not fixed, and that the identity of ‘things’ is contingent on how, and at what scale, we observe them. The closer we look, the less solid our objects become. Instead of discrete entities, we encounter wave functions, fields of potentiality, and thresholds of probability. What appears as a ‘thing’ at one scale dissolves into interactivity at another. This shift undermines the illusion of objectivity. Observation is no longer a passive act, but an event that collapses potential into actuality; the observer and the observed are entangled in the emergence of the phenomenon itself. We do not observe things—we observe change. What becomes visible is not an inherent property of the object but a consequence of the act of observation, shaped by position, energy, and intention. In this sense, the universe is not a static tableau of facts waiting to be discovered but a dynamic unfolding in which the observer plays a constitutive role. Subjectivity, far from being a flaw in knowledge, is revealed as its necessary condition.

This paradigm shift does not simply return the human subject to the center—it repositions them within a subjective universe, where perception, entanglement, and relationality become the core principles of intelligibility marking a radical departure from the anthropocentric illusion of mastery.

VI. THE CONVIVENCIA OF THINGS

Continuing with the physics perspective, and thinking about the description of things: is ‘A rose is a rose is a rose’²⁴, i.e. the law of identity or ‘are things what they are?’²⁵ Looking at the world around us, where materials and objects seem rigid, solid and well-defined, it might seem simple to concur with this statement as self-evident. Let’s challenge this by taking different perspectives on objects,²⁶ and seeing whether the scale of observation defines the thing observed.

To carry out this exercise—let’s start with an object—that exemplar rose of Gertrude Stein. The perspective can then be changed on this

²⁴ Gertrude Stein, ‘Sacred Emily’ in *Geography and Plays* (Four Seas Company 1922).

²⁵ Plato, *Theaetetus* (Robin Waterfield tr, Oxford University Press 2004); Gottfried Wilhelm Leibniz, *New Essays on Human Understanding* (Peter Remnant and Jonathan Bennett trs, Cambridge University Press 1981).

²⁶ Richard Hall-Wilton, ‘What Can Quantum Physics Offer the Humanities?’ in Richard Hall-Wilton, Sara Hejazi and Massimo Leone (eds), *La Rivoluzione Quantistica* (Fisica, Antropologia, Religione 2025).

object by both zooming out and zooming in from the original perspective and see how the description of the key features of the object under observation changes with that change of perspective of scale.

Starting with zooming out from the scale of a rose—maybe 10 cm in size, to then observe it at the scale of the earth (diameter ca. 12740km), and the scale of the galaxy (87000 light years diameter) and the scale of the universe (observable universe ca. 93 giga light years).

At the scale of the rose itself (10cm), it is a living flowering plant.²⁷ It grows by obtaining energy from sunlight to produce sugars from carbon dioxide and water. Below ground it has roots; above ground, there is the thorny stem, leaves, and the attractive colourful flower which led to it being the example selected. Chemically, it contains a high fraction of water, is made of mainly carbon, hydrogen and oxygen, with a requirement for many other organic and inorganic nutrients to thrive, including nitrogen and potassium.

At the scale of the earth (ca. 13000km), there is the ‘blue planet’, with about 70% of the surface covered by saltwater oceans.²⁸ The planet itself is a rocky planet with an iron (89%) and nickel (6%) core. The crust has a quite different elemental composition, by order of decreasing composition: oxygen (46%), silicon (28%), aluminium (8.3%), iron (5.6%), sodium (2.5%), magnesium (2.4%), potassium (2.0%), titanium (0.61%), everything else being <0.15%. This is strikingly different from the core elemental components for life.

Arriving at the scale of our galaxy (87000 light years diameter²⁹), the Milky Way, it is a spiral galaxy. The thickness of the milky way is 1000 light years in the arms. At the centre of the galaxy is a supermassive black hole of 4 million solar masses (the mass of the sun). The chemical composition of the milky way is 74% hydrogen and 24% helium. This leaves 4% for all the other elements.³⁰ Also surprising is that the ordinary matter that can be observed seems to compose only 15% of the mass of the milky way. The other 85% of the mass cannot be observed—so called dark matter as it is invisible to light. It is a matter of great research interest to find and understand the nature of this dark matter.³¹

The size of the observable universe is defined by the physical limit

²⁷ Jennifer Potter, *The Rose: A True History* (Atlantic Books 2010).

²⁸ Tjeerd H van Andel, *New Views on an Old Planet: A History of Global Change* (2nd edn, Cambridge University Press 1994).

²⁹ A Light Year is the distance light travels in 1 year. It is 10 million million km (10^{13} km).

³⁰ Malcolm S Longair, *Galaxy Formation* (3rd edn, Springer 2023).

³¹ Matthias Bauer and Tilman Plehn, *Yet Another Introduction to Dark Matter* (Springer 2019).

created by the speed of light, and the particle horizon created by this light. Beyond this nothing could be detected as the light could not have reached us yet. This size is about 93 giga light years. The median of the universe is empty; it is punctuated by massive galaxies and clusters of galaxies. Taking the overall properties of the universe, in the same way as was done for the milky way, about 5% of the universe is composed of the ordinary matter that we observe, another 25% is the dark matter of missing matter that is not observed. The remaining 70% is termed dark energy—it is energy, which our understanding of how the universe works tells us must be there, but we do not understand the nature of it yet. It is surprising that the vast majority of the universe is not understood as to what it is composed of.³²

Looking at the edge of this observable universe, on the particle horizon, is the cosmic microwave background. This is the first light that we can observe in the universe, 380000 years after the big bang. This light is at -3K which is -270 C. This is currently as far back as we can observe at the moment.³³ What we see when we observe a map of the temperature fluctuations in the cosmic microwave background is the fluctuations at this stage of the universe's development.

From the above, it can be seen that the description and view of the rose varies wildly as the scale is zoomed out. Performing this zooming in the opposite direction is similarly enlightening. In doing this, the exercise is nicely summarised by Jonatham Swift:

*So, Nat'ralists observe, a Flea
Hath smaller Fleas that on him prey,
And these have smaller yet to bite 'em,
And so proceed ad infinitum*³⁴

Here again, starting from the scale of the rose (10cm), one can zoom down to the cell level (1-100um), observe life and death, DNA (6um), molecules and atoms (1A-10nm), subatomic (1A), subnuclear (1-10fm) and finally vacuum fluctuations.

The cell (1-100um) is the basic structure and functional division of life. It only becomes visible under a microscope. There are many different types of cells. There are 2 billion cells in a rose; 30 trillion in a human.

Life itself is a change of perspective! Looking at something alive or dead seems obvious as to its state—think of a beautiful full tree in a park

³² Jorge Cham and Daniel Whiteson, *We Have No Idea: A Guide to the Unknown Universe* (Penguin 2017).

³³ Alessandra Balbi, *The Music of the Big Bang* (Springer 2007).

³⁴ Jonathan Swift, 'On Poetry: A Rhapsody' in Temple Scott (ed), *The Works of Jonathan Swift*, vol X (Blackwell 1902); Augustus De Morgan, *A Budget of Paradoxes* (Longmans, Green & Co 1872).

in contrast to firewood or furniture. However, what is the breath of life is complex: defining life is difficult. Recently it was determined that there are >120 definitions of life;³⁵ none of them all encompassing or perfect.

DNA is often described as the genetic code for life. It is a double helix of identical information. It acts as long term genetic information storage. It is a few nm wide, but if stretched out would be very long—for a human 2m long. Inside a cell, it might be distributed across 6µm in the nucleus of the cell. One of the key features of DNA is its replication; this is done by unwinding strands using molecular machines and using each strand as a template for the copy.³⁶ The fidelity of this replication is extremely accurate, with only a 1 in 10 million error rate. This error rate is key—too high, and successful competition and survival is endangered, but a finite error rate is what allows for the application of natural selection and evolution.³⁷

The atomic level (0.1nm or 1Å) is the basic unit of the chemical elements. There are 118 chemical elements, 94 of which occur naturally on earth, the rest synthesised. The atom is a nucleus, with electrons circulating in bands around it. The typical cartoon image of the electrons in planetary orbits around a balls like nucleus is slightly misleading; the size of the nucleus is much smaller, and the electrons behaviour is better described by quantum mechanics; this can be thought of as probability bands for their wave formalism. Of these 118 chemical elements, life as understood thus far requires carbon, hydrogen, nitrogen, oxygen phosphorus and sulphur.

At the subatomic level, all common matter that is observed 'everyday' is composed of protons and neutrons in the atomic nucleus, and electronics orbiting around that nucleus.

The protons and neutrons are themselves composite entities. The proton is composed of 2 up quarks and 1 down quark. The neutron conversely has two down quarks and 1 up quark. These quarks are 'glued' together in the atomic nucleus by gluons, which are the force carriers or mediators of the strong nuclear force. These are believed to be fundamental particles in the standard model of elementary particles, which in its particle description contains 6 'flavours' of quarks, 3 leptons (electron, muon and tau) and their corresponding flavour of neutrinos. All of the particles have corresponding opposite antiparticles. Interacting between the elementary

³⁵ Edward Nikolayevich Trifonov, 'Vocabulary of Definitions of Life Suggests a Definition'(2011) 29 (2) Journal of Biomolecular Structure and Dynamics 259.

³⁶ Peter M Hoffmann, *Life's Ratchet: How Molecular Machines Extract Order from Chaos* (Basic Books 2012).

³⁷ Richard Dawkins, *The Selfish Gene* (30th anniversary edn, Oxford University Press 2006).

particles are the force carriers of each of the fundamental forces: photon (electromagnetic force), gluon (strong force), Z and W boson (weak force) and Higgs (higgs field). The standard model is at the same time both simple (the number of fundamental particles fits on 1 page) and complicated in terms of a fundamental description of the universe. It is perhaps surprising that the everyday world observed contains only a small number of the total everyday particles.³⁸

The quantum nature means that what you observe depends upon how you look at it. For example, if you observe a proton, the energy of the particle interrogating it will determine what you 'see' inside the proton. At the lowest energies it might just be the two up and one down quarks; at higher energies, it might be the gluons as well; at the highest energies, it is possible to resolve yet more gluons and fluctuations into other quark-antiquark pairs, such as charm quarks. It has been observed that at the highest energies, and with the shortest dimensions of the probes, there is up to 30% chances that the probe might interact with a charm quark³⁹: a quark that does not natively exist inside the proton. This shows that at the quantum level, the observation is highly subjective and dependent upon the observer.

The above observation comes about due to Heisenberg's uncertainty principle: that you cannot know the position and momentum perfectly, and this allows gluons and quark-antiquark pairs to exist for short periods of time, borrowing energy from the vacuum. These quantum and vacuum fluctuations are what is observed at the smallest scale: temporary random fluctuation of energy at a point in space as allowed by Heisenberg's uncertainty principle. The shorter the time, the larger the energy fluctuation allowed. This means at the smallest scales of space there are particle-antiparticle pairs popping in and out of existence all the time.⁴⁰

That completes our quick tour of a rose by changing the perspective of the viewer. What is to be learnt? It matters how you view things: by taking various perspectives on things, the initial description of those things changes enormously. There is a joke describing that theoretical physicists

³⁸ Brian Robert Martin and Graham Shaw, *Particle Physics* (4th edn, Wiley 2013); Jonathan Allday, *Quarks, Leptons and the Big Bang* (3rd edn, Taylor & Francis 2017).

³⁹ ZEUS Collaboration, 'Measurement of $D^*\pm$ Production and the Charm Contribution to F_2 in Deep Inelastic Scattering at HERA' (2000) 12 *European Physical Journal C* 35 (DESY Preprint 99-101); Richard Hall-Wilton, *Diffraction and Non-Diffraction Charm Production in Deep Inelastic Scattering at HERA* (PhD thesis, University of Bristol 1999).

⁴⁰ Tony Hey and Patrick Walters, *The Quantum Universe* (Cambridge University Press 2003).

approach the world by approximating for example a cow as spherical⁴¹: here the nature of that rough description really changes the spherical description, depending upon the perspective and scale of the observation made. There is a degree of subjectivity to each observation.

This means that the scale of the observation matters. In turn so does the definition of things: that definition and the details matter. In terms of the scale of the observation, the scale of the perspective taken might be in space, time, energy or its state of life. Different perspectives and scales give different information on the same thing.

In summary—a rose is not a rose is not a rose. The identity that you observe is a function of the perspective taken on that thing or object. That means that the thing in question is from a physical point of view very much a ‘convivencia’ of different descriptions based on different perspectives that it is possible to take towards that object. A fundamental singular description of an object is not possible; the perspective taken must be part of that description. This is a convivencia of things.

VII. FROM CHAOS TO COSMOS

Anthropological perspectives reveal that, from the very beginning, the human relationship with things has been animated by the drive to bring order to disorder—a cultural gesture through which rituals, myths, and material forms have given shape to shared worlds, turning chaos into cosmos.

Since ancient times, the concept of chaos has been used by humans to describe the primordial soup from which life emerged. Etymologically, the term derives from the Greek *Xaínō* / *Xáskō*, meaning ‘to be open wide,’ evoking an image of openness, multiplicity, and potentiality. Chaos has thus been associated with indeterminacy, the coexistence of parallel realities, and the raw, unstructured matter that preceded the emergence of its opposite: the kosmos—the ordered universe. In many cosmologies and foundational myths, chaos marks the beginning of time, the initial condition from which human existence departs in the direction of increasing order, structure, and civilization.⁴²

This narrative—from chaos to cosmos—recurs across cultures and epochs. Anthropologically, human societies and religious traditions have

⁴¹ Albert O Williams Jr, ‘Normal-Mode Methods in Propagation of Underwater Sound’ in Vernon M Albers (ed), *Underwater Acoustics* (Wiley-Interscience 1970).

⁴² Emiliós Christodoulidis, ‘Kosmos, Nomos, Physis, and the Concept of Liberal Democratic Law’ (2021) 23(2) *Etica & Política* / *Ethics & Politics* 481.

consistently performed the function of bringing order to chaos, not only externally, in the natural or social world, but also internally, within the human psyche. The myth of Gilgamesh, for instance, begins with a hero engulfed by tumultuous emotions and existential confusion.⁴³ Through trials and encounters with death, Gilgamesh gradually learns to accept mortality—embracing limitation, and thereby order—and eventually becomes a wise and just ruler. Similarly, in the Chinese creation myth of Pangu,⁴⁴ the primordial chaos is imagined as an egg within which opposing forces are entangled. The giant Pangu separates these forces—Yin from Yang—thus creating the foundational distinction between heaven and earth and establishing the order of the universe according to cosmic time.

The impulse to structure, separate, and define—to impose a legible order upon an ambiguous, entropic beginning—has animated human symbolic systems throughout history. Across myth, ritual, philosophy, and social organization, the humanities and social sciences have long studied these cultural efforts to confront and domesticate chaos. Whether through cosmological narratives, ritual enactments, legal rules, or moral systems, the ordering of chaos remains a central axis in the formation of cultural meaning.

In this light, the entire human symbolic universe—institutions, knowledge systems, technologies, social formations—can be understood as a long attempt to impose order on the chaos of existence. For over 300,000 years, humanity has pursued the conviction that the universe, though initially obscure, could be rendered intelligible through discovery, error, sacrifice, and transmission. This belief has animated scientific endeavours as well, grounded in the assumption that reality, if sufficiently scrutinized, would yield to mastery. It promised that human beings might ultimately govern the forces that once threatened them, bending nature to will and designing futures with precision. These have been the foundational myths of modernity as well.⁴⁵

But with the quantum revolution, this arc of human confidence encountered a fold in space-time. What was once imagined as the linear distance from chaos to order now appears as a loop: the chaos we believed to have overcome is no longer behind us, but before us. The age of

⁴³ Ajay Kumar Gangopadhyay, 'The Epic of Gilgamesh: A Saga of Humanism Mythified' (2020) 1(1) *New Literaria: An International Journal of Interdisciplinary Studies in Humanities* 96.

⁴⁴ Paul R Goldin, 'The Myth That China Has No Creation Myth' (2008) 56 *Monumenta Serica* 1.

⁴⁵ Sara Hejazi, 'Dal Disordine all "Ordine, E Viceversa. L" Antropologia Incontra la Fisica Delle Particelle' in R Hall-Wilton, Sara Hejazi and Massimo Leone (eds), *La Rivoluzione Quantistica* (Fisica, Antropologia, Religione 2025).

determinism—where nature was predictable, time linear, and observation objective—has given way to an age of radical indeterminacy, non-locality, and entanglement. Suddenly, *chaínō*—the openness of chaos—returns not as origin but as horizon.

As physicists Leon M. Lederman and Christopher T. Hills put it in *Quantum Physics for Poets*,⁴⁶ observers in the classical era were like aliens hovering above Earth, perceiving only the predictable motions of large crowds. Yet, when attention shifted to the level of the individual, unpredictability reigned—people laughed, loved, created things. What could not be deduced from the mass became visible only at the scale of the individual.

Sticking to the alien metaphor, early anthropologists, heirs to evolutionary hierarchies, approached other cultures as if traveling back in time. Primitive cultures did not represent the infinite variables of solutions that humans provided to the same universal questions. Rather, they were living pictures of the past, of how human communities were before great civilizations eventually occurred. So anthropologists were outsiders, observers from a more ‘advanced’ stage of humanity studying the ‘primitive other.’ Like the physicists of their time, they believed in a subject who could observe a clearly defined object from a position of detachment. This alienation was not accidental—it was the foundation of the ethnographic method, of objectivity, of science itself.

For that type of anthropology, in short, going to study ‘the other’ was not only a journey into the space of the exotic, but it was also a real journey back in time.⁴⁷ Anthropologists who travelled in space-time as astronauts without spacecraft were, after all, alien to the humanity they went to observe. This same alienation procedure was also familiar to physicists of the same period. For scholars of both disciplines, it was necessary and inevitable to place themselves ‘outside’ their object of study, a process of alienation that was based on the observation of a clear and defined object by an equally delimited subject: if anthropologists observed a given humanity from the outside, so physicists observed a given nature from the outside.

And yet, this was one of modernity’s great illusions: that the observer could be separated from the observed, that the subject and object were ontologically separate. The quantum turn has dissolved that boundary. As Lederman and Hills write again: ‘Because everything is made of

⁴⁶ Leon M Lederman and Christopher T Hill, *Quantum Physics for Poets* (Prometheus Books 2011).

⁴⁷ Bronislaw Malinowski, *Argonauts of the Western Pacific: An Account of Native Enterprise and Adventure in the Archipelagos of Melanesian New Guinea* (Dutton 1961).

atoms, including human beings, it is virtually impossible to escape the consequences of what happens at the atomic level. We have discovered an alien world, and that world is inside us.' In this vision, the observer is no longer a distant alien—but part of the very field she observes.

Quantum mechanics has replaced certainty with probability, substance with relation, and the object with interaction.⁴⁸ At the subatomic level, distinctions between human, things, plant, and object dissolve; what remains is a web of interactions, a reality shaped by observation, perspective, and scale. The classical confidence in cause and effect, in linear history, in objective knowledge, has been displaced by an understanding that different rules may apply at different levels of reality—and that those rules are not simply hierarchical but entangled.

This shift resonates deeply across disciplines. Just as quantum physics undermines physical determinism, so too have anthropology, sociology, psychology, and law reached the limits of their own universalist ambitions. No single theory can exhaust the complexity of cultural variation, of individual behaviour, of human meaning-making. Reality is no longer a fixed object seen from a stable point, but a constantly shifting field, refracted through countless lenses.

Quantum mechanics has described reality as a field of interactions. At the subatomic level, there is no distinction between a human being, a plant and a table.⁴⁹ Quantum physics thus disillusioned a cultural apparatus that was based on certain certainties: for example, that the subject and the object could be distant and clearly separated; or, that the principle of cause and effect worked universally, in one hundred percent of cases. Scientific, cultural and historical determinism, on the other hand, has proved insufficient to describe reality, just as the great anthropological, sociological and psychological theories have never exhausted the profound reasons that explain cultural differences and the infinite variety in the behaviours, inclinations and choices of individual people.

In this sense, quantum physics has opened new openings in disparate areas: we have begun to consider that reality was a matter of scales, but no longer evolutionary, but perspective: reality changes depending on the point of observation. Cultural illusions of the possibility that an observation can be objective and universal have decayed along with a new awareness: different rules for different scales not only coexist, but

⁴⁸ Leon M Lederman and Christopher T Hill, *Symmetry and the Beautiful Universe* (Prometheus Books 2004).

⁴⁹ Eric J Squires, *The Mystery of the Quantum World* (Taylor & Francis 1994).

constantly interact, as if the alien mentioned above took off a layer of green skin and showed its true face underneath. It is not a human face: it is human and alien at the same time and walks quietly on earth carrying with it a multiple nature.

Quantum physics has not only changed our scientific models; it has begun to reorient the humanities in considering the interaction between humans and objects and between humans and humans, as fields of energies.⁵⁰ From a quantum perspective, the universe exists only as a set of probabilistic states, which actualize within the limits imposed by the relationship between the observer and the observed phenomenon.⁵¹ As such, the human-things relationship has undergone a profound metamorphosis: from a solid feeling of touch and objectivity, it shifted into the realm of probability and uncertainty.

For centuries, human cultures sought to tame disorder, shaping the world through systems of meaning. Within those systems lay not only an explanation of human existence but also of all that exists. The bond that tied humans and things had multiple strata: from practical aims to aesthetics, from power relations to social statuses. A knife was a tool, yes—but also a surface for signs, for memory, for care and for war. Things were never neutral—they were part of a constant process stemming from the coproduction between our species and its living or non-living, material and immaterial surroundings.

Today, as we are immersed in a continuum between online and offline, virtual and real, our relationship with things is being redefined. The objects we once mastered through knowledge of their mechanisms are now opaque, embedded in hidden infrastructures. Their logic is no longer visible. Their processes are distant. What once offered tactile intimacy now speaks in abstraction, through signals and protocols we don't fully grasp. This is not a novelty that shall be considered exclusively by anthropology and the social sciences.

Quantum thinking reveals why. Reality itself is no longer made of fixed units, but of relational fields, energy, and indeterminacy. Objects are not what they seem—they emerge through interaction. And the observer is no longer outside: we are inside the system, part of what we try to understand. This undermines the modern distance between subject and object, and with it, the old forms of control.

⁵⁰ Radek Trnka and Radmila Lorencová, *Quantum Anthropology: Man, Cultures, and Groups in a Quantum Perspective* (Charles University Karolinum Press 2016).

⁵¹ Arkady Plotnitsky, *Reality Without Realism: Matter, Thought, and Technology in Quantum Physics* (Springer 2021).

In this new landscape, the human-thing relationship must be reimagined from the anthropological perspective. We no longer stand before things—we are entangled with them. And so the humanities, too, must shift toward perspectival thinking, toward relational ethics, toward an imagination that sees in uncertainty not chaos, but potential.

Things are no longer what we use. They are what we become with. In the face of this transformation, we are called not simply to recover lost materiality, but to rethink the essence of the human in light of the matter and energy that underlie all things. If objects are fields of possibility shaped by observation, are we not the same? Is the human not also an unstable constellation of relationships, in constant becoming?

Such questions compel the humanities and social sciences to move beyond critique and toward ontological innovation. They demand new interpretive strategies—capable not only of navigating the politics and ethics of technology, but of imagining a renewed relationality, where understanding things might become, once again, a way of understanding ourselves.

VIII. LAW BEYOND MECHANISM: COMPARATIVE LAW AND LEGAL PLURALISM

As in other fields of knowledge, legal thought has not evolved in isolation. It has long mirrored the dominant epistemological paradigms of its time, absorbing and internalizing the assumptions embedded in wider scientific, philosophical, and cultural worldviews. Through the ‘tacit rules of discourse’⁵² an implicit continuity has long been drawn between the natural order—as the structure of what exists—and the legal order—as the normative framework through which human coexistence takes shape. Law, in this sense, has served not merely as a tool of governance but as a cultural technology for translating prevailing visions of reality into institutional form.

The separation of humans and things has been the conceptual device that enabled jurists to transpose into the institutional framework of modernity the positivistic vision largely derived from Cartesio. This vision supplied the epistemic grammar through which legal order could be conceived and enforced. By turning the ideal of rational order into

⁵² See Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (2nd edn, Routledge 2001) at 183. ‘In any given culture and at any given moment, there is always only one episteme that defines the conditions of possibility of all knowledge, whether expressed in theory or silently invested in a practice.’

a systematic and coherent body of norms, jurists came to believe that social reality could, and should, be reduced to an abstract and internally consistent framework. Over time, this approach solidified into a legal structure regarded as almost immutable—one that reflects the core ideology of positivism: the belief that law forms a hierarchical, self-contained order against which real-life situations can be objectively measured simply by knowing *ex ante* ‘what the law is.’⁵³

Such a construction rested on the claim that law was, or ought to be, a neutral and objective device for regulating social reality, grounded in scientific rationality and in the universal applicability of its categories, irrespective of historical contingency.⁵⁴ In this way, modern law came to present itself as an order legitimised by its own internal coherence: a conceptual grid that purports to interpret the world without being shaped by it, projecting onto society the image of a necessary and universal system governed by the laws of reason.

Just as the deterministic universe of classical physics was profoundly destabilized by the advent of quantum theory, so too this legal worldview has begun to unravel. The shift from Newtonian to quantum paradigms marks not merely a move from certainty to complexity, but a genuine epistemological rupture. The classical image of the universe as a deterministic machine, fully knowable from the outside by a detached observer, gives way to a relational and indeterminate cosmos.

Within this new frame, human agents are embedded in the very fabric of the systems they interpret; meaning emerges not from external description but from participation. Identity is no longer stable and universal, but contingent upon the position and scale from which the world is observed. The reality to which law responds is not a flat and neutral terrain but a multidimensional, shifting landscape shaped by historical, cultural, and institutional forces.⁵⁵

This epistemological transformation undermines the very foundations of modern legal thought. Law does not appear as a fixed structure of abstract norms, but as a dynamic practice—an evolving form of social knowledge enacted through the lived experience of those who engage with it. From this perspective, it can no longer be seen as a sovereign

⁵³ See P G Monateri, ‘Black Gaius: A Quest for the Multicultural Origins of the “Western Legal Tradition”’ (2000) 51 *Hastings LJ* 479, who shows how the canonical narrative of European law reflects a specific intellectual construction shaped by Cartesian rationalism and nineteenth-century scientific paradigms.

⁵⁴ Paolo Grossi, *A History of European Law* (Wiley-Blackwell 2010) 77ff.

⁵⁵ R George Wright, ‘Should the Law Reflect the World? Lessons for Legal Theory from Quantum Mechanics’ (1991) 18 *Florida State University Law Review* 855.

structure imposed from above. It is better understood as a symbolic form situated within the cultural and material life of society, shaped by the institutions, practices, and worldviews of those who inhabit it.⁵⁶

Through this view the positivist aspiration to subsume the whole of social life within a coherent normative system appears not only inadequate, but epistemologically blind to the plurality of forms through which human meaning takes shape. It conceals the cultural, historical, and political dimensions that continuously shape legal meaning, ignoring the complexity of cultural variation, individual behaviour, and evolving social practices—none of which can be fully captured by a single, abstract theory.

What appears to be a determined legal reality is often a projection of the standpoint from which it is observed. Just as a rose, under close inspection, dissolves into a dense web of structures, so too legal concepts reveal their internal fragmentation when examined up close. Coherence gives way to complexity, unity to plurality.

It is precisely this ideological closure that comparative law has long sought to challenge. Shifting away from abstract formulations and focusing to the concrete emergence of operative legal responses the comparative legal approach moved beyond the conception of law as a mechanical system governed by universally valid rules and instead explores how different legal systems respond to specific factual scenarios.⁵⁷ Comparative law invites us to see law not as the expression of a single, unified voice, but as the outcome of a complex dialogue between many different mechanisms: doctrines, institutional structures, models of interpretation, practical applications, and cultural patterns all contribute—each in their own way—to shaping the legal rule that ultimately governs a given situation.⁵⁸

Rather than being dictated from above by a single source, the legal rule emerges from this layered and dynamic interaction, which the comparative lens allows us to perceive more clearly. Just as the nature of a particle depends on how it is observed, so too law does not reveal itself through abstract reasoning alone, but through its entanglement with the

⁵⁶ Clifford Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective' in *Local Knowledge* (Basic Books 1983) 167–176.

⁵⁷ Rudolph B. Schlesinger, *Formation of Contracts: A Study of the Common Core of Legal Systems* (Oceana Publications 1968).

⁵⁸ Rodolfo Sacco famously termed these heterogeneous contributors to legal meaning 'formants,' borrowing from phonetics—where a formant is one of several resonant frequencies that together shape a sound—to stress that a legal rule arises from the combined resonance of multiple sources: see Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39(1) OUP 1–34 and 343–402.

social, political, and material realities in which it lives.⁵⁹

Viewed from this angle, reality itself does not stand apart waiting to be discovered: it comes into being through relation, where meaning is not inherent in things or texts but takes shape through interpretive frameworks, institutional practices, and the concrete contexts in which law is lived.⁶⁰

Comparative law plays a crucial role in rethinking legal meaning. It questions the positivist belief that law can be reduced to a single normative order and instead uncovers the plurality of legal solutions beneath the surface of apparent uniformity.⁶¹ Rather than offering abstract coherence, law reveals itself as a layered and evolving practice, deeply entangled with the contexts in which it takes form. Within the same social space, multiple normative orders often coexist: state law, customary rules, religious norms, local agreements, and informal expectations may all claim authority—sometimes complementing one another, sometimes overlapping or even conflicting. This plural landscape shows that legal meaning is not dictated from above by a single source, but emerged through the interaction of diverse frameworks of legitimacy and interaction.⁶²

Legal comparison becomes more than a classificatory method: it is a mode of inquiry that reveals the constructed nature of legal categories and the historical contingencies they embody. It does not simplify but it takes complexity for granted—highlighting pluralism of legal traditions.⁶³ Like the quantum microscope, the comparative lens are capable of detecting the layered texture of a seemingly solid object, it reveals that behind the surface of legal uniformity lies a dense weave of differentiated meanings,

⁵⁹ The perspectival nature of legal reasoning—namely, that what appears as a determinate legal reality often reflects the standpoint and conceptual framework of the observer—was already articulated by Benjamin N Cardozo, who described judicial decision-making as an inescapably situated practice shaped by the judge's experiences and values: *The Nature of the Judicial Process* (Yale University Press 1921) 9–20, 166–167. This insight is later reformulated through the lens of modern physics by Laurence H Tribe, who, drawing on analogies with quantum theory, argues that legal determinations 'war' or shift depending on the observer's vantage point and interpretive frame: 'The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics' (1989) 103(1) *Harvard Law Review* 6, 7.

⁶⁰ See Fritjof Capra and Ugo Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Berrett-Koehler Publishers 2015).

⁶¹ Rudolph B. Schlesinger, *Comparative Law: Cases–Texts–Materials* (5th edn, Foundation Press 1988) Ch. 7 where he stated that 'Comparative law enlarges the perspective beyond doctrinal formalism to include diverse legal cultures, thereby exposing the plurality of legal solutions beneath apparently uniform bodies of law'.

⁶² Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 *American Journal of Comparative Law* 5.

⁶³ Günter Frankenberg, 'Critical Comparisons: Rethinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411.

inherited assumptions, and situated practices. Law, in this light, is not the product of a single voice or a neutral system, but the evolving outcome of a continuous dialogue between legal traditions, cultural imaginaries, and situated perspectives. In this reframed epistemology, chaos is no longer a deviation to be corrected, but the very horizon within which law must operate—an horizon shaped by indeterminacy, plurality, and complexity, rather than by order, uniformity, or abstraction.⁶⁴

IX. PRIVATE PROPERTY AND THE HUMAN AND THINGS RELATIONSHIP

Today, the frameworks that guide legal, political, and economic development appear to be marked by a profound chiasm. On the one hand, globalisation continues to promote the diffusion of a dominant cultural model—rooted in the ideals of the rule of law, liberal democracy, and the rhetoric of human rights—presented as universal and self-evident. On the other hand, the growing complexity of contemporary societies challenges this model at its core, forcing legal thought to confront realities that resist simplification and demand new conceptual tools. At the core of this systemic rupture lies a paradoxical persistence: the relationship between humans and things continues to be governed by a singular, reductive model of property—one intellectually rooted in Cartesian science and premised on the notion of absolute dominion, ‘that sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the right of any other individual in the universe.’⁶⁵

This vision has been codified by modern legal systems into a grammar of exclusion and commodification, reflecting an epistemology grounded in the separation of subject and object. Within this framework, property has come to be increasingly detached from the materiality of things and redefined as the abstract projection of the owner’s autonomous will.

The relative simplicity of its basic assumption has determined the success of the property rights paradigm and the seeds of its diffusion across diverse legal traditions, cultural settings, and economic systems. In this way, the language of property became the dominant medium through

⁶⁴ See Sara Hejazi, above at par.6.

⁶⁵ See Blackstone’s *Commentaries*, Abridged by W. C. Sprague (9th edn, Callaghan & Company 1915) 105.

which modernity structured its relationship with the world.⁶⁶

The digital revolution has profoundly transformed the scale and reach of this relationship. What was once limited to tangible goods now extends into immaterial and previously inaccessible domains—life processes, genetic resources, personal data, algorithmically generated knowledge. The perimeter of what can be owned has expanded dramatically, absorbing ever more elements of human life and ultimately reducing the human itself to a site of extraction and value production—feeding systems designed to learn, predict, and decide. In this process, the boundaries between subject and object, agent and artefact, have grown increasingly unstable.⁶⁷

However legal thinking, for the most part, remains anchored to the classical image of property as an abstract and neutral form—detached from the dense web of ecological, material, and social relations in which it operates. So deeply entrenched is this perspective that few are willing to recognise that the rebellion of things—whether manifest in the planetary reaction to environmental degradation or in the algorithmic agency of intelligent machines—may be traced back to the very legal grammar that constructs things as ownable, humans as sovereign, and relations as asymmetrical. In this sense, the legal form of property is not merely a reflection of broader social transformations; it is a constitutive force in shaping the reality it purports to govern.

This conceptual dislocation invites a deeper epistemological reflection. What presents itself as a universal model of property is, in fact, grounded in the same rationalist foundations that sustained the classical and positivist conception of law. Like classical physics—and the legal formalism it inspired—this vision assumes a world of stable meanings and fixed categories: where a rose is just a rose, and property is a clearly defined right to exclude. But once we shift perspective and examine these categories more closely, their apparent coherence begins to dissolve, revealing them as historically contingent and culturally constructed.

Comparative legal scholars have long recognised this. They know that legal categories are not universal truths but culturally embedded linguistic devices, shaped within specific traditions to address socially relevant facts.⁶⁸ Viewed through this lens, property law becomes a

⁶⁶ Duncan Kennedy, 'Two Globalizations of Law and Legal Thought: 1850–1968' (2003) 36(3) *Suffolk University Law Review* 631, 648ff.

⁶⁷ Ugo Mattei, 'The Legal Metaverse: Law and Justice in the Age of Technological Disruption' (2023) 71(3) *American Journal of Comparative Law* 549.

⁶⁸ See Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (5th edn, Oxford University Press 2014), 18ff.

privileged site of legal pluralism: a terrain where statutory norms intersect with judicial interpretation, customary rules, and lived practices, enabling communities to articulate divergent ways of organising material relations. Some systems emphasise exclusivity, dominion, and individual entitlement; others prioritize reciprocity, shared use, or integration within a community or ecosystem.⁶⁹

Placed in this broader comparative and epistemological perspective, the modern model of exclusive property appears less as the natural endpoint of legal evolution than as one historically contingent arrangement among many—one whose apparent universality dissolves, much like the quantum rose, once the observer shifts vantage point. What emerges from this shift is not simply the fragility of the dominant paradigm, but the recognition that property itself is not a fixed object of knowledge, but something that changes form as the lens through which it is viewed changes.⁷⁰

Indeed, the very concept of property reveals itself as intrinsically polysemic. Rather than offering a singular or abstract essence, it unfolds as a relational field shaped by the observer's standpoint—an ecology of norms and practices in which statutory rules intersect with judicial interpretation, customary usage, and the lived materiality of everyday life. In this broader sense, property ceases to appear as a stable legal construct and becomes instead a dense web of meanings continually produced within specific social, cultural, and historical configurations.⁷¹

In quite recent decades, anthropological accounts show that across diverse societies and epochs, the relationship between humans and things has often been conceived not as a dichotomy but as a continuum of forms of reciprocity, care, and mutual belonging. These relations are structured less by exclusive rights than by obligations, symbolic attachments, and ritual practices.⁷²

What legal modernity presents as a unified concept reveals itself instead as just one configuration within a far broader landscape of normative practices. Alternative systems of allocation and entitlement

⁶⁹ See Fritjof Capra and Ugo Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Berrett-Koehler Publishers 2015).

⁷⁰ U Mattei and A Quarta, *The Turning Point in Private Law: Ecology, Technology and the Commons* (Edward Elgar 2022) 11ff.

⁷¹ Albina Candian, Antonio Gambaro and Barbara Pozzo, *Property–Propriété–Eigentum: Corso di diritto privato comparato* (CEDAM 1992).

⁷² For anthropological accounts emphasising that material relations in many societies are organised through reciprocity, obligation, and embedded social ties rather than exclusive rights, see Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 2001) 46–60; and Marshall Sahlins, *Stone Age Economics* (2nd edn, Routledge 2004).

have long coexisted with formal property regimes—not in a linear progression from ‘primitive’ to ‘advanced’, but within the same normative spaces, sometimes in harmony, sometimes in open tension.⁷³ These arrangements sometimes resist codification and elude the rigid conceptual frameworks of legal theory, however they remain deeply embedded in the lived experience of communities, in their ritual practices, moral economies, and collective memories. Even where legal scholars hesitate to label them as ‘property’ in the technical sense, they operate as functional systems of governance, grounded in locally meaningful logics.⁷⁴

The Islamic legal tradition offers a particularly rich illustration of such normative plurality, where the regime of traditional property is complicated by a dense network of mediations between the substratum constituted by the shariatic tradition and the rules that are introduced to varying degrees by modern civil codes and regulations.⁷⁵ Within this layered framework, the *waqf* regime plays a central role: a religiously grounded institution whereby individuals relinquish property ‘for the love of God’ to support communal welfare. Far from being a marginal relic, *waqf* has long operated as a decentralized mechanism for delivering public goods.⁷⁶ The sacral bond that commonly characterized the variety of structures and forms present in traditional Islamic law certainly did not favour the circulation of resources: despite being increasingly overshadowed by Western-style individual property regimes, the sacral bond still survive in collective structure like the Persian Qanats a traditional pattern of water management that enabled the formation of farming communities in the most arid regions of Iran.⁷⁷

As we turn our observation to African traditional systems a similar pattern emerges—one that further challenges the assumptions of legal

⁷³ On the historical coexistence of multiple systems of allocation and entitlement—often overlapping, competing, or mutually constraining—and on the critique of any evolutionary narrative that moves linearly from communal arrangements to private property, see David Graeber and David Wengrow, *The Dawn of Everything: A New History of Humanity* (Penguin 2021) 210–246.

⁷⁴ ‘Official legal culture has difficulty recognized the validity and effectiveness of unofficial, informal, or customary practices. It is not that these do not exist, but rather that they are often rendered invisible within the dominant legal epistemology.’ See Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (2nd edn, Butterworths 2002) 85.

⁷⁵ Wael B Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009).

⁷⁶ Timur Kuran, ‘The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System’ (2001) 35(4) *Law and Society Review* 841.

⁷⁷ On this topic, I may refer to: Andrea Pradi, ‘Private Property and the Commons: The Case Study of Water Distribution in Persian Qanats Part 1.’ (2023) 23 *Global Jurist* 287; and Sara Hejazi, ‘Private Property and the Commons: The Case Study of Water Distribution in Persian Qanats Part 2’ (2023) 23 *Global Jurist* 305.

modernity, where property is not merely a legal construct, but a living relationship grounded in land, ritual memory, and community. In these contexts, collective ownership prevails, mediated by sacred values that recognize the spiritual essence of things. Even where individual rights exist, they remain subordinate to communal responsibilities and ancestral practices aimed at sustainable use. Although Western legal models have increasingly eroded these frameworks, ethnographic evidence—such as from Mali—shows that plural systems of authority and layered rules around land and water continue to reflect a deeply embedded communal logic.⁷⁸

The Chinese debate on copyright offers a further vantage point for observing how divergent conceptions of property can coexist—often in openly conflicting ways—within the same normative space. The controversy that has unfolded in the past two decades is not merely a question of enforcement capacity, but reveals a profound epistemological tension between the Western regime of exclusive intellectual property, strengthened through WTO accession and TRIPS implementation, and the long-standing Confucian grammar that has historically shaped China's approaches to creativity and knowledge. Commentators have frequently noted how Confucian traditions—rooted in emulation, pedagogical imitation, and the authority of exemplary models—sit uneasily beside the individualised logic of authorship that informs modern copyright law.⁷⁹

Within this alternative framework, the act of copying a master's work is not a wrongful taking but a morally inflected gesture of reverence, a practice through which students refine skill, transmit learning, and honour inherited lineages.⁸⁰ Far from representing a marginal residue, this ethos of communal creativity long operated as a decentralised mechanism for sustaining the circulation of knowledge, even as formal reforms increasingly strengthened proprietary claims. The result is a layered doctrinal field where conceptions of entitlement grounded in collective refinement and respectful imitation persist beneath, besides, and at times against the exclusive rights recognised by Western-style copyright.

Taken together, the Islamic, African, and Chinese examples underscore a broader comparative insight: property is never a monolithic institution,

⁷⁸ Luca Pes, 'A different model to look at the relationship between humans and things: land and water rights in the Inner Delta of the Niger River (Mali)' forthcoming.

⁷⁹ For cultural accounts of how Confucian traditions of emulation and moral cultivation complicate the reception of exclusivity-based copyright norms, see Peter K Yu, 'The Confucian Challenge to Intellectual Property Reforms' (2012) 4 *WIPO Journal* 1, 3–10.

⁸⁰ William P Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford University Press 1995).

but a composite of heterogeneous normative grammars—religious, communal, pedagogical, statutory—whose coexistence and friction reveal the contingent, relational, and deeply cultural nature of legal ordering. Such plurality troubles any assumption that exclusive property represents the universal or natural endpoint of legal evolution and instead highlights the diverse ways in which communities articulate access, obligation, value, and belonging that bind humans to one another and to the material world.⁸¹

From these examples what emerges is not a uniform legal form, but a landscape marked by cultural and normative pluralism, where the idea of property resists stable categorization and instead takes shape through ongoing negotiation. Property is continuously shaped not only by legal traditions and institutional arrangements, but also by the social practices, symbolic meanings, and even the intrinsic nature of the things themselves.⁸²

This invites us to rethink the very ontology of property. Things are not silent objects waiting to be possessed, but actors within a shared cultural and legal narrative, capable of expressing claims, values, and attachments through the communities that engage with them.⁸³

Much like in quantum theory, where the act of observation alters the very state of what is observed, property arises through a process of co-constitution: meaning, entitlement, and materiality do not exist independently, but emerge through their mutual interplay. In this sense, property is the outcome of a reciprocal relation, in which human intention and material agency are deeply entangled.⁸⁴

Law cannot be blind to this interaction: property should be conceived as a co-produced legal relation, grounded not only in the will of the subject but also in the nature and constraints of the object.

This recognition calls for a renewed legal reasoning—one that does not seek to eliminate complexity, but to dwell within it. Comparative law offers a privileged vantage point: it reveals how law is lived, not just written—emerging through cultural entanglements, normative tensions, and ecological interdependencies. In the face of overlapping crises, this approach invites us to abandon the search for abstract uniformity

⁸¹ Filippo Valguarnera, *Access to Nature: The Rights of Humans and the Rights of Nature in Comparative Perspective* (Martinus Nijhoff 2012).

⁸² Philippe Descola, *Beyond Nature and Culture* (University of Chicago Press 2013) 373ff.

⁸³ Carol M Rose, 'Possession as the Origin of Property' (1985) 52 *University of Chicago Law Review* 73, 82, now in Carol M Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press 1994) 25–31.

⁸⁴ Ian Hodder, *Entangled cit.* (Wiley-Blackwell 2012).

and instead cultivate a legal imagination grounded in relation and responsibility.

Seen through this lens, legal categories no longer appear as fixed or universal, but as historically situated frameworks for organizing convivencia—always open to revision, negotiation, and care. Within such a vision, property must be rethought: no longer as the ‘sole and despotic dominion’ over things⁸⁵, but as a social and ecological responsibility, accountable to the community, to the living world and to future generations.⁸⁶

X. CONCLUSION

The time is ripe for a reconfiguration of the relationship between humans and things within legal thought. The mechanistic paradigm that placed the sovereign subject at the center of a passive, fully knowable world no longer holds. As the sciences, particularly quantum physics, have revealed the relational, indeterminate, and dynamic nature of matter, so too the law must learn to look beyond its inherited certainties—beyond the reassuring glow of the lamppost, where we have long sought answers. Like in the Sufi parable of the drunken man searching for his keys under the streetlight, we risk continuing to search where it is easiest, not where truth may reside.

Interdisciplinary dialogue invites us to look into the shadows—to question the epistemological assumptions embedded in our legal categories and institutions. Scientific revolutions do not transform only their native domains; they radiate outward, shifting metaphors, dislodging intuitions, and unsettling the foundations of adjacent fields. Comparative law, with its sensitivity to context, contradiction, and cultural difference, is particularly attuned to this vibration. It allows us to perceive the pluralism, contingency, and embodied practices that conventional legal frameworks often obscure.

This reorientation does not mean abandoning law’s structuring role but rather reimagining it as a field of co-existence rather than domination—a medium that acknowledges the agency not only of human actors, but also of things, environments, and processes. In this light, legal institutions can become more than instruments of control; they can cultivate shared worlds, enabling forms of relation that are attentive to

⁸⁵ Even Blackstone himself, just a few lines after promptly qualifies the statement, admitting that ‘this proprietary form no subject in England has’ see William Blackstone, *Commentaries on the Laws of England*, 137.

⁸⁶ Fritjof Capra and Ugo Mattei, *The Ecology of Law cit.*

ecological fragility, material entanglement, and cultural specificity.

By embracing this shift—from abstraction to relation, from mastery to interdependence—we may begin to build legal imaginaries and institutional architectures that reflect the world not as it was once conceived, but as it is becoming: dynamic, uncertain, and profoundly entangled.

The subject of this essay is to rethink the relationship between humans and things. But why speak of a *convivencia* of things? The term, drawn from anthropology and philosophy, evokes the idea that things do not stand alone but co-exist with us in dense material, symbolic, and temporal relations. In this sense, *convivencia* is not a mere metaphor but an epistemological prompt: it reminds us that legal reality emerges from layered interactions that resist reduction to singular definitions. Interdisciplinary inquiry—across physics, anthropology, and legal theory—helps reveal the implicit assumptions embedded in our categories, bringing to light the tacit knowledge that silently shapes our thinking and that, once made visible, can finally become open to choice and transformation.

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ON THE POLITICAL, LEGAL, AND CONSTITUTIONAL LEGITIMACY OF THE SYSTEM CONSTRUCTION OF SPECIAL ADMINISTRATIVE REGIONS

ABSTRACT: The theoretical explanations provided by the academic community around the construction of the special administrative region are currently showing a diversified trend, including ‘One Country, Two Systems’, achieving peaceful reunification of the motherland, the Basic Law, Article 31 of the Constitution, the comprehensive governance power of the central government, and the high degree of autonomy of the special administrative region, all of which provide legitimacy for the construction of the special administrative region system from different perspectives. However, among the aforementioned theoretical foundations, there is currently a lack of theoretical and logical sorting, and effective theoretical connections have not been established amongst various theoretical foundations. There is also a lack of classification and hierarchical research on various theoretical foundations from the perspective of theoretical systems. In fact, President Xi Jinping’s important speech at the celebration of the 25th anniversary of Hong Kong’s return to the motherland and the inauguration ceremony of the 6th Hong Kong Special Administrative Region government comprehensively and systematically elaborated on the theoretical basis of the construction of the special administrative region system from the perspectives of political, legal and constitutional legitimacy, providing ideological methods and action directions for a scientific understanding of the nature of the special administrative region system and exploring a reliable institutional framework for the construction of the special administrative region system. To implement the spirit of the President Xi Jinping’s important speech conscientiously, it is necessary to establish a scientific and reasonable theoretical connection between the political, legal, and constitutional aspects of the construction of the special administrative region system, and strengthen the political, legal, and constitutional responsibilities of the central and special administrative regions in the construction of the special administrative region system.

KEYWORDS: ‘One Country, Two Systems’, Special Administrative Region System, Basic Law, The Constitution, Political Legitimacy, Legal Legitimacy, Constitutional Legitimacy

On July 1, 2022, President Xi Jinping delivered an important speech at the celebration of the 25th anniversary of Hong Kong's return to the motherland and the inauguration ceremony of the 6th Government of Hong Kong Special Administrative Region.¹ This important speech revolves around important theoretical and practical issues in the 25 years since Hong Kong's return to the motherland, such as the comprehensive governance of the central government, the high degree of autonomy of the Special Administrative Region, and the patriot's governance of Hong Kong. Starting from the 'One Country, Two Systems' policy, the Basic Law, and the Constitution, it profoundly elaborates on the political, legal, and constitutional legitimacy of the construction of the special administrative region system, providing a solid theoretical basis for the future social stability and economic prosperity of the Hong Kong Special Administrative Region, and opening up a new chapter in the history of the Hong Kong Special Administrative Region. This article is based on the spirit of President Xi Jinping's important speech mentioned above, combined with the current Constitution, Basic Law, and the 'One Country, Two Systems' policy, and seeks comprehensively and systematically to analyse the political, legal, and constitutional legitimacy of the construction of the special administrative region system, as well as the logical relationship between the three kinds of legitimacy mentioned above, in order to establish confidence in the path, theoretical system, institutional and cultural confidence to facilitate further the unwavering maintenance of Hong Kong and Macao's stability and prosperity as they embark on a successful path of national and local governance with Chinese characteristics.

I. THEORETICAL SYSTEM FOR SCIENTIFIC CONSTRUCTION OF SPECIAL ADMINISTRATIVE REGION SYSTEM

The system of special administrative regions is a basic constitutional system established in Article 31 of the current Constitution of China.² It corresponds to the central system and, together with the general local system and the system of regional ethnic autonomy, constitutes the local system in the form of national structures established in the Constitution

¹ Xi Jinping, 'Speech at the Celebration of the 25th Anniversary of Hong Kong's Return to the Motherland and the inauguration ceremony of the 6th Hong Kong Special Administrative Region Government' *People's Daily* (Beijing, 2 July 2022) 2.

² Article 31 of the current Constitution stipulates that the state may establish special administrative regions when necessary. The system implemented within the special administrative regions shall be prescribed in law by the National People's Congress according to specific circumstances.

of China. The system of special administrative regions is a complete constitutional system, which includes the method of establishment and geographical scope of the administrative regions, the nature and types of special administrative regions, the relationship between special administrative regions and the central government, the relationship between the special administrative regions, the high degree of autonomy and comprehensive central governance of the special administrative regions, the systems implemented within special administrative regions, the place of national defence and foreign affairs in the special administrative regions, the legal responsibilities of special administrative regions, and so on. The special administrative region system established in Article 31 of the current Constitution of our country is a legal system, and its value goal is mainly to achieve the political concept of 'One Country, Two Systems' and to achieve peaceful reunification of the motherland.

Since the current Constitution of 1982 clarified the system of special administrative regions as an important part of the Constitution, as a local system in the form of a national structure, the system of special administrative regions has been formulated by the National People's Congress through the formulation of the Basic Law of Hong Kong³ and the Basic Law of Macao,⁴ the single law related to special administrative regions formulated by the National People's Congress and its Standing Committee,⁵ the interpretation of the Basic Law by the Standing Committee of the National People's Congress,⁶ the special resolutions and decisions of the National People's Congress and its Standing Committee on the Hong Kong and Macao Special Administrative Regions,⁷ the laws formulated by the legislative organs of the Hong Kong and Macao Special

³ The Basic Law of Hong Kong was passed at the Third Session of the Seventh National People's Congress on April 4, 1990, and promulgated by Order No. 26 of the President of the People's Republic of China on April 4, 1990. It came into effect on July 1, 1997.

⁴ Approved by the First Session of the Eighth National People's Congress on March 31, 1993, and promulgated by Order No. 3 of the President of the People's Republic of China on March 31, 1993, and effective from December 20, 1999.

⁵ For example, on June 30, 2020, the 20th meeting of the Standing Committee of the 13th National People's Congress held its second plenary session, third plenary session, and closing session. The meeting voted to pass the Hong Kong Special Administrative Region Law of the People's Republic of China on Safeguarding National Security, and the President Xi Jinping signed Presidential Decree No. 49 to make it public.

⁶ For example, the Interpretation of Article 13, Paragraph 1 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, passed at the 22nd meeting of the Standing Committee of the 11th National People's Congress on August 26, 2011.

⁷ For example, on May 28, 2020, the Third Session of the 13th National People's Congress passed the Decision of the National People's Congress on Establishing and Improving the Legal System and Implementation Mechanism for Safeguarding National Security in the Hong Kong Special Administrative Region.

Administrative Regions, and the original capitalist legal system that does not conflict with the basic principles of the two basic laws, etc., forming a series of theoretically consistent, institutionally and functionally complete and practically feasible laws. This institutional system reflects the requirement of governing the country according to law and is an orderly promotion of the construction of the special administrative region system on the track of the rule of law.

Of course, in the practice of the construction of the special administrative region system, especially after the return of Hong Kong and Macao, when promoting the effective operation of the special administrative region system in accordance with the provisions of the Constitution and the Basic Law, there have been situations where the political, legal, and constitutional aspects of the special administrative region system are guided in parallel, and there is a legal tendency of prioritising political principles. In fact, from a theoretical logic perspective, the political, legal, and constitutional legitimacy regarding the system of special administrative regions lie at different levels of the theoretical system, with close logical connections and respective theoretical functions between them.

Political legitimacy is about why it is necessary to establish a special administrative region as a local autonomous system, and what political goals the establishment of a special administrative region system aims to achieve. Specifically, the special administrative region system stipulated in China's Constitution requires the establishment of a special administrative region to implement the political concept of 'One Country, Two Systems', so that the political concept of 'One Country, Two Systems' can be institutionalised and normalised through the special administrative region system, and ultimately achieve the peaceful reunification of the motherland. Therefore, 'One Country, Two Systems' and achieving peaceful reunification of the motherland are the biggest political goals and value pursuits behind the special administrative region system.

Legally speaking, the special administrative region system refers to the sum of a series of behavioral rules formulated by the National People's Congress and its Standing Committee, as well as the legislative organs of special administrative regions, based on the Constitution, around the specific institutional construction of special administrative regions. From a systematic perspective, it can be referred to as the 'Special Administrative Region Legal System' on which the special administrative region system is established. Legal legitimacy aims to explain how the 'legal system' surrounding the system of special administrative regions

shapes them in law, and especially how to achieve the 'politics' that special administrative regions aim to pursue effectively through legal means. Among the various legal principles in the construction of the special administrative region system, the principles and specific provisions of the Basic Law also reflect the legal legitimacy of the special administrative region system. So, when it comes to the 'special administrative region system', it must be based on 'legal legitimacy'. Without legal principles, various specific institutional designs become passive waters, and 'One Country, Two Systems' can only remain political speculation and empty talk.

Constitutional legitimacy entails a legal method of using 'political legitimacy' to revise 'legal legitimacy' in an ongoing way, especially when there are deviations in legal theory. For example, it cannot effectively integrate various legal provisions on the special administrative region system in theory and practical logic, and cannot scientifically and reasonably explain the structure and function of the special administrative region legal system by itself. It is necessary to use constitutional theory to reveal the 'political theory' and 'legal theory' behind the special administrative region system. The Basic Law of Hong Kong and the Basic Law of Macao are the basic laws concerning the system of the Special Administrative Regions, but these two basic laws only fulfil most of the functions of the construction of the legal system of the Special Administrative Region, and do not resolve all legal issues. Therefore, it is necessary effectively to amend the deficiencies in the design of the system of the Special Administrative Region based on the provisions of the Constitution, so that the two basic laws can better adapt to the requirements of realising the political concept of 'One Country, Two Systems'. In addition, through the theory of the Constitution itself, the legal status of the two Basic Laws in the legal system of the Special Administrative Regions can be further clarified, and the important role of other legal provisions in the construction of the Special Administrative Region system and the realisation of the political concept of 'One Country, Two Systems' can be further utilised.

In short, to analyze the legitimacy of the construction of the special administrative region system, it is necessary to combine the three principles of 'political theory', 'legal theory', and 'constitutional theory' organically, in order to grasp the direction, identify the essence of the problem, and closely combine political value and legal system in theoretical logic. Only from the perspective of constitutional theory, especially from the perspective of constitutional review, can we survey the

theoretical logic behind the special administrative region system from a macro perspective, and more effectively respond to various doubts about the legitimacy and legality of the special administrative region system in practice.

II. THE POLICY OF 'ONE COUNTRY, TWO SYSTEMS' IS A POLITICAL REQUIREMENT FOR THE CONSTRUCTION OF THE SPECIAL ADMINISTRATIVE REGION SYSTEM

In his important speech at the celebration of the 25th anniversary of Hong Kong's return to the motherland and the inauguration ceremony of the 6th government of the Hong Kong Special Administrative Region, President Xi Jinping gave a very in-depth and thorough explanation of the 'political theory' behind the institutional construction of the Special Administrative Region, which is the guiding ideology and action guide for promoting the institutional construction of the Hong Kong and Macao Special Administrative Region in the current and future period. President Xi Jinping pointed out in his speech that 'One Country, Two Systems' is an unprecedentedly great initiative. The fundamental purpose of 'One Country, Two Systems' is to safeguard national sovereignty, security, development interests, and maintain long-term prosperity and stability in Hong Kong and Macao. Everything the central government does is for the good of the country, for the good of Hong Kong and Macao, and for the good of our compatriots in Hong Kong and Macao.⁸

Seriously studying and understanding the spirit of the President Xi Jinping's aforementioned speech, ultimately, in the construction of the Hong Kong and Macao Special Administrative Region system, we must adhere to the correct political direction and firmly grasp the main line of 'One Country, Two Systems'. Throughout the process of the emergence and construction of the Hong Kong and Macao Special Administrative Region, various tasks were carried out to implement the political concept of 'One Country, Two Systems'. 'One Country, Two Systems' is the political principle behind the system of special administrative regions. To speak of 'One Country, Two Systems' is to grasp the overall situation and direction of the construction of the system of special administrative regions, which is closely combined with major national interests, security, and political values such as national sovereignty, ethnic interests, and special economic zone interests. So, when considering Hong Kong and

⁸ Xi (n 1) 2.

Macao issues, if we deviate from the basic premise and starting point of the 'One Country, Two Systems' political concept, it is impossible scientifically to grasp the basic characteristics of the construction of the special administrative region system, nor can we point out a clear future for the Hong Kong and Macao special administrative regions. In fact, the 'One Country, Two Systems' policy is understandable in the Hong Kong and Macao Special Administrative Regions, and has achieved great success. It is in the interests of national sovereignty, security, and development, as well as the fundamental interests of the residents of the special administrative regions. Therefore, to maintain the prosperity and stability of Hong Kong and Macao, there is no reason not to adhere to the 'One Country, Two Systems' policy. For this reason, President Xi Jinping said at the celebration of the 20th anniversary of Hong Kong's return to the motherland that the central government adheres to two principles in implementing the 'One Country, Two Systems' policy: first, to remain steadfast and ensure that it will not change or waver. Second, so as to be comprehensive and accurate, to ensure that there is neither deviation nor deformation. In an important speech delivered at the celebration of the 25th anniversary of Hong Kong's return to the motherland and the inauguration ceremony of the 6th government of the Hong Kong Special Administrative Region, President Xi Jinping once again emphasised that 'One Country, Two Systems' has been repeatedly tested in practice, is in line with the fundamental interests of the country and the nation, and the fundamental interests of Hong Kong and Macao. It has received strong support from over 1.4 billion Chinese people, unanimous support from the residents of Hong Kong and Macao, and universal support from the international community. In consequence, this kind of good system has no reason to change and must be adhered to in the long term.⁹

The Fourth Plenary Session of the 19th Central Committee of the Communist Party of China formulated in its decision to list 'One Country, Two Systems' as one of the 13 significant advantages of China's national system and governance system, and, as the twelfth item in this list, it clearly pointed out the need both to adhere to and to improve the 'One Country, Two Systems' and promote peaceful reunification of the motherland. The Fourth Plenary Session of the 19th Central Committee of the Communist Party of China emphasised that 'One Country, Two Systems' is an important system under which the Party leads the people to achieve peaceful reunification of the motherland, and is a great

⁹ Xi (n 1) 2.

initiative of socialism with Chinese characteristics. The principle that 'one country' is the prerequisite and foundation for implementing the 'two systems', which are subordinate to and derived from 'one country' and unified within it must be adhered to. Strictly in accordance with the Constitution and the Basic Law, governance over the Hong Kong Special Administrative Region and the Macao Special Administrative Region will be exercised so as firmly to safeguard national sovereignty, security, and development interests, maintain the long-term prosperity and stability of Hong Kong and Macao, and never to tolerate any behavior that challenges the bottom line of 'One Country, Two Systems' nor any behavior that splits the country. 'One Country, Two Systems' as mentioned in the above decision is an important system for the Party to lead the people to achieve the peaceful reunification of the motherland. The system refers to the political sense, which is a directional and guiding political design created by the CPC through the Party's policies. Therefore, from the perspective of political theory, 'One Country, Two Systems' has gained the support of all people, including residents of the Hong Kong and Macao Special Administrative Regions and the entire Chinese people. As a political concept, it plays a crucial role in promoting peaceful reunification of the motherland, which is in line with the common interests of the entire Chinese people and has full legitimacy. Therefore, in his important speech at the celebration of the 25th anniversary of Hong Kong's return to the motherland and the inauguration ceremony of the 6th government of Hong Kong Special Administrative Region, President Xi Jinping also emphasised the importance of reviewing the past and learning from it. The rich practice of 'One Country, Two Systems' in Hong Kong has left us with valuable experience and profound insights. 25 years of practice have taught us that only by deeply understanding and accurately grasping the practical laws of 'One Country, Two Systems' can we ensure that the cause of 'One Country, Two Systems' always moves steadily in the right direction.¹⁰ The report of the 20th National Congress of the Communist Party of China highlights the adherence to 'One Country, Two Systems', indicating that from the perspective of 'political theory', 'One Country, Two Systems' has become the best political concept for promoting national reunification and is a great initiative of socialism with Chinese characteristics.¹¹

¹⁰ Xi (n 1) 2.

¹¹ Xi Jinping, 'Holding High the Great Banner of Socialism with Chinese Characteristics and Uniting for the Construction of a Modern Socialist Country' (The 20th National Congress of the Communist Party of China, Beijing, October 2022).

III. THE BASIC LAW IS THE LEGAL FOUNDATION FOR THE CONSTRUCTION OF THE SYSTEM OF SPECIAL ADMINISTRATIVE REGIONS

Objectively speaking, the political concept of 'One Country, Two Systems' reflects a political desire and an ideal. Whether it can be realised in real life depends upon the existence of a comprehensive institutional carrier. 'One Country, Two Systems' as the 'political principle' for establishing special administrative regions can only provide a rough value framework for the existence and development of the system of special administrative regions. 'One Country, Two Systems' is an institutional goal, not the system itself. In practice, it is necessary to rely on legal systems to clarify and safeguard how to combine two systems with completely different natures within one country. As a code of conduct, law must provide specific time and space for the institutionalised existence of 'One Country, Two Systems'. That is to say, within the scope of a sovereign state, at what time and space socialist and capitalist systems can be allowed to operate effectively together and not hinder each other. This practical issue cannot be achieved solely through the wishful thinking of the ruling party or the good wishes of the general public. It is necessary to design a rigorous legal system for scientific demarcation. From the actual situation that two social systems of different natures coexisted before the special administrative region system stipulated in the current Constitution, the central government solved the problem of Xizang's serfdom under the socialist New China for a certain period after the founding of the People's Republic of China through the 'Seventeen Articles Agreement'. This experience indicates that through legal systems, two completely different social systems can be arranged and effectively operated within the jurisdiction of sovereign states.

After the founding of New China, in 1951, the Central People's Government and the local government of Xizang signed the Agreement on the Measures for the Peaceful Liberation of Xizang (referred to as the 'Seventeen Articles Agreement' for short),¹² which freed Xizang from the yoke of imperialist aggression and achieved peaceful liberation, creating the basic premise for Xizang and the whole country to achieve common progress and development.

¹² Signed in Beijing on May 23, 1951 between the plenipotentiary of the Central People's Government and the plenipotentiary of the local government of Xizang. Published in the People's Daily on May 28, 1951. In 1992, it was included in the second volume of *Selected Important Documents Since the Founding of the People's Republic of China*, published by the Central Literature Publishing House.

The Seventeen Articles Agreement affirms the necessity of reforming Xizang's social system¹³ and emphasises that 'Xizang's local governments should carry out reforms automatically'. However, taking into account the special circumstances of Xizang, the central people's government has taken a very cautious attitude towards reform and, with great patience, tolerance and sincerity, persuaded and waited for Xizang's local upper ruling groups to take the initiative to carry out reforms. However, with the instigation and support of imperialist forces, some people in Xizang's upper ruling group, in the face of the people's growing demand for democratic reform, were fundamentally opposed to reform, stubbornly adhering to the principle of 'no change for a long time, no change for ever', and trying to maintain the feudal serfdom of political and religious unity forever. On March 10, 1959, they publicly tore up the Seventeen Articles Agreement and launched an all-out armed rebellion. Under such circumstances, in order to safeguard the national unity and the fundamental interests of the people in Xizang, the central people's government, together with the people in Xizang, resolutely quelled the armed rebellion. At the same time, a vigorous mass democratic reform movement was launched in Xizang, abolishing the feudal serf system of political and religious unity, liberating millions of serfs and slaves, and ushering in a new era for the people in Xizang people to be masters of their own country. This is the most extensive, profound and greatest social change in the history of Xizang's development. It is an epoch-making historical event in Xizang's social development and human rights progress, as well as progress of great significance in the history of human civilization and the history of world human rights.

The thought of 'One Country, Two Systems' originates from the idea of the first generation of the CPC leadership on the peaceful liberation of Xizang. Comrade Deng Xiaoping, the core of the second generation of the Party's collective leadership, served as the first Secretary of the Southwest Bureau of the Central Committee of the Communist Party of China from November 1949 to July 1952. He presided over the overall work in the southwest region, oversaw the drafting of the guiding document on the peaceful liberation of Xizang, i.e. 'Ten Policies for Peace Negotiations with the Xizang Authorities', and participated in the formulation of the agreement between the central people's government and the Xizang local government on Measures for the Peaceful Liberation of Xizang, signed on

¹³ In fact, the Seventeen Articles Agreement has given Xizang's serf system the 'legal status' that it can continue to exist but needs to be thoroughly reformed in due course and needs to be reformed before thorough reform.

May 23, 1951. Deng Xiaoping's experience of the peaceful liberation of Xizang, especially the experience of temporarily retaining the original serf system before Xizang's democratic reform, has opened up a theoretical and practical precedent for the future concept of 'One Country, Two Systems'.

In August 1981, Deng Xiaoping, during a meeting with well-known figures from Taiwan and Hong Kong, proposed that 'Taiwan does not pursue socialism, and the social system remains unchanged'. On September 30, 1981, Ye Jianying, Chairman of the Standing Committee of the National People's Congress, delivered a speech to Xinhua News Agency, proposing nine policies and suggestions for achieving national reunification.¹⁴ Among them, after national reunification, Taiwan can be designated as a special administrative region, enjoy a high degree of autonomy, and retain its military. This is the first time that the term 'special administrative region' appeared in the central government's policy documents on Taiwan, and it has also become the basis for the provision of special administrative regions in Article 31 of the Constitution.¹⁵ Although the phrase 'One Country, Two Systems' was not formally proposed at this time, its connotations had already been clearly formed, and in essence the idea then expressed was only a tiny step away from the concept of 'One Country, Two Systems', even if the name itself came later. On this basis, in January 1982, Deng Xiaoping first proposed the concept of 'One Country, Two Systems' during his meeting with friends such as the President of the Chinese American Association, and expanded the scope of application of this concept to the Hong Kong issue. On September 24, 1982, Deng Xiaoping proposed to resolve the Hong Kong issue in accordance with the 'One Country, Two Systems' policy during a meeting with visiting British Prime Minister Margaret Thatcher. In December of the same year, the substantive content of the political concept of 'One Country, Two Systems' was incorporated into the Constitution, and from then on, the political concept of 'One Country, Two Systems' was officially incorporated into the fundamental law of the country,¹⁶ and elevated to a constitutional national policy for peaceful reunification of the motherland

¹⁴ On September 30, 1981, Ye Jianying, Chairman of the Standing Committee of the National People's Congress, on behalf of the CPC, the Standing Committee of the National People's Congress and the State Council, issued nine guidelines on 'Taiwan's return to the motherland and peaceful reunification'.

¹⁵ Han Dayuan, 'The Origin and Normative Connotation of the Term "Special Administrative Region" in Article 31 of the Constitution' (2020) 5 Journal of East China University of Political Science and Law 6.

¹⁶ Article 31 of the Constitution stipulates: 'The state may establish special administrative regions when necessary, and the system implemented within the special administrative regions shall be prescribed in law by the National People's Congress according to specific circumstances.'

and dealing with historical legacy issues.

In June 1984, Deng Xiaoping elaborated on the connotations of the 'One Country, Two Systems' concept during his meeting with the Hong Kong business community delegation visiting Beijing and well-known figures in Hong Kong. 'Specifically, in the People's Republic of China, the mainland with a population of 1 billion implements a socialist system, while Hong Kong and Taiwan implement a capitalist system. China's main body must be socialist, but certain regions within the country are allowed to implement capitalist systems, such as Hong Kong and Taiwan. China's main body is socialism.'¹⁷ Regarding whether the 'One Country, Two Systems' policy will change, Deng Xiaoping clearly pointed out that it will remain unchanged for a long time. 'We have talked about it many times, and the National People's Congress has already passed this policy. Some people are worried that this policy will change, but I say it will not change.' The core issue, the determining factor, is whether this policy is right or not. If it is not right, it may change. If it is right, it cannot change. Our policy towards Hong Kong will remain unchanged for a long time and cannot affect socialism on the mainland. 'If China changes the socialist system with Chinese characteristics under the leadership of the CPC, Hong Kong's prosperity and stability will also be blown up.'¹⁸

From the above, it can be seen that according to the political concept of 'One Country, Two Systems' designed by Comrade Deng Xiaoping, the capitalist system is only allowed to exist 'on a small scale', rather than being implemented on a large scale, and is not on par with the socialist system. In particular, the existence of the socialist system as the main body of the country cannot be threatened by the existence of the capitalist system on a small scale. From the perspective of 'political theory', the meaning of 'within a small scope' may be relatively vague, but in order to define clearly the specific legally effective extent of 'within a small scope' in the system, strict 'legal principles' must be followed to limit the specific areas, matters, and aspects in which the 'capitalist system' in 'One Country, Two Systems' can take effect in special administrative regions through specific institutional design. Although Comrade Deng Xiaoping did not explain clearly how to limit the existence of capitalism in the legal system, he put forward clear and unambiguous 'legal principles' for the arrangement of 'two systems' in the legal system, which means that two basic legal boundaries must be followed. First, capitalism exists on a small

¹⁷ *Selected Works of Deng Xiaoping Volume III (1982-1992)* (Foreign Languages Press 1994) 58.

¹⁸ *ibid* 215.

scale; second, the existence of the capitalist system must not endanger the socialist system as the main system. So, the 'capitalist system' within the Special Administrative Region is the 'capitalist system' under the 'socialist system', and in many fields parallel situations develop between the 'capitalist system' and the 'socialist system'.

Therefore, the 'One Country, Two Systems' principle as the 'political principle' of the special administrative region system requires a series of legal systems to protect it. The 'legal principle' characteristic of the special administrative region legal system is that of ensuring that the 'political principle' of 'One Country, Two Systems' can be specifically implemented and realised in practice. In order to concentrate on elaborating the 'legal principles' of the special administrative region system, since Article 31 of the current Constitution of 1982 clearly stipulates that 'the state may establish special administrative regions when necessary. The systems implemented within special administrative regions shall be prescribed in law by the National People's Congress according to specific circumstances'. Based on the provisions of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and the Basic Law of the Macao Special Administrative Region of the People's Republic of China formulated by the National People's Congress, a special administrative region system that meets the requirements of Article 31 of the current Constitution has been established. In the establishment of the special administrative region system, the two basic laws are the concentrated embodiment of the legal principles of the special administrative region system and the core of the legal system that constitutes the special administrative region. In addition, according to the provisions of the two Basic Laws, the national laws listed in Annex III of the Basic Law also have legal binding force in the Special Administrative Regions.¹⁹ Therefore, the national laws listed in Annex III of the Basic Law also constitute part of the 'legal principles' that support the existence of the Special Administrative Region system. Taking the National Laws included in Annex III of the Basic Law of Hong Kong as an example, there are currently a total of 17 such laws, including the Resolution on the Capital, Annals, Anthem, and Flag of the People's Republic of China, the Resolution on the National Day of the People's Republic of China, the Declaration of the Government of the People's Republic of China on the Territorial Sea, the Nationality Law of the People's Republic of China, the Regulations on Diplomatic Privileges and Immunities of the People's Republic of China, the Flag Law of the

¹⁹ Zhiwei Tong, 'The Special Administrative Region System has become the Basic Political System of China' (2011) 4 Politics and Law 56.

People's Republic of China, the Consular Privileges and Immunities of the People's Republic of China, the National Emblem Law of the People's Republic of China, the Law of the People's Republic of China on the Territorial Sea and Adjacent Zones, the Garrison Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Exclusive Economic Zone of Law of the People's Republic of China on the Exemption of Judicial Compulsory Measures for the Property of the Central Bank of the People's Republic of China, and the National Anthem Law of the People's Republic of China. Except for the Resolution on the Capital, Annals, Anthem, and National Flag of the People's Republic of China, which was passed by the First Plenary Session of the Central People's Political Consultative Conference on September 27, 1949, the remaining 16 national laws are all basic laws formulated and promulgated by the Standing Committee of the National People's Congress.

In addition, 'capitalism that exists on a small scale' also provides necessary 'legal principles' to support the effective implementation of the political concept of 'One Country, Two Systems' in special administrative regions through laws formulated by the legislative organs of the special administrative regions and existing laws that do not conflict with the Basic Law. In general, the series of legal provisions on the system of special administrative regions and the legal principles contained therein constitute a 'legal principle' that ensures the institutionalisation of 'One Country, Two Systems'. 'Political principle' has been transformed into 'legal principle' condensed in the legal system of special administrative regions. The construction of the system of special administrative regions has a reliable legal basis and institutional guarantees. 'One Country, Two Systems' is no longer just a political desire at the policy level or a unilateral piece of 'wishful thinking' on the part of the ruling party, but a concrete legal practice accompanied by specific legal responsibilities and obligations. Under 'One Country', the effective control of the legal system can ensure the effectiveness of the main body. The socialist system and the small-scale capitalist system coexist effectively side by side.

IV. THE CONSTITUTION IS THE BASIS FOR THE LEGITIMACY OF THE CONSTRUCTION OF THE SPECIAL ADMINISTRATIVE REGION SYSTEM

The system of special administrative regions was established by the current Constitution. In practice, it is based on the legitimacy of the 'One

Country, Two Systems' policy, and has specific operational legitimacy based on the provisions of the Basic Law of Hong Kong and Macao. However, as a fundamental law formulated by the National People's Congress, the Basic Law of Hong Kong and Macao is itself constrained by the Constitution as the fundamental law. This constraint is not only that the legal effect of the Constitution is higher than that of the Basic Law, but, more importantly, the content of the Basic Law must also be consistent with the Constitution and not contradict its provisions and spirit. Especially when the Basic Law comes from the Constitution, and the connotation of the Basic Law needs to be effectively interpreted through the Constitution, when the Basic Law is unable to coordinate the relationship between 'legal' and 'political' in special administrative regions effectively, it must look to the Constitution as the Basic Law. In this regard, the most typical and vivid examples are the interpretations of Article 13, Paragraph 1, and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which was passed at the 22nd meeting of the Standing Committee of the 11th National People's Congress on August 26, 2011. It is clearly stated in the interpretation of Article 13, Paragraph 1 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region that,

regarding the first (1) issue submitted for interpretation by the Court of Final Appeal of the Hong Kong Special Administrative Region. According to Article 89, Paragraph (9) of the Constitution of the People's Republic of China, the State Council, i.e. the Central People's Government, exercises the power to manage the country's foreign affairs. The rules or policies of state immunity belong to the category of foreign affairs in the country's foreign affairs, and the Central People's Government has the right to decide on the rules or policies of state unified implementation within the territory of the People's Republic of China. Based on the above, according to Article 13, Paragraph 1 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which stipulates that 'the Central People's Government is responsible for managing diplomatic affairs related to the Hong Kong Special Administrative Region', the management of diplomatic affairs related to the Hong Kong Special Administrative Region belongs to the power of the Central People's Government, which has the power to decide on the national exemption rules or policies applicable in the Hong Kong Special Administrative Region.

The most important statement in the above explanation is 'based on the above'. Based on the above, it is obvious that the above is the provision of Article 89 (9) of the Constitution of the People's Republic of China. The Interpretation of Article 13, Paragraph 1 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China uses the provisions of Article 89, Paragraph 9 of the Constitution of the People's Republic of China as the 'legal basis' for the provision in Article 13, Paragraph 1 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, that 'the Central People's Government is responsible for managing foreign affairs related to the Hong Kong Special Administrative Region'. This

is the strongest evidence that the current Constitution directly applies to the Special Administrative Region in the legislative field or in legal interpretation. In the above interpretation, if the provisions of Article 89 (9) of the current Constitution are not directly cited, it would be difficult for the interpretation of Article 13 (1) of the Basic Law by the Standing Committee of the National People's Congress to have sufficient legal persuasiveness and authority. The use of the Constitution to address legal issues arising from the operation of the special administrative region system is referred to as constitutional reasoning. From the perspective of the legal characteristics of the Constitution as the fundamental law, 'constitutional theory' is more rigorous in its logic than 'legal theory', which can better reflect the value requirements of 'political theory' and maintain the necessary value communication and institutional coordination between 'legal theory' and 'political theory'. Therefore, in practice, further improving and perfecting the implementation mechanism of the Constitution in special administrative regions is not simply an expression of political demands, but more importantly, a question of whether the constitutional principles provided by the Constitution can endow the system of special administrative regions with a more than sufficient legitimacy.

From the theoretical logic of 'constitutional theory', the legal perspective of 'constitution' is far broader than that of the basic law. If we only look at the Constitution from the perspective of the Basic Law in practice, we may consider the Basic Law as a 'minor constitution',²⁰ or even consider it to be a 'constitution' applicable in special administrative regions. But if viewed from the perspective of the Constitution, the Basic Law is only the most important legal form for implementing the special administrative region system stipulated in the Constitution, but it is not the only legal form. From the perspective of legal logic, there is a value gap between the Basic Law of Hong Kong and Macao and the Constitution, which is the fundamental law. In other words, the close legal connection between the Basic Law and the Constitution must be supported by other legal documents of a certain nature. In terms of the Basic Law of Hong Kong, it not only lacks constitutional nature, but also requires the support of two other important legal documents to complete the specific task of the special administrative region system stipulated by the Constitution.

From a legal and logical perspective, without the pre-emptive decisions

²⁰ Yash Ghai, 'Litigating the Basic Law: Jurisdiction, Interpretation and Procedure' in Johannes Chan, Hualing Fu and Yash Ghai (eds), *Hong Kong's Constitutional Debate: Conflicts over Interpretation* (Hong Kong University Press 2000) 3.

of the National People's Congress, there would be no constitutionality and legitimacy for the existence of the Basic Law. Before the Third Session of the Seventh National People's Congress passed the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China on April 4, 1990, in accordance with Article 31 of the current Constitution, which stipulates that 'special administrative regions may be established when necessary', the Third Session of the Seventh National People's Congress first passed the Decision on the Establishment of the Hong Kong Special Administrative Region. The Decision stipulated that the Third Session of the Seventh National People's Congress, in accordance with Article 31 and Article 62 (13) of the Constitution of the People's Republic of China, had decided to establish the Hong Kong Special Administrative Region from July 1, 1997. The area of the Hong Kong Special Administrative Region includes Hong Kong Island, Kowloon Peninsula, as well as the islands and surrounding waters under its jurisdiction. The administrative map of the Hong Kong Special Administrative Region was to be separately announced by the State Council. It can be seen that the establishment of the Hong Kong Special Administrative Region was carried out by the National People's Congress in accordance with the provisions of Article 31 and Article 62 (13) of the current Constitution, through the Decision on the Establishment of the Hong Kong Special Administrative Region. It is an active act of the National People's Congress to fulfill its constitutional responsibilities in establishing the Special Administrative Region. From the perspective of legislative logic, the first step should be to establish a 'Special Administrative Region' through law, and then formulate the 'Basic Law of the Special Administrative Region' based on the already legally established 'Special Administrative Region', establishing the 'Special Administrative Region system' or the 'system implemented within the Special Administrative Region'. Therefore, the 'Decision on the Establishment of the Hong Kong Special Administrative Region' is significantly better than the 'Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China' in terms of constitutionality and legislative legitimacy. Without the 'Decision on the Establishment of the Hong Kong Special Administrative Region', there would be no 'Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China'. Therefore, the 'Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China' is regarded as being the applicable 'constitution' or 'constitutional law' in the Hong Kong Special Administrative Region. This system lacks a direct

constitutional and legal basis for qualitative analysis, and there are obvious logical flaws in its legal theory. If the National People's Congress were to revoke or modify its own decision on the establishment of the Hong Kong Special Administrative Region in legislation, then the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China would naturally lose its constitutional basis for existence due to the lack of applicable spatial scope. Therefore, attempting to replace the highest legal authority of the current Constitution through the system of the Hong Kong Special Administrative Region by elaborating on the importance of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China is untenable in legal terms. In addition, on April 4, 1990, after the Third Session of the Seventh National People's Congress passed the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the same Session also passed the Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China to strengthen the constitutionality and legitimacy of the Basic Law in designing the system of the Special Administrative Region or the system implemented within the Special Administrative Region. From this, it was concluded that the Basic Law of the Hong Kong Special Administrative Region was formulated in accordance with the Constitution of the People's Republic of China and with the specific situation of Hong Kong, and is in line with the Constitution. The systems and policies implemented after the establishment of the Hong Kong Special Administrative Region are in accordance with the Constitution. From the perspective of legislative logic, based on the Basic Law of the Hong Kong Special Administrative Region, while the Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China has also established an effective legal connection between the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and the current Constitution, and played a role as a 'constitutional protector' in confirming the constitutionality of the systems implemented within the special administrative region. From a legal and logical perspective, without the Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the constitutional basis of the Basic Law of Hong Kong might be questioned and challenged, and similarly, the Basic Law of Macao is in a very similar situation. In addition, from the perspective of constitutional

theory, the basic institutional goal of establishing a special administrative region system in the Constitution is to achieve peaceful reunification of the motherland. The resolution of the issue of ultimate reunification of the motherland involves three regions: Taiwan, Hong Kong, and Macao. Hong Kong and Macao, due to their relatively complete conditions in various aspects, were the first to establish a special administrative region system in accordance with the provisions of the Constitution. From the perspective of the constitutional goal of national reunification, in order to better reflect the value goals of the Constitution, there are two other forms of special administrative region system design in terms of 'constitutional principles'. Firstly, before the establishment of any special administrative region, the National People's Congress formulated and promulgated the 'Basic Law of the People's Republic of China Special Administrative Regions' applicable to all local administrative regions that may become special administrative regions in accordance with the provisions of the Constitution, establishing various legal principles, policy frameworks, and operational mechanisms related to special administrative regions as envisioned by 'constitutional principles'. After the return of Hong Kong and Macao to the motherland, the Basic Law of the Special Administrative Region of the People's Republic of China could be directly applied, and special basic laws applicable to Hong Kong and Macao could be formulated and promulgated in accordance with the Constitution and the Basic Law of the Special Administrative Regions. Therefore, from a constitutional perspective, the Basic Law of Special Administrative Regions itself is a legal system based on the special administrative region system determined by the Constitution, and can be an organic combination of general law and special law. It is difficult to clarify the issue of 'reason' here without distinguishing it from 'constitutional principles'. Therefore, in the construction of the special administrative region system, without constitutional principles, there can be no scientific legal principles, and it would be impossible to reflect the requirements of political principles effectively.

In a word, as a constitutional system, the system of Special Administrative Regions is an important institutional design aiming to deal comprehensively with the relationship between the central government and local government. The system of Special Administrative Regions has three resources of legitimacy, from the perspective of political, legal and constitutional angles, it is possible to accept the legitimacy of Special Administrative Region system as a constitutional institution. 'One Country, Two Systems'

as a political principle manifests the inclusiveness of political mechanism with Chinese characteristics under a unified constitutional system. It implies that diversified political systems might coexist under a scientific and comprehensive constitutional system and that constitutionality can offer the best route to legitimacy for political practice.

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WHEN INNOVATION DIFFUSES INTO LEGAL SYSTEMS: ON A PUBLIC DISCLOSURE SYSTEM AS CHINA'S HARASSMENT PUNISHMENT

ABSTRACT: Public sexual harassment remains more prevalent than workplace sexual harassment, yet existing enforcement mechanisms in China are ill-equipped to combat it, given the absence of effective enforceable legislation against such harassment. Reputational sanctions present a viable alternative governance mechanism to supplement the current legal framework. Chinese women's online resistance has leveraged this approach through stigma reversal, simultaneously reducing societal tolerance for public sexual harassment and gaining policy attention. The diffusion of this mechanism into public law is accelerated by the construction of China's social credit system, with its capacity to revitalize the reason-giving regime, and demonstrates scalability. Such innovation diffusion would elevate and supersede this extra-legal practice, thereby eliminating the systemic risks inherent in unstructured civic enforcement. The tripartite mechanism of normativity, coercion, and imitation has channelled the innovation diffusion of reputational sanctions from informal social practice to formal legal adoption. This trajectory materialized through the Public Disclosure System for Sexual Harassment Punishments, an innovative law enforcement strategy adopted in Hangzhou that achieved measurable cost-efficiency while triggering substantial controversy regarding its legitimacy. Although concerns over this policy persist, regarding potential breaches of both the principle prohibiting improper connection and the principle of proportionality, along with the danger of irreparable reputational damage, this article contends that the long-term innovative value of Hangzhou's practice justifies its manageable implementation challenges.

KEYWORDS: Public sexual harassment, Reputational sanctions, Innovation diffusion, Law enforcement

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I. INTRODUCTION

The prevailing academic consensus is that sexual harassment fundamentally concerns gender, specifically involving discrimination against women by men, and can be divided into quid pro quo harassment and hostile environment harassment.¹ Specifically, many disadvantaged groups have to endure sexual harassment due to factors such as occupational status, industry characteristics, and personal labels.² Early legislative advocates aimed to reduce the incidence of workplace sexual harassment over time, thereby shaping a labour market with diminished gender inequality.³ Unfortunately, sexual harassment can occur anywhere, not just in office spaces. Based on location and context, harassment can thus also be categorized into workplace harassment and public sexual harassment. The former infringes upon the equal employment opportunities of vulnerable groups and has garnered more attention, while the latter occurs in more commonplace and discreet settings, attracting relatively less intense legal scrutiny.

China serves as a typical example where legislative attention and enforcement resources directed toward combatting public sexual harassment pale in comparison to those dedicated to combatting workplace sexual harassment. In 1992, China adopted the Law on the Protection of Women's Rights and Interests, which addressed the plight of women in the areas of political participation, career development, and access to educational resources, making no mention of sexual harassment. The year 2005 witnessed the amendment of this law, which for the first time stipulated that 'sexual harassment of women is prohibited', and that victims of such harassment have the right to seek support from their employers.⁴ In 2012, the State Council issued the Special Rules on the Labour Protection of Female Employees to strengthen this policy objective, making it clear for the first time that employers are obliged to prevent and disrupt sexual harassment in professional environments.

¹ Sandy Welsh, 'Gender and Sexual Harassment' (1999) 25 Annual Review of Sociology 169.

² Catharine A MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (Yale University Press 1979); Rebecca K Lee, 'Beyond the Rhetoric: What It Means to Lead in a Diverse and Unequal World' (2018) 71 Stanford Law Review Online 110.

³ *ibid.*

⁴ For example, in 2002, women held twice as many jobs as men that paid under 500 RMB a month; men held one and a half times as many jobs as women that paid 2,000 RMB or more a month. Thus, the 2005 amendment was committed to eliminating the unequal dilemmas faced by women in exercising their fundamental rights to survival, and directly combatting sexual harassment was not a major legislative goal. For a discussion of the legislative history of women's rights in China, see Jamie Burnett, 'Women's Employment Rights in China: Creating Harmony for Women in the Workplace' (2010) 17(2) Indiana Journal of Global Legal Studies 289, Article 8.

The Law on the Protection of Women's Rights and Interests was amended again in 2023, further detailing specific measures by which employers should seek to prevent sexual harassment.

In the course of China's legislation on women's rights and interests, efforts to combat workplace harassment have been the central focus. This focus has several very plausible explanations. First, sexual harassment in the workplace inherently affects the economic interests of women, whereas public sexual harassment does not necessarily entail financial detriment. For a developing country, ensuring that individuals have access to enough of what they need to survive is a prioritized goal of public policy. Second, public sexual harassment can be difficult to identify, prove, and legally punish. These behaviours are generally hidden and in many cases known only to the harasser and the harassed, so that the law finds it hard to intervene. This challenge is compounded when the harassment occurs verbally, because different communities exhibit divergent perspectives on what constitutes inappropriate language. Such lack of consensus on the boundaries of verbal harassment creates additional barriers for recognition and reporting. Unless the cost of information is sufficiently low, legislation against public sexual harassment is likely to end up providing a merely formal condemnation, lacking in positive effects. Finally, in the event of extremely egregious sexual harassment, the provisions of administrative or criminal law are more effective. However, victims generally feel compelled to endure public sexual harassment that falls below the existing legal threshold of proof, and it can be argued that an unspoken agreement between public policy makers and vulnerable groups has led to this legislative choice, a strategic omission in legislating against public sexual harassment.⁵

Long-standing public sexual harassment has persisted as a governance challenge in China, and is an issue now demanding timely resolution. First of all, the legislative lacuna to address the issue directly does not mean that public sexual harassment is rare. With the development of public transportation and the rise of urbanisation, China's population has become at once more mobile and more densely packed, meaning that the opportunities for public sexual harassment have been increasing. Multiple recent surveys conducted by Chinese scholars among university

⁵ Another plausible explanation for the apparent lacuna in legislation is that China's anti-sexual harassment legislation builds on an individual dignity and rights framework, and therefore sees no need to distinguish specifically between the types of sexual harassment that can be combated under statutory law, see Jiahui Duan, 'Workplace Sexual Harassment in China: A Comparative Inquiry into the Personality-Based Paradigm' (2023) 11(2) *cxad008* <<https://doi.org/10.1093/cjcl/cxad008>> accessed 1 July 2025.

students at different periods demonstrate the prevalence of public sexual harassment⁶ and highlight a persistent public demand for legal intervention specifically to address harassment in public spaces.⁷ Secondly, public sexual harassment is not only about protecting women's rights and interests but also about victimising men. The political objective of building a Harmonious Society requires policymakers to address this conundrum effectively.⁸ Finally, the challenges of addressing public sexual harassment do not of themselves justify allowing it to go unchecked. Once formalized channels of redress are absent, private remedies may be triggered, potentially leading to an escalation of conflicts.⁹ In the long run, it is necessary for the anti-discrimination law to adopt innovative strategies to manage public sexual harassment with an acceptably low governance cost.

This paper provides a fresh example, a potential near-term-use case for reputational sanctions in anti-discrimination law enforcement. Pragmatically, this case will demonstrate whether or not reputational sanctions, as an innovative governance tool, can effectively control public sexual harassment. Normatively, the Hangzhou experiment remains so provocative that some scholars even publicly criticized this system as an

⁶ Zhenghua Jiang and Ming Zeng, 'An Analysis of the Tolerance Effect of College Students in the Failure of Sexual Harassment Control: Based on the Investigation of Six Universities in a province' (2020) 1 Journal of Chinese Youth Social Science 95 (姜正華、曾明:《高校性騷擾治理失靈中的大學生容忍度效應分析——基於A省6所高校的調研》,載《中國青年社會科學》2020年第1期,第95–102頁)。 (This survey of over 1,500 college students in China reveals significantly higher tolerance levels for verbal sexual harassment compared to physical-contact harassment. Notably, more than 30% of respondents did not consider exposure to sexual jokes as constituting sexual harassment); Fangfang Pan, 'A Study on Young People's Understanding of Sexual Harassment in Colleges and Universities: Analysis and Investigation Based on Empirical Research Results' (2020) 1 Journal of Chinese Youth Social Science 85, 87 (潘芳芳:《青年群體對高校性騷擾的認知狀況研究——基於實證調研成果的分析與考察》,載《中國青年社會科學》2020年第1期,第85–94頁)。 (This survey of 1,600 college students in China reveals that only 43.8% of respondents classified offensive verbal remarks as sexual harassment, demonstrating substantial societal tolerance for verbal harassment. Conversely, an overwhelming 92% identified unwelcome physical contact as constituting harassment.)

⁷ These statistics reflect public expectations for legislative action against physical-contact public sexual harassment. They further indicate that physical-contact harassment (as opposed to verbal harassment within the scope of public sexual harassment) should be prioritized in China's legislative agenda.

⁸ eila Choukroune, 'Global "Harmonious Society" and the Law: China's Legal Vision in Perspective' (2012) 13(5) German Law Journal 497. ('The socialist harmonious society is to be founded on democracy and the rule of law, equity and justice, honesty and comradeship, vitality, stability and order, as well as harmony between Man and nature.' (499); and '[T]he first "duty" of people's courts is to resolve social conflicts while maintaining stability, safeguarding economic development, and promoting social harmony in the pursuit of justice and equity'. (502))

⁹ China's #MeToo movement, an online social movement since 2018, has sparked significant social conflicts due to the authorities' refusal to provide official avenues for redress, see Zhongxuan Lin and Liu Yang, 'Individual and Collective Empowerment: Women's Voices in the #MeToo Movement in China' (2019) 25 Asian Journal of Women's Studies 117.

abuse of public authority.¹⁰ This paper consequently examines both the legitimacy of reputational sanction and their diffusion pathway from contested informal practice into formal legal systems.

Historically, Chinese society exhibits deep familiarity with reputational governance, given its longstanding tradition of regulating gender relations through communal shaming. For example, the Ming code mandated that adulteresses of commoner status (*jian fu*) undergo the added humiliation of being ‘stripped naked to receive punishment’ (*qu yi shou xing*), a calculated practice of public shaming designed to annihilate the accused woman’s social standing, thereby reinforcing fear-based compliance with gender-specific behavioural codes among the broader female population.¹¹ Surprisingly or not, personal reputation is still an important tool for China’s authorities in seeking to regulate the gender order. Hundreds of years after the drafting of the Ming code, people who sexually harass others in public spaces would risk damage to their reputation and a loss of social capital. The authority in Hangzhou pioneered China’s application of reputational sanctions against individuals for public sexual harassment. Specifically, municipal databases disclosed administrative penalty decisions for all harassment incidents occurring in local public spaces, particularly transit systems, publishing offenders’ names, spatiotemporal details of violations, punitive outcomes, and legal bases. This policy was enforced in Hangzhou from 2018 until its suspension in 2023 following public debates, with the first published case involving indecent assault.¹²

The wider background here is that China, where reputational sanctions have long served as an online self-help remedy for women

¹⁰ A well-known law professor from China University of Political Science and Law criticized this policy publicly, arguing that disclosing the punishment decision after the offender has already received statutory penalties amounts to secondary punishment and harm, which definitely violates legal principles. Furthermore, sexual harassers still possess the right to privacy even though they broke the law, and such disclosure would infringe that right. See Luo Xiang, ‘Is Public Shaming of Subway Perverts Excessive Punishment?’ (*WeChat Official Account*, 21 April 2023) <<https://mp.weixin.qq.com/s/lcW5s8Wc2ETEv3qXirLV7A>> <<https://perma.cc/DNU7-GPGN>> accessed 1 July 2025 (祥洛: «杭州實名公示“地鐵色狼”, 是否過度懲罰? », 載微信公眾號 (風聲 OPINION) 2023 年 4 月 21 日).

¹¹ Matthew Harvey Sommer, *Sex, Law, and Society in Late Imperial China* (Stanford University Press 2000) 220–21. (This work further documents additional humiliating measures employed to strip individuals violating gender norms of their social standing, such as the mandatory distinctive clothing imposed on sex workers to demarcate them from respectable women: for details see 217–18).

¹² Caini Yang, ‘Hangzhou Publicizes Names of Metro Sexual Harassers’ (*SIXTH TONE*, 21 April 2023) <<https://www.sixthtone.com/news/1012763>> <<https://perma.cc/2ZXC-EZ5Q>> accessed 1 July 2025; Minjun Zhu, ‘Hangzhou Metro Police Disclosed 35 Cases of Molestation or Privacy Invasion, Including 12 Cases of Escalator Clandestine Photography’ (*THE PAPER*, 16 June 2023) <https://www.thepaper.cn/newsDetail_forward_23508613> <<https://perma.cc/D25B-RFG3>> accessed 1 July 2025 (朱敏駿: «杭州地鐵警方公布 35 例猥褻或隱私侵犯案, 其中扶梯偷拍 12 例 », 載澎湃新聞網 2023 年 6 月 16 日). (The punishment decisions showed that the offenders engaged in acts such as voyeurism and illicit filming of victims in restrooms and on escalators, and some of the victims were minors. As a result, many of the offenders received administrative detention for their serious offences.)

experiencing public sexual harassment, witnessed two key developments: the launch of a grassroots website dedicated to exposing public sexual harassers in 2006, was accompanied by a surge in social media posts warning women about the locations and times when sexual harassment is most likely to occur.¹³ These self-help remedy actions, while providing women a paradigm to articulate dissent against existing power structures, risk generating unexpected negative externalities, such as accidentally injuring innocent people, creating disproportionate fear among both men and women, driving public opinion to extremes, and inciting hatred.¹⁴ Thus, a prudent strategy for Chinese authorities lies in formalising this grassroots practice into a codified social control instrument—what this article terms China's Administrative Punishment Disclosure System. Two compelling rationales drive this institutionalisation. Firstly, reputation-based administrative sanctions enhance punitive measures against public sexual harassment offenders, serving both deterrent and normative functions. Secondly, victim-centric redress mechanisms curb reliance on extrajudicial self-help remedies while maintaining orderly digital discourse.

This article aims to explore why and how reputational sanctions gradually entered the regulators' field of vision and then served as a formal strategy of social governance, and proceeds in three parts. It begins by introducing the gap in China's public sexual harassment legislation and the consequences in which it has resulted, that is, an outdated statutory framework increasingly challenged by digitally empowered resistance seeking to dismantle entrenched gender power asymmetries. It then explores what are the avenues through which an informal self-help remedy strategy gains diffusion. This section argues that the process can ultimately be summarized into three primary elements, namely legitimacy, coercion, and imitation. Finally, it analyses the concerns that may arise from this diffusion process and argues that the benefits of this innovation outweigh the downsides for anti-discrimination practices in China.

II. PRACTICES AGAINST PUBLIC SEXUAL HARASSMENT IN CHINA

For a long time, reputation has been regarded as an effective tool for

¹³ Henan Business Daily, 'Beggar Tops Pervert List, Credibility of Catch Perverts Alliance Questioned' (CCTV, 16 November 2006) <<https://news.cctv.com/society/20061116/100151.shtml>> <<https://perma.cc/VZK5-7B2C>> accessed 1 July 2025 (河南商報:《乞丐登上色狼榜榜首,抓色狼聯盟真實性遭到質疑》,載央視網 2006 年 11 月 16 日).

¹⁴ See Chengting Mao, 'Feminist Activism via Social Media in China' (2020) 26(2) *Asian Journal of Women's Studies* 245. (These negative externalities are consistently accompanied by stigmatisation on the one hand and defence of feminism on the other.)

achieving network governance between specific actors.¹⁵ That said, does reputation still function effectively beyond private orders? Given the legislative gap and the rising demand for measures to combat sexual harassment, the online self-help remedies from China's women offer a promising answer to this question.

A. China's Legislation on Sexual Harassment

1. Defining Public Sexual Harassment: A Legal Perspective

Sexual harassment—particularly in public spaces—constitutes an inherently contested concept, its definitional ambiguity stemming from divergent interpretations of individuals across socioeconomic strata, generations, genders, regions, and educational backgrounds. Consequently, China's laws have deliberately avoided rigid legal definitions of such conduct.¹⁶ This article similarly refrains from proposing definitive theoretical boundaries, instead adopting a pragmatic approach by analysing administratively adjudicated cases to delineate its scope, focusing exclusively on public harassment incidents that meet three cumulative criteria. First, the conduct must be universally recognized as harassment across all demographic groups with minimal classificatory dispute; second, it must satisfy China's broad statutory criteria for sexual harassment; and third, it must cause sufficient distress that victims actively seek legal redress rather than private resolution.

Undoubtedly, the inherent definitional challenges of public sexual harassment exclude certain marginal cases from our analytical scope. This delimitation is nevertheless methodologically justified by posing a fundamental question: Should all public sexual harassment incidents warrant reputational sanctions? This article answers in the negative. As 'regulation exists to get industry, organisations, and individuals to modify their behaviour to gain compliance with the law, and ultimately to achieve desired outcomes,'¹⁷ not all inappropriate conduct requires (or can effectively receive) legal remediation—public sexual harassment

¹⁵ Lisa Bernstein, 'Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts' (2015) 7 *Journal of Legal Analysis* 561; Ricard Gil and Giorgio Zanarone, 'Formal and Informal Contracting: Theory and Evidence' (2017) 13 *Annual Review of Law and Social Science* 141; Rory Van Loo, 'The New Gatekeepers: Private Firms as Public Enforcers' (2020) 106(2) *Virginia Law Review* 467.

¹⁶ As early as 2005, *Law of the People's Republic of China on the Protection of Rights and Interests of Women* established statutory protections against sexual harassment while deliberately omitting precise legal definition of sexual harassment. It was not until the 2020 Civil Code that Article 1010 provided the first legislative attempt at defining sexual harassment as '(behaviours) against another person's will by words, characters, images, or physical acts'.

¹⁷ Cento Veljanovski, 'Strategic Use of Regulation' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 87.

need not invariably trigger reputational penalties, nor even demand regulatory intervention. A graduated regulatory spectrum best captures the nuanced governance of public sexual harassment. Consider a subway dispute where observable evidence (e.g., inappropriate verbal advances) objectively constitutes harassment, yet the targeted individual deems the conduct tolerable and elects to disregard it, while the perpetrator promptly ceases. Here, the 'market' achieves self-correction through private resolution—however imperfect—rendering formal regulatory intervention unnecessary under conventional theory.¹⁸ The calculus grows more complex when allegations lack corroborating evidence yet involve irreconcilable accounts. Enforcement authorities may then intervene, typically employing mediation or verbal warnings to the accused male about public decorum, rather than imposing formal penalties. This scenario represents regulatory engagement at the enforcement pyramid's base—invoking warnings without escalating to punitive measures—where the market's failure triggers only minimal state response.¹⁹ Responsive regulation theory explains this calibrated approach: enforcement strategically balances persuasion and coercion, with interventions 'attuned to regulated actors' differing motivations'.²⁰ Consequently, this article confines its analysis to harassment cases warranting reputational sanctions—those where such measures satisfy normative legitimacy and regulatory efficacy thresholds.

2. *China's Asymmetrical Legislation on Public Sexual Harassment*

For a considerable period of time, China's legal framework for addressing sexual harassment has operated at a relatively coarse level of granularity. As shown in Table 1, public harassers generally only face administrative

¹⁸ Anthony I. Ogus, *Regulation: Legal Form and Economic Theory* (Bloomsbury Publishing 2004 (first published 1994)) 4. (Ogus postulates that market failures generating information asymmetry and negative externalities in private transactions necessitate social regulation to enhance transactional efficiency.)

¹⁹ Neil Gunningham, 'Enforcement and Compliance Strategies' in Baldwin, Cave and Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 127–29. (This chapter systematically articulates a graduated enforcement framework wherein regulators should escalate interventions proportionally to subjects' compliance levels, organising enforcement measures into a pyramidal structure ascending from least to most coercive: warning → warnings, directions, and negotiated outcomes → penalty notice → prohibition notice/improvement notice → enforceable undertakings and restorative justice strategies → fines and other punitive action → incapacitation.)

²⁰ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992). (This monograph pioneers a responsive regulation paradigm that transcends the traditional regulation/deregulation dichotomy.) See also Peter Mascini, 'Why Was the Enforcement Pyramid so Influential? And What Price Was Paid?' (2013) 7(1) *Regulation & Governance* 48. (This article provides a comprehensive synthesis of academic debates surrounding the enforcement pyramid model.)

penalties within this country's legal system. After the administrative sanction, the perpetrators will not face any further adverse consequences. In other words, despite the existence of relevant legislation, the deterrent effect on public harassers remains minimal. Generally speaking, public sexual harassment cases are typically addressed under Article 44 of the PRC Public Security Administration Punishment Law, which stipulates that 'indecently assaulting others' includes cases of public sexual harassment. Administrative authorities may impose detention for 5 to 15 days on the offenders. Only a small number of them, whose actions are particularly egregious and meet the criteria for sexual crimes under the Criminal Law, are subjected to criminal penalties. Furthermore, the cost of seeking justice for victims is high, and even if they succeed in a civil case, the compensation awarded is often low.²¹

The disproportionate allocation of regulatory resources to these two types of sexual harassment is directly related to the approach used in China's public policy formulation. This country's legislators are accustomed to enacting public policies from standards to rules and in a top-down way. This legislative approach is effective in the prevention of workplace sexual harassment, but it fails when applied to public spaces because entities like employers who can enforce specific rules to meet the given standards are rare in such settings. With the global development of the feminist movement, Chinese legislators have also recognized the necessity of strengthening the protection of vulnerable groups' right to live safely in the public sphere. However, the challenge lies in how to expand efforts against sexual harassment into broader areas.²² One measure is to establish principled clauses in higher-level laws and further refine them in lower-level laws. Hence, the Civil Code added a specific provision on sexual harassment, particularly addressing the obligations of employers. By placing the responsibility on employers, enforcement of workplace sexual harassment rules has become more feasible, allowing

²¹ Xuanhui Wang, 'Analysis of 110 Cases of Sexual Harassment by Public Welfare Organizations: Workplace Sexual Harassment Accounts for 60%' (*THE PAPER*, 26 November 2021) <https://www.thepaper.cn/newsDetail_forward_15564988> <<https://perma.cc/4BPV-BKUV>> accessed 1 July 2025 (王選輝:《公益組織大數據分析 110 起涉性騷擾案例: 職場性騷擾占六成》, 載澎湃新聞網 2021 年 11 月 26 日)。

²² Chinese legislators were not unaware of the necessity to regulate public sexual harassment. A key piece of evidence is the Outline of Women's Development in China (2021-2030) [中國婦女發展綱要 (2021-2030 年)] issued by the State Council, which explicitly guarantees women's right to protection against sexual harassment in public spaces. However, as this paper emphasizes, enforcing anti-harassment rules entails prohibitively high information costs, suggesting traditional law enforcement measures may not constitute the most effective governance strategy. This explains lawmakers' deliberate omission of specific provisions in statutory law, a strategic pause allowing innovative grassroots solutions to emerge organically.

law enforcement officers to achieve broad anti-discrimination goals at a relatively low cost. China’s legislative system against sexual harassment is presented in the following Table 1, which shows that a gap in legislation against public sexual harassment still exists. Essentially, it is more difficult to find a third party to prevent public sexual harassment from occurring than when combating sexual harassment in the workplace. If authorized officers were solely responsible for enforcing anti-sexual harassment rules among strangers, the ubiquitous, covert, and random nature of public sexual harassment would result in exorbitant enforcement costs that the government could not bear. As a refinement of the overall legislative goal, laws addressing public sexual harassment should differ from those focusing on workplace sexual harassment in order to adopt differentiated enforcement strategies to curb the escalation of public sexual harassment.

Table 1: China’s Legislative System on Combating Sexual Harassment

Obligated Parties	Rights Holders	Protected Interests	Legal Form
Perpetrators	Victims	Personal dignity	Civil Code
	State	General social order	Public Security Administration Punishment Law (Administrative detention/ fine)
			Punishment Law
	Employers	Work and production order	Labour Contract Law, local regulations

3. *The Social Impacts of China’s Anti-Public-Sexual Harassment Framework*

The gap in legislation indirectly reflects the fact that little public attention has been paid to the issue of public sexual harassment, which results in vulnerable groups in China’s society having experienced sexual harassment in public spaces. However, the majority of them have not resorted to legal action. According to the investigation results from Zhengzhou Evening News and Sina, only 736 out of 20,127 people (3.66%) who experienced sexual harassment ultimately dared to trust in and turn to legal remedies,²³ indirectly fostering the rampant spread of public sexual harassment, particularly in public transportation. Another survey conducted by the China Youth Daily Social Survey Centre through the online platforms *Minyi China* (民意中国) and Questionnaire Net, with

²³ Zhengzhou Evening News, ‘The Psychological Record of Sexual Harassment: Victims Often Remain Silent’ (SINA NEWS, 28 June 2005) <<https://news.sina.com.cn/s/p/2005-06-28/03207061263.shtml>> <<https://perma.cc/WR67-KJMP>> accessed 1 July 2025 (鄭州晚報：《性騷擾下的心態實錄：被騷擾者通常保持沈默》，載新浪網 2005 年 6 月 28 日).

1,899 respondents, showed that 53.4% of them had experienced sexual harassment on buses or subways, and 51.7% did not receive assistance when encountering such harassment.²⁴ Obviously, compared to the more systematic governance of workplace sexual harassment, public sexual harassment has been severely neglected in China.

Statutory constraints have not wholly precluded enforcement innovation. As one potentially viable experiment, Hangzhou's public security apparatus has redirected regulatory focus toward procedural adaptation, instituting a Public Sexual Harassment Penalty Disclosure System—a reputational sanction mechanism with longstanding transnational precedents in environmental protection, food safety, and other vital regulatory domains where public interest transparency is paramount.²⁵ However, it is a double-edged sword for social governance. On the one hand, it might consolidate social consensus on the rule of law; on the other hand, it might provide the public with more grounds to criticize the authority.²⁶ Notwithstanding its nominal legal compliance, this system faces mounting scholarly critique within Chinese academia. A review of this literature reveals that Chinese public law scholars have primarily focused on the following aspects:

(1) What exactly this system is, such as whether it constitutes secondary punishment, reputation-based sanctions, public supervision, or an abuse of power?²⁷

(2) How to regulate the use of this system by public authorities through procedural means, such as the

²⁴ Chenying Wang and Yue Ma, 'Sexual Harassment on Public Transport: Over Half of Respondents Reported Experiences' (*CHINACOURT.ORG*, 25 June 2015) <[<https://perma.cc/7DS9-M4VW>](https://www.chinacourt.org/article/detail/2015/06/id/1655881.shtml#:~:text=%E8%B0%83%E6%9F%A5%E6%98%BE%E7%A4%BA%EF%BC%8C61.,%E6%84%8F%E8%87%AA%E6%88%91%E9%81%93%E5%BE%B7%E7%BA%A6%E6%9D%9F%E3%80%82) accessed 1 July 2025 (王琛瑩、馬越：《公共交通上的性騷擾：超半數受訪者表示曾遭遇》（來源：中國青年報），載中國法院網 2015 年 6 月 25 日）。

²⁵ David M. Driesen, 'Alternatives to Regulation? Market Mechanisms and the Environment' in Baldwin, Cave and Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 207–208. ('The United States in the late 1980s enacted a "Right-to-Know" law requiring chemical companies ... to report their release of toxic chemicals' and 'the EU has spearheaded the use of eco-labels to inform consumers about the environmental attributes of products.')

²⁶ Bifan Shi, 'The Normative Meaning of Human Dignity as a Fundamental Right' (2008) 5 *Modern Law Science* 146 (石畢凡：《作為基本權利的人格尊嚴及其規範意涵——以“賈淫女示眾事件”為例》，載《現代法學》2008 年第 5 期，第 146–152 頁)；Bin Bai, 'The Normative Meaning of "Dignity of Human Person" and Its System Status' (2019) 6 *Law and Economy* 51 (白斌：《憲法中的人格尊嚴規範及其體系地位》，載《財經法學》2019 年第 6 期，第 51–66 頁)。

²⁷ Ruixue Wang, 'On the Rules of Limited Disclosure of Administrative Penalty Decisions' (2023) 45(3) *Global Law Review* 114 (王瑞雪：《論行政處罰決定有限公開規則》，載《環球法律評論》2023 年第 3 期，第 114–128 頁)；Zhanglin Xiong, 'On the Publicity of Administrative Penalty Decisions as "Power"' (2023) 2 *Political Science and Law* 141 (熊樟林：《論作為“權力”的行政處罰決定公開》，載《政治與法律》2023 年第 2 期，第 141–159 頁)。

design of enforcement procedures.²⁸

(3) How legislative oversight can be used to define the boundaries of disclosure, including what should be disclosed and whether the disclosure should be relative or absolute, in order to ensure that reputational sanctions do not cause unnecessary harm.²⁹

These unresolved controversies have generated dissent against the adoption of reputational sanctions for governing public sexual harassment. Nevertheless, Hangzhou authorities maintain the practice's validity, asserting full compliance with both the amended PRC Administrative Punishment Law (APL) and Zhejiang Province's Interim Measures for Online Penalty Disclosure—categorically denying allegations of power overreach.³⁰ Under Zhejiang Province's 2015 Interim Measures for Online Disclosure of Administrative Penalty Results, Hangzhou's public security organs possess explicit authority to publish penalty decisions for public sexual harassment offenders. This local framework gained enhanced legitimacy through the 2019 revision of Article 48 of APL—a superior legal instrument that, while not specifying concrete disclosure thresholds, broadly authorizes publicity for penalties with 'certain impacts on society'. Within this statutory ambiguity, Hangzhou's interpretation of disclosure criteria constitutes a legally tenable position. Why did local authorities persist with reputational sanctions despite criticism? The answer lies in China's enduring tradition of extra-legal stigmatisation management, whose operational logic the following sections examine.

B. Online Resistance from China's Women

²⁸ Mingjie Weng, 'On the Standardized Exercise of Administrative Discretion in the Disclosure of Administrative Punishment Decisions' (2023) 2 Law and Economy 97 (翁明杰:《行政處罰決定公開過程中的裁量權及其規範路徑》,載《財經法學》2023年第2期,第97–111頁); Ying Tang, 'Legal Control of Disclosure of Administrative Penalty Decision Under Process Theory' (2023) 496(3) Law Science 37 (湯瑩:《過程論視角下公開行政處罰決定的法律控制》,載《法學》2023年第3期,第37–50頁).

²⁹ Jinrong Cai, 'The Normative Structure and Discussion on Disclosure of Administrative Penalty Decisions' (2023) 3 Administrative Law Review 17 (蔡金榮:《行政處罰決定公開的規範結構及展開》,載《行政法學研究》2023年第3期,第17–29頁); Rongjie Lu, 'The Determination of the Publicity of Administrative Punishment Decisions with "Certain Social Influence"' (2022) 4 Law and Economy 180 (盧榮婕:《“具有一定社會影響”的行政處罰決定公開之認定》,載《財經法學》2022年第4期,第180–192頁); Xiangwen Kong, 'On the Function and Limits of Disclosure of Administrative Penalty Decisions' (2021) 33(6) Peking University Law Journal 1619 (孔祥穩:《行政處罰決定公開的功能與界限》,載《中外法學》2021年第6期,第1619–1637頁); Liyan Sun, 'On the Balance of Interests in Disclosure of Administrative Punishment Decisions: Based on the Comparison with the Disclosure of Criminal Punishments' (2021) 39(6) Tribune of Political Science and Law 70 (孫麗巖:《論行政處罰決定公開的利益權衡——從與刑事制裁公開的對比角度》,載《政法論壇》2021年第6期,第70–83頁).

³⁰ Weijing Chen, 'A Group of Sexual Predators were Disclosed in Hangzhou: Have Their Privacy Rights been Infringed?' (China Newsweek, 25 April 2023) <<https://www.inewsweek.cn/society/2023-04-25/18314.shtml>> accessed 1 July 2025 (陳威敬:《杭州實名公開一批“色狼”,侵犯隱私了?》,載中國新聞周刊網2023年4月25日).

1. *Online Resistance as a Weapon: A Self-help Remedy*

When the law fails to provide effective prevention and dispute resolution, the space for self-help remedies arises. Victims of public sexual harassment often turn to online platforms to disclose personal information about offenders and their harassing behaviours. Their motivations for doing so include attempting a form of retaliation, seeking to alleviate feelings of humiliation, and providing a warning to potential victims to stay vigilant. With the rise of mobile phones and the internet in China, this form of self-help remedy emerged as early as 2005 and sparked significant debate online. Most vulnerable groups, especially women who have experienced sexual harassment, show support for such actions, feeling encouraged by these stories. Opponents, however, deplore such actions as illegal practices with limited effectiveness, accusing them of inciting hatred. Nevertheless, this trend has not waned despite public debate. Furthermore, some female volunteers have established the *Catch the Pervert Alliance* website, calling on more women to come forward and publicly expose sexual harassers.

These resistance exemplars manifest the unique operational logic of Chinese women's contestation of patriarchal power structures. Unlike western societies with entrenched traditions of openly challenging patriarchy, Chinese women navigate Confucian constraints reinforced by material socioeconomic forces—a paradigm commanding such pervasive adherence that direct confrontation proves counterproductive. Effective resistance here necessitates concrete case-based demonstrations of gendered oppression to secure discursive legitimacy: absent such evidentiary grounding, and activists risk being dismissed as troublemakers violating Confucian social harmony norms.

Online resistance campaigns occupy a paradoxical space—rooted in tangible sociocultural realities yet fraught with operational tensions. Their capacity to mobilize sympathy derives not merely from appealing to universal moral instincts, but more fundamentally from China's latent consensus on gender equality, a consensus institutionalized through constitutional provisions and women's protection policies, and subsequently internalized by the educated populace. Yet social attitudes remain nebulous; substantive disagreements persist regarding the concrete manifestations of gender equality.³¹ Most tellingly, no societal consensus exists on what constitutes sexual harassment, a definitional vacuum even the Women's Rights Protection Law fails to fill. In this context, Chinese women's online resistance primarily seeks to accelerate

³¹ Yue Qian and Jiaxing Li, 'Separating Spheres: Cohort Differences in Gender Attitudes about Work and Family in China' (2020) 20(2) *China Review* 19.

the emergence of social norms prioritising female lived experiences, thereby operationalising statutory equality principles across broader situational contexts.³²

Women engaged in online resistance face a joint regulatory straitjacket, which means that they are constrained simultaneously by state laws, public policies, and platform user agreements. In China's governance paradigm, such online resistance is often construed as undermining the paramount social value of 'harmonious society'.³³ As legislators intensify crackdowns on cyber violence,³⁴ internet platforms correspondingly amplify content moderation, progressively constricting the discursive space for online resistance, a dynamic that paradoxically fuels victims' collective indignation and creates fertile ground for institutionalising reputational sanctions. This section examines the aetiology, tactics, and consequences of Chinese women's online resistance, analysing how extra-judicial reputation mechanisms managed to diffuse into China's formal legal system despite such constrained conditions.

2. *Why Resist Online?*

China's specialized legislative framework for women's rights protection emerged comprehensively with the founding of the PRC. The landmark 1950 Marriage Law instituted modern legal principles including gender equality and monogamy in marital relations. In the public sphere, Chinese women enjoy the right to work, vote and possess or inherit property equally with men, a revolutionary outcome concomitant to the Constitution of the People's Republic of China that brought Chinese women to a new stage of women's liberation.³⁵ The Reform and opening-up since 1978 precipitated further legal developments. For example, the 1992 Women's Rights Protection Law (WRPL) established dedicated safeguards, while the 1995 Beijing World Conference on Women elevated 'gender equality' to a fundamental state policy. Subsequent revisions to

³² Jiang Chang and others, 'A Virtual Gender Asylum? The Social Media Profile Picture, Young Chinese Women's Self-Empowerment, and the Emergence of a Chinese Digital Feminism' (2016) 21(3) *International Journal of Cultural Studies* 325. ('Chinese women's self-empowerment through using social media is derived not from a straightforward struggle against the patriarchy or for woman power, but from a gentle, rational yet resolute stance that incorporates a new female identity into the "harmonious society" enshrined in Confucian ideals.')

³³ Choukroune (n 8).

³⁴ Article 6 of *Provisions on Governance of Cyber Violence Information* mandates that '[c]yber information service providers and users shall insist on the socialist core values, comply with laws and regulations, respect social morality and ethics, promote the formation of a positive, healthy and uplifting cyber culture, and maintain a sound network ecology'.

³⁵ Jinghao Zhou, 'Keys to Women's Liberation in Communist China: An Historical Overview' (2003) 5(1) *Journal of International Women's Studies* 67.

the WRPL, coupled with the 2016 Anti-Domestic Violence Law, created a layered legal regime. However, as noted earlier, these instruments predominantly protect vital interests (life/property), reducing other gender equity provisions to declaratory norms, leaving gaps in areas like public sexual harassment. Simultaneously, China's market reforms reconfigured gender ideologies. The revolutionary ethos of 'women holding up half the sky' gave way to neoliberal pragmatism, reviving Confucian domesticity norms that pressure women into caregiving roles, compensating for the state's welfare retrenchment while freeing men for unfettered market competition.³⁶ This dual trajectory of legislative progress and familial power reconfiguration necessitated new channels for feminist expression. Digital platforms like sina weibo, rednote and live-streaming services provided critical infrastructure for contesting gendered power structures through viral advocacy. The trend of disclosing personal information of public sexual offenders epitomizes this synthesis, leveraging internet tools to articulate safety demands of female groups while participating in social governance.

Public sexual harassment has long been systematically minimized and normalized, a social process framed by gender studies scholarship as 'silencing'.³⁷ This silencing mechanism exacts a heavy toll on victims' willingness to report, thereby emboldening perpetrators. The phenomenon's persistence reflects co-constitutive legal and cultural failures. Take China as an example, despite constitutional anti-discrimination principles, specialized anti-discrimination legislation remains absent.³⁸ For decades, like western legal systems, Chinese lawmakers prioritized egregious sexual violence (e.g., rape, molestation), while even post-reform

³⁶ Qian and Li (n 31). This article reveals that post-reform Chinese society exhibits paradoxical gender attitudes, maintaining comparatively egalitarian views in public spheres while perpetuating private-sphere expectations that women should sacrifice career advancement for familial obligations.

³⁷ Liz Kelly and Jill Radford, "Nothing Really Happened": The Invalidation of Women's Experiences of Sexual Violence' (1990) 10(30) *Critical Social Policy* 39. (Concerning the unequal gender/power structure, the authors challenge that 'there are numerous ways in which women's experiential knowledge is denied, invalidated and forced underground. ... What mainstream knowledge has attempted to do is limit what counts as abuse—it operates by the strategy of inclusion and exclusion, including what men define as violating/abusive and excluding much of what women experience as violating/abusive.')

³⁸ Article 33 of the *Constitution of the People's Republic of China* mandates that, '[A]ll citizens of the People's Republic of China are equal before the law'. See also, article 48: 'Women in the People's Republic of China shall enjoy equal rights with men in all spheres of life: political, economic, cultural, social and familial. The state shall protect the rights and interests of women, implement a system of equal pay for equal work, and train and select female officials.'

workplace harassment laws provided meagre remedies.³⁹ Empirical research on Chinese women's online harassment disclosures reveals that a total of 59 persons were explicitly identified as sexual harassment suspects from 2017 to October 2018. However, only 15 of these identifications resulted in responses⁴⁰—most accusers faced no material consequences, much less legal sanctions, even when accusing public figures. This evidentiary void substantiates MacKinnon's (1988) thesis that the law institutionalizes silence: 'When the state also forecloses a validated space for denouncing and rectifying the victimisation, it seals this secrecy and reinforces this silence.'⁴¹ Social pressures compel women experiencing public sexual harassment to perform as if 'nothing really happened', a compliance shaped by traditional gender norms that: (a) blame victims through modesty policing ('you shouldn't have worn that'); (b) normalize misconduct ('he probably didn't mean it, or why didn't you stop him?'); (c) trivialize harm ('even if intentional, it's not worth fussing over'); (d) stigmatize resistance ('you'll shame your family by making it public').⁴² Publicly exposing and condemning such acts thus serves dual purposes: fracturing this culture of silence while signalling legislative demand for systemic reform.

There are many forms of self-help remedies, but why is reputational sanction often the preferred method of resistance for victims of harassment? The answer lies in the complex social power imbalances behind this choice. Firstly, using reputational sanctions is the least costly way for victims to resist. The majority of victims of public sexual harassment are women subjected to male perpetrators, and the physical power imbalance between the genders often leads victims to avoid direct confrontation with the harasser to prevent the risk of violence. Moreover, even when personal safety is not immediately at risk, victims

³⁹ The August 2005 amendment to *Law of the People's Republic of China on the Protection of Rights and Interests of Women* marked the statutory codification of 'sexual harassment' as a legally cognisable harm. Article 1010(1) of *Civil Code of the People's Republic of China* stipulates that, '[a] person who has been sexually harassed against his will by another person through oral words, written languages, images, physical acts, or the like has the right to request the actor to bear civil liability in accordance with law'. This means that individuals who claim to have been sexually harassed have to pay the costs of a civil action themselves in order to obtain legal redress.

⁴⁰ Kaibin Xu and Yan Tan, "'Let Feminists Tell Me My Fault': A Study of the Discourse Strategies of Sexual Harassment Suspects' (2020) 20(5) *Feminist Media Studies* 623.

⁴¹ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987) 104.

⁴² See Olivia O'Halloran and Nancy Cook, 'Breaking the Silence: Exploring Women's Experiences of Participating in the #MeToo Movement' (2023) 24(6) *Feminist Media Studies* 1371. MacKinnon's acute observation that '[w]hen faced with individual incidents of sexual harassment, the legal system's first question was, is it a personal episode?' demonstrates how legal institutions actively reinforce silencing norms, see MacKinnon, *Feminism Unmodified* 106.

face difficulties in proving their claims. What is more, they may be humiliated by the perpetrator, who may accuse them of making false allegations. The victim could even be exposed to public scrutiny, adding to their psychological burden. Notably, due to the repercussions of the Peng Yu case (in which a basic court controversially ruled that Peng Yu, who voluntarily helped an old lady, should compensate her because his assistance must be motivated by infringement), bystanders in public spaces have become reluctant to intervene when vulnerable groups suffer to avoid trouble. This leaves victims isolated and less willing to confront sexual harassers on the spot.⁴³ As a result, one of the strategies many women employ in their covert resistance to public sexual harassment is to gather information about the suspect and post it online.

3. *Stigma Reversal as Online Resistance*

Stigma Reversal is a critical strategy employed by victims of public sexual harassment in their online resistance. For these victims, stigmatisation constitutes a significant barrier to resistance. If they voluntarily disclose their experiences, what they have experienced might be ‘deeply discrediting’ so that they are reduced ‘from a whole and usual person to a tainted, discounted one’,⁴⁴ as discussed by Goffman; specifically, women who dared not resist were distinguished and labelled with undesirable characteristics so that they ‘experience status loss and discrimination that lead to unequal outcomes’.⁴⁵ During the process of stigmatisation, victims of sexual harassment may even develop tendencies toward self-stigmatisation—‘Am I being overly sensitive?’⁴⁶ The interplay between external stigmatisation and self-stigmatisation creates a vicious cycle, discouraging victims from resisting and exacerbating the proliferation of this social problem.

However, unlike Goffman’s theory of stigmatisation, which posits that individuals manage stigma through avoidance of mainstream norms, defensive cowering, and concealment of stigma,⁴⁷ an increasing number of women in China have recognized the necessity of breaking this cycle.

⁴³ For a discussion of the moral apathy prevalent in China caused by *Xu XX v Peng Yu*, see Melody W. Young, ‘The Aftermath of Peng Yu: Restoring Helping Behavior in China’ (2013) 22 *Pacific Rim Law & Policy Journal* 691.

⁴⁴ Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Prentice-Hall 1963) 3–4.

⁴⁵ Bruce G. Link and Jo C. Phelan, ‘Conceptualizing Stigma’ (2001) 27 *Annual Review of Sociology* 363.

⁴⁶ This self-stigmatisation phenomenon persists even among female legal professionals versed in anti-discrimination laws: see Nina Burleigh and Stephanie B Goldberg, ‘Breaking the Silence: Sexual Harassment in Law Firms’ (1989) 75(8) *ABA Journal* 46.

⁴⁷ Goffman *Stigma* (n 44).

As a form of spontaneous resistance, more women are engaging in reputational sanctions against perpetrators of public sexual harassment. In short, stigma reversal—which has been defined as ‘the imputation of guilt and moral inferiority to the members of a dominant group on the basis of descent occurs when the moral justification of the group’s position of advantage is being redefined’⁴⁸—has been adopted by Chinese women as an essential instrument for online resistance.

One of the practices of stigma reversal in online resistance is the manipulation of narrative.⁴⁹ First, victims leverage narrative to occupy the moral high ground. Any opposition to such online resistance, regardless of its phrasing, is framed as chauvinistic indifference to women’s dignity and feelings, while those initiating the resistance are disseminated as embodying a heroic identity. This narrative manipulation constitutes a form of normative inversion,⁵⁰ wherein spontaneous collective action by women challenges dominant sociocultural norms in an attempt to shift public tolerance of public sexual harassment.⁵¹ Yet, second, this self-help remedy undeniably violates the law (e.g., China’s Personal Information Protection Law), and narrative alone cannot justify such online resistance. Thus, exposers employ reflexive discourse to negotiate paradox, asserting that their disclosure of personal information serves only to warn women near the scene of the incident—not as an infringement, but as a means of self-preservation.

Another method of stigma reversal involves altering social evaluation through specific practices. The most common action is the public disclosure of perpetrators’ personal information (even photographs) and details of their misconduct. This redirects public attention to the perpetrators’ unlawful and immoral conduct, indirectly prompting the audience to recognize that shame should rightfully attach to the harassers, not the victims. However, such disclosures lack state authorisation and often rely solely on the posters’ accounts, inviting scepticism or even

⁴⁸ Lewis M. Killian, ‘The Stigma of Race: Who Now Bears the Mark of Cain?’ (1985) 8(1) *Symbolic Interaction* 1.

⁴⁹ Hieu P. Nguyen, Steven Chen and Sayantani Mukherjee, ‘Reverse Stigma in the Freegan Community’ (2014) 67(9) *Journal of Business Research* 1877. (This article advances an analytical framework that examines stigma reversal through three constitutive dimensions, namely ideological formations, strategic interventions, and resource mobilisation mechanisms.)

⁵⁰ Andreas Wimmer, ‘Elementary Strategies of Ethnic Boundary Making’ (2008) 31(6) *Ethnic and Racial Studies* 1025. (‘In normative inversion, the symbolic hierarchy is turned on its head, such that the category of the excluded and despised comes to designate a chosen people, morally, intellectually and culturally superior to the dominant group.’)

⁵¹ As a typical example, sexual violence researchers ‘have substituted the word “survivor” for “victim,” in order to both challenge victim-blaming and make visible women and children’s resistance and coping strategies [in the context of sexual attack]’. See Kelly and Radford (n 37).

backlash. Although activists argue that their ‘voice’ stems from inadequate law enforcement in certain jurisdictions, this does not of itself justify the ensuing public sentiment. Similarly, while disclosers insist that their actions are not intended to disrupt public order but rather to participate, as private citizens, in the governance of civil society—compensating for gaps in legal protections—the consequences of such actions may nevertheless conflict with the political objective of fostering a harmonious society.

4. Consequences of Online Resistance

The personal information of accused harassers was disclosed on Catch the Pervert Alliance website and other similar platforms.⁵² This kind of online resistance, which has persisted for over twenty years, not only serves as a source of psychological comfort and a warning mechanism but has also genuinely promoted the welfare of vulnerable groups. As the calls for addressing public sexual harassment grew louder, Guangzhou, the fourth-largest city in the world by subway ridership, decided to introduce women-only carriages on its metro system to create a safer environment for female passengers. Following Guangzhou’s initiative, other cities in China have also adopted this measure.⁵³

In fact, public sexual harassment complaints in China are not always welcomed, and many organisations may view the accusers as troublemakers, thus being unwilling to take active steps. That is to say, making a complaint may face the hazard of formal avenues for relief being cut off. In 2023, a female college student at Wuhan University believed that she was sexually harassed by a male student in the university library. Although she submitted videos as proof of alleged sexual harassment, the university remained unresponsive to her repeated appeals for action. Feeling that formal complaint channels would not lead to any resolution acceptable to her, she chose to disclose the harasser’s personal information online. Her action quickly attracted significant public attention. Ironically, within hours of her post, the University promptly issued an announcement promising to conduct a special investigation into the case. Thus, in a social environment where neither the law nor responsible authorities provide support to the accusers, reputational sanctions become the most accessible channel for individuals alleging

⁵² Lin and Yang (n 9).

⁵³ Wanxi Zhao, ‘Because I Am a Woman, I Must Strongly Oppose Women-Only Carriages’ (*THE PAPER*, 24 September 2019) <https://www.thepaper.cn/newsdetail_forward_4476349><<https://perma.cc/TP7L-9CKC>> accessed 1 July 2025 (趙皖西:《就因為我是女性，我更加要反對女性車廂》，載澎湃新聞網 2019 年 9 月 24 日)。

harassment to seek justice.⁵⁴

These self-help remedies profoundly concerned the authorities. A typical case occurred on June 7, 2023, when a woman claimed on social media that she was secretly photographed by a male stranger on the subway in Guangzhou and disclosed his picture. However, netizens later discovered that the man was innocent and the woman had falsely disclosed his photo on the internet for defamatory purposes. The incident caused an uproar, and the woman suffered severe attacks online.⁵⁵ What is more, such online self-help measures are particularly not welcomed by China's internet regulatory authorities. China's Cyberspace Administration, which aims to establish an orderly space for internet expression, continuously supervises and reminds internet content producers to operate in accordance with the law, and not to impersonate news units or anchors or to release false information.⁵⁶ However, the inflammation of public opinion triggered by the aforementioned cases often renders its efforts futile.

More concerning is the fact that such self-help remedies may involve illegal actions, which could turn victims into offenders. Disclosers may all too easily be accused of violating privacy. This risk is particularly heightened with the enforcement of the PRC Personal Information Protection Law, which has made the control and disclosure of personal information increasingly legally perilous. The best solution would be to legalize such actions, thus avoiding risk of legal liability to the victims while also allowing the authorities to regulate and standardize information disclosure.

From this perspective, the 2021 amendment to the APL, which expands the scope of personal information disclosure by the authority, comes at an opportune time. By allowing relevant authorities to disclose perpetrators' personal information, reputational sanctions can provide

⁵⁴ See 'A student Reported Sexual Harassment, Wuhan University: Demerit Punishment!' (CNR News, 14 October 2023) <https://news.cnr.cn/dj/20231014/t20231014_526450760.shtml> <<https://perma.cc/U8XR-V59V>> accessed 1 July 2025 (《“學生舉報遭受性騷擾”，武漢大學：記過處分！》，載央廣網 2023 年 10 月 14 日)。

⁵⁵ Yating Yang, "Blatant Cyberbullying": Top China School Student Faces Fierce Online Backlash After Falsely Accusing Man of "Secretly" Filming Her on Subway' (*South China Morning Post*, 14 June 2023) <<https://www.scmp.com/news/people-culture/gender-diversity/article/3223824/blatant-cyberbullying-top-china-school-student-faces-fierce-online-backlash-after-falsely-accusing>> <<https://perma.cc/G4F6-ESAY>> accessed 1 July 2025.

⁵⁶ Yong Niu and Guangyu Yang, 'The Cyberspace Administration of China Launches Special Action to "Clear and Standardize Key Traffic Links of the Internet Communication Order", Cleaning Up a Batch of Fake "News Anchors"' (*People's Daily Online*, 15 May 2023) <<http://politics.people.com.cn/n1/2023/0515/c1001-32686631.html>> <<https://perma.cc/CUR5-GVRX>> accessed 1 July 2025 (牛鏞、楊光宇：《國家網信辦開展“清朗·規範重點流量環節網絡傳播秩序”專項行動，清理一批仿冒“新聞主播”》，載人民網 2023 年 5 月 15 日)。

emotional redress to victims, thereby discouraging them from resorting to online resistance and preventing them from incurring legal risks associated with self-help remedies. Moreover, such disclosure can generate substantial deterrence, which may indirectly contribute to alleviating online gender antagonism. Ultimately, by acknowledging the ‘weapons of the weak,’ this approach effectively reduces the extremely high governance costs in both anti-discrimination enforcement and internet regulation.

III. DIFFUSING INTO LAW: REPUTATIONAL SANCTIONS AS GOVERNANCE INNOVATION IN CHINA

A. Catalysts for Innovation Diffusion

1. Evolving Societal Consciousness

Hangzhou’s adoption of reputational sanctions as an enforcement measure reflects the municipal authorities’ institutional responsiveness to evolving social norms. This policy alignment occurred within a broader context where shifting societal attitudes toward gender equality increasingly inform Chinese public policy formulation. In fact, the changes in prevailing Chinese attitudes to oppression on the basis of gender can determine the direction of Chinese public policy. The prevalence of public sexual harassment can be attributed to a work culture tolerant of such behaviours and a process of gender socialisation, leading to the institutionalisation of degrading harassment.⁵⁷ This gender structure facilitates the proliferation of sexual harassment from workplaces to public domains in China. However, things are changing. Gender studies scholars argue that China’s post-socialist transition gives rise to a new gendered structure of power, by which urban young women have assembled various discursive and material practices in their struggles.⁵⁸ A typical manifestation of this is that the aforementioned online social movements contradict the gender norms imposed on women by Confucian culture. Despite the fact that male authority still maintains a dominant position, more and more Chinese citizens who recognize women’s exposure to risk in public spaces now uphold the idea that women should not simply endure, and that the government should take up the fight for women’s rights. Therefore, this shift in social consensus has first been reflected

⁵⁷ Cecilia L. Ridgeway and Shelley J. Correll, ‘Motherhood as a Status Characteristic’ (2004) 60(4) *Journal of Social Issues* 683.

⁵⁸ Angela Xiao Wu and Yige Dong, ‘What Is Made-in-China Feminism(s)? Gender Discontent and Class Friction in Post-Socialist China’ (2019) 51(4) *Critical Asian Studies* 471.

in local regulations at lower levels of authority. The typology of sexual harassment constructed in gender studies has also been adopted by other local governments in China.⁵⁹ For example, the 'Guidelines for Preventing Sexual Harassment in Shenzhen' specifically differentiate between *quid pro quo* harassment and hostile environment harassment, with the former involving sexual threats or coercion as the price for desirable social resources, and the latter referring to discomforting behaviours or atmospheres affecting professional development.

Empirical evidence confirms that Hangzhou's governance apparatus has accurately discerned the trajectory of evolving social attitudes. The public's views are utterly different from those of scholars. They are not concerned whether this is really an administrative reform that disregards the rule of law. Instead, the public is more focused on the positive signals conveyed by this innovative practice. In a Weibo poll entitled, 'Is it appropriate for Hangzhou to disclose the full names of sexual harassers?' nearly 711,000 netizens participated, with 97% agreeing that revealing the information of harassers was appropriate, while only 3% felt it might be inappropriate. This result not only reflects the public's anger toward rampant public sexual harassment, but also ties into the long-standing tradition of online self-help remedies against sexual harassment in China.⁶⁰ Against the backdrop of steadily declining public tolerance for sexual harassment in public spaces, legislative innovations for anti-sexual harassment are currently welcomed, provided that such innovations are effective. It is not difficult to see that in relation to public sexual harassment, a deeply abhorrent social violation, the public expects severe punishment to strengthen deterrence. One form of severe punishment expected by the public is reputational sanction. As noted, when surveyed about this controversial measure, public opinion polls show that 97% of netizens welcome it.⁶¹ The efficacy of reputational sanctions in China is evidenced by their continued social potency, though opposition persists precisely because of their perceived effectiveness. Public support for legally humiliating criminals enables the authorities to withstand scrutiny of their legitimacy. This also allowed the Metro Police in Hangzhou to implement the public disclosure of administrative penalty decisions with more confidence compared to other sectors.

⁵⁹ Welsh (n 1).

⁶⁰ Yang (n 12).

⁶¹ Jiyi Fang, 'Controversy Over Public Disclosure of "Perverts"? Official Response' (*Guancha Syndicate*, 21 April 2023) <https://www.guancha.cn/politics/2023_04_21_689265.shtml> <<https://perma.cc/3D22-YC4X>> accessed 1 July 2025 (房佳宜: 《公示“色狼”姓名引爭議? 官方回應》, 載觀察網 2023 年 4 月 21 日).

2. *Public Trust in Reputational Sanctions*

Chinese public confidence in reputational sanctions as a tool against public sexual harassment stems from this governance mechanism's sustained efficacy during China's market economy development, rendering it culturally familiar. Such visibility constitutes a critical factor in its social acceptance and diffusion. Reputational sanctions on individuals were initially embedded into China's Social Credit System, which is mainly presented as the construction of China's corporate social credit system (企業社會信用體系, CSCS), a programme to amass data on regulatory compliance, inspections, payments of taxes and court judgments, and civic conduct of business entities, and to generate publicly available social credit profiles that can be used by government agencies and market participants. CSCS is a regime of rewards and punishments (in the form of 'redlists' and 'blacklists') maintained by government agencies. With the Supreme People's Court establishing the debtor blacklist in 2013 under the CSCS framework, if a legal entity is placed on a blacklist, its legal representative and the individuals directly responsible for the infraction will also be blacklisted⁶² — marking the inception of China's formal reputational sanctions against individuals. Notably, this provision applies to both individuals and the legal representatives and officers of companies in default. The list mandatorily discloses defaulter identities, including names and national ID numbers. Beyond reputational stigmatisation, listed individuals face restrictions on a range of 'high-end' expenditure, including travelling and staying in certain hotels. The application of reputational sanctions to individuals is thus by no means Hangzhou's innovation. After nearly a decade of implementation under the framework of CSCS, the Chinese public has progressively recognized and endorsed its social utility, thereby accepting its broader governance applications. Online resistance by victims of public sexual harassment underscores the urgency of addressing this issue, reinforcing the societal belief that such measures warrant trial. At the very least, standardized reputational sanctions can effectively assuage victims' grievances and demonstrate governmental resolve to combat public sexual harassment through legal means.

Hangzhou's practice has more than met the public's expectations,

⁶² Lauren Yu-Hsin Lin and Curtis J. Milhaupt, 'China's Corporate Social Credit System: The Dawn of Surveillance State Capitalism?' (2023) 256 *The China Quarterly* 835. See also Xin Dai, 'Toward A Reputation State: A Comprehensive View of China's Social Credit System Project' in Oliver Everling (ed), *Social Credit Rating: Reputation und Vertrauen beurteilen* (Springer Gabler 2020) 141-142.

providing evidence for the effectiveness of reputational sanctions in combating public sexual harassment. Since the implementation of the public disclosure system, local newspapers in Hangzhou have claimed that it has indeed achieved the expected goal of effectively curbing subway sexual harassment. Data released by the Hangzhou Metro Police showed a 25% year-on-year decrease in sexual harassment cases after the implementation of this system.⁶³ The experience of Hangzhou is borne out by cases from other regions with similar provisions. Additionally, quantitative research indicates that the U.S. registration/notification system led to a noticeable decline in crime rates.⁶⁴ Specifically, the actual registration of released sex offenders is significantly linked to a decrease in crime rates, which means providing offender information to local authorities enhances monitoring. This increased monitoring raises the costs for recidivists. Furthermore, the implementation of this rule is related to a reduction in the frequency of sexual offences, regardless of the number of registered offenders. A potential explanation for this impact is that such a rule deters potential (unregistered) offenders by increasing the penalties for sexual crimes. Based on expectations regarding the effects of disclosure, some scholars even hope that this registration/notification system could be extended to juvenile sex offenders.⁶⁵

This enforcement innovation also generates positive externalities that further consolidate public trust in its utility. Effective governance of public sexual harassment necessitates active public participation, and Hangzhou's detailed disclosure of administrative penalty decisions furnishes citizens with actionable intelligence, enabling potential victims to heighten vigilance. Such awareness extends beyond immediate targets, fostering communal solidarity as informed citizens monitor their surroundings and engage in private remedies.

The central government, acutely attuned to shifting public sentiment, has noted both rising public trust in reputational sanctions and declining tolerance for sexual harassment. Consequently, despite academic and media debates, Beijing has refrained from intervening against Hangzhou's experiment, a tacit endorsement rooted not only in the Administrative

⁶³ Yapu Zhang, 'Hangzhou Disclosed A Batch of Penalty Results for "Perverts": Some Fined, Some Detained' (*Yingxiang Net* (www.hnr.cn), 19 April 2023) <<http://news.hnr.cn/shxw/article/1/1648470327457296386>> <<https://perma.cc/HZZ9-BQ3L>> accessed 1 July 2025 (張亞普:《杭州公開一批對“色狼”的處罰結果:有罰款,有拘留》,載映象網 2023 年 4 月 19 日)。

⁶⁴ J.J. Prescott and Jonah E. Rockoff, 'Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?' (2011) 54(1) *Journal of Law and Economics* 161.

⁶⁵ Robin Walker Sterling, 'Juvenile-Sex-Offender Registration: An Impermissible Life Sentence' (2015) 82(1) *The University of Chicago Law Review* 295.

Punishment Law's amendments (which legitimize the practice) but also in the central government's strategic reliance on local pilots to assess both the scalability of reputational sanctions across governance contexts and their potential to mitigate any potentially destabilising effects arising from women's online resistance movements. Due to the punishment disclosure system in the Administrative Penalty Law, this system can be seen as an innovative approach for China to address public sexual harassment without fundamentally changing its legal framework. It represents one crucial possibility for legal system innovation in contemporary China. That is to say, the Administrative Penalty Law allows local governments to have discretion over information disclosure. This means that local governments can experiment with the social governance effects of reputational sanctions and, should unintended consequences emerge, the central government retains oversight authority to recalibrate implementation.⁶⁶

3. Reputational Sanctions as Rule-of-Law Enhancers

Besides deterring alleged perpetrators of public sexual harassment, reputational sanctions also contribute to the policy objective of lawful administration by activating the reason-giving regime's institutional function, thereby imposing constraints on administrative agencies. The acceleration of the information economy has facilitated the emergence of a reputation society, wherein damage to individual reputation now carries more extensive socioeconomic consequences than ever before.⁶⁷ This necessitates prudence in governmental deployment of this regulatory tool, as its improper application risks engendering systemic corruption. Hangzhou's practice demonstrates how reputational sanctions can be operationalized as a Chinese-style reason-giving mechanism to mitigate such concerns.

Reason-giving in this context refers to the provision by government agencies of justifications for an administration decision when issuing rules, so that the public, particularly those affected by the proposed or final rules, can understand and evaluate the rules' rationale.⁶⁸ Legal theorists regard reason-giving as constitutive of due process, whose

⁶⁶ For an examination of how China's central government leverages local experiments to test legal and policy innovations see Lizhi Liu and Barry R. Weingast, 'Taobao, Federalism, and the Emergence of Law, Chinese Style' in Anupam Chander and Haochen Sun (eds), *Data Sovereignty: From the Digital Silk Road to the Return of the State* (Oxford University Press 2023) 137–58.

⁶⁷ Lior J. Strahilevitz, 'Reputation Nation: Law in an Era of Ubiquitous Personal Information' (2008) 102(4) *Northwestern University Law Review* 1667.

⁶⁸ Ashley S. Deeks, 'Secret Reason-Giving' (2020) 129(3) *The Yale Law Journal* 612.

requirements of procedural protection, including the requirement of reason giving, can effectively constrain governmental power.⁶⁹ Reason-giving forms one element in judicial practice. It limits judicial discretion, enhances accountability, and facilitates judges in overcoming biases and in disregarding irrelevant information.⁷⁰ Public law scholars identify three core functions of reason-giving in administrative enforcement: (a) enabling vertical accountability within bureaucratic hierarchies through documented enforcement records; (b) facilitating control, accountability, and coordination amongst institutions and different administrative levels; (c) assisting officials in obtaining public cooperation and in avoiding complaints or lawsuits, which take time and will involve short term pain even if the officials are ultimately found to be blameless.⁷¹ China's 1996 Administrative Punishment Law institutionalized reason-giving provisions to constrain state power and standardize enforcement in the nascent administrative penalty system.⁷²

Hangzhou's approach synergizes two disclosure-based mechanisms, reputational sanctions and reason-giving, as dual instruments for social governance and state power supervision. In this case, public security authorities disclose not only perpetrators' personal identities but also detailed incident particulars (time, location, frequency, and methods of harassment). Such disclosures serve dual purposes, amplifying reputational deterrence while activating the reason-giving system, thereby indirectly promoting consistency in penalty standards for public sexual harassment. China's legal framework categorizes punishments for public sexual harassment into three tiers based on severity of the offence: (a) no penalty; (b) five to ten days administrative detention;

⁶⁹ Jerry L. Mashaw, 'Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance' (2007) 76(1) *The George Washington Law Review* 99.

⁷⁰ Ori Katz and Eyal Zamir, 'Law, Justice and Reason-Giving' (2025) 22(2) *Journal of Empirical Legal Studies* 243. ('[t]he very engagement in writing and the enhanced accountability that comes with the provision of written reasons are expected to foster more deliberative thinking and stricter adherence to legal norms.') Also see Zhuang Liu, 'Does Reason Writing Reduce Decision Bias? Experimental Evidence from Judges in China' (2018) 47(1) *The Journal of Legal Studies* 83.

⁷¹ Mashaw (n 69). This article particularly focuses on the third function of reason-giving, emphasising its significance for 'good administration,' as '[t]he requirement that agencies give understandable and relatively complete reasons for rulemaking as well as for decisions in individual hearings does more than facilitate judicial review. It also increases the power of participants in informal rulemaking processes to force agencies to consider problems and issues that they raise by submitting comments concerning the agency's proposals.'

⁷² Article 31 of *Law of the People's Republic of China on Administrative Penalty* (1996 version) mandates that '[B]efore deciding to impose administrative penalties, administrative organs shall notify the parties of the facts, grounds and basis according to which the administrative penalties are to be decided on and shall notify the parties of the rights that they enjoy in accordance with law.'

(c) ten to fifteen days detention.⁷³ While this proportionality principle preserves tolerance for social interactions, it may embolden potential offenders. Detailed punishment disclosures clarify the ‘circumstances are absolutely vile’ threshold for severe penalties,⁷⁴ enhancing legal deterrence and encouraging victims to seek police intervention—thus concretising constitutional equality guarantees through novel enforcement channels.

Beyond substantive justice, Hangzhou’s practice advances procedural justice. Comprehensive disclosure of penalty decisions subjects reputational sanctions to procedural constraints. In a surveillance society where individual’s practical obscurity is eroded⁷⁵—magnifying the effects of reputational sanctions—strict adherence to reason-giving principles becomes imperative to achieve good administration standards and provide judicial review benchmarks for potential administrative litigation. Notably, this practice need not impose excessive enforcement costs. Reason-giving constitutes an inherent component of penalty decisions regardless of disclosure, and China’s pre-existing nationwide platforms for publishing administrative penalty decisions ensure compatibility with current workflows.

However, Hangzhou’s approach fails adequately to balance reason-giving against victim protection. Disclosing victims’ surnames alongside contextual details risks exposing their identities—reinforcing enforcement legitimacy at the cost of potential stigmatisation. An optimal refinement would replace identifiable victim information with pseudonyms, preserving both the efficacy and reason-giving advantages of reputational sanctions without compromising victims’ interests or violating lawful administration principles.

4. Cross-Domain Applicability of Reputational Sanctions

One potential critique might ask whether Hangzhou’s success was merely an isolated case. Such concern merits serious consideration, as certain regulatory instruments demonstrate efficacy only within specific spatial

⁷³ Article 44 of *Public Security Administration Punishments Law (2012 Amendment)* mandates that ‘[A]nyone who acts indecently towards any person or deliberately expose his body at a public place shall be detained for not less than 5 days but not more than 10 days if the circumstances are absolutely vile. Anyone who acts indecently towards a disabled person, mentally insane patient, or minor under the age of 14, or who commits any other severe violation shall be detained for not less than 10 days but not more than 15 days.’

⁷⁴ *ibid.*

⁷⁵ Patrick C. File, ‘A History of Practical Obscurity: Clarifying and Contemplating the Twentieth Century Roots of a Digital Age Concept of Privacy’ (2017) 6(1) *University of Baltimore Journal of Media Law & Ethics* 4. (‘Practical obscurity—the idea that a privacy interest exists in information that is not secret but is nonetheless difficult to obtain.’)

contexts.⁷⁶ Should reputational sanctions prove effective in combating public sexual harassment solely in particular municipalities (Hangzhou, for example), this practice would lack the necessary scalability for incorporation into the national legal framework, given that statutory institutional arrangements must possess nationwide applicability. This article argues that the deterrent effects of reputational sanctions on public sexual harassment are not territorially limited to Hangzhou. This universality stems from the fundamental operational logic underlying reputational sanctions. Generally speaking, reputational sanctions can address a critical information dilemma in the governance of public sexual harassment, a dilemma that has long challenged traditional anti-discrimination legislation. A typical cost-benefit analysis suggests that rational individuals will refrain from violating the law when the marginal illegal gain fails to exceed the marginal illegal cost. If the increase in personal utility from an act of sexual harassment can be estimated, corresponding adverse consequences can be established to create a 'no profit' rule, effectively deterring potential offenders. However, traditional anti-discrimination legislation has struggled to create such an ideal rule due to two significant information barriers. One challenge lies in the high information costs of legislation. Quantifying subjective utility is inherently difficult, even if a range estimation is attempted. As a result, accurately calculating the subjective utility offenders derive from acts of public sexual harassment becomes nearly impossible. Relying on reductions in utility, policymakers are unable to establish reliable thresholds to deter violations during the rule-making process. Another barrier involves the costs of enforcement, which further complicate the execution of such policies. In the absence of precise knowledge about the benefits offenders gain from a single act, authorities often resort to harsher punitive measures to deter violations. This approach not only increases the cost of prevention but is also inefficient, given the low probability of apprehending offenders compared to other less pervasive crimes. Attempts to enhance this probability further escalate enforcement costs, but higher penalties do not necessarily lead to stronger deterrence under such conditions. An ideal solution would lower the enforcement costs of anti-public-sexual harassment efforts while achieving heightened deterrence. This article argues that reputational sanctions present such an ideal characteristic. By promoting self-regulation, reputational sanctions address these challenges in an innovative way.

⁷⁶ Certain governance models like network governance require specific relational frameworks for effective implementation, see Bernstein *Beyond Relational Contracts* (n 15).

Specifically, reputational sanctions provide a mechanism to achieve the goal of lowering enforcement cost as well as increasing the costs of violations without precise calculation, while reducing enforcement costs with the operation of self-regulation. In contexts where information and enforcement costs are high, reputational sanctions may facilitate self-regulation to internalize enforcement costs. This is a kind of human behaviour that depends on individuals' willingness to impose constraints on themselves, often driven by external stimuli (for example the 'nudges' beloved of behavioural economists). A nudge capitalizes on the bounded rationality of humans to maximize individual welfare or minimize losses with minimal legal intervention. It enhances individuals' subjective valuation of lawful behaviour, enabling legal compliance without relying solely on state coercion to increase negative consequences. Nudging strategies include using default options to guide choices or fostering social conformity to encourage compliance.⁷⁷

In addition, reputational sanctions serve as a tool to elevate the costs of unlawful conduct, thereby amplifying the legal deterrent effect against public sexual harassment. Offenders under traditional law enforcement frameworks might perceive that administrative punishments are the only consequence of apprehension, with no further repercussions. Reputational sanctions introduce additional public disclosure consequences, creating a sense of loss for offenders. Their privacy is compromised, and their concealment is removed. For repeat offenders who previously acted with impunity or potential offenders considering occasional violations, this sense of loss can trigger 'loss aversion,' making the act of harassment appear 'not worth' the risk. In summary, reputational sanctions offer a technically innovative enforcement mechanism by nudging rational actors toward self-restraint. It is a strategy that overcomes the informational challenges inherent in anti-discrimination legislation and provides a promising pathway for more effective social governance.

However, the effectiveness of a measure does not necessarily mean that it must be absorbed into the law. The incorporation of innovative practices into the legal system requires pathways of institutionalization. Where such pathways are absent, we witness the existence of myriad forms of 'order without law.'

B. Pathways for Innovation Diffusion

Although reputational sanctions deserve adoption and standardisation

⁷⁷ See Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press 2008).

by public policymakers, is China's legal system ready to accommodate this innovation? Are there existing pathways to facilitate the diffusion of this innovation from informal practices into the legal system? This article argues that the answer to both questions is in the affirmative. Drawing on DiMaggio and Powell's (1983) framework,⁷⁸ this section analyses the pathways for the diffusion of reputational sanctions.

1. Normativity

Sociological research points out that social change has always been driven by the active efforts of professionals, and it is the specialized division of labour that brings about normative pressure.⁷⁹ In the face of hard-to-eradicate illegal behaviours, scholars often call for the enhancement of deterrence by lawmakers.⁸⁰ In the United States, one of the most paradigmatic examples of deterrence enhancement through social governance is the enactment of Megan's Law, which established sex offender registration requirements amid deepening legal scholarship on sexual offenses.⁸¹ In China, within the framework of CSCS, regulators have similarly attempted to employ information disclosure as a top-down governance instrument for targeted social issues, though public sexual harassment was not originally included among these prioritized concerns. As a primary strategy of operating CSCS, it manifests as the system of disclosing the names of untrustworthy individuals, industry-specific access reviews, and the requirement of presenting a clean criminal record, among other legal provisions to combat illegal behaviours such as deliberate debt evasion, professional misconduct, and recidivism. These measures essentially constitute deterrence escalation mechanisms because, when individuals exist within what Weber called the 'web of significance', the circulation of records of violations through institutional networks compels them to bear consequent social pressures, including depletion of social capital and revocation of professional qualifications. The essence of China's practice lies in transforming phenomena traditionally governed by legal deterrence into a modality of networked governance, thereby intensifying deterrent effects.

Examining the evolution of women's rights protection in China reveals three distinct cohorts of professionals whose collective efforts

⁷⁸ Paul J. DiMaggio and Walter W. Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48(2) *American Sociological Review* 147.

⁷⁹ *ibid.*

⁸⁰ Daniel S. Nagin, 'Deterrence: A Review of the Evidence by a Criminologist for Economists' (2013) 5 *Annual Review of Economics* 83.

⁸¹ Rose Corrigan, 'Making Meaning of Megan's Law' (2006) 31(2) *Law and Social Inquiry* 267.

transformed sexual harassment from a neglected issue into a governance priority addressed through reputational sanctions. The first cohort comprises international law experts. Following China's ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1980, these specialists conducted periodic audits of China's efforts on anti-discrimination. As early as 1999, CEDAW review committees recommended establishing legal remedies for sexual harassment victims, with such international expertise becoming a catalytic force in China's progressive refinement of gender equality policies.⁸²

The second group consists of comparative law scholars in China. Capitalising on the 1995 UN World Conference on Women in Beijing, these academics systematically analysed foreign legal frameworks addressing sexual harassment throughout the 1990s.⁸³ Their scholarship transcended traditional characterisations of harassment as mere '*shua liu mang*' (耍流氓) or '*sheng huo zuo feng*' (生活作風), reconceptualising it as a legally cognisable claim with theoretical foundations. This conceptual legalisation yielded two significant impacts: first, it informed legislative proposals before the National People's Congress, culminating in the 2005 Women's Rights Protection Law's explicit prohibition of sexual harassment. Second, it resolved early judicial confusion where courts struggled to identify violated rights in harassment cases, often misclassifying them as defamation or labour disputes. These scholarly efforts directly enabled the Supreme People's Court's 2018 *Notice on Adding Causes of Action in Civil Cases* to recognize 'sexual harassment tort liability disputes' formally as a distinct legal category.⁸⁴

The third cohort involves legal scholars engaged in legislative projects. Unlike their academic counterparts, these practitioner-scholars actively shaped lawmaking and judicial reforms. Notable examples include the 2009 *Expert Proposal Draft on Workplace Sexual Harassment Prevention Law*, submitted by researchers from Sun Yat-sen University and Zhejiang Academy of Social Sciences, which prompted the All-China Women's Federation to acknowledge the inadequacy of gender-specific

⁸² Ninglan Xue, 'Preventing Sexual Harassment in China: Academic Discussion, Legislation and Adjudication' (2021) 3 *Journal of Chinese Women's Studies* 88 (薛寧蘭:《防治性騷擾的中國之路:學說、立法與裁判》,載《婦女研究論叢》2021年第3期,第88-102頁).

⁸³ *ibid.*

⁸⁴ Li-wan Wang, 'Legislation against Sexual Harassment in China: Experience and Prospects' (2022) 5 *Journal of Chinese Women's Studies* 83 (王理萬:《性騷擾立法的中國經驗與前景展望》,載《婦女研究論叢》2022年第5期,第83-96頁).

protections.⁸⁵ Their work facilitated the development of a comprehensive anti-harassment legal framework, transitioning from constitutional principles to specific provisions across civil, labour, and education laws. These efforts not only secured legislative recognition of specialized knowledge,⁸⁶ but also expanded harassment governance from workplaces and educational institutions to public spaces, with reputational sanctions emerging as the next frontier of innovative enforcement. It is within this professionalized context that public sexual harassment gained societal recognition, compelling administrative agencies to incorporate it into novel regulatory approaches and creating the necessary conditions for the diffusion of reputational sanctions.

2. *Coercion*

Why did the administrative authorities choose reputation as a tool to combat public sexual harassment? This decision was also influenced by the top-down formulation of public policy objectives. Since the beginning of the 21st century, the primary goal of China's administrative law enforcement reforms has focused on reducing mutual distrust both among strangers and between citizens and law enforcement agencies. This societal psychology of mutual distrust manifests particularly prominently in public discourse surrounding anti-public sexual harassment measures. In recent years, the internet has seen a surge in cases where individuals expose and report sexual harassment by posting online. These cases are often highly controversial and provocative, even though both parties are usually unable to provide concrete evidence, significantly disrupting the order of online expression. As mentioned earlier, in Guangzhou's metro sexual harassment cases, both parties have their supporters. Once the public debate escalates, it divides into two opposing camps, pressuring the authorities to take sides. For law enforcement agencies, to avoid accusations of bias, they must ensure that their actions are transparent and provide clear support for any enforcement decisions so as not to exacerbate social conflicts. In other words, for law enforcement agencies dealing with sexual harassment incidents, timely disclosure may be a powerful measure to prevent the loss of control over public discourse and a crucial way to demonstrate their proactive attitudes toward such cases, thereby maintaining their legitimacy.

⁸⁵ *ibid.*

⁸⁶ *The Implementation Outline for Building a Government Ruled by Law (2015-2020)*, issued by the central government, mandates that 'establishing consultation mechanisms involving state organs, social organizations, and subject matter experts to deliberate on significant interest adjustments in government legislation.'

To enhance law enforcement transparency and mitigate public opinion risks surrounding sensitive social issues, China's central authorities have consistently promulgated top-down administrative enforcement reform objectives. An examination of policy directives issued by Beijing to subordinate agencies reveals the central government's increasingly resolute commitment to bolstering enforcement credibility through heightened transparency, with annually escalating performance benchmarks. Long before Hangzhou's initiative, the Central Committee of the Communist Party of China explicitly mandated in the Implementation Outline for Building a Government Ruled by Law (2015–2020) that 'a system for publicising administrative law enforcement actions shall be implemented. Efforts shall be made to promote IT application and information sharing in administrative law enforcement, and local authorities and departments with necessary conditions shall establish uniform administrative law enforcement information platforms by the end of 2016'. By 2018, this policy objective had evolved into 'promoting the transformation of governmental functions, maintaining the credibility and executive force of the government'.⁸⁷

The Three-Year Action Plan for Improving the Quality of Administrative Law Enforcement (2023–2025) introduced more granular and ambitious reform targets, including 'by the end of 2025 ... the quality and efficiency of administrative law enforcement shall be significantly improved, the authority and credibility of administrative law enforcement shall be greatly enhanced'. Beyond establishing these overarching frameworks, Beijing has provided concrete implementation blueprints for local enforcement agencies. The penalty disclosure mechanism has emerged as a prioritized reform measure endorsed at the highest levels. Several Opinions of the General Office of the State Council on Strengthening the Services and Supervision over Market Entities by Means of Big Data Analysis expressly stipulate that 'unless otherwise provided by laws and regulations, administrative licensing and penalty decisions shall be published online within seven working days from the date of issuance'.

These policy directives, disseminated through bureaucratic channels, are ultimately implemented by administrative enforcement agencies to achieve their designated governance objectives. For a bureaucratic system, normative requirements are directly expressed to subordinates who are expected to respond to instructions from superiors within

⁸⁷ General Office of the State Council, *Notice of Issuance of the 2018 Legislative Work Plan of the State Council* (Document No 14, 2018) (《國務院辦公廳關於印發國務院 2018 年立法工作計劃的通知》國辦發〔2018〕14 號, 2018 年 3 月 2 日發布).

a specified time frame. Especially for Chinese officials, aligning with the position of their superiors is key to the promotion of lower-level bureaucrats.⁸⁸ For law enforcement agencies responsible for addressing public sexual harassment, this performance pressure from higher authorities compels them to mobilize available resources rapidly and to establish disclosure systems for administrative punishments related to public sexual harassment efficiently. Currently, CSCS and the 'Judicial Transparency' project under construction together lay the foundation for a vast disclosure system. In the private sector, the authority encourages the disclosure of various social credit information under the framework of CSCS, leading to the development of commercial platforms such as *Tianyancha* and *Qichacha*. Users can pay to access information such as the industrial and commercial registration, equity structure, and litigation records of various business entities on these platforms. In the public sector, to promote judicial legitimacy, 'Judicial Transparency' encourages the public broadcast of court trials through the Internet and the lawful disclosure of effective judgments on the China Judgments Online website. Against this backdrop, private credit disclosure platforms and public information disclosure websites can be considered part of the information infrastructure. It is the local government's responsibility to identify the blueprint laid out by the central government and to commit to integrating public infrastructure continuously and utilising information diffusion to deter potential illegal activities. The implementation of the public disclosure system for sexual harassment in Hangzhou Metro is also a demonstration of fully utilising infrastructure and aligning with the current top-level design. In conclusion, at a time when law enforcement agencies are under pressure to fulfil governance targets set by public policymakers, reputational sanctions offer a perfect solution to the external criticisms they face.

3. Imitation

What constitutes the normative function of institutional imitation? When discussing how imitation occurs, DiMaggio & Powell (1983) theorized that:

*Organizations tend to model themselves after similar organizations in their field that they perceive to be more legitimate or successful. The ubiquity of certain kinds of structural arrangements can more likely be credited to the universality of mimetic processes than to any concrete evidence that the adopted models enhance efficiency.*⁸⁹

⁸⁸ Hongbin Li and Li-An Zhou, 'Political Turnover and Economic Performance: The Incentive Role of Personnel Control in China' (2005) 89 *Journal of Public Economics* 1743.

⁸⁹ DiMaggio and Powell (n 78).

This analytical framework proves equally applicable to legal institutional reforms. In recent years, the Chinese government has consistently emphasized the need to strengthen the fairness and transparency of law enforcement.⁹⁰ Faced with this macro-level goal, the public security departments do not have a predetermined execution path. A feasible approach is to imitate the judicial system, another legal application department, and learn from how the judiciary enhances judicial transparency.

In the year 2000, the Supreme People's Court introduced the 'Management Measures for the Disclosure of Judicial Documents', stating that 'to promote the further development of the reform of the trial methods and safeguard judicial justice, the Supreme People's Court has decided to selectively disclose judicial documents to the public from this year onwards'. This reform remains a work in progress. All levels of courts are required to disclose effective judicial documents publicly. Exceptions for non-disclosure were strictly stipulated by law, and the public can conveniently access the text of judicial documents online without restrictions. After July 1, 2013, when China's Judicial Documents Website was launched, the total number of documents surpassed 100 million judgments within an 86-month period. This initiative received an overwhelmingly positive response. As the world's largest judicial document website with over 1.5 billion overseas visits, it reflects the continuous improvement of judicial efficiency and fairness in this developing country, and the fact that China's judicial transparency has drawn attention and recognition from countries around the world. In the World Bank's Doing Business Report, this country's judicial system received high scores across all evaluation dimensions.⁹¹

However, as the construction of CSCS progresses, administrative agencies cannot simply replicate the judicial document disclosure system when pursuing the overarching policy objective of 'enhancing

⁹⁰ General Office of the State Council, Guiding Opinions of the General Office of the State Council on Comprehensively Implementing the Administrative Law Enforcement Publication System, the Recording System of Law Enforcement in the Whole Process and the Legal Review System of Major Law Enforcement Decisions (Document No 118, 2018) (《國務院辦公廳關於全面推行行政執法公示製度執法全過程記錄製度重大執法決定法製審核製度的指導意見》國辦發〔2018〕118號, 2019年1月3日發布).

⁹¹ Pan Luo, 'Global Largest Judgment Database Exceeds 100 Million Documents' (*China News Service*, 1 September 2020) <<https://www.chinanews.com.cn/gn/2020/09-01/9279998.shtml>> <<https://perma.cc/7784-76U4>> accessed 2 July 2025 (羅攀:《全球最大裁判文書資源庫文書總量突破1億篇》, 載中國新聞網 2020年9月1日).

administrative transparency and governmental credibility⁹². The most critical issue pertains to the substantive content of disclosed information. Given that administrative enforcement is far more pervasive than judicial litigation, enforcement agencies lack the capacity to produce meticulously reasoned legal documents akin to judicial opinions. Indeed, most street-level bureaucrats are not trained to formulate such sophisticated legal reasoning. Consequently, administrative organs must develop a disclosure paradigm tailored to enforcement operations.

For agencies handling sexual harassment cases, an optimal model for emulation already exists. Building upon pre-existing resistance strategies employed by Chinese women, street-level bureaucrats need only document the verified perpetrator's personal information, evidence and other incident details, then correlate these findings with applicable legal provisions and penalty outcomes to effectuate reputational sanctions. The enforcement agencies' emulation of this model derives not from any preconceived notion of its capacity to achieve optimal governance outcomes, but rather from an institutional confidence in its empirically verifiable social utility—its dual capacity to provide redress for aggrieved victims while systemically deterring sexual misconduct. While administratively disclosed information undergoes legal vetting and evidentiary review—thus commanding greater authority than online self-help remedies—the structural parallels between informal and formal reputational sanction frameworks remain evident. Retrospectively, the informal reputational sanction mechanism, through bureaucratic emulation, has successfully institutionalized itself within formal legal operational processes.

This emulation exemplifies regulators' capacity for timely and effective responsiveness to societal demands, therefore the image of administrative law enforcement agencies may also be strengthened. For a long time, this country's law enforcement agencies have faced accusations of inadequately handling sexual harassment cases, even leading to doubts from victims regarding how their cases were processed. Due to the gap in legislation, the penalties for sexual harassers often fail to meet the victims' expectations, in that these cases are considered minor violations and lack strict enforcement procedures, which prevents harassers from receiving

⁹² General Office of the State Council, Several Opinions of the General Office of the State Council on Strengthening the Services and Supervision over Market Entities by Means of Big Data Analysis (Document No 51, 2015) art 18 (《國務院辦公廳關於運用大數據加強對市場主體服務和監管的若干意見》國辦發〔2015〕51號第18條, 2015年7月1日發布).

a heavy penalty.⁹³ Consequently, public security agencies, as the main administrative body for combating public sexual harassment, inevitably face accusations from victims who find the sanctions imposed on public sexual harassers unacceptable. Chinese law enforcement agencies, particularly the public security agencies, have long confronted a credibility deficit among female demographics, resulting in a persistent legitimacy crisis.⁹⁴ Should authorities continue to fall short of societal expectations in public sexual harassment enforcement, such institutional distrust would inevitably intensify. After the adoption of reputational sanctions for combating public sexual harassment, the social control efficacy of this approach has garnered cross-institutional validation within governmental enforcement bodies, leading to its diffusion beyond public security departments' initial application in combating public sexual harassment. Since as early as 2018, according to the official website of information disclosure of Zhejiang Province, multiple Chinese administrative agencies have implemented public disclosure regimes spanning diverse regulatory domains, including but not limited to transportation infrastructure, food safety protocols, and environmental protection standards.⁹⁵

IV. SOME NORMATIVE CONCERNS

Reputation as an innovative tool for social governance has been recognized by China's authorities and designed into an administrative penalty decisions disclosure system to address public sexual harassment. Yet does this policymaking innovation yield unequivocal benefits? Substantive objections to this innovation have emerged in the public discourse, which this section crystallizes into three core arguments. These objections are all grounded in considerations related to the rule of law, and they have gained considerable traction within legal academia. However, this section will demonstrate that when properly implemented, reputational sanctions not only pose no threat to the rule of law but can actively enhance the legal system's positive social impacts.

A. Improper Connection

⁹³ *Public Security Administration Punishments Law*, art 44 (n 73). (This institutional reality means that even when public sexual harassment is substantiated by evidence, it may not necessarily result in detention; even in egregious cases, offenders face a maximum administrative detention period of fifteen days.)

⁹⁴ See Yuning Wu and Ivan Y. Sun, 'Citizen Trust in Police: The Case of China' (2009) 12(2) *Police Quarterly* 170.

⁹⁵ Chen (n 30).

1. The Principle of Prohibition against Improper Connection

Public law scholarship advocates for the principle of prohibiting improper connection, which is a fundamental principle that ‘prevents administrative agencies from forming illegal associations between an administrative decision or event and other unrelated events.’⁹⁶ This legal doctrine requires that any administrative action must exclude consideration of extraneous factors beyond the case’s merits, as such inclusion would constitute an abuse of administrative power. For instance, law enforcement agencies must base penalties solely on the offender’s misconduct, rather than irrelevant considerations such as physical appearance, ethnicity, or the enforcing officer’s subjective disposition—factors wholly unrelated to the case’s substantive elements. This principle effectively constrains the expansion of administrative authority while ensuring consistent treatment of comparable violations. The complexity arises from the operational reality that not all case-specific factors can be readily categorized as legitimate enforcement considerations. Regarding Hangzhou’s practice, critics contend that imposing reputational damage and privacy infringements through state-mandated disclosure constitutes an improper connection, as these consequences bear no inherent connection to the act of sexual harassment itself. They argue that public sexual harassment cannot trigger the penalty disclosure mechanism without violating the principle of prohibition against improper connections.⁹⁷

2. Legal Boundaries of Proper Connection

The sustained advocacy among Chinese public law scholars for transplanting the principle of prohibition against improper connection from civil law systems, coupled with their ongoing doctrinal studies, stems primarily from domestic administrative agencies’ recurrent difficulties in determining what constitutes ‘improper connection.’ This challenge, as a result, exposes law enforcement agencies to accusations of abusing state power. Take for instance the reputational sanctions commonly employed within CSCS: when a judgment debtor fails to satisfy an effective judgment or ruling of a court, that party will be prohibited by the court from having high or non-necessary consumptions and/or blacklisted as a ‘discredited judgment defaulter’ in the nationwide disclosure system. Administrative measures such as disclosing defaulters’ information,

⁹⁶ For a discussion of the implications and risks of improper connection (e.g. building a surveillance state), see Xiaodong Ding and Dale Yuhao Zhong, ‘Rethinking China’s Social Credit System: A Long Road to Establishing Trust in Chinese Society’ (2020) 30(130) *Journal of Contemporary China* 630.

⁹⁷ Xiang (n 10).

imposing luxury consumption restrictions, and enforcing exit bans directly serve the legitimate purposes of compelling debt repayment, alerting the public to credit risks, and safeguarding recoverable assets—maintaining alignment between enforcement rationale, objectives, and means. However, existing Chinese legal provisions that elevate securities issuance standards for companies managed by discredited persons bear no rational connection to these enforcement purposes, as they prove ineffective in inducing debt repayment, consequently drawing scholarly criticism.⁹⁸

The fluidity and heterogeneity of popular notions preclude reliance on societal consensus for determining whether administrative means are ‘proper’. Instead, such assessments must derive from statutory interpretation. The public disclosure system for administrative punishments concerning public sexual harassment as an innovative governance mechanism, remains substantively grounded in national law, given its operational compliance with APL’s authorisation for publishing penalty information. Article 48.1 of APL (2021 Revision) stipulates that, ‘administrative sanctioning decisions that have certain impacts on society shall be disclosed to the public in accordance with the law’. Thus, the legitimacy of reputational sanctions hinges on whether they are applied to enforcement scenarios genuinely exhibiting ‘certain impacts on society’.

Elucidating the ‘certain impacts on society’ standard requires examining the legislative origins of China’s punishment decision disclosure regime. Scholarly consensus holds that the 2021 statutory incorporation of this mechanism aimed to adapt normative frameworks to the risk conditions in society.⁹⁹ Specifically, punishment disclosure enhances administrative transparency while enabling stakeholders to mitigate potential social risks through advance notice. This teleological interpretation suggests that not all administrative punishment decisions warrant lawful disclosure—the ‘certain impacts on society’ threshold minimally requires satisfying either of two criteria: (a) the penalty imposed necessitates public awareness to prevent irreparable harm to affected parties; (b) disclosing case details and offender information effectively enables risk prevention among the general public, thereby augmenting aggregate social welfare.

3. Case Analysis: Hangzhou’s Enforcement Innovation

The disclosure system for administrative punishments concerning public sexual harassment, as a form of reputational sanction, imposes long-

⁹⁸ Chunyan Ding, “‘Moral Conviction’ plus ‘Joint Sanctions’: The Judgment-Defaulter Blacklist System in China” (2023) 48(2) *Brooklyn Journal of International Law* 389, 436–439.

⁹⁹ Kong (n 29).

term and potentially irreversible detrimental effects on offenders' social creditworthiness. Such severe consequences necessitate strict compliance with the statutory threshold of 'certain impacts on society' when administrative agencies impose these penalties. This article maintains that Hangzhou's practice satisfies the requirements under Article 48.1 of APL, because it establishes a proper connection between punitive means and enforcement purpose. Given that public sexual harassment predominantly occurs in high-density public spaces, disclosing offenders' information serves dual purposes—enhancing deterrence through social condemnation while effectively mobilising both the public and venue administrators collectively to safeguard communal order. Maintaining public order constitutes this mechanism's primary legitimacy foundation, notwithstanding its ancillary reputational consequences beyond conventional administrative penalties. Liability is not immutable, after all, and offenders should bear the appropriate costs of their illegal actions in different aspects, otherwise the chaos of public harassment will remain hard to govern. In conclusion, the public disclosure regime for public sexual harassment punishments fully complies with the reputational sanction criteria established by APL, maintaining proper connections between enforcement purposes and methods.

Another similar criticism related to reputational sanctions concerns privacy. Critics contend that no proper connection exists between the deprivation of sexual offenders' privacy rights and their prior misconduct.¹⁰⁰ This position, however, conflicts with sociological and legal understandings of privacy. The concept of privacy, which emerged historically as a juridical response to media-inflicted social harms within private spheres, has demonstrated inherent dynamism in its legal implications and doctrinal development.¹⁰¹ Judicial practices in the United States continually adjust the boundaries of privacy protection. The 'reasonable expectation' principle established in *Katz v. United States*¹⁰² considers whether society would recognize such an expectation of privacy as one criterion for assessing the reasonableness of disclosures. Additionally, *United States v. Knotts*¹⁰³ introduced the public exposure theory, which posits that when individuals voluntarily place their privacy in the public domain, they may be deemed to have lost their reasonable

¹⁰⁰ Xiang (n 10).

¹⁰¹ See Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' (1890) 4(5) *Harvard Law Review* 193.

¹⁰² *Katz v United States* (1967) 389 US 347.

¹⁰³ *United States v Knotts* (1983) 460 US 276.

expectation of privacy. Given the divergent social meanings attributed to privacy across cultural contexts, a rigorous examination becomes imperative to ascertain why privacy has assumed such paramount significance in contemporary China, and whether this heightened valuation warrants sustained attention.

Scholars questioning the practices in Hangzhou for reasons based on the notion of human dignity often exhibit a reverence for the myth of privacy, which is indicated as a culturally embodied perspective.¹⁰⁴ The legal cultures of the common law system and the civil law system differ significantly. A pragmatic view from the common law system holds that wrongdoers are morally deficient or pose a danger to society and necessitate social control. In contrast, advocates of the civil law system metaphysically assert that the human dignity associated with the right of privacy, as a secular manifestation of humanity created in the image of God, provides the premise for all other fundamental rights claims. This is to say that it represents the ultimate moral aspiration, and that, in consequence, undermining a wrongdoer's dignity can set us on the path to nihilism. In light of China's extensive history of legal transplantation, this civil law-derived moral intuition has garnered substantial scholarly endorsement and institutional promotion among Chinese legal theorists. While this wariness of instrumentalism is commendable, it should not lead to rigidity. The initiation of state violence inevitably harms certain rights of wrongdoers. However, such harm is predicated on the realisation of corrective justice, aligning with the reasonable expectations of the general public and thus possessing inherent legitimacy. Therefore, even in a context where privacy protection remains as significant as in the past, disclosing the personal information of sexual harassers does not violate common sense.

B. Proportionality

1. The Principle of Proportionality

The principle of proportionality was first developed by German administrative courts and it served as an additional constraint on police action. This doctrinal framework has subsequently been adopted and applied to administrative agencies across various jurisdictions. A failure to comply with the following requirements rendered administrative actions unlawful. As a universally applicable constraint on the exercise of public authority, the principle of proportionality generally entails three

¹⁰⁴ Joshua Kleinfeld, 'Two Cultures of Punishment' (2016) 68(5) Stanford Law Review 933.

fundamental requirements: (a) the action had to pursue a lawful purpose; (b) the means adopted by the police vis-à-vis the citizen had to be suitable to achieve the purpose of the law; (c) if a less intrusive means to achieve the end of a law was available, this means had to be applied.¹⁰⁵ This principle is often metaphorically illustrated in public law lectures through the maxim that law enforcement authorities must not ‘employ cannons to shoot sparrows,’ but rather select enforcement measures proportionate to the specific administrative action in question.

This conceptual framework elucidates the distinction between the principle of proportionality and the principle of prohibition against improper connection. While the proportionality principle primarily concerns whether administrative agencies have adopted appropriately calibrated measures to achieve legitimate administrative ends, the principle of prohibiting improper connection prevents agencies from employing means that bear no rational relationship to their stated objectives. Only through the concurrent application of both principles can the legality of administrative enforcement measures be fully guaranteed.

2. Critical Perspectives and Counterarguments

When it comes to Hangzhou’s practice, some argue that reputational sanctions remain too severe, thus violating the principle of proportionality, in that disclosing the personal information of an offender who has already received an administrative penalty amounts to an additional punishment and may even violate the personal dignity to which the offender is entitled.¹⁰⁶ In actual fact, there have indeed been instances in China’s modern society where excessive punishment severely infringed upon the legitimate rights and interests of the public. Given this collective memory, public law scholars’ concerns are understandable, yet they fail fully to apprehend the legal implications embedded in Hangzhou’s innovative approach and to recognize that the current legal arrangements are disproportionately lenient and thus fail to prevent public harassment.¹⁰⁷

¹⁰⁵ Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57(2) *The University of Toronto Law Journal* 383. See also Grégoire C.N. Webber, ‘Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship’ (2010) 23(1) *Canadian Journal of Law and Jurisprudence* 179, 182. (This article examines the theoretical foundations and operational effects of the principle of proportionality, noting that ‘the principle of proportionality, according to Alexy, consists of three sub-principles: suitability, necessity, and proportionality in the strict sense.’)

¹⁰⁶ Yang (n 12).

¹⁰⁷ Ting Xiao, ‘A City in Jiangsu Divides Citizens into Four Classes: “Good Citizens” Will Receive Preferential Treatment’ (*China Daily*, 26 March 2010) <https://www.chinadaily.com.cn/dfpd/jjs/2010-03/26/content_9646161.htm> <<https://perma.cc/9HR9-ZCEY>> accessed 2 July 2025 (肖亭：《江蘇睢寧將民眾分為4個等級“良民”將獲優待》，載中國日報網（來源：南方網）2010年3月26日）。

The proportion of cases involving ‘sexual harassment damage liability disputes’ as an independent civil cause of action, which was permitted by the Supreme People’s Court in 2018, accounted for only 21.82% of the total number of sexual harassment cases (2019–2021), and has been decreasing annually.¹⁰⁸ This empirical evidence, demonstrating the considerable procedural hurdles sexual harassment victims encounter in pursuing civil remedies through judicial channels, substantiates the prevailing imbalance wherein perpetrators bear disproportionately low costs for their misconduct while victims incur relatively high burdens in seeking justice. Even if successful, the amount of civil compensation for victims is, as mentioned above, often low, leading to a general reluctance on the part of sexual harassment victims to seek judicial remedies. The difficulty of obtaining evidence and the relatively higher cost of seeking justice contribute to the low probability of offenders being held accountable.¹⁰⁹ Moreover, institutional support for harassment victims often comes primarily from their workplaces in the context of China’s anti-sexual harassment law. Once they enter public spaces, the reality that victims have to bear the prohibitive cost of seeking justice themselves drives them to abandon their rights rather than pursue the legal responsibility of offenders. According to analysis in terms of law and economics, a low probability of sanction will lead to more frequent violations. Therefore, incorporating reputation governance into the package of consequences for violations is a reasonable governance measure that serves dual regulatory purposes—it directly elevates the costs of unlawful conduct while indirectly empowering victims to pursue legitimate redress through formal legal mechanisms.

In fact, other law enforcement practices in China have long demonstrated that it is wise for public policymakers to utilize external pressures to increase the cost of violations when a social disorder cannot be fully governed by traditional administrative enforcement alone. This approach can make a more positive impact at relatively lower enforcement costs. Take China’s regulatory practices regarding related-party transactions as an example. Due to limited administrative capacity and the prevalence of business groups with pyramid structures in China, the China Securities Regulatory Commission (CSRC) and stock exchanges cannot effectively scrutinize all non-compliant related-party transactions

¹⁰⁸ Beijing Dongcheng District Yuanzhong Family and Community Development Service Centre, *Case Study Report on Legislation and Judicial Trials to Combat Sexual Harassment 2019–2021* (2021) (北京市東城區源眾家庭與社區發展服務中心:《防治性騷擾法律與司法審判案例研究報告(2019–2021)》).

¹⁰⁹ *ibid.*

among listed companies.¹¹⁰ Therefore, the feasible strategy has been to punish exemplary violators to send regulatory signals to the market, thereby creating deterrent effects. Article 197 of China's Securities Law and Article 55 of the Administrative Measures on Information Disclosure by Listed Companies issued by CSRC stipulate that listed companies involving related-party transactions shall face reputational sanctions including warnings and mandatory public explanations. Empirical analysis of two decades of public disclosure data from both private and state-owned enterprises in China shows that such reputational sanctions lead to lost business opportunities for listed companies, thereby effectively deterring the proliferation of non-compliant transactions.¹¹¹ When public policymakers apply this strategy to everyday life, we have reason to believe that reputational sanctions may similarly constrain public sexual harassment.

The failure to recognize reputational sanctions as a proportionate escalation of violation costs has led some commentators to misconstrue such measures as constituting punishing twice for a single offence. Proponents of this view maintain that offenders who have already received administrative punishments face additional reputational consequences, thereby violating the primary principle of law-based administration. This critique fundamentally misunderstands the jurisprudential reality that 'the same act can violate legal norms in multiple fields, meaning that punishment measures are applied in each field'.¹¹² Just as environmental and food safety regulations impose reputational sanctions on non-compliant enterprises, these measures simply reflect evaluative judgments along a distinct regulatory dimension, a necessity arising from the multifaceted policy objectives inherent in governance systems where regulators must concurrently assess both the legality of specific conduct and its negative externalities. Therefore, reputational sanctions should not be regarded as 're-punishment', but as instances of 'multiple punishments' that do not violate the rule of law.

In conclusion, as an integral component of punitive measures, reputational sanctions possess an inherent punitive character and

¹¹⁰ Min Gong, Yanan Wang and Xiandong Yang, 'Do Independent Directors Restrain Controlling Shareholders' Tunneling? Evidence from a Natural Experiment in China' (2021) 94 *Economic Modelling* 548; Huan Dou *et al.*, 'Are Related-Party Transactions Beneficial or Detrimental in Emerging Markets? New Evidence of Financial Services Agreements from China' (2022) 81 *International Review of Financial Analysis* 102144.

¹¹¹ Jian Zhou and others, 'Do Sanctions Imposed on Peers Have a Deterrence Effect on Related-Party Transactions of Observing Firms? Evidence from Chinese Listed Firms' (2024) 141 *Economic Modelling* 106898.

¹¹² Marianne von Blomberg and Björn Ahl, 'Debating the Legality of Social Credit Measures in China: A Review of Chinese Legal Scholarship' (2024) 24(3) *China Review* 17.

constitute an escalation of legal responsibility. While requiring cautious implementation by administrative agencies, this innovative strategy can withstand proportionality scrutiny.

C. Irreparability of Reputation

With the advancement of digital technologies, personal credit information now circulates through networks at unprecedented velocity, rendering it virtually impossible fully to neutralize pre-existing negative records through subsequent deletions or additions of new data. In this information society, reputation functions as an intangible asset of exceptional fragility—one that requires meticulous maintenance by individuals to prevent the depreciation, impairment, or even bankruptcy of this invaluable immaterial property. Based on this contextual reality, those who argue against reputational sanctions believe that innocent individuals with similar names or other personal information may be implicated by the results of reputational sanctions. Furthermore, offenders may be burdened with a negative record for a lifetime due to a single mistake, which is evidently unfair. These twin concerns constitute the third objection underlying widespread scepticism toward the reliability of reputational sanction mechanisms.

1. Minimising Misidentification in Reputational Sanctions

The first concern involving reputational sanctions is related to the modalities of personal information disclosure. Existing examples showed that as long as the information disclosure method can be gradually improved, the misfortune of reputation damage can be avoided. Specifically, during the development of the public disclosure system for judicial documents, disputes arose due to the disclosure of AIDS patient information leading to employment discrimination, claims of the right to be forgotten by parties, and data security issues caused by public information disclosure. These problems are not insurmountable. One important measure is that the Supreme People's Court has introduced an application system for involving parties in the three revisions of the 'Provisions of the Supreme People's Court on the Internet Publicity of Judicial Documents'. Upon judicial review and approval, parties can achieve an exemption from the disclosure of judicial documents. Currently, controversies over the public disclosure of judicial documents are rare. Similarly, innocent parties affected by public sexual harassment issues may demand corrections from the authority to prevent wrongful harm from the disclosure.

This article simultaneously acknowledges that contemporary reputational sanctions require enhanced institutional constraints to ensure that this innovative strategy does not risk violating the principle of proportionality. After all, compared to traditional industrial society, digital society not only strengthens the deterrent effect of reputational sanctions, but also leads to more serious uncontrollable consequences. Effective approaches must ensure procedural justice in the practice of reputation punishment. Any information disclosure must meet two conditions: (a) the subject's informed consent; (b) conclusive evidence of administrative punishments.

Properly to implement reputational sanctions, legislators must first develop nuanced interpretive guidelines for Article 48 of APL, that clearly delineate appropriate application scenarios. The framework should first establish categorical limitations, restricting reputational sanctions to specifically defined offence types given their position on the enforcement pyramid—such elevated status necessitates statutory safeguards against potential abuse of this powerful governance instrument. Second, the authority needs to devote more resources to achieving procedural justice in this practice. For instance, equally critical are robust evidentiary requirements that account for the permanent and life-altering consequences of reputational damage. Sanctions should only apply when administrative agencies can produce direct, incontrovertible evidence meeting stringent proof standards, with the full burden of proof resting on authorities who inherently possess superior evidence-collection capabilities in public spaces. The system must incorporate mandatory appeal periods during which no information disclosure may occur, allowing subjects to challenge penalties before suffering irreparable harm. Furthermore, all disclosure practices must strictly comply with the Personal Information Protection Law's principle of data minimisation, permitting only the revelation of information demonstrably essential for protecting public safety and ensuring enforcement transparency. While disclosing identifying physical characteristics of offenders may serve legitimate public interest, absolutely no irrelevant personal data, including residential addresses or employment details, may be revealed under any circumstances. Regulatory bodies violating these disclosure parameters must face significant legal consequences, as the overarching principle demands that only the minimum necessary information for effective social warning be disclosed.

Ensuring the proper application of reputational sanctions can effectively mitigate external criticisms. Some criticisms questioned China's

motivation to perfect CSCS. Some scholars have characterized these regulatory efforts as ‘state capitalism’,¹¹³ arguing that Beijing is constructing a system of social control that is ‘both all-encompassing and highly individualized, using a mix of mechanisms to impose varying levels of supervision and constraint on people depending on their perceived threat to the state.’ The most effective countermeasure to such criticisms lies in establishing rigorous legal parameters that precisely delineate the conditions for implementing reputational sanctions.

2. Perpetual Consequences of Reputational Sanctions

Critics contend that once initiated, reputational sanctions create indelible records in the digital society that may adversely affect offenders throughout their lifetime. This critique originates in Confucian social norms that prioritize containing shame within kinship boundaries (家醜不可外揚), positing that sexual harassment disputes ought to be resolved through closed-door mediation to prevent collateral reputational harm to all stakeholders. While such traditional conceptions may properly inform workplace and campus sexual harassment governance under China’s legal framework, they prove inapplicable to public space harassment due to fundamental differences in statutory governance strategies. The legislative logic distinguishes three governance paradigms. Thus educational institutions assume primary responsibility for campus harassment and employers oversee workplace incidents—both entities may indirectly regulate members’ conduct through organisational rule-making without resorting to reputational sanctions. A third paradigm is necessary however, for administrative agencies which lack authority to dictate public behaviour, and must therefore employ reputational sanctions, relying on decentralized social monitoring by the general public.

Moreover, the presumption of irreparable reputational harm is being progressively challenged in contemporary China. The legal system has developed multifaceted reputation restoration mechanisms across three dimensions. First, at top-level policy design, the State Council’s 2020 guidelines mandated all governmental departments to implement credit rehabilitation programmes within legal parameters.¹¹⁴ Second, substantive legal protections exist under Article 995 of the Civil Code (civil liability

¹¹³ Lin and Milhaupt (n 62); see also Yu-Jie Chen, Ching-Fu Lin and Han-Wei Liu, “Rule of Trust”: The Power and Perils of China’s Social Credit Megaproject’ (2018) 32(1) Columbia Journal of Asian Law 1.

¹¹⁴ Article 16 of Guiding Opinions of the General Office of the State Council on Further Improving the System for Deterring Bad-faith Acts and Building a Long-term Mechanism for Promoting Good Faith mandates that ‘[t]he determination of the list of seriously dishonest individuals and entities, as well as punishment for dishonesty and credit repair, shall be properly supervised’.

for reputational harm),¹¹⁵ and the Anti-Unfair Competition Law (penalties for commercial defamation).¹¹⁶ Third, institutional circulars (單位通報) have emerged as an effective extrajudicial remedy, exemplified during the COVID-19 pandemic when a community hospital's official statement rehabilitated a controversial nurse's reputation by confirming her voluntary service while addressing qualification issues, thereby mitigating public speculation.¹¹⁷ The fact is that in China, official circulars have served as a form of authoritative information dissemination, and have become a popular means of reputation repair for organisations and individuals.

Ultimately, sustained reputational sanctions may paradoxically benefit offenders by creating incentives for rehabilitation and demonstrating accountability to society. The evolving Chinese model demonstrates that when properly calibrated with restoration mechanisms, reputational sanctions need not constitute permanent stigma but can function as dynamic regulatory tools. Reputational sanctions not only avoid unnecessary damage to innocent parties but also serve the function of reputation restoration. One major way of restoring reputation is to prove yourself over time. In other words, only a long period without recidivism can prove the determination of a former offender's remorse. A public disclosure system as harassment punishment could potentially provide a verifiable record of an offender's reformation, which would be an informal certificate in the job market or in social interactions more generally. From this perspective, the public disclosure system of administrative penalty decisions for sexual harassment can serve as an avenue for the public demonstration of self-improvement.

V. CONCLUSION

Using an example from China, this article examines how an informal self-

¹¹⁵ Article 995 of *Civil Code of the PRC* mandates that '[w]here the personality rights are infringed upon, a victim has the right to request the actor to assume civil liability in accordance with this Code and other laws. The provisions on the statutes of limitation shall not apply to any request of a victim for cessation of infringement, removal of obstacles, elimination of danger, elimination of adverse effects, rehabilitation of reputation, or extending a formal apology'.

¹¹⁶ Article 11 of *Anti-Unfair Competition Law of the PRC (2019 Amendment)* mandates that '[a] business shall not fabricate or disseminate false or misleading information to damage the goodwill or product reputation of a competitor'. Subsequent Articles 17(1) and 23 establish civil and administrative liabilities for violations of Article 11 respectively.

¹¹⁷ Xin Dai, 'How to repair reputation' (2021) 1 *China Law Review* 125 (戴昕:《聲譽如何修復》,載《中國法律評論》2021年第1期,第125-140頁). (This hospital's official circular acknowledged her lack of professional qualifications while simultaneously verifying her voluntary service in the epidemic zone, urging the public to recognize her professional dedication rather than speculate about her private life. This institutional intervention successfully rehabilitated the nurse's public reputation while safeguarding the hospital's own institutional credibility.)

help strategy has diffused into the legal system and gained legitimacy, making the authorities' adoption of a Public Disclosure System to regulate public sexual harassment part of China's evolving legal framework. This innovative model of social governance has been closely related to resistance on the part of China's women, through the combined forces of normativity, coercion, and imitation, and has effectively deterred potential offenders and mitigated social conflicts exacerbated by online resistance. Traditional views posit that the diffusion of innovation is a crucial driving force for the progress of an organisation or social system. This case expands the traditional understanding by demonstrating that innovation can diffuse from informal practices to formal ones, without necessarily requiring organisations or individuals as carriers of diffusion.¹¹⁸

China's disclosure of sexual harassment offenders by public security departments is based on the most recent social consensus and aims to achieve the augmentation of deterrence, a result driven by the combined pressures of online resistance and higher-level public policy objectives.

Hangzhou's practice epitomizes a legal innovation propelled by contemporary social consciousness, yet remains inherently transitional. This is why the city's reform momentum has stalled: its Public Sexual Harassment Penalty Disclosure System operated only until June 2023, before reverting to anonymized notifications following intense academic critique. This trajectory demonstrates that innovative governance solutions diffusing into formal legal systems do not guarantee stable institutionalisation. Successful legal internalisation requires satisfying two evaluative criteria. The first criterion is the scrutiny of public opinion. Legal innovations must withstand public interrogation, as societal discourse reflects contemporaneous social consensus—innovations lacking this consensual foundation will face legitimacy crises. The second criterion derives from professional epistemic communities. Shared expert knowledge functions as an accountability mechanism to pressure authorities implementing enforcement innovations. China's legislature expressly recognizes the constitutional significance of these criteria, as codified in the 2023 Legislative Law Revision: 'the relevant specialized committees and the working bodies of the Standing Committee of the

¹¹⁸ James Coleman and others, 'The Diffusion of an Innovation Among Physicians' (1957) 20(4) *Sociometry* 253; James D. Westphal, Ranjay Gulati and Stephen M. Shortell, 'Customization or Conformity? An Institutional and Network Perspective on the Content and Consequences of TQM Adoption' (1997) 42(2) *Administrative Science Quarterly* 366; Mauro F. Guillén and Laurence Capron, 'State Capacity, Minority Shareholder Protections, and Stock Market Development' (2015) 61(1) *Administrative Science Quarterly* 125; Bernhard Reinsberg et al., 'The World System and the Hollowing Out of State Capacity: How Structural Adjustment Programs Affect Bureaucratic Quality in Developing Countries' (2019) 124 *American Journal of Sociology* 1222.

National People's Congress may organize legislative post-assessment of the relevant laws or the relevant provisions of laws.¹¹⁹

Prospectively, it bears noting that innovative legal enforcement responds not only to social consciousness but also to technological evolution. As evidentiary technologies for documenting public sexual harassment advance, administrative agencies will likely issue substantially more sanctions—a trajectory already foreshadowed by emerging digital forensics capabilities.¹²⁰ To reduce administrative burdens, enforcement agencies will inevitably gravitate toward more cost-effective governance tools for addressing public sexual harassment, with Hangzhou's experiment serving as a pivotal reference. Yet even if this innovation progresses, it will confront enduring challenges, in particular rigorous social impact assessments that promise heightened scrutiny. The system faces inherent tensions with China's Personal Information Protection Law, and will likely precipitate reputation-sanction litigation. This necessitates legislative recalibration of competing policy priorities: either enduring the judicial backlash from reputational sanctions or implementing structural reforms to reconcile the regime with fundamental rights protections.

While there are controversies surrounding the improper connection principle, the violation of the principle of proportionality, and the potential risks associated with the irreparability of reputational sanctions, they do not undermine the legitimacy of this legal reform. Looking forward, reputational sanctions, as an instrument of China's social credit construction, possess features that are potentially applicable in spheres well beyond sexual harassment governance. Furthermore, the diffusion of innovation to update the law should not be seen as unique to China. In the long run, the law should confirm in a timely manner the legitimacy of norms that emerge spontaneously from a pragmatic perspective. Without violating higher-order laws, this confirmation would consolidate social consensus.

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¹¹⁹ Legislation Law of the People's Republic of China (2023 Amendment), art 67.

¹²⁰ Zheng Su and others, 'What Explains Popular Support for Government Monitoring in China?' (2021) 19(4) *Journal of Information Technology & Politics* 377. (This study documents the pervasive adoption and progressive sophistication of innovative technologies in China's social governance framework.); Zhizhao Li et al., 'Policy Designs for Adaptive Governance of Disruptive Technologies: The Case of Facial Recognition Technology (FRT) in China' (2023) 6(1) *Policy Design and Practice* 27. (This research demonstrates how facial recognition technology has become thoroughly embedded in Chinese society. 'China's "Skynet" project—part of its social credit system—was completed in 2018 with more than 20 million security cameras installed nationwide'.)

MARK FELDMAN *

COOPERATION, HARMONY AND THE ASEAN OUTLOOK ON THE INDO-PACIFIC

Thank you to the University of Macau Faculty of Law and Department of Global Legal Studies, Professor Rostam Neuwirth, and Juris Diversitas for the opportunity to participate in this General Conference, with the theme of '*Convivencia: Comparing Legal Scenarios of a Life Together in Harmony*'. It is an honor to deliver a keynote address as part of this event.

I would first observe that we are in Macau, in Asia, and that over the years, the *Juris Diversitas* General Conference has reflected significant regional diversity, with prior events held in, as a few examples, South Africa in 2019, France in 2017, the United States in 2016, and Ireland in 2015.

Recognizing the Conference theme of harmony, and recognizing our location in Asia, with my remarks today I would like to focus on a significant, Asia-based initiative aimed at advancing harmony in the region: the ASEAN Outlook on the Indo-Pacific.

'ASEAN' refers to the Association of Southeast Asian Nations, an organization that has evolved from a five-member¹ informal security alliance in 1967 (with the adoption of the Bangkok Declaration) to a ten-member² inter-governmental organization in 2007 (with the adoption of the ASEAN Charter).

About a decade after the adoption of the ASEAN Charter, ASEAN developed its Outlook on the Indo-Pacific. To understand the ASEAN Outlook on the Indo-Pacific, it is important to first understand two key regional initiatives that were being developed at the time, specifically in 2018 and 2019: first, China's Belt and Road Initiative (which had been launched in 2013), and second, the U.S. 'Free and Open Indo-Pacific' policy (which had been launched in 2017).

In the early days of China's Belt and Road Initiative, the geographic

* This article was delivered as the keynote speech at the Juris Diversitas 9th General Conference hosted by the University of Macau on 25 October 2024.

¹ Indonesia, Malaysia, the Philippines, Singapore, Thailand.

² By 1999, Brunei, Cambodia, Laos, Myanmar and Vietnam had become ASEAN Members. Pasha L. Hsieh, *New Asian Regionalism in International Economic Law* (Cambridge 2022) 30.

scope of the project appeared to be somewhat limited, with the 'Belt' referring to a 'Silk Road Economic Belt' running from China through Central Asia to Europe and the 'Road' referring to a '21st Century Maritime Silk Road' running from China through Southeast Asia to East Africa. But the policy soon became global in scale, with assurances of being open to everyone.

The U.S. Free and Open Indo-Pacific Policy, which had been launched in late 2017, could have been seen, to some extent, as one form of response to China's BRI. One early articulation of the policy was set out in an October 2017 speech by then-Secretary of State Rex Tillerson. In that speech, Secretary Tillerson made the following observations with respect to India, the United States, and the Indo-Pacific region:

[T]he world, and the Indo-Pacific in particular, needs the United States and India to have a strong partnership . . . In particular, the United States and India must foster greater prosperity and security with the aim of a free and open Indo-Pacific. The Indo-Pacific, including the entire Indian Ocean, the Western Pacific and the nations that surround them, will be the most consequential part of the globe in the 21st century.³

Secretary Tillerson also referred to the need to provide countries in the Indo-Pacific with 'the right options when it comes to sustainable development,' while criticizing infrastructure 'financing mechanisms' used by China as 'saddling' countries 'with enormous levels of debt.'⁴ Similar comments were made about China's infrastructure lending practices a few months later, in March 2018, during a tour of five African countries.

Following Secretary Tillerson's March 2018 comments, China's then-Ambassador to South Africa, Lin Songtian, responded by stating that the United States wanted to keep Africa 'as it was, poor and divided, to be always controlled by others,' and that the United States was in fact worried about 'Africa's realization of economic independence with China's support.'⁵ It was in this environment-which could be characterized as something other than harmonious-that work on ASEAN's Outlook on the Indo-Pacific began.

Indonesia's key role in leading ASEAN discussions on the development of an Outlook on the Indo-Pacific has been widely discussed.⁶ Indeed, as

³ Rex Tillerson, 'Defining our Relationship with India for the Next Century: An Address by U.S. Secretary of State Rex Tillerson' (Center for Strategic and International Studies, 18 October 2017) <<https://www.csis.org/analysis/defining-our-relationship-india-next-century-address-us-secretary-state-rex-tillerson>> accessed 16 May 2025.

⁴ *ibid.*

⁵ Pengying, 'Chinese Diplomat Rebukes Tillerson's Untrue Remarks about China-Africa Relations' (Xinhuanet, 13 March 2018) <https://big5.news.cn/gate/big5/www.xinhuanet.com/english/2018-03/13/c_137035671.htm> accessed 15 May 2025.

⁶ Indonesia has been driving the AOIP since tabling the initial draft early last year. See Evan A Laksmiana, 'Flawed Assumptions: Why the ASEAN Outlook on the Indo-Pacific is Defective' (Asia Global Institute, The University of Hong Kong, AsiaGlobal Online, 19 September 2019) <<https://www.asiaglobalonline.hku.hk/flawed-assumptions-why-the-asean-outlook-on-the-indo-pacific-is-defective>> accessed 15 May 2025.

stated by one scholar, ASEAN Leaders adopted the ASEAN Outlook on the Indo-Pacific in June 2019, following '18 months of intensive lobbying by Jakarta'.⁷

Scholars have identified several motivations driving Indonesia's decision to lead the discussions.

A key motivation identified by one scholar was to respond to 'great power politics that is dividing the Indo-Pacific into competing strategic camps',⁸ or, as characterized by another scholar, to establish, for ASEAN, a 'common position *vis-à-vis* the Indo-Pacific discourse'.⁹

A second key motivation was a need to support ASEAN 'centrality'.¹⁰ 'Centrality' is a foundational principle for ASEAN; as stated in ASEAN's Charter, one of the 'Purposes' of ASEAN is '[t]o maintain the centrality and proactive role of ASEAN as the primary driving force in its relations and cooperation with its external partners in a regional architecture that is open, transparent and inclusive'.¹¹ One noteworthy point, with respect to ASEAN centrality, is that the 'regional architecture' as contemplated by the ASEAN Charter in 2007 likely does not match the 'Indo-Pacific' framing of the region that is so common today. That is, while the core concept of ASEAN centrality has remained consistent since the adoption of the ASEAN Charter in 2007, the relevant 'region' in which ASEAN aims to be the 'primary driving force' has not. As reconfirmed by the ASEAN Outlook on the Indo-Pacific, the relevant region today, for purposes of ASEAN centrality, in fact consists of two regions: 'The Asia-Pacific and Indian Ocean regions'.¹² And ASEAN, in its Outlook, expressly identifies ASEAN's interest in leading the 'shaping' of the 'economic and security architecture'¹³ in the Asia-Pacific and Indian Ocean regions.

For ASEAN to lead the 'shaping' of the 'economic and security architecture'¹⁴ in a two-ocean region that includes Japan, Australia, and India is a significant policy goal. Quite notably, when ASEAN announced its Outlook on the Indo-Pacific in 2019, the announcement was welcomed

⁷ Dewi Fortuna Anwar, 'Indonesia and the ASEAN Outlook on the Indo-Pacific' (2020) 96 (1) *International Affairs* 111.

⁸ Laksmana (n 6).

⁹ Anwar (n 7) 111.

¹⁰ Because south-east Asia is located at the geographic midpoint between the Indian and Pacific oceans and all the lands around and within then, ASEAN must, in Jakarta's view, continue to retain its centrality in the evolving Indo-Pacific construct". See *ibid*.

¹¹ *ASEAN Charter* (2007) art 1(15).

¹² *ASEAN Outlook on the Indo-Pacific* (23 June 2019) para 1.

¹³ *ibid* para 2.

¹⁴ *ibid*.

by both China and the United States. The United States ‘welcome[d]’ the ASEAN Outlook on the Indo-Pacific, and indeed confirmed that the United States ‘continues to place ASEAN centrality at the heart of our Indo-Pacific strategy.’¹⁵ China has ‘taken note that ASEAN has independently put forth its own Outlook on the Indo-Pacific, highlighting that it will uphold the concepts such as openness, transparency, inclusivity, equality, mutual respect, mutual trust and mutual benefit, and keep to the important principles of respect for sovereignty and non-intervention.’¹⁶ China further observed that the principles highlighted by ASEAN in its Outlook ‘align with the thinking behind China’s foreign policy.’¹⁷

And those principles, quite notably for this Conference, also emphasize harmony. In its Outlook on the Indo-Pacific, ASEAN underscored the importance of avoiding ‘mistrust, miscalculation, and patterns of behavior based on a zero-sum game,’¹⁸ while at the same time calling for ‘closer cooperation in the Indo-Pacific.’¹⁹ It highlighted the need to regard the Asia-Pacific and Indian Ocean regions as ‘a closely integrated and interconnected region,’²⁰ and stressed that the Indo-Pacific should be understood as ‘a region of dialogue and cooperation instead of rivalry.’²¹ Finally, ASEAN emphasized the importance of ‘promoting amity and cooperation among countries in the Indo-Pacific region.’²²

These key themes—cooperation, interconnectedness, engagement through dialogues, avoiding mistrust and rivalry—have continued to be developed by ASEAN in a series of recent bilateral Joint Statements outlining future cooperation efforts under the ASEAN Outlook on the Indo-Pacific framework.

To date, ASEAN has negotiated these Joint Statements with India, China, Korea, New Zealand and the United States. The Joint Statement with India was issued in 2021, while the other four Joint Statements were

¹⁵ Morgan Ortugas, ‘The United States Welcomes the ASEAN Outlook on the Indo-Pacific’ (U.S. Department of State, 2 July 2019) <<https://2017-2021.state.gov/the-united-states-welcomes-the-asean-outlook-on-the-indo-pacific/>> accessed 15 May 2025.

¹⁶ Embassy of the People’s Republic of China in the Republic of Indonesia, ‘Wang Yi: The Summit Commemorating the 30th Anniversary of the Establishment of China-ASEAN Dialogue Relations Will Help Strengthen and Upgrade Bilateral Relations’ (Foreign Affairs Headlines, 20 November 2021) <https://id.china-embassy.gov.cn/eng/xwdt/202111/t20211120_10450884.htm> accessed 15 May 2025.

¹⁷ *ibid.*

¹⁸ *ASEAN Outlook* (n 12) para 1.

¹⁹ *ibid* para 3.

²⁰ *ibid* para 6.

²¹ *ibid* para 6.

²² *ibid* para 11.

issued in 2023. These statements ‘reaffirm’²³ the goals and principles of the ASEAN Outlook on the Indo-Pacific and indeed reinforce priorities that can advance harmony in the region.

The statements also highlight the need to implement the four ‘priority areas’²⁴ of the ASEAN Outlook on the Indo-Pacific, specifically (i) maritime cooperation, (ii) connectivity, (iii) the Sustainable Development Goals, and (iv) economic and other possible areas of cooperation. Within each of those four priority areas, the Joint Statements reinforce harmony-related principles.

On maritime cooperation, the Joint Statements highlight the need for ‘policy dialogue’²⁵ ‘information sharing’²⁶ and promoting cooperation on marine environmental protection and biodiversity conservation.²⁷ Language on connectivity highlights the promotion of ‘cooperation and partnerships that support digital innovation’ as well as ‘youth and people-to-people exchange’²⁸; the Joint Statements also emphasize cooperation on ‘smart customs,’ ‘smart borders,’²⁹ and ‘open, secure and resilient supply chains.’³⁰ Regarding the Sustainable Development Goals, the Joint Statements highlight cooperation opportunities in many areas, including food security, health security, gender equality, human rights, youth empowerment, clean energy, smart and sustainable cities, and environmental conservation.³¹ For economic or other areas of cooperation, the Joint Statements highlight opportunities for cooperation in many areas, including trade facilitation, logistics infrastructure, digital economy, cybersecurity,³² and development of micro, small and medium-sized enterprises (MSMEs).³³ The combination of ASEAN’s issuance of an Outlook on the Indo-Pacific in 2019, together with the subsequent development of a set of Joint Statements reaffirming

²³ *Joint Statement of the 24th ASEAN-Republic of Korea Summit on Cooperation on the ASEAN Outlook on the Indo-Pacific* (6 September 2023) preamble.

²⁴ *ibid* para 6.

²⁵ *ibid* para 5.

²⁶ *ASEAN-India Joint Statement on Cooperation on the ASEAN Outlook on the Indo-Pacific for Peace, Stability, and Prosperity in the Region* (8 October 2021) para 4.21.

²⁷ *ASEAN-China Joint Statement on Mutually Beneficial Cooperation on the ASEAN Outlook on the Indo-Pacific* (2023) para 3.

²⁸ *ASEAN-U.S. Leaders’ Statement on Cooperation on the ASEAN Outlook on the Indo-Pacific* (2023) para 5.

²⁹ *ASEAN-China Joint Statement* (n 27) para 4.

³⁰ *Joint Statement of the 24th ASEAN-Republic of Korea Summit* (n 23) para 5.

³¹ *ASEAN-New Zealand Joint Statement on Cooperation on the ASEAN Outlook on the Indo-Pacific: Standing Firm Amidst Swirling Currents* (13 July 2023) para c; *ASEAN-U.S Leaders’ Statement* (n 28) para 10.

³² *ibid* paras 12–13.

³³ *ASEAN-China Joint Statement* (n 27) para 7.

and, quite notably, beginning to implement, that Outlook, is significant.

ASEAN now represents the fifth largest economy in the world.³⁴ Southeast Asia is situated, as stated in the ASEAN Outlook, ‘in the center’ of the ‘dynamic’ Asia-Pacific and Indian Ocean regions.³⁵ Both China and the United States have elevated their respective relationships with ASEAN. In November 2022, the US and ASEAN elevated their relationship to a ‘Comprehensive Strategic Partnership’³⁶ almost exactly one year after China and ASEAN had done the same.³⁷

ASEAN, as a major economic force located in the center of the Indo-Pacific region, has, in its Outlook, expressly prioritized engagement and cooperation and has expressly rejected rivalry and zero-sum approaches to external relations. China and the United States have welcomed ASEAN’s Outlook. Although the US has a close relationship with ASEAN and supports ASEAN’s Outlook on the Indo-Pacific, the US continues to use language with respect to the Indo-Pacific region that could be seen as encouraging rivalry. Such language can be seen as being in tension with the ASEAN Outlook’s understanding of the Indo-Pacific as ‘a closely integrated and interconnected region.’³⁸

Examples of such US language include references to cooperating with ‘allies, partners, and friends’ in the Indo-Pacific to ‘build collective capacity.’ The United States has also emphasized the need to ‘protect our shared vision of the world in the face of heightened geopolitical challenges,’ while at the same time advancing the ‘common values and interests’ of its partners in the region.³⁹ Such language implies, of course, that some states in the Indo-Pacific region might not be ‘allies, partners and friends’ of the United States, might not share the US vision of the world, and might not share US

³⁴ HSBC, ‘ASEAN—a region on the rise’ (HSBC Website, 8 July 2024) <<https://www.gbm.hsbc.com/en-gb/insights/market-and-regulatory-insights/asean-a-region-on-the-rise>> accessed 16 May 2025.

³⁵ *ASEAN Outlook* (n 12) para 2.

³⁶ The White House, ‘Fact Sheet: President Biden and ASEAN Leaders Launch the U.S.-ASEAN Comprehensive Strategic Partnership’ (U.S. Mission to ASEAN, 12 November 2022) <<https://asean.usmission.gov/fact-sheet-president-biden-and-asean-leaders-launch-the-u-s-asean-comprehensive-strategic-partnership/>> accessed 16 May 2025.

³⁷ Xinhua, ‘China, ASEAN form Comprehensive Strategic Partnership as Xi Chairs Summit’ (The State Council of the People’s Republic of China, 22 November 2021) <https://english.www.gov.cn/news/topnews/202111/22/content_WS619b8df5c6d0df57f98e54c6.html#:~:text=BEIJING%20%E2%80%94%20China%20and%20ASEAN%20on%20Nov%2022,anniversary%20of%20ChinaASEAN%20dialogue%20relations%20via%20video%20link> accessed 16 May 2025.

³⁸ *ASEAN Outlook* (n 12) para 6.

³⁹ US Department of State, ‘Fact Sheet, The United States’ Enduring Commitment to the Indo-Pacific: Marking Two Years Since the Release of the Administration’s Indo-Pacific Strategy’ (Office of Spokesperson, 9 February 2024) <<https://2021-2025.state.gov/the-united-states-enduring-commitment-to-the-indo-pacific-marking-two-years-since-the-release-of-the-administrations-indo-pacific-strategy/>> accessed 16 May 2025.

values and interests.

For the Indo-Pacific region, a key question becomes whether a region can be ‘integrated’ and ‘interconnected’ when the region is divided between states that are ‘allies, partners and friends’ and states that are not. With respect to advancing prospects for harmony in the Indo-Pacific region, ASEAN is playing a particularly constructive role. ASEAN not only has developed its Outlook on the Indo-Pacific, but also has started to implement that Outlook through a series of bilateral Statements outlining next steps for cooperation in four priority areas. These actions demonstrate that ASEAN’s commitment to centrality—that ASEAN should be playing a central and proactive role in shaping the regional architecture of the Indo-Pacific—is firm.

ASEAN’s decision to prioritize engagement and cooperation, and to reject rivalry, should be helpful for encouraging movement in the direction of an integrated, interconnected Indo-Pacific. ASEAN’s express preference for engagement over rivalry is the preference of the fifth largest economy in the world, the preference of an organization that has entered into a ‘Comprehensive Strategic Partnership’ with both China and the United States.

An integrated, interconnected Indo-Pacific region will require the full participation of world’s two largest economies; will require, in a sense, a significant level of harmony. Without a significant level of harmony, the Indo-Pacific region will not be integrated and will not be interconnected.

By expressly supporting engagement and rejecting rivalry in its Outlook, and by starting to implement those priorities through a set of bilateral statements on cooperation with key Indo-Pacific economies, ASEAN is advancing the regional goals of integration and interconnectedness—and, for purposes of our discussion today, harmony—in very significant ways.

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Discussion

The Judicial System of China

XIN HE SIDA LIU MENGLIANG DAI XU JIANHUA

This contribution presents a series of statements on the published book *The Judicial System of China*. Framed by the author's introductory and concluding comments are contributions by Liu, Dai and Xu. This debate, originating from a Faculty Seminar Series at the University of Macau Faculty of Law in 2025, is designed to initiate a broader dialogue between the author and readers. Positions advanced by individual contributors should be assigned only to them and not to the group of contributors as a whole.

Speech by Xin He, Author, University of Hong Kong

I have spoken about this book on several occasions at various universities. We began this project some years ago, and I am often reluctant to repeat myself. This time, I aim to discuss aspects of the book that have not been covered previously, focusing on different chapters and perspectives.

Regarding the library system here in Macau, I am not fully acquainted with its details. In Hong Kong, our system remains somewhat outdated. For instance, my own library still does not possess the complete version of this book. I hope that Macau's library system is more advanced and that the full version is accessible to everyone for free download, which would be ideal.

The origin of this book dates back many years. Before I transferred to HKU, roughly seven or eight years ago, a former colleague, Professor David Law, approached me. He was working on a project concerning a global theory of judicial systems, covering major jurisdictions such as the United States, France, India, Russia, and China. He asked me to write a book on China's legal system. At the time, he emphasised that there was no urgency and that I could take my time and only begin when I felt ready.

Given my extensive research in this field—over two decades—I initially believed this would be a manageable task. I thought I could build upon my previous work, update it with recent secondary literature, and add a few new insights to my curriculum vitae.

However, as I began working on the project, I realised that the task was more complex than anticipated. Despite my expertise, I discovered many areas with which I was less familiar. The book aimed to be comprehensive, intending to serve readers who might not have prior knowledge of the Chinese legal system, including colleagues and students curious about its operation, particularly regarding the court system.

One of the challenges was that, although I had long studied Chinese courts, I lacked a unifying theoretical framework for the system as a whole. It is difficult to position the Chinese courts precisely in comparison to other legal systems globally. Additionally, the rapidly changing nature of the Chinese system meant that I constantly had to revise and update the content. Recent regulations and interpretations issued by the Supreme People's Court further complicated the writing process.

Despite these challenges, I am satisfied that the final manuscript has been completed and published. The book is now available, and I leave it to you to assess the extent to which it has achieved its original goals. I hope that the book is accessible and engaging, rather than doctrinally dense or overly technical. If I can persuade you that it is worth reading, then I consider it a success; if not, I hope at least it will not bore you.

My aim was to produce a book that provides a clear entry point for those seeking to understand the Chinese legal system, including its major debates and theoretical issues. I also reviewed existing literature, noting that much of the English-language scholarship tends to be highly critical, often focusing on issues such as judicial independence and rights protection.

Much of this criticism is based on Western liberal democratic standards, which serve as an idealised benchmark. Even in mature systems like the United States, the UK, or Hong Kong, the judicial system is not without flaws. However, these critiques tend to highlight only the shortcomings of the Chinese system through this Western lens, implying that China's judiciary is backward and should move toward Western-style liberal democracy.

In contrast, many experts now agree that China's legal system is unlikely to follow this path. Therefore, it is crucial to understand the system on its own terms—to grasp its unique logic and operational principles. This involves situating China's system within its specific social,

political, and cultural context, rather than comparing it exclusively to Western models.

A key insight from my earlier work, such as my book *Embedded Courts*, is that judicial decision-making in China is deeply embedded within social and political influences, rather than being entirely autonomous. To truly understand the Chinese judiciary, one must analyse how it enforces government policies and maintains social stability, rather than viewing it solely through the lens of Western notions of independence and justice.

Over the past decade, significant changes have occurred. Initially, Chinese courts were closely linked to local governments, often serving as their agents. Today, there is a clear trend indicating that local courts have become more aligned with central government policies, reflecting a shift in their role and function.

This transformation is evident across various areas of judicial activity. For example, in criminal justice, issues such as the use of torture—once widespread—have significantly declined.

The rights of defence lawyers have greatly improved; historically, defence attorneys faced difficulties in meeting clients, reviewing case files, or collecting evidence. Now, many of these obstacles have been reduced or eliminated. The use of the death penalty has also decreased markedly, even though China still executes more people annually than any other country.

In civil justice, local protectionism has diminished, and judicial enforcement has improved considerably. The enforcement rate of judgments is now higher than in many other developing countries, as confirmed by United Nations data. These developments indicate that the Chinese legal system is evolving along its own trajectory, following its internal logic.

Fundamentally, the Chinese judiciary remains primarily a tool for implementing government and party policies. While the pursuit of justice is a broad and somewhat vague concept, the courts predominantly serve as instruments to enforce state policies—whether originating from the central or local governments. This policy-driven nature is evident in several concrete examples.

For instance, in recent years, the Chinese government has prioritised economic development and social stability, which directly influences judicial priorities. Cases related to environmental protection, labour disputes, and intellectual property rights have seen increased attention, reflecting policy objectives aligned with national strategies. The

courts have also been instrumental in cracking down on corruption, implementing policies aimed at consolidating party control and maintaining social order.

Another example concerns the handling of politically sensitive cases. During certain periods, courts have been directed to suppress dissent or manage social unrest, demonstrating that judicial functions are often aligned with broader political and social goals. This shows that the judiciary's primary role is not necessarily to serve as an independent arbiter, but to act as a facilitator of state policies, ensuring social stability and political control.

Furthermore, in areas such as administrative law, courts tend to uphold government decisions, even when challenged by individuals or organisations. For example, judgments in cases involving land expropriation or environmental regulations often favour government authorities, reflecting the system's role in supporting state policy implementation.

This policy enforcement function is not unique to China; many authoritarian regimes rely on their judiciary as an instrument of governance. However, in the Chinese context, this role is particularly pronounced and institutionalised. Courts are often seen as extensions of administrative agencies, and their decisions tend to serve the interests of the ruling party and government.

Some scholars argue that translating *fa yuan* as 'court' may be misleading, as it does not precisely align with Western notions of judicial independence or impartiality. In fact, *fa yuan* may be more akin to an administrative or governmental agency, tasked primarily with policy implementation rather than dispute resolution in the traditional sense.

Drawing inspiration from Damaška, I note that courts serve two primary functions: dispute resolution and policy enforcement. In China, courts predominantly focus on the latter. Although they handle a large volume of cases—around 45 million annually—their primary role remains policy implementation rather than dispute resolution *per se*.

Historically, the scope of cases handled by Chinese courts has fluctuated. During periods of heightened political or social demands, courts might handle few or no cases at all, depending on policy needs. The current trend suggests that the core function of policy enforcement remains unchanged, and I do not foresee substantial changes in this trend in the foreseeable future.

In summary, the Chinese judiciary's fundamental role continues to be enforcing government and party policies within a specific social

and political context that differs markedly from Western models. This understanding is essential when analysing the system's development and reforms.

Comments

By Sida Liu, University of Hong Kong

I can safely say I am among the first to have used this book in my own teaching. As the Chinese saying goes, 'A waterfront pavilion gets the moonlight first' (近水樓臺先得月). Since Professor He and I are colleagues at the University of Hong Kong (HKU), I began using his book, *The Judicial System of China*, in my own course soon after its publication in the autumn of 2024. At HKU, I have been co-teaching a compulsory LLB course, Introduction to the Chinese Legal System, with my colleague Professor Ying Xia. This book is the perfect reference for our course. In the past semester, Professor Xia and I used four chapters of the book to teach different topics, and I would like to share my reflections on its value for teaching and for the broader field of Chinese legal studies.

To appreciate the contribution of Professor He's book, it is helpful to place it in the context of the evolution of scholarship on Chinese law over the past few decades. Earlier foundational works, such as Jerome Cohen's *The Criminal Process in the People's Republic of China, 1949-1963* (1968) and Stanley Lubman's *Bird in a Cage: Legal Reform in China after Mao* (1999), provided broad historical overviews of China's legal reform after 1949, including the post-Mao reform period. These studies often painted with a broad brush, identifying general patterns and trends, and were frequently authored by scholars who were generalists of Chinese law—proficient in a wide range of legal topics, from civil and criminal law to the legal profession.

Over the past twenty-five years, the field has become markedly more specialised. Scholars now focus on specific areas such as the courts, criminal justice, corruption, or the legal profession. For example, much of my own work has been on lawyers: corporate lawyers, 'barefoot' lawyers, criminal defence lawyers, and so forth. This trend toward specialisation has greatly enriched the research literature, yielding in-depth studies on a variety of topics.

However, this specialisation has also created a challenge. While we now have many excellent studies on particular topics, it has become increasingly difficult to find comprehensive yet accessible English-

language teaching materials suitable for both undergraduate and postgraduate courses on Chinese law. When I first taught the 'Introduction to the Chinese Legal System' course, I struggled to find readings that were both sophisticated enough for top research universities like HKU and the University of Macau, yet not so specialised as to be inaccessible to students new to the field.

Take administrative law as an example. There is a rich body of scholarship in Chinese, but relatively little in English that is both current and sufficiently broad for teaching purposes. Some Chinese scholars have provided valuable overviews of the reforms of the Administrative Litigation Law, but much of the available work is either too general or too narrowly focused on specific legal reforms or procedures. The same issue arises in other areas, including criminal law and the legal profession. In some cases, I had to assign my own decade-old articles or book chapters simply because there were few other suitable options.

Against this backdrop, the publication of Professor Xin He's book was a delight. It fills a major gap in the teaching literature by providing a comprehensive, thoughtful, and accessible overview of China's judicial system, suitable for a wide range of courses. Almost every topic is covered with both depth and clarity, providing not just a summary of existing research but also insightful analysis grounded in Professor He's own fieldwork and decades of scholarship.

Let me give an example using administrative law. Professor He's chapter on administrative litigation provides an excellent overview of the historical evolution of China's administrative legal system, particularly the stratification of the courts and the functioning of administrative litigation. Importantly, he highlights the persistent tension between the intentions of legal elites and policymakers in Beijing, who may design legal reforms with certain ideals and norms in mind, and the realities of implementation at the local level. This tension between 'law on the books' and 'law in action' is a fundamental theme in understanding China's judicial system, and Professor He presents it with both clarity and nuance.

Students responded very well to this discussion. Many of our law students at HKU are among the best in Hong Kong, but most have little prior knowledge of the Chinese legal system. For many, the 'Introduction to the Chinese Legal System' course is their only formal exposure to Chinese law. Professor He's book makes the system approachable, providing students with not only key facts and institutional analysis but also real cases, contemporary examples, and sophisticated theoretical insights. This book achieves the rare feat in a textbook of possessing the

ability to engage both newcomers and more advanced students.

Another strength of the book is its exemplary use of existing literature. Professor He is modest about this, but I want to highlight that his literature reviews are models for postgraduate students and junior scholars. He provides thorough and balanced overviews of different schools of thought and perspectives, showing how they relate to each other and to his own findings. More importantly, he weaves together his own empirical research with that of others, producing a comprehensive and authoritative account of each topic. This balanced and integrative approach is something we should all aspire to in our scholarship and teaching.

Given the increasing interest in Chinese law in Macau, especially with the launch of new undergraduate programmes like Global Legal Studies at the University of Macau, Professor He's book will be invaluable for faculty and students alike. It can be used in a variety of courses, not only as a textbook but also as a reference for case studies, group discussions, and research projects. I encourage colleagues here and elsewhere to use it in their teaching.

As part of this discussion, I would also like to pose two broader questions for Professor He and for all of us working in the field.

First, what is the current direction of China's legal reform? When I was an undergraduate student more than two decades ago, there was a general sense, though not universal agreement, about the trajectory of China's legal system. There was a shared belief in the need for judicial reform, greater professionalism, and the strengthening of legal institutions. Today, however, the landscape feels less certain. While reforms continue, such as the ongoing revisions to the Criminal Procedure Law, the overall direction is much less clear. For example, although there is official rhetoric about 'putting trials at the centre' of criminal procedure, actual practice has often not matched these aims. A good example is the 'prosecution centeredness' in the plea leniency system that Professor He discusses in one of his recent articles. The system seems increasingly pragmatic, with courts often functioning primarily as policy-implementing bodies for the Party. In this context, is it still meaningful to speak of a coherent direction for legal reform? Or have we entered an era of greater uncertainty and fragmentation?

Second, I would like to return to the question of continuity versus change. Professor He's earlier work, such as his co-authored book *Embedded Courts*, identified enduring features of the Chinese judiciary, such as the emphasis on efficiency and performance metrics for judges.

While many recent reforms and technological innovations, such as widespread audio and video recording in courtrooms, have transformed aspects of the legal process, I wonder whether he views these recent changes as core or peripheral characteristics. What, in Professor He's view, are today the most important enduring features of China's judicial system? Are there particular institutional logics or practices that persist, even as the system evolves in response to new challenges?

In sum, Professor He's book is a significant contribution to both scholarship and teaching on the Chinese legal system. It fills a longstanding gap in the literature, offering a comprehensive, accessible, and insightful overview that will benefit students and instructors for years to come. I look forward to hearing Professor He's responses to these questions, and to continued dialogue on the future of Chinese law.

Review

By Mengliang Dai, Macau University of Science and Technology

Professor Xin He's new book, *The Judicial System of China*, is such an insightful book representing the latest research in the field of China's judicial system. It provides a valuable theoretical framework and practical case studies for studying the system, and it is packed with high quality reading for both scholars and practitioners in understanding the role of Chinese courts in national governance.

As I read the book, many points left a deep impression on me. To start with, Professor He begins by summarising two classic perspectives in academic discussions about the Chinese judicial system: the 'independence perspective' and the 'rights approach'. He argues that both of these approaches fall short when it comes to explaining how Chinese courts actually operate—they simply do not hold up. First, in relation to the 'independence perspective', Professor He digs into how Chinese courts operate under political control. He points out that political factors play a decisive role in everything, from the appointment and promotion of judges to court budgets, and even rulings on specific cases. The Party's complete control over the judiciary makes judicial independence an impossible goal. This control is not only institutional but also present in everyday practices. For example, leaders of higher courts often hold Party positions within local Party committees, and ultimate decision-making power in the court system is subject to Party leadership. Chapter 8 discusses the 'iron triangle' relationship between the police, procuratorate,

and courts. This relationship is often described as an assembly line, where collaboration is key to ensuring convictions. According to data from 2023, China's conviction rate was a staggering 99.95%.¹ Now, compare that to Hong Kong, where the conviction rate after trial in Magistrates' Courts was 60.7% in 2023, and in District Courts was 79.8%.² This comparison shows just how abnormally low China's acquittal rate is. Once a suspect enters the judicial system, there is almost no way out. The system essentially creates guilty verdicts—sometimes even wrongful convictions—one after another. This reality challenges the Western ideal of 'judicial independence' based on the separation of powers and shows that China's judicial system follows a completely different logic.

Second, in relation to the 'rights approach', Professor He critiques the common assumption among Western scholars that authoritarian judicial systems can be understood as 'law versus the state'. He argues that this assumption does not apply to China. In China, laws and courts are not in opposition to the state—they are tools for governance. The primary duty of the courts is not to protect individual rights but to serve the state's policy goals. This dynamic is further explained in Chapter 4, where he discusses lawyers. For example, the suppression of *weiquan* lawyers clearly reflects how courts prioritise state control over individual rights. As the saying goes, 'they don't solve the problem; they solve the person who raises the problem'. Similarly, Chapter 8 examines the plea bargaining system and raises the question: What role do lawyers play? What role should they play? In reality, most defence lawyers have become little more than 'persuaders' or 'observers'. Their main responsibility is to convince defendants to accept plea deals rather than to defend their rights. These contradictions show that the core goal of China's judicial system is not to highlight or protect citizens' rights—it is rather to serve the needs of state governance.

Building on these critiques of traditional perspectives, Professor He proposes a highly insightful framework: the governance model. This model focuses on how courts balance two key goals: policy implementation and legitimacy enhancement. This perspective is much closer to how Chinese courts actually work. The governance model sees courts as agents of the state and tools of Party control. Their primary

¹ 'The innocence rate is so low, how many of these are wrongful convictions?' Sina Finance, accessed June 6, 2025, <http://finance.sina.com.cn/cj/2024-11-28/doc-incxquyv3025947.shtml> (《無罪率這麼低，其中多少冤案？》，載新浪財經網，<http://finance.sina.com.cn/cj/2024-11-28/doc-incxquyv3025947.shtml>，2025年6月6日訪問）。

² 'Prosecutions Hong Kong 2023', accessed June 6, 2025, https://www.doj.gov.hk/en/publications/pdf/doj2023pd_statistics.pdf.

function is to promote governance by implementing Party policies—or, to put it more bluntly, to achieve the Party's goals through the legal system. Chapter 2 points out that when judges handle cases, they often prioritise social stability and political concerns, trying to avoid outcomes that could threaten stability or lead to petitions and other forms of unrest. While some judicial reforms have been introduced, they have been largely superficial and have not brought about real change. For example, He highlights the limitations of the judicial quota system reform. While it has improved professionalism and efficiency, it has also created heavy workloads, reduced job attractiveness, and produced both serious talent loss and immense pressure from lifetime-accountability mechanisms. Overall, the policy-first approach makes procedural justice and the application of law secondary in practice. Judges often rely on mediation to avoid escalating conflicts instead of strictly following legal procedures. While this approach may help achieve short-term policy goals, it sacrifices procedural justice and damages judicial independence. In the long run, this tendency not only weakens judges' legitimacy but also harms the credibility of the entire judicial system.

Now, regarding the governance model, I have a question that arose after reading the book. Professor He argues that the courts' core functions under this model are 'policy implementation' and 'legitimacy enhancement'. But I do not think that these two functions are unique to courts—they are common to all state institutions in China. For example, public security agencies and procuratorate also play major roles in implementing Party policies and enhancing legitimacy. So, what makes courts special compared to other institutions? Do they have any unique functions or characteristics that other institutions do not possess? Another aspect deserving of reflection is the book's methodology. As an academic work, the book demonstrates strong empirical rigour. Professor He uses a wealth of first-hand interview material, such as 'a court vice president said to me ...'³ or 'a judge from a hinterland court told me ...'⁴ These direct quotes show how detailed and thorough the book's data collection is, covering both primary and secondary sources. However, it lacks an independent discussion of its research methods. I believe the book could benefit from a more in-depth exploration of its methodology. Such an addition would not only enhance its academic credibility but also provide readers with a clearer understanding of how its conclusions were reached.

³ Xin He, *The Judicial System of China* (Oxford University Press, 2024), 60.

⁴ *ibid* 3, 64.

In conclusion, this book, with its rigorous research, rich data, and insightful theoretical contributions, provides a clear picture of how China's judicial system works and its role in governance. It also inspires us to think deeply about the nature of the judicial system and the direction of future reforms. By proposing the 'governance model', He has broken through the limitations of traditional perspectives and provided a framework that is much closer to China's reality. This innovative exploration lays an important foundation for future research and provides valuable insights for practitioners. Finally, I would like to thank Professor He again for contributing such a meaningful book to the field.

Review

By Xu Jianhua, University of Macau

About 12 years ago, when I had just finished my PhD and was working as a postdoctoral fellow at University of Hong Kong, Xin He, the author of *The Judicial System of China*, invited me to a workshop he had organised about empirical studies on the Chinese legal system held at the City University of Hong Kong. I was one of the presenters, and many prominent Chinese scholars attended, including the renowned Chinese legal studies scholar Fu Hualing. During the discussion, Fu raised a question to He, noting that while He had done extensive empirical work, he hoped to see him develop his own theory about the Chinese legal system. This book, *The Judicial System of China*, has provided an excellent answer to that question.

In the book, He proposes a compelling theory about the Chinese judicial system, the governance model. In the existing literature, there are two dominant discourses about Chinese judicial system: the independence perspective and the rights-based perspective. He goes beyond these frameworks, arguing that the Chinese judicial system does not neatly fit either model. Instead, He argues that Chinese courts play an important but less discussed function: namely implementing various policies for the state. In doing so, they help the government to improve its legitimacy. He argues that instead of pursuing the goals of judicial independence and protection of the rights of litigants, the goal of Chinese judicial system is to facilitate the governance of the state.

The book has a number of strengths. First, to some extent, this book is like an encyclopedia with unique depth, offering many insights into various aspects of the Chinese court system—its history, the role of

judges, people's assessors, different types of lawyers, and litigants. It also examines different justice models (civil, criminal, administrative) and the court's involvement in mediation. While my own research has primarily focused on the Chinese police, I found this book incredibly informative.

Second, the book combines thorough literature reviews with original fieldwork, interviews and data analysis. Unlike many traditional academic articles, the book's integration of empirical evidence with the literature discussion appears seamless, enhancing both readability and scholarly value.

Third, the book provides a balanced perspective on the Chinese judicial system. While much English-language literature often assumes that a critical attitude toward the Chinese judicial system is a necessary requirement for accurate assessment, the book adopts rather a balanced approach, offering a critical but sympathetic analysis of China's judicial system. It acknowledges the dilemmas and challenges faced by the Chinese courts as well as their working logics, without making a straightforward moral judgement—an approach I deeply admire.

Fourth, the writing style of the book is vivid and reader-friendly. It is far from boring—the author's humour shines through on nearly every page. For example: He describes judicial errors as 'sleeping like time bombs' (p.51); the lifetime-accountability system as 'a sword of Damocles hanging over the judicial mind' (p.52); and judges who left the system as often 'the cream of the crop' (p. 53). These vivid metaphors make complex ideas accessible and engaging.

Overall, the book contributes significantly to our understanding of the role of Chinese judicial system. It provides a good opportunity and invites readers to explore some important questions further. For instance, what will be the future direction of the development of the Chinese judicial system? While the governance model provides many insights into the status quo of the current Chinese courts, scholars who advocate for a more independent judicial system and those who wish for better protection of the rights of litigants could explore whether the governance model indicates a new unique 'China Model' *sui generis*, or is simply a stage in a process of evolution into something else. In addition, the impact of market forces on the Chinese judicial system could also be explored. Over the past forty years, market and commercial forces have significantly reshaped many government institutions, the judicial and criminal systems included. For instance, the logic of the market has deeply penetrated in the operation of the Chinese police, in the form of extensive use of civilian forces and the outsourcing of much of its work to private entities. Future research on how civilianisation and outsourcing

(for instance involving the role of platforms and legal service companies) may affect the governance model of courts would add new insights to our understanding of the Chinese judicial system. In short, the book provides a comprehensive understanding of the Chinese judicial system. It will be of interest to readers in various disciplines including legal studies, sociology, criminology, political sciences and China studies, etc.

Responses

By Xin He

Thank you all for your insightful questions and thoughtful comments. I sincerely appreciate your generosity and engagement. In my own group meetings, the atmosphere tends to be quite critical, with a focus primarily on identifying areas that need improvement. Discussions about what has been satisfactorily accomplished are rare, as the emphasis is on continuous progress and refinement. Nonetheless, I am genuinely grateful for your careful reading of the book and for utilising it as a teaching resource. Although I am no longer teaching that particular course, I am pleased to know that the material continues to serve educational purposes.

Regarding the questions raised, particularly by Sida and Professor Jianhua, they inquire about the extent to which the book provides insights into the future direction of judicial reform or the evolution of China's legal system. From my perspective, this largely depends on the specific policies being implemented and, crucially, on the decisions made by key political leaders. The trajectory of reform is heavily influenced by the preferences and priorities of influential figures such as the leaders of the Political and Legal Affairs Committee, the members of the Supreme People's Court, and other central authorities. Their strategic choices shape the system's development in significant ways.

In this context, I must emphasise that predicting the future course of China's judicial system is inherently challenging. Many shifts are contingent on personal visions, political considerations, and the strategic interests of those in power. As a legal sociologist, I tend to be cautious about making definitive forecasts, especially given that many changes are driven by individual leadership styles and political agendas. The system's direction is often subject to the personal inclinations of top officials and their assessment of social stability, legitimacy, and governance priorities.

However, based on observable trends and current developments,

there are some clues. For example, there appears to be a clear movement toward increasing judicial professionalism. This includes recruiting more highly educated legal professionals—graduates from top law schools and former military officers—into judicial roles. The rationale is that a more legally educated judiciary will be better equipped to handle complex legal issues, understand the interaction between law and politics, and serve governance objectives more effectively. This trend suggests an emphasis on enhancing the competence and capacity of judicial personnel, which could, in turn, influence the overall legitimacy and efficiency of the system.

Of course, these trends are subject to fluctuation. For instance, the focus on judicial education and professionalism has experienced periods of intensification and slowdown over time. Mediation, for example, has maintained a consistent presence but has also seen cyclical fluctuations in emphasis. Therefore, while the book offers an overview of current developments, it cannot serve as a precise predictor of future policy directions or reform trajectories. Its primary purpose is to provide an informed account of what is happening and what has happened, without advocating specific policy proposals.

Predicting the future remains a complex endeavour because it is contingent upon various factors, including leadership changes, political negotiations, and strategic considerations. For example, the current President of the Supreme People's Court, Zhang Jun, possesses considerable influence and capacity to shape judicial reforms, but his next steps remain uncertain. The same applies to other influential figures, such as the heads of the Political and Legal Affairs Committee or the leaders of the Supreme Court. These individuals' personal visions and political calculations significantly impact the system's trajectory.

That said, certain fundamental aspects of the Chinese judicial system are unlikely to change dramatically in the near future. For example, the policy interventionist nature of the judiciary has persisted for the past four decades and remains a defining characteristic. I believe that this pattern will continue, given the system's embedded role in maintaining social stability and supporting the ruling party's governance agenda. Similarly, the emphasis on substantive justice—ensuring fairness, legitimacy, and social stability—does not appear to be shifting toward an exclusive focus on procedural justice. The ongoing interest in mediation, reconciliation, and other alternative dispute resolution mechanisms indicates that procedural fairness, while important, remains subordinate to broader social and political considerations.

Furthermore, the importance of maintaining social stability as a core

concern continues to underpin judicial decision-making. The system's underlying logic is to serve as an instrument of policy implementation, rather than as an independent arbiter of disputes. For example, the use of mediation and reconciliation reflects a preference for resolving conflicts in ways that uphold social harmony, rather than emphasising the adversarial procedures typical of Western systems. This approach is unlikely to change substantially in the near future.

Regarding the question of whether the Chinese court system fundamentally differs from other government branches, my straightforward answer is that it does not. In practice, the judiciary functions as an extension of the government, much like other administrative agencies. Although the constitution explicitly distinguishes the judiciary from the executive branch, in reality Chinese courts operate primarily as instruments of policy enforcement. Their decisions are often aligned with the interests of the ruling party and government, rather than functioning as independent bodies.

The distinction between law and policy in China is often blurred. Policies are frequently formulated and implemented, and sometimes exceed the boundaries of legislation, reflecting the highly dynamic and politicised nature of the system. For example, criminal justice policies have evolved from a focus on severe punishment to incorporating leniency and reconciliation measures, reflecting shifts in leadership attitudes and social stability needs. These changes highlight that the system is primarily driven by political considerations and strategic objectives, rather than by adherence to legal principles alone.

The interaction among different governmental branches further illustrates this point. For instance, the relationship between the Supreme People's Court and the Procuratorate demonstrates how judicial and prosecutorial functions are intertwined within a broader policy framework. The introduction of new institutions, such as the National Supervision Commission, and the evolving roles of prosecutors and judges, reflect ongoing adjustments aimed at reinforcing policy implementation.

In summary, the primary role of the Chinese judiciary is the implementation of government and party policies. Although it performs functions such as dispute resolution, these are subordinate to, and heavily influenced by, political and social stability considerations. The system's continuous change is driven by policy shifts, leadership decisions, and the overarching goal of maintaining social order. Understanding these dynamics is essential for interpreting the development and reform of China's legal system.

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