THE RULE OF LAW IN THE GLOBAL PERSPECTIVE**

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Abstract

The essay aims to review from a comparative law perspective the premises and postures underpinning Western efforts to transplant the rule of law outside the West. In order to do so, the paper first examines the historical and cultural foundations of the rule of law in the West and then scrutinizes its actual potential for being exported in non-Western societies. Through a historical and comparative analysis, the paper sheds light on a set of data that are usually either discarded or underrated in mainstream legal debates.

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1. Introduction

The focus of this paper is on the attitudes and methods underpinning the Western attempts to transplant[1] the rule of law

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[1] In this paper the processes targeting legal changes from outside will be named 'legal transplants', even though comparative law literature uses a flurry of

outside the West[2]. The overall aim of the essay, in turn, is to both unearth the intimate legal foundations of the rule of law and to

different terms to indicate the very same (or similar) phenomena. For a concise survey of this terminology, M. Seckelmann, *Clotted history and chemical reactions on the possibility of constitutional transfer*, in G. Frankenberg (ed.), *Order from Transfer. Comparative Constitutional Design and Legal Culture* (2013) 37-40. Literature on legal transplants in turn is immense. Suffice here to mention the works where one can find the major ideas driving the debate: A. Watson, *Legal Transplants. An Approach to Comparative Law* (1974; 2nd ed. 1993); P. Legrand, *The Impossibility of 'Legal Transplants*, 4 Maastricht J. Eur. & Comp. L. 111 (1997); D. Berkowitz, K. Pistor & J.-F. Richard, *The Transplant Effect*, 51 Am. J. Comp. L. 163 (2003); M. Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in M. Reimann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (2019, 2nd ed.) 442-473; G. Frankenberg, *Constitutional Transfer: The IKEA Theory Revisited*, 8 Int'l J. Const. L. 563 (2010); M.J. Horwitz, *Constitutional Transplants*, 10 Theo. Inq. L. 535 (2009); J.-L. Halpérin, *The Concept of Law: A Western Transplant?*, 10 Theo. Inq. L. 333 (2009); S. Choudhry (ed.), *The Migration of Constitutional Ideas* (2011); M. Van Hoecke, *Legal Culture and Legal Transplants*, in R. Nobles and D. Schiff (eds.), *Law, Society and Community. Socio-Legal Essays in Honour of Roger Cotterrell* (2014) 273-291; M. Siems, *Comparative Law* (2nd ed., 2018) 231 ff. On the different nuances of the expression 'legal globalization', and on the meanings attached to them, *see* for all Dun. Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in D.M. Trubek, A. Santos (eds.), *The New Law and Economic Development. A Critical Appraisal* (2006) 19 ff.; S. Cassese, *The Global Polity. Global Dimensions of Democracy and the Rule of Law* (2012) 21-28; N. Walker, *Intimations of Global Law* (2015); J.-B. Auby, *Globalisation, Law and the State* (2017); H.P. Glenn, *Legal Traditions of the World. Sustainable Diversity in Law* (5th ed., 2014) 51 ff. One should, however, be aware that beginning, latest, from the 16th century the development of capitalism has always "called for the destruction of differences in laws, standards, currencies, weights and measures, taxes, and customs duties at the level of nation state": B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 Eur. J. Int'l L. 1, 7 (2004).

[2] The financial investment in legal transfers often disguised as aid for legal and judicial development is remarkable. According to the last available data provided by the OECD database (stats.oecd.org – before they changed the dataset), in 2015 aid flows effectively disbursed to the legal sector of developing countries referred only to 'Legal and Judicial Development' (thereby excluding other entries like 'Human Rights', 'Anti-corruption', 'Media and free flow of information' and 'Women's equality') was about US $ 2.6 billion. In terms of development aid the World Bank "has spent around $18 billion since the 1990s on projects with a component from the 'law and justice' subsector, and around $48 billion on projects coded as having some 'rule of law' thematic impact": D. Desai, *Power Rules: The World Bank, Rule of Law Reform, and the World Development Report 2017*, in C. May, A. Winchester (eds.), *Handbook on the Rule of Law* (2018) 217, 221. See also J. Gillespie, P. Nicholson, *Taking the Interpretation of*

scrutinize its actual potential for being exported in non-Western societies. In order to do so, I will reappraise the notion of Rule of Law from a comparative law perspective. The latter approach, entailing a careful consideration of the historical and contextual factors, will enable the analysis of a set of data that are usually either discarded or underrated in the mainstream legal debate.

On the terminological level, it is worth noting at the onset that: by 'West' I refer to the areas of the world where Western legal tradition stands as the backbone of the concerned society; and by Western legal tradition I mean what a handful of world societies have in common as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught"[3].

2. Everything is 'Rule of Law'

'Rule of law' is a key notion to understand not only Western legal lingo, but also the identitarian discourse clustered around this very notion, as well as any possible argument

Legal Transfers Seriously: The Challenge for Law and Development, in Id. (eds.), *Law and Development and the Global Discourses of Legal Transfers* (2012) 2. On the scant evidence that legal transfers induce recipients to change their behavior in the ways envisaged by donor agencies, *see e.g.* K. Pistor, P.A. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development 1960–95* (1998); D. Kaufmann, A. Kraay & M. Mastruzzi, *Governance Matters III: Governance Indicators for 1996-2004* (2005), at worldbank.org/wbi/governance/pdf/govmatters3.pdf; W. Merkel, *Measuring the Quality of Rule of Law: Virtues, Perils, Results*, in M. Zurn, A. Noelkamper & R. Peerenboom (eds.), *The Dynamics of Rule of Law in an Era of International and Transnational Governance* (2012) 21; R. Peerenboom, *Toward a Methodology for Successful Legal Transplants*, 1 Chinese J. Comp. L. 4 ff. (2013); V.L. Taylor, *Regulatory rule of law*, in P. Drahos (ed.), *Regulatory theory: foundations and applications* (2017) 393, 397.

[3] J.H. Merryman, R. Pérez-Perdomo, *The Civil Law Tradition* (3rd ed., 2007) 1-2. We will see below (sections 2 to 5) that the Western "set of deeply rooted, historically conditioned attitudes" is perceived by our mainstream legal culture as a set of attitudes deprived of adverbs and adjectives and, therefore, as a toolkit ready to be transplanted into any other legal tradition, and into the mind of any other law-makers and law-users.

circulating about the expansion of Western law, its reasons, aims and patterns[4].

Indeed, if after the end of World War II and during the 'cold war' period the rule of law was by and large invoked as a principle of desirable political international order, since the 1990s it has come closely associated with the overall current achievements of Western civilization[5]. In fact, if one asks: what is the 'rule of law'? one finds many authoritative definitions converging in overlapping it with the whole of our legal civilization.

To avoid any cherry-picking, let me take as an example the 2004 Report by the UN Secretary-General on the Rule of Law[6]. The Report gives a characterization of the Rule of Law, which is mother and daughter of many other definitions circulating in the debate – from that of the Council of Europe[7], to those divulgated

[4] On the claim that Dicey was the first jurist to use the phrase 'the rule of law', *see e.g.* (and sceptically) J. Waldron, *The Rule of Law and the Measure of Property (Hamlyn Lectures 2011)* (2012) 7 ff.

[5] *E.g.*, S. Pahuja, *Decolonising International Law. Development, Economic Growth and the Politics of Universality* (2011) 178-179. See also the text below and sections 4 and 5.

[6] *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616 (2004) paragr. 6 – according to J. Farrall, *United Nations Sanctions and the Rule of Law* (2007) 22, between 1998 and 2006, the phrase 'the rule of law' appeared in at least 69 Security Council resolutions. On the same lines of the UN Secretary-General Report, see USAID, *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework* (2010), according to which the elements that comprise the rule of law – each of them "must be present for rule of law to prevail" (Id., 1) – edare: order and security, legitimacy, checks and balances, fairness (the latter consisting of four sub-elements: (a) equal application of the law, (b) procedural fairness, (c) protection of human rights and civil liberties, (d) access to justice), effective application (Id., 1-2 and *passim*).

[7] European Commission for Democracy through Law (Venice Commission), *Report on the Rule of Law*, adopted at its 86th plenary session (Venice, March 2011), venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e, para 41. On the same lines see 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*, Brussels, 3.4.2019 COM(2019) 163 final, p. 1. In reaching this definition, the Venice Commission relied heavily on the work of Thomas Bingham referred to below, next note.

by Tom Bingham[8], Jeremy Waldron[9], Lon Fuller[10], Joseph Raz[11], and many others[12]. The Report reads:

"[The rule of law is] a concept at the very heart of the [UN] 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".

After reading and learning what the rule of law is according to the UN and the many other authorities I mentioned above[13], one could ask: As to the values, and principles on which

[8] T.H. Bingham, *The Rule of Law* (2010) ch. 3-10.

[9] J. Waldron, *The Rule of Law*, cit. at 4, 6-7; see also Id., *The Rule of Law and the Importance of Procedure*, in J.E. Fleming (ed.), *Getting to the Rule of Law* (2011) 3, 6-7; Id., *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 Eur. J. Int. L. 315, 316-17 (2011).

[10] L.L. Fuller, *The Morality of Law* (1965, rev. ed.) ch. 2, 33-94.

[11] J. Raz, *The Rule of Law and its Virtue*, 93 L. Q. R. 195, 198 (1977), now in Id. (ed.), *The Authority of Law: Essays on Law and Morality* (1979) 210, 213. Fuller and Raz advocate what is usually considered the 'thin' or 'formal/procedural' view of the rule of law (see also J.M. Finnis, *Natural Law and Natural Rights* (2nd ed. 2011) 270-271; C. Sunstein, *Legal Reasoning and Political Conflict* (2nd ed. 2018) 119-122), as opposed to the 'thick' or 'substantive' one, for which see T.H. Bingham, *The Rule of Law*, cit. at 8; P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, Public Law 467–87 (1997)). On this dycothomy and for major references, see J. Møller, *The advantages of a thin view*, and A.W. Bedner, *The promise of a thick view*, in in C. May, A. Winchester (eds.), *Handbook on the Rule of Law*, cit. at 2, respectively at 21-33 and 34-47.

[12] Once remembered that "there are almost as many conceptions of the rule of law as there are people defending it" (O. Taiwo, *The Rule of Law: The New Leviathan?*, 12 Can. J. L. & Jur. 151, 152 (1999)), a survey of the definitions circulating in the literature, from Aristotle to contemporary writers, can be found, *e.g.*, in B.Z. Tamanaha, *On the Rule of Law. History, Politics, Theory* (2004); R. Kleinfeld, *Competing Definitions of the Rule of Law*, in T. Carothers (ed.), *Promoting the Rule of Law Law Abroad: In Search of Knowledge* (2006) 31 ff.; C. May, *The Rule of Law: The Common Sense of Global Politics* (2014) 33 ff.

[13] See above, notes 6-12.

we ground the basics of the Western legal civilization, what is left aside in this definition? As a matter of fact, all the fundamental beliefs and ideals underpinning our legal way of looking at, and living in the world are therein included. And yet, paradoxically, on the one hand, some of the features the mainstream debate attach to the rule of law cannot be found or are not fully-fledged in all Western societies[14]; and, on the other hand, some of those features (think of, e.g., 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[15], which Westerners do not consider to live by the rule of law itself[16].

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[14] 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 F.K. Upham, *Mythmaking in the Rule of Law Orthodoxy*, in T. Carothers (ed.), *Promoting the Rule of Law Law Abroad*, cit. at 12, 75, 88 (see also the still binding U.S. Supreme Court decision in *Dandridge v. Williams*, 397 U.S. 471 (1970), stating that the U.S. Constitution contains no affirmative state obligation to care for the poor – and upholding welfare cap regardless of the family size). As to the treatment of African-Americans, minorities, and the lowest socio-economic classes in the U.S., P. Gowder, *The Rule of Law in the Real World* (2016) 189 ff.; C. Albisa, J. Schultz, *The United States. A Ragged Patchwork*, in M. Langford (ed.), *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (2008) 230, 247 ff. (as to the obstacles faced in the U.S. by the implementation and justiciability of economic and social rights). See also J. Waldron, *Security as Basic Right (after 9/11)*, in C.R. Beitz, R.E. Goodin (eds.), *Global Basic Rights* (2009) 207 ff.; M. Galanter, *Why the Haves Come Out Ahead. The Classic Essay and New Observations* (2014); E.G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Response*, in E.G. Jensen, T.C. Heller (eds.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003) 336, 338; B. Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (2019) 3. For the lack of a "meaningful correlation" between gender equality and rule of law in many 'developed' countries, K. Pistor, A. Haldar & A. Amirapu, *Social norms, rule of law and gender reality: an essay on the limits of the dominant rule-of-law paradigm*, in J.J. Heckman, R.L. Nelson & L. Cabatingan (eds.), *Global Perspectives on the Rule of Law* (2010) 241 ff. (the quote is from p. 257).

[15] To reject or scrutinize the membership of autocratic and Islamic societies to the rule of law club, most include also the respect for human rights in the core definition (see e.g. the above definitions offered by Bingham, USAID, the Council of Europe, the UN Secretary-General, as well as J. Stromseth, D. Wippman & R. Brooks, *Can Might Make Rights?: Building the Rule of Law After Military Interventions* (2006) esp. at 58, 79, 186; M. Cartabia, *The Age of "New Rights"*, *Straus Working Paper* 03/2010, 14-15, at

3. Issues at Stake

Considering this, and considering the articulations the public discourse and scholarly discussions display about the functions that should be actually assigned to the rule of law[17], and

law.nyu.edu/sites/default/files/siwp/Cartabia.pdf; G. Palombella, *The Rule of Law Beyond the State: Failures, Promises, and Theory*, 7 Int'l J. Const. L. 442-467 (2009)) – at the price of emphasizing its all-Western nature (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*, 49 New Series American Anthropologist 539 (1947). See also P. Fitzpatrick, *Modernism and the Grounds of Law* (2001); G. Frankenberg, *Human rights and the belief in a just world*, 12 Int'l J. Const. L. 35, 49 f. (2014); U. Baxi, *Epilogue: Changing Paradigms of Human Rights*, in J. Eckert, B. Donahoe, C. Strümpell & Z.Ö. Biner (eds.), *Law against the State: Ethnographic Forays into Law's Transformations* (2012) 266, 273 ff. For some significant refinements to this perspective, see M. Bussani, *De-Globalizing Rule of Law and Democracy. Hunting Down Rhetoric through Comparative Law*, 68 *Am. J. Comp. L.* (forthcoming 2020).

[16] As Joseph Raz noted (J. Raz, *The Rule of Law and its Virtue*, cit. at 11, 211), "[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's remarks befit the systems ruled by the so called 'autocratic legalism' as well, see e.g. K. Lane Scheppele, *Autocratic Legalism*, 85 U. Chi. L. Rev. 545 (2018); S. Baer, *The Rule of – and not by any – Law. On Constitutionalism*, 71 Current Legal Problems 335, 350-352 (2018)). See also J. Møller, *The advantages of a thin view*, cit. at 11, 21 f.; D. Dyzenhaus, *Legality and Legitimacy* (1997); L. Salas, *From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, in P. Domingo and R. Sieder (eds.), *The Rule of Law in Latin America* (2001) 17, 35, 46; T. Ginsburg and T. Moustafa, *Introduction*, in Iid. (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008) 4; B.Z. Tamanaha, *On the Rule of Law*, cit. at 12, 112, 119 f.; J.H.H. Weiler, *Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law*, in C. Closa, D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (2016) 313-326; B. Ackerman, *Revolutionary Constitutions*, cit. at 14, 2-3; M. Cherif Bassiouni & G.M. Badr, *The Shari'ah: Sources, Interpretation and Rule Making*, 1 UCLA J. Islamic & Near Eastern L. 135 (2002), note that modern Arabic translates the 'rule of law' as siyadar alqanun, meaning 'sovereignty of law'. Futher, one could remind that "the 1936 Soviet constitution provided for the supremacy of law, equal rights, free speech, free press, and a whole host of other liberal-democratic ideals": P. Gowder, *The Rule of Law in the Real World*, cit. at 14, 178 (and see J.R. Starr, *The New Constitution of the Soviet Union*, 30 Am. Pol. 1143 ff. (1936)).

[17] See in general O. Taiwo, *The Rule of Law*, cit. at 12, 34; J.N. Shklar, *Political Theory and the Rule of Law*, in A.C. Hutchinson, P. Monahan (eds.), *The Rule of*

considering also the low degree of specificity – and/or realism – achieved by the mainstream definitions mentioned above, anyone would agree that the question I started from keeps lying out there: What is the rule of law? What is the rule of law that Westerners are so proud of to the point of wishing it to be promoted and actually transplanted everywhere?

As we saw, the debate is inclined to mean, by the expression 'rule of law', the whole of our legal civilization[18]. This could embody a linguistic convention as many others[19], and yet quite unfortunate, under both the normative and the analytical point of view. On the normative level the point is that this oversized notion of rule of law would ridicule from the very outset any serious discussion on the possibility of having it transplanted outside the West (in less than a thousand years,

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Law: Ideal or Ideology? (1987), reprinted in S. Hoffmann (ed.), *Political Thought & Political Thinkers* (1998) 1 (the rule of law "has become meaningless thanks to ideological abuse and general over-use"); J. Waldron, *The Rule of Law*, cit at 4., 47 (criticizing 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"; see also M. Krygier, *The rule of law: pasts, presents, and two possible futures*, 12 Ann. Rev. L. Soc. Sci. 199, at 211 (2016), according to whom the rhetoric of rule of law as an ideal should be assessed "critically to expose false claims in its name":); R. Kleinfeld, *Competing Definitions of the Rule of Law*, cit. at 12, 46 ff., 59 ff.; A.W. Bedner, *The promise of a thick view*, cit. at 11, 34-36.

[18] On the limits within which the notion, and the very idea of rule of law can be discussed at the international law level, *cf.* J. Crawford, *International Law and the Rule of Law*, 24 Adel. L. Rev. 3 (2003); M. Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 Va. J. Int'l L. 19 (2003); C. May, *The Rule of Law*, cit at 12.; B.Z. Tamanaha, *On the Rule of Law*, cit. at 12, 127 ff.; R. McCorquodale, *Defining the International Rule of Law: Defying Gravity*, 65 Int. & Comp. L. Q. 277; V. O'Connor, *Understanding the International Rule of Law Community, its History, and its Practice* (2015), at inprol.org/publications; J.H.H. Weiler, *Epilogue*, cit. at 16.

[19] From the mainstream perspective, translating the term 'rule of law' into other languages turns out to be a difficult endeavour. Duncan Fairgrieve has shown that even translation between English and French is far from simple with possibilities including 'règle de droit', 'la primauté de droit' (used in Canada), 'préeminence du droit' (used in the Council of Europe) and 'Etat de Droit' (or law governed state), with the latter being considered by the author as the closest to the common law meaning: D. Fairgrieve, *'Etat De Droit and Rule of Law: Comparing Concepts – A Tribute to Roger Errera*, Pub. L. 40-59 (2015). See also M.E.J. Krygier, *Rule of Law (and Rechtsstaat)*, in *International Encyclopedia of the Social & Behavioral Sciences*, vol. 20 (2nd ed., 2015) 780 ff.

unless we supply history with a made-in-West accelerator). On the analytical level, the oversized packaging of the rule of law as our entire legal civilization would dilute the rule of law into the ocean of our legal technostructures making it undistinguishable from the other features of our legal systems[20].

Thereby, we could either discard the notion as an unwieldy linguistic convention bereft of actual analytical and normative meaning[21], or try to understand whether it exists a kernel notion of rule of law that can be seen at the same time as characterizing our legal experiences and as the seed of whatever achievement we attained growing out of it[22].

Does this kernel notion exist (beside and beyond the variable degrees of compliance with any other requirement surrounding that kernel)? And where and when was this kernel notion generated?

4. At the Core of the Notion

It is a common opinion that the 'rule of law' we are talking about today was first initiated in England, with the Magna Charta (1215), or, some centuries later, when the famous judge Edward Coke "forbade" King James I (1603-1625) to sit in "his" Court, as

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[20] Cf. B.Z. Tamanaha, *Functions of the Rule of Law*, in M. Loughlin, J. Meierhenrich (eds.), *The Cambridge Companion to the Rule of Law* (forthcoming), at ssrn.com/abstract=3113820, 2-3.

[21] The lack of historical and comparative accuracy in singling out roots and technical background of the rule of law fails to acknowlwedge what noted also by J. Kroncke, *Law and Development as Anti-Comparative Law*, 45 Vand. J. Transn. L. 477, 524 (2012), i.e. that : "throughout 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).

[22] For a more thourough analysis of the issues dealt with in he following sections, see M. Bussani, *De-Globalizing Rule of Law and Democracy*, cit. at 15

the former considered the latter lacking the technical knowledge essential to administer the law.[23] 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 ruler[24]. Thus, in order to understand what the rule of law is, one should bear in mind that the law stands in bi-univocal correspondence with the

[23] *See* for all P. Linebaugh, *The Magna Carta Manifesto* (2008); A. Arlidge, I. Judge, *Magna Carta Uncovered* (2014); P. Costa, *The rule of law: An outline of its historical foundations*, in C. May, A. Winchester (eds.), *Handbook on the Rule of Law*, cit. at 2, 135, 139-142; and cf. J.C. Holt, *Magna Carta* (3rd ed. 2014, with a new introduction by G. Garnett and J. Hudson) esp. 46-48; M. Radin, *The Myth of Magna Carta*, 60 Harv. L. Rev. 1060, 1062 (1947). See also B.Z. Tamanaha, *On the Rule of Law*, cit. at 12, 25 ff., as well as J.N. Shklar, *Political Theory and the Rule of Law*, cit. at 17, 26, on "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".

[24] One can indeed recall the coeval efforts carried out with the same purposes in other parts of Europe, for, *e.g.*, through the Golden Bull of King Andrew II of Hungary (1122), 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 J.M. Bak, G. Bónis & J.R. Sweeney (eds.), in collaboration with L.S. Domonkos, *Decreta regni mediaevalis Hungariae/The Laws of the Medieval Kingdom of Hungary*, I, *1000-1301* (2nd ed. 1999) 32 ff. and (for the English translation) 95 ff.; see also H.J. Berman, *Law and Revolution. The Formation of Western Legal Tradition* (1983) 293 f. 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 had the freedom to elect their own councils and to enact their own legislation (see A. Haverkamp, *Der Konstanzer Friede zwischen Kaiser und Lombardenbund (1183)*, in H. Maurer (ed.), *Kommunale Bündnisse Oberitaliens und Oberdeutschlands im Vergleich* (1987) 11 ff.; G. 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*, 39 J. Medieval His. 61 ff. (2013)); by the *Statutum in favorem principum* (Statute in favour of the princes, 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 power of jurisdiction over their territories and the right of approval over any legislation proposed in future by the Emperor (see W. Koch, *Statutum in favorem principum*, in *Lexikon des Mittelalters* (1999) VIII 75-76).

culture it stems from and contributes in generating[25], and that Western culture and law were not born in England. Consequently, and to the very same purpose, one should go further than focussing on the apportionment of powers between the sovereign and its subjects. On the same foot, one should go deeper when understanding what made the technocratic uprising of judge Coke possible.

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, it gave way to the secularization and professionalization of the law-giving process[26]. When one looks at the deepest roots of the notion, i.e. 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 occurs under socialist legality).

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[25] J.H. Merryman, R. Pérez-Perdomo, *The Civil Law Tradition*, cit. at 3, 1-2; J. Husa, *Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law*, 6 Chinese J. Comp. L. 129, 138 ff. (2018).

[26] The latter point has been made, *e.g.*, by H.J. Berman, *Law and Revolution*, cit. at 24, 7 ff.; B.W. Frier, *The Rise of Roman Jurists. Studies in Cicero's pro Caecina* (1985) 139 ff., 156, 188 ff., 269 ff.; F. Wieacker, *Römische Rechtsgeschichte. Einleitung, Quellekunde, Frühzeit und Republik* (1st ed. 1988) 519 ff.; Id., *Foundations of European Legal Culture*, 38 Am. J. Comp. L. 1, 23 f. (1990); A. Watson, *The Law of Ancient Romans* (1970) 24 ff.; J.-L. Halpérin, *The Concept of Law*, cit. at 1, 338; Michel Humbert, *Droit et religion dans la Rome antique*, 38 Arch. Phil. Dr. 34 (1993); D. Johnston, *Roman Law in Context* (1999) 5 ff.; F. Schulz, *History of Roman Legal Science* (1946) esp. 6-12, 30 f., 60 f.; and see also Max Weber, *Economy and Society. An Outline of Interpretive Sociology* (1978; G. Roth and C. Wittich eds., transl. from J. Winckelmann (ed.), *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*, 4th ed. 1956) 795 ff. See also J.R. Commons, *Legal Foundation of Capitalism* (1924) 67, 86, 249; F.A. von Hayek, *The Constitution of Liberty: The definitive edition* (rev. ed. 2011 – 1st ed. was published in 1960) 243-246.

This is the kernel of the rule of law. This is a feature that surfaces in many of the mainstream definitions I referred to above (it is usually presented as "independent adjudication", or as "access to justice before independent and impartial courts"[27]), but the role of this element is decentralized by the parallel emphasis assigned to a long list of different attributes deemed crucial and substantial to the very definition of the rule of law[28]. Yet, without the independent, secular dispute-solver technocracy, none of the features of the rule of law those definitions emphasize (from "supremacy of law" to "accountability to the law", from "prohibition of arbitrariness" to "judicial review of administrative acts") would have been able to find their way into the development of Western institutions. Without the independent, secular dispute-solver technocracy, any defense of one's own entitlements, any claim against fellow citizens or public bodies – including claims related to the implementation of the principles of equality and non-discrimination, and to the different forms of freedom – would be (and outside the West they can always be) pre-judged against a set of political, religious, philosophical, clannish values, goals and rules. Values, goals and rules that do not represent the backbone of our legal and institutional infrastructure. Conferring the power of resolving the disputes to an independent, technocratic professional requires a secularized society (i.e. a social and cultural context which deeply supports its

[27] See the definitions offered by the UN Secretary General, USAID, the Council of Europe, Bingham, Waldron, Raz, *supra* notes 6-11, and accompanying text. See also M.N.S. Sellers, *What Is the Rule of Law and Why Is It So Important?*, in J.R. Silkenat, J.E. Hickey Jr., P.D. Barenboim (eds.), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (2014) 3, 4 ff., 13; A.W. Bedner, *The promise of a thick view*, cit. at 11, 37; T. Ginsburg, *Difficulties with Measuring the Rule of Law*, in C. May, A. Winchester (eds.), *Handbook on the Rule of Law*, cit. at 2, 50, 52; R.S. Summers, *A Formal Theory of the Rule of Law*, 6 Ratio Juris 127, 133-134 (1993).

[28] Let me just add that the arguments grounded on the overlapping of rule of law with what it should achieve, such as 'global justice', or 'good governance' (see for all A. Sen, *Global justice*, in J.J. Heckman, R.L. Nelson & L. Cabatingan (eds.), *Global Perspectives on the Rule of Law*, cit. at 14, 53 ff.; and, in a more articulate way, J. Waldron, *The Rule of Law*, cit. at 4, *passim* and at 93 ff.; J. Raz, *The Rule of Law and its Virtue*, cit. at 11, 211) can at their best simply complement the present comparative analysis on what the rule of law is, and where it comes from, for 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.

independence from religious as well as political transcendentalisms) where individuals and groups have led the ruler and/or the other customary or religious chiefs to dismiss the power of settling 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 roots 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-solver technocracy.

5. Lessons. The Western Legal Self in a Broken Mirror

It should go without saying that much more, and far more complex than the implantation of the above 'kernel' of the rule of law on Western soil, allowed us to tread the path towards the construction of apparatuses of notions and principles, as well as of techno-structures able to support the development of the legal institutions our societies live by today. And yet, of this complex path one should just be relentlessly mindful.

Being aware of this multifarious 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 civilization and labelling it as the 'rule of law' to use it for export purposes, as if it were a commodity, or a turnkey plant, reveals itself as not only faultering on the ground, but also heedless 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 which are now available to us and which we would like to see adopted everywhere[29].

[29] D.C. Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?*, in C.S. Hsu (ed.), *Understanding China's Legal System: essays in honor of Jerome A. Cohen* (2003) 93; S. Humphreys, *Theatre of the Rule of Law. Transnational Legal Intervention in Theory and Practice* (2010), *passim*, and 13, 187; J. Kroncke, *Law and Development as Anti-Comparative Law*, cit. at 21, 488 (but see also 533-534: "With some irony, we should remember that the only other modern country [besides the U.S.] to so systemically misjudge foreign legal developments through an export-oriented legal culture was the Soviet Union");

Depriving the rule of law of its very historic and comparative value makes the 'export' version of the 'rule of law' – be it supported by 'big money', States, NGOs, or global institutions[30] – become one of the many spongy notions which either offer themselves to the interests of those who use them, or serve a vision of the law (and of the world) lacking the capacity of looking beyond the West[31]. Take all the notions of the rule of law I mentioned earlier. Each of them come from, are entrenched within, and aim to reflect the whole of current political, socio-economic and institutional Western frameworks – as well as the role and work of legal thought producers, and of lawyers, judges, law enforcement agencies[32]. What is further evident in this oversized packaging of the rule of law is that the formulas it contains and the proposals it makes are rarely supported by historical and comparative analysis able to overcome the partiality embedded in the regional dimension of the Western legal culture.

K. Pistor, *Advancing the Rule of Law: Report on the International Rule of Law Symposium Convened by the American Bar Associations November 9-10, 2005*, 25 Berkeley J. Int'l L. 7, 10 (2007).

[30] V.L. Taylor, *Regulatory rule of law*, cit. at 2, 401 f.; K. Simion, V.L. Taylor, *Professionalizing Rule of Law: Issues and Directions* (2015) esp. 27 ff.; M. Infantino, *Numera et impera: gli indicatori giuridici globali e il diritto comparato* (2019) 104-122.

[31] Another good example comes from USAID (USAID, *Guide to Rule of Law Country Analysis*, cit. at 27 – the Guide's purpose is "to assist USAID Democracy and Governance (DG) officers in conducting a rule of law assessment and designing rule of law programs that have a direct impact on democratic development": Id., 1): "Legal cultures differ depending upon history, with many countries basing their legal system on the civil law tradition and others (including the U.S.) on the common law tradition, while many countries include elements of both traditions and may incorporate significant traditional, religious, or customary components. … Societies differ in terms of the values they ascribe to law versus other means of social organization, such as personal or family loyalty. … The principle of rule of law, however, transcends all these differences. This has important implications for practitioners. If the rule of law is a universal principle, then supporting the rule of law is not necessarily imposing foreign ideas on a society" (Id., 6).

[32] 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": J.W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L. J. 22 (1984), and this is precisely what most differs across legal cultures and jurisdictions.

In other words, the intellectual awareness as well as the scientific attitude necessary to understand the impact of our views on experiences different from our own are dramatically lacking[33].

Let me be clear, all this would be reasonable if we were to discuss the rule of law and its living features in an all-Western dimension, if theoreticians entitled the fruits of their work "Western (or American, or European) rule of law". This is not the case, though: the vocation towards universality and/or timelessness is implicit. Consequently, any claim to treat the Western rule of law as a notion that includes the whole of Western legal civilization and that can be universalized without paying due attention to its historical sources (and to the different contexts where it should be exported), is doomed to appear as preposterous or opportunistic. It comes to no surprise, therefore, that those notions of rule of law, turned into concepts without history and geography, be put at the service of strategies unable to build a pacified and fruitful relationship between 'us' and 'them'[34]. Our public discourses feed the consideration of the 'other' lacking the rule of law, not as the starting point for any analysis willing to be inclusive of diversity and of a shared perspective, but as a defect to be put straight or to be 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[35].

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[33] See also G.K. Hadfield, B.R. Weingast, *Microfoundations of the Rule of Law*, 17 Ann. Rev. Pol. Sci. 21 (2014); R. Kleinfeld, *Competing Definitions of the Rule of Law*, cit. at 12, 41; G. Frankenberg, *Constitutions as commodities: notes on a theory of transfer*, in Id. (ed.), *Order from Transfer. Comparative Constitutional Design and Legal Culture* (2013) 10 ff.

[34] 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": M.E.J. Krygier, *Institutional Optimism, Cultural Pessimism and the Rule of Law*, in M.E.J. Krygier, A. Czarnota (eds.), *The Rule of Law after Communism* (1999) 77, 82. See also C. May, A. Winchester, *Introduction*, in Iid. (eds.), *Handbook on the Rule of Law*, cit. at 2, 1, 3; J. Husa, *Developing Legal System, Legal Transplants, and Path Dependence*, cit. at 25, 483-486; and cf. G. della Cananea, *Due Process of Law Beyond the State: Requirements of Administrative Procedure* (2016) 86-87, 198-204.

[35] See T. Ruskola, *Legal Orientalism*, 101 Mich. L. Rev. 179 ff. (2002); S. Wilf, *The Invention of Primitivism*, 10 Theo. Inq. L. (2008), art. 7, 485 ff.; R. Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, in Id. (ed.), *Asian Discourses of Rule of Law* (2004) 1 ff.; D.B. Goldman, *Globalisation and the*

Along this way, being 'de-contextualised' and 'naturalized', 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, not to mention to solve, any of the others' problems.

Western Legal Tradition: Recurring Patterns of Law and Authority (2008) 4-8; C. May*, The Rule of Law*, cit. at 12, 100 ff.