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# Deglobalizing Rule of Law and Democracy: Hunting Down Rhetoric Through Comparative Law

*Notwithstanding the well-known differences that run through cultures and traditions, the West has never stopped trying to export its own law into the rest of the world. During and after the colonial era similar endeavors were spreading Western views on how legal issues are to be understood and handled, thereby broadening the West's area of influence on global legal affairs. More recently, these efforts have overlapped with (and have been blurred by the rhetorical veil of) so-called legal globalization. The focus of this Article is on the attitudes and methods underpinning the ongoing Western attempts to transplant the two pillars of Western civilization, i.e., democracy and the rule of law, into outside contexts. Confronted with processes that concern different legal systems, this Article cannot but take a comparative law approach. Such an approach entails a careful consideration of the historical and contextual factors and will enable an analysis of data that are usually either discarded or underrated in mainstream legal debates. Thus notions, ideas, and debates about the rule of law and democracy will be reappraised from a comparative law point of view in order to both unearth their intimate legal foundations and to scrutinize their potential for being transplanted outside Western societies. The analysis will show how this potential, to the extent that it exists, can only be exploited through a radical shift from the usual way in which the West approaches the legal settings it aims to change.*

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Profound differences across legal traditions and cultures have never hindered the West's efforts to export its own law, or—as some might put it—to reform the law of the others in order to make it uniform with, or compliant with, that of the West. During and after the colonial era similar endeavors were spreading the West's views on how legal issues are to be understood and handled, thereby broadening Western areas of influence on global legal affairs. More recently, these efforts have overlapped with (and have been blurred by the rhetorical veil of) so-called legal globalization.[1]

All these phenomena belong to the broad and wide-ranging category of processes targeting legal change from the outside, processes which may pursue change in different fields, with different priorities, and in different ways.[2] The focus of this Article is on the attitudes and methods underpinning Western attempts to transplant[3] outside

1. On the different nuances of the expression "legal globalization," and on the meanings attached to them, see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 19–20 (David M. Trubek & Alvaro Santos eds., 2006); SABINO CASSESE, THE GLOBAL POLITY: GLOBAL DIMENSIONS OF DEMOCRACY AND THE RULE OF LAW 21–28 (2012); JEAN-BERNARD AUBY, GLOBALISATION, LAW AND THE STATE (2017); NEIL WALKER, INTIMATIONS OF GLOBAL LAW (2015); H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 51–53 (5th ed. 2014). One should, however, be aware that beginning, at the latest, in the sixteenth 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": Bhupinder S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1, 7 (2004).

2. Mauro Bussani, *Comparative Law and the Geopolitics of Legal Reforms*, *in* COMPARISONS IN LEGAL DEVELOPMENT: THE IMPACT OF FOREIGN AND INTERNATIONAL LAW ON NATIONAL LEGAL SYSTEMS 235 (Mauro Bussani & Lukas Heckendorn Urscheler eds., 2016).

3. In this Article, the processes targeting legal changes from the outside will be called "legal transplants," even though the comparative law literature uses a flurry of terms to refer to the very same (or similar) phenomena. For a concise survey of this terminology, see Margrit Seckelmann, *Clotted History and Chemical Reactions: On the Possibility of Constitutional Transfer*, *in* ORDER FROM TRANSFER: COMPARATIVE CONSTITUTIONAL DESIGN AND LEGAL CULTURE 36, 37–40 (Günter Frankenberg ed., 2013). Literature on legal transplants is immense. Suffice it to mention here the works where one can find the major ideas driving the debate: ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993); Pierre Legrand, *The Impossibility of "Legal Transplants,"* 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); Daniel Berkowitz, Katharina Pistor & Jean-François Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); Michele Graziadei, *Comparative Law, Transplants, and Receptions*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 443 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019); Günter Frankenberg, *Constitutional Transfer: The IKEA Theory Revisited*, 8 INT'L J. CONST. L. 563 (2010); Morton J. Horwitz, *Constitutional Transplants*, 10 THEORETICAL INQUIRIES L. 535 (2009); Jean-Louis Halpérin, *The Concept of Law: A Western Transplant?*, 10 THEORETICAL INQUIRIES L. 333 (2009); THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2011); Mark Van Hoecke, *Legal Culture and Legal Transplants*, *in* LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL 273 (Richard Nobles & David Schiff eds., 2014); MATHIAS SIEMS, COMPARATIVE LAW 231 (2d ed. 2018).

the West[4] not just single rules or institutions but two main pillars of Western civilization, i.e., democracy and the rule of law. It is worth noting that by "West" I refer to the areas of the world where Western legal tradition is the backbone of society; by "Western legal tradition" I mean that which a handful of world societies have in common, "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."[5] Confronted with processes originating in and targeting different legal systems, this Article cannot but take a comparative law approach. Such an approach entails a careful consideration of the historical and contextual factors and will enable the analysis of a set of data that is usually either discarded or underrated in the mainstream legal debate.

From these premises, I will first put forward a series of cultural and practical caveats arising from a comparative law understanding of the legal changes pursued by Westerners outside the West (Part I). Second, I will sketch out the overall attitude taken by the West in promoting legal change around the world, with a focus on the role scholars have in supporting this process (Part II). I will then direct the

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4. The financial investment in legal transfers, often disguised as aid for legal and judicial development, is remarkable. According to the Organisation for Economic Cooperation and Development (OECD), in 2015, aid effectively disbursed to the legal sector of developing countries referred only to "legal and judicial development" (thereby excluding other categories such as "human rights," "anti-corruption," "media and free flow of information," and "women's equality") and was about 2.6 billion USD. 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": Deval Desai, *Power Rules: The World Bank, Rule of Law Reform, and the World Development Report 2017*, *in* Handbook on the Rule of Law 217, 221 (Christopher May & Adam Winchester eds., 2018) (citations omitted). *See also* John Gillespie & Pip Nicholson, *Taking the Interpretation of Legal Transfers Seriously: The Challenge for Law and Development*, *in* Law and Development and the Global Discourses of Legal Transfers 2 (John Gillespie & Pip Nicholson eds., 2012). On the scant evidence that legal transfers induce recipients to change their behavior in the ways envisaged by donor agencies, see, e.g., Katharina Pistor & Philip A. Wellons, The Role of Law and Legal Institutions in Asian Economic Development 1960–95 (1998); Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters III: Governance Indicators for 1996, 1998, 2000, and 2002*, 18 World Bank Econ. Rev. 253 (2004); Wolfgang Merkel, *Measuring the Quality of Rule of Law: Virtues, Perils, Results*, *in* The Dynamics of Rule of Law in an Era of International and Transnational Governance 21 (Michael Zurn, André Noelkamper & Randall Peerenboom eds., 2012); Randall Peerenboom, *Toward a Methodology for Successful Legal Transplants*, 1 Chinese J. Comp. L. 4 (2013); Veronica L. Taylor, *Regulatory Rule of Law*, *in* Regulatory Theory: Foundations and Applications 393, 397 (Peter Drahos ed., 2017).

5. John H. Merryman & Rogelio Pérez-Perdomo, The Civil Law Tradition 1–2 (3d ed. 2007). We will see 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 lawmakers and law users. *See infra* Parts V–XII.

analysis to two pillars of the mainstream legal discourse supporting the overall transplanting drive, i.e., the rule of law (Parts III–VIII) and democracy (Parts IX–XII). The two beacons of Western civilization will be reappraised from a comparative law point of view in order to both unearth their intimate legal foundations and to scrutinize their potential to be transplanted outside Western societies. The final portion of the Article (Part XIII, Conclusion) shows how such transplant initiatives can only be successful through a radical shift from the usual way the West approaches the legal settings it aims to change.

## I. Cultural and Operational Caveats: The Role of Ethnocentrism

Lessons learned from both the past and the present show us how often Western endeavors targeting the transformation of the law of the others lack(ed) the support of adequate means of comparative law that would be able to meet the basic needs of contextualization for the solutions to be applied in the new, or newly shaped settings.[6] In assessing these initiatives, however, one should keep the various possible levels of analysis differentiated. The evaluation of the cultural aspects is one thing, the evaluation of the operational aspects is another. On the cultural level, those who engage with the teachings of history know how one of the most evident phenomena of the suppression of legal diversity, that is colonization, first determined the propagation of European models within the colonies, then a halting effectivenesss in their implementation, and finally provoked a critical reaction to their forced dissemination (although not necessarily to the whole contents of the transpanted laws).[7] In the same vein, to use the language of the students of traditional models, the superimposition of foreign legal rules and institutions—irrespective of the wishes of the local elites, who have often been educated in the West—is mostly seen as a tool of deculturalization, an attempt to trample the "weaker" identity, and destruction of possible meanings.[8]

Another and more general, cultural critique against forced destruction of legal diversity stems from a simple evaluation of opportunities brought by the evolution of the legal solutions. The fewer the types of solutions available, the fewer the possibilities that, depending on the changing needs, new models could be tested, spread,

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6. *See* Werner F. Menski, Comparative Law in a Global Context: The Legal Systems of Asia and Africa 37 (2006); Jedidiah Kroncke, *Law and Development as Anti-comparative Law*, 45 Vand. J. Transnat'l L. 477 (2012).

7. *See* Antonio Gambaro, Rodolfo Sacco & Louis Vogel, Le droit de l'Occident et d'ailleurs 429–43 (2011).

8. *See, e.g.*, Etienne Le Roy, *Quels projets de société pour les africains du XXIe siècle?*, *in* À la recherche du droit africain du XXIe siècle 61 (Camille Kuyu ed., 2005); Steven Wilf, *The Invention of Primitivism*, 10 Theoretical Inquiries L. 485, 491–509 (2008); Lauren A. Benton, Law and Colonial Cultures: Legal Regimes in World History, 1400–1900 (2002); Gambaro, Sacco & Vogel, *supra* note 7, at 429–43 (with further references). *But see* Chimni, *supra* note 1, at 4; Antony Anghie, Imperialism, Sovereignty and the Making of International Law 5 (2004).

or imitated—which is precisely what occurred many times within our own Western history.[9] Even narrowing the inquiry to the domain of private law, it would suffice to think of the very idea of equity taken from canon law,[10] the Uniform Commercial Code notion and role of good faith taken from the German law of obligations,[11] legal outlines of negotiable instruments taken from medieval Italian law,[12] rules and institutions of business law, applied worldwide, taken from the Anglo-American legal frameworks.[13]

On the operative level, efforts to impose legal uniformity call for a reappraisal. It is indeed necessary to recognize that not every divergence from Western paradigms is to be blindly praised. For instance, some divergences may be the output of a legal tradition that is oppressive to a portion of society, such as female genital mutilation,[14]

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9. Alan Watson, The Evolution of Western Private Law (expanded ed. 2001); Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 Theoretical Inquiries L. 723 (2009); Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 Nw. U. L. Rev. 198, 201–02 (1977); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 Mod. L. Rev. 1, 14–20 (1974). *See also* Richard H. Helmholz, The *Ius Commune* in England (2001).

10. Mauro Bussani & Francesca Fiorentini, *The Many Faces of Equity: A Comparative Survey of the European Civil Law Tradition*, *in* The Concept of Equity: An Interdisciplinary Assessment 101, 110–13 (Daniela Carpi ed., 2007).

11. Alan D. Miller & Ronen Perry, *Good Faith Performance*, 98 Iowa L. Rev. 689, 691–92 (2013); Marjorie Hoch, *Is Fair Dealing a Workable Concept for European Contract Law?*, 5 Global Jurist Topics 11 (2005); E. Allan Farnsworth, *The American Provenance of the UNIDROIT Principles*, 72 Tul. L. Rev. 1985, 1990 (1998).

12. Benjamin Geva, The Payment Order of the Antiquity and the Middle Ages: A Legal History 354–55 (2011).

13. To find examples of how solutions formulated in the south of the world have attracted Western attention, one could look to the good practices followed by some African countries (such as South Africa, Botswana, Swaziland, Namibia, and Lesotho) such as collecting third-party liability motor insurance through the fuel levy, a legal device which virtually eliminates the possibility of driving without insurance. *See, e.g.*, Amy Aeron-Thomas, The Role of the Motor Insurance Industry in Preventing and Compensating Road Casualties 7 (2002). Another illustration is given by the microcredit phenomenon, started in Bangladesh in the mid-1970s by Muhammad Yunus: *see* Muhammad Yunus, Banker to the Poor (1998); Muhammad Yunus, Creating a World Without Poverty: Social Business and the Future of Capitalism (2007). The Grameen Bank, an institutional offspring of the original idea, inspired the establishment of similar institutions in dozens of countries and hundreds of microfinance initiatives, including those carried out by international organizations such as the World Bank, and the United Nations (which declared 2005 as the year of microcredit). *See, e.g.*, Antara Haldar & Joseph E. Stiglitz, *Analyzing Legal Formality and Informality: Lessons from Land-Titling and Microfinance Programs*, *in* Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century 112, 114 (David Kennedy & Joseph E. Stiglitz eds., 2013); Abhijit Banerjee et al., *The Miracle of Microfinance? Evidence from a Randomized Evaluation*, 7 Am. Econ. J. Applied Econ., no. 1, at 22 (2015).

14. Elisabetta Grande, *Hegemonic Human Rights and African Resistance: Female Circumcision in a Broader Comparative Perspective*, 4 Global Jurist Frontiers 1535 (2004); Molly Melching, *Abandoning Female Genital Cutting in Africa*, *in* Eye to Eye: Women Practising Development Across Cultures 156 (Susan Perry & Celeste Schenck eds., 2001); Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices,"* 40 Harv. C.R.–C.L. L. Rev. 71 (2005); Tatyana Chesnokova & Rhema Vaithianathan, *The Economics of Female Genital Cutting*, 10 B.E. J. Econ. Analysis & Pol'y 1 (2010).

or the overall role of women in that society.[15] In turn, some cultural legacies can be very costly to keep in place in light of economic development aimed at overcoming survival patterns. Suffice it to refer to—apart from other fundamental cultural, social, and anthropological issues[16]—how unofficial systems of dispute adjudication may fail to provide effective access to justice to the poor or to the outlier,[17] or how legal paradigms for distributing land and other entitlements according to religious or clannish values may dramatically limit incentives to go beyond mere subsistence models, i.e., innovation, entrepreneurialism, capital accumulation, and investments.[18] Further, one

15. *See, e.g.*, U.N. Women, Annual Report (2017); Janet G. Stotsky et al., *Trends in Gender Equality and Women's Advancement* (Int'l Monetary Fund Working Paper No. 16/21, 2016), imf.org/external/pubs/ft/wp/2016/wp1621.pdf (last visited Dec. 18, 2019); Gender Equality and Sustainable Development (Melissa Leach ed., 2015); Ctr. on Housing Rights & Evictions, Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub-Saharan Africa (2004).

16. On these fundamental issues, see, e.g., Lorenzo Cotula et al., Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa (2009); John K.M. Ohnersorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. Pa. J. Int'l Econ. L. 219 (2008); John W. Bruce, *Property Rights Issues in Common Property Regimes for Forestry*, 1 World Bank Legal Rev. 257 (2003). *See also* 2 Comm'n on Legal Empowerment of the Poor, Making the Law Work for Everyone 64–128 (2008); Michael Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. Pa. J. Int'l L. 429 (2008); Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, *in* The New Law and Economic Development: A Critical Appraisal, *supra* note 1, at 253, 285–86; Ha-Joon Chang, Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism esp. 1–39 (2009). *Cf.* Katharina Pistor, *Contesting Property Rights: Towards an Integrated Theory of Institutional and System Change*, 11 Global Jurist, no. 2, art. 6 (2011); Hernando de Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else (2000). On the "obvious goods"—from vaccines to improved seeds, from fertilizers to roads to water pipes—and the sometimes shameful modalities of their distribution, see William Easterly, The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good 368–69 (2006). *See also* Jeffrey D. Sachs, Common Wealth: Economics for a Crowded Planet esp. 291–311 (2008); Scott Barrett, Why Cooperate? The Incentive to Supply Global Public Goods (2007); Vandana Shiva, Globalization's New Wars: Seed, Water and Life Forms (2005); Bhupinder S. Chimni, *The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels*, 1 Law & Dev. Rev. 3, 3 n.1 (2008).

17. See Marc Galanter & Jayanth K. Krishnan, *Lok Adalats and Legal Rights in Modern India*, in Beyond Common Knowledge: Empirical Approaches to the Rule of Law 96–127 (Erik G. Jensen & Thomas C. Heller eds., 2003).

18. For the debate, see Mancur Olson Jr., *Big Bills Left on the Sidewalk: Why Some Nations Are Rich, and Others Poor*, 10 J. Econ. Persp. 3, 22 (1996); Erik S. Reinert, How Rich Countries Got Rich . . . and Why Poor Countries Stay Poor 101–64 (2007); Douglass C. North, John J. Wallis & Barry R. Weingast, Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History 263–71 (2009); Tukumbi Lumumba-Kasongo, *General Introduction* to Land Reforms and Natural Resource Conflicts in Africa: New Development Paradigms in the Era of Global Liberalization 1 (Tukumbi Lumumba-Kasongo ed., 2016); Curtis J. Milhaupt & Katharina Pistor, Law and Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development Around the World (2008); Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 Am. J. Comp. L. 895 (2008); Frank K. Upham, *Lessons from Chinese Growth: Rethinking the Role of Property Rights in Development*, *in* The Beijing Consensus? How China Has

may appreciate how processes of legal uniformization can take place without any driving force external to the concerned legal actors. These processes can be carried out through the spontaneous acceptance of the same body of rules by different groups of law users able to effectively enforce widespread, transnational compliance, with no imposition from above or outside.[19] *Lex mercatoria*,[20] the rules controlling the transnational diamond trade,[21] as well as much of transnational financial law,[22] are good examples in this respect.

A final caveat is in order. It is well known that most debates about, and ground initiatives aimed at a Western-style legal globalization are prompted by geopolitical and (micro- and macro-, public and private) economic interests—sometimes disguised as "security" interests.[23] It is equally true, however, that the same discussions would likely take place in our societies even without the tracking of those interests.

One must acknowledge that what is inherent in any civilization is a phenomenon anthropologists call "expansive ethnocentrism," that is, the tendency to consider one's own form of society better than any other and trying to spread it as much as possible.[24] From the

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Changed Western Ideas of Law and Economic Development 119 (Weitseng Chen ed., 2017). *See also* Anita Abraham & Jean-Philippe Platteau, *Participatory Development in the Presence of Endogenous Community Imperfections*, 39 J. Dev. Stud. 104 (2002); Lan Cao, Culture in Law and Development: Nurturing Positive Change 239–45 (2016). *See infra* notes 102–104.

19. *See, e.g.*, David A. Westbrook, *Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort to Think Gracefully Nonetheless*, 47 Harv. Int'l L.J. 489 (2006); Cao, *supra* note 18. *See also* Mauro Bussani, *Strangers in the Law: Lawyers' Law and the Other Legal Dimensions*, 40 Cardozo L. Rev. 3127 (2019).

20. Karl Kroeschell, *Universales und partikulares Recht in der europäischen Rechtsgeschichte*, *in* Vom nationalen zum transnationalen Recht 265, 273 (Karl Kroeschell & Albrecht Cordes eds., 1995); 1 Helmut Coing, Europäisches Privatrecht: Älteres Gemeines Recht (1500 bis 1800), at 519 (1985); *Lex Mercatoria* and Legal Pluralism: A Late Thirteenth-Century Treatise and Its Afterlife (Mary Elizabeth et al. eds., 1998).

21. Barak D. Richman, *How Communities Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 Law & Soc. Inquiry 383 (2006); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Stud. 115 (1992).

22. *See, e.g.*, Chris Brummer, Soft Law and the Global Financial Crisis 246–56 (2d ed. 2015). *See also* Bussani, *supra* note 19, at 3158–60.

23. Stephen Humphreys, Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice 149–55, 165–66 (2010).

24. *See, e.g.*, Serena Nanda & Richard L. Warms, Cultural Anthropology 10–11 (10th ed. 2011); Michael Herzfeld, Anthropology Through the Looking-Glass: Critical Ethnography in the Margins of Europe 78, 97 (1989); Christoffel A.O. van Nieuwenhuijze, Culture and Development: The Prospects of an Afterthought esp. 3, 21, 24–25, 48 (1983); Edmund R. Leach, *Etnocentrismi*, *in* 5 Enciclopedia Einaudi 955 (1978); Edmund R. Leach, *The Nature of War*, *in* The Essential Edmund Leach: Anthropology and Society 354 (Stephen Hugh-Jones & James Laidlaw eds., 1965); Claude Lévi-Strauss, Race et histoire (1952). *But see* Tzvetan Todorov, Nous et les autres: La réflexion française sur la diversité humaine (1989); William G. Sumner, Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals 13–14 (1906) (Sumner is considered the first to have used the word "ethnocentrism").

perspective of this Article, the assumption runs as follows: (a) in the West, rule of law and democracy are considered to be valuable assets in and of themselves; and (b) it is unavoidable for the West to promote its vision of the world and to widely disseminate rule of law and democracy as institutions to be shared with the rest of mankind, in order to improve the political, social, economic, and cultural lives of others.[25] The pursuit of expansive ethnocentrism and of Western interests can then be seen as noble or necessary, but to avoid sounding awkward or tragic, the above caveats and the following analysis need to be taken into account.

## II. Legal Globalization and Legal Scholars

The foregoing observations should lead one, on the one hand, to stress that when the aim is to successfully transplant one's own rules or institutions into another context, one must always be aware of the needs to be met, as well as the tools that are better attuned to the recipient's context.[26] Needs and tools are factors that change considerably, depending on the area of the law, and on the region of the world one targets (what is necessary to make any procedural law reform effective is quite different for France and Burundi; labor law is not intellectual property law; movable assets are different from immovable assets; finance is not commerce).[27] On the other hand, the possible

25. *See also* Kroncke, *supra* note 6, at 491; David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 Wis. L. Rev. 1062, 1088 (1974).

26. Similar dynamics are common not only in legal encounters between the West and the "others." The example of Portugal shows how forcing legal reforms from above can lead to a deadlock, even when the process takes place in the West. The package of legal reforms imposed on Portugal by the European Union, the European Central Bank, and the International Monetary Fund in 2011 as part of a plan to overcome the financial crisis, was based on the assumption that several aspects of the Portuguese legal system were outdated and unable to sustain economic growth. The legal reforms imposed included a drastic restructuring of the court system and judicial processes. Unsurprisingly, these reforms encountered major criticism from the same people who were expected to apply them, that is, lawyers and judges. *See* Dario Moura Vicente, *Legal Reforms in the Context of the Financial Crisis: The Case of Portugal*, *in* Comparisons in Legal Development: The Impact of Foreign and International Law on National Legal Systems, *supra* note 2, at 133. As Moura Vicente observes, when a foreign-inspired reform seeks to impact a deeply rooted practice which is perceived as deeply functional by internal actors (and appears dysfunctional only to external observers), the chances of such a reform being successful might be, at least in the short term, pretty low.

27. Rather, what is evident is a paradox. Trade, which is based on exchanges and interests that may be closely entwined with local culture, rules, and needs, is controlled by an official uniform law adjudicated by a global official institution (the World Trade Organization), in the shadow of which a few powerful actors (the United States, the EU, China, the World Bank, the International Monetary Fund, the biggest multinationals, etc.) keep an unofficial but large room to maneuver. Finance, which thrives on exchanges, interests, and technical matrices largely shared by all the operators on the planet, has been so far governed by an unofficial law made and shared by the financial actors, and by official laws largely depending on the local (national or regional) regulations—whose possible "capture" by big business actors is

lack of a common cultural background shared by law givers and law takers,[28] and the neglect of the essential involvement of the local law users, may actually turn any transplantation process into wishful thinking or make its implementation excessively costly (economically, politically, and socially) in terms of time, money, and energy.[29]

But keeping in mind the above remarks may also help us to deal more sensibly with the more general, and forceful drive towards the so-called globalization of law. Along with economic globalization,[30] legal globalization has long been supported by large parts of the Western public and Western political, intellectual, economic, and

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a phenomenon that cannot be underestimated. On this binary issue, see, e.g., Chris Brummer, *Why Soft Law Dominates International Finance—and Not Trade*, 13 J. Int'l Econ. L. 623 (2010); Brummer, *supra* note 22; Eric Helleiner, *Regulating the Regulators*, *in* Transnational Legal Orders 231 (Terence C. Halliday & Gregory Shaffer eds., 2015); Juan A. Marchetti, *Technical Standard-Setting in the Financial Sector*, *in* The Law, Economics and Politics of International Standardisation 137 (Panagiotis Delimatsis ed., 2015); Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 Q.J. Econ. 1089 (1991); Terence C. Halliday, Josh Pacewicz & Susan Block-Lieb, *Who Governs? Delegations and Delegates in Global Trade Lawmaking*, 7 Reg. & Gov't 279 (2013). *See also* Knut Blind et al., *Standards in the Global Value Chains of the European Single Market*, 25 Rev. Int'l Pol. Econ. 28 (2018); Khalid Nadvi, *Global Standards, Global Governance and the Organization of Global Value Chains*, 8 J. Econ. Geography 323 (2008). For an earlier debate, see Marver Bernstein, Regulating Business by Independent Commission (1955).

28. As it is now realized, according to Hassane Cissé, even by the World Bank in its programs for legal and judicial reforms: Hassane Cissé, *Justice Reform: The Experience of the World Bank*, *in* Comparisons in Legal Development: The Impact of Foreign and International Law on National Legal Systems, *supra* note 2, at 19–29. *See also* World Bank, World Development Report 2017: Governance and the Law esp. 2, 7, 25–26, 41 (2017). *See also* sources cited *infra* notes 133, 135–137.

29. Stephen Golub, *The Legal Empowerment Alternative*, *in* Promoting the Rule of Law Abroad: In Search of Knowledge 161 (Thomas Carothers ed., 2006); Mary E. McClymont & Stephen Golub, Many Roads to Justice: The Law Related Work of the Ford Foundation Grantees Around the World (2000); Michael R. Anderson, *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs* (Inst. of Dev. Studies (IDS) Working Paper No. 178, 2003); Law Against the State: Ethnographic Forays into Law's Transformations (Julia Eckert et al. eds., 2012).

30. The slowdown of global trade highlighted by some (*see e.g.*, *Slowbalisation*, The Economist, Jan. 24, 2019, at 1) should be considered relative in light of (if not contradicted by) the statistics made available by the WTO, which show that in 2018 the volume of world merchandise trade grew by 3% and the trade in commercial services rose by 8%, while in the decade 2008–2018 the whole of world trade increased by 26%: WTO, World Trade Statistical Review 2019, wto.org/english/res_e/statis_e/wts2019_e/wts2019chapter02_e.pdf (last visited Dec. 18, 2019). What should be underlined, instead, is how the pillars and founding values of economic globalization are to be assessed taking into account the large scale of inequalities it has been engendering (especially) in the domestic settings. *See* Anthony B. Atkinson, Inequality: What Can Be Done? 82–109 (2015); Branko Milanovic, Global Inequality: A New Approach for the Age of Globalization esp. 10–45 (2016); Thomas Piketty, Capital in the Twenty-First Century esp. 237–70, 430–67 (Arthur Goldhammer trans., Belknap Press 2014); Robert G. Gilpin, *Globalization, Civilizations, and World Order*, *in* Civilizations and World Order: Geopolitics and Cultural Difference 155, 163–67 (Fred Dallmayr, M. Akif Kayapınar & İsmail Yaylacı eds., 2014); World Inequality Lab, World Inequality Report 2018 (2017), wir2018.wid.world (last visited Dec. 18, 2019). *See also infra* text accompanying note 141.

professional elites.[31] Of course, there have always existed different approaches, but they seem much more related to the issue of leadership (the United States, the EU, the common law, the civil law), rather than to the scale of values they promote. This is why the global models keep being forged by Western (or Western-trained) legal professionals, mirroring the tenets of Western law, and largely reflecting the interests of the Western world.[32]

While it is uncertain whether the West will have the wind of global history at its back,[33] it is worth mentioning that among the proponents of Western legal patterns a crucial role is performed by legal scholars. Scholars are indeed powerful agents of legal change and of legal transplants. In addition to advising governments and agencies, they participate in transnational public debates, and, therefore, may

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31. This trend is not threatened in the long term by the backlash on the part of the current U.S. administration or by the social and political phenomena of populism and economic nationalism on the rise (not only) in Europe and the United States. These phenomena, by contrast, seem to be a forceful reaction against the pervasiveness of globalization processes (including the technological ones), and against the modalities of dealing with the impact of these processes on labor and welfare markets. For a survey of these issues, see the authors cited *supra* note 30. *See also* Jan-Werner Müller, What Is Populism? (2016); The Oxford Handbook of Populism (Cristóbal Rovira Kaltwasser et al. eds., 2017) (*see in particular* Kirk A. Hawkins, Madeleine Read & Teun Pauwels, *Populism and Its Causes*, *in* The Oxford Handbook of Populism, *supra*, at 267; Christopher Bickerton & Carlo Invernizzi Accetti, *Populism and Technocracy*, *in* The Oxford Handbook of Populism, *supra*, at 326).

32. *See similarly* Edward Said, Culture and Imperialism (1993); Ronald C. Wolf, Trade, Aid, and Arbitrate: The Globalisation of Western Law 12 (2004); David B. Goldman, Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority 4–8 (2008); Sally E. Merry, *Measuring the World: Indicators, Human Rights, and Global Governance*, 52 Current Anthropology 83 (2011); Jothie Rajah, *"Rule of Law" as Transnational Legal Order*, *in* Transnational Legal Orders, *supra* note 27, at 340, 360–61; Günter Frankenberg, *Constitutions as Commodities: Notes on a Theory of Transfer*, *in* Order from Transfer: Comparative Constitutional Design and Legal Culture, *supra* note 3, at 1, 19–26. *See also* Kristina Simion & Veronica L. Taylor, Professionalizing Rule of Law: Issues and Directions 27–52 (2015); Walker, *supra* note 1, at 47–54, 173.

33. Along with other data and indicators that could challenge this occurrence, one should be aware of, for example, the debates on Chinese-style globalization and on Chinese legal models as a globally exported product: *see* The Beijing Consensus? How China Has Changed Western Ideas of Law and Economic Development, *supra* note 18; Charles E. Morrison, *East Asia's Evolving Regional Order and Its Global Implications*, *in* The Rise and Decline of the Post-Cold War International Order 161, 176–78 (Hanns W. Maull ed., 2018); Chaesung Chun, *Regional Order in East Asia*, *in* The Rise and Decline of the Post-Cold War International Order, *supra*, at 180, 186–90; Zhongying Pang, *China and the Struggle Over the Future of International Order*, *in* The Rise and Decline of the Post-Cold War International Order, *supra*, at 235, 235–51; Hanns W. Maull, *Conclusions: The Rise and Decline of the Liberal International Order*, *in* The Rise and Decline of the Post-Cold War International Order, *supra*, at 272, 288–98. Particularly interesting to the present analysis is Benjamin L. Liebman, *Authoritarian Justice in China: Is There a "Chinese Model"?*, The Beijing Consensus? How China Has Changed Western Ideas of Law and Economic Development, *supra* note 18, at 225, 235–48; Chinese Legal Reform and the Global Legal Order: Adoption and Adaptation (Yun Zhao & Michael Ng eds., 2017). *See also* Richard Falk, *Geopolitical Turmoil and Civilizational Pluralism*, *in* Civilizations and World Order: Geopolitics and Cultural Difference, *supra* note 30, at 3, 15–18.

influence foreign legal circles, debates, and public opinion.[34] They are not perceived by local communities as agents of external imposition, and as such they do not trigger resistance. In principle at least, scholars simply want to spread their knowledge and worldviews. But whenever their arguments prove persuasive, they may penetrate local scholarly debates; and the solutions promoted as a consequence of those arguments can eventually be adopted in the foreign setting, via the mediation of the local legal elite—with no need to exert any economic, political, or military pressure. Next to economic power, scholars certainly represent one of the most effective channels through which Western legal notions and models have progressively entered the vocabulary, and informed the techniques, ordinarily used in international legal debates and in the international practice of the law.

This is nothing new, one could say.[35] But what is new in current Western endeavors to change the laws of the "Rest"[36]—and here the role of legal scholars has been decisive—is that these endeavors are not limited to the dissemination of rules. These efforts are, more or less consciously, underpinned by the idea of penetrating the others'

34. Bryan G. Garth & Yves Dezalay, *Introduction* to Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy 1, 1–3 (Bryan G. Garth & Yves Dezalay eds., 2002); Lawyers and the Rule of Law in an Era of Globalization (Bryan G. Garth & Yves Dezalay eds., 2011); Robert Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 Theoretical Inquiries L. 441 (2010); Kroncke, *supra* note 6, at 512–17. *See also* James A. Gardner, Legal Imperialism: American Lawyers and Foreign Aid in Latin America esp. 286 (1981); Taylor, *supra* note 4, at 399; David Kennedy, A World of Struggle: How Power, Law and Expertise Shape Global Political Economy 18 (2016).

35. It is often held that one of the driving forces of legal globalization, i.e., international law and its technocracy, is a field where the rules that are debated usually show a strong correlation with the interests of their proponents. It will suffice here to recall an all-Western example, by no means an isolated one: *see, e.g.*, Martti Koskenniemi, *The Politics of International Law*, 1 Eur. J. Int'l L. 4 (1990). For more recent examples, see Martti Koskenniemi, *The Politics of International Law—20 Years Later*, 20 Eur. J. Int'l L. 7 (2009); Anghie, *supra* note 8. The illustration is particularly telling because it involves two famous international law scholars who, when faced with the same legal issue, arrived at different solutions because they were serving different national (and professional) interests. It was on the occasion of a legal dispute, at a time when the Netherlands depended on maritime commerce and had to face the formidable competition of Spain and Portugal, that one of the founders of modern international law, Hugo Grotius (de Groot), while giving advice to his country, wrote the famous *Mare Liberum* (1609), in which he came to the conclusion that the freedom of the seas was a principle of natural law. Some decades later, when England started to affirm its maritime hegemony, another famous jurist, the Englishman John Selden (called by King James I to plead the case of the English over the North Sea and the North Atlantic against the Dutch), deemed it scientifically unavoidable to defend the thesis opposite to that of Grotius, in the equally famous *Mare Clausum* (1635). The first English edition of the latter work was published in 1652, only a year after Cromwell's Navigation Act (which had limited commercial traffic with England to the English fleet). On this parallel, see Monica Brito Vieira, Mare Liberum *v.* Mare Clausum*: Grotius, Freitas, and Selden's Debate on Dominion over the Seas*, 64 J. Hist. Ideas 361 (2003); James E. Farnell, *The Navigation Act of 1651, the First Dutch War, and the London Merchant Community*, 16 New Econ. Hist. Rev. 439 (1964).

36. *See* Niall Ferguson, Civilization: The West and the Rest (2011). *See also* Glenn, *supra* note 1, at 272–83.

frame of mind, the categories that shape legal problems, even before legal solutions arise. The aim is to have all of this compliant with the Western view of what law is, how it works, and how it needs to be thought, taught, and applied.[37] By and large, these endeavors represent an attempt to globalize the axes of our civilization, that is, to universalize the legal notions, principles, and rhetoric that are at the foundation of Western societies.

The most telling examples that will help us understand these efforts to Westernize the world, how they are carried out, as well as the results they have achieved, come from the debates on, and the use made of, two complex notions: the rule of law and democracy. These two notions are closely intertwined and are deeply embedded in our perception of ourselves and of what others should be.

## III. Force Feeding the Rule of Law

The "rule of law" is a key notion in understanding not only Western legal lingo, but also the ethnocentric discourse clustered around that very notion, as well as any possible argument circulating about the expansion of Western law, its reasons, aims, and patterns.[38] 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 1990s it has become closely associated with the overall current achievements of Western civilization.[39]

But what is the "rule of law"? Many authoritative definitions of this notion are in circulation, setting the tone for mainstream discourse. To avoid cherry picking, let me refer to some definitions whose authority is uncontested.[40] 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

37. To paraphrase the above John Merryman quote: Merryman & Pérez-Perdomo, *supra* note 5.

38. On the claim that Albert Dicey was the first jurist to use the phrase "the rule of law," see, e.g., (skeptically) Jeremy Waldron, The Rule of Law and the Measure of Property (Hamlyn Lectures 2011) 7–8 (2012).

39. *See, e.g.*, Sundhya Pahuja, Decolonising International Law: Development, Economic Growth and the Politics of Universality 178–79 (2011).

40. Once 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?*, 12 Can. J.L. & Juris. 151, 152 (1999)), 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 (2004); Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, *in* Promoting the Rule of Law Abroad: In Search of Knowledge, *supra* note 29, at 31; Christopher May, The Rule of Law: The Common Sense of Global Politics 33–56. (2014). *See also infra* Part III and Parts VI–VIII.

> 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.[41]

The Council of Europe, of which forty-seven states from across Europe (including Russia) are 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."[42] Similarly, the British jurist Tom Bingham crafted an incisive definition with eight sub-rules or principles,[43] which he summarized as follows: "[The rule of law means that] all persons and authorities within a state, whether

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41. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (2004). According to Jeremy Farrall, between 1998 and 2006, the phrase "rule of law" appeared in at least sixty-nine Security Council resolutions: Jeremy Farrall, United Nations Sanctions and the Rule of Law 22 (2007). Along the lines of the U.N. Secretary-General Report, see USAID, Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework 1–2, *passim* (2010) (according to which the elements that comprise the rule of law and must be collectively "present for rule of law to prevail" are order and security, legitimacy, checks and balances, fairness (the last consisting of four sub-elements: (i) equal application of the law, (ii) procedural fairness, (iii) protection of human rights and civil liberties, and (iv) access to justice), and effective application).

42. Eur. Comm'n for Democracy Through Law (Venice Comm'n), Report on the Rule of Law 10 (Mar. 2011), venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e (last visited Dec. 18, 2019). On the same lines, see Eur. Comm'n, 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, at 1, COM (2019) 163 final (Apr. 3, 2019), eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163 (last visited Dec. 18, 2019). In reaching this definition, the Venice Commission relied heavily on Thomas H. Bingham, The Rule of Law (2010).

43. The law must be accessible and, as far as possible, intelligible, clear, and predictable; questions of legal right and liability should ordinarily be resolved by application of the law and not through the exercise of discretion; the law should apply equally to all, except to the extent that objective differences justify differentiation; ministers and public officers at all levels must exercise the powers conferred on them in good faith and fairly, for the purpose for which the powers were conferred, and without exceeding the limits of such powers and not unreasonably; the law must afford adequate protection of human rights; means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve; judicial and other adjudicative procedures must be fair and independent; and there must be compliance by the state with its international law obligations: Bingham, *supra* note 42, chs. 3–10.

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."[44] 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.[45] 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 able to be guided by it."[46]

## IV. Rule of Law Everywhere

Paradoxically, and this is well known, some of the just mentioned features attached to the rule of law cannot be found or are not fully fledged in all Western societies.[47] At the same time, some of those

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44. *Id*. at 8.

45. Waldron, *supra* note 38, at 6–7. *See also* Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, *in* Getting to the Rule of Law 3, 6–7 (James E. Fleming ed., 2011); Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 Eur. J. Int'l L. 315, 316–17 (2011).

46. Joseph Raz, *The Rule of Law and Its Virtue*, 93 Law Q. Rev. 195, 198 (1977), *reprinted in* Joseph Raz, The Authority of Law: Essays on Law and Morality 210, 213 (1979). Raz then goes on to list some of the most important principles derived from the above notion: all laws should be prospective, open, and clear; laws should be relatively stable; the making of particular laws (or particular legal orders) should be guided by open, stable, clear, and general rules; the independence of the judiciary must be guaranteed; the principles of natural justice must be observed (meaning that "[o]pen and fair hearing, absence of bias, and the like are obviously essential for the correct application of the law and thus, through the very same considerations mentioned above, to its ability to guide action": Raz, *supra*, at 217); the courts should have review powers over the implementation of the other principles; the courts should be easily accessible; the discretion of the crime-preventing agencies should not be allowed to pervert the law. Raz, *supra*, at 214–18. *See also* Lon L. Fuller, The Morality of Law 33–94 (rev. ed. 1965) (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 270–71 (2d ed. 2011); Cass Sunstein, Legal Reasoning and Political Conflict 119–22 (2d ed. 2018)), as opposed to the "thick" or "substantive" one, for which, see Bingham, *supra* note 42; Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 Pub. L. 467. On this dichotomy and for major references, see Jørgen Møller, *The Advantages of a Thin View*, *in* Handbook on the Rule of Law, *supra* note 4, at 21; Adriaan Bedner, *The Promise of a Thick View*, *in* Handbook on the Rule of Law, *supra* note 4, at 34.

47. 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* Promoting the Rule of Law Abroad: In Search of Knowledge, *supra* note 29, at 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 the welfare cap regardless of family size). On the treatment of African-Americans, minorities, and the lowest socioeconomic classes in the United States, see

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.[48] In order to defuse the impact of these paradoxes on the mainstream definitions, two discrete arguments have been advanced.

First, to reject or scrutinize the membership of autocratic and Islamic societies in the rule of law club, most include respect for human rights in the core definition[49]—at the price of emphasizing its

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Paul Gowder, The Rule of Law in the Real World 189–95 (2016); Cathy Albisa & Jessica Schultz, *The United States: A Ragged Patchwork*, *in* Social Rights Jurisprudence: Emerging Trends in International and Comparative Law 230, 247–49 (Malcolm Langford ed., 2008) (on the obstacles faced in the United States by the implementation and justiciability of economic and social rights). *See also* Jeremy Waldron, *Security as a Basic Right (After 9/11)*, *in* Global Basic Rights 207 (Charles R. Beitz & Robert E. Goodin eds., 2009); Marc Galanter, Why the Haves Come out Ahead: The Classic Essay and New Observations (2014); Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Response*, *in* Beyond Common Knowledge: Empirical Approaches to the Rule of Law, *supra* note 17, at 336, 338; Bruce Ackerman, Revolutionary Constitutions: Charismatic Leadership and the Rule of Law 3 (2019). For the lack of a "meaningful correlation" between gender equality and the rule of law in many "developed" countries, see Katharina Pistor, Antara Haldar & Amrit Amirapu, *Social Norms, Rule of Law and Gender Reality: An Essay on the Limits of the Dominant Rule-of-Law Paradigm*, *in* Global Perspectives on the Rule of Law 241, 257 (James J. Heckman, Robert L. Nelson & Lee Cabatingan eds., 2010).

48. Raz, *supra* note 46, at 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.*, Kim Lane Scheppele, *Autocratic Legalism*, 85 U. Chi. L. Rev. 545 (2018); Susanne Baer, *The Rule of—and Not by Any—Law: On Constitutionalism*, 71 Current Legal Probs. 335, 350–52 (2018); the works cited *infra* note 93. *See also* Møller, *supra* note 46, at 21–22; David Dyzenhaus, Legality and Legitimacy (1997); Luis Salas, *From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, *in* The Rule of Law in Latin America 17, 35, 46 (Pilar Domingo & Rachel Sieder eds., 2001); Tom Ginsburg & Tamir Moustafa, *Introduction* to Rule by Law: The Politics of Courts in Authoritarian Regimes 4 (Tom Ginsburg & Tamir Moustafa eds., 2008); Tamanaha, *supra* note 40, at 112, 119–20; Joseph H.H. Weiler, *Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law*, *in* Reinforcing Rule of Law Oversight in the European Union 313 (Carlos Closa & Dimitry Kochenov eds., 2016). M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation and Rule Making*, 1 UCLA J. Islamic & Near E. L. 135 (2002) (noting 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, *supra* note 47, at 178. *See also* Joseph R. Starr, *The New Constitution of the Soviet Union*, 30 Am. Pol. 1143 (1936); Ackerman, *supra* note 47, at 2–3.

49. See, e.g., the definitions offered by Bingham, the Council of Europe, USAID, and the UN Secretary General cited *supra* Part III, as well as J. Stromseth, D. Wippman & R. Brooks, Can Might Make Rights? Building the Rule of Law After Military Interventions esp. 58, 79, 186 (2006); Marta Cartabia, *The Age of "New Rights"* 14–15 (Straus Working Paper No. 3, 2010), www.law.nyu.edu/sites/default/files/siwp/Cartabia.pdf (last visited Dec. 18, 2019); Gianluigi Palombella, *The Rule of Law Beyond the State: Failures, Promises, and Theory*, 7 Int'l J. Const. L. 442–67 (2009).

all-Western nature.[50] 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 right may or may not be part of that definition.[51] If the answer is in the affirmative, one should conclude that the rule of law can be fully recognized only where the whole range of human rights (including the social and economic ones) are actually enforced. Otherwise, to say at the very least, whichever rule of law definition 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" fundamental and ubiquitous promise of the human rights discourse.[52]

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

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50. As made clear, in the very process of drafting the UDHR in 1947, by the American Anthropological Association: *see* Executive Bd., *American Anthropological Association Statement on Human Rights*, 49 New Series Am. Anthropologist 539 (1947). *See also* Peter Fitzpatrick, Modernism and the Grounds of Law (2001); Günter Frankenberg, *Human Rights and the Belief in a Just World*, 12 Int'l J. Const. L. 35, 49–50 (2014); Upendra Baxi, *Epilogue: Changing Paradigms of Human Rights*, *in* Law Against the State: Ethnographic Forays into Law's Transformations, *supra* note 29, at 266–83. On the professionalization of human rights activists (and of their discourse), in lieu of many others, see Kennedy, *supra* note 34, 249–51.

51. Robert McCorquodale, *Defining the International Rule of Law: Defying Gravity*, 65 Int'l & Comp. L.Q. 277, 282, 292 (2016); Sandra Fredman, Comparative Human Rights Law 29–57 (2018). *Cf.* Kleinfeld, *supra* note 40, at 44–46.

52. *See* Mauro Bussani, El derecho de Occidente: Geopolítica de las reglas globales chs. 10–13 (Maria Elena Sánchez Jordán trans., Marcial Pons rev. ed. 2018); Hilary Charlesworth, *Human Rights and the Rule of Law After Conflict*, *in* The Hart–Fuller Debate in the Twenty-First Century 43, 55–57 (Peter Cane ed., 2010); Fredman, *supra* note 51, at 59–77. *See also* Adriaan Bedner, *An Elementary Approach to the Rule of Law*, 2 Hague J. Rule L. 48, 66 (2010); USAID, *supra* note 41, at 10–11; Plunder: When the Rule of Law Is Illegal (Laura Nader & Ugo Mattei eds., 2008). *Cf.* Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality (1983); Tamanaha, *supra* note 40, at 5, 102–04, 110–12; Gowder, *supra* note 47, at 45–48; Humphreys, *supra* note 23, at 58, 85–86; Tom Ginsburg, *Difficulties with Measuring the Rule of Law*, *in* Handbook on the Rule of Law, *supra* note 4, at 48, 51. *See also* Int'l Comm'n of Jurists, The Rule of Law in a Free Society, at vi–vii (1959) ("The 'dynamic concept' which the Rule of Law became in the formulation of the Declaration of Delhi does indeed safeguard and advance the civil and political rights of the individual in a free society; but it is also concerned with the establishment by the State of social, economic, educational and cultural conditions under which man's legitimate aspirations and dignity may be realized. Freedom of expression is meaningless to an illiterate; the right to vote may be perverted into an instrument of tyranny exercized by demagogues over an unenlightened electorate; freedom from governmental interference must not spell freedom to starve for the poor and destitute.").

and a complete actualization of the rule of law at the other,"[53] thereby emphasizing how even the legal systems which "subscribe to [the rule of law] find it difficult to apply all its precepts quite all the time . . . . It 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."[54] These arguments, straddling pragmatism and messianism, may be taken as generic ideals, to be deployed in political discourses.[55] Or can they be taken as an implicit acknowledgement of what has long been clear to historical and comparative scholarship—something we will find useful later in the analysis. 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 terms, we are before 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 known them so far.[56]

## V. Conflicting Functions

The variable degree of awareness (and, sometimes, of opportunism) brought by the participants in the debate is further evidenced by a survey of the public discourse and scholarly discussions about the functions to be assigned to the rule of law.[57] Going over wide-ranging literature, one can see the "rule of law" spearheaded to defend social

53. McCorquodale, *supra* note 51, at 291. *See also* John Tasioulas, *The Rule of Law*, *in* The Cambridge Companion to the Philosophy of Law (John Tasioulas ed., forthcoming 2020); Fuller, *supra* note 46, at 122–33; Raz, *supra* note 46, at 215, 222.

54. Bingham, *supra* note 42, at 174. *See also* Friedrich A. von Hayek, The Constitution of Liberty: The Definitive Edition 311 (rev. ed. 2011).

55. The rhetoric of the 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*, 12 Ann. Rev. L. & Soc. Sci. 199, 211 (2016).

56. An attitude that is actually not contrasted by the (re)inventors of the wheel arguments.

57. *See generally* Taiwo, *supra* note 40; Judith N. Shklar, *Political Theory and the Rule of Law*, *in* The Rule of Law: Ideal or Ideology? (Allan C. Hutchinson & Patrick Monahan eds., 1987), *reprinted in* Political Thought & Political Thinkers 21, 21 (Stanley Hoffmann ed., 1998) (the rule of law "has become meaningless thanks to ideological abuse and general over-use"); Waldron, *supra* note 38, at 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"); Kleinfeld, *supra* note 40, at 46–65; Bedner, *supra* note 46, at 34–36.

and human rights,[58] oppressed minorities, and democracy, as well as to strengthen the judiciary, market-friendly legislative reforms, and guarantees for foreign investment[59]—thereby meaning especially the protection of private property and contractual rights.[60] 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.

According to the producers of global legal indicators (e.g., the World Justice Project,[61] the World Bank[62]), the so-called autocratic or dictatorial regimes can rank high in terms of foreign investments or other business, while scoring poorly in terms of social rights protection.

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58. *See also infra* the last paragraph of Part IV.

59. Besides and beyond the debate on the "thick" versus "thin" rule of law (*see supra* note 46), on the different perspectives indicated in the text, and their impact upon the debate about the notion and actual meaning of the rule of law in its "export" version, see Thomas Carothers, *The Rule of Law Revival*, *in* Promoting the Rule of Law Abroad: In Search of Knowledge, *supra* note 29, at 3, 15. *See also* Allan C. Hutchinson & Patrick Monahan, *Democracy and the Rule of Law*, *in* The Rule of Law, *supra* note 57, at 97, 100–04; Michael J. Trebilcock & Ronald J. Daniels, Rule of Law Reform and Development: Charting the Fragile Path of Progress 12, 14–29 (2008); Gordon, *supra* note 34; Waldron, *supra* note 38, at 11–14, 42–58; Rajah, *supra* note 32; Martin E.J. Krygier, *Rule of Law (and Rechtsstaat)*, *in* The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat) 51 (James R. Silkenat, James E. Hickey Jr. & Peter D. Barenboim eds., 2014).

60. 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": Douglass North, Institutions, Institutional Change, and Economic Performance 91 (1990). These costs are to be minimized 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* The Cambridge Companion to the Rule of Law (Martin Loughlin & Jens Meierhenrich eds., forthcoming 2020); Robert J. Barro, *Determinants of Democracy*, 107 J. Pol. Econ. 158 (1999); Benton, *supra* note 8, at 19. *See also supra* note 4. *See infra* notes 68, 110, and 111.

61. *See* World Justice Project, www.worldjusticeproject.org (last visited Dec. 18, 2019). According to its Rule of Law Index, the rule of law is grounded on four principles: accountability (the government as well as private actors are accountable under the law), just laws (laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of the person and property, and certain core human rights), open government (the processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient), accessible and impartial dispute resolution (justice is delivered in a timely fashion by competent, ethical, and independent representatives and neutral parties who are accessible, have adequate resources, and reflect the makeup of the communities they serve). Each of these factors is determined using a variety of data indicators, which then give the outcome as to what degree a state is compliant with the ideal rule of law. *See What Is Rule of Law?*, World Justice Project, www.worldjusticeproject.org/about-us/overview/what-rule-law (last visited Dec. 18, 2019). For a perceptive assessment, see Mark Tushnet, *Critical Legal Studies and the Rule of Law*, *in* The Cambridge Companion to the Rule of Law (Martin Loughlin & Jens Meierhenrich eds., forthcoming 2020).

62. The rule of law, as measured by the World Bank, "captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence": *Rule of Law*, World Bank, www.info.worldbank.org/governance/wgi/pdf/rl.pdf (last visited Dec. 18, 2019).

For example, Colombia under Álvaro Uribe (Vélez), which is usually reproached for a lack of respect for human rights,[63] by the same indicators was praised as being governed by the rule of law because it guaranteed economic investments[64]—as is now the case with China.[65] In the *Doing Business Report 2020*, the legal systems of Singapore and the United Arab Emirates are ranked, respectively, second and sixteenth among 190 countries as being business friendly, while in the *Freedom of the World Report 2019* they get, respectively, a score of fifty-one and seventeen out of 100 for their limited protection of political rights, civil liberties, and freedoms.[66] Conversely, in some European continental countries (such as Italy, France, and Germany) one can find severe legal limitations to the "sanctity" of contracts and property rights. The reference goes, for example, to: the pervasive judicial review of contractual terms; employers' responsibility for providing health and retirement coverage for their employees and complying with strong laws regulating layoff practices; the statutory limits on foreclosures in mortgage laws; the mandatory intervention of highly professionalized notaries in certifying legal transactions.[67] These countries may thus

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63. In the *Rule of Law Index 2010*, published by the World Justice Project, Colombia ranked twenty-second out of the thirty-five countries surveyed. *See* The World Justice Project, Rule of Law Index 38–39 (2010), www.worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2010_Report.pdf.

64. In the World Bank's *Doing Business Report 2010*, Colombia ranked fifth out of 183 countries for "protecting investors": World Bank, Doing Business 2010: Reforming Through Difficult Times (2009), www.openknowledge.worldbank.org/handle/10986/2562. In the latest *Doing Business Report*, Colombia ranks thirteenth out of 190 countries for "protecting minority investors": World Bank, Doing Business 2020: Economy Profile—Colombia 4 (2019), www.doingbusiness.org/content/dam/doingBusiness/country/c/colombia/COL.pdf.

65. In the World Bank's *Doing Business Report 2020*, China is fifth in "enforcing contracts": Doing Business 2020: Economy Profile—China 4 (2019), www.doingbusiness.org/content/dam/doingBusiness/country/c/china/CHN.pdf. In the (most recent) *Rule of Law Index 2019*, China was ranked eighty-second among 126 countries: *see* World Justice Project, Rule of Law Index 2019, at 6 (2019), www.worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf. For the theorization of the connections between this notion of rule of law, autocratic regimes, and economic growth, see, e.g., Edward L. Glaeser et al., *Do Institutions Cause Growth?*, 9 J. Econ. Growth 271 (2004); Chang, *supra* note 16, at 160–68, 177–81; Franklin Allen & Jun Qian, *Comparing Legal Alternative Institutions in Finance and Commerce*, *in* Global Perspectives on the Rule of Law, *supra* note 47, at 118; Ronald J. Gilson & Curtis J. Milhaupt, *Economically Benevolent Dictators: Lessons for Developing Democracies*, 59 Am. J. Comp. L. 227 (2011); Jothie Rajah, Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore (2012); May, *supra* note 40, at 108–33.

66. *Compare* Doing Business 2020: Comparing Business Regulation in 190 Economies 4 (2019), www.openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf; *and* Freedom House, Freedom in the World 2019 (2019), www.freedomhouse.org/report/countries-world-freedom-2019.

67. On many of these aspects, see Ass'n Henri Capitant des Amis de la Culture Juridique Française, Les droits de la tradition civiliste en question: À propos des Rapport *Doing Business* de la Banque Mondiale 47–49 (2006) (on health and retirement coverage); *id.* at 50–51 (on layoff laws); *id.* at 55, 58–61 (on mortgages); *id.* at 71–72, 100–10 (on judicial control over contractual substance); *id.* at 120–21 (on the mandatory presence of notaries).

be considered as less performing[68] with regard to the rule of business law,[69] and yet be seen as promoting a redistribution of entitlements that better guarantees a higher level of participation in democratic procedures, lower barriers to access to natural and primary resources, and more intense protection of so-called social human rights (such as the right to work, fair pay, education, health, and social security).[70]

## VI. The Rule of Law: Questions

Other examples of functional mismatching could follow,[71] but once reminded of the low degree of specificity—and/or realism—achieved by the mainstream definitions cited in Part V, the blurry reference to the human rights requirement, as well as the perfunctory allusion to the dynamism of legal experiences, the reader would 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? As we have seen, the expression "rule of law" tends to refer to the whole of our legal civilization.[72] This attitude could be seen as embodying a linguistic convention as many others,[73] and yet it would be quite unfortunate, under both the normative and the analytical point of view. In

68. In the *Doing Business Report 2020*, Italy ranks 119th for "getting credit" and fifty-first for "protecting minority investors." *See* Doing Business 2020: Economy Profile—Italy 4 (2019), www.doingbusiness.org/content/dam/doingBusiness/country/i/italy/ITA.pdf. France ranks 104th for "getting credit" and forty-fifth for "protecting minority investors." *See* Doing Business 2020: Economy Profile—France 4 (2019), www.doingbusiness.org/content/dam/doingBusiness/country/f/france/FRA.pdf (last visited Dec. 18, 2019). Germany ranks forty-eighth for "getting credit" and sixty-first for "protecting minority investors." *See* Doing Business 2020: Economy Profile—Germany 4 (2019), www.doingbusiness.org/content/dam/doingBusiness/country/g/germany/DEU.pdf.

69. "Rule of business law" is a recurring notion in economic media circles: *see, e.g.*, Jim O'Neill, *A View from St. Petersburg: Russia Rebounds from Oil Collapse*, Forbes (June 23, 2010), www.forbes.com/sites/greatspeculations/2010/06/23/a-view-from-st-petersburg-russia-rebounds-from-oil-collapse/.

70. In the *Rule of Law Index 2019*, Italy ranks twenty-eighth, France seventeenth, and Germany sixth out of 126 countries. World Justice Project, *supra* note 65.

71. *See, e.g.*, Thomas Carothers, Aiding Democracy Abroad 7–12 (1999); Linn A. Hammergren, *International Assistance to Latin American Justice Program*, *in* Beyond Common Knowledge: Empirical Approaches to the Rule of Law, *supra* note 17, at 290, 321–22; Kroncke, *supra* note 6, at 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*, 25 Berkeley J. Int'l L. 7, 40–42 (2007).

72. On the limits within which the notion, and the very idea of the rule of law can be discussed at the international law level, compare James Crawford, *International Law and the Rule of Law*, 24 Adelaide L. Rev. 3 (2003); Mattias 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); May, *supra* note 40; Tamanaha, *supra* note 40, at 127–36; McCorquodale, *supra* note 51; Vivienne O'Connor, Understanding the International Rule of Law Community, Its History, and Its Practice (2015), www.inprol.org/publications/14886/understanding-the-international-rule-of-law-community-its-history-and-its; Auby, *supra* note 1, 126–29; Weiler, *supra* note 48.

73. From the mainstream perspective, translating the term "rule of law" into other languages turns out to be a difficult endeavor. 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*

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 civilization 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.[74] Thus, we could either discard the notion as an unwieldy linguistic convention devoid of any analytical or normative meaning,[75] or try to understand whether there exists a core notion of the rule of law that can be taken as a distinctive feature of our legal experiences 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?

## VII. The Roots and Scope of the Rule of Law

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 (1603–1625) to sit in "his" Court, because he considered that the King lacked the technical knowledge requisite to administer the law.[76] These were paramount events that marked a

(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 Pub. L. 40. *See also* Martin E.J. Krygier, *Rule of Law (and Rechtsstaat)*, *in* 20 International Encyclopedia of the Social and Behavioral Sciences 780 (Neil Smelser, Paul Baltes & James D. Wright, 2d ed. 2015).

74. *Cf.* Tamanaha, *supra* note 60.

75. The lack of historical and comparative accuracy in singling out roots and technical background of the rule of law (besides allowing the no more rigorous "idealistic" or "gradualistic" approaches mentioned above: *see supra* notes 54–57 and accompanying text) fails to acknowledge what noted also by Kroncke, *supra* note 6, at 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)).

76. *See for all* Peter Linebaugh, The Magna Carta Manifesto (2008); Anthony Arlidge & Igor Judge, Magna Carta Uncovered (2014); Pietro Costa, *The Rule of Law: An Outline of Its Historical Foundations*, *in* Handbook on the Rule of Law, *supra* note 4, at 135, 139–42. *Cf.* James C. Holt, Magna Carta esp. 46–48 (3d ed. 2014); Max Radin, *The Myth of Magna Carta*, 60 Harv. L. Rev. 1060, 1062 (1947); Pietro Costa, *The Rule of Law: An Outline of Its Historical Foundations*, *in* Handbook on the Rule of Law, *supra*

point in time (and space) in the development of Western law's efforts to constrain the power of the sovereign.[77] But 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 culture it stems from and contributes to generating,[78] and that Western culture and law were not born in England. Thus, to the very same purpose, one should go further from 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 organizational 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.[79] When one looks at the

note 4, at 135, 139–42. *See also* Tamanaha, *supra* note 40, at 25–31; Shklar, *supra* note 57, at 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* Handbook on the Rule of Law, *supra* note 4, at 167.

77. 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* Online Decreta Regni Mediaevalis Hungariae: The Laws of the Medieval Kingdom of Hungary 156–71 (János M. Bak ed., 2019), www.digitalcommons.usu.edu/lib_mono/4. *See also* Harold J. Berman, Law and Revolution: The Formation of Western Legal Tradition 293–94 (1983). 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* Kommunale Bündnisse Oberitaliens und Oberdeutschlands im Vergleich 11 (Helmut Maurer ed., 1987); 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*, 39 J. Medieval Hist. 61 (2013). 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*, *in* 8 Lexikon des Mittelalters 75 (1997).

78. Merryman & Pérez-Perdomo, *supra* note 5; Jaakko Husa, *Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law*, 6 Chinese J. Comp. L. 129, 138–45 (2018).

79. The latter point has been made, for example, by Berman, *supra* note 77, at 7–9; Bruce W. Frier, The Rise of Roman Jurists: Studies in Cicero's *Pro Caecina* 184–96, 269–88 (1985); Franz Wieacker, Römische Rechtsgeschichte: Einleitung, Quellekunde, Frühzeit und Republik 519–617 (1988); Franz Wieacker, *Foundations of European Legal Culture*, 38 Am. J. Comp. L. 1, 23–24 (1990); Alan Watson, The Spirit of Roman Law 57–63 (1995); Halpérin, *supra* note 3, at 338; Michel Humbert, *Droit et religion dans la Rome antique*, 38 Archives de Philosophie du Droit 35 (1993); David Johnston, Roman Law in Context 5–8 (1999); Fritz Schulz, History of Roman Legal Science esp. 6–12, 30–31,

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 legitimized to settle disputes is the technocrat, on the basis of her specialized 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"[80]), but the role of this element is decentralized by the parallel emphasis on a long list of attributes deemed crucial and substantial to the very definition of the rule of law.[81] Yet, without the independent, secular dispute-resolving technocracy, none of the features of the rule of law those definitions emphasize (from "supremacy of law" to "accountability to the law," to "prohibition of arbitrariness" and "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 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 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, 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 disputes on an independent, technocratic professional requires a secularized society (i.e., a social

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60–61 (1946). *See also* Max Weber, Economy and Society: An Outline of Interpretive Sociology 794–97 (Günther Roth & Claus Wittich eds., Ephraim Flschoff et al. trans., Univ. of Cal. Press 1978). *See also* John R. Commons, Legal Foundation of Capitalism 67, 86, 249 (1924); von Hayek, *supra* note 54, at 243–46.

80. See the definitions offered by the U.N. Secretary General, USAID, the Council of Europe, Bingham, Waldron, and Raz *supra* notes 41–46 and accompanying text. *See also* Mortimer N.S. Sellers, *What Is the Rule of Law and Why Is It So Important?*, *in* The Legal Doctrines: Of the Rule of Law and the Legal State (Rechtsstaat), *supra* note 59, at 3, 4–6, 13; Bedner, *supra* note 46, at 37; Ginsburg, *supra* note 52, at 50, 52; Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 Ratio Juris 127, 133–34 (1993).

81. 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*, *in* Global Perspectives on the Rule of Law, *supra* note 47, at 53; in a more articulated way, see Waldron, *supra* note 38, *passim*, at 93–97; Raz, *supra* note 46, at 211) can, at 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.

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.

## VIII. Lessons: The Western Legal Self in a Broken Mirror

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 organize our societies today. 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 civilization and labeling 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 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.[82]

Depriving the rule of law of its very historic and comparative value (or assessing it through the lenses of a handful of indicators[83]),

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82. Donald C. Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?*, *in* Understanding China's Legal System 93 (C. Stephen Hsu ed., 2003); Humphreys, *supra* note 23, *passim*, at 13, 187; Kroncke, *supra* note 6, at 488 (*but see id*. at 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."); Pistor, *supra* note 71, at 7, 10.

83. *See supra* notes 61–70 and accompanying text. For a discussion of the problems associated with the use and abuse of current empirical measures of rule of law, see, e.g., Waldron, *supra* note 38, at 11–12; Nikhil K. Dutta, *Accountability in the Generation of Governance Indicators*, 22 Fla. J. Int'l L. 401, 421 (2010); Tom Ginsburg, *Pitfalls of Measuring the Rule of Law*, 3 Hague J. Rule L. (Special Issue) 269 (2011); Rajah, *supra* note 32; Ha-Joon Chang, *Institutions and Economic Development: Theory, Policy and History*, 7 J. Inst. Econ. 473, 483–86 (2011); Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, *Introduction* to Governance by Indicators: Global Power Through Classification and Rankings 3, 9 (Kevin E. Davis et al. eds., 2012); Jørgen Møller & Svend-Erik Skaaning, The Rule of Law: Definitions, Measures, Patterns, and Causes (2014); Bedner, *supra* note 46, at 45; Ginsburg, *supra* note 52, at 53–55; Sabino Cassese & Lorenzo Casini, *Public Regulation of Global Indicators*, *in* Governance by Indicators:

as we have seen, makes the "export" version of the "rule of law"—be it supported by "big money," states, nongovernmental organizations, or global institutions[84]—become 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.[85]

All the conceptions of rule of law surveyed above (Part III) 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 enforcement agencies.[86] 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, which is able to overcome the partiality embedded in the regional dimension of Western legal culture. 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 lacking.[87]

To 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, and if theoreticians framed their work in terms of "Western (or American, or European) rule of law." However, this is not the case: the inclination towards universality, timelessness, or both, is implicit.

Consequently any claim about treating the Western rule of law notion as one that includes the whole of Western legal civilization and

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Global Power Through Classification and Rankings, *supra*, at 465; Taylor, *supra* note 4, at 399–400; Marta Infantino, *Global Indicators*, *in* Research Handbook on Global Administrative Law 347 (Sabino Cassese ed., 2016).

84. Taylor, *supra* note 4, at 401–02; Simion & Taylor, *supra* note 32; Marta Infantino, Numera et impera: Gli indicatori giuridici globali e il diritto comparato 104–21 (2019).

85. Another good example comes from USAID, *supra* note 41, at 6 (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"). *See also id.* at 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.").

86. 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*, 94 Yale L.J. 1, 22 (1984). This is precisely what differs most across legal cultures and jurisdictions.

87. *See also* Gillian K. Hadfield & Barry R. Weingast, *Microfoundations of the Rule of Law*, 17 Ann. Rev. Pol. Sci. 21 (2014); Kleinfeld, *supra* note 40, at 41; Frankenberg, *supra* note 32, at 10–12.

that can be universalized without paying due attention to its historical sources (and to the different contexts where it is exported) is doomed to appear as 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 approach,[88] but of strategies unable to build a pacified and fruitful relationship between "us" and "them."[89] Our public discourse 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.[90] Along the way, "decontextualized" 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, never mind solve, any problems of the other. This is a fate not dissimilar to that faced by the rule of law's sister notion, i.e., democracy.

## IX. Democracy and Its Discontents

In the Western public discourse, the availability of democracy is usually presented as a prerequisite to the evaluation, be it political, economic, or legal, of any country, and as an imperative to be pursued (with or without the West's help) by all societies that do not enjoy it. Here my purpose is not to discuss either how political scientists define democracy and rank democratic systems around the world, or the bases for those definitions and rankings, or the contingent nature of democracy as any other social and legal phenomenon.[91] As I did for the rule of law, my aim is to analyze the legal foundations on which

88. *See supra* Part IV.

89. 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* The Rule of Law After Communism 77, 82 (Martin E.J. Krygier & Adam Czarnota eds., 1999). *See also* Christopher May & Adam Winchester, *Introduction* to Handbook on the Rule of Law, *supra* note 4, at 1, 3; Husa, *supra* note 78, at 483–86. *Cf.* Giacinto della Cananea, Due Process of Law Beyond the State: Requirements of Administrative Procedure 86–87, 198–204 (2016).

90. *See* Teemu Ruskola, *Legal Orientalism*, 101 Mich. L. Rev. 179 (2002); Wilf, *supra* note 8, at 507–09; Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, *in* Asian Discourses of Rule of Law 1 (Randall Peerenboom ed., 2004); Goldman, *supra* note 32; May, *supra* note 40, at 100–07.

91. A useful synthesis of this wide debate can be found in the contributions collected in Justice and Democracy (Keith Dowding, Robert E. Goodin & Carole Pateman eds., 2004); Amichai Magen & Leonardo Morlino, *Scope, Depth, and Limits of External Influence*, *in* International Actors, Democratization and the Rule of Law: Anchoring Democracy? 224, 224–32 (Amichai Magen & Leonardo Morlino eds., 2008); Charles Tilly, Democracy 7–11 (2007); Nicholas W. Barber, The Principles of Constitutionalism 147–86 (2018); Chris Thornhill, The Sociology of Law and the Global Transformation of Democracy 39–133 (2018). For an in-depth analysis of the current threats to "constitutional democracies," see Constitutional Democracy in Crisis? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

Western democracies are erected, understanding what are the legal bricks and mortar whose use over time made it possible to build the houses we live in, and thereby to assess what is the potential for our democracy to be transplanted outside the Western world.

To start with a general issue (albeit bearing on my line of reasoning only up to a certain point), one has to recall that, besides those who consider nondemocratic societies to be pathological,[92] in the global arena one finds those who view our democracies as local expressions of a particular culture, as well as those who, for given places and ages, discuss the merits of different forms of government, including those of autocratic or epistocratic nature[93]—nowadays the latter views recur in particular in and about East Asian[94] and Islamic[95] societies.[96]

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92. Barber, *supra* note 91, at 149 ("[A]n undemocratic state is, necessarily, a failing state.").

93. *See, e.g.*, Jason Brennan, Against Democracy (2016); David M. Estlund, *Why Not Epistocracy*, *in* Desire, Identity and Existence: Essays in Honor of T.M. Penner 53 (Naomi Reshotko ed., 2003); David M. Estlund, Democratic Authority: A Philosophical Framework (2008); Alice Olbrecht, *Long Live the Philosopher-King?*, 1 Rerum Causae 37 (2006); Sheldon S. Wolin, Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism 159 (2008); Rajah, *supra* note 65; William Easterly, The Tyranny of Experts: Economists, Dictators, and the Forgotten Rights of the Poor 307–27 (2013); Mancur Olson Jr., *Dictatorship, Democracy, and Development*, 87 Am. Pol. Sci. 567 (1993); Jean-Pierre Benoît & Lewis A. Kornhauser, *Only a Dictatorship Is Efficient or Neutral* (N.Y.U. Law & Econ. Working Paper No. 85, 2006).

94. In earlier literature, see Karl A. Wittfogel, Oriental Despotism: A Comparative Study of Total Power (1957); Seymour M. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 Am. Pol. Sci. Rev. 69 (1959). More recently, see, e.g., Samuel P. Huntington, The Clash of Civilization and the Remaking of the World Order (1996); Amartya Sen, Human Rights and Asian Values, Sixteenth Morgenthau Memorial Lecture on Ethics & Foreign Policy (1997); Fareed Zakaria, The Future of Freedom: Illiberal Democracy at Home and Abroad (2003); Balakrishnan Rajagopal, International Law from Below: Development, Social Movements, and Third World Resistance 212–19 (2003); Graham Walker, *The Idea of Nonliberal Constitutionalism*, *in* Ethnicity and Group Rights 154 (Ian Shapiro & Will Kymlicka eds., 1997); Daniel A. Bell, East Meets West: Human Rights and Democracy in East Asia (2000); Stephen C. Angle, Human Rights and Chinese Thought: A Cross-Cultural Inquiry (2002); Rajah, *supra* note 65; The Beijing Consensus? How China Has Changed Western Ideas of Law and Economic Development, *supra* note 18.

95. *See*, *e.g.*, Bernard Lewis, *Islam and Liberal Democracy: A Historical Overview*, 7 J. Dem. 52 (1996); Edward W. Said, *The Clash of Ignorance*, The Nation (Oct. 22, 2001), www.thenation.com/article/clash-ignorance/; Jack Donnelly, Universal Human Rights in Theory and Practice 79–81 (3d ed. 2013); R. Michael Feener, Muslim Legal Thought in Modern Indonesia (2007); Ann Elizabeth Mayer, Islam and Human Rights: Tradition and Politics (4th ed. 2007); Ernest Gellner, The Conditions of Liberty (1994); Abdullahi A. An-Na'im, *Islam and Human Rights: Beyond the Universality Debate*, *in* Proceedings of the 94th Annual Meeting of the American Society of International Law 2000, at 95 (2001); Bernard G. Weiss, The Spirit of Islamic Law (1998); 4 Mus. W.J. Hum. Rts. (Special Issue: The Transnational Muslim World, Human Rights, and the Rights of Women and Sexual Minorities) (2007); Graham E. Fuller, *The Future of Political Islam*, 81 Foreign Aff. 48 (2002); Salman Sayyd, *Western Democrats, Oriental Despots?*, *in* Civilizations and World Order: Geopolitics and Cultural Difference, *supra* note 30, at 99.

96. As well as in the debates focused on the democratic "backsliding or retrogressions" (Rosalind Dixon, *Rule of Law Teleology: Against the Misuse and Abuse of Rule of Law Rhetoric*, 11 Hague J. Rule L. 461, 462 (2019)) that surface in some countries usually enrolled in the "Western democracies" club. *See* Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. Rev. 78 (2018); Ozan O. Varol, *Stealth Authoritarianism*, 100 Iowa L. Rev. 1673 (2015). *See also* the works cited *infra* note 124.

Without the historical and comparative analysis that will follow, it would be difficult to challenge any of these perspectives unless one chose to rely on arguments that are inherently dogmatic, ethnocentric (an issue that will be addressed later on), and disrespectful of the cultural differences of others. Yet, even at this stage, there are two points to note. First, entrusting power to a wise or autocratic elite presupposes an agreement about the "wisdom" and the qualities of this elite, which, in turn, requires a social body generally sharing homogenous values. These are requirements whose stability cannot be taken for granted in the long term, and not even today, in most societies.[97] Second, in nondemocratic forms of government, there are no guarantees of the rulers' culture and preferences remaining in step with the changing needs of society. The lack of adaptation to societal needs, on the one hand, does not deter authoritarian shifts aimed at imposing the ruler's views upon the social body; on the other hand, it makes certain that inner flexibility and receptiveness to render democracy preferable "over time."[98] This ought to be considered as crucial, and also biologically inevitable, if each generation, and each of us, accepts that we are all accountable to the next and subsequent generations, like a tenant to the landlord.

But the above is just a (rather general) argument. The desirability of democracy is one thing; its internal structure is another. A fully developed discussion of nondemocratic systems, and of the Western aspiration to transform them, must take into account the basic legal elements of our democratic societies, and the very threads from which the legal fabric of our democracy is woven. Doing so will unveil arguments that go in an opposite direction to that pursued by both detractors of democracy and those who believe that democracy is an easily exportable commodity. But to accomplish this, one needs to investigate the grounds on which mainstream arguments thrive today and, therefore, to draw once again on the reservoir of knowledge made available by comparative law and its heuristic tools (including the appreciation of history). This need is critical, even though it is usually met through analyses that are (attractive, but from my perspective) relevant only to a certain extent.

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97. *Cf.* Tamanaha, *supra* note 40, at 103.

98. *See also* Giovanni Sartori, The Theory of Democracy Revisited 206–07, 271–75 (1987); Avinash Dixit, Gene M. Grossman & Faruk Gul, *The Dynamics of Political Compromise*, 108 J. Pol. Econ. 531 (2000). On the temporal dimension of political and cultural preferences, see, e.g., Tamanaha, *supra* note 40, at 101; Daron Acemoglu & James M. Robinson, Economic Origins of Dictatorship and Democracy 16–25 (2006); Morton H. Halperin, Joe T. Siegle & Michael M. Weinstein, The Democracy Advantage 13–20 (2010). The foregoing arguments and what follows in the text apply to "direct democracies" as well. For a summary of the debate on the latter form(s) of democracy, see Barber, *supra* note 91, at 148–53.

## X. Legal Foundations of Western Democracies

The fundamental question is about the foundations, or better, the prerequisites, which—from a legal point of view—have made it possible to establish and develop our democracies.[99]

A first intuitive answer invokes the models for the selection of rulers. This answer is incontestable, but it is not sufficient. To say the least, the ways of selecting rulers are quite variable, and may overlap with those formally in force in societies that are considered nondemocratic.[100] This is why one is urged to turn to more robust

99. Incidentally, and yet straightforwardly, one has to stress how naïve it would be to indulge in the idea that democracy is only located on the level of the (changeable) constitutional forms. Evidence of limited relevance, within our specific analysis, of any discussion on the centrality of constitutional frameworks, may plainly come from the comparison with Islamic countries—i.e., a kind of society Westerners criticize for their lack of democracy. In the West, as well as in the Islamic world, there is invariably a level of "constitutional" legality that is higher than the will of every single parliament or government. When these bodies—in Islamic societies as well as in the West—issue any law, they do so in their capacity as organs bound by "superior" laws, principles, and values—the ones embedded, respectively, in our constitutions and in the sharia. The crucial point is represented by the contents and, even more, by the overall legal framework in which the superior constitutional structure operates, which in the West is (are) the way(s) we know, and "there" is given by the complex interaction between the sharia and the state-posited law, the *siyāsa*. This is why there is a lot more than just the formal existence of a constitution, and of its overarching language, that makes the latter not just a "sacred" text, but an instrument for political battles transferred to legal grounds and then disputed or disputable before the (secular) courts. *See generally* Neil MacCormick, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (1999); Horwitz, *supra* note 3, at 535; Daniel Chirot, *Does Democracy Work in Deeply Divided Societies?, in* Is Democracy Exportable? 85 (Zoltan Barany & Robert G. Moser eds., 2009); Daniel H. Levine, *Rule of Law, Power Distribution, and the Problem of Faction in Conflict Intervention*, *in* The Rule of Law in Comparative Perspective 147 (Mortimer N.S. Sellers & Tadeusz Tomaszewski eds., 2010); Upendra Baxi, *Modelling "Optimal" Constitutional Design for Government Structures: Some Debutant Remarks*, *in* Comparative Constitutionalism in South Asia 23, 24–25, 28 (Sunil Khilnani, Vikram Raghavan & Aun K. Thiruvengadam eds., 2013). In particular, it is easy to understand the dialectic relationship which exists—in the West as well as in the Islamic countries—between civilization and legal tradition: the "secular" legal tradition is a fundamental pillar of our civilization, as much as the "Koranic" tradition is for the Islamic countries. In other words, within both traditions we can observe (a) a one-to-one correspondence between the values of civilization and the values of the law; (b) the main role, in the development of those values, played by the jurist—a layman in the West, a religious figure in the Islamic countries—as the maker and the messenger of that complex of rules which represent the historical and current legal ground of the different societies. *See* Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 Cardozo L. Rev. 67 (2006); Timur Kuran, *The Rule of Law in Islamic Thought and Practice: A Historical Perspective*, *in* Global Perspectives on the Rule of Law, *supra* note 47, at 71.

100. *See, e.g.*, John Dunn, *Judging Democracy as Form of Government for Given Territories: Utopia or Apologetics?*, *in* Democracy in a Russian Mirror 97, 103 (Adam Przeworski ed., 2015); Giovanni Sartori, *How Far Can Free Government Travel?*, *in* The Global Divergence of Democracies 52, 55 (Larry Diamond & Marc F. Plattner eds., 2001); Easterly, *supra* note 93, at 139–49; Møller, *supra* note 46, at 22 ("If the people are truly sovereign, making decisions via the democratic channel, the people can tamper with everything from formal legality over checks and balances to freedom rights (whether negative or positive)."); Weiler, *supra* note 48.

and consistent legal foundations. The search for the latter brings to the surface the great principles of equality and of freedom of expression.[101] But much earlier than these principles could find their way into Western societies, the development of our history assigned a prominent role to the (bundle of phenomena that in the long run have produced) free accessibility to, and effective protection of, property rights.

In societies where legal subjectivity has long been grounded in status and property (especially over land), the latter was the most reliable tool, not only to compensate for the possible lack of status, but to affirm one's role and be acknowledged as a claim holder in society. Property rights, indeed, have proved to be a reservoir of duties, of rights, and, especially, of communicative resources.[102] Western property rights holders have come to learn that to effectively protect their prerogatives they have to count on a dispute solver, and on that the latter is not going to adjudicate their cases on religious, political, or clannish grounds. This widespread and socially shared reliance on the availability of a secular, technocratic adjudicator has over time become a cultural asset and an engine of expansive resource for the edification of the legal sphere of the individual. Such a framework—with the recurring risks of abuses, at the expense of nonowners or small owners—has been able to direct to the individual, and then radiate from her, values and claims which ended up shaping the individual's legal subjectivity towards other members of society, as well as towards public powers themselves.[103]

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101. Cass Sunstein, Democracy and the Problem of Free Speech (1995); Walzer, *supra* note 52; Robert A. Dahl, On Democracy (1998). One should be aware, however, that "if we delve beneath the surface of phrases such as liberty and equality then significant differences of views become apparent even amongst those who subscribe to one version or another of liberal belief": Paul Craig, *The Rule of Law* app. 5 (paper presented to the U.K. House of Lords Select Committee on the Constitution 2007), www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm. See also *supra* note 48 for a reminder of how the 1936 Soviet Constitution provided for freedom of speech and of the press. *See also* David S. Law & Mila Versteeg, *Sham Constitutions*, 101 Calif. L. Rev. 863 (2013).

102. See, among many, Joseph W. Singer, *Property Law as the Infrastructure of Democracy*, 63 Duke L.J. 1287 (2014). Converging from different perspectives, see also Henry S. Maine, Ancient Law 168–70 (London, J.M. Dent & Sons Ltd. 1861); Jürgen Habermas, *On the Internal Relation Between the Rule of Law and Democracy*, 3 Eur. J. Phil. 12, 17–18 (1995); Thomas Piketty, Capital et idéologie *passim*, esp. 18–19 (2019). On the need of the communicative resources mentioned into the text, see Dunn, *supra* note 100, at 103–06.

103. For a series of counterexamples confirming the validity of what is exposed in the text, see, regarding Russia, Alexei D. Voskressenski, *General Settings, Regional and National Factors, and the Concept of Non-Western Democracy*, *in* Democracy in a Russian Mirror, *supra* note 100, at 184, 187–91; Jeffrey D. Sachs & Katharina Pistor, *Introduction* to The Rule of Law and Economic Reform in Russia 1, 5–6 (Jeffrey D. Sachs & Katharina Pistor eds., 1997); Tracy Dennison, The Institutional Framework of Russian Serfdom (2011); Richard Pipes, Russia Under the Old Regime, esp. at xvii–xxii, 17–18, 69–70, 153–59 (2d ed. 1977); 1 Teodor Shanin, Russia as a Developing Society 17–33, 133–44 (1985); John P. LeDonne, Absolutism and Ruling Class: The Formation of the Russian Political Order, 1700–1825, at 4–9, 40–41, 218–24 (1991); Jane Burbank, *An Imperial*

It is not by chance that the protection of property rights has historically been tied to the idea according to which the rights belong to the individual as such, and not because of his membership in a family, a tribe, or a religious, ethnic, or political group. The recognition that rights and duties belong to the individual is further connected with the principle that responsibility is personal, and not to be ascribed to a group. And that principle of personal responsibility is mirrored in the acknowledgement of the intangibility of the private sphere of each individual, the protection of which, in turn, historically developed along the lines of the protection afforded to property rights.[104]

It is from this rights-based perspective that one can better grasp another crucial point. Looking at the way in which it is understood in the West, democracy reveals itself as a complex of rights and duties. Legal systems, as implemented by the law-applying and law-enforcing institutions, guarantee that these rights and duties are respected on a day-to-day basis, both by individuals and by public institutions. In particular, the very fact that public institutions too have become (over time) subject to the control of the law enables the democratic circle to open and close around individual persons. In order to discover, evaluate, and develop their own preferences, and make their own political choices, individuals need the "communicative" resources, which, in our societies, are provided by the common awareness that every person is effectively able to defend his or her rights against anybody.[105]

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*Rights Regime: Law and Citizenship in the Russian Empire*, 7 Kritika Explorations Russian & Eurasian Hist. 397 (2003); Carol S. Leonard, Agrarian Reform in Russia: The Road from Serfdom 125–41, 166–75 (2010); Uriel Procaccia, Russian Culture, Property Rights and the Market Economy esp. 115–18 (2007); Stephen L. Hoch, Serfdom and Social Control in Russia (1986); Tim McDaniel, Autocracy, Capitalism, and Revolution in Russia 17–19, 174–75 (1988); Steven Runciman, The Byzantine Theocracy (1977). On Latin America, see Roy L. Prosterman, *Land Reform in Latin America: How to Have a Revolution Without a Revolution*, 42 Wash. L. Rev. 189, 193–94 (1966); Ernest Feder, *"Latifundios" and Agricultural Labour in Latin America*, *in* Peasants and Peasant Societies 89 (Teodor Shanin ed., 2d ed. 1987); Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function-Doctrine and Land Reform in Latin America*, 19 Tul. Envtl. L.J. 69, 76–88, 110–11 (2006) (particularly useful in historical perspective, as it is in Susan E. Ramírez, *Large Landowners*, *in* Cities and Societies in Colonial Latin America 19 (Louisa Schell Hoberman & Susan Migden Socolow, eds., 1986)); Pak Hung Mo, *Land Distribution Inequality and Economic Growth: Transmission Channels and Effects*, 8 Pac. Econ. Rev. 171, 178, 181 (2003); Matthew C. Mirow, *Origins of the Social Function of Property in Chile*, 80 Fordham L. Rev. 1183 (2011). *See also* de Soto, *supra* note 16, esp. at 157–74, 187–97.

104. Gambaro, Sacco & Vogel, *supra* note 7, at 51–52.

105. Jürgen Habermas, Zwischen Naturalismus und Religion 30–83 (2005); Amartya Sen, The Argumentative Indian 12–33 (2005); Stephen Holmes, *Imitating Democracy, Feigning Capacity*, *in* Democracy in a Russian Mirror, *supra* note 100, at 30, 55. *But see* Tamanaha, *supra* note 60; Paul Schiff Berman, *From International Law to Law and Globalization*, 43 Colum. J. Transnat'l L. 485, 493–95 (2005); Gowder, *supra* note 47, at 158–61; Keith Dowding, *Are Democratic and Just Institutions the Same?*, *in* Justice and Democracy, *supra* note 91, at 25–39 (with further references). On the "thruths held in common, by ordinary people as well as experts and representatives of the state, that a robust democratic public sphere ostensibly requires," see Sophia Rosenfeld, Democracy and Truth: A Short History 12 (2019), and see also *id*. at 13, 63, 165–76.

## XI. Technocracies

From what has been said so far, one can infer that another essential clue to the understanding of the intimate nature and legal roots of our democracies is closely intertwined with the historical role played by the rule of law, as intended in this Article.[106] But in order to better understand this crucial point, some further remarks are in order.

The Western legal mindset has come to assign to justice and the law an autonomous space, beyond the areas of the purely political, the purely moral, or the purely religious. An autonomy that has over time shown a parallel dynamism on both sides of the Channel,[107] which has experienced cyclical restrictions and erosions, but which has always entrusted history with the role of ridiculing any attempt at its definitive suppression. Justice and the law, in turn, are not meant to be metaphysical perspectives, or conceptual nomenclatures, written texts, prisons, and taxes, but as widespread mentalities, deep-rooted traditions, daily visions of what legality is and by whom and in which ways it is to be administered.[108]

This social and cultural framework is, indeed, another fundamental prerequisite among those that history entrusted us with, for each of our democracies. As we said, Roman law triggered a process that in the long run has been able to shape the autonomy[109] of the legal space and to put it in a bi-univocal correspondence with the widespread conviction that the administration of the law must be

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106. In the West, the development of the rule of law preceded the birth of current forms of democracy, and this is one of the reasons for which speaking of Western democracy before the rule of law took root in the concerned society may lead to contested results. On the classical reference to ancient Greece, see, e.g., Giovanni Sartori, The Theory of Democracy Revisited, Part One: The Contemporary Debate 279–86 (1987); Robert A. Dahl, Democracy and Its Critics 13–33 (1989); John Dunn, Democracy: A History esp. 13–14 (2005); David Held, Models of Democracy 13–14, 26 (3d ed. 2006); Is Democracy Exportable?, *supra* note 99; John Keane, The Life and Death of Democracy 3–77 (2009). *See also* Niels P. Lemche, *Justice in Western Asia in Antiquity, or: Why No Laws Were Needed*, 70 Chi.-Kent L. Rev. 1695 (1995); Richard Garner, Law and Society in Classical Athens (1987); Michael Gagarin, Early Greek Law (1986); Martin Ostwald, From Popular Sovereignty to the Sovereignty of Law: Law, Society, and Politics in Fifth Century Athens (1986); Adriaan Lanni, Law and Justice in the Courts of Classical Athens esp. 15–40 (2006); Sayyd, *supra* note 95, at 99, 100–02; Francis Fukuyama, *Transitions to the Rule of Law*, 21 J. Dem. 33, 35–36 (2010).

107. Berman, *supra* note 77, at 273–94.

108. *See* Huntington, *supra* note 94, at 72 ("Individually, almost none of these factors was unique to the West. The combination of them was however, and this is what gave the West its distinctive quality."). *See also* Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 Am. J. Comp. L. 195 (1994).

109. Paolo Grossi, L'ordine giuridico medievale 51 (1995) (A notion, which, clearly, "does not mean neutrality of the law nor its subtraction from the theater of history: in a very human reality, like the legal one, neutral areas are indeed, if not unthinkable, at least extremely limited. Autonomy is therefore a relative notion . . . and it means only that [in the West] the law is not the expression of this or of that regime or of the forces which refer to it." (translated by author)). On the alternating fortunes, and the different configurations, that this autonomy met with over the centuries, see, e.g., Berman, *supra* note 77, at 49–84; Raoul C. van Caenegem, An Historical Introduction to Western Constitutional Law 34–42, 62–71, 78–90 (1995).

assigned to a class not of theologians or ideologues but one of technocrats—namely, jurists. These are professionals whose work depends on specialized knowledge, which cultivated by the professionals themselves, and perceived by laypersons as independent from the incumbent ruler—be it a politician, a king, or a religious leader. It is legal culture's specialization and secularism, acting together as a filter to the will of God and the King, which have represented the fertile ground capable of receiving, growing, and spreading in our societies (when history has made it possible) the seeds of liberties and of equality—as prerogatives that belong to the individual and not to any other power, and that are best protected not by the sovereign or the church, but by the law.

One could wonder whether the above results would have been possible if the forces that guided the evolutions of our history, including economic history, had not needed the law as we know it, and had not promoted its development.[110] Or, one could put the question the other way round and ask whether the Western path of economic development would have been possible without Western law.[111]

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110. For an in-depth analysis of the complex relationship between establishing "clear and strong" property rights and promoting economic development, see David Kennedy, *Some Caution About Property Rights as a Recipe for Economic Development*, 1 Acct. Econ. & L. 1 (2011), www.degruyter.com/downloadpdf/j/ael.2011.1.1/ael.2011.1.1.1006/ael.2011.1.1.1006.pdf; Frank K. Upham, The Great Property Fallacy: Theory, Reality, and Growth in Developing Countries (2018). From the perspective of granting access to essential resources (water, food, shelter), see Governing Access to Essential Resources (Katharina Pistor & Olivier De Schutter eds., 2015). *See also* Pistor, *supra* note 71, at 12–18, 26–30, 40–42; Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 Yale L.J. 996 (2006). *Cf.* Chang, *supra* note 16, at 110; Chang, *supra* note 83, at 479–81; Rajagopal, *supra* note 94, at 263–66; Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures (Lee Godden & Maureen Tehan eds., 2010); Upham, *supra* note 18.

111. On the correlation between legal institutions and economic development, see *supra* notes 4 and 66. *See, e.g.*, Amartya Sen, *What Is the Role of Legal and Judicial Reform in Economic Development?* 10 (June 5, 2000), siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf ("[E]ven if legal development were not to contribute one iota to economic development (I am not saying that is the case, but even if this were, counterfactually, true), even then legal and judicial reform would be a critical part of the development process."); Comm'n on Legal Empowerment of the Poor, *supra* note 16, at 47; The New Law and Economic Development: A Critical Appraisal, *supra* note 1; Davis & Trebilcock, *supra* note 18; Law in the Pursuit of Development (Amanda Perry-Kessaris ed., 2010); Milhaupt & Pistor, *supra* note 18; Michael J. Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 Va. L. Rev. 1517, 1554–72 (2006); Chang, *supra* note 83, at 473–95. *See also* Easterly, *supra* note 93; Reinert, *supra* note 18, at esp. 101–11, 118–25; Siems, *supra* note 3, at 332–62. One could also, however, question whether all the above would have been possible if another motor of our civilization, Western Christianity, had not supported, at least since the times of Pope Gregory VII—with some lapses to be sure—the gospel rule encourages respect towards Caesar (Brian Tierney, The Crisis of Church and State, 1050–1300 (1988); Berman, *supra* note 77, esp. at 85–119, 273–94; on the demarcating line between Christianity, on the one hand, and Islam and Judaism on the other, to be found on the incorporation, by the former, of the differences between "sacred" and "secular," see, e.g., Jacob Neusner & Tamara Sonn, Comparing Religions Through Law: Judaism and Islam 2–17 (1999)).

What is certain is that no other phenomenon, or process, would have been sufficient per se to forge the Western civilization as we know it, had the legal technocracy not been able to shape claims and duties independently from the crown and the cloth. The legal technocracy did act as an effective "insulating" device with respect to the pressures of the political and religious powers. This contributed to building and spreading that frame of mind, that reservoir of cultural reflexes, which over the long term allowed (for the Magna Carta, the Golden Bull of King Andrew II,[112] King Podiebrad,[113] and later for the Illuminists, the British parliamentarism, Madison & Co., and) for all efforts to minimize the impact of rulers' arbitrariness on our societies, to make legality prevail over sovereignty, of any nature.

Specialism and professionalism are also significant in another way. In fact, they have become organizational factors of the Western legal systems, which happened from "the bottom" as well as from "the top" of our societies. This is so, first, because the day-to-day perception of what is technically "lawful" slowly soaked up the concept of what is abstractly "just"—as it already was the case for the miller of Potsdam, and even before for the artisans of Figeac, the fullers of Ghent, and all the other initiators of the proto-union struggles of the 1200s and 1300s.[114] Second, because specialized legal knowledge became indispensable to describe the legal system, and because the very functioning of the legal system depended on the work and the culture of the secular jurists—not of the politicians, or the ministers of religion.

This latter perspective also accounts for the variety of institutional structures, categories, and nomenclatures one can find in Western societies themselves. Suffice it to think of the distances between monarchies and republics, between systems that are markedly free-market oriented and those aimed at "social market" models, between common law countries and those whose tradition is "romanistic" or "civilian." Paradoxically, all these differences are possible precisely because in the Western tradition the autonomy of the legal dimension has affirmed itself as a fundamental and widespread value. The law's autonomous evolution has been able to continue, irrespective of the similarities and the divergences which history brought in our societies, our political institutions and our economies.[115]

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112. For the original text of 1222, and the revised one dated 1231, see Henrik Marczali, Enchiridion Fontium Historiae Hungarorum 131, 134–43 (1902). *See also supra* note 77.

113. See the visionary, cautionary, and fascinating Tractatus (1464), *reprinted in* L'Europe une 52 (Jean-Pierre Faye ed., 1992).

114. *See* Jacques Le Goff, L'Europe est-elle née au Moyen Age? 166–67 (2003).

115. *See* Gambaro, Sacco & Vogel, *supra* note 7, at 57–58.

At the foundation of my understanding of the relationships linking democracy and the (rule of) law there is, therefore, a sort of circularity between individual rights and freedom, secularism and professionalism, communicative resources and widespread mindsets.

Nobody can fail to acknowledge (as has already been pointed out) that each of the results we are talking about is both the seed and the fruit of a combination of economic, religious, and social factors. Nor can one overlook the fact that the above account fits closely the evolution of private law—which plays the role of an effective and authentic connective tissue of the fundamental relationships "with" things and "between" the individuals.[116] In matters such as administrative or constitutional law, the influence of political factors could certainly be much more important. However, it is worth stressing that the law is—everywhere—the social infrastructure of public and private conduits; that in our democracies the law is also the fundamental ground for the exercise of power; and therefore that, in the West, the ruler in office can be legitimately chosen, and function, only according to secular law.[117] It is only against this technical and cultural framework that one can set the background for any discussion of the "political" dimension of the law.

The above also explains how misleading the positivistic debate (this too, and for good reason, an all-Western debate) about the abstract "purity" of the law having its own purpose turns out to be. Purity arguments, on the one hand, deny the obvious—the law is positioned everywhere in a dynamic, one-to-one working relationship with civilization, which it contributes to shaping and of which it is an expression. Consequently, these arguments prove incapable of realizing how often the law is enmeshed in sets of values, whose aims are only apparently neutral.[118] It could be the values that sustain a "customary," "common" law, whose pace of development most of the times is bound to buttress the keeping of the status quo.[119] Or it could be the "natural," moral or religious values[120] (for the role of which the most

116. *See also* Symposium, *Beyond the State? Rethinking Private Law*, 56 AM. J. COMP. L. 527 (2008).

117. Pistor, *supra* note 71, at 7, 10–11; TAMANAHA, *supra* note 40, at 114, 117.

118. See the classic HANS KELSEN, REINE RECHTSLEHRE (2d ed. 1960). *See also* BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 5–7, 61–76 (2006) (for the discussion of the stance taken, on this point, by a large group of protagonists of the political and legal debate, ranging from Friedrich Engels to Felix Cohen, from Oliver W. Holmes to Rudolf von Jhering—the English translation of the latter's 1 DER ZWECK IM RECHT (Isaac Husik trans., Boston Book Co. 1913) is where Tamanaha's book title comes from).

119. Needless to say, these are values that can underpin and be well strengthened by socio-economic interests. *See, e.g.,* WEBER, *supra* note 79, at 213–14, 226–31, 867–71.

120. *See*, *e.g.*, Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988) (for the rooting of the legal phenomenon in the paradigm of the "classical" natural law); FINNIS, *supra* note 46 (the reference to natural law

evident problem[121] is the rate of common sharing in societies whose members are less and less ready to gather the wide gamut of their life choices under a compact vision of transcendences[122]).

This is why those who remind us that the battle of values in any society is fought also on the field of the law are not mistaken; nor are they wrong when they insist that legal systems are "contested sites of meaning, where dominant ideas and values provide the framework for contestation and for advancing alternative understandings and practices."[123] What changes, across time and place—and it is crucial—is the different legal culture widespread in societies. What changes is the capacity of the jurists, secular or otherwise, to contribute to, or resist the twists and turns imposed on the rules by those who govern the society. In the West, unlike anywhere else, this capacity was consolidated through the means of a secular technocracy, becoming the main characteristic of the relationships between power and the individual, and constituting firm support for the role that the law has durably been able to play in our societies. Of the latter argument there is an example, among the many, that from the perspective of this Article is particularly worth recalling.

Without the autonomy of the law, as construed above, it becomes difficult to explain the resistance of legal traditions, and of the widespread mentality underpinning them, to the rise of Western European twentieth-century totalitarian regimes. This resistance has represented until now a reliable promise for overcoming any autocratic rule: a sort of antidote against any totalitarianism,[124] which Western

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is the one in the Catholic version of Thomas Aquinas); MICHAEL S. MOORE, EDUCATING ONESELF IN PUBLIC: CRITICAL ESSAYS IN JURISPRUDENCE 295–305 (2000) (referring to "moral realism"); James Gordley, *The State's Private Law and Legal Academia*, 56 AM. J. COMP. L. 639, 643–44, 647–48 (2008) (especially for the interaction between natural law and legal positivism).

121. On top of the fact that these same values can be expressed differently simply by crossing a border.

122. *See, e.g.*, Carl Schmitt, *Die Tyrannei der Werte*, *in* SÄKULARISATION UND UTOPIE: EBRACHER STUDIEN. ERNST FORSTHOFF ZUM 65. GEBURTSTAG 37–62 (1967); TAMANAHA, *supra* note 40, at 79, 103.

123. Rachel Sieder & Jessica Witchell, *Advancing Indigenous Claims Through the Law: Reflections on the Guatemalan Peace Process*, *in* CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES 201, 203 (Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson eds., 2001). See, more generally, José María Maravall, *The Rule of Law as a Political Weapon*, *in* DEMOCRACY AND RULE OF LAW 261 (José María Maravall & Adam Przeworski eds., 2003). See also, showing how the statement quoted in the text applies to what happens (and has happened) every day and everywhere, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977); LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW (2d ed. 1985); Herbert Jacob, *Introduction* to COURTS, LAW AND POLITICS 6 (Herbert Jacob et al. eds., 1996); Jacques Djoli, *Le constitutionnalisme africain: Entre l'officiel et le réel . . . et les mythes: État de lieux*, *in* À LA RECHERCHE DU DROIT AFRICAIN DU XXIE SIÈCLE, *supra* note 8, at 175.

124. This is confirmed, for example, by the substantially unchanged German Civil Code, dated 1896, in force before and after the Nazi period, the Spanish Civil Code, dated 1889, in force before and after the Franco regime, by the technical continuity between the Italian Civil Code of 1865 and the one adopted during the fascist era, in 1942, and still in force, as well as by the re-emergence in Eastern European

law is unable to prevent on its own but it has so far had the strength to relegate to history quite quickly. These are the reasons for which one can understand the relative ease with which the rule of law and democracy took back their place in Italy and in Germany after World War II. It is for these same reasons that associating, without an accurate comparative law analysis, the Italian or the German experiences with other non-Western (such as the Iraqi or Afghan) routes towards rule of law and democracy[125] appears to be an intellectual

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law of the Roman law roots specific to those systems up to the rising of the communist regimes (Gianmaria Ajani, Diritto dell'Europa orientale 33–162 (1996); Rodolfo Sacco, *The Romanist Substratum in the Civil Law of the Socialist Countries*, 14 Rev. Socialist L. 65 (1988); Paolo Grossi, A History of European Law 153–58 (2010); Dmitry Poldnikov, *Le renouvellement scientifique du droit civil russe au travers de la méthode comparative entre 1861 et 1917*, 13 Clio@Themis—Revue électronique d'histoire du droit 1, 1–17 (2017), www.cliothemis.com/Le-renouvellement-scientifique-du). On the so-called autocratic legalism recently pursued by political systems such as Hungary and Poland and on the presence/absence in those societies of the legal foundations of rule of law and democracy as discussed in this essay, see, e.g., Scheppele, *supra* note 48, at 549–81; Baer, *supra* note 48, at 350–54, 365–66.

125. *See, e.g.*, Conor Gearty, Can Human Rights Survive? The Hamlyn Lectures 2005, at 78 (2006); Steven Levitsky & Daniel Ziblatt, How Democracies Die 11–16 (2018). See also, with reference to Germany and Japan, 2 U.S. Dep't of State, The Future of Iraq Project 11 (2003), www.nsarchive2.gwu.edu/NSAEBB/NSAEBB198/FOI%20Overview.pdf (this is part of a set of thirteen volumes published between October 2001 and September 2003). For the peculiarities of the Japanese experience torn between Western inspirations and local culture, see generally Edwin O. Reischauer, Japan: The Story of a Nation (3d ed. 1981); Daniel A. Metraux, *The Soka Gakai's Critical Role in the Rapidly Changing World of Postwar Japanese Politics*, *in* Religious Organizations and Democratization: Case Studies from Contemporary Asia 267 (Tun-Jen Cheng & Deborah A. Brown eds., 2006) (on the historically secularized institutions); Johann P. Arnason, *Paths to Modernity: The Peculiarities of Japanese Feudalism*, *in* The Japanese Trajectory: Modernization and Beyond 235 (Gavan McCormack & Yoshio Sugimoto eds., 1988); Frank K. Upham, *The Illusory Promise of the Rule of Law*, *in* Human Rights with Modesty: The Problem of Universalism 279, 301–12 (András Sajó ed., 2004); Curtis J. Milhaupt & Mark D. West, Economic Organizations and Corporate Governance in Japan (2004). David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 Tex. L. Rev. 1545, 1587 (2009) (noting that much of the task of political control over the judiciary is delegated "to ideologically reliable agents within the judiciary itself—namely, a cadre of senior judges centered upon the Chief Justice and his administrative aides in the General Secretariat. The result of this deft bit of engineering is a judiciary that amply satisfies formal criteria of judicial independence yet remains reliably in tune with the wishes of the government."). According to Frank Upham, "even readers more familiar with the bureaucratic judiciaries of the civil law world will be surprised by the personnel manipulation and unrelenting supervision of the Japanese judicial system": Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 Law & Soc. Inquiry 453 (2005). *See also* Upham, *supra* note 47, at 77–79 (pointing out that Japan's most impressive period of economic development coincided with a period in which the Japanese government deliberately limited the role that the legal system played in Japanese society by, among other things, drastically limiting the number of qualified lawyers). On the latter point, see also Malcolm M. Feeley & Setsuo Miyazawa, *Legal Culture and the State in Modern Japan*, *in* Law, Society, and History: Themes in the Legal Sociology and Legal History of Lawrence M. Friedman 169, 178–85 (Robert W. Gordon & Morton J. Horwitz eds., 2011). *See also* Davis & Trebilcock, *supra* note 18, at 933–34 ("Capitalism in East Asia . . . is characterized by networks of relationships, both between economic agents and between economic agents and the state, which operate largely outside the formal legal system. In this brand of capitalism, the legal system plays a marginal role and so substantial investments in legal reform are of dubious value.").

operation much more inclined to the grotesque, than to any possible opportunism.[126]

Needless to say, wherever rule of law and democracy prevailed, they did so after a demanding and costly struggle, the winners of which did not simply aim—as happens all too often around the world today—to clear the legal ground for the adoption of market devices.[127] However, this victory could not have been won anywhere (including Italy and Germany) had the battlefield not been historically cleared of political and religious transcendentalism,[128] and had the legal tradition, its techno-structure, and its professionals not been available to support and protect the rights of individuals, rather than the rights of

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126. Indeed, it suffices to peruse what was recently disclosed by the *Washington Post* in the so-called Afghanistan Papers (Chris Whitock, *The Afghanistan Papers: A Secret History of the War*, Wash. Post (Dec. 9, 2019), www.washingtonpost.com/graphics/2019/investigations/afghanistan-papers/afghanistan-war-confidential-document), to understand the grotesque and blatant lack of comparative law culture that incapacitated the U.S. administrations and the military facing the Afghan situation. Among the many possible citations, one can read the following:

> U.S. officials tried to create—from scratch—a democratic government in Kabul modeled after their own in Washington. It was a foreign concept to the Afghans, who were accustomed to tribalism, monarchism, communism and Islamic law. "Our policy was to create a strong central government which was idiotic because Afghanistan does not have a history of a strong central government," an unidentified former State Department official told government interviewers in 2015. "The timeframe for creating a strong central government is 100 years, which we didn't have."

*Id*.

127. *See, e.g.*, Ha-Joon Chang, Kicking Away the Ladder: Development Strategy in Historical Perspective 69, 71–110 (2003); Keane, *supra* note 106, at 873–83.

128. It may be worth noting that in societies unaffected by totalitarian ideology, and where historically (i) religion has developed as a plural phenomenon with no direct claim to seize political power, and (ii) the hierarchical structure of the society allows the rulers to exercise a strong control over social and economic processes, the adoption of Western-style legal change imposed top-down by a secular ruler may be (at least formally) much less troublesome than elsewhere. For similar observations with respect to Japan, see Reischauer, *supra* note 125; Metraux, *supra* note 125; Arnason, *supra* note 125; Upham, *supra* note 125; Law, *supra* note 125; Tom Ginsburg, *In Defense of Imperialism? The Rule of Law and the State-Building Project*, *in* Getting to the Rule of Law, *supra* note 45, at 224, 231–35; Helen Hardacre, *The Formation of Secularism in Japan*, *in* A Secular Age Beyond The West: Religion, Law and the State in Asia, the Middle East and North Africa 86 (Mirjam Künkler, John Madeley & Shylashri Shankar eds., 2018); *see also supra* note 126. On India, see, e.g., Malcolm MacLaren, *"Thank You India": Reflections on the 4th International Conference on Federalism, New Delhi, 5–7 November 2007*, 9 German L.J. 367, 381 (2008) (noting that "[t]he task of striking the fine balance between manifold identities, of reconciling competing national and subnational interests, and of managing contradictions between unity and diversity is not an easy one. It is, however, easier when there is a narrative of cultural heritage to be drawn upon, and much easier when that heritage is one of acceptance of heterodoxy, ongoing dialogue, and pluralism"). *See also* Sen, *supra* note 105; Werner F. Menski, Hindu Law: Beyond Tradition and Modernity 121–30, 548, 590 (2003); Julius J. Lipner, *The Rise of "Hinduism"; or, How to Invent a World Religion with Only Moderate Success*, 10 Int'l J. Hindu Stud. 91 (2006); Prafullachandra N. Bhagwati, *Religion and Secularism Under the Indian Constitution*, *in* Religion and Law in Independent India 35 (Robert D. Baird ed., 2d ed. 2005); Gary J. Jacobsohn, The Wheel of Law: India's Secularism in Comparative Constitutional Context (2003); Swarna Rajagopalan, *Secularism in India: Accepted Principle, Contentious Interpretation*, *in* The Secular and the Sacred, Nation,

members of a party, a clan, or a congregation.[129] These are not only the winning conditions for democracy and the rule of law; they must also be emphasized as the most reliable indicator of what the West is, as compared to what it is not, as well as the key difference between those places where democracy and the rule of law could take root within a reasonable time, and those where the road to them risks leading into an impasse, or to rather long and bumpy detours.

## XIII. Perspectives and Resistances

It is against this scenario that all the debates about, and efforts of promoting or transplanting the rule of law and democracy outside the West should be assessed. To be sure, one has to keep in mind the role played, implicitly or explicitly, by the above-mentioned drivers—both anthropological (expansive ethnocentrism) and practical (geopolitical and economic)—of those debates and efforts. But these are not good reasons to put in place ideas and projects that, at best, are clumsy or, at worst, produce social and economic disasters. This is why some lessons from the foregoing, from the past, as well as from the most sophisticated literature in the field should be learned.[130]

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Religion and Politics 241 (William Safran ed., 2003); M.V. Rajeev Gowda & Eswaran Sridharan, *Parties and the Party System, 1947–2006*, *in* The State of India's Democracy 3 (Sumit Ganguly, Larry J. Diamond & Marc F. Plattner eds., 2007); Shylashri Shankar, *Secularity and Hinduism's Imaginaries in India*, *in* A Secular Age Beyond The West: Religion, Law and the State in Asia, the Middle East and North Africa, *supra*, at 128. On Indonesia, see Greg Barton, *Islam and Democratic Transition in Indonesia*, *in* Religious Organizations and Democratization: Case Studies from Contemporary Asia, *supra* note 125, at 221; Tun-Jen Cheng & Deborah A. Brown, *Introduction: The Roles of Religious Organizations in Asian Democratization*, Religious Organizations and Democratization: Case Studies from Contemporary Asia, *supra* note 125, at 3, 16, 27–40; Mirjam Künkler, *Law, Legitimacy, and Equality: The Bureaucratization of Religion and Conditions of Belief in Indonesia*, *in* A Secular Age Beyond The West: Religion, Law and the State in Asia, the Middle East and North Africa, *supra*, at 107; Tim Lindsey, *Indonesia: Devaluing Asian Values Rewriting Rule of Law*, *in* Asian Discourses of Rule of Law, *supra* note 90, at 281; Harold A. Crouch, Political Reform in Indonesia After Soeharto (2010). On Taiwan, see André Laliberté, *"Buddhism for the Human Realms" and Taiwanese Democracy*, *in* Religious Organizations and Democratization: Case Studies from Contemporary Asia, *supra* note 125, at 55; Murray A. Rubinstein, *The Presbyterian Church in the Formation of Taiwan's Democratic Society, 1945–2004*, *in* Religious Organizations and Democratization: Case Studies from Contemporary Asia, *supra* note 125, at 109; Weitseng Chen, *Twins of Opposites: Why China Will Not Follow Taiwan's Model of Rule of Law Transition Toward Democracy*, 66 Am. J. Comp. L. 481 (2018). On Korea, see Chaihark Hahm, *Ritual and Constitutionalism: Disputing the Ruler's Legitimacy in a Confucian Polity*, 57 Am. J. Comp. L. 135 (2009); Im Hyug-Baeg, *Christian Churches and Democratization in South Korea*, *in* Religious Organizations and Democratization: Case Studies from Contemporary Asia, *supra* note 125, at 136; Martina Deuchler, The Confucian Transformation of Korea: A Study of Society and Ideology (1992).

129. *See also* Tamanaha, *supra* note 40, at 58–59, 123–24; Martin Shapiro, *Courts*, *in* 5 Handbook of Political Science: Governmental Institutions and Processes 321, 327 (Fred I. Greenstein & Nelson W. Polsby eds., 1975).

130. For a more extensive discussion, with further references, see Trubek & Galanter, *supra* note 25; Davis & Trebilcock, *supra* note 18; Law and Development (Julio Faundez ed., 2012); David Kennedy, The Dark Sides of Virtue: Reassessing International Humanitarianism 149–67 (2005); Thomas C. Heller, *An Immodest Postscript*, *in* Beyond

First, even though apparently successful in the short term, simply transplanting West-grown democracy and rule of law into other societies risks entailing extraordinarily high maintenance costs.[131] These costs are characterized by high unpredictability in terms of the protection of property and contracts (not to speak of other rights we deem fundamental) in social environments which can be culturally, professionally, or technically unprepared to receive or administer Western sets of rules and remedies.[132] Further, these maintenance costs are bound to increase considerably if, from the very beginning the transplanting efforts fail to meet the needs of a variety of counterparts. Ensuring strength to the rules and rights we would like to transplant means relying on all the subjects who can guarantee effectiveness to the project, especially when the state involved appears to be indifferent or inadequate.[133] The list of these subjects is a long one, and

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Common Knowledge: Empirical Approaches to the Rule of Law, *supra* note 17, at 382; Carothers, *supra* note 71; Rajagopal, *supra* note 94, at 146–61; Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor? (Roberto Gargella, Pilar Domingo & Theunis Roux eds., 2006); Leigh T. Toomey, *A Delicate Balance: Building Complementary Customary and State Legal Systems*, 3 Law & Dev. Rev. 156 (2010). *See also* Paul Collier & Jan Willem Gunning, *Explaining African Economic Performance*, 37 J. Econ. Literature 64 (1999); Milhaupt & Pistor, *supra* note 18, at esp. 17–25, 197–217; Rhodri C. Williams, *Stability, Justice and Rights in the Wake of the Cold War: The Housing, Land and Property Rights Legacy of the UN Transitional Authority in Cambodia*, *in* Housing, Land, and Property Rights in Post-conflict United Nations and Other Peace Operations 19 (Scott Leckie ed., 2009); Conor Foley, *Housing, Land, and Property Restitution Rights in Afghanistan*, *in* Housing, Land, and Property Rights in Post-conflict United Nations and Other Peace Operations, *supra*, at 136; Margaret Cordial & Knut Rosandhaug, *The Response of the United Nations Interim Administration Mission in Kosovo to Address Property Rights Challenges*, *in* Housing, Land, and Property Rights in Post-conflict United Nations and Other Peace Operations, *supra*, at 61; Nigel Thomson, *The Trouble with Iraq: Lessons from the Field on the Development of a Property Restitution System in "Post"-conflict Circumstances*, *in* Housing, Land, and Property Rights in Post-conflict United Nations and Other Peace Operations, *supra*, at 220; Patrick McAuslan, *Land and Power in Afghanistan: In Pursuit of Law and Justice?*, *in* Law in the Pursuit of Development, *supra* note 111, at 269; Gillian K. Hadfield, Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy 323–40 (2017).

131. This holds true also when at stake is simply the building of a free market economy. On the relationship between "legal" and "economic development," see *supra* notes 4, 65, 110, and 111. Among the economists, it is well known that the debate substantially turns around those who propose top-down comprehensive plans (*see, e.g.*, Jeffrey D. Sachs, The End of Poverty: Economic Possibilities for Our Time (2005)), those who favor a middle ground aimed at identifying the most pressing constraints in a particular country at a given time (*see, e.g.*, Dani Rodrik, One Economics, Many Recipes (2007)), and—in a perspective much closer to the one advocated here—those who advocate a bottom-up approach (*see, e.g.*, Easterly, *supra* note 93. *But see* Easterly, *supra* note 16).

132. See, e.g., Upham, *supra* note 47, at 100; Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 Am. J. Comp. L. 97, 97–99, 111–14 (2002).

133. *See, e.g.*, Monique Nuijten, *Legal Responses to Cultural Diversity: Multi-Ethnicity, the State and the Law in Latin America*, *in* Cultural Diversity and the Law: State Responses from Around the World 235, 247–49 (Marie-Claire Foblets ed., 2010); Etienne Le Roy, *Local Law in Black Africa: Contemporary Experiences of Folk Law Facing State and Capital in Senegal and Some Other Countries*, *in* People's Law and State Law 253, 253–57 (Antony Allott & Gordon R. Woodman eds., 1985);

includes most definitely humanitarian organizations, organizations recognized by the state, as well as firms and other entities wielding effective powers, and, therefore, legal authority over people's lives: from families to tribes and territorial groups, to religious associations.[134]

Second, for a process of legal Westernization to be effective, it is necessary to encourage the citizens to use the (new) institutional infrastructures and determine an effective demand for the new patterns of legality, whereby rules are no longer perceived as a means to bestow favors or issue threats but to promote actionable rights towards any other member of the society as well as towards the ruler.[135] Along the same lines, it is necessary that judges, lawyers, and politicians acquire the skills needed to handle the new—and necessarily incomplete—legal framework.[136] It is only in the context of this common widespread demand that the road towards the effective claimability of those rights (individual, political, social, economic, cultural, environmental) which we strenuously conquered can be widened, and shaped according to the various contexts.[137]

By contrast, disregarding the complex articulation of the target society, dealing only with state apparatuses and promoting top-down reforms is a shortsighted agenda whose by-product is a further threat.

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Berkowitz, Pistor & Richard, *supra* note 3, at 170, 175; Fu Haling, *Access to Justice in China: Potentials, Limits, and Alternatives*, *in* Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes 163, 176–77 (John Gillespie & Albert H.Y. Chen eds., 2010); Ling Li, *The Chinese Communist Party and People's Courts: Judicial Dependence in China*, 64 Am. J. Comp. L. 37 (2016); Huong Thi Nguyen, *Contesting Constitutionalism in Vietnam: The Justifications and Proposed Models of Judicial Review in the 2013 Amendment Process*, *in* Politics and Constitutions in Southeast Asia 271 (Marco Bünte & Björn Dressel eds., 2016); Xin He & Kwai Hang Ng, *"It Must Be Rock Strong!" Guanxi's Impact on Judicial Decision Making in China*, 65 Am. J. Comp. L. 841 (2017); Martin Krygier & Adam Winchester, *Arbitrary Power and the Ideal of the Rule of Law*, *in* Handbook on the Rule of Law, *supra* note 4, at 75, 91–92.

134. Comm'n on Legal Empowerment of the Poor, *supra* note 16, at 18. *See also* Robert McCorquodale, *An Inclusive International Legal System*, 17 Leiden J. Int'l L. 477 (2004); Boaventura de Sousa Santos, Towards a New Legal Common Sense: Law, Globalization, and Emancipation 94 (2002); Toomey, *supra* note 130; Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law Beyond Borders (2012); Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 Yale J. Int'l L. 107 (2012); Peerenboom, *supra* note 4, at 7–20. *See also* Easterly, *supra* note 93, at 29–32, 216–26.

135. *See, e.g.*, Amartya Sen, *Democracy and Its Global Roots*, The New Republic, Oct. 6, 2003, at 28; Comm'n on Legal Empowerment of the Poor, *supra* note 16, at 4; Jensen, *supra* note 47, at 362–66; Pistor, *supra* note 71, at 10; Berkowitz, Pistor & Richard, *supra* note 3, at 167–68, 178–79, 189–90; Gowder, *supra* note 47, at 143–58.

136. Kathryn Hendley, *Rewriting the Rules of the Games in Russia: The Neglected Issue of the Demand for Law*, 8 E. Eur. Const. Rev. 89 (1999); Martin Krygier, *The Rule of Law After the Short Twentieth Century: Launching a Global Career*, *in* Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell, *supra* note 3, at 327, 342–44; Milhaupt & Pistor, *supra* note 18, esp. ch. 10; Gordon, *supra* note 34, at 464–68; Pistor, *supra* note 132, at 98, 111–12.

137. *See* sources cited *supra* notes 135–136. *See also* Margaret Grosh et al., For Protection and Promotion: The Design and Implementation of Effective Safety Nets 118–19 (2008), siteresources.worldbank.org/SPLP/Resources/461653-1207162275268/For_Protection_and_Promotion908.pdf.

This is the risk of encouraging a tension, either latent or explicit, between what is perceived as one's own tradition and what is presented as Western modernity. Old and new media allow messages issued not only by the "imperialist enemy" or the domestic power, but also other voices of dissent against our "modernity," to reach local populations. Hence the danger of consolidating an automatic reservoir of shared responses stemming from the fusion between the elements of identity rooted in the local tradition and the attractiveness of a posture of resistance.[138] Hence too, and consequentially, the risk of impoverishing the local political discourse eventually reinforcing would-be traditionalists—who are offered a glorious chance of presenting their own vision as the only true alternative to the Western view of the world (and sometimes that glorious chance can be just one step away from the holy war against the oppressor).[139]

A further series of remarks is prompted by the analysis carried out above and by the evidence that Western civilization and legal tradition are the offspring of a multilinear history, which only over a long time has been shaping our institutions and techno-structures, as we know them today, over a long time.

*If* the objective is to promote our democracy and the rule of law outside the West, we have to keep in mind the factors which made their rise and development possible. To be sure, constitutions and unfettered electoral competitions are all important elements of the process, but, as I said, without the equal and actual chance to claim one's own rights as against anybody, and before a technocratic and secular judge, any attempt to plant the seeds of our democracy and rule of law remains a wishful (and largely hypocritical) thinking.[140]

It is equally obvious that this perspective implies a very long-term agenda. But this is likely to be the only strategy destined to pave the way for an effective, as opposed to cosmetic, reception of rule of law and of democracy. The reference to the rule of law I have just made obviously is to the notion as intended in this Article: the rest of the Western "package" cannot but be a matter of slow accumulation of technical attitudes, communicative resources, and cultural patterns absorbed by the local law users, law givers, and lawmakers. Indeed, it is worth stressing that, in any country or society, there is no "ideal" model of legal development. More precisely, there is no model of legal development which could do without solid connections with the

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138. *See, e.g.*, David Held, Democracy and the Global Order: From the Modern State to Cosmopolitan Governance 125–26, 135–40 (1995).

139. *See, e.g.*, David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 Utah L. Rev. 545, 578–79; Daniel Chirot, *A Clash of Civilizations or of Paradigms? Theorizing Progress and Social Change*, 16 Int'l Soc. 341 (2001); Upendra Baxi, The Future of Human Rights 91–92 (2002); Matthias Kumm, *Taking "the Dark Side" Seriously: Constitutionalism and the Question of Constitutional Progress, or: Why It Is Fitting to Have the 2016 ICON-S Conference in Berlin*, 13 Int'l J. Const. L. 777, 780 (2015).

140. *See, e.g.*, Trebilcock & Daniels, *supra* note 59, at 236–78.

socioeconomic, cultural, and legal context.[141] Some may think that the current reality of the world, and in particular the global power of the media, of our public discourse, of the values, models, and symbols they spread, will determine that not a millennium, and probably not even a century is required for our ideas (possibly cleansed from arrogance and blindness) to be firmly established in societies different from ours. But, supposing that these processes could take place within a decade, or the lifespan of a generation, would be flirting with utopia while refusing to recognize reality.[142]

## Concluding Remarks: Beyond Rhetoric

In conclusion, assessing (if not plainly promoting) Western-style rule of law and democracy requires a full-fledged understanding of the variety of historical, economic, and cultural backgrounds against which the different legal systems flourish, converge and diverge, compete with, and imitate each other. In other words, it is high time we met the need for deglobalizing our views on the role and scope of our rules and institutions. These views are the product of a culture and a civilization whose history and actual development are not fully shared by the rest of the world. *If*—I stress the conjunction once again—we are willing to persuade others that our own way of dealing with the law is better than everyone else's, we can no longer treat our history and its law as commodities or equity funds that can be placed anywhere.

From this perspective, Westerners should hone and rethink their methods, attitudes, and programs—whether they aim to impose, advise, or simply prod legal change. Regardless of the purpose of the need to transplant "rule of law & democracy," Western initiatives should be brought forward with a view that should be inclusive of Western as well as of non-Western rationales—those coming from their respective legal traditions and current legal frameworks. How can we claim to understand other civilizations, cultures, and legal systems, or to have better rules than they do, without knowing what they do have, or where our own and their rules come from? In order to assess the "quality" of other legal systems, may we possibly rely on GDP, on the foreign investments index, or on some surveys focusing on the

141. *See* Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, *in* Local Knowledge: Further Essays in Interpretive Anthropology 167 (1983). *See also* Sieder & Witchell, *supra* note 123, at 202 (stressing that every legal system "contains systems of symbols and meaning through which structures of ordering are formed, communicated, imposed, shared and reproduced").

142. Kroncke, *supra* note 6, at 536 ("Imagine the variety of answers that would emerge from any grouping of American lawyers if one were to ask them how domestic legal change happens, much less how to best provoke it. The diversity of such answers to essentially a key but unresolved issue in contemporary American debates resounds with loud dissonance when compared with attempts to export idealized models of American law.").

"sentiment" of local (English speaking) citizens?[143] In other words, the search should be for criteria that are able to calibrate our judgments and our options on the variable standards that other legal experiences offer, rather than on the measure of self-established messianic spirits. The latter, as unavoidable as they can be,[144] appear all the more unhelpful and even dysfunctionally absurd when they stem from an unquestioning reliance on the econometrics of international financial institutions,[145] or on the knowledge of one only (one's own) legal system.[146] Any serious analysis of whether and how to spread the rule of law and democracy must tap into reservoirs of knowledge different from those utilitarian and simplified toolkits.

What theory and practice need is to absorb the lessons of anthropology, history, and comparative law. These are not mere academic disciplines, or a sort of intellectual exercise devoid of actual impact on the making and processing of legal rules. To the contrary, these fields of study are the most powerful heuristic tools able to drive the analysis towards solutions which promise to be working because of being (in principle, at least[147]) unfettered by Western-centered biases and because they are inclusive of what matters in the local settings.[148] These are reservoirs of knowledge that represent an indispensable instrument to try the facts, sort out the problems, and possibly find appropriate solutions to the given times and contexts. Abandoning these reservoirs of knowledge gives way to alternative approaches, which—especially those embedded in the indiscriminate globalization of the "rule of law & democracy"—we have seen appearing, innocently or otherwise, consciously or not, as simple exercises in rhetoric, sometimes opportunistic, sometimes commendable, sometimes useless (and, as it happened, sometimes bloody).

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143. Infantino, *supra* note 84, at 169–230; David Restrepo Amariles, *Supping with the Devil? Indicators and the Rise of Managerial Rationality in Law*, 13 Int'l J.L. Context 465 (2017); Amanda Perry-Kessaris, *The Re-co-construction of Legitimacy of/Through the Doing Business Indicators*, 13 Int'l J.L. Context 498 (2017); Ass'n Henri Capitant des Amis de la Culture Juridique Française, *supra* note 67, at 81–94, 113–15.

144. Kroncke, *supra* note 6, at 481, 553. *See also supra* notes 106–107 and accompanying text. See also the skepticism articulated in Ginsburg, *supra* note 128, at 225 ("Basic order may be more achievable but, ironically, is easier to impose with a more authoritarian model than is politically acceptable in the "intervening" societies. . . . We are insufficiently imperialistic to carry out social transformation from abroad. And our intervention often undermines social transformation from within.").

145. Infantino, *supra* note 84, esp. 30–52, 104–22, 140–59.

146. *See also* Shklar, *supra* note 57, at 21, 26; Frankenberg, *supra* note 32, at 19–26. See also the caveats set forth in Kahn-Freund, *supra* note 9, at 27.

147. On the Western biases that affect some self-called comparative law scholarship, see Mauro Bussani & Ugo Mattei, *Diapositives Versus Movies: The Inner Dynamics of the Law and Its Comparative Account*, *in* Cambridge Companion to Comparative Law 3, 4–7 (Mauro Bussani & Ugo Mattei eds., 2012); Günter Frankenberg, *The Innocence of Method—Unveiled: Comparison as an Ethical and Political Act*, 9 J. Comp. L. 222 (2014).

148. *See also* John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 Am. J. Comp. L. 457 (1977); Lawrence M. Friedman, *Legal Culture and Social Development*, 4 Law & Soc'y Rev. 29 (1969); Husa, *supra* note 78, at 129.