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Absurda lex, sed lex? Public value and the decay of the Rule of Law: A conceptual perspective[1]

Erick Behar-Villegas[2]

Abstract: The Rule of Law serves, under a broadly accepted notion of justice, the enforcement of property rights and a relative predictability of citizen affairs, i.e. it fosters Public Value. However, it is subject to risks that materialise in weakened institutions, uncertainty and transaction costs. The connection between Public Value and the Rule of Law becomes salient when understanding how the latter degenerates at the expense of the former. This article provides two theoretical frameworks that explain the connection between the two concepts, as well as three manifestations of the Rule of Law's decay. These comprise the excess of legal-formalism, the excess of discretion in enforcement and the instrumentalisation of the law, i.e. when it embodies injustice. Although they vary depending on the legal system, these aspects build a conceptual body that illustrates how contingent legal outcomes affect society, developing Daly's (2019) concept of democratic decay in the economics and business literature.

Keywords: Public Value, Rule of Law, legal-formalism, legal institutions, democratic decay, property rights.

JEL codes: K150, K49, P48, P14.

Introduction

In California, bees were considered fish as of 2022, at least legally speaking. Beyond controversies in legal discussions that point to complex connotations and the potential absurdity of the matter, one may consider, "semantics aside" (Larson, 2022), that bees are essential pollinators that help plants reproduce

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and thus explore other implications.[3] In this perspective the Court of Appeals' decision that led to this categorisation may seem reasonable from the point of view of Public Value (cf. Moore, 1995), i.e. "anything people put value to with regard to the public" (Meynhardt, 2009, p. 206), or stated differently, actions that contribute to a society's well-being. The latter is connected to the Rule of Law, i.e. a "regulative ideal" that protects citizens and their business from arbitrariness and delivers a sense of "reasonable confidence" to plan their own affairs (Fallon, 1997, pp. 1–4), in other words a fundamental element for business development and prosperity.

However, the contingent and eventually instrumentalised quality of legal outcomes rekindles what Hayek (1953) has called *The Decline of the Rule of Law,* which reveals itself in weakened institutions and uncertainty in the business context, spawning therefore transaction costs and even tragic events. The law itself appears in North's (1990) words as a formal institution or constraint that structures daily business for citizens. In this sense, when institutions decay, they fuel uncertainty.

The views of Hayek and North underpin a new field of research, originally stemming from political science and public law, which Daly (2019) denominates as "democratic decay", i.e. the degradation of liberal democracies and their institutions, or put differently, the contradiction to Adam Smith's ideal of having peace, easy taxes and a tolerable administration of justice (Smith & Stewart, 1982 (1755)). In economics and business research, this concept is fundamental, as the process of institutional decay may shed light on *how* the agitations of the Rule of Law could impact businesses and citizens. This paper makes two theoretical contributions in this sense. First, it provides a framework that links Public Value and the Rule of Law from an institutional perspective. Second, it introduces a theoretical framework that explains how the Rule of Law degen-

[3] Two years after a US judge considered that the *Endangered Species Act* only covered invertebrates in "marine habitats", the Court of Appeals ruled that bees effectively fall into the protection of the Act (Adatia, 2022). The importance of bees is well known, e.g. they are major pollinators that aid plant reproduction both in terrestrial and natural ecosystems (Tepedino, 1979; Brown & Paxton, 2009). However, the ruling has not been bereft of controversy (Somin, 2022; Thomas, 2022) and relights a doctrine-related debate about the extent to which government agencies enjoy discretion when judges defer decisions to them. The latter is known as *Chevron Deference* for the Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 case in 1984. In essence, as long as a government agency's answer is reasonable and Congress has not addressed the matter explicitly, judicial deference would be deemed "appropriate" (Legal Information Institute, 2022). This acquires another level of complexity when government agencies, to use Hamburger's (2014) words, "rise above the law and the courts" via administrative law, i.e. having the power to bind and thus impose constraints on liberties. In the case at hand, reclassifying bees as fish reflects this instability between the branches of power in favor of the executive and revives the concept of Thayerian minimalism (based on the work of James Thayer in the late 19th century), whereby judges should not invalidate actions of other branches unless they have clear errors or appear irrational (Schmidt, 2022, pp. 836–842).

erates in three manifestations: excess of legal-formalism, excess of discretion of agents of the State and injustice embodied in the law. Explaining how the contingent nature of legal decisions connects to Public Value, especially from the risk that the decay of the Rule of Law poses, is paramount to understanding business contexts.

In the first manifestation, overtly formalistic decisions that reflect a preference for the "letter" and not for the "spirit" or the context of an issue (Jackson, 1983, p. 329) can lead to more uncertainty and transaction costs for the parties involved. In the second manifestation, the discretion that agents of the State enjoy when making legal decisions may become another source of uncertainty and potentially rising transaction costs. It can, in extreme scenarios, lead to abating freedom and spurring tragedies. Third, if injustice is embodied in the law, itself a possible object of capture or instrumentalisation by ideology or private interests, the Rule of Law can fail to guarantee justice and may even degenerate into formally concocted tyranny.

This paper is structured as follows. The first section provides a literature review of Public Value and a brief review on the extensive field pertaining to the Rule of Law. The second section addresses a theoretical background, while the third introduces the institutional framework that binds Public Value and the Rule of Law. Finally, the fourth section presents the second framework, i.e. the degeneration of the Rule of Law with its corresponding manifestations and examples, followed by a short discussion and a comment on the limitations of this work.

1. Literature review

Following Moore's (1995) seminal work, *Creating Public Value: Strategic management in government*, a body of literature has flourished around the possibility of creating value for the general public through the "efforts of individuals and the use of public authority" (Prebble, 2018, p. 104). This rekindles North's (1992) concept of social benefit, which arises, i.a. from the work of government organisations. The latter also connects to the concept of "Common Good Constitutionalism" in US Law (Vermeule, 2022), which its author sees as a middle way between conservative originalism and progressive thought, serving the common good as a general government duty that is backed in moral principles.[4]

[4] In US Law, the idea of *originalism* implies interpreting the Constitution based on the original understandings of the time and context it was introduced in. On the other hand, Vermeule's initial considerations on Common Good Constitutionalism were first published in 2020 in an article in *The Atlantic,* where he argued for a legitimate "strong rule" that is based on "substantive moral principles", in the same spirit of Dworkin's moral readings of the Constitution, such as "respect for the authority of rule and of rulers; respect for the hierarchies needed for society to function; solidarity within and among families, social groups, and workers' unions, trade as-

The literature on Public Value has discussed its philosophical and conceptual claims (Meynhardt, 2021; Moore, 2014; Prebble, 2018), paradigm shifts, e.g. from new public management to Public Value (O'Flynn, 2007), the creation or destruction of Public Value (Meynhardt, 2009; Sancino, Rees, & Schindele, 2018), a wide array of practical applications for government (Cole & Parston, 2006; Lindgreen et al., 2019), as well as critical approaches to the concept of value in economic thought (Bozeman, 2007; Mazzucato, 2019).

The Rule of Law, on the other hand, appears as an extensive field in itself, nurtured by different disciplines and historical moments, spanning "many literatures" or an "avalanche of literature" (Bedner, 2010), and at times conceptually minimised as a stable government that enforces rules (Hadfield & Weingast, 2013). Fallon's (1997) conceptual approach to the Rule of Law as a 'historical ideal' speaks for the importance of connecting it to a particular legal system (cf. Pech, 2022; Pirie, 2022), implying that it is not a catch-all concept satisfactorily serviced by one particular definition. Its measurement is itself a controversial issue that oftentimes lacks a theoretical underpinning (Skaaning, 2010). Judging from the traditional use of the Spanish equivalent, *Estado de Derecho*, a functional implication of the concept is noteworthy when the Rule of Law is seen as having a democratic function towards freedom, security and enforcement of property rights (cf. Locke, n.d.; Roig, 2006). This dimension of the Rule of Law is salient in economic literature when referring, e.g. to the effects on progress and economic growth (Haggard & Tiede, 2011; North & Weingast, 1989), the shadow economy (Luong, Nguyen, & Nguyen, 2020) or entrepreneurship (Agostino, Nifo, Trivieri, & Vecchione, 2020).

The literature that binds Public Value with aspects of legal philosophy offers implicit connections that can be grasped in three purposes of the Rule of Law (Fallon, 1997). First, the latter protects against anarchy. Second, it allows citizens to plan their affairs "with reasonable confidence". Third, it serves as a guarantee against different manifestations of "official arbitrariness" (p. 8). For Moore (2014) public authority can change conditions for citizens for the better, for example, through dispute settlement and regulations, yet it is unclear whether a 'correct' execution of the law always creates Public Value (Meynhardt, 2009)

In Posner's (1973) seminal work, *Economic analysis of law*, a discussion on the efficiency of rules suggests that the legal system serves a purpose that benefits society. Fallon (1997) complements this idea by portraying five elements that constitute the Rule of Law: a) the capacity of legal rules to guide people as they go about their affairs, b) the efficacy of the law in actually guiding people, c) the stability of the law that makes coordination viable over time, d) the

sociations, and professions; appropriate subsidiarity (…) and a candid willingness to 'legislate morality'" (Vermeule, 2020).

supremacy of legal authority that governs citizens, officials and judges and d) the presence of impartial justice that accessible Courts give citizens (pp. 8–9).

However, when these elements are not fulfilled, a deficit of the Rule of Law eventuates, which means, i.e. that alternative institutions arise and weaken both formal and informal institutions (Simovic, 2020; Tsourdi, 2021). This results in what Daly (2019) has termed "democratic decay", an emerging research field in itself that studies the degradation of liberal democracies from the point of view of public law and political science. Democratic decay is connected to similar concepts, e.g. constitutional rot, democratic recession or Rule of Law backsliding (Daly, 2019; Pech & Scheppele, 2017). The latter symbolise a "deterioration of public and political norms that underpin democratic rule" (Daly, 2019, p. 11). In other words, democratic decay reflects the destruction of Public Value, when seen from an *outcome-based* perspective. As the field of democratic decay emerges, conceptualising manifestations thereof with regards to socioeconomic outcomes in the economics and business literature serves the purpose of enriching the field with further frameworks and derived empirical work.

2. Theoretical background

2.1. On Public Value

To speak of what is convenient as a whole for society is naturally diffuse, even an "enigma" (Prebble, 2018) or a "necessary fiction" (Meynhardt, 2021). Long before the Public Value literature evolved from the seminal work of Moore (1995), philosophers broadly addressed similar questions. Marcus Aurelius (2017, sec. 3.4) wrote on the "good of the community" (*ad commune utilitatem*), Seneca addressed the "usefulness of things" (*usus rerum*), Socrates, following Xenophon, criticizes the "purposeless" in his *Memorabilia*, whereas in more modern times, Veblen (2003, p. 66), in the *Theory of the leisure class,* criticised that which "does not serve human life or human well-being on the whole".

The reasoning in Moore's (1995) work departed from the idea that just as private managers would create private value, so could public managers with regards to the community as a whole. This has implied both utilitarian and deontological views, which respectively address the 'good' and the 'just' (Moore, 2014, p. 466). From the bulk of literature regarding public value in the last decades, it is worth highlighting two further aspects. On the one hand, public value is not only produced and offered by an entity alone; it is co-created or destroyed, implying a complex set of interactions that rekindle North's (1990) idea of institutional change. On the other hand, Meynhardt (2009) highlights how Public Value has much to do with *how* it is perceived by the public. A simple example will illustrate this. In 18th century France thousands of small businessmen

were executed for violating cotton regulations (Bernstein, 2004). Here, Public Value is destroyed, as rules are not perceived as good nor just by those affected. Social practices, economic outcomes and even tragedies are thus shaped by interactions, legal or not, with public authorities.

2.2. On the Rule of Law

A society that endorses the Rule of Law co-evolves with it, albeit through the existence of institutions (Katz, Coupette, Beckedorf, & Hartung, 2020). This does not necessarily ascribe *ex-ante* a benign role to the content of the law itself (cf. section 4.3.), yet the existence of the Rule of Law has been associated with welfare (Zerbe & Bellas, 2006), the pursuit of justice (Bastiat, 2012) and even the expression of diversity (Pirie, 2022). At the same time and without delving into the iuspositivist, iusnaturalist and neoconstitutionalist debate (Adams & Spaak, 1995; Pozzolo, 2018) the Rule of Law may be linked to moral considerations as well (cf. Vermeule, 2022). The renowned Letter from Birmingham Jail of Martin Luther King Jr (1963) illustrates the complexity of the matter: "One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that 'an unjust law is no law at all'."

The Rule of Law[5], seen from different angles as a 'historical ideal' (Fallon, 1997), thus appears as more than a mere system of rules (Jackson, 1983), perhaps even as a functional and more complex system that generates expectations and reflects its surroundings (Luhmann, Ziegert, & Kastner, 2008). These expectations are naturally linked to economic matters. The Rule of Law is embodied, e.g. in committing to granting and enforcing stable property rights, which demands "responsible behavior" from the side of public authorities (North & Weingast, 1989). This speaks for benefits that arise when the Rule of Law is clear, i.e. the ownership of a resource and the possibility of improving it, or as Landes & Posner (2003, p. 13) term them, static and dynamic benefits, e.g. economic growth. If one cannot alienate a good, say a terrain or a merchandise, the incentive structures that arise will go against one of the essential purposes of legal institutions: reducing uncertainty (North, 1990).

The Rule of Law has been measured through different methodologies that are captured in several indices. Two visions stand out generally regarding the definition, i.e. *thin* (based on existing formal rules) vs. *thick* (based on the content and the effects of the law) (Kaufman, Kraay, & Mastruzzi, 2010). On the one hand, the *Worldwide Governance Indicators* include the Rule of Law dimension, which captures "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"

[5] For a historical account on the Rule of Law, cf. Rogge (1960), Reid (2004) and Pirie (2022)

(p. 4). On the other hand, the *World Justice Project* Rule of Law Index follows a 'thick' definition by looking, i.a. into policy outcomes, based on eight factors[6] that derive from four principles: Accountability, Just Law, Open Government and Accessible & Impartial Justice (World Justice Project, 2021, p. 14). A third index regarding the Rule of Law is included in the *International Country Risk Guide* (ICRG), which brings together twenty-two variables in three subcategories of risk (political, financial, economic). The relevant component of this index for this work is "Law and Order". The Law sub component "assesses the strength and impartiality of the legal system, and the 'order' sub-component assesses popular observance of the law" (PRS Group, 2021, p. 13).

3. An institutional framework of Public Value and the Rule of Law

Following a brief characterisation of Public Value and the Rule of Law, it is important to grasp part of the interaction between both with regards to businesses and their socioeconomic context. Economic issues and disputes have resulted in the establishment of the Rule of Law (Hayek, 1953), which aligns with economic interests having co-shaped legal institutions (Pistor, 2019; White, 1961; Beard, 1956). The Rule of Law, albeit materialised in clear and predictable property rights and the respect for justice and that which is broadly seen as socially 'good', creates Public Value and evolves within the process of institutional change (cf. North, 1981). Consider the difficult topic of expropriation and the complexities it unleashes with the following classical example. Mr. X inherited a warehouse that he is very fond of. It holds dear family memories, yet it lies at the very middle of the new planned highway. Enforcing property rights would require making expropriation impossible, yet the greater good of mobility for even more citizens and the payment of a broadly accepted (market) price, tolerates and legitimises the exception. If, however, the whims of a public authority render expropriation as a probable event with arbitrary causes and uncertain compensation mechanisms, Public Value is destroyed.

The fine line between predictable and uncertain property rights allows for an institutional framework that binds Public Value and the Rule of Law in order to deepen our understanding of the socioeconomic consequences of the contingencies of the legal system. This is e.g. where the role of transaction costs proves valuable. Note that the law itself is a transaction (Mirkine-Guétzévitch, 1949), one that naturally generates expectations. For North (1981, 1990, p. 362)

[6] The eight factors are constraints on government powers, absence of corruption, open government, fundamental rights, order and security, civil justice, criminal justice, and a ninth factor, which is not included in the aggregate scores is denominated as "informal justice" (cf. World Justice Project, 2021, p. 16)

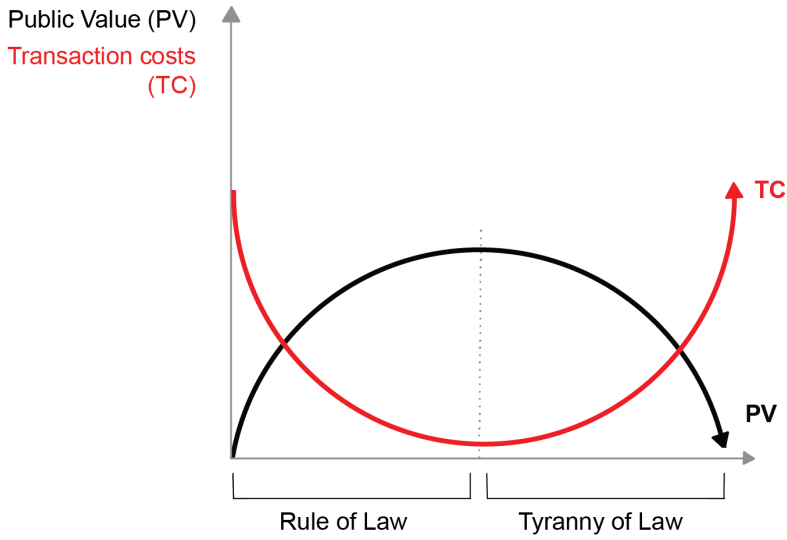

Figure 1. A framework on the Rule of Law and Public Value

Notes: As the Rule of Law advances and institutions are strengthened, hampering arbitrary decisions, Public Value increases and transaction costs sink. However, once the Rule of Law starts degenerating into the tyranny of law, transaction costs will increase and Public value will correspondingly sink. In extreme historical cases such as dictatorships and in institutionalised discrimination (e.g. apartheid), uncertainty abounds for the common denominator of the public, privilege is created for a particular group, destroying public value.

Source: Own elaboration.

transaction costs, which materialise in the inefficient enforcement of property rights, refer to measuring and enforcing agreements. This is similar to Coase's (1960) view of transaction costs as the cost of defining, enforcing and trading property rights. If the Rule of Law deteriorates, a group of citizens, large or small, bears the costs. If the Rule of Law allows for seamless transactions and relatively predictable social interactions that reflect stability and justice, then the tendency will favour Public Value creation and a reduction of transaction costs. Figure 1 illustrates this approach, positioning Public Value and Transaction Costs in the *y* axis and the dynamic state of the Rule of Law on the *x* axis.

If the law itself, driven by ideological and/or rent-seeking related behaviour becomes an instrument of Public Value destruction, one can refer to this degeneration of the Rule of Law, using Jackson's (1983) concept, as the *tyranny* of the law, which would fall into Daly's (2019) broad field of democratic decay. Although the use of the concept of tyranny was already diffuse in antiquity (cf. Coumoundouros, 2006), it is understood here following Plato's *Republic* as the absence of justice, yet specifically in the sense that rights, including those of property, are enforced in uncertain and contingent ways.

As depicted in Figure 1, Public Value is a function of the quality of the Rule of Law, which is represented, i.a. in less burdensome transaction costs. For example, in terms of entrepreneurship, this is connected with better incentives and "the realization and appropriability of related returns" (Agostino et al., 2020, p. 816). This goes in line with North (1990, p. 366), who posits that "the level of transaction costs is a function of the institutions (and technology) employed". Weakening the latter, however, is neither a simple nor a homogenous process, which calls for a clear understanding of how the Rule of Law decays. The next section introduces a second framework that characterises three manifestations of the degeneration of the Rule of Law, i.e. excessive legal-formalism, excessive discretion of law enforcement and injustice embodied in the content of the Law.

4. The degeneration of the Rule of Law in detriment of Public Value: A framework

Binding Public Value with the Rule of Law may consider the effect of transaction costs on citizens, which are, in Aristotelian terms, the *efficient cause* of any policy or public decision. The degeneration of the Rule of Law materialises in the increment of transaction costs and other socioeconomic woes, even tragedies. Three manifestations characterise the degeneration of the Rule of Law at the expense of citizens. Each one will be explained with a set of examples that illustrate the contingent nature of legal effects on citizens.

4.1. The case of extreme *legal-formalism*

The Rule of Law is hardly separable from the debate between *iuspositivism* and *iusnaturalism.* Where the former sees morals as separated from the Law, the latter sees them as inherent to it. At the same time, positivism is understood essentially as the "systematic and normal character" of the Law (Green & Adams, 2019). This, however, does not illustrate the inner workings, let alone the effects, of the Rule of Law itself, the quality of which may be affected when decisions are taken in purely *formalistic* ways. Characterising the phenomenon of *legal-formalism* thus becomes essential to understanding how the Rule of Law deteriorates at the expense of the citizen.

In Posner's (1986, p. 186) terms, there is a "fallacy in legal reasoning" when "smuggling the conclusion into the premise". For him, the problem lies in using "deductive logic to derive the outcome of a case from premises accepted as authoritative (…) in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect" (p. 181). This type of "doctrinal rigidity" (Quevedo, 1985, p. 123) has been linked to an "abusive" definition of positivism, as a "formalistic doctrine according to which the law

is always clear and, however pointless or wrong, is to be rigorously applied by officials and obeyed by subjects" (Green & Adams, 2019).

This blind and decontextualised rigor is the essence of extreme legal-formalism, which goes beyond Posner's (1986, p.184) perspective of merely having decision making based on "deductive logic". The extreme version, or to continue using Posner's words, the "pejorative" version is thus a *Weltanschauung* where "fidelity to the 'letter of the law'" (Antonov, 2021, p. 192) is central to legal decisions. As Hayek (1953) would claim, the "metalegal criteria" are abandoned, and the will of the majority becomes the sole criterion to define what is justice and injustice. It is the mechanical decision-making approach that does not necessarily regard the moral within the law nor the contingent effects of legal outcomes, or in Jackson's (1983, p. 329) words, "the tendency to prefer the letter to the spirit". This situation may be reflected not necessarily in laws deemed absurd but in the abuse of legal mechanisms. In 4th century B.C. Athenian Law, while *propria persona* trials were inexpensive, the State had mechanisms in place to stop "citizens and foreigners from abusing the legal system" (Thür, 2015, p. 39), for example imposing fines of those who dropped charges after having formally accused others. In more modern times, abuse of legal mechanisms is not hard to find. Consider the following example that is linked to football and a citizen's oversight association in Latin America.

In Colombia, constitutional rights are safeguarded with a writ of protection (*tutela*), which any citizen can file to public authorities (cf. Alemán, 2009). During the Qatar 2022 World Cup playoffs, the referee of the Brazil vs. Colombia match made a decision that upset, e.g. the Colombian Oversight Association (Red de Veedurías). This NGO used the writ of protection mechanism in order to demand the constitutional safeguard of fundamental rights, including "due process in the sports field" along with a plea to penalise the referees and the South American Football Association—Conmebol (Forbes, 2021). The case implies a social opportunity cost derived from the time that a judge must spend processing the writ of protection, which generates inefficiency, transaction costs and clutter for the judicial system, as writs of protection are mainly used for urgent health-system related issues (Lozano Rodríguez, Muñoz Muñoz, & González Martínez, 2020).

The economic dimension of extreme legal-formalism implies a paradox. In spite of the deterministic outcome that one actor may anticipate from this vision of the law, e.g. the registration of property for an entrepreneur, a legal-formalistic interpretation may lead to the *opposite* of the expectation, i.e. the registration was not carried out due to a missing document that was not deemed essential for the procedure by the entrepreneur. The example of the Interstate Commerce Commission (ICC) of the United States illustrates the point as well. For Bernstein (2008, p. 361), five words in the US Constitution, i.e. that "commerce with foreign nations *and among the several states*" (italicized by author) could be regulated, led to the creation of the Commission

in 1887, "which regulated nearly every aspect of long-range transport in the United States, corroded nearly every industry it touched, and stifled American transport innovation until it was finally abolished in 1995". The dense regulations of the Commission include, i.a. the exact salary of the Commissioners (Sec. 18) and the unlawfulness of changes in time schedule that hampered carriage continuity (Sec. 7).

Consider another case stemming from Swiss Jurisprudence, where a judge did not allow a plaintiff to submit a divorce agreement that effectively existed, as the plaintiff had forgotten to submit it in due time. Following the appeal, the decision was repealed by an upper Court, considering it "excessive formalism" (Kantongericht Basel, 2007). Increasing transaction costs derived from legal-formalistic decisions does not follow a sense of pragmatism let alone the understanding of context, experience and history (cf. Holmes, 1899). In this sense consider Code Title 7.1. Alcohol and Tobacco § 7.1-3-10-5 in the State of Indiana in the United States, where "a package liquor store's exclusive business" only includes ten items, one of which is "uncooled and uniced charged water (…)". For Robinson and McDowell (2020) of *Business Insider*, this is problematic, as it is illegal to sell refrigerated water in these stores. While this may not have a homogeneously quantifiable transaction cost for all customers, the summer may prove to be inconvenient for those willing to combine their beverage purchases in a liquor store, i.e. it is inefficient but, above all, does not provide a convincing argument.

This logic fits the seven element-characterisation of 'formalism in law' that Champeil-Desplats (n.d., p. 1754) introduces for French Law in the 20th century, which implies a) a strong focus on definitions, b) the decontextualisation of legal analysis that studies law in an isolated manner, c) the image of the world as based only on juridical categories (*pan juridisme*), d) the rationalisation or norms based on logical inference e) the view of Law as non-contradictory, f) the use of logic-deductive reasoning and g) the use of logic systemic thinking that does not necessarily include external factors. Note that this characterisation, while stemming from Civil Law, is not entirely distant from one of the ideal-types of the Rule of Law introduced by Fallon (1997, p. 16), i.e. the 'formalist' perspective. The latter refers to clarity in rules and as a logical step, in their consequences, which for legal-realists, carries the risk of overtly deterministic outcomes.

In the extreme of legal-formalism it is not the holistic consideration of justice that matters, but the wording of a certain article that need not incorporate the contingency of distinct cases, let alone any sense of pragmatism. For this reason it is inevitable to look at the figure and meaning of the decision maker, i.e. the judge, even under the heterogeneity of the Law when grasping the Civil and Common Law systems. For Posner (1986, p. 180) the task of interpretation for a judge is not the same as that of a "formalist and realist analysis", which goes in line with Kelsen's (1945, 2008) view of reducing the law to a system of

prohibitory norms and against granting judges more freedom "beyond the law" (Jackson, 1983, p. 347).

While extreme legal-formalism poses the risk of leaving the context aside and falling into what Posner (1986) called *langdellism*[7], the other side of the spectrum reflects the weakening of institutions as well, when the pragmatism that O.W. Holmes advocated is not met with a moral sense of justice. In line with Holmes's view of the Law as reflecting history, the tragedy of Nazism exemplifies this. Scheuerman's (2020, p. 13) analysis of Carl Schmitt's fascist anti-formalism shows how public value can be destroyed under the stigmatisation of formalism as a "normativistic faith". An ideal midpoint between both extremes is summarised in Llewellyn's wish that a judge have "a quantum of freedom sufficient to be just, but insufficient to be arbitrary" (Jackson, 1983, p. 335). In the business context, this is akin to the aforementioned principle attributed to Adam Smith of having not only peace and easy taxes, but also "a tolerable administration of justice" (Smith & Stewart, 1982) for which there is little guarantee under extreme legal-formalism.

4.2. Uncertainty derived from excess discretion of Law Enforcement

Excess discretion need not only concern judges but also other parties in legal decisions, such as law enforcement and the executive branch in general. If, following Montesqieu, the judge acts as "the mouth that pronounces the wording of the law" (Scheuerman, 2020, p. 22), law enforcement and other State agents execute it, yet there is no assurance for a citizen that this will be bereft of subjective interpretations and a certain level of discretion, which rekindles the idea of imperfect legal determinacy and may even embody injustice. If the latter occurs, it implies the destruction of Public Value and a violation of Dworkin and Vermeule's moral perspective of the law.

Legally relevant behaviour is subject to psychological principles (Hertwig, 2006), which spell out an uncertainty of expected outcomes and rekindle Simon's (1957) concept of 'bounded rationality'. Consider the example that Hertwig (2006) offers, based on the experiment of Lindsey, Hertwig and Gigerenzer (2003). Lawyers were asked about uncertainties in DNA fingerprinting, using natural frequencies (e.g. 10 out of 100) on the one hand, and conditional probabilities (e.g 10%) on the other. The results indicate that the groups that saw the data as conditional probabilities tended to consider a defendant more likely to be guilty, resulting in an unjust outcome for the innocent defendant of the experiment.

[7] Based on the work of C. Langdell, former Dean of Harvard Law School. Posner (1986) considered langdellism fallacious, while Holmes saw his work as narrow-minded. Twining (1973) refers to Langdell's "true lawyer" as one who masters and applies legal principles, and quotes Pollock in a letter to Holmes that describes a further view on Langdell's work "he is all for logic and hates any reference to anything outside of it" (p. 277, footnote), 58.

It is not the discretion itself of law enforcement or, generally, agents of the State, that one can associate with the deterioration of the Rule of Law, rather its contingent and uncertain effects that can harbour injustice for citizens. This rekindles Hamburger's (2014) analogy regarding the unlawfulness of administrative law: he presents it as off-road driving in the sense that the government has normal lawful roads, but given its power, resorts to off-road driving, going against the people and even the Constitution, yet the problem for him is not the content or the "substantive policy" (p. 3), but the implications of binding legislative and judicial powers. The scope of this analogy is of course limited to legal systems in which deference is systematically practiced, yet its critical essence about the reach of the executive branch sheds light on what excessive discretion can entail for citizens, albeit even in the concrete scope of law enforcement.

A law enforcement agent may look away when a mother slightly speeds beyond the limit in the case of her son's emergency, resulting in pragmatism that is hardly generalisable in all speed-limit violations. Whether this decision affects public value negatively (the agent sets a negative precedent for further infringements) or positively (a mother is able to rescue her son), is also a philosophical dilemma that this work does not address extensively. The issue at hand, however, is that discretion of State agents *can* serve injustice and the augmentation of transaction costs for citizens and businesses.

As North (1990, p. 54) posits, enforcement, albeit generally enforcing property rights, is neither perfect not constantly imperfect, and one way of understanding its imperfection has to do with the utility function of agents, which influence outcomes. Consider the case of a legal cannabis company established in Europe,[8] which collides against local law enforcement given that the latter has an incentive to show results in the fight against narcotics. The irregular seizure of the company's inventory translates into uncertainty and higher transaction costs, which depend not on the legislator, but on the discretion of law enforcement that sees a loophole in the law. This example mirrors Hayek's (1953) concern about the abandonment of justice and the decline of the Rule of Law:

> (...) in the use of its coercive powers, the discretion of the authorities should be so strictly bound by laws laid down beforehand that the individual can foresee with fair certainty how these powers will be used in particular instances; and that the laws themselves are truly general and create no privileges for class or person because they are made in view of their long-run effects and therefore in necessary ignorance of who will be the particular individuals who will be benefited or harmed by them (online).

The Rule of Law deteriorates as law enforcement discretion results in contingent decisions that may often deviate from a sense of justice and hamper the reduction of transaction costs for citizens and businesses. In Ferguson's (2012)

[8] Example derived from author's current research.

the *Great Degeneration*, the Rule of Law transitions into the Rule of Lawyers in the midst of institutional decay, bringing back Hayek's (1953) imaginary of the lawyer as a technician that need not ask "whether a law conforms to general principles of justice". As the Greek journalist Mandralevis (2006) noted regarding censorship law, "it seems clear that laws exist to adorn the libraries of lawyers".[9] If law enforcement agents have incentive structures that align with weakened institutions and even rent-seeking behaviour, then the Rule of Law does not fulfil its purpose and both citizens and businesses must devote more efforts and resources to solving legal disputes.

4.3. Injustice embodied in the content of the Law: *absurda Lex*

The third manifestation of the decay of the Rule of Law occurs when the content of the law itself is perceived as unjust and materialises in public value destruction. In other words, the Rule of Law degenerates when the Law is abused as an arbitrary instrument of ideology or personal gain that thwarts the pursuit of a broadly accepted common good, resulting in transaction costs and even tragic events. For Jackson (1983, p. 327), "no one ever doubted that law could be made an instrument of tyranny", and following Holmes's (1881) interpretation of the life of law being not logic but experience, a wide array of historical examples illustrate this point, two of which are the infamous Nuremberg Laws of 1935 and the 1913 Land Act in South Africa, i.e. instruments of racism and discrimination.

When injustice is embodied in the law, it contradicts the essence of the Rule of Law and distances itself from the conception that the law is an instrument of freedom. The latter is represented in Cicero's maxime in *Pro Cluentio* (Sect. 146)*:* "We are all servants of the law, magistrates, interpreters of the laws, judges, and finally we are all slaves of the laws so that we may be able to be free" (*Legum ministri magistratus, legum intepretes iudices, legum denique idcirco omnes servi sumus ut liberi esse possimus*), which aligns with the idea of containing a Republic *within* the boundaries of the law (*civitate quae legibus contineatur*). For Locke (n.d., Chapter 6), the objective of the law is not the mere restriction or liberty, but its preservation. The latter speaks for a broad conception of justice, tied to freedom and to the citizen's tranquillity that authorities will act towards a common good.

The World Justice Project (2021) consolidates the idea of the common good in two principles, i.e. that the exercise of power of State agents be limited and that the law serve public interest. Aligned with this, yet seventy years before, Hayek (1953) expressed a similar idea when positing that the Rule of Law is ultimately that "the law should be an instrument to be used by the individuals for their ends and not an instrument used upon the people by the legislators". This is why the

[9] Original text: "Προφανώς οι νόμοι υπάρχουν για να κοσμούν τις βιβλιοθήκες των νομικών".

Law, in its purely formalistic facet, is vulnerable to instrumentalisation by ideology. The Law becomes thus a means to an end (Horwitz, 1971), albeit any end that a political movement or a ruler deems legitimate. Ironically, Carl Schmitt (1932, p. 53), who laid the juridical foundations of Nazism, referred to the sovereignty of Law as the sovereignty of the people who create the norms. When they create the ruling of a 'higher order' (*Herrschaft einer „höheren Ordnung"*), they use it to govern citizens of a lower order. That the tragedy of the holocaust symbolises this vision was clear to Hayek, who wrote of the decline of the Rule of Law and took the example of how Nazism seized power through the discretion given to courts, destroying thus the *Rechtstaat*, i.e. the State of Law.

The Law thus appears as a non-neutral artefact in human history, one that can serve the public good, yet not necessarily one that will. Pistor's (2019) research on how the Law contributes to creating more inequality through 'codes' is yet another example of the malleability of the law. Another example is how the Law is abused in order to capture the State by unbalancing the separation of powers, as has happened in Poland after 2015, where a ruling party was able to pack the National Council and the Constitutional Tribunal by exploiting constitutional flaws (Sweeney, 2018). This paves the way to cases of abuse or even those of absurd laws, i.e. those that go against both the common good and common sense, while possibly serving private interests or even the lack of pragmatism and the drive for ignorance.

Consider the example of feudalism, where sumptuary laws forced the population to wear specific clothes based on income and social status, leading to the suffocation of an economy "whose primary manufactured product was textiles" (Bernstein, 2004, p. 29) or the era of French protectionism under Colbert, where "one particular type of cloth was to contain 1.376 threads; another 2.638. Specific widths were demanded for each type as well. The regulations pertaining to cloth dyeing alone ran to 317 articles (...) Colbert's ministry published forty-four codes pertaining to different industries and appointed a corps of inspectors to assure that they were followed to the letter. (...) Colbert's system (...) choked off innovation and provided almost endless opportunity for corruption" (p. 241). The law is thus no guarantee of justice, and may even serve the purpose of preserving injustice and social dogmas that go against public value. As Meynhardt (2009, p. 213) concludes, the "Eigenwert" of the law resides in the "perception of people evaluating their experience with public action". The law is thus *per se* indeterminate with regards to public value and its contribution to the Rule of Law is contingent.

Conclusions

This work set out to bind Public Value and the Rule of Law in a first framework, then characterising, in a second framework, three manifestations of how the

Rule of Law decays and how this creates socioeconomic outcomes of different nature, albeit bound to uncertainty for businesses and citizens. Both perspectives are thought to contribute to the continuation of theoretical developments of Daly's (2019) concept of democratic decay, especially in the field of economics and business research. As the world progresses in uncertain contexts and democratic institutions are oftentimes at risk, having deterministic and formalistic conceptions of something as malleable as the law proves inconvenient for the construction of Public Value.

Signalling the flaws in the Law, its possible instrumentalisation, and the myriad of outcomes that businesses and citizens may encounter through its interpretation, benefits further research. The framework provided in this work serves as a foundation for future contributions, yet it is limited to a theoretical and interdisciplinary process of thought that is not presented with specific empirical hypothesis testing and data. This first limitation connects with a second issue. The details and structures of every legal system, let alone its informal institutions, to use North's words, may impact the three manifestations and their outcomes in ways that cannot be covered in the scope of this paper. Third, differences in Common Law, Civil Law and even Germanic Law may blur the concrete application of the presented frameworks, as the discretion of different branches and even the nature of legal-formalism cannot be understood in the exact same way in each system. However, derived from any analysis, it is worth delving into the problem of transaction costs and how Public Value, i.e. the common good, is affected by legal decisions. A more profound understanding will thus depend on specific analyses, case studies, etc, which are based on concrete historical and cultural contexts, shedding light on the complexities of the interaction between the Law, citizens, institutions and the economy.

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