Rule of Law without God?

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Rule of Law is usually interpreted as formal legality that is that government must act by law which must be prospective, general, clear, public and relatively stable with necessary mechanisms including an independent judiciary, open and fair hearings without bias, review of legislative and administrative officials and limitations on the discretion of police to insure conformity to the requirements of the rule of law [1].

The concept of the Rule of Law has been challenged on the indeterminacy of law, claiming that neutrality and impartiality of law is an intentional fiction imposed by authority to make their authoritative rule invisible for the ordinary citizens.

The legal indeterminacy thesis is arguably derived from moral pluralism which justifies and supports legal positivism.

So, if we accepted natural law theories that 1) there is objective moral truth, 2) the truth of legal proposition depends on moral propositions, it seems that we could solve this dilemma [2].

However, in my account, the fundamental issue is not disagreement between legal positivists and natural law theorists, but the underlying premise behind the concept of Rule of Law, presumption of certain conception of social moral order shared by both schools.

In my account, both legal positivists and natural law theorists in the West shares the common premise, what I call "transcendentality of moral source".

In this presentation, I examine this premise of the concept of Rule of Law framed and sustained by Christianity in its broadest sense in the Western Europe, and examine

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[1] Brian Z. Tamanaha, *On the Rule of Law-History, Politics, Theory*, Cambridge University Press, 2004

[2] Michael S. Moore, Law as a Functional Kind, in Robert P. George ed., *Natural Law Theory*, Oxford University Press, 1992

alternative approach which supports the legitimacy of Rule of Law.

First, I revisit the concept of rule of law, referring to Brian Z. Tamanaha, Ronald Dworkin and Joseph Raz to sort out their common ground, moral pluralism.

Second, I scrutinize the hidden premise of the concept of Rule of Law, transcendentality of moral source embedded in the Western Thought, referring to Ronald Dworkin, Charles Taylor, Giorgio Shani and David James Stuart.

Third, I introduce Jacques Maritain's critical realism, comparing with the contemporary "speculative realism" of Markus Gabriel and Steven Shaviro and, referring to Giordano Bruno and Costas Douzinas, present a non-transcendent/immanent conception of moral source and examine how the theory could justify the legitimacy of Rule of Law.

1. Rule of Law

There are two types of the conception of rule of law, one is thin or procedural and the other is thick or substantive.

In Tamanaha's account, the procedural conception of the rule of law is divided to the three subcategories[3];

1) Rule by law: government must act by law,

2) Formal legality: government must act by law which must be prospective, general, clear, public and relatively stable with necessary mechanisms including an independent judiciary, open and fair hearings without bias, review of legislative and administrative officials and limitations on the discretion of police to insure conformity to the requirements of the rule of law,

3) Democracy + formal legality: government must act by law authorized by the consent of the people(governed) in addition to the requirements mentioned in 2).

Tamanaha referred to Jurgen Habermas, who held that given the loss of faith in natural law and the fact of the moral pluralism, liberal democracy is the only legitimate arrangement, and commented that democratic mechanism in a society without democratic tradition might be utilized for claiming the legitimacy for advancing a particular agenda of subgroups and that democratic system can greatly swing in public mood and attitude and may be less certain and predictable and more tyrannical than a stable authoritarian regime without the rule of law.

Tamanaha, then, presented the three substantive versions of the rule of law[4];

4) Individual rights: in addition to the elements of the formal rule of law, individual rights are added,

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[3] B. Z. Tamanaha, *On the Rule of Law-History, Politics, Theory*, pp.91-101.

[4] ibid, pp.102-113.

5) Right of dignity and/or Justice: in addition to 4), it assumes that individual rights should be preserved beyond the reach of the legislature and the right of dignity could be even beyond the constitutional amendment,

6) Social Welfare: social welfare rights are added to formal legality, individual rights and democracy.

Tamanaha, referring to Ronald Dworkin as a proponent of the substantive version 4), pointed out its defect that what individual rights entail could not be determined without controversy and consideration of such disputes by the judiciary may undermine the democracy as the self-rule, one of the elements of the substantive version of the rule of law[5].

In this connection, Joseph Raz also emphasized that publicly promulgated, principled and reasoned legislation is possible only in countries suitable for democratic government. This is because it requires a culture of restraint and a spirit of compromise for the minority to be subject to policies against their intents and benefit and for the majority to refrain from disregarding the minority's interests and beliefs.[6]

It seems both Tamanaha, Habermas, Dworkin, and Raz assumes that public faith in natural law is gone and "Reason Alone" could secure neutrality and impartiality of law through rational deliberation in the public sphere.

In my account, the fundamental background ideology behind the challenge of the legal indeterminacy thesis against the concept of Rule of Law is this "Reason Alone" tradition.

Taylor insists that the distinction in rational credibility between religious and nonreligious discourse seems to have no reasonable foundation, which is supposed by (a) nonreligiously informed reason, which Taylor calls "Reason Alone," can legitimately satisfy any honest, unconfused thinker and (b) religiously based conclusions will always be dubious and only convincing to people who have already accepted the dogmas in question[7].

In Taylor's account, this belief of "Reason Alone" is one of the fruits of the Enlightenment myth in the West, which holds that "Reason Alone" could provide us truths in the moral-political realm as the realm of natural science.
In Taylor's account, this myth has developed among the three moves: (1) the principle of self-sufficient reason; (2) the model of natural science; (3) the modern post-Grotian

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[5] ibid, p113.

[6] Joseph Raz, the Politics of the Rule of Law, *Ethics in the Public Domain*, revised edition, Clarendon Press, 2001, 370-378, p.377.

[7] Charles Taylor, Die Blosse Vernunft ("Reason Alone"), *Dilemmas and Connections*, The Belknap Press of Harvard University Press, 2011, p.328

understanding of society as made of individuals, where good order demands that their relations conduce to mutual benefit[8].

Taylor points out the difficulty of the idea of "Reason Alone":

a. There is no such set of timeless principles that can be determined, at least in the detail they must be for a given political system, by pure reason alone;

b. Situations differ very much, and require different kinds of concrete realization of agreed general principles, so that some degree of working out is necessary in each situation;

c. It follows that some supposedly higher authority need to dictate the principles, which will violate the right of all spiritual families to be heard and included in the ongoing determining process on its political identity and the exact regime of rights and privileges;

d. It leaves us very often with difficult conflicts and dilemmas between basic goals[9].

Taylor holds that we need to recall the fundamental goal of state neutrality which is, in his account, a response to diversity that require equal treatment of religious and nonreligious discourse in the public space and for this end, contemporary states, particularly in the West, need to redefine their historical identities including the one based on the myth of secularization.

I will get back to this point at the 3rd section.

Beforehand, I turn to Ronal Dworkin to delve into and articulate the common premise between theist and atheist in the West.

2. Transcendent source of morality

In his posthumous work[10], Dworkin presented his idea about religion. In his account, religion is deeper than God and a deep, distinct, and comprehensive worldview. More importantly, Dworkin held that the conviction that a god underwrites value presupposes a priori commitment to the independent reality of that value[11].

Dworkin assumes that it is this a priori commitment, a fundamental religious impulse, that has generated two distinct convictions, a belief in an intelligent supernatural force-a god and a set of diverse ethical and moral convictions which include atheistic ones[12]. Dworkin

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[8] ibid, p.343.

[9] CharlesTaylor, Why we need a radical redefinition of secularism?, in Eduardo Mendieta ed., *The Power of Religion in the Public Sphere*, Columbia University Press, 2011, pp.34-35.

[10] Dworkin, *Religion without God*, Harvard University Press, 2013.

[11] ibid, pp.1-2.

[12] ibid, p.146.

referred "Hume's principle" which insists that one cannot support a value judgement just by establishing some scientific fact about how the world is or was or will be and insisted that we need a background value judgements that shows why the scientific fact is relevant and has certain consequence. In his account which is an extended form of his interpretivist conception, those background value judgements can be defended only within the overall scheme of value[13].

In order to attest his argument, he cited Thomas Nagel's analysis. Nagel contrasted the theory of evolution by random mutation and natural selection and the one of intelligent design which assumes divine purpose or divine design functioning behind biological evolution and held that the scientifically ungrounded antecedent belief of scientists on the possibility that a nonphysical being should intervene in the natural order affects their rational interpretation of the same empirical evidence[14].

Dworkin concluded that the two assumptions – that a god does or does not exist – seems on a par from the perspective of science[15].

Arguably, Dworkin tried to expand his interpretivist conception so that religious and non-religious discourse could be addressed in the same ground.

Dworkin held that both theist and atheist convictions are rooted in the fundamental human aspiration and whether he/she would choose to be either theist or atheist merely depends on his/her antecedent belief, hoping to provide the basis for reconciling contemporary battles between theists and atheists[16].

In Dworkin's account, the fundamental human aspiration of theist and atheist is prior to their scientific judgement and in that sense, beyond "Reason Alone."

In other words, if we accept Dworkin's argument, it follows that fundamental human belief is beyond rational decision, which means that the background culture Dworkin inferred and developed his interpretivist theory presupposes certain distinction between "immanence" and "transcendence".

As H.L.A. Hart commented, Dworkin's interpretivist's conception needs distinct boundary of value set on which their interpretation relies for articulating what he/she considers the best account and in Dworkin's case, it is the legal culture of Anglo-American Law[17].

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[13] ibid, pp.27-29.

[14] Thomas Nagel, Public Education and Intelligent Design, Philosophy and Public Affairs 36, No.2, 2008, p.188, p.194, p.197.

[15] Dworkin, *Religion without God*, pp.127-128.

[16] ibid, *Religion without God*, pp.146-147.

[17] H.L.A.Hart, Postscript in *the Concept of Law*, third edition, Oxford University Press,

In this connection, Giorgio Shani holds that "the possibility of transcendence through an external form of authority, whether it be God, the Messiah or the state" is the major characteristics of the Judeo-Christian tradition[18].

Taylor also stressed that the distinction transcendent/immanent is peculiar in the religious discourse in the West or Latin Christendom. In his account, the notion of "immanent", an idea that things in Nature could be explored and explained in its own terms without referring to any "transcendent" entities, was the great invention of the West with post-Galilean science as it secures space to infer "a transcendent Creator" beyond "immanent"[19].

However, this issue needs more subtle examination and explanation.

In the modern "secularized" world, whether the West or the other world, belief in a transcendental Creator is not a universally acceptable option.

Taylor also explicitly explained his version in contrast with Habermas. Taylor holds that Habermas' speech model cannot account for "the search for moral sources outside the subject through languages which resonate within him or her, the grasping of an order which is inseparably indexed to a personal vision"[20]. In Taylor's account, transcendental moral sources can be reached only through personal resonance.

Now, for advancing this scrutiny, I would pose one question if the distinction transcendent/immanent in Taylor's account is an only possible option.

David James Stuart claims that Taylor seems to ignore the following possibility[21].

Someone who rejects the notion of God qua metaphysical super-agent can still be a Christian "believer."
Such a person can experience fullness as coming from "without," as a gift.

David seems to take "deep ecology" as such a possible ideology whereas Taylor explicitly rejected it as he presented "deep ecology" as a mode of unbeliever of transcendence. In

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2012, p.240.

[18]   Giorgio Shani, *Religion, Identity and Human Security*, Routledge, 2014, p.3.

[19]   Charles Taylor, *A Secular Age*, the Belknap Press of Harvard University Press, 2007, pp.14-16.

[20]   Charles Taylor, *Sources of the Self – The Making of the Modern Identity*, Harvard University Press, 1989, p.510.

[21]   David James Stuart, "Transcendence" in A Secular Age and Enchanted (Un)Naturalism, in Charles W. Lowney ed., *Charles Taylor, Michael Polanyi and the Critique of Modernity*, Palgrave Macmillan, 2017, p.103.

Taylor's account, this ideology finds the moral source either in Nature, or in our own inner depth, or in both, which emerges from the Romantic critique of disengaged reason, and does not accept transcendental source of morality[22].

So, in my account, what we need to find out as an alternative conception of source of morality must overcome the dichotomy transcendent/immanent.

Now, I turn to Jacques Maritain, "Speculative Realism" and Giordano Bruno.

3. Alternative conception of morality

In Maritain's theory, the essence of Man, which is equivalent to the nature of Man, is embedded in human. The Natural Law could not be conceptualized a priori and would develop through our social experience which triggers the essence of Man to disclose certain norm within the unique context of each stage of history.

In order to examine and recast Maritain's theory of natural law and human rights, I turn to Immanuel Kant and look into his theory of rights.

It is Kant who articulated the dual distinction of human rights in terms of Human Freedom. Sousuke Amitani highlighted Kant's distinction between the right of humanity (Recht der Menschheit) and the right of persons (Recht der Menschen), insisting that there is misidentification of the two concepts of right[23].

Referring to Kant's division according to the objective relationship of law to duty, Amitani pointed out that "the right of humanity in our own persons" corresponding to "the end of humanity in our own persons", in contrast with "the right of persons" corresponding to "the ends of persons", means that person as homo noumenon exists as a perfectly free being under moral laws defined by rationality. In Amitani's account, the right of humanity or personality is the most fundamental as underlying foundation of the right of persons. Of course, humanity

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[22] C.Taylor, *Sources of the Self*, p.9.

[23] **In the theory of duties, persons [der Mensch] can and should be represented from the point of view of the property of their capacity for freedom, which is completely supersensible, and so simply from the point of view of their humanity considered as a personality, independently of physical determinations (homo noumenon). In contradistinction to this, persons can be regarded as subjects affected by these determinations (homo phaenomenon). Accordingly, [the ideas of] just and end, which are related to duty under these two aspects, will in turn give us the following division.** Immanuel Kant, Division of the Metaphysics of Morals in General II, *Metaphysical Elements of Justice*, 2nd edition, translated by John Ladd, Hackett Publishing Company, Inc., 1999, 25(239)

is supersensible and a purely imagined notion, but necessarily and practically deduced from the nature of homo noumenon as a perfectly rational being who is able to create and adhere to moral laws[24].

Amitani's argument highlights the major characteristic of Kant's rights theory.

Kant takes it as granted that human could not grasp things apart from our schema and humanity or personality is supersensible and only deductable from the concept of homo noumenon.

Steven Shaviro, an advocate of the contemporary philosophical current "Speculative Realism," holds that speculative realists all challenge "correlationalism", a doctrine that human cannot grasp things independent from our cognition[25] despite of their difference in theoretical formation.

Shaviro included in this school of "correlationalism", Descartes, Lock, Kant, Wilfred Sellars and Ray Brassier[26].

Shaviro questioned "correlationalism" if it is only an anthropocentric prejudice to assume that things cannot be lively and active and mindful on their own without us (human) [27].

In contrast with "correlationalism", Maritain's "critical realism" seems to resonate with the contemporary speculative realists as follows;

If, with Aristotle and St. Thomas, things and object are distinguished in this fashion but not separated, and if, while maintaining their unity, allowance is made for what comes from the thing and for what comes from the mind in knowing, then it is clear that from the things which exist outside of our mind and constitute what may be called the universe of existence, the mind draws forth a world of objects composed of abstract and universal concepts which we may term the universe of intelligibility of human knowledge. And that universe is, on the one hand, detached from the universe of existence, in order that it may be known. It is, on the other hand, identified with it, in order that it may itself subsist[28].

If we recall Markus Gabriel's Neo-Existentialism, a plural ontology, that we belong to many

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[24] Sousuke Amitani, *Ideal of Republic-Immanuel Kant and the polemic on "theory and practice" in the late 18th century Prussia*, Hosei University Press, 2018(Japanese), 104-120.

[25] Steven Shaviro, *The Universe of Things*, University of Minnesota Press, 2014, 5-6.

[26] Ibid, 2.

[27] Ibid, 77.

[28] Jacques Maritain, *The Degrees of Knowledge*, University of Norte Dame Press, 1995 (first published in 1959, Charles Scribner's Sons), 139

fields of sense (FOSs) in which we need and use different languages to describe things properly according to their distinct characters and that some FOSs could be accounted for objectively while other FOSs could be described only with human engagement, we immediately notice Gabriel's theory is very similar to Maritain's ontological and epistemological position.

In Shaviro's account, value and sense are intrinsic to all entities and thereby immanent to the world as it actually exists[29]. He insists that if we accepted the ontological dignity of things, we would have to admit things are all, at least to a certain extent, vital, active, and creative[30]. Shaviro's proposition reminds us of Maritain's theory of the Natural Law that the essence of Man is embedded in human and the Natural Law could not be conceptualized a priori and would develop through our social experience which triggers the essence of Man to disclose certain norm within the unique context of each stage of history.

Expanding Maritain's formation, If we admitted that not only human but also other "things" have their unique essence, we could accept that other "things" have their rights, proportional to their context and existential experience.

For example, I take up the recent movement for the rights of river.

Since Christopher Stone presented the idea of "environmental personhood" in 1974[31], the right of river has been recognized in increasing number of countries including New Zealand, Ecuador and Bangladesh[32].

In this connection, the Universal Declaration of the Rights of the Rivers recognizes that all rivers are; 1) Living entities, 2) Entitled to fundamental rights, and 3)Entitled to legal guardians[33].

Ashley Westerman quoted Chris Finlayson, a former New Zealand attorney, saying that the most difficult part in passing the legislation was getting New Zealand's European-descendant

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[29] S.Shaviro, *The Universe of Things*, 77.

[30] Ibid, 62.

[31] Christopher D. Stone, *Should Trees Have Standing?: Law, Morality, and the Environment*, Oxford University Press, 2010(first published in 1972).

[32] Ashley Westerman, "Should Rivers Have Same Legal Rights As Humans? A Growing Number Of Voices Say Yes", NPR, August 3rd 2019, <https://www.npr.org/2019/08/03/740604142/should-rivers-have-same-legal-rights-as-humans-a-growing-number-of-voices-say-ye >accessed April 4th 2021.

[33] The Universal Declaration of the Rights of the River, <https://www.rightsofrivers.org/ >accessed April 4th 2021.

majority "to see the world through Maori eyes".[34]

For many years, we have been accustomed to the legalistic view of seeing nature as human owned property in which human has full authority to protect or exploit it at their discretion. However, if we accept that human is only a part of nature and every"thing" has own essence, dignity as the foundation of rights, we would come up with a completely different philosophy of rights which needs different ontology, epistemology and moral philosophy.

Now, let's come back to Charles Taylor and David James Stuart.

Taylor insisted that the fundamental goal of state neutrality which is to secure diversity by equally treating religious and nonreligious discourse in the public space and the Western contemporary states need to reexamine their "myth of secularization" based collective identity. As David pointed out, Taylor seems to overlook possibility of the moral source in Nature that doesn't ignore "transcedentality" of moral source but overcome it.

In my account, Giordano Bruno already presented an alternative outlook of the moral source in Nature[35].

God is totally and comprehensively infinite because not only is He without any boundary or limit, but also each of His attributes is one and infinite.

God is infinite because each part of Him contains and comprehends infinity and totality in contrast to the infinity of the universe, which is only infinite in total, but not in each of its parts (if it is even possible to say "parts" with reference to an infinite whole).

Following Maritain, Shaviro and Bruno, if we accept that not only human but also other "things" have own essence and they are triggered through interaction with each other to disclose certain rule/norm within the unique context of each stage of history, we could reach a non "transcendent/immanent" moral theory.

In my account, Taylor also examined this position when he studied Hegel, but overlooked another plausible position.

He concluded that Hegel's position was in between theism and some form of naturalism or pantheism[36].

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[34] Ashley Westerman, "Should Rivers Have Same Legal Rights As Humans? A Growing Number Of Voices Say Yes".

[35] Giordano Bruno, *On the infinite the universe and the worlds*, translated and introduced by Scott Gosnell, Huginn, Munnin & Co.,Publisher, 2014, p.50.

[36] Charles Taylor, *Hegel*, Cambridge University Press, 1975, p.102.

Hegel did use the term 'pantheism', to apply to a position which indiscriminately attributed divinity to finite things. In this sense Hegel was not a pantheist. The world isn't divine for him, nor is any part of it. God is rather the subject of the rational necessity which manifests itself in the world.

In my account, an idea of infinite divinity manifested in the world through finite things as a part of it looks very possible and would lead up to a different mode of "Natural Law" theory.

This "Natural Law" could not be conceptualized a priori and would develop through interaction between "things" including human which triggers the essence of "things" to disclose certain rule/norm within the unique context of each stage of history.

Therefore, we could not deduct concrete norms from fixed principles but need to examine and develop norms at each stage of history in each context.

Jacques Maritain once highlighted the paradox of human rights.

Rational justifications are indispensable and at the same time powerless to create agreement among men[37].

In his account, human rights have two dimensions, the underlying foundation/justification and legal norms as highlighted in the drafting process of the Universal Declaration of Human Rights.

I am fully convinced that my way of justifying belief in the rights of man and the ideal of liberty, equality and fraternity is the only way with a firm foundation in truth. This does not prevent me from agreeing on these practical tenets with those who are convinced that their way of justifying them, entirely different from mine or opposed to mine, in its theoretical dynamism, is likewise the only one that is based on truth[38].

Maritain's statement was made, following his observation that we could practically agree to the various rights as stipulated in the Universal Declaration of Human Rights although we could not accept others' underlying foundations/justifications from which such agreements were derived.

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[37] Jacques Maritain, *Man and the State* (first published in 1951), the Catholic University of America Press 1998, p.77.

[38] ibid, p.78.

Maritain's paradox could be solved by either his "Natural Law" theory or my revised version. Universal agreement to "practical conclusions[39]" in the Universal Declaration of Human Rights attests our common belief in existence of "universal morality", which Maritain called "Natural Law" although it could not be conceptualized a prior and would develop differently in each context at each historical stage and it can be named and formulated differently.

However, the recent disruptive technological innovation is redefining the meaning of legal personhood. Costas Douzinas holds that technologies don't divide persons from things any more and are giving personhood to actants and hybrids, androids and replicants, computer programs and animals, and depriving specific categories of humans from consolations[40].

In addition, there are non-Western and non-Abrahamic faith oriented societies where faith constitutes an essential part of daily life, but has no transcendental ideology like the Judeo-Christian tradition in the West[41]. So, non-Western and non-Abrahamic faith is inevitably transformed and loses its essential cores through translation process which makes them incomprehensible in the political public forum framed predominantly in the Western tradition. My version might better explain the expansion of categories of legal personhood having been given to "things" other than human and secure space for non-Western and non-Abrahamic morality in parallel with the Western value system.

Of course, my proposition is very preliminary and needs more in-depth examination.

4. Conclusion

In the first section, I took up the concept of rule of law, referring to Brian Z. Tamanaha, Ronald Dworkin and Joseph Raz and identified their common ground, moral pluralism.

In the second section, I highlighted the common premise of the morality in the Western thought, distinction transcendent/immanent, and suggested a plausible overlooked option, referring to Ronald Dworkin, Charles Taylor, Giorgio Shani and David James Stuart.

In the third section, I introduced Jacques Maritain's critical realism and highlighted its resonance with the contemporary "speculative realism" of Markus Gabriel and Steven Shaviro and, referring to Giordano Bruno and Costas Douzinas, presented a non-transcendent/immanent conception of moral source and examine how the theory could justify the legitimacy of Rule of Law.

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[39] Maritain called each article in the Universal Declaration of Human Rights "practical conclusion". ibid, p.76

[40] Costas Douzinas, The Radical Philosophy of Rights, Routledge Taylor & Francis Group a GlassHouse Book, 2019, p.21.

[41] Giorgio Shani, *Religion, Identity and Human Security*, p.57.

My proposition is very preliminary and needs further examination in historical scrutiny and philosophical articulation.

I only hope my presentation would inspire further exploration for common ground/framework in the radically diversifying contemporary moral outlooks.

[Reference]

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