

*The Rule of Law: Pasts, Presents, and a possible Future.*¹

Martin Krygier

The rule of law is today *so totally* on every aid donor's agenda that it has become an unavoidable cliché of international organisations of every kind. More generally, praise for it has infiltrated contemporary political moralising virtually unopposed. It might not do much to quicken the pulse, but it is prescribed for a vast array of other problems. This is a relatively recent occurrence (Krygier 2014), which one would not have predicted as recently as the 1980s – I know; I didn't. If I'd known the stocks of rule of law would soar as they have, I would have printed money, instead of mere words, to invest in it. But I had no inkling I was talking up a goldmine.

This has changed so dramatically, that in virtually every introduction to the subject, the rule of law logo-cliché has come to be joined by three supplementary clichés, meta-clichés as it were, ritual observations about cliché no.1. The first is evidenced in the preceding paragraph: everyone who writes about the rule of law begins by noting its unprecedented voguishness. Second is the observation that, along with popularity has gone promiscuity. It has a huge array of suitors around the world, and it seems happy to hitch up with them all. That has in turn resulted in a third predictable adornment of every contemporary article on the subject: the rule of law now means so many different things to so many different people, it is so 'essentially contested' (see Waldron 2002) and likely to remain so, that it is hard to say just what this rhetorical balloon is full of, or indeed where it might float next. These clichés off their chests, people continue to blow warm air into 'it'.

Its recent rise from parochial and controversial political and legal ideal to universal international slogan has, then, given the rule of law a great boost in brand recognition. It has added less, actually nothing, to the clarity of the concept, which was, in any event, never its strongest suit. Indeed its now mandatory rhetorical presence has rendered increasingly murky what the concept might mean, what the phenomenon might be, and what it might be worth. This fluidity might even be part of its charm to those who deploy it (Chesterman 2002, 2; Rajagopal 2008, 1359; Security Council Report 2011, 13), but it has a price. Like the mission statements of many contemporary universities, the term threatens to become simultaneously compulsory and empty of significance.

Can anything be done about that? I hope so, since I take the phrase to point to important and enduring issues of politics and law. This paper seeks to defend that claim in a deliberately unoriginal way, by exploring some ageless intimations of old concerns. It identifies two venerable themes, related to each other as vexing problem and potential solution, namely arbitrary exercise of power, and its institutionalised *tempering*. These date from well before the rule of law became an economist's and aid worker's cliché. They might usefully inform present conversations, that instead often go on in ignorance of them. The

¹ The first draft of this paper was delivered at the inaugural INFAR conference: Changing Narratives of the Rule of Law, Erasmus University Rotterdam, 28-29 January 2016. This is still a draft, not to be cited, quoted, etc., without author's permission

paper then moves to some past experiences with and without the rule of law understood this way. It then goes normative, to suggest the ideal of the rule of law is a THOROUGHLY GOOD THING, even if not every invocation or even application of it is. The penultimate section raises some normative and sociological criticisms of current discussions, to do with their inadequate treatment of ideals and contexts respectively. The paper concludes with two suggestions about future directions: one a call for a social science that doesn't exist, and the other a timid suggestion that it might be time to go beyond the rule of law, in order to pursue its own ideals.

1. 'THE PURSUIT OF INTIMATIONS' (Oakeshott, 1991, 66-69)

The English phrase 'the Rule of Law' was made famous and influential by the constitutionalist, Albert Venn Dicey, at the end of the nineteenth century, to capture 'a trait of national character which is as noticeable as it is hard to portray' (Dicey 1982, 109). There has been some discussion about whether he coined the term for this purpose or inherited it: from nineteenth century English contemporaries (Arndt 1957), from Harrington's 'empire of laws, and not of men' in the seventeenth century; from Aristotle's preference for 'the rule of the law' over 'that of any individual'; from Montesquieu, who had nice things to say about the English (or at least their laws), or from the many other available sources that were nourished by and in turn fed the traditions of ideas and practices which began long before Dicey and some of which he came to draw upon and then influence.

On their own, the 'literal sense' (Raz 1979, 213) of the phrase won't take you far. That track, as Jeremy Waldron (2012, 8) and Julian Sempill (2016) have noted, is unhelpful and liable to mislead. As Sempill points out, focusing on the specific form of words can confuse, both by excluding cognate conceptions just because they are expressed in different terms, and by suggesting connections between unrelated ideas that happen to have found shelter under the same verbal umbrella.

Thus, on the one hand, common themes can recur in different formulations. There are, for example, both similarities and differences between the English 'rule of law' and the German *Rechtsstaat*, French *état de droit*, Italian *il stato di diritto*, Polish *państwo prawa*, and so on, and those continental usages also overlap and diverge from each other. They can't all be reduced to the (nevertheless significant) fact that that the English speak of 'rule' but not of 'state,' and the Continent of 'state' and not of rule (see Krygier 2015). Even Dicey, for all his notorious parochialism,² knew that the ideas and practices he was seeking to distil did not start with him or his formulation but were very old indeed; that indeed was his point. His mistake was to exaggerate English exceptionalism.

Whoever thought to put these four words together (with – in English - their, key, prefatory definite article: '**the**' not just '**a**' rule of law) to designate a normative ideal rather than simply a kind of legal norm, did not invent the idea, nor the concerns it addresses. So parsing the specific words and phrase Dicey popularised will not on its own reveal the

² As to which, see Judith Shklar (Shklar 1998, 26) on this 'unfortunate outburst of Anglo-Saxon parochialism', from which the rule of law emerges 'both trivialized as the particular 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'.

problematic of concerns, threats, responses, etc., to which discourses about the rule of law have long been addressed, and for which this phrase and others like it have come to be shorthand indicators. Whether *avant la lettre* or not, concerns with these issues are millennia old, at least in Western legal traditions; part of History with a capital 'H'.

Conversely, as Sempill also argues, the presence of the *lettre* does not guarantee identity of ideas. Descending to history with a very small 'h', I have been writing about the rule of law for over 30 years. That period, cosmically fleeting if cosmetically challenging, has witnessed some striking transmogrifications of meanings given to the term. For while the phrase has remained the same through that span of time and has never been more widespread than it is today, its conceptual referents, the contexts in which, and the purposes for which it has been invoked have changed frequently and in many ways surprisingly. Indeed its very popularity has magnified its unclarity.

If following the words won't do it, how about following the money? Thus Deval Desai, a talented participant in the 'Rule of Law Reform Field,' has registered but rejected the numerous complaints from frustrated toilers in the 'field,' that it might not exist - no there there, as you in the Bay area might say - given the unclarity and contestation that surrounds its subject and the lack of success of its efforts. He rejects any attempt to ground the meaning of the term in any essential features or any disciplinary or conceptual domain. However, he insists that there is a field after all, and we can discern its subject by looking at what those now in the field think it is. And that is to be ascertained by looking at hiring criteria used by rule of law promoting agencies (for an account of the extraordinary variety of these and what they do, see O'Connor 2015). As he puts it:

I rely on the self-articulation of actors as rule of law professionals—thereby performatively constituting a rule of law field—and the institutions that give this self-articulation material weight, from donors to journals to job postings. (Desai 2014, 45)

That is a more radically imperious step than I would advise. It might suggest that this signpost of a very old range of concerns, which have been treated seriously by many serious people for many serious reasons for centuries, even millennia, was just a place-holder waiting for the World Bank and its equivalents to get their act together and stipulate what it means. But why think that? Better to follow Amartya Sen's comments (at the Bank) about another, related and also popular, 'field' - development:

It is, of course, true that at one level development is a matter of definition, and some people seem to insist that they are free to define any concept in any way they like ... However, it so happens that linguistic usage over a long time has given a certain content to the idea of development, and it is not possible to define development independently of those established associations. (Sen 2000)

Well, actually it *is* possible to define development independently of its established associations. It goes on all the time; with development as with the rule of law, which is precisely why it was important for Sen to point out that it was a bad idea. And when such a term appears in new renderings that drop off or cut across elements important in the old, one should be on the alert. Something significant might be being given up, whether wilfully or thoughtlessly doesn't matter, which a continuity of terms renders invisible. Moreover,

criticisms of recent incarnations might well be sound about *them*, without that necessarily being, as it is often taken to be, destructive of or even relevant to other conceptions that share the same name. So it was in the last century with Marxist critiques of the rule of law as ‘bourgeois ideology’³ which it often is, but that is not the whole story (at least Aristotle wouldn’t have thought so); so it appears to be becoming today when the rule of law is reduced to being part of the neo-liberal project of the World Bank or suchlike. In both cases there was and is more to be said.

No one can dictate a uniquely correct meaning for the rule of law, or any uncontested stipulation of the values it serves. It’s too late for that, and in any event it would not be enough. Too late because the term has become altogether too protean, the purposes for which it is invoked too many and varied, the freight carried by this short phrase too distant from anything that could be derived from dictionary definitions of its component words. Not enough, because the phrase is part of old and ongoing moral and political arguments about fundamental matters of political organisation. It has been used to express concerns and ideals, much affirmed and much contested. These include enduring common themes but also axes of argument and disputation that have pervaded discourse on the rule of law over long periods. So, while it would not be helpful, even if we could, to try to excavate some universally acceptable lowest common denominator, it might help to recall concerns that have motivated the vocabularies we have inherited; what was at stake for those who shared or debated those concerns, what were the ideals that they believed mattered and why, is there anything we can learn from them even though we live in a many ways different world from them, and do they still or again deserve support?

This is not to say that only a historian can speak sensibly about the rule of law. Rather, it is a caution against the kind of willed or unwilled ignorance, so common among contemporary activists and, for that matter, social scientists, who write as though the rule of law starts with them. Historians might recover original intentions and contexts, often likely to be very far, perhaps unbridgeably far, from our own. But past thoughts are not all package deals to be taken or left just as they were in the minds of those who first thought them. There are other ways to draw on them. One such is motivated less by a concern to reconstruct past thoughts in and with their immediately animating contexts, *wie sie eigentlich gewesen war*, than to pursue intimations of intellectual dispositions, sensibilities, and traditions of thought and practice that have left significant residues in our culture and seem still able to offer valuable clues about things that matter. If that looks at times like cherry picking, well, if they’re tasty that’s what you do with cherries.

Traditions of thought and practice feed, transmit, and transform dispositions and sensibilities. They rarely remain unaltered over time. Dispositions and sensibilities draw from traditions and are absorbed by them, to be interpreted, supplemented, disputed and changed. They accumulate. Occasionally they degenerate. Some disappear. If the traditions are intellectually rich, they are matters of continuing conversation, argument, and at best dialectical development. For as MacIntyre has argued, ‘a tradition is an argument extended through time’ (MacIntyre 1988, 12); ‘Traditions, when vital, embody continuities of conflict. ... A living tradition then is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition. Within a

³ Cf. Collins 198 : ‘the principal aim of Marxist jurisprudence is to criticize the centrepiece of liberal political philosophy, the ideal called the Rule of Law’.

tradition the pursuit of goods extends through generations, sometimes through many generations' (MacIntyre, 1985, 222). Moreover, traditions rarely exist in a discursive vacuum. They compete with other traditions, often over generations: think of monarchists and republicans; conservatives and revolutionaries; moderates and zealots; absolutists and advocates of tempered power. Often members of traditions come to strengthen or weaken their attachments in confrontation with counter-tendencies and hostile traditions. And then there are *events*. These can cause and arrest development, transformation, crises, even in well-established traditions.

All this has been true of rule of law traditions, and not for a short time. So there is no single understanding of the rule of law that captures it all. But there are constellations of themes, preoccupations and tendencies, some long-lived. The stakes can be high, and it makes sense to draw on traditions of thinking about how to play well for them. Even if it didn't make sense, by the way, we would continue to echo past thoughts and the traditions that bear them, consciously and unconsciously, reflectively and otherwise, intelligently and stupidly, since as Edward Shils has observed, 'every human action and belief has a career behind it' (Shils 1981, 43). Better to try to make some acquaintance with that career, learn from it about recurrent problems, avoid pitfalls it has exposed or fallen into, and develop novel thoughts in the light of all the above, rather than be condemned, often by *hubris* (a vice many in these traditions condemned from the beginning (North 1973)), to ignore its moments of successful achievement or remake its mistakes.

2. INTIMATIONS IN THOUGHT

a. The Problem: Arbitrary Power

The rule of law has typically been advocated as (part of) a solution to a problem or class of problems. That being the case, it is important to start with the problem, rather than the purported solution, with the end rather than the means. As I have argued elsewhere, the rule of law is a teleological concept, to be understood in terms of its point, its purpose(s), what it's supposed to be good for; not an *anatomical* one, concerned simply to identify some bunch of phenomena in the world. We seek the rule of law for purposes, hope to enjoy it for reasons. Unless we seek first to clarify those purposes and reasons, and in their light explore what would be needed to approach them, we are flying blind (Krygier 2009; 2011). In any event, any account of rule of law that points to some features of law rather than the many others available is making a selection; it makes sense to start by asking why one should select what.

Many purposes have been identified for the rule of law, these days too many. However, one that has generated long traditions of comment has to do with the inescapable existence of disparities of social power. Since more power can dominate less, many thinkers have wondered about how power might be channeled away from recurrent pathological forms and tendencies, how it might be rendered at least safe and then, more positively, *helpful*, for those subject to it, rather than loom as a perennial source of threat and fear?

So the focus is on *power* and how it is exercised. That is the place to start. And what makes it problematic is not its mere *existence* but the potential for its arbitrary exercise. The problem lies in the combination, what the adjective does to the noun, rather than the noun *per se*. Power is necessary for all sorts of good things. In any event the existence of power

and disparities of power cannot be eliminated, and rule of law traditions (unlike anarchist ones) don't seek to do so. While many thinkers discuss the proper ends which it should serve, within rule of law traditions the *ways* power is exercised are seen as central problems.

A common thought has been that left to their own devices wielders of power cannot be relied on to avoid exercising it arbitrarily, and will constantly face the temptation and in many circumstances the incentive to act in their own, rather than the public interest (however that is defined). Some rulers might confound such pessimistic expectations, but we shouldn't have to rely on that. At least we need to hedge our bets. For even were power-wielders' intentions beneficently public-oriented, the *possibility* of arbitrary exercise of power would still be a perennial concern. All the more because (though not only because), as Lord Acton was not the first to notice, corruption awaits. If we are left merely to the *will* or *pleasure* of the power-holder (to use traditional terms of apprehension), arbitrariness will be a constant possibility, and if so a constant worry. As too many people over too many centuries have not only observed but experienced, the likelihood that power will be exercised arbitrarily, *will-fully* is perennially unsettling, and when it occurs it can be terrible. Arbitrary power is not always wild but even short of that, it is usually and already objectionable. That is because, to put briefly what many writers have argued in many places: even the *potential* of its arbitrary exercise diminishes subjects' freedom (Pettit 1997), causes their lives to be fearful (Shklar 1998), denies them respect, dignity (Fuller 1969, Waldron 2011) and moral equality (Gowder 2016; Sempill 2016), and destroys possibilities of fruitful cooperation among citizens and between citizens and states (Hayek 1960). So it is NOT A GOOD THING! What might be done about it? There are traditions of thought about such matters. Many of them put the rule of law at the centre of their reflections.

Arbitrariness is notoriously under-theorised (see Endicott 2014, Gowder 2016, Sempill 2016), and I will not deliver conceptual purity here. I just mention three ways in which power can be exercised arbitrarily; there may be others. Each has figured as the anti-hero in one or other invocation of the rule of law. Often they are not distinguished. I think they are different ways in which power can be exercised without having to regard the interests or legitimate expectations of those whom it affects; three species of a distasteful genus. So an exercise of power which is arbitrary in any one or more of these senses should be treated, at the very least, with great suspicion; better still, the possibility of such exercise of power should be reliably curtailed, and the paths towards power that is not arbitrary opened and smoothed.

One form of arbitrariness is found where power-wielders are not subject to routine, regular control or limit, or accountability to anything other than their own 'will' or 'pleasure.' This sense accords with the Indian Supreme Court's interpretation of a constitutional provision guaranteeing equality before the law. This provision, the Court held, implied that natural resources could not be handed out 'according to the sweet will and whims of the political entities and/or officers of the State.'⁴ This might well have been the *ur*-notion of the term: power is arbitrary to the extent that exercise of power 'is subject just to the *arbitrium*, the

⁴ *Akhil Bharatiya Upbhokta Congress v State of Madhya Pradesh* (2011) 5 SCC 29 [65], quoted in Endicott 2014, 1.

decision or judgement of the [power-wielding] agent; the agent was in a position to choose it or not choose it, at their pleasure' (Pettit 1997, 55).

A second sense of arbitrariness, often but not necessarily allied with the first, occurs where power is exercised in ways those it affects cannot know, predict or obey when they are deciding how to act. That is the form typically taken up in the various 'laundry lists' (Waldron 2011b) of formal characteristics of 'legality' or the rule of law - clear, prospective, public, etc., so beloved by contemporary analytic philosophers of law (see Fuller 1969; Raz 1979; de Q. Walker 1988), and it is true that if one has no way of knowing how power is to be exercised, because its grounds are secret, retroactive, too variable to know, vague beyond specification, impossible to perform, exercised in ways unrelated to the rules that purport to govern them and so on, then one has been treated arbitrarily.

The common law tradition from the medieval period to the eighteenth century laid more emphasis on avoiding the first sort of arbitrariness, and that is the term they repeatedly used (McIlwain 1947; Palombella 2012); it was less concerned with the law's clarity than its superiority, even to the King (see Reid 1977, 2004). Post-eighteenth century legislative developments in England (Reid 2004), and the contemporaneous development of the concept of the *Rechtsstaat* (Krygier 2015) in Europe, particularly in the second half of the nineteenth century, put more emphasis on the second. Until the twentieth century advent of written constitutions in Europe, the *Rechtsstaat* did not know a higher law (Palombella 2010; 2012), and from the eighteenth century the English rejected it (though they, Dicey among them, called on 'conventions' to do what law was now thought not to do). Power that is beyond limit and that is unruly are not the same, but for those at the receiving end both are arbitrary.

These are not the only ways the powerful can treat their subjects/objects arbitrarily. For a third way would be the exercise of power, whether or not limited and/or predictable, where there is no space or means made available for its targets to be heard, to question, to inform, or to affect the exercise of power over them and no requirement that their voices and interests be taken into account in the exercise of power. In recent writings, Waldron has stressed the importance of this dimension and of procedural elements of law which require attention to such concerns, that do not allow those subject to power to be treated 'like a rabid animal or a dilapidated house' (Waldron 2011b, 19).

Different thinkers have been more or less concerned with one or other of the above forms; often they have been elided. They can be distinguished, however, at least analytically, and what one does about each might need to be different. Each of them is liable to attract the strictures against arbitrariness that have been commonly voiced, and there is nothing linguistically or conceptually eccentric about that. And each deserves to be opposed. A regime is not home free because it scores well (low) on one, but not another dimension of arbitrariness. It should do well on all three. There are all sorts of benefits that might accrue to a regime that applies stable and understandable rules, for example, but if rulers are free in principle to act purely at their 'sweet will and whim', even if they choose not to, and even more if the rules shut those affected out from consideration, they treat people, to that extent, arbitrarily.

Commitment to tempering power is not an absolute, all or nothing affair, in at least two senses. First, limiting arbitrariness is a matter of degree. If power-holders could do *whatever*

they liked; if there were *no* way that subjects could know the law; and if *no* account whatever were taken of the existence, voice, or interests of those affected by power this, of course, would be abominable. And for some way along the scales less arbitrariness in any of these senses is better. But there are vices that go with making the exercise of power so rigidly constrained that those in power can exercise no initiative, flexibility, judgment or wisdom. These are very old themes and concerns (see Mansfield 1985). I just wish to caution lest an admirable hostility to arbitrariness slides, as Dicey's did, by sleight of hand not powerful reasoning, into reactionary suspicion of any exercise of discretion. Thus Dicey, and many opponents of the Welfare State after him (see Hayek 1994), elide a number of possibilities as the antithesis to the rule of law, when he asserts that 'the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint' (Dicey 1982, 110). We are not compelled to follow him there. Width and discretion might indeed be necessary for flexibility in many circumstances of governance, and for many legitimate ends, including avoiding arbitrariness in the third sense, of ignoring the specific interests and views of persons power might harm. If wide and discretionary powers can be effectively limited, framed and subject to review, must one assume that they will involve arbitrariness, which is the real foe of the rule of law? Eliding them all, however, does make it easier to oppose active government. There may be reasons to do that, but they don't follow automatically from a commitment to the rule of law. They will need to be separately argued. Where the boundary lies, and how it should be marked, between discretions that can and should be permitted and those that should be curbed is never an easy or uncontested matter to decide, but the former should not be thought necessarily to be the start of an inexorable and slippery slope to the latter.

Secondly, the rule of law is never the only thing we want, and so its purity might well need to be balanced against other goals that we deem valuable. It is a strong consideration always to be borne in mind, that power should be prevented from being arbitrary. It should not be thought of as an automatic conversation stopper in every exercise of power or every discussion of social goods and policy choices.

b. The Solution: Tempering Power

While in any of its many versions the meaning of the rule of law is contested, and particular institutional recipes rarely last, in most versions the idea is present that law and legal institutions can and should contribute in salutary, some say indispensable, ways to channeling, constraining and informing – rather than merely serving - the exercise of power, particularly power with public consequence. On such views, law should be involved in the exercise of power, not merely as vehicle or instrument but as channel, limit, constraint, tempering agent.

In the rule of law understood this way, institutionalising ways to temper exercise of power is considered a necessary part of their solution. The point has typically been cast in negative terms - as a need for curb, limit, constraint – and there is a need for such limiting frames. However, the point of the rule of law can also be understood to include a more positive dimension as well. The object is to *temper* or *moderate* the exercise of power (Krygier 2016c), in order to avoid its arbitrary use, not necessarily to weaken or shackle it. The rule of law is recommended to prevent the ever-present negative possibility of arbitrariness, but

that also allows positive uses of power and social responses to power to flourish which would never bloom or quickly wilt in the face of arbitrariness. Rule of law traditions have typically focused on *political* power, a choice I think too narrow, but we will return to that (see below s.4).

Such concerns are already implicit in Aristotle's distinctions between 'true forms' of government, concerned with 'the common interest' and those that 'regard only the interest of the rulers'. The latter 'are all defective and perverted forms ... for they are despotic, whereas a state is a community of freemen' (Aristotle 1988, 61). A central difference between true and perverted forms, lies in the role of law: 'the rule of the law, it is argued, is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law' (Aristotle 1988, §1287a 19 – 22). One reason for such rule of law is that it helps to prevent the overreaching (*pleonexia*) that Aristotle feared, and to engender that virtue exalted in Greek drama and Greek philosophy alike: temperance (*sōphrōsynē*, glossed by Cicero and Roman writers after him, as *temperantia*) in the exercise of power (North 1973).

Aristotle's thoughts on these matters are arguably less absolute and dichotomous than they might seem (see Frank 2005, ch.4). Too many commentators (eg Loughlin 2010, 312) think they need to remind us that it is impossible to have the rule of law without the rule of men. I doubt that Aristotle would have demurred or been surprised to hear it. Rather I like to think of these words as a seminal reflection on the importance of *institutionalising* the exercise of power, so as to temper what powerful individuals might do without it, both to avoid excesses feared to flow from untempered power and to reap the benefits of its temperate exercise. Such institutionalisation is meant to help generate, Aristotle and many contemporaries and successors argued, positive political virtues such as 'moderation, the golden mean, mixed government, and temperance' (Craiutu 2012, 20) and is contrasted with unqualified power's predictable perversions, central among them arbitrariness and what over millennia has been condemned as 'tyranny'. These themes recur through the centuries, in Greek reflections on temperance, moderation, lack of excess and their links with thoughtful self-knowledge and wisdom, in Aristotle's expansion of the scope of such virtues from personal/ethical to institutional/political, in later reflections on and embroideries of Aristotle such as Roman discussions of *Imperium legum* (Sellers 2014, 14), in Marsilius of Padua's invocation of 'the Philosopher' to distinguish between 'two generic kinds of princely part or principate, the one well-tempered and the other flawed' (Marsilius 2005, 40), for example, and in many other writings.

In France, to pick one high point, Montesquieu above all puts at the centre of *the Spirit of the Laws* (Montesquieu 1992), the distinction between 'moderate' forms of government, which he applauds, and 'immoderate' forms which he loathes. Thus, while both monarchs and despots rule alone, the former do so 'by fixed and established laws,' while the latter, who governs 'without law and without rule, draws everything along by his will and his caprices' (Montesquieu 1992, 10). Whoever wielded power, Montesquieu's overriding question was whether they did so moderately or not, and one of the keys to moderation was the rule of law.

Montesquieu makes extensive connections between institutionalised moderation and particular forms of legal architecture, but the general point is more important (and travels

further) than the specifications. The whole of *The Spirit of the Laws* was bent to investigating the sources of moderation of government and recommending institutional ways to ensure it. It was not, he insisted, an easy task. Indeed, he notes that, despite the horrors of despotism and the attractions of moderation, the world has seen many more despotic governments than well-ordered moderate ones. He laments that but finds it unsurprising, because a moderate government is a much more complicated achievement. The language with which he makes the contrast is suggestive, for it is not a language of brute impediments. Contrary to what many say about the rule of law, the aim of moderating or tempering power is not to *weaken* or *shackle* government. Rather it is to channel its activities to what it needs to do, and in the process make it able to do such things better, and not do things it should not do:

Despite men's love of liberty, despite their hatred of violence, most peoples are subjected to this type of government [despotism]. This is easy to understand. In order to form a moderate government, it is necessary to combine the several powers; to regulate, temper, and set them in motion; to give, as it were, ballast to one, in order to enable it to counterpoise the other. This is a masterpiece of legislation; rarely produced by hazard, and seldom attained by prudence. By contrast, a despotic government leaps to view, so to speak; it is uniform throughout; as only passions are needed to establish it, everyone is good enough for that. (Montesquieu 1992, 63).⁵

Montesquieu's is a language of difficult and complex balancing, tempering, regulating, not shackling, and certainly not weakening. Indeed he emphasised - with profound if counter-intuitive insight - that although restrained government was not fearful, as despotism was, it was in a crucial sense stronger than any despot could be, for:

A moderate government can, as much as it wants and without peril, relax its springs. It maintains itself by its laws, and even by its force. But when in despotic government the prince ceases for a moment to raise his arm, when he cannot instantly destroy those in the highest places, all is lost, for when the spring of the government, which is fear, no longer exists, the people no longer have a protector. (Montesquieu 1992, 28)

Craiutu notes that 'Montesquieu was favourably disposed toward moderate monarchy *à l'anglaise*, because in this regime laws reign rather than the will of individuals (in the Aristotelian sense) and the authority of the sovereign is effectively limited by intermediary powers and fundamental laws' (Craiutu 2012, 39). Indeed he famously and wrongly attributed a tripartite institutional separation of powers to the English, thus influencing the Americans to institutionalise it.⁶ But he didn't get everything wrong. Rule of law traditions

⁵ Cf. Craiutu 2012, on 'the strong connection between moderation and institutional complexity, an idea that would resonate ... with Montesquieu, Mounier, Necker, Mme de Staël, and Constant ... classical authors praised the institutional framework of mixed government, not only because the latter blended various social interests and elements, allowing them to coexist harmoniously, but also because it made it extremely difficult for any group to impose its will over others and exercise arbitrary power.' 31-32.

⁶ In fact, however, though negative constraining conceptions of constitutionalism often speak of separation of powers, as everyone knows that is not enough: mixing is key. As Craiutu observes:

have been extraordinarily significant in England if not, as Dicey fantasised, there alone. Perhaps it is this heritage that impressed those 'foreign observers of English manners, such for example as Voltaire, De Lolme, de Tocqueville, or Gneist,' of whom Dicey wrote that they have been 'far more struck than have Englishmen themselves with the fact that England is a country governed, as is scarcely any other part of Europe, under the rule of law.' (Dicey 1982, 108). Whatever slippage we allow between self-preening ideology and actual historical practice, there is something in the claim.

Of course, such developments can easily be bowdlerised, as anyone will recognise, who recently endured the year of encomia in England and its former colonies on the 800th anniversary of Magna Carta (see Krygier 2016b), which has sanctified this at the time ineffective interest-driven deal between King, Church and barons. And yet, whatever the detailed targets and beneficiaries of Magna Carta, hostility to the arbitrary exercise of power by the King was manifest in many of its provisions, as well as what contemporaries in England (Bracton) and Europe (eg the Hungarian Golden Bull of 1222 and the German Statute in Favour of Princes of 1232) and successors (eg Sir John Fortescue) made of them. It might not have been a general thought among the barons who negotiated the particular provisions of the Charter, but many of its chapters exemplified a general principle., that was already part of arguments found in western, among them English, legal traditions, and continued to be a matter of argument and institutional experimentation. The line was not straight, the arguments were often lost, power and interest trumped and co-opted them often enough. However, there were victories, many of them coming to be institutionalised in our legal systems, and our expectations of them.

And then there was the English seventeenth century apotheosis (with copious acknowledgments to Aristotle and Livy; see James Harrington 1771, 110) of Magna Carta, the 'ancient constitution' (see Pocock 1987), and 'an empire of laws, and not of men'. However much myth-making was involved in the appropriations of former documents and events, there is no doubt that that century drew on real precedents and then spawned its own traditions and legacies, central among them powerful statements and actions professedly hostile to arbitrary power. Thus, central to John Philip Reid's account of the rule of law tradition in England is the antinomy repeated over centuries between rule of law and arbitrary power (Reid 2004). As he writes of seventeenth century demands, 'As "arbitrary" was the opposite of "liberty," and the opposite of "liberty" was also "unlimited power" or "tyranny," it followed that another antonym of "arbitrary" was "law" or "rule of law."' Any check on unlimited power moved government away from arbitrariness and closer to constitutional liberty, and English experience had uncovered no other check than the rule of law' (Reid 1977, 463).

Of course, that century saw some of the most powerful defences of absolutism, first among them the timeless texts of Hobbes and also Filmer's *Patriarcha*, influential at the time; not to mention the at last eloquent but unfortunate defences of Charles I. But ultimately they lost, Charles most of all. Among those on the winning side was John Locke, with his condemnation of:

'Montesquieu in fact favoured a blending rather than a strict separation of powers and referred in his book to *pouvoirs distribués* and not *pouvoirs séparés*' (Craiu 2012, 49)

Absolute Arbitrary Power, or Governing without *settled standing Laws*, [which] can neither of them consist with the ends of Society and Government, which Men would not quit the freedom of the state of Nature for, and tie themselves up under, were it not to preserve their Lives, Liberties and Fortunes; and by *Stated Rules* of Right and Property to secure their Peace and Quiet. (Locke 1960, II, art. 137, 405)

To think that men would (should) do otherwise, would be to judge them 'so foolish that they take care to avoid what Mischiefs may be done them by *Pole-Cats*, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*' (Locke 1960, II, art.93, 372)

The American colonists inherited these traditions, valued them, and mythologised them in turn. They felt betrayed by their British rulers for very British reasons:

The painful truth, as William Hicks pointed out, was "that liberty is only to be supported by a steady opposition to the first advances of arbitrary power." The adjective "arbitrary," not the noun "power," was the imperative consideration. Power per se could be dangerous, not because of its nature but because it might become arbitrary. Fail to resist, and all could be lost (Reid 1977, 461).

Indeed, the last great defence of that old English conception, Reid argues conscious of the irony, was the American Revolution against the British Crown. In the eighteenth century, the Americans insisted that no government was above the law, but the English had moved beyond them to regard the lawmaker as legally sovereign, outstripping though (and perhaps thus) losing its about-to-be-former colony. The Americans still defended an older understanding of law and the rule of law: 'In truth, the American Revolution, if understood from the perspective of the development of the concept of rule of law in England and Great Britain should be seen as one of the last – if not the very last – constitutional stands for the old ideal of rule by customary, prescriptive, immutable, fundamental law ... the American Revolution was the greatest triumph for the rule of law' (Reid 2004, 75).

These have not been the only themes and streams in European legal traditions of thought, still less of political practice, and often they were submerged or even anathematised. They have mixed choppily with other streams, their significance is often exaggerated, but by comparison with many other legal orders, there has been something significant there to exaggerate. And where, as often, practice did or was thought to betray the ideals, there has developed a rich *critical* language in which to condemn arbitrary exercise of power.

Such a language, still less instantiation of the ideal it recommends, has not always or everywhere been available. A tradition in which the rule of law has been an animating value shared, always unevenly but still significantly, among initiates, lay people and institutions is a good one to have. It is not universal. Indeed, Heinz Popitz claims that:

Only rarely has it been possible even just to pose the question of how to constrain institutionalised violence, in a systematic and effective manner. This has only taken place with the Greek *polis*, republican Rome, a few city-states, and the constitutional states of the modern era. The answers have been surprisingly similar: the principle of the primacy of the law and of the equality of all before the law (*isonomia*); the idea of setting boundaries to all legislation (basic rights), norms of competence (separation of powers, federalism), procedural norms (decisions to be taken by

organs, their publicity, appeal to higher organs), norms concerning the distribution of political responsibilities (turn-taking, elections), public norms (freedom of opinion and of assembly) [Popitz in Poggi 2014, 48]

I follow Popitz (and Poggi) on faith, since I am not in a position to know. However, it is enough that distinctive and strong rule of law traditions are not natural facts, in some times and places not facts at all. In the Russian imperial state tradition, for example, law was not a central cultural symbol, and to the extent that it counted, it did so as an arm of central Czarist power (see Pipes 1977), over which there stood no superior. The notion that power should be framed and restrained by law, that law should have a power-tempering role, both *horizontally* among members of the society and *vertically* between political power-holders and their 'subjects', or that it should do anything but transmit central orders, was for long periods unknown, then heretical, more commonly alien, and late and weak in developing. Here law was viewed primarily as properly a subordinate – indeed servile – branch of political, administrative, and at time theocratic power. This has not altogether changed.

Such views are not ancient history. Apart from the countries I have mentioned, many recent and contemporary legal orders, for example those of Myanmar and Sudan over the last decades (see Cheesman 2015a; Massoud 2013) have made use of law deliberately and systematically to serve ends contradictory to those of the rule of law. Tempering power is simply not the name of any official game. Other games, highly institutionalised in ways that systematically oppose and contradict the aims of the rule of law, were the only ones contemplated. At the time of writing, an interesting experiment to change these realities, often cast explicitly under the rubric of the rule of law both in English and Burmese (Cheesman 2015b), has begun in Myanmar. It is too soon to predict its fate. In yet other polities, eg contemporary Poland, Hungary, South Africa, rule of law values and practices exist and are to some extent institutionalised but they appear thinly so, and threatened (on Hungary: Bozóki 2012, South Africa: Issacharoff 2013, Poland: Sadurski 2016). Even where such values and practices are long-embedded, they can come under huge pressures in times of real or purported crisis, such as the War on Terror (see Holmes 2005), or the contemporary treatment of refugees.

3. INTIMATIONS IN PRACTICE

a. At home

Associations between tempering of power, hostility to arbitrariness in its exercise, and the rule of law have, then, been significant themes in enduring and recurring dispositions and traditions, for long periods at least in the western legal traditions with which I am familiar. Moreover, in several of the societies where these traditions exist, measures to restrain arbitrariness have permeated practices of law and more generally the exercise of power, and expectations as to how power will be exercised. They matter and are thought to matter in the everyday workings of a society. That is all good, it seems to me, even if one might often hope it could be better, and even if the rhetorical and other uses to which people might put such a salutary achievement are not always good at all (see Krygier 2006).

A separate point is that even where power-wielders ignore or reject or flout or mock the ideal directly or through hypocrisy, there are concepts, values, ideals available and so too a *language*, in which they might be condemned. This *critical* potential of the concept and the

tradition is key, but often forgotten, both by those who celebrate the rule of law as a panacea in the possession of some rather than others and also often by those critical of boosterisms of this sort. The rule of law is no panacea, though it might well be a source of health. It is, however, a practical ideal of great worth. As such, it should be invoked when the values it endorses are flouted as much as or more than when they are served.

Where all that is available, it is only partly traceable to the activities of contemporary actors, or to particular rules and institutions, though these matter too. It is buttressed, made to endure, made part of the legal culture, by less obvious but no less important, indeed indispensable, legal traditions which underpin, institutionalise, and transmit the values and practices (many unwritten) that accompany them.

There is nothing Whiggish in this claim, no historical script, no trace of a 'universal linear trajectory towards the rule of law ... an allegedly unproblematic linear trajectory towards the rule of law.'⁷ Just some dispositions, of varying strength and prominence, embedded in and transmitted by traditions of some significance. I think it would be nice if they did well, but nothing assures it and they have often been radically, even tragically, maligned, rejected, ignored, overwhelmed. Residents of modern Europe, indeed anyone who was alive in the twentieth century, shouldn't need any reminders of this, so I needn't waste time making the case.

Of course, we know from innumerable radical and Marxist critiques, from classic works in the sociology of law, and from common experience that, even in the birthplaces of rule of law rhetoric, commonly 'the haves come out ahead' (Galanter 2014). It is not clear that on its own the rule of law in the sense I have sketched here can ensure against all such inequalities, since they depend on so many factors, though they will often be a sign of arbitrary distinctions and uses of power, and so deserving of critique in terms of the rule of law, and arguably on other terms as well. But pursuit of ideals of *social* egalitarianism have other reasons, and will need to supplement the tempering of power in other ways. While that shows that tempering power is not all one wants from a political order; it does nothing to show such tempering is not precious in its own right nor, as the Greeks insisted, that it might not be a precondition for the safe and thoughtful (Waldron 2011a) pursuit of other worthy ends. And a question always is worth asking when goods are condescended to as providing merely some, but not all, of what might want: 'compared to what?'

Necessary conditions for some good ends are rarely sufficient for all. But if they are real conditions for real goods, that should be recognised, even as one heeds their limitations, and hopes for more. And thus, notwithstanding the storm of controversy he caused when he first made the claim, I side with E.P. Thompson's eloquent if controversial insistence, at the end of a profoundly hostile critique of English eighteenth century criminal law as ruling class law, that still:

... there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath the law ... [but] the rule of law itself, the imposing of effective inhibitions upon power and the

⁷ As alleged in the outline for INFAR conference, *Changing Narratives of the Rule of Law*, Erasmus University Rotterdam, 28-29 January 2016, to be the view of contemporary partisans of the rule of law.

defence of the citizen from power's all-intrusive claims, seems to me an unqualified human good. (Thompson 1975, 266)

As one of the most distinguished Marxist historians of his generation, Thompson did not need to be told that even where the rule of law was strong, law might be of use to ruling classes. Still he insisted that:

I have shown in this study a political oligarchy inventing callous and oppressive laws to serve its own interests. I have shown judges who, no less than bishops, were subject to political influence, whose sense of justice was humbug, and whose interpretation of the laws served only to enlarge their inherent class bias. Indeed, I think that this study has shown that for many of England's governing élite the rules of law were a nuisance, to be manipulated and bent in what ways they could; and that the allegiance of such men as Walpole, Hardwicke or Paxton to the rhetoric of law was largely humbug. But I do not conclude from this that the rule of law itself was humbug. On the contrary, the inhibitions upon power imposed by law seem to me a legacy as substantial as any handed down from the struggles of the seventeenth century to the eighteenth, and a true and important cultural achievement of the agrarian and mercantile bourgeoisie, and of their supporting yeomen and artisans.

More than this, the notion of the regulation and reconciliation of conflicts through the rule of law -and the elaboration of rules and procedures which, on occasion, made some approximate approach towards the ideal - seems to me a cultural achievement of universal significance. (Thompson 1975, 266)

b. Abroad

Of course, rulers from the homes of these rule of law traditions didn't always stay home. And thus imperialism, which came in many forms to many places, rested upon dramatic inequities of power and was commonly (though not always) quite untempered in its violence, exploitation, condescension and humiliation of colonised populations. In some empires, prominently the British, the whole combination was imbued with a certainty of mission, often proclaimed as the delivery of civilisational blessings, among them the rule of law, to benighted savages. Law was typically a central part of the colonists' institutional and spiritual baggage (see Benton 2002, McLaren 2015). What does that tell us about the rule of law?

Critics of colonial legalism have often claimed that it shows that the rule of law is merely an instrument of colonial exploitation, or an ideological cover and fig leaf for the same. For such critics, 'rule of law' seems to cover every use of (Western) law for 'plunder', and any example of rule of law rhetoric or 'rule of law ideology' (Mattei and Nader 2008). Since law, rhetoric, ideology etc can be found in many places, some not at all attractive, it becomes easy to denounce the rule of law for a lot of things. Easy but empty. For if one attends to the traditions I have been extolling, that seems to me, at least in many cases, a serious misunderstanding of the rule of law. Just as a 'People's Democracy' should not be confused with democracy, so what colonists called the rule of law was often not that at all, whatever they said.

The ideal of the rule of law is always fundamentally compromised in colonial settings, if only because the ideal demands that persons be treated without arbitrary discriminations, and that's one thing colonists don't do. Does that make invocation of the rule of law in such settings necessarily a fraud or ideological cover for nefarious activities? Often simply yes, but not always and not only. Often the picture was more complex, plural, interactive, in ways that might have lessons beyond the imperialist era. And a further question remains: does it discredit the ideal?

That ideal demands that the exercise of power be tempered, so as to lessen the chances of its arbitrary exercise. It is not enough that the ideal is invoked, or that those who do so also impose law. The question has to do with whether the ideal is actually in play and approached in the society in question, not whether the term is used. In terms of this discussion, that question becomes whether there were (sometimes whether there *could have been*) effective efforts to institutionalise ways of tempering power to avoid arbitrariness in the three senses discussed.

Assessment is complicated because containing arbitrary power can serve many different and competing interests, including ruling interests - of communication and legitimation, for example - at the same time. Take, for example, the reduction of arbitrariness in sense 2: unruliness. As Max Weber understood so well, regularity and predictability can serve many different constituencies: rulers who want to know and control what is happening in the peripheries; officials, so they can be employed throughout the realm; economic actors, so they can rely on the frameworks for 'sober bourgeois capitalist' investment; rights advocates so that power is less able to take them by surprise (Weber 1968, 846-48). Even where colonial rule turns out to be non-arbitrary in this sense, however, the extent of arbitrariness remaining in colonial settings depends in significant part on the two other dimensions of prevention of arbitrariness as well: control over power; and presence, voice, and concern for interests of those to whom power is applied. On these scores, particularly the second, colonialism typically fares poorly. And an ex-colony, Singapore, to take a fascinating and complex example, fares well against arbitrariness in sense 2, and in *some* (primarily economic) domains in sense 3. It is weak (because too) in sense 1, and in other domains (eg political) in sense 3. These bifurcations lead Rajah to speak of 'a Singapore paradox: A regime that has systematically undercut "rule of law" freedoms has managed to be proclaimed as a rule of law state' (Rajah 2012, 2).

Of course and always, in matters of ideals one should never discount hypocrisy, the homage of vice to virtue. Thus, where (colonial and other) rulers prate about the rule of law, as today and oftentimes they have, while exercising arbitrary power, we are dealing with hypocritical *abuse* of the rhetoric of the rule of law (see Krygier 2006), not the thing itself. 'Hurrah terms' such as rule of law, democracy, liberty, equality, lend themselves to such abuse, precisely because they are thought to be good things to have, and rulers tend to boast of them. In such circumstances, the ideal should be invoked *critically* to expose false claims in its name. That is another reason one should seek to clarify and hold on to the ideal, however one construes it, not simply let it be appropriated by impostors. Without it, immanent normative criticism has nowhere to stand.

In many colonial encounters, however, realities were more ambiguous and complex, maybe indeed 'fatally confused' (Washbrook (1968), 407), though hypocrisy, as is typically the case

when one is benefiting from things taken from others, will again not be far from the surface. Thus Mark Massoud has written of the convoluted and often tragic legal history of Sudan from the time of British colonialism (Massoud 2013) through a brief democratic interlude, to dictatorial successors, joined more recently by human rights advocates and aid workers. In the phase of colonial rule, there was great emphasis on creating legal institutions on the British model, integrating local elites into their activities, enlisting locals as jurors, and more generally, 'put[ting] the Sudanese under colonial control by advancing a weak rule of law and seeking to create an independent judiciary' (Massoud 2013, 44).

Massoud finds many similarities between the uses of law by the colonists and that of later dictators whose rule, he stresses, was not 'lawless' but heavily dependent on law. On the one hand, he describes this extension of a 'weak rule of law' as part of a British strategy of legitimation, of which use of law rather than rifles, or law before rifles, or along with them, was well adapted:

As a political strategy, promoting the rule of law serves at least four purposes for a nondemocratic regime: it enhances social stability, oppresses local movements, facilitates economic development, and increases the likelihood of long-term legitimacy. (Massoud 2013, 47)

On the other hand, Massoud acknowledges that under the British it was by no means all smoke and mirrors. Thus he writes frequently of the attractions and uses of English law to anti-and immediate-post-colonial activists, and notes more generally that:

Certainly, being encouraged to count on the rule of law was an important aspect of the Sudanese colonial experience ...

The colonial administration provided procedural and substantive guarantees to its subjects and created institutions in which the Sudanese people could interact directly with administrators. The British instituted courts, legal procedures, and standard methods of appeal in order to deter crime, resolve private disputes, address individual grievances, and moderate the exercise of state power. The provision of the rule of law was imperfect during Sudan's colonial period, but it was strong enough to be taken seriously (and later adopted wholesale) by *effendiyya* (elites and intellectuals) and major political and religious figures. (Massoud 2013, 45)

Indeed, in cadences that evoke the complexities and ambivalences of Thompson, Massoud reports: '[I]ike all foreign diplomats, members of the Sudan Political Service were appointed to serve the interests of the metropole. But unlike many of their colleagues stationed in other British colonies, many SPS officials saw themselves as obligated to serve the Sudanese as well. They sought to promote an authority in Sudan greater than their own: the authority of law ... the rule of law was not just lipstick on the face of an authoritarian pig. On some level, however limited it was, norms of fairness did guide Britain's representatives in Sudan. But by cultivating an image of fairness and justice, the colonial regime was also able to maintain its essentially unust and authoritarian rule' (Massoud 2013, 82). Similar observations have been made about many parts of the British Empire (see on India, Kolsky 2012, 13) and about other empires as well (see Benton 2002).

There is no logical inconsistency between Massoud's two themes – legitimization of exploitative imposition and salutary anti-arbitrariness. Law can ultimately serve bad purposes even if it does some good; indeed as Massoud stresses, doing good can be one way of doing bad because, for example, it legitimizes illegitimate power, distances it from (its own) distasteful acts, can act as a pressure release valve. But sometimes, even in the midst of bad, doing good just does good; sometimes it is even intended to. Constraining arbitrariness in the exercise of power is one such good. Following Thompson again, we might note that:

[i]n a context of gross class inequalities, the equity of the law must always be in some part sham. Transplanted as it was to even more inequitable contexts, this law could even become the instrument of imperialism. For this law has found its way to a good many parts of the globe. But even here the rules and the rhetoric have imposed some inhibitions on the ruling power. If the rhetoric was a mask, it was a mask which Gandhi and Nehru were to borrow, at the head of a million masked supporters. (Thompson 1975, 266; see reflections on Thompson in colonial contexts, both hostile (Guha 1998, 66-67) and friendly (Benton 2002, 253-67)

We should leave conceptual space for those tension-ridden possibilities, though it is not always easy to do that, and it is often not done.

Thirdly, one should never confound the mere presence and active utilisation *of law*, even when it is accompanied with rule of law rhetoric, with the rule of law itself. The rulers of the Soviet Union, for example, made extensive use of law and extensive use of legalistic rhetoric, after Stalin ended the period (that he had instituted) of 'legal nihilism' in the 1920s. He was never burdened, however, by concern for the rule of law (see Kurkchian 2003; Krygier, Czarnota 2006).

The existence and use of law are facts of political organization and practice, which can be useful and used for many purposes, some antithetical to the ideal of the rule of law, some supporting of it, some both at once. What role a particular legal order plays in the attainment of the ideal is a question; it should never be an assumption. Sometimes it does, sometimes it doesn't. Sometimes it does both at once, and other times even if there were a will to establish the rule of law, the means in the circumstances of colonialism were simply not up to it, nor is it obvious that they could they have been. The origins of my own country, Australia, as a settler-colony are a telling illustration of that.

Colonialism typically is selective: colonists are treated one way, indigenes another, even if the written law says otherwise. That is obvious enough when the interlopers are volunteers or employees of the colonial power. However, the Australia colony began as a convict settlement and grew to become a settler-ruled nation. The majority of the initial colonisers were not wielders but punishees of the law, by definition criminal law but also, as it turned out, civil law as well. Yet there is no way of understanding the convict story in Australia without appreciating that convicts were not merely prisoners but prisoners with legal rights, who knew that, demanded respect for their rights, and got it surprisingly often from officials who were not at liberty completely to ignore them, much as they might have liked to and sometimes did. That has been convincingly demonstrated in a number of studies (see esp. Hirst 1983, and Neal 1991). The rule of law as a kind of 'cultural baggage' that the invaders carried contributed, as Neal argues persuasively, to Australia's development in a matter of

some 40 years from convict settlement to relatively free society. Convicts insisted that they were British subjects and expected to be treated according to British law (which many of them knew only too well), demanded it, and to an extent surprising in the circumstances received it. The language of their demands was the language of legal entitlement, and more often than not, they received their entitlements. Their overlords were poorly placed to resist; after all they spoke the same language.

If that was the whole of the story, we could stop there. However, what happened to convicts, though enormously significant for the overall future development of the country, was only part of the story, and could not, in the nature of the encounter of colonisers and settlers with indigenous Australians, represent the whole.

Motivations are complicated. It is easy to castigate colonisers who intended to deny the rule of law to the colonised. There were a lot of them about in most settler colonies, Australia included, often they did terrible things, and arbitrary discriminations were in any event built into the structure of the encounter. While morally significant and reprehensible, none of this is very hard to explain. What if, however, as was often proclaimed at the time, by some sincerely, and as is the announced goal of contemporary rule of law promotion, the desire was to bring the rule of law to indigenous peoples of eighteenth and nineteenth century colonies, such as Australia, previously untouched by European 'civilisation'? This raises issues that are not merely historical and moral, but conceptual and sociological. They haven't completely lost relevance for purportedly well-meaning ventures today.

One Australian polemicist-historian, Keith Windschuttle, has sought, with indefatigable effort, to defend 'the character of the nation' against allegations that his forebears behaved arbitrarily, and often much worse than that, to Aborigines. Among other reasons, he denies that the misdeeds alleged occurred, indeed could have occurred, at least on the large scales alleged, because the British brought the rule of law to Australia:

A British declaration of sovereignty over a territory meant that all individuals within it, native and colonist, were subject to English law. ... It was this rule of law that made every British colony in its own eyes, *and in truth*, a domain of civilization. (Windschuttle 2002, 186; emphasis added)

Let's take this absurdity seriously for a moment. If, like so many who write about the rule of law, we identify its vehicle as the formal state-imposed legal order, think what might be required of law to contribute to routine tempering of power in a colony such as Australia? Perhaps systematic restraint and channelling, by law and convention, of the activities of officials; equally systematic restraint and channelling of the power of powerful citizens; law that was knowable and generally known by those it might affect, and that provided ways for them to voice their views and interpretations of the law and of what happened; and the capacity of citizens, in their interactions with each other and with officials, routinely to appreciate the meaning and authority of the law and its relevance to their encounters, and to be prepared to invoke it in relations between each other and between themselves and officials. For whether the rule of law exists and matters in *any* society is not a question of mere proclamation, whether sincere or hypocritical. It is a political and a social matter. It must *count* in the social world.

In the early settlers' relations with Aborigines this could not routinely be the case. One problem, inherent in the social logic of many colonial encounters, has been identified with rare insight by Charles Rowley:

The problem of a cultural frontier in the colonial situation is basically the same everywhere. If the frontier is expanding, law and order depend on the government leading the way and taking charge of the processes of trade, settlement, recruitment of labour; and establishing by use of superior force the best approximation to a rule of law possible in these very difficult conditions. This has happened only rarely in colonial history ... In any case, more 'development' is necessary for more revenue. Development involves the taking of land: and in spite of legal theories about certain lands being 'waste and vacant', practically all land is the object of indigenous claims to ownership. There may be violent resistance, and reprisals by the settlers taking the law into their own hands. Efforts by police to keep the peace tend to come later.

In practice, the police will go where there is 'trouble'; and the nature of the trouble will be described for them by the settler community. So the first contact of the Aboriginal with the police has been characteristically in the role of an avenging force. (Rowley 1970, 123-24)

Rowley emphasises a point too often ignored by rule of law enthusiasts, and we will return to it. In many places, major sources of arbitrary power come not from the state or the law, and if they are to be tempered, that will take more than even the most punctiliously designed legal rules and institutions.

In this particular context, settlers were often isolated, frightened and, in the nature of things, on the make. This is precisely the sort of situation Hobbes envisaged, and that stems from a truth often enough manifested and noted: *homo homini lupus*, man is a wolf to man. Sometimes it was better, and not infrequently it was worse, helped along as it was by the weakness of restraints on the frontier, the superior power of the settlers, the fact that real interests were at stake, and by convenient beliefs that Aborigines were barbarian, not quite human, anyway nothing like us.

And if the settlers had all been of good will and devoted to the rule of law, what then? In the first stages of Australian contact, with a few exceptions, law had yet to be devised specifically for Aborigines. The 'law in the books' was generally that which applied to convicts, British law. But contact brought out in the most dramatic and extreme forms the depth of those truisms of sociology of law that stress the distance between 'law in books' and 'law in action', and – more significant still – between official law, whether in books or in action, and what the legal sociologists Eugen Ehrlich (Ehrlich 2002) called 'living' and Leon Petrażycki (Petrażycki 1969) 'intuitive' law. Those distances exist in every society, however familiar with and obedient to official law. But variations are huge, some societies are not at all familiar with that law, and among those who know something about it, many see no reason to obey.

Whatever the formal law was like, settlers would often find themselves in circumstances where they faced opportunities and temptations to flout it, and Aborigines did not and for a long time could not know it, or understand it. As Sir Paul Hasluck, onetime Australian Minister for Aboriginal Affairs, comments:

These new British subjects did not know British law and they did not believe it was a good law, and even if they had known and believed, their situation and condition meant that the law was not accessible to them and that they were not amenable to it. They knew nothing of the process of sworn complaint, warrant, arrest, committal for trial, challenging the jury, pleading, legal defence, recovery of costs, suit for damages, summons for assault, evidence on oath, and so on. Those living in the bush did not know that it was wrong to resist arrest or hinder a policeman in the execution of his duty and they also frequently refused to stop when called upon to do so. (Hasluck 1970, 123)

In the circumstances of the early colony the notion that Aborigines would be busy *using* the official law on more than rare occasions is absurd. That is dramatically true of criminal law, where the process was in the hands of whites, and it was also true of civil law, which depends on litigants taking action. It takes a rich imagination to conjure up crowds of avid Aboriginal litigants in the early years of settlement. Still less the far more important service that the rule of law is supposed to provide in informing and supporting the relations of citizens who never go to court but act on understandings of the law in countless routine individual acts, accidents and forms of co-operation (and competition) in daily life. In sunny Australia, official law did not often cast a long shadow. None of this 'tacit knowledge' was or could quickly be available to the Aborigines upon whom the penal colony had been inflicted. In the long meantime, at so many levels in so many ways, British law contradicted exactly that 'living', 'intuitive' law that legal sociology has shown to be fundamental to people's ordinary lives, and to the structures, roles, culture, and expectations that underpin them.

The original sin of the Australian project was that whites came, expelled, exploited, dispossessed, Aborigines. There were also killings, systematic at some moments, sporadic in others. However, even had none of that occurred, it would be hard to imagine the rule of law acting as a protector of Aborigines from arbitrary power, much of it coming from the installers themselves, in and out of government, for some considerable time. For that presupposes a lot to be effective and a lot to be good. It also presupposes understanding, which needs to be in significant part sociological understanding, of what needs to be done. In early contact with Aboriginal society its presuppositions did not exist even where the will to adhere to it might have. And that often didn't exist either.

Most unsettling for ardent adherents to the rule of law, among them myself, is that it is hard to see how a will more concerned to bring the rule of law could have done much to alter the tragedy that began the encounters between Aborigines and settlers in my country and framed much of its course, once whites had arrived. Indeed, in the context of early colonialism, and even more in the light of the relative impotence of the imposed law to intervene helpfully in relation to Aborigines, for much of the nineteenth century, talk of the rule of law could serve to justify, mythologise, and may well have blinded the perpetrators to the horror of relationships of domination and exploitation out of which, systematically and unavoidably, there could be only one set of winners. Again, this is a systemic problem, not necessarily a problem of anyone's ill will. But Aborigines might be forgiven for not noticing the distinction. The rule of law was simply not in the picture for most of them for a considerable time. That will only be apparent, however, if you have an idea of what it would take for it to be there.

4. CONTEMPORARY RULE OF LAW DISCOURSES

a. Ideals

This last point is not merely of antiquarian concern. For arbitrary power is as rampant in many parts of the world as it ever was, even though the world is full as never before of rule of law missionaries. Often they travel to places where fierce wars are ongoing or just over, where state structures are fragile, where all sorts of religious, ethnic, cultural cleavages make everyday life 'solitary, poor, nasty, brutish, and short,' (Hobbes 1960, 82) and where the 'facts on the ground' have no connection with the legal *bric-à-brac* that is being imported or polished up. These are simply 'hard facts' (di Palma 1989, chapter 1). They mean the job is never easy, and success in limiting possibilities of arbitrary power is likely to be elusive or ephemeral. But apart from the existence of such hard facts, there are ways in which we think about them (or often don't) that do not make them easier. Here are a few. Some have to do with the ideals that spur interest in the rule of law; others with sociological aspects of the relations between institutions and contexts.

i. Ends and Means⁸

It is extremely common for the question 'what is the rule of law?' to be answered with a list of purported institutional elements, as though they were ingredients in a recipe or blueprint for institutional design. That seems to me quite the wrong way to proceed. It is the wrong way to *begin*, because as a normative notion, one needs to start with the *point* of the exercise, before one can identify what achievement of that point might require. And it is the wrong way to *go on*, because the value(s) that animate concern with the rule of law might in principle be pursued and institutionalised in a variety of ways. Specifying the ultimate values that the rule of law is to secure is not yet to describe how these values are to be achieved. And perhaps such specification can never be achieved with any combination of generality and precision. Since L

In different societies, with different histories, traditions, circumstances, and problems, these (and other) values have been secured in different ways. And there are many ways to fail, too. Nevertheless, starting with generally specified commitments - eg. hostility to arbitrary power - one can seek to elaborate more specific conditions and intermediate and more concrete principles - eg don't put all power in the same hands; generate power to balance power, etc. From these in turn one can seek to develop specific practical and institutional recommendations, in particular circumstances, with particular ways and means derived from and adapted to those circumstances. These intermediate principles can help in appraising whatever normative and institutional setups one has, and suggesting modifications or alternatives to them. They are variably fulfilled, and fulfilled in various ways, in different societies and times. And again, there are many ways to fail, some of them quite surprising to missionaries of the rule of law.

On the one hand, ideals of the rule of law have been better served in some nations and by some institutions than others. Institutional possibilities are not infinite, institutions have consequences, different institutions have different consequences, learning can and does occur, and you have to start somewhere. So it would be absurd to ignore what Selznick

⁸ This section is drawn from Krygier 2016d.

(1969, 9), following John Dewey, called the ‘funded experience’ of generations, among them truisms that have proved valuable again and again. One of these might be, as Montesquieu and Reinhold Niebuhr insisted, that only power can tame power. One is, therefore, often warranted in starting with a (preferably weak) presumption in favour of institutional models which have worked elsewhere.

On the other hand, one should be wary of too swiftly converting general presumptions into prescriptions, particularly prescriptions that are highly specific, let alone that hold out particular institutions as universal models to be emulated.

One need not conclude from institutional variety that new contexts are simply ‘*sui generis*’ (Teitel, 2000, *passim*), (as all contexts are in part but not completely). Pursuit of the rule of law requires reflection on how some generally valuable goods might be achieved in particular contexts. Problems and predicaments will vary, and so too will the best ways to meet them. Wherever you are, the rule of law should be approached with a combination of its point(s) in mind, more specific principles derivable from those grounding values, and acquaintance with various attempts to secure and institutionalise such ends, *together with* a great deal of reflected-upon local knowledge. It is more common, however, to cut to what is imagined to be the chase, often without idea of what is the object of the chase, still less what obstacles might lie in wait.

ii. Thin and thick

On the view developed here, the ideal of the rule of law is concerned with the exercise of power. Distinctions have to be made, and matters of scale, character and consequence matter, but the bottom line is that wherever power with significant public consequence is in play, it is better that it be tempered than not. I find it hard to understand how anyone can treat the problem lightly. It is perennial, examples of its tragic outcomes are close to infinite, and those examples are not drying up. To worry about the problem is not original (which in this case I take to be a virtue). It is not unanimously endorsed, however, both because some people do not consider it worrisome, and others have other worries. There are certainly other things one might worry about, such as social inequalities, or public health, or education, or the predicament of refugees around the world. None of these is a small problem, but arbitrary power is not trivial either. We do better when there are some regular and reliable ways to diminish it.

In the perspective of contemporary discussions, however, this focus might seem to attribute either too much or too little to the rule of law: too much if you are committed to what is called a ‘thin’, ‘formal’, institution-focused conception of the rule of law; too little if one’s preference is for a ‘thick,’ ‘substantive’, or ‘material’ conception of it. The former locates the rule of law in formal properties of laws and legal institutions and approved ways of operating them. The latter requires substantive elements from a larger vision of a good society and polity – democratic, free-market, human rights-respecting, or some such – to be present.

Thin accounts identify the rule of law with a particular set of institutions, rules, and/or practices, but exclude valued outcomes from the definition. Their concept of what the rule of law *is* is morally unencumbered, even though most of them appear to think it is by and large a good thing. ‘Thick’ accounts are morally more ambitious and include ‘substantive’

outcomes, from a larger vision of a good society and polity, as part of the conception itself (see Peerenboom 2004, Cavanagh and Jones, 2011).

'Thin' and 'thick', 'formal' and 'substantive', conceptions compete in countless discussions of the rule of law, among legal philosophers, comparative lawyers, and rule-of-law promoters. Positivist legal philosophers, and legal comparativists, tend to favour 'thin' conceptions of the concept, what might be called rule-of-law-lite, for its lack of normative ballast: morally non-committal, easier to identify, and able to travel further, because it carries less baggage. Many governments, too, particularly authoritarian ones, prefer to be assessed against thin formal criteria, easier to satisfy than thick morally demanding ones. Today international businesspeople, unwilling to buy into controversial questions about democracy, human rights and other large values in, say, Singapore and China (with both of which they might want to do business), often prefer a formal, thin, conception too.

I am uneasy with both ends of the distinction, and indeed with the scale – from institutional to substantive – on which they compete. On the one hand, thin accounts carry much more freight than they admit. Typically they list features of legal institutions – *official* institutions – that are thought to be the vehicles of what we take to be the rule of law in First World countries thought to have it. What then about the now notorious problems of 'isomorphic mimicry ... adopting the camouflage of *organizational* forms that are successful elsewhere to hide their actual dysfunction' (Pritchett, Woolcock, Andrews 2010, 2). Institutions and rules are shipped or mimicked but the outcomes expected don't eventuate. Does one then have the rule of law because the institutions appear to be in place, or lack it because nothing works as it should?

More generally, and to anticipate a point elaborated below, given the focus of thin accounts on state institutions, what of the exercise of power by non-state forces – social networks, prominent (dominant?) families, clans, religious leaders, Mafia bosses, or assorted fellowships of 'dirty togetherness' (Podgórecki 1994, 51, 115, 131-32)? If, whatever the law says, they are free to act arbitrarily, capriciously, does it make sense to insist that nevertheless the rule of law exists because purported institutional underpinnings of a legal order are present, or standard practices have been mimicked?

The rule of law is not like a pebble, which might be the same wherever you put it, or even like a functional device, say a wheel, which should do what it hoped to do, so long as it is round. We know what wheels do, by and large, and what is necessary for them to do it. However the problem with the activities of rule of law promoters, as an anonymous colleague of Carothers famously and in lapidary terms explained, is that 'we know how to do a lot of things, but deep down we don't really know what we're doing' (Carothers 2006, 15).

We simply don't know how institutions, even familiar institutions that we associate with the rule of law at home, will perform in the sorts of settings where we promote the rule of law. For that matter, we don't know much about why such institutions perform as they do at home. So much is in place that can't be wished away. Should we say we have achieved the rule of law, when we have built courts, installed computers, trained judges, but no one visits them and, more important, they have little effect on what goes on in the wider society? (see Kilcullen 2011)? Or what should we say when the efforts of so-called 'rule of law' or 'human rights' focused law reformers to train judges and build courthouses in Sudan, in order to enlist and reform the law in the service of the poor, turn out not to do much of that but to

legitimise the power of a dictatorship that is 'already accustomed to using any available legal tools and resources for political gain' (Massoud, 2013,206)? Have they installed the rule of law wheel, but it turns out to be square or punctured, or have they simply issued their best guess about what might serve rule of law values, which turns out not to? Or has what they have done anything to do with the rule of law at all?

Again, Kleinfeld observes (2006, 53) that certain efforts, which may well satisfy thin accounts as rule of law measures, might turn out to harm precisely what they are supposed to help. Thus, she points out:

Most pernicious, depending on how they are implemented, institutional reforms carried out under the banner of rule-of-law reform can actually undermine rule-of-law ends. For instance, in Romania, businessmen have pleaded for an end to legal reform: They can live with bad laws, but the constant "improvement" of key property laws by various bilateral and multilateral aid agencies creates an unpredictable legal environment. An end good of the rule of law---a stable, predictable legal system---has been undermined by the so-called reform process.

So thin accounts are at once too thin, since they bear only a contingent relationship to what we would want and recognise as the rule of law, and too thick, since they are full of parochial assumptions about the workings and value of legal institutions, assumptions we have no reason to imagine will flow as far as the institutions and rules that supposedly carry them (see further Krygier 2016d)?

On the other hand, thick accounts too easily fall foul of Raz's caution that to equate the rule of law with the rule of 'good' law, or with whatever we take the good to be, robs the concept of any separate significance. Loading wide-ranging substantive ideals into the concept threatens to melt it into everything else we might like, and renders a separate and distinct concept otiose. As Raz expresses the point, 'if the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph' (Raz (1979), 211).

That is why the interpretation of the rule of law I recommend does not choose between thick and thin substantive achievement at large, but looks somewhere else. Though its implications are not small it is modest, in at least two senses. First, it has to do not with social values at large but rather with a specific issue: how power is exercised. And second, it has a specific enemy – arbitrariness in the exercise of power - rather than power itself.

iii. The ends of the rule of law

The rule of law would not have received such applause if no one thought it was good for anything. And in truth, all sorts of goods have been claimed to flow from the rule of law - economic development, human rights, democracy etc. Indeed these claims are the lifeblood of the international rule of law promotion industry: if they didn't think these results flowed from the rule of law, they would not be interested in it. But I still would be. Why?

On the view developed here, the problem with which the rule of law is offered as part solution is that of arbitrary power. It makes sense, though it might not always be true, to

think of law as a solution to problems that power disparities raise, because law is specifically and characteristically – at its core – a vehicle for the exercise of power; that is what it does. In certain configurations and circumstances, or so is the rule of law hope, it is also a potent means, though never the only means, by which power – state *and* non-state - might be channelled, directed, constrained, tempered. On the view developed here, then, one question, the central one for the rule of law, is what difference law can make to the ways power is exercised.

On this view, if arbitrariness is successfully minimised, one might argue, as Max Weber did, that ‘sober bourgeois capitalism’ is likelier to get off the ground, but on my interpretation of the tradition, and of Weber, that is a sociological argument about what reduction of arbitrariness in the exercise of power might facilitate. It is not itself a quality of the rule of law itself. Nor are democracy, the full panoply of human rights (apart from some of those rights, like the right to a fair trial, which are parts of the rule of law) and other things it is now fashionable to attribute to the rule of law. What difference might this make?

On the argument offered here, the value the rule of law is called on to serve by ‘anti-arbitrary’ traditions is *immanent* and *generic*, that is, hostility to arbitrary power is intrinsic to the ideal of the rule of law, and it is relevant across the board. In philosophically-derived accounts, the ground for valuing it is likely to be some account of human persons, their interests and needs; and hostility to arbitrariness stems from a commitment to liberty (Pettit 1997) or moral equality (Gowder 2016, Sempill 2016), or dignity (Waldron 2011) appropriate to that understanding of humanity and personhood. Ways of exercising power, including non-arbitrary and non-dominating ways are, in other words, tied to the concept of the rule of law in ways that other goods, say, economic development or even democracy are simply not, though they might flow from it. The former are not external but immanent values of the rule of law, their *telos*. The latter are external benefits said to flow from it.

However, most proponents of ends for which the rule of law is enlisted today focus on its contribution to success in a particular domain. The rule of law is supported *to the extent that* it supports democracy, contributes to economic development, reinforces human rights, and so on. Treating the rule of law thus, as an *instrument for attainment of particular ends* narrows the reasons to support it, and renders it more fragile.

The reigning accounts today are particularly well characterised by Sempill as expressions of what he calls ‘the bureaucratic standpoint,’ which seeks:

to understand how various features of social life, including those practices which embody the projects of one or more traditions, can be appropriated and adapted by possessors of the bureaucratic standpoint to serve as, or in support of, techniques for the effective control of the social world. From this perspective, which is indifferent to the moral goods animating traditions, traditions may nonetheless bequeath things of value insofar as they effectively provide instruments or tools that enhance the power of those whose ends this standpoint serves. (Sempill 2016, 11)

In the case of the Rule of Law, the bureaucratic standpoint interprets elements of inherited legal thought and practice according to a manipulative idea of instrumental efficiency which obscures their traditional significance. (Sempill 2016, 12)

The main target of Sempill's article is not rule of law promoters, but formalist philosophical accounts of the rule of law, specifically that of Joseph Raz,. His argument is larger, however, and his characterisation fits promoters even more closely, much more closely, than it does philosophers.

Economists' new passion for the rule of law is a good example. Previously non-existent, it is now in every nostrum for economic development. Is that a good thing? It depends. Even were we more confident than we have reason to be that neo-liberal legal and market reforms were guaranteed to produce the economic outcomes intended, the selectiveness of their interests should worry anyone with a traditional commitment to the rule of law. Thus, from a World Bank expert on development, we learn that:

A broad consensus has emerged on the centrality of the rule of law in the second stage of reform ... The prevailing development paradigm rooted in the neo-liberal precepts of the Washington Consensus has elevated the rule of law to the altar of the institutional reforms required to sustain market reforms. (Santiso 2003, 113)

The 'broad consensus' seems remarkably contingent, however, on the current state of economic theorising. Thus:

While the swift and decisive decision-making needed to implement first generation market reforms often requires a pliant judiciary, second generation economic reforms aimed at anchoring the institutional foundations of the market economy require precisely the opposite.

Market-oriented economic reforms are not sustainable without restoring and strengthening the credibility of the rule of law. As the reliability of the legal and judicial process increases, so does the credibility of the public policymaking process. More fundamentally, government by executive decree, while an asset in the initial phase of economic reform, progressively becomes a liability in the second phase of reform (Santiso, 2003, 119)

What if the author, or the Bank, or the post-Pinochet government were to change their view, and decide that not merely 'first generation market reforms' requires a 'pliant judiciary,' but second generation reforms do too. Or what if the rule of law had been promoted to generate liberal democracy but, like the present (early 2016) Hungarian and Polish governments, we're over that. The logic of the argument appears to be that the rule of law would be out the window.

And even when it has got in the door, it may skip a few rooms in the house, particularly those less opulently appointed. Thus economic reformers are particularly interested in encouraging security of property rights, investment and trade. That explains what institutional reforms they advocate. It also explains *where* they advocate them. That is rarely everywhere. So, note the reflections of one of the most sophisticated and dedicated advocates of the importance of the rule of law, as reforms in Latin America in the 1990s were made in its name:

in the present context of Latin America, the type of justification of the rule of law one prefers is likely to make a significant difference in terms of the policies that might be advocated. In particular, there is the danger derived from the fact that

nowadays legal and judicial reforms (and the international and domestic funding allocated to support them) are strongly oriented toward the perceived interests of the dominant sectors (basically domestic and international commercial law, some aspects of civil law, and the more purely repressive aspects of criminal law). This may be useful for fomenting investment, but it tends to produce a 'dualistic development of the justice system,' centred on those aspects 'that concern the modernizing sectors of the economic elite in matters of an economic business or financial nature ... [while] other areas of litigation and access to justice remain untouched, corrupted and persistently lacking in infrastructure and resources.' For societies that are profoundly unequal, these trends may very well reinforce the exclusion of many from the rule of law, while further exaggerating the advantages that the privileged enjoy by means of laws and courts enhanced in their direct interest. (O'Donnell 1999, 319-20).

The values the rule of law serves are not absolute but they are *general*, and they are truly valuable. If they are to be favoured merely insofar as they are thought instrumental to the achievement of some other *particular* goal, such as economic development or democracy, then other ways arbitrary power can damage lives threaten to drop from consideration.

This is a particularly serious issue since our knowledge in these areas is notoriously uncertain. There are intuitively plausible reasons, and some evidence, to support the belief that lessening the possibility of arbitrary power might support those further good things. But the evidence is equivocal (see Bugarič 2014; Haggard, MacIntyre, Tiede 2008; Haggard, Tiede 2010), and if it were shown that though in a particular society power was not exercised arbitrarily the economy had tanked, say, this would not be reason to deny that the reduction of arbitrariness in the exercise of power was still a good thing. Haggard and his colleagues have noted, after a wide-ranging review of literature on law and economic development that had 'taken a highly instrumental view of the rule of law, stressing its utility for growth in particular.' 'But' they caution:

our final and most important point is that the rule of law is of great importance as a value in its own right and as a contributor to other values, such as human freedom. Yet precisely for that reason— because we believe in the rule of law— it is all the more important that those who would offer development assistance make sure, first, to do no harm. (Haggard, MacIntyre, Tiede 2008, 22)

This warning has not always been heeded. Yet while tempered power is not necessarily or always more important than other goals, it has a specific focus and a general importance not reducible to other things, but often not separately considered or taken into account. There are many ways to exercise power, and doing so in a way that is not, and routinely can be expected not to be, arbitrary is salutary. That is so even independently of the particular substantive ends for which power is exercised (though I share Lon Fuller's belief that some of the worst ends are more difficult to pursue in accordance with the rule of law than not (see Fuller 1969; Rundle 2009).

b. States and societies

According to Hadfield and Weingast, 'Despite its centrality to many literatures, the concept of the rule of law is woefully undertheorized ... Indeed, the great majority of academic and

policy work takes the concept for granted, generally equating it with the institutions and practices in those (relatively few) parts of the world where the rule of law has been largely achieved' (Hadfield, Weingast 2014, 22). Just to render explicit what the passage assumes, typically those are the 'institutions and practices' of the formal state legal order. Lawyers typically start and stop there, so too legal philosophers, economists and political scientists, and most often rule of law promoters as well. This 'equation', I have argued elsewhere is virtually universal (see Krygier 2011; 2016c, and see Kleinfeld 2006) in discussions of the rule of law: if you define the rule of law, you enumerate features of central legal institutions, if you want to assess its strength or weakness, you look at features of precisely the same institutions, and if you aim to 'build' it, that means building just those institutions or, since the originals don't travel, some imitation or simulation of them.

Two examples, one from the field, the other from the study. First, as Jensen and Heller point out:

In legal circles in developing countries and in international development circles, *rule of law* has become almost synonymous with *legal and judicial reform*. Basic questions about what legal systems across diverse countries actually do, why they do it, and to what effect are either inadequately explored or totally ignored. In developed and developing countries, larger questions about the relationship of the rule of law to human rights, democracy, civil society, economic development, and governance often are reduced to arid doctrinalism in the legal fraternity. And in the practice of the international donor community, the rule of law is reduced to sectors of support, the most prominent of which is the judicial sector. (Heller and Jensen 2003, 1-2; see also Santiso 2003)

This sort of pervasive focus on central state institutions is, as we will see, sociologically misguided, but it also obscures for many who are involved in rule of law promotion, what the point of their activities – often highly sophisticated, dangerous and brave though they are – is. Attention is so focused on what are, after all, only means to some sort of end, that the end is lost sight of in favour of the means. This is the familiar organisational pathology of 'goal displacement.'

It is not quite the case that people have no other ends than serving the means chosen, but rather, as Kleinfeld observes:

When the rule of law is implicitly defined by its institutions, rather than its ends, the latter tend to be assumed. Rather than considering the desired goals we are trying to achieve through the rule of law, and then determining what institutional, political, and cultural changes best achieve these ends, practitioners are tempted to move directly toward building institutions that look like those reformers know. (Kleinfeld 2006, 50-51, and see Kleinfeld 2012).

Welcome to 'isomorphic mimicry.' No wonder that Pritchett et al complain that '[t]he conflation of form and function ... has been one of the most ubiquitous but pernicious mistakes of development policy over the last sixty years, and is manifest most clearly in widespread implementation failure' (Pritchett, Woolcock, Andrews 2010, 2).

A second example of institution-fixation is not a product of the difficulties of recent practice; it is rather a more long-standing, perhaps discipline-inspired, failure of sociological imagination, common among philosophers. One rare, notable, and noble exception to the standard in legal philosophy might prove the rule.⁹ Jeremy Waldron is one of very few philosophers who have complained (rightly) about the narrow social and institutional focus of contemporary philosophical accounts of the rule of law. He makes the important point that 'getting to the Rule of Law does not just mean paying lip service to it in the ordinary security of a prosperous modern democracy: it means extending it into societies that are not necessarily familiar with the ideal; and in those societies that are familiar with it, it means extending it into these darker corners of governance as well' (Waldron 2011, 3-4). He also observes that:

[w]hen I pay attention to the calls that are made for the Rule of Law around the world, I am struck by the fact that the features that people call attention to are not necessarily the features that legal philosophers have emphasized in their academic conceptions of this ideal ... this formal conception is not what ordinary people have in the forefront of their minds when they clamor for the extension of the Rule of Law into settings or modes of governance where it has not been present before. (Waldron 2011, 4)

Waldron purports to capture such features, what 'ordinary people are urging', by supplementing Fuller-and-Raz-style *formal* features of legal rules with elements of legal *procedure* and the institutions like courts that embody them. He commends a list of ten such features, mainly to do with the fair, impartial, open and appealable conduct of legal hearings before 'a legally trained judicial officer' and with a 'right to representation by counsel.' These are all admirable procedures, and well motivated as well. However, they have in common with the accounts Waldron criticises that they are all focused solely on the usual official institutional suspects. The big shift in institutional focus between Fuller and Waldron is from official legislatures to official courts, particularly criminal courts of kinds well recognised in the West. This is not, in comparative or sociological perspective, a huge distance to travel. Such procedures move barely an inch from the formalities they supplement.

What of keeping faith with 'what ordinary people are urging'? Again, this is welcome. But it is unclear that Waldron's salutary supplement to traditional understandings goes anywhere near far enough. As he would doubtless agree, the vulnerabilities, aspirations, and values that lead people to 'clamour' for the rule of law are not primarily to be judged by what it does for lawyers, still less legal philosophers. Indeed elsewhere he says as much:

this ideal is not the property of the analytic philosophers and it is certainly not our job to go round reproaching laymen for not using the term in the way that (for example) Joseph Raz uses it (Waldron 2012, Kindle edition, 16).

If the rule of law is a good, it is a social good, and it is challenged, *inter alia*, by social bads. Not all of these have much to do with what goes on before judicial tribunals. If Afghan citizens, for example, or Syrians or ..., lament the absence of the rule of law in their societies and lives, is it obvious that they are talking only about receiving unclear legal messages from

⁹ This condenses a section from Krygier 2016c.

the parliament (Raz), or having a hard day in court (Waldron)? Perhaps the irrelevance of the law or any other institutional constraints, the capriciousness of normatively untempered power from warlords, terrorists, and others in their lives, might matter to them more immediately, more often, and more, than the character of any laws they are likely to encounter, or their (likely rare) appearances before judicial tribunals (where they exist).

In pursuing Waldron's agenda, then, we should be open to expanding the social and institutional range of our 'conceptual geography' (Judt 1990, 25), to use an apt phrase from another context. We need at least to consider whether the values that animate concern with the rule of law might need and draw support from other than western standard-issue sources, as well as whether there might be other conditions for, and alternatives to, effective state-law contributions to that putatively charmed state of affairs.

Though it rarely seems to be taken up by philosophers, this point is far from new. Indeed Desai and Woolcock claim it is a constitutive lament of the rule of law promotion field and has continued to be heard for forty years (Desai, Woolcock 2015, 157). One question, which they tackle, is why members of the field nevertheless continue to do as they have done for so long (Desai, Woolcock 2015). The work of 'Justice for the Poor', the group within the World Bank to which they contribute, is a salutary antidote to long-term tendencies, but it is not (yet) mainstream.

Another question is why the criticisms seemed only to arise after disappointments in the field, whereas staples of socio-legal research over a century might have short-cut the learning process. The literature of 'legal pluralism' suggesting that societies abound with normatively significant nodes and networks apart from the state, is, after all, not young. Even if we leave aside Aristotle's observations that 'customary laws have more weight, and relate to more important matters, than written laws' (Aristotle 1984, §1287b 5-6), and more extensively and deeply Montesquieu's enumerations of the extra-legal sources of moderation and immoderation, we have Ehrlich (2002), Petrażycki (1968), Malinowski (1926) and their descendants, most recently prominent Sally Falk Moore (1978) and Marc Galanter (1981). All of them stress the range and significance of sources of social normativity outside states and official laws (where there *are* states and official laws).

Moore has recently reflected on a long life of discovering such phenomena, sometimes serendipitously, sometimes with intent, alongside the official activities she had investigated, of various sorts and in various societies. Those activities 'have all been shown to exist only in the presence of officially unacknowledged or parallel societal realities. The significance of such parallel contexts to an understanding of the world in which law functions is now generally recognized in studies of society. I would argue that the social context is a dimension that also belongs in the very study of law itself' (Moore 2015, 13).

Elsewhere I have sought to examine some implications of these sociological truisms for the rule of law (e.g., Krygier 2011; Krygier 2016c). Here I will merely compress three themes:

1. *Social causality*: No account of law which systematically ignores the interactions, and the variable *complexities* of interactions, between official law and 'semi-autonomous social fields' (Moore 1978), or 'indigenous orderings' (Galanter 1981) can come to terms with the fundamental questions of 'social causality' (Moore 1978, 6) that lie at the base of any attempt to use law to affect life, and of any attempt to assess how and how much it

does so. To take these truisms seriously requires a reassessment of relations between 'centre and periphery' in the relations between official law and those to whom it relates, indeed a reassessment of what is centre and what periphery. As well as noting that many law-affected interactions involve 'bargaining in the shadow of the law' (Mnookin, Kornhauser 1979), we need to be alert to the many and *varied* ways law operates 'in the shadow of indigenous orderings' (Galanter 1981). Since the ends of the rule of law depend on the causal efficacy of the means chosen, and that only emerges from these interactions, some understanding of what that involves might be useful.

2. *Sources of threat*: If society is full of networks, nodes, fields, orderings that have power over people in and around them, and if arbitrary exercise of power is to be avoided, the conventional assumption, that threats of arbitrariness with which the rule of law is concerned are a state monopoly, needs an argument. I do not know a persuasive one either from the tradition or contemporary writings. What are the sources, scale and significance of arbitrary power are empirical matters, answers to which will vary in different societies and at different times. But then why has there been such an exclusive concentration on threats coming from *governments*, by writers on the rule of law?

If there are reasons to be concerned about arbitrary exercise of power, then one would think these reasons should apply wherever it is to be found significant enough to make them worrisome. Of course, if the power is inconsequential, or perhaps to be judged a 'private' matter, or for some reason outweighed by benefits of leaving it unregulated, then perhaps those reasons for concern would be overridden. But surely that is in principle an empirical question, to be assessed in light of evidence relating to the magnitude of the power involved, the number of people who might be affected by it, the significance of the effects, the amount and kinds of arbitrariness to which they might be liable, and so on. But none of these answers points exclusively, certainly not automatically, in the direction of states. The power to harm individuals if exercised arbitrarily can plausibly be alleged of corporations within and outwith states; non-state organisations, among them terrorist and financial organisations, oligarchs, Mafiosi, warlords, tribal elders; international ratings agencies and financial institutions. Banks can do a lot of damage too, and in recent relatively unregulated years and countries, they have. Nothing in the tradition (except its silence on the issue) explains why we should not have an interest in tempering significant power with public consequences, whoever or whatever is exercising it.

3. *Sources of promise*: Why imagine that the state has a monopoly of effective responses to arbitrary power? Sometimes and places, state law will be of great significance in tempering arbitrary power, other times, other places less so. If not, then, given the significance of avoiding arbitrary power, we will need to look elsewhere for help. And there are likely to be many places to look, though that too will vary from society to society, time to time, source of arbitrariness, available response. If sources of the illness to which the rule of law is supposed to be a cure, might come from entities other than states, so too might it be with cures themselves. Though even that is not self-evident. Non-state causes might have state cures, and vice versa. Universalising assumptions about variable social processes are unhelpful here.

5. A POSSIBLE FUTURE:

a. 'a social science that doesn't exist'

The concerns that have led to discussions of the rule of law - what problems it needs to cope with, what might be helpful in the attempt, how this might vary – are multiple and so too the sources we need to draw on to appreciate them: among them: social and political theory, jurisprudence, history, and several of the social sciences. If there were ever a subject that could benefit from historical awareness and interdisciplinary mixing, it is the rule of law. But it is not common.

For inmates of disparate rule of law 'fields' don't mix much. You are unlikely to stumble over many philosophers or historians of political thought at rule of law promoters' conferences, for example. The compliment is commonly returned, though occasionally the tone of such gatherings might be raised a notch with a one line reference to Aristotle or, in the past year, Magna Carta; two lines would be stretching things. Remind me of the last treatment of the rule of law, which was philosophically adept, betrayed close familiarity with social scientific discussion, the huge rule of law index industry, and the activities of rule of law promoters. Actually, there is one (Gowder 2016), but it will only be published this year, and its author rightly claims it to be distinctive for this very combination. And yet everyone agrees that the rule of law is supposed to be not just some thing but a good thing, so it's odd that the thoughts of those who have reflected deeply on the nature of the good(s) that might be associated with it are so resolutely ignored by those who want to generate them (but see, for a collection of essays that cover some ground Fleming (2011). Conversely, the rule of law is a practical ideal; its partisans think it can make some difference in the world. But should lawyers and philosophers learn some more about how law works in the world, maybe from socio-legal research? Apparently not; not their field.

Philosophers speak about the rule of law, of course, but as I suggested in the last section, they tend to do so in a socially and often historically unanchored way. On the other hand, a sociology specifically concerned to wrestle with the normative and explanatory grounds of the rule of law and their policy implications, is not a well-populated field. Almost fifty years ago, Philip Selznick argued that, given its centrality among legal values, the rule of law 'must be a chief preoccupation of legal sociology' (Selznick 1968, 52), and he pointed to a good deal of research that spoke to that theme. Though they might have spoken to it, however, in the sense of bearing on it, most sociologists did not speak of the rule of law or analyse it particularly closely. The rule of law has not until recently been a mainstream sociological concern.

In recent years, as we have seen, some mainstream social scientists have become interested in what they understand as the rule of law (see North, Wallis, Weingast 2009; Weingast 2010; Hadfield, Weingast 2014), in part because the rule of law export industry raises problems and postulates connections which are interesting for social scientists to explore. However, they rarely engage with philosophical issues of either a conceptual or normative sort. Their conceptual investigations typically have to do with identification of things to measure, rather than niceties of meaning, and their normative concerns, where these are allowed, are typically commonsense utilitarian. They are generally uneasy to say much about values, perhaps because it remains largely true, as Selznick long ago lamented, that

'[t]o put it bluntly, our keenest minds in the social sciences didn't know what to do with an ideal except handle it gingerly and view it with alarm' (Selznick 1973).

A bit of mixing – past/present; specialism/specialism - might help. So I would advocate, plagiarising a phrase coined for another purpose by Karol Sołtan, the cultivation of 'a social science that doesn't exist' (Sołtan, 1999, 387; 2002, 357¹⁰). This would begin with a normative range of questions, among them: what are the reasons for which people have 'clamoured' and we might still clamour for the rule of law? Are they good reasons? This would involve examining existing answers, perhaps revising them, perhaps devising new ones. If persuaded that the reasons justify the quest, one might then seek to think about how this clamour might be satisfied.

It would then need to be asked where the dangers to whatever values were settled on were likely to come from, where effective responses might be found, and what those might be. Since many of the key dangers are likely to be socially generated, many of the major goods that flow from tempering arbitrary power (or whatever other value is chosen) will be delivered in the wider society, and many of the major sources of defence against arbitrariness need to be found there too, the normative quest would lead us to make observations and theorisations about things other than law.

And to understand how law does what it does, and why it doesn't always do what we might like it to do, among other things effectively temper the exercise of power, we need to understand the workings of law in society and of society in law. So accounts of the rule of law, billions of dollars spent on rule of law promotion, anatomical dissection of the 'essential elements' of the rule of law, which focus their energies almost exclusively on central, state, legal institutions are misconceived.

These are exceedingly complicated matters, where lawyers', or philosophers', or anyone's, intuitions are unlikely to be helpful. So we would necessarily be led beyond intuitions, however intelligent, to facts about the social world, and in particular about causality, variety and contexts in that world. We would need to consider, and maybe even do some, empirical research and social theory, asking how those values have been secured - where and if they have - how they might be where not, and how much of what we have discovered to work somewhere is likely to work elsewhere. There is, or that is an implication of this argument, no single all-encompassing recipe to be found, and it is a waste of time to look for one. But there might be fruitful possibilities, law is likely often to be among them, and intelligent, self-consciously modest, extrapolations from one place to another might be available.

b. Beyond the Rule of Law?

In an unpublished conference paper, John Braithwaite (2011) pointed out that though many people speak of the rule of law as a 'good thing for its own sake,' it was not that. Rather, he contended, it 'is best thought of as part of a separation of powers rather than the reverse.' Why should the order matter? According to Braithwaite, who is a card-carrying classical

¹⁰ I borrow the phrase from Karol Sołtan. He has used it of Philip Selznick, Lon Fuller, and Charles Anderson, whom he considers pioneers of such a science, that of 'civics' (see Sołtan 1999, 387; or, using Fuller's coinage, 'economics' (1999, 387). Since Selznick and Fuller are arguably also pioneers in the sociology of the rule of law, I justify myself with the thought that it is not plagiarism but merely respectful homage to have borrowed the phrase from Sołtan.

republican (*not* in the US sense of that word, no tea parties for him; his concern is avoidance of domination):

Conceiving the separation of powers as a rule of law question constrains a republican imagination in how to struggle for more variegated separations of powers. It tracks political thought to a barren, static constitutional jurisprudence of a tripartite separation of powers. This when conditions of modernity require us to see private concentrations of power such as ratings agencies and private armies ... as both dangers and contributors to productive balances of power.

Later he comments that:

Webs of institutions are needed to strengthen governance by making it accountable for effectiveness and integrity. Webs of state and non-state institutions that control domination and enable innovation, enterprise and learning, can be mutually enabling and mutually checking of one another's accountability failures ...

For most tasks of modern governance, networks get things done better than hierarchies. But networks must be coordinated and sometimes, but only sometimes, the state is the best candidate to coordinate. For most problems, strengthening state hierarchy to solve problems is not as effective as strengthening checks and balances on hierarchy as we also strengthen private-public partnerships, professions with technocratic expertise on that problem, civil society engagement and vigilance, and other networks of governance, while at the same time strengthening co-ordination of networked governance.

I'm not totally persuaded. I don't believe, for example that separation of powers should be regarded as the ultimate end in view, and I hang on to the tempering of arbitrary power as closer to that. Separation seems to me one technique to that end, not to be valued in itself but for what, in certain forms and for certain purposes, it can support. We need power to accomplish and enable many good, some indispensable, purposes, but it must be tempered and channelled. Separations of certain sorts are important sources of such tempering and channelling, but not the only ones and not to be applauded just because separation is accomplished. If separation disintegrates sources of salutary power (eg for peacekeeping, enforcement of bargains, etc.), or if it leads to new sources of 'autistic corporatism' among newly released and then independent subordinates such as judges in post-despotic conditions (Holmes 2004, 9), we should not applaud. In any event I agree with Montesquieu that mixing and blending are more important than separation. I don't believe that Braithwaite would disagree with any of this, and he certainly shares my hostility to arbitrary power, but I fear that putting separation front and centre might mislead.

However I do believe that we would gain greatly by following his suggestion that the law be viewed, not as the always-necessary centrepiece of power-tempering policy to which other measures are inferior or supplementary addenda, but as one implement among several, of potentially unique importance in some respects and circumstances, but dependent for its

success on many other things, and perhaps not more important for the achievement of its own goal than they.

That in no way diminishes the importance of the ideal that the rule of law traditions I have mined here uphold, nor does it suggest that law is unimportant. But it might enable us to see its importance in (variable) perspective(s), give due weight to other phenomena that might need enlisting to serve such goals, and release us from the hold of a mantra which in its modish ubiquity threatens to obscure the valuable purposes for which it was once pushed into the fray, and instead serve virtually any purpose you might want to name.

Now I don't yet know what the substantive results of this might be. They might turn out to be none or negative. Moreover, while it is easy to suggest abandoning a phrase that has been so often abused, the rule of law is in very good company in receiving such abuse. Companions include democracy, justice, equality, etc. Controversy about their meaning might have as much to do with the importance of the values they evoke as with any intrinsic opacity of reference.

It's a bold step, and not necessarily the wisest one, to slough off a term, and with it perhaps a set of seriously pondered thoughts, just because they have now come to attract bad company. So I will leave open the option of reverting to my earlier persona, and trying to defend an account of the rule of law, conceived in my 'teleological, sociological' way. Should people think I'm having it both wishy-washy ways, I have only the wisdom of Groucho Marx to fall back on: 'Those are my principles, and if you don't like them ... Well I've got others.'

References:

Aristotle (1988), *The Politics*, Cambridge University Press.

Arndt, Heinz (1957), 'The Origins of Dicey's Concept of the " Rule of Law "' 31 *Australian Law Journal* 117-23.

Benton, Lauren (2002), *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, Cambridge University Press.

Bozóki, András (2012) 'The Crisis of Democracy in Hungary 2012'

<http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>

Bugarič, Bojan (2014), 'Law and Development in Central and Eastern Europe: The Neo-liberal Development State and Its Problems', in Randall Peerenboom and Tom Ginsburg, eds., *Law and Development in Middle-Income Countries: Avoiding the Middle-Income Trap*, Cambridge University Press.

Carothers, Thomas (2006), 'The Problem of Knowledge,' in Thomas Carothers, ed., *Promoting the Rule of Law Abroad. In Search of Knowledge*, Carnegie Endowment for International Peace, Washington D.C., 15-28.

Cheesman, Nick (2015), *Opposing the Rule of Law. How Myanmar's Courts Make Law and Order*, Cambridge University Press.

Cheesman, Nick (2015b), 'The Signifier of Desire,' 82, 2 *Social Research*, 267-90.

Chesterman, Simon (2002), 'Taking stock: The UN Security Council and the rule of law', Keynote Address, Dialogue with UN Member States on the rule of law at the international level, New York, 28 October 2010.

Collins, Hugh (1982), *Marxism and Law*, Oxford University Press.

Craiutu, Aurelian (2012), *A Virtue for Courageous Minds. Moderation in French Political Thought, 1748-1830*, Princeton University Press.

Desai, Deval (2014), 'In Search of "Hire" Knowledge: Donor Hiring Practices and the Organization of the Rule of Law Reform Field,' in David Marshall, ed., *The International Rule of Law Movement – A Crisis of Legitimacy and the Way Forward*, Harvard University Press (Human Rights Program Series), Cambridge, MA.

Desai, Deval and Woolcock, Michael (2015), 'Experimental Justice Reform: Lessons from the World Bank and Beyond', 11 *Annual Review of Law and Social Science*, 155-74.

Dicey, Alfred Venn (1982), *Introduction to the Law of the Constitution*, reprint of the 8th edition of 1915. First edition 1915, LibertyClassics, Indianapolis.

Di Palma (1990), *To Craft Democracies. An Essay on Democratic Transitions*, University of California Press, Berkeley.

Ehrlich, Eugen (2002 [first published 1913]), *Fundamental Principles of the Sociology of Law*, trans. Walter L. Moll, Transaction Books.

Endicott, Timothy (2014), 'Arbitrariness,' *University of Oxford Legal Research Paper Series Paper No 2/2014*, <http://ssrn.com/abstract=2378858>.

Fleming, James E. ed. (2011), *Getting to the Rule of Law*, Nomos no.50, New York University Press.

Frank, Jill (2005), *A Democracy of Distinction. Aristotle and the Work of Politics*, University of Chicago Press.

Galanter, Marc (1981), 'Justice in Many Rooms. Courts, Private Ordering, and Indigenous Law,' 9 *Journal of Legal Pluralism*, 1-47.

Galanter, Marc (2014), *Why the Haves Come Out Ahead. The Classic Essay and New Observations*, Quid Pro Books, New Orleans.

Ginsburg, Tom (2015), 'Stop Revering Magna Carta,' <http://www.nytimes.com/2015/06/15/opinion/stop-revering-magna-carta.html? r=0>

Gowder, Paul (2016), *The Rule of Law in the Real World*, Cambridge University Press.

Guha, Ranajit (1998), *Dominance Without Hegemony: History and Power in Colonial India*, Harvard University Press, Cambridge Mass.

Hadfield, Gillian K. and Weingast, Barry R. (2014), 'Microfoundations of the Rule of Law,' 17 *Annual Review of Political Science*, 21–42.

Haggard, Stephen, MacIntyre, Andrew, and Tiede, Lydia (2008), 'The Rule of Law and Economic Development' (2008) 11 *Annual Review of Political Science*, 205-34.

Haggard, Stephen, Tiede, Lydia (2010) 'The Rule of Law and Economic Growth: Where are We?' 39, 5 *World Development*, 673-85

Harrington, James (1771), *The Oceana and Other Works of James Harrington, with an Account of His Life by John Toland*, Becket and Cadell. Accessed 07/01/2016. <http://oll.libertyfund.org/titles/916>

Hasluck, Paul (1970), *Black Australians: a survey of native policy in Western Australia, 1829-1897*, Melbourne University Press.

Hayek, Friedrich von (1960), *The Constitution of Society*, Routledge & Kegan Paul, London.

Hayek, Friedrich von (1994), *The Road to Serfdom*, 50th anniversary edition with a new introduction by Milton Friedman, University of Chicago Press, Chicago.

Hirst, John (1983), *Convict Society and its Enemies*, Allen & Unwin, Sydney.

Hobbes, Thomas (1960), *Leviathan*, Basil Blackwell, Oxford.

Holmes, Stephen (200), 'In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror,' 97, 2, *California Law Review*, 301-55.

Horwitz, Morton (1977), 'The Rule of Law: An Unqualified Human Good?' 86 *Yale Law Journal* 566

Issacharoff, Samuel (2013), 'The democratic Risk to Democratic Constitutions' 5 *Constitutional Court Review*, 1-31.

Jensen, Erik G. and Heller, Thomas C., eds. (2003), *Beyond Common Knowledge. Empirical Approaches to the Rule of Law*, Stanford Law and Politics.

Judt, Tony (1990), 'The Rediscovery of Central Europe,' 119, 1 *Daedalus*, 23-54.

Kamenka, Eugene and Tay, Alice Erh Soon (1975), 'Beyond Bourgeois Individualism: the Contemporary Crisis in Law and Legal Ideology,' in Kamenka and R.S. Neale, eds., *Feudalism, Capitalism and Beyond*, Edward Arnold, London.

Kavanagh, Camino and Bruce Jones (2011), *Shaky Foundations: An Assessment of the UN's Rule of Law Support Agenda* (New York, New York University Center on International Cooperation).

Kilcullen, David J. (2011), 'Deiokes and the Taliban: Local governance, bottom-up state formation and the rule of law in counter-insurgency,' in Whit Mason, ed., *The Rule of Law in Afghanistan*, Cambridge University Press, 35-50.

Kleinfeld, Rachel (2006), 'Competing Definitions of the Rule of Law, in Thomas Carothers, ed., *Promoting the Rule of Law Abroad. In Search of Knowledge*, Carnegie Endowment for International Peace, Washington D.C., 41-73.

Kolsky, Elizabeth (2010), *Colonial Justice and British India: White Violence and the Rule of Law*. Cambridge University Press.

Krygier, Martin (2006), 'The Rule of Law. An Abuser's Guide', in András Sajó, ed., *The Dark Side of Fundamental Rights*, Eleven International Publishing, Utrecht, 129-161.

Krygier, Martin (2009), 'The Rule of Law. Legality, Teleology, Sociology,' in Gianluigi Palombella and Neil Walker, eds., *Relocating the Rule of Law*, Hart Publishing, Oxford, 2009, 45-69.

Krygier, Martin (2011), 'Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?,' in James E. Fleming, ed., *Getting to the Rule of Law*, Nomos no.50, New York University Press, 2011, 64-104.

Krygier, Martin (2014), 'The Rule of Law after the Short Twentieth Century: Launching a Global Career', in Richard Nobles and David Schiff, eds. *Law, Society and Community: Essays in Honour of Roger Cotterrell*, Ashgate, 327-46.

Krygier, Martin (2015), 'Rule of Law (and Rechtsstaat), in James D. Wright (editor-in-chief), *International Encyclopedia of the Social & Behavioral Sciences*, 2nd edition, Vol 20, Elsevier, Oxford, 2015, 780–787.

Krygier, Martin (2016a) 'Tempering Power,' forthcoming in Maurice Adams, Ernst Hirsch Ballin, Anne Meuwese, eds., *Bridging idealism and realism in constitutionalism and Rule of Law*, Cambridge University Press
MacIntyre, Alasdair (1985), *After Virtue. A study in moral theory*, 2nd edition, Duckworth, London.

Krygier, Martin (2016b), 'Magna Carta and the Rule of Law Tradition', forthcoming in the Department of the Australian Senate, *Papers on Parliament*, 2016.

Krygier, Martin (2016c), 'Legal Pluralism and the Rule of Law' forthcoming in Andrew Halpin and Nicole Roughan, eds., *Jurisprudence without Borders*, Cambridge University Press.

Krygier, Martin (2016d), 'The Rule of Law and the Security Council. Some conceptual reflections,' forthcoming in Jeremy Farrall and Hilary Charlesworth eds., *Strengthening the Rule of Law through the Security Council*, Routledge.

Krygier, Martin and Czarnota, Adam (2006), 'After Postcommunism. The Next Phase', 2 *Annual Review of Law and Social Science*, 299-340

Kurkchyan Marina (2003), 'The Illegitimacy of Law in Post-Communist Societies', in Brian Galligan and Marina Kurkchyan, eds., *Law and Informal Practices. The Post-Communist Experience*, Oxford University Press, 25-46.

Locke, John (1960), *Two Treatises of Government*, Mentor, New York.

Loughlin, Martin (2012), *Foundations of Public Law*, Oxford University Press.

- MacIntyre, Alasdair (1985), *After Virtue. A study in moral theory*, 2nd edition, Duckworth, London.
- MacIntyre, Alasdair (1988), *Whose Justice? Which Rationality*, University of Notre Dame Press, Notre Dame, Ind.
- McIlwain, Charles (1947), *Constitutionalism: Ancient and Modern*, rev. ed., Cornell University Press, Ithaca, NY.
- McLaren, John (2015), 'Chasing the Chimera: The Rule of Law in the British Empire and the Comparative Turn in Legal History,' 31 *Law in Context*, 21-36.
- Malinowski, Bronislaw (1926), *Crime and Custom in Savage Society*, Routledge & Kegan Paul, London.
- Mansfield, Harvey C. (1985), 'Constitutionalism and the Rule of Law,' 8 *Harvard Journal of Law and Public Policy*, 323-26.
- Marsilius of Padua (2005), *The Defender of the Peace*, Cambridge University Press.
- Massoud, Mark (2013), *Law's Fragile State: Colonial, Authoritarian and Humanitarian Legacies in Sudan*. Cambridge and New York: Cambridge University Press.
- Mattei, Ugo, Nader, Laura (2008), *Plunder. When the Rule of Law is Illegal*, Blackwell.
- Merryman, J.H. (1985), *The Civil Law Tradition*, 2nd edition, Stanford University Press.
- Mnookin, R.H., Kornhauser, L. (1979), 'Bargaining in the Shadow of the Law: The Case of Divorce,' *Yale Law Journal*, 950-97.
- Montesquieu, Charles-Louis de Secondat, Baron de La Brède et de (1992), *The Spirit of the Laws*, translated and edited by Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone, Cambridge University Press.
- Moore, Sally Falk (1978), *Law as Process. An Anthropological Approach*, Routledge & Kegan Paul, London.
- Moore, Sally Falk (2015), 'An Unusual Career: Considering Political/Legal Orders and Unofficial Parallel Realities' 11 *Annual Review of Law and Social Science*, 1-14.
- Neal, David (1991), *The Rule of Law in a Penal Colony*, Cambridge University Press.
- North, Douglass C., Wallis, John Joseph, Weingast, Barry R., *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History*, Cambridge University Press, 2009.
- North, Helen F. (1973), 'Temperance (sōphrōsynē) and the Canon of the Cardinal Virtues,' *Dictionary of the History of Ideas*, vol. IV, New York, Charles Scribner's Sons, 365-78.
- Oakeshott, Michael (1991), "Political Education," in *Rationalism in Politics and other essays*, New and expanded edition, LibertyPress, Indianapolis.

O'Connor, Vivienne (2015), 'Understanding the International Rule of Law Community, its History, and its Practice,' INPROL, <http://ssrn.com/abstract=2665672>

O'Donnell, Guillermo (1999), 'Polyarchy and the (Un)rule of Law in Latin America,' in Juan E. Mendez, Guillermo O'Donnell, Paulo Sergio Pinheiro, eds., *The (Un)Rule of Law & the Underprivileged in Latin America*, University of Notre Dame Press, Notre Dame.

Palombella, Gianluigi (2010), 'The rule of law as institutional ideal,' in L. Morlino and G. Palombella, eds., *Rule of Law and Democracy* Brill, Leiden, 3-37.

Palombella, Gianluigi (2012), *È possibile una legalità globale? Il Rule of law e la governance del mondo*, Il Mulino.

Peerenboom, Randall (2004), 'Varieties of rule of law: an introduction and provisional conclusion,' in Peerenboom, ed., *Asian Discourse of Rule of Law*, RoutledgeCurzon, London, 1-55.

Petrażycki, Leon 1968 [1955], *Law and Morality*, trans. Hugh W. Babb, Johnson Reprint, New York.

Pettit, Philip (1997), *Republicanism: A Theory of Freedom and Government*, first edition, Cambridge University Press.

Pipes, Richard (1977), *Russia under the Old Regime*, Peregrine Books, Harmondsworth.

Pocock, J.G.A. (1987) *The Ancient Constitution and the Feudal Law: A Reissue with a Retrospect*, Cambridge: Cambridge University Press.

Podgórecki, Adam (1994), *Polish Society*, Praeger, Westport Conn.

Poggi, Gianfranco (2014), *Varieties of Political Experience. Power Phenomena in Modern Society*, ecpr essays, Colchester.

Pritchett, Lant, Woolcock, Michael, and Andrews, Matt (2010) 'Capability Traps? The Mechanisms of Persistent Implementation Failure,' CGD Working Paper 234. Washington, D.C.: Center for Global Development.

<http://www.cgdev.org/content/publications/detail/1424651>

Rajagopal, Balakrishnan (2008), 'Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination,' 49(4) *William and Mary Law Review* 1347-1376.

Rajah, Jothie (2012), *Authoritarian Rule of Law*, Cambridge University Press.

Raz, Joseph (1979) 'The Rule of Law and its Virtue,' In Raz, *The Authority of Law. Essays on law and morality*, Clarendon Press, Oxford, 210-29.

Reid, John Philip (1977), 'In Legitimate Stirps: The Concept of "Arbitrary," the Supremacy of Parliament, and the Coming of the American Revolution,' 5,3 *Hofstra Law Review*, 459-99.

Reid, John Philip (2004), *Rule of Law. The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries*, Northern Illinois University Press, DeKalb.

Rowley, C. D. (1970), *The Destruction of Aboriginal Society*, ANU Press, Canberra.

Rundle, Kristen (2009), 'The Impossibility of an Exterminatory Legality: Law and the Holocaust,' 59 *University of Toronto Law Journal*

Sadurski, Wojciech (2016) 'What Makes Kaczyński Tick?,' *International Journal of Constitutional Law Blog*, <http://www.icconnectblog.com/2016/01/what-makes-kaczynski-tick>

Santiso, Carlos (2003), 'The Elusive Quest for the Rule of Law: Promoting Judicial Reform in Latin America,' 23, 3 *Brazilian Journal of Political Economy*, 113-34.

Security Council Report, *Cross-Cutting Report on the Rule of Law* (2011), [www.securitycouncilreport.org/atf/cf/{65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9}/XCutting Rule of Law 2011.pdf](http://www.securitycouncilreport.org/atf/cf/{65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9}/XCutting%20Rule%20of%20Law%202011.pdf).

Sellers, Mortimer N.S. (2014), 'What is the Rule of Law and Why Is It So Important', in James R. Silkenat, James E. Hickey Jr., Peter D. Barenboim, eds., *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, Springer Verlag, Heidelberg, 3-13.

Selwood, Dominic (2015), 'The cult of Magna Carta is historical nonsense. No wonder Oliver Cromwell called it "Magna Farta"', http://blogs.telegraph.co.uk/news/dominic_selwood/100276672/the-cult-of-magna-carta-is-historical-nonsense-no-wonder-oliver-cromwell-called-it-magna-farta/

Selznick, Philip (1968), 'The Sociology of Law,' *The International Encyclopedia of the Social Sciences*, vol. 9, Macmillan, New York.

Selznick, Philip (1969), *Law, Society, and Industrial Justice* (New York, Russell Sage Foundation).

Selznick, Philip (1973), 'The Dialectic of Fact and Value: Foundations of a Humanist Social Science,' Bernard Moses Memorial Lecture, University of California, Berkeley, February 21, 1973, ms. in possession of the author.

Sempill, Julian A. 'Ruler's Sword, Citizen's Shield: the Rule of Law and the Constitution of Power,' (forthcoming 2016), *Journal of Law and Politics*

Sen, Amartya (2000), 'What Is the Role of Legal and Judicial Reform in the Development Process?' *speech, Washington, DC, June 5, 2000*, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf>.

Shils, Edward (1981), *Tradition*, University of Chicago Press.

Shklar, Judith 1998, 'Political Theory and the Rule of Law', in *Political Theory and Political Thinkers*, Chicago, University of Chicago Press.

Softan, Karol (1999), 'A Social Science That Does Not Exist', in Willem J. Witteveen and Wibren van der Burg, eds., *Rediscovering Fuller. Essays on Implicit Law and Institutional Design*, Amsterdam University Press, Amsterdam.

Softan, Karol (2002), 'Selznick and Civics,' in Robert A. Kagan, Martin Krygier, and Kenneth Winston (eds.), *Legality and Community. On the Intellectual Legacy of Philip Selznick*, Rowman and Littlefield, Maryland.

Sumption, Jonathan (2015), 'Magna Carta then and now,' address to Friends of the British Library, <https://www.supremecourt.uk/docs/speech-150309.pdf>

Teitel, Ruti, 2000, *Transitional Justice*, New York, Oxford University Press.

Upham, Frank (2002), 'The Illusory Promise of the Rule of Law, in András Sajó, ed., *Human Rights with Modesty: The Problem of Universalism*, Martinus Nijhoff, Leiden/Boston.

Waldron, Jeremy (2002), 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (21,2, *Law and Philosophy* 137-64

Waldron, Jeremy (2011a), 'Thoughtfulness and the Rule of Law,' *British Academy Lecture*

Waldron, Jeremy (2011b), 'The Rule of Law and the Importance of Procedure,' in in James E. Fleming, ed., *Getting to the Rule of Law*, Nomos no.50, New York University Press, 3-31.

Waldron, Jeremy (2012), *The Rule of Law and the Measure of Property*, Hamlyn Lectures, Cambridge University Press.

Walker, Geoffrey de Q. (1988), *The rule of law : foundation of constitutional democracy*, Melbourne University Press, Carleton, Victoria.

Washbrook, David (1968), 'India: two faces of colonialism', in Andrew Porter, ed., *Oxford History of the British empire. Vol. 2. The Nineteenth Century*, Oxford University Press.

Weber, Max (1968), *Economy and Society*, volume 2, ed. Guenther Roth, Claus Wittich, Bedminster Press, New York.

Weingast, Barry R. (2010), Barry R. Weingast, 'Why developing countries prove so resistant to the rule of law,' in James J. Heckman, Robert L. Nelson, and Lee Cabatingan, eds., *Global Perspectives on the Rule of Law*, Routledge, 28-51.

Windschuttle, Keith (2002), *The Fabrication of Aboriginal History*, vol.1, Macleay Press, Sydney.