Rule of Law (and *Rechtsstaat*)

Martin Krygier

Gordon Samuels Professor of Law and Social Theory, University of New South Wales

Adjunct Professor, Regulatory Institutions Network, Australian National University.

Tel: +61 (0)2 93852240

Email: m.krygier@unsw.edu.au

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ABSTRACT

In all its many versions, the rule of law has to do with the relationship between law and the exercise of power, particularly public power. As an ideal, it signals that law can and does well to contribute to articulating, channeling, constraining and informing – rather than merely serving - such exercise. Beyond that, what it rules out, what it allows, what it depends on and indeed what it is, are all matters of disagreements that stem from differences among political and legal histories and traditions, but also reflect dilemmas and choices that recur, in different forms and weights, in many such histories and traditions. This entry is concerned with these enduring themes, dilemmas and choices, as they occur within particular traditions, especially the common law 'rule of law' tradition, on the one hand, and the Continental Rechtsstaat tradition, on the other.

From the last quarter of the twentieth century, the rule of law has come to occupy an increasing amount of discursive space, not only among lawyers, for whom it had been an old theme, but also among promoters of economic development, human rights, democratization, state-building, and political and legal reform. Increasingly, it is alleged, the rule of law is a key ingredient in the attainment of all these good things and others. As one author has observed,

> Among a plethora of development and security agencies, a new "rule of law consensus" has emerged. This consensus consists of two elements: (1) the belief that the rule of law is essential to virtually every Western liberal foreign policy goal – human rights, democracy, economic and political stability, international security from terrorist and other transnational threats, and transnational free trade and investment; and (2) the belief that international interventions, be they through money, people, or ideas, must include a rule-of-law component. (Call, 2007, 4)

In this transformation, the rule of law has gained a great deal in modishness but less, actually nothing, in clarity. But clarity was never the concept's strong suit. Like many other important moral, political and legal ideals, among them democracy, justice and liberty, its meaning, scope, conditions and significance are all highly, perhaps essentially, contested (Waldron, 2002). And like those ideals, not only are there enduring common themes but also common axes of argument and disputation that pervade discourse on the rule of law. As suggested elsewhere (Krygier, 2011, 69), these contests do not render such concepts meaningless or useless. On the contrary, some of them are the most important we have. We will not resolve those contests, here or anywhere, but it might be possible to clarify a few of them and suggest why they – and the rule of law - are important.

The concept of the rule of law embodies ideals that have figured in political and constitutional discourse at least since Aristotle, who contrasted 'the rule of the law' with 'that of any individual'. Those ideals have varied, so too the strategies to achieve them and the verbal formulation of them. They revolve around enduring themes and concerns,

however, the character of which is nicely captured by Otto Kirchheimer's laconic observation that:

> for all the differences in historical roots and particular legal traditions their common denominator lies in the simple thought that the security of the individual is better served when specific claims can be addressed to institutions counting rules and permanency among their stock-in-trade than by reliance on transitory personal relations and situations. Beyond that, a good part of their common success probably lies in the mixture of implied promise and convenient vagueness. (Kirchheimer, 1992, first published 1967, 244)

In all versions, the rule of law has to do with the relationship between law and the exercise of power, particularly public power. As an ideal, it signals that law can and does well to contribute to articulating, channeling, constraining and informing – rather than merely serving - such exercise. That takes us some distance from those who see law simply as one of the means by which power is exercised, neither better nor worse than any other. For there are lots of ways to exercise power; partisans of the rule of law insist that it helps us block some of them, including many of the worst of them (see Rundle, 2007), and to channel others in salutary directions and ways. But what it rules out, what it allows, what it depends on and indeed what it is, are all matters of disagreement. This is so for several reasons, often stemming from differences among political and legal histories and traditions, but also reflecting dilemmas and choices that recur, in different forms and weights, in many such histories and traditions.

1. Law and State

These days, and in contemporary language, the words 'law' and 'state' are rarely far apart. However, it was not always and everywhere so, and even now it makes a difference whether the connection is seen as necessary or contingent, even more so whether it is seen as a conceptual rather than an historical connection. A clue to this comes from the terms used in various languages. In particular, there is an obvious semantic difference between 'rule of law,' the term used in English, and those found in many European languages to cover some, but not all, of the same terrain. Each of these has a context and a history that cannot be ignored or simply elided, but in a host of European languages there is one thing commonly built into the concept, which is missing from the English phrase: the State. Whether it is *Rechtsstaat* (German: (state of law; law-governed state)), *état de droit* (French), *statto diritto* (Italian), *estado de derecho* (Spanish), *państwo prawa* (Polish) or *pravovoe gosudarstvo* (Russian), law is inextricably connected to the state. It is the subject – grammatically and ontologically - of each rendition. However, the rule of law does not mention the state. This is not an accident.

The concept of the state is not part of English constitutional jurisprudence, while in Australia and the United States it refers to what Germans would call *Länder* (see MacCormick, 1984,

65). More deeply, the English tradition was long pluralistic in its conceptions of the sources of law (Rosenfeld, 2001), with multiple cumulative and competing authoritative sources, among them custom, court decisions and statutes. Indeed, while the common law courts were long agents of the Crown, some of the mythologically most powerful contests in the English rule of law tradition, particularly the constitutional struggles of the seventeenth century, pitted them against successive wearers of that Crown, even at the cost of the head of one of those (Charles I); what might in other countries be called the head of State.

According to the common law tradition, popular custom, an 'ancient collection of unwritten maxims and customs' (Blackstone [1765–9] 1979, vol. 1: 17) was long seen as a primary source of law, and '[t]he only method of proving, that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it' (Blackstone [1765–9] 1979, vol. 1, 68). That custom was evidenced (rather than made, it was claimed) by another non-legislative source, the judgments of courts in particular cases brought to them. This was the 'common law' (Krygier, 1998), which seventeenth century partisans of the rule of law preferred to the commands of the King; 'Law established by customary practice, law that was not the creation of will, command, or sovereignty, was a restraint on government – a restraint on discretionary power (Reid, 2002, 12). True, the courts were the King's courts, but the law they adjudicated was not, in the main, considered to be the King's creation. It was not just an instrument with which the Crown and the state could direct activities and control public policy. For the King, like his subjects, was subject to 'the law of the land.'

Deliberate, secular, purpose-guided, prosaic (not sacred) legislation, as Max Weber observed, is a central and distinctive characteristic of modernity in law (see Weber 1968, 760-68). Today, of course, in its exponential rush since the eighteenth century (see Lieberman, 1989), legislation has swamped custom and even judicial decisions as a quantitatively primary and increasingly imperious source of law, in the common law world as elsewhere. However, the notion that the rule of law draws upon sources other than legislative fiat (i.e. an order for an act to be carried out), that the judiciary is a fundamental guardian of it, and that all, even the most powerful, are and should be subject to it, goes deep in the common law tradition and has not lost resonance. It was expressed in many ways over centuries, but the canonical connection between the term 'rule of law' and those thoughts came to displace other descriptors, primarily as a result of the hugely influential late nineteenth century work by A.V. Dicey (Dicey, 1959 (first published 1885)). Dicey's formulations distilled (and in some respects distorted) a very old English legal tradition.

No parallel existed in the nineteenth and early twentieth century *Rechtsstaat.* The term was coined only at the very end of the eighteenth century (Heuschling, 2002, 29), to capture a new phenomenon, the modern State with its monopoly of force. That state was the subject of this concept, and also the legal source of law. The *Rechtsstaat* ruled *by or through* law, whereas other states, such as the *Machtstaat* (state of power) or *Polizeistaat* (police-state)

(see Raeff 1983) might dispense with it and exercise power in other ways. What was distinctive of a *Rechtsstaat* was not that the state was subject to law that had other sources and independent guardians, but that it acts in a *rechtlich* (lawful, legal) way; 'according to some nineteenth century (and early twentieth-century) constructions, there is a relation of near-identity between the state and its law … within the system of rule the law is the state's standard mode of expression, its very language, the essential medium of its activity' (Poggi, 1978, 102). That is how we recognize it as a *Rechtsstaat,* as distinct from any other type of state. There was no conceptual space to say to the State what Sir Henry Bracton already said in the thirteenth century:

> The king has a superior, namely God. Also the law by which he is made king. Also his *curia,*namely the earls and barons, because if he is without bridle, that is without law, they ought to put the bridle upon him. (quoted in Reid, 2002, 11, and see Palombella, 2010, *passim*)

That is an important rule-of-law claim.

2. Arbitrary power: uncontrolled or unruly

That the law should rule even over the most powerful people and institutions is a very old theme in the English legal tradition. The rule of law is commonly contrasted with *arbitrary* exercise of power; that, above all, is the evil that the rule of law is supposed to curb. This leads to another difference, this time masked rather than revealed by semantics. For arbitrariness is itself an ambiguous concept. Is it, for example, 'uncontrolled interference' or 'interference that is not subject to established rules' (Pettit, 2012, 58)? These are two of several (see Richardson, 2002, chapter 3) conceptions of the concept. They have particular relevance to law; the former commonly being referred to as 'government *under* law', the latter as 'government *by* law.' If one had to choose, there are strong arguments to favor the former over the latter (see Pettit, 2012), but ideally one would encounter the first always, and in exercises of public power the second as well. Not everyone opposed to 'arbitrary power' has had both these senses in mind, however.

As we saw, the common law tradition, from at least the thirteenth century until well into the eighteenth, maintained that the king was subject to a law that he had not made, indeed that made him king. For the king, for anyone, to ignore or override that law was to act arbitrarily (see Reid, 2004, Palombella, 2010). Liberties, and procedures to protect them such as habeas corpus and due process, were enshrined in that law, and encroachment on such liberties was barred, even to the monarch, by the law. That that law was often *not* expressed in clear, prospective, general rules (see Maitland, 1965, first edition 1908, 383), today regarded as the essence of the rule of law, was not to the point (Reid, 2002). Indeed, given the customary, dynamic, fluxful, and evolutionary character of the common law as theorized by its adepts, it was beside the point (see Postema, 1986, chap. 1). The issue was that it was superior.

From the eighteenth century, however, law came to be viewed increasingly as the direct or indirect product of the political legislator, the 'sovereign', and in English law there was, at least arguably until very recently as a result of EU membership, no legal superior to the sovereign legislator. The conception of the rule of law gradually became more preoccupied with the character of the rules that the sovereign enacted: they should be clear, prospective, consistent, etc.

Shocked by this downgrading of the notion of a law superior to the sovereign, and by what they regarded as their own 'arbitrary' treatment by the British sovereign Parliament (Reid 2002), the American colonists first staged a revolution, and then a pathbreaking innovation: a written constitution binding on the legislator, and in due course routinely overseen by an independent Supreme Court, whose decisions also came to be seen as binding on the legislator. This was a novel way of vindicating a very old principle. In England, old conceptions persevered, but in increasing tension with the legislative bias of modernity.

On the Continent, things were different. A *Rechtsstaat* was not just any sort of state, as we have seen, but one which operated on the basis of legal rules configured in particular ways. '[S]ituated at the heart of the theory of the *Rechtsstaat* is the question of the arbitrariness of power, of the potential violence inscribed in all relations of domination, whether private or public' (Heuschling, 2002, 42). However, partisans of the *Rechtsstaat* did not envisage a law superior to the state, a basis for appeal to some higher notion or other source of law. Law was a characteristic of the *Rechtsstaat,* but it was also its *product*. The non-arbitrary *rechtlich* quality of the state was a matter of the degree to which its edicts took the form of general rules that conformed to specific formal criteria and were supposed, in particular, to guarantee certainty and predictability. In this understanding, '[t]he *Rechtsstaat* means that the law is the structure of the State, not an external limitation to it. … Liberty is a consequence not truly a premise of the law. The authority vested in this conservative aristocratic state protected civil liberties as a service offered through the State' (Palombella, 2010, 11-12).

The notion that state agencies must comply with a law above the State, only came with the development of written and legally binding constitutions, particularly in reaction to the Nazi calamity in the middle of the last century. Until then, although 'it was in the state's interest to promote its self-limitation through self-binding to legal norms' (Loughlin, 2010, 320), and the people's interest too, it was up to the state to bind itself (*Selbstbeschränkung*). Whereas the common law tradition frequently, and in the seventeenth century vociferously, conceived of individual rights as protected by the courts *against* the Crown, no such opposition existed in the German conception of the *Rechtsstaat* (see Rosenfeld, 2001, 1319), which, as Leondard Krieger shows, projected 'older national assumptions which made the idea of liberty not the polar antithesis but the historical associate of princely authority' (Krieger, 1957, 5). The contrast is deep. As Gozzi observes:

> In Germany … the doctrine of the *Rechtsstaat* precludes the possibility of the primacy of law over the state. Indeed, it is precisely in the relationship between law and state – which in the German case is settled with the primacy of the state – that the most significant feature of the doctrine of the German *Rechtsstaat* emerges. Conversely, the English doctrine of the government of law is most clearly distinguished by grounding the rule of law on the superiority of law as proclaimed by the courts of justice. (Gozzi, 2007, 238)

From the point of view of those subject to the exercise of power, both its control and its manner of exercise, government under and by law, are important. But they are not the same. A state could be controlled but act under decrees with quite particular targets, kept secret from citizens, or inconsistent with each other, or retrospective, or without any decrees, let alone laws, at all. It could, conversely, be uncontrolled but act through promulgated, clear, consistent etc. laws. In either case, something significant would be lacking. For where arbitrariness in either of these senses is linked with significant power, it at the very least raises the reasonable apprehension that it will tend to: threaten the *liberty* of anyone subject to it; generate reasonable and enduring *fear* among them; and deprive citizens of sources of reliable sources of expectations of, and *coordination* with, each other and with the state. And as Lon Fuller (1969) and Jeremy Waldron (2011a) have emphasized, it threatens the *dignity* of all who find themselves mere objects of power exercisable at the whim or caprice of another.

These are four good reasons to value reduction of the possibility of arbitrary exercise of power (see Krygier 2011, 79-81). There may well be many others, such as those that commend themselves to many economists, having to do with the alleged contribution of the rule of law to economic development (Dam 2006).To the extent that the rule of law can help deliver such reductions, this is reason to value it. This is not, of course, merely a negative matter of removing evils, but can be expressed positively. A society in which law contributes to securing freedom, confidence, coordination and dignity, is some great and positive distance from many available alternatives. There are other things we want from law, and many more things we might want in a good society, but ways of serving these values are goods immeasurably harder to attain without institutionalizing constraints on arbitrariness, in both these senses, in the exercise of power.

For some thinkers, speculating in these ways about what good might flow from reducing arbitrariness in the exercise of power, what it might be *for,* takes us beyond the analytical task of understanding what the rule of law *is*; for others it doesn't get us close to what matters. The former favor 'thin' accounts; the latter lard their accounts of the rule of law with more ingredients and of different kinds. These are often known in the literature as 'thick' accounts of the rule of law.

3. Thin or thick

Apart from questions of control versus character of law, writers on the rule of law often distinguish between 'thin' or 'formal,' on the one hand, and 'thick', 'substantive', or 'material' conceptions of it, on the other. The former limit themselves to formal properties of laws and legal institutions, that are purported to constitute the rule of law. The latter require substantive elements from a larger vision of a good society and polity – democratic, free-market, human rights respecting, or some such – to be present.

The first track is favoured by modern analytical jurists. They have often adopted (Hart, 1969, 273-74) or extended (Raz, 1974; Walker, 1988) Lon Fuller's eight principles of what he called 'the morality of law' as defining characteristics of the rule of law, even when they disagreed with him over whether they deserved to be called moral principles. According to Fuller (1969), these characteristics were that there must be rules, these rules must be publicly available, prospective, understandable, consistent, possible to perform, sufficiently stable for citizens to orient their actions by them, and administered in ways congruent with their terms. There is controversy over whether there is any reliable connection between such thin principles and substantive values beyond them (see Krygier, 2010, 114-20) but whatever the view on that, on a thin conception those further values are something other than the rule of law.

Again, the *Rechtsstaat* has oscillated between thick and thin through its 200 years of evolution. It was first theorized by German liberal constitutional and administrative theorists, prominent among them Karl Rotteck, Karl Theodor Welcker and Robert von Mohl, seeking to characterize a legal order in terms of values it served (those values in their turn to be realized *in* and not *against* the state). The post-Nazi *Rechtsstaat* returned to, and richly amplified, a normative characterization based on the fundamental value, inscribed in the first article of the German Basic Law of 1949, of human dignity. However, in between times, after the failure of the 1848 revolutions and particularly under and after Bismarck, its late nineteenth century and early twentieth century versions were pared of normative adhesions, and strictly devoted to elaborating the formal components of a legal order that might properly be called a *Rechtsstaat.*

Not only legal philosophers, but also legal comparativists (see Peerenboom ed., 2004) tend to favour 'thin' versions of the concept, what might be called rule-of-law-lite: 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 businessmen, 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.

Many, however, find thin conceptions quite inadequate. Ronald Dworkin, for example, was skeptical of conventional 'rule book' conceptions of the rule of law, which insist that 'so far as is possible, the power of the state should never be exercised against individual citizens

except in accordance with rules explicitly set out in a public rule book available to all ... Those who have this conception of the rule of law do care about the content of the rules in the rule book, but they say that this is a matter of substantive justice, and that substantive justice is an independent ideal, in no sense part of the ideal of the rule of law' (Dworkin, 1985, 11). He, by contrast, regarded the rule of law as incorporating an ideal and an eminently positive and substantive one, 'the ideal of the rule by an accurate public conception of individual rights' (Dworkin, 1985, 11-12).

The sociologist Philip Selznick had a more complex combination of thin and thick. He agreed with those political realists who stressed the importance of strict legality as a restraint on, and saw the rule of law as a precious protection against abuse of, power (Selznick, 1992, 174). On the other hand, he insisted that there was a 'larger promise of the rule of law,' and this 'thicker, more positive vision speaks to more than abuse of power. It responds to values that can be *realized,* not merely protected, within a legal process. These include respect for the dignity, integrity, and moral equality of persons and groups. Thus understood, the rule of law enlarges horizons even as it conveys a message of restraint' (Selznick, 1999, 26).

In Germany, the circumstances which moved prevailing conceptions of the *Rechtsstaat* from thin to thick were more dramatic than those that preoccupied Dworkin and Selznick. Indeed they were tragic. Already in the Weimar Republic, Hermann Heller rejected the legal positivist, formalistic, conception of the *Rechtsstaat* as crystallized by his contemporary, Hans Kelsen, which could accommodate any state. He argued for one that insisted that only a democratic state that depended upon and then institutionalized fundamental ethical principles was a *Rechtsstaat* (for the debates between Carl Schmitt, Hans Kelsen and Hermann Heller, which centred on the nature of the *Rechtsstaat,* see Dyzenhaus, 1997). Though Heller died in 1933, he already saw fascism as the great threat to such a state. His nightmare became real in the ensuing years.

In the perspective of German post-Nazi retrospection and introspection, thin conceptions came to seem not merely inadequate, but on their own positively dangerous. The *Rechtsstaat* embodied in post-War German jurisprudence thus embodies a strong commitment to fundamental rights and to the dignitarian premise of its 1949 *Grundgesetz* or Basic Law (see Grote, 1999), grounded in its unamendable Article I. This proclaims that 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' Particularly through the interpretations of the Federal Constitutional Court, this has spawned a rich jurisprudence of fundamental rights that characterizes the modern German understanding of the *Rechtsstaat,* or as it is frequently expanded (and at times complicated) to join the social welfare state (*Sozialstaat*), the *sozialer Rechtsstaat.*

There are problems at the extremes. What is gained by defining down a concept that bears so much normative resonance, in terms that ignore any interrogation of what its point might be, and simply focus on the characteristics of institutions and practices? Particularly when it is not clear whether the characteristics chosen by 'thin' theorists relate as much to what law

does and should do in the world, as they do to lawyers' unevenly informed intuitions and guesses about these matters. Again, what of the exercise of power by extra-legal forces, social networks? If they are free to act arbitrarily, capriciously, whatever the law says, does it make sense to insist that nevertheless the rule of law exists because certain formal elements of a legal order are present? Excessively thin conceptions often seem urgently in need of a feed.

Yet, conversely, accounts that purport to be thin as a rake are often rather plumper than intended, particularly where – as is frequently the case in well-intentioned first world interventions in benighted countries - they embody parochial suggestions as to what features of familiar legal orders generate rule-of-law friendly results. When packages of legal *bric-à-brac* are asked to travel, it often turns out that they work very differently or not at all where they land (see Krygier 2011). It might also turn out that institutions and practices of sorts not known in the homes of confident rule of law exporters perform adequately in their own homes, even if they look quite strange to visitors. Whether they do or not should be a matter of investigation, not overbearing legalistic assumption. Too often, however, imported assumptions about the working of legal institutions, based on distant histories, traditions, institutions and practices, have been smuggled in and then re-sold as though of universal applicability. When they fail to 'take' is it because the rule of law is a false ideal, or because what has been exported is not the rule of law itself but parochial institutions taken to be necessary for values that might yet be reached, and need to be reached, in other ways?

Partisans of thin versions, on the other hand, often associate the thickness insisted on by moralists with a combination of parochialism and imperialism about values and institutions. Why should we assume, either as a matter of fact or of value, that all cultures value the same things from law? Meta-ethical disputes this raises are too large to be resolved here, but there is another worry about too thick an account of the rule of law. As Joseph Raz has argued, 'thick' conceptions have a tendency to wash away all distinction between the rule of law and anything else we might want. That lays them open to the criticism that '[i]f the rule of law is the rule of the 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).

Such criticism points up another inadequacy of the choice on offer: the dichotomy between a spare and formalistic thinness, on the one hand, and a pudgy confection of everything we'd like to find in a good society, does not exhaust the field. There is space for values particularly associated with the exercise of power, what might be called distinctively *legal* values were it not for the fact that the differences between them and other values are unlikely to be categorical, but rather matters of focus, shades and degree. Many legal orders bear and transmit long histories of observation, experience and reflection upon the

pathologies of unconstrained and/or capricious exercise of power and on what might be done to avoid or moderate such pathologies. Legal orders typically embody and generate values related to what they do, both in their animating principles and ideals, and in the complaints they provoke when their practices flout the sources of their legitimacy (see Selznick, 1999; Waldron, 2011a). These have included such values as due process or natural justice, ideals of fair treatment and notice, and in particular legal traditions much more. They have to do with treating a subject of power with the respect due to a person, rather than a 'rabid animal or a dilapidated house' (Waldron, 2011a, 16). The rule of law might well be argued to be incomplete to the extent that some such power-related values, that have to do with how to arrange and transact potentially harmful interactions between it and its subjects (too often treated as objects), are dishonored. Attempts to vindicate such values, often implicit in many legal principles and traditions if not all legal rules, might be considered a service to the rule of law, even if they go beyond purely formal aspects of laws and notwithstanding that they might fall short of justice more holistically conceived. On one view, the special disease, to which the rule of law is part of a remedy, is the propensity of power unconstrained to be exercised in arbitrary ways. It is a widespread disease.

4. Anatomy or teleology

More fundamental than contests over the fleshiness of the rule of law is one over whether we should begin with focus on its anatomy - the institutional features one should expect to find in such a creature - or its point – the reasons one is concerned with this rather than something else. The long common law tradition was not fixated on specific institutions, even less the precise character of legal rules. As Reid demonstrates, it was all too murky: 'Ironically, the medieval constitutional law out of which today's rule of law developed would not have met the requirements of clarity or precision. There was always an air of indefiniteness, a smoky vagueness surrounding this all-embracing restraining "law" of English constitutionalism. Even its authority as law was shrouded in immeasurability' (Reid, 2002, 16). But the common law tradition was clear on one thing: 'It was, Viscount Bolinbroke said in the eighteenth century, a matter of curbing power and not of the type and structure of government. Whether power was vested in a single monarch, in "the *principle Persons of the Community,* or in the *whole Body of the People*,' was immaterial. What mattered was whether power was without control. "Such Governments are Governments of *arbitrary Will,'* he contended" (Reid, 2002, 42). Bolinbroke would likely be puzzled by the rule of law toolkits carried by UN and World Bank rule of law promoters throughout the world today; uniform in character, diverse in application, apparently universal in application. Why are *those* particular institutions sacrosanct? What is the *point*? How has the point influenced the kit? Even for those of us who have left the mythologies and hagiographies of common law theory long behind, these are not bad questions.

Similar choices are also found in the *Rechtsstaat* tradition. The early propagators of the concept were not legal anatomists but proto-liberals in the main, many influenced by Kant,

seeking to establish an order of citizens equal before the law, whose personal autonomy and property were protected by the law. A state was a *Rechtsstaat* to the extent that it achieved these tasks, not because it had this or that particular form. As von Mohl put it, 'the objective of the *Rechtsstaat* is not logically entwined with a particular form of government; on the contrary, every arrangement of public power which guarantees the right and the development of all human activities, is admissible' (quoted in Heuschling, 2002, 59; my translation from Heuschling's French). These writers were explicit that what mattered was achieving what they conceived to be the point of the rule of law, not whether it exemplified a particular form of institutional architecture. That understanding did not continue through the nineteenth century, but was supplanted by a formalistic, anatomizing conception, stressing the positivistically characterized features of a state, that qualified it to be declared a *Rechtsstaat.*

On the teleological account, however, the rule of law cannot adequately be explicated by a list of features of legal institutions, rules or practices. For the rule of law occurs when and to the extent that there is a social *achievement* to which law contributes. If we say, for example, that there were lots of laws under Stalin and a lot of rule, but there was not much rule of law, we are not saying something controversial, and you wouldn't have to know much about Dicey or Fuller to agree. So at least among the legally and philosophically unwashed, the rule of law has something to do with what the law does, rather than simply with what it has been somewhere declared to be.

Moreover, if the law is enlisted to do things we associate with the rule of law but the mission fails, we might say that there was an attempt to achieve the rule of law, but it was unsuccessful: laws were of the sorts we associate with the rule of law, everyone was trying, but they were overborne, for whatever reason. To say the rule of law exists in a society is to imply an accomplishment; among its partisans a valued accomplishment: an ideal to which law is taken to contribute has been approached.

On this view, the rule of law is not a natural entity like a tree, simply awaiting scientific description, or even a man-made contrivance like *a* rule of law in a statute book, which might be identified by pointing to it. It exists to the extent that a certain state of affairs, one in which power is exercised in relatively non-arbitrary ways, exists in the world. Law is supposed to contribute, though it will never do so on its own. The aspiration or ideal is satisfied only *insofar as* some purpose or goal for law is realized. While such an achievement could in principle be thought value neutral or even valueless, and has been, the rule of law also has partisans – today perhaps, even too many - who think it valuable, an ideal for law. If we value that ideal we should of course seek to identify what might be necessary to generate it. But that is a second step. Without some principle of selection even if only tacit, we won't find a bunch of legal bits and pieces waiting 'out there' and recognizable as the rule of law.

The teleological contention is, then, that to understand what the rule of law requires we need to start by reflecting first on its *point* rather than, as is more common, with an enumeration of purportedly defining legal-institutional *features*, whether they be particular institutions such as common law courts (Dicey 1959), particular formal qualities of rules, such as prospectivity, clarity, etc., or even traditions and procedures, such as defences, *habeas corpus,* and so on (Waldron 2011a), though the last is getting closer to explicit concern with the specific point of the rule of law.

At first blush, this looks like a repetition of the distinction between thin and thick, and it is true that anatomical accounts of the rule of law are often 'thin', since they focus on delineating the characters of legal institutions. But there are two differences. First, particularly among rule of law promoters, it is rare that anyone has thin *ambitions,* more commonly they just have confused ideas of what the rule of law is about. Rule of law promotion, after all, is ostensibly an attempt to enlist the rule of law to do good in the world, not just to build replicas of institutions from home. However rule of law promoters are often restricted by the conventional identification of the rule of law, or *Rechtsstaat,* with a particular box of tricks, and proceed to try to vindicate some purpose with an *a priori* catalog of what is needed to achieve it, rather than an openness to the possibility that they might need to learn some new tricks. Awareness that one should start with the end, as it were, rather than purported means, might avoid a lot of grief over transplants that fail to do what is expected of them: promote the rule of law.

Moreover, the distinctions between thin versus thick, on the one hand, and anatomical versus teleological, on the other, do not occupy the same plane. A teleological account is not necessarily normatively thick; it might occupy itself with a small point, say predictability in the legal environment. How normatively enriched the point of the rule of law might be is a legitimate matter of debate, but it is a debate on the teleological plane. On that plane, the question is not, first of all, how much normative weight the concept carries but where one should start to think about the rule of law – by enumerating a set of purported (and typically universal) features or by asking what it is might be good for. Since it is hard to know what features matter unless one has sorted out what they are for, the suggestion here is to start with the end.

5. Legal or Socio-legal

If one is concerned with underlying values that inspire commitment to the rule of law, this has significant and somewhat paradoxical implications for where one should look to vindicate whatever one decides such values to be. For the search to redeem them is likely to de-center law itself. After all, it is in principle an open, and likely variable, matter what in the world best minimizes arbitrariness in the exercise of power, and the same might be said of any other values that we imagine law helps vindicate. Yet if ends matter, then it is not clear that one should *assume* that law is always key to achievement of the animating values of the rule of law, even less the state. This is so, whatever the values one has in mind, and it

will be all the more so as one ramps up the values one associates with the rule of law. A good society is quite an achievement, and law only a small, if precious, contributor.

This applies at virtually every level. If arbitrary power is to be feared, then wherever power is powerful enough to be fearful, rule of law concerns are relevant. Thus, preoccupation with the state is not always appropriate, in circumstances where many of the sources of restraint on arbitrary power, many dangers flowing from it, and many of the goods accomplished by its curtailment, lie outside the state, and many of the means of achieving those goods lie outside the law as well (see Krygier, 2011, 85-91).

If that is the case, it is not obvious that the familiar institutions associated by legal anatomists with the rule of law will always be the best to wield. Law will never accomplish much in the world on its own, and a key accompaniment of investigation of the rule of law should be, but rarely has been, study of what else is needed, beside and beyond, law, to attain its ends.

On this view, law should be viewed, not as the always-necessary centerpiece of power-taming policy to which other measures are subordinate or supplementary addenda, but as one implement among several, of varying significance, in some respects and circumstances of potentially unique importance, but dependent for its success on many other things, and perhaps not more important for the achievement of its own goal than they. Similar reflections apply, but all the more, to the State of the *Rechtsstaat.*

There is something to be said for the legal pluralism embodied in the old common law tradition, and squeezed out by the rise of the contemporary state: in principle in the *Rechtsstaat,* and by the statophilic tendencies of modernity more generally. Even with its dominance, and especially where it is 'failed', 'fragile' or 'transitional', the state is never the only game in town. That is a sociological platitude, but it should have more bearing on legal platitudes than it has. Lawyers will naturally, habitually, focus their attention on state and legal agencies, but those interested in promoting the values that underpin the rule of law and make it worthwhile will need to look further afield.

If the foregoing considerations are plausible *within* existing nation states, they must be all the more compelling for anyone who wants, as many today do, to speak about an emerging 'international rule of law' (Palombella, 2009; Waldron, 2011b). For whatever that might mean, there is no international *Staat* to be its lawgiving and enforcing source. It might be a matter of argument whether it is a good idea to seek to extend the rule of law to the international sphere, but it would seem a strange truncation of the argument simply to rule out a non-state-centered rule of law *by definition.*

This suggests the need for a sociological awareness and sensibility not especially common among lawyers, whether rule-of-lawyers, or *rechtsstaatlich* ones. There will be other sectors of a society altogether that influence the extent to which the values at the heart of the rule

of law will be attained. Paradoxically, in order to reach those values we will have to look far beyond the institutions we have most conventionally associated with them.

That does not make either the law or the state unimportant. However, it might enable us to see their importance in perspective, give due weight to other phenomena that might need enlisting to serve such goals, and release us from the hold of a mantra, whether 'rule of law' or *Rechtsstaat,* which in their modish ubiquity threaten to obscure the valuable, indeed precious purposes for which they were pushed into the fray, instead promiscuously to serve virtually any purpose you want to name.

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