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WHY DO WE WANT THE RULE OF LAW?

Thanks very much for your conversation with Thomas.¹ I went on to read his piece on the rule of law and respect,² and I liked it and will use it. Even though we're interested in different things, have different priorities, and think in very different ways, I found it very interesting and it provoked me to some thought.

I'll just pick up a few points in the conversation that relate to where I come from and in; a lot that interests Oxford is not really my thing. Which is not to say that I think it is not A thing, but I'm not interested in some things they are, and I don't find them always interesting for the things that matter to me. And I'll speak from the heart or stomach rather than the head. I'm just not in, and don't always find appealing, the business of analytical legal philosophy at all; the questions that matter to me, and the answers likeliest to satisfy me, come within what Philip Selznick used to call normative social theory, where conceptual precision matters less than what works, and why it does.³ But that requires investigation not merely intuition plus cleverness. There! A defiantly sloppy beginning!

I

At p.5 you argue that the idea that 'the rule of law's point is to temper or constrain arbitrary power' is self-defeating, because, depending upon your understanding of arbitrary power, there might be more effective or better ways to temper arbitrary power than the rule of law, as Krygier himself confesses: 'after a very long time of being called a "rule of law" guy, I've decided to come out. I am really a "well-tempered power guy"; and in the same article, he says, 'if we thought we could get there [have power well-tempered] by praying...we should pray more and worry about

¹ This is Professor Krygier's letter to Xiaobo Zhai. The conversation refers to Thomas Adams and Xiaobo Zhai, 'A Conversation on the Rule of Law' (2024) 1 *Macau Journal of Global Legal Studies* 67–76.

² Thomas Adams, 'The Rule of Law and Respect for Persons' in Genevieve Cartier and Mark D Walters (eds), *The Promise of Legality: Critical Reflections on the Work of TRS Allan* (Hart Publishing 2025) 103–16.

³ See Martin Krygier, *Philip Selznick: Ideals in the World* (Stanford University Press 2012).

law less'.⁴

I agree that there might be more effective ways, but don't see why it's self-defeating to recognize it. I'd call mine an acknowledgement rather than a confession, and a reason not to abandon the rule of law but contemplate de-centring it. And here I think what really matters is why we think it's important to think about the rule of law at all. Adams and Oxford start with a lawyer's/legal philosopher's descriptive anatomy—the rule of law is a bunch of formal legal attributes, a, b, c—and then ask why something that has such attributes might be valuable, what it might be valuable for etc. But the rule of law is not a found object; it's a normative concept, which many used long before anyone came up with the Harvard/Oxford lists (though as you know better than me, Bentham already had them). But when Magna Carta was taken up over centuries as something valuable done with law (even though originally it was unlikely that that was what the barons were after), when the common lawyers attacked James I and decapitated Charles I for defying the supremacy and rule of law, and when the Americans thought the English had abused the supremacy of law by treating them arbitrarily, they didn't have Fuller or Raz in mind, nor did many of the laws they valued conform to their lists.

My vulgar question is: why should anyone outside Oxford philosophy start with such lists? Or more specifically, what is the citizen's, rather than the lawyer's or philosopher's interest in looking into the rule of law? Is it to decide how much vagueness Fuller's list can tolerate? Or how much inconsistency is consistent with Raz's? I reckon it's not the anatomy but the payoff, and that, many have associated with reduction in the availability of arbitrariness in the exercise of power. Why should we restrict ourselves to the analytics' lists? The seventeenth century appeals, and the Americans' complaints were not about the forms of law, but about the 'sovereign's' determination to ignore it;⁵ the anatomies, I again vulgarly surmise, were after-the-event attempts to find legal features that (usually purely by intuition) lawyers and philosophers imagine might lead to virtues claimed for law by generations of people who have worried about arbitrary power before them.

I endorse Waldron's comment that 'we want the rule of law' not just for lawyers and philosophers in legally well endowed positions and societies, but for new societies and old societies, for those in any society

⁴ Martin Krygier, 'Well-Tempered Power: "A Cultural Achievement of Universal Significance"' (2024) 16 *Hague Journal on the Rule of Law* 479, 487.

⁵ See in particular John Phillip Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (Northern Illinois University Press 2004); Quentin Skinner, *Liberty as Independence* (Cambridge University Press 2025).

who are at the margins, for those in the 'dark corners of governance', and for those where the rule of law is not 'a familiar presence'.⁶ As a result, he rightly suggests that the typical analytical philosophers' lists of elements of the rule of law are far from many people's worlds or concerns. He claims to reach those worlds and concerns with his analysis of the importance of adjudicative procedures. But what he then offers to add to a Fullerian/Razian focus on the formal character of legal rules, is another list focused on procedures to accord litigants a respectful hearing in court. This makes an important dignitarian addition to standard lists legal philosophers compile, but, surprisingly given his laudable wide-ranging ambitions, it does not deviate from the institutional assumptions on which they are based. The big shift in institutional focus between Fuller and Waldron is from official legislatures to official courts. That is not an enormous distance to travel. Yet in many societies and among many of the people he wants the rule of law to reach, virtually no one thinks of going to courts or of what goes on there, but they do worry when the cops are corrupt or beat them up for fun and/or money, local notables can do what they want, mafias and soldiers roam the streets, etc. The weaknesses of the rule of law that citizens confront frequently have nothing much to do with formal infelicities in the rules or procedural inadequacies in courts, though if they ever got to court they would probably find both in abundance. The more immediate problems arise from the pervasive reality that where they encounter power, the law very rarely counts for much, and even more rarely does it count for them or in their favour. That's one reason why I think standard approaches are an inadequate way to approach a precious social achievement, that well-tempered power, with, through, and beyond the law, represents. So I started with the rule of law because I thought it was important for an important value, and I called that value its purpose, which I still think makes sense. But I think that if that purpose matters, we can't stop there, or indeed with the rule of law, but realize that its significance is likely to vary, so too how it will need to be configured to help attain its end, and it will never do much on its own, so we have to look beyond the rule of law in particular and law more generally. Not my fault; the world's a complex place!

II

'A subject not committed to upholding their contracts is no problem for

⁶ Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James Fleming (ed), *Getting to the Rule of Law* (New York University Press 2011) .

the rule of law, but a government not committed to keeping within its legal powers is.’ That’s an argument the chapter I’m writing presently is devoted to.⁷ I’ve attached something I published on that,⁸ but I think the issues are more complicated than I then saw. I think the state is special, both for the rule of law and tempering power, but it’s not the only game in town even for the former, and very clearly not for the latter. If the problem is arbitrary exercise of significant power, there are many sources of that around.

III

‘By honouring it you do not necessarily do right to those subject to the law, but by breaching it you necessarily do them wrong.’ I think that’s right. That it is not necessarily a way of doing right is plain from phenomena like ‘abusive constitutionalism’ and ‘autocratic legalism’ as practised by many populist regimes, which in many ways use legality as a weapon, not just a sham or camouflage, and to other autocratic regimes that have found that clear stable prospective comprehensible laws are good ways of maintaining order and efficiency, combating bureaucratic insubordination by local officials etc., so long as it is combined with escape hatches to ensure the leaders aren’t themselves restrained, and places no constraint on what goes into the laws. Ernst Fraenkel called this a ‘dual state’ when writing about Nazi Germany—normative state for non-enemy subjects doing non-political things; prerogative state for the rulers and whatever is deemed of interest to them;⁹ as you know that model has been applied elsewhere. OK the prerogative part violates Fuller/Oxford, but the normative elements can serve the rulers well, without showing any respect at all for subjects. I actually think Weber knew all this, and I’m trying to draw that out of him at the moment. Everything Adams says on p.7 seems right to me.

IV

(p.9) ‘it is worth recognising that law itself could never be the remedy

⁷ Martin Krygier, *Tempering Power. Beyond the Rule of Law* (Cambridge University Press, forthcoming) ch 7.

⁸ Martin Krygier, ‘The Ideal of the Rule of Law and Private Power’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar 2023) 14–29.

⁹ Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (EA Shils tr, Oxford University Press 2017).

to political power because it is a particular institutionalized form of this power. The rule of law, by way of contrast, can be the remedy to certain of the dangers of legal power because it functions as a constraint on its exercise.' This doesn't make sense to me. If you have wildly arbitrary political power, and you say it would be nice to channel it through law (of a Fullerian sort, or whatever seems to you contrary to free arbitrary exercise, which, in my rendition, is uncontrolled, unpredictable, unrespectful, ungrounded), yes it still will be power but the channelling is intended to make it less arbitrary. This is a remedy to arbitrariness of political power (though of course it's still political power), not just a remedy 'to certain of the dangers of legal power.'

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