MARTIN KRYGIER'S CONTRIBUTION TO THE RULE OF LAW

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Abstract

Martin Krygier is the Gordon Samuels Professor of Law and Social Theory at the University of New South Wales. He is the son of the prolific Henry Richard Krygier of Quadrant *fame and carries on the same anti-Communist legacy. Martin's field of expertise is the Rule of Law in former Communist countries, especially Eastern European countries. Conceptions of the rule of law span from the influential A V Dicey to substantive conceptions like F A Hayek. Both the formal and substantive conceptions have contributed much to understanding the rule of law. The content of conceptions are very flexible. Martin has drawn from many good sources; of note would be Philip Selznick. Martin bridges the gap between formal and substantive conceptions, creating a new subset of rule of law conceptions. Martin's ideas represent the 'middle ground' between formal and substantive conceptions. Martin prefers teleological conceptions, starting with the 'end of the rule of law', and that is the reduction of arbitrariness. By focusing on the purpose of the rule of law, Martin has created a conception that will allow retrofitting institutions and values related to the rule of law, in places where they are less available – his greatest contribution.*

I   INTRODUCTION

Martin Krygier is the Gordon Samuels Professor of Law and Social Theory at the University of New South Wales.[1] He was born in Sydney

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on 9 February 1949[2] to famous publisher, journalist and businessman, Henry Richard Krygier (Richard) and his wife, Romaulda Halpern.[3] His father, a Polish-Jewish refugee, was also the founder of *Quadrant* magazine.[4] Richard Krygier was initially sympathetic to Communism, having this sympathy shaken by the Moscow trials of the 'Old Bolsheviks' (1936–38), and 'shattered by the Hitler-Stalin pact of August 1939, the division of Poland between Germany and the Soviet Union and their experience of Sovietisation in Lithuania from June 1940'.[5] The anti-Communist legacy of the Krygier family began there.

Quadrant is very much a piece of Martin Krygier's past as well as whom his father was, so it deserves some mention as to what it is. The purpose of Quadrant is to 'throw down an intellectual challenge to the Left's domination of Australian literary culture'.[6] It is interesting to note, that Hal G P Colebatch regards the importation of ideas from the Left as a betrayal of *Quadrant's* purpose, criticising especially Robert Manne, whom Colebatch regarded as too Left (and even Communist).[7] Contrast this with the opinion of Martin, who regarded Robert as doing 'something interestingly and individually different in a more complicated situation',

[1]   University of New South Wales, *Staff Directory: Martin Krygier* (2011) <http://www.law.unsw.edu.au/staff/KrygierM/>.

[2]   *Martin Krygier* (2011) Pipl <http://pipl.com/directory/people/Martin/Krygier>.

[3]   Peter Coleman, *Krygier, Henry Richard (1917–1986)* (2007) Australian Dictionary of Biography <http://adb.anu.edu.au/biography/krygier-henry-richard-12760/text23015>

[4]   Ibid.

[5]   Ibid.

[6]   Hal Colebatch, 'Opinion: Robert Manne and the Quadrant Affair', *News Weekly* (online) 15 October 2011 <http://www.newsweekly.com.au/article.php?id=4961>.

[7]   Ibid.

that situation being the 'loss' of the Communist enemy in 1989.[8] Of importance is Martin's assertion in 2006 that:

> [W]e're a political culture that hunts in packs and there was a tendency once you're sort of pushed to one side in popular polemics for *Quadrant* people to actually quite like the role of pariah and being the anti-pack pack. I think that that has continued with a vengeance over the Aboriginal issue and many other things in recent years and it has dismayed me and it's why I'm not associated with *Quadrant* now.

In some ways, Martin Krygier has followed his father's example and gone the extra mile in his own right. Richard Krygier was a law student, no stranger to law.[9] On several occasions, Martin has admitted his father's profound influence in his life and work.[10] Martin is a contemporary Australian legal philosopher who has written numerous works concerning the rule of law, Marxism, and post-Communism in Eastern European countries.[11] This is much an extension of his father's anti-Communism,[12] though it has also acquired its own specific character. Indeed, Martin Krygier is well aware of the horrific legacy of Nazism and Communism, and has recounted briefly his family's experience, from and following the Nazi-Communist experience in a number of publications in his father's *Quadrant.*[13] One can imagine his family spending uncountable nights over many meals detailing their family's loss due to

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[8] 'How Martin Krygier ambushed the Quadranters…' (2006) Floating Life 4/06 ~ 11/07 <http://ninglun.wordpress.com/2006/09/29/how-martin-krygier-ambushed-the-quadranters/>

[9] Ibid.

[10] Martin Krygier, 'The Sources of Civil Society I' (1996) 40(10) *Quadrant* 12, 13; Martin Krygier, 'The Sources of Civil Society II' (1996) 40(11) *Quadrant* 26, 31.

[11] University of New South Wales, above n 1.

[12] Most obviously seen in Richard Krygier's founding of *Quadrant*.

[13] Martin Krygier, 'Does Australia Need a Racial Vilification Law?' (1994) 13(11) *Quadrant* 20, 24; Krygier, 'The Sources of Civil Society I', above n 10, 13.

Communism, and making sure he himself does not become a Communist. Yet, there is a further personal element to Krygier's views on Communism. Although he has many friends affected by Marxism,[14] his family and personal convictions have clearly shaped his anti-communist worldview[15] and his academic work, which, as mentioned before, is primarily about rule of law and, in particular, the rule of law in post-Communist societies and the like.[16]

Krygier has received a Polish Knight's Cross and is currently co-director of the Network of Interdisciplinary Studies of Law, as well as contributing editor to *Jotwell* and editorial board member of *Hague Journal on the Rule of Law*; *History and Methodology, East-West*; *Jus et Lex*; *Ratio Juris*; *Theoretical Studies*; and *East Central Europe*.[17] He is also a fellow at the *Academy of the Social Sciences in Australia*, and Co-Director of the European Law Centre, University of New South Wales.[18] He was a past president of the Australian Institute of Polish Affairs from 1997–2001.[19] Finally, Krygier is a Vice-President of the Australian Society of Legal Philosophy.

Rule of law is an important ideal of legality. This research essay will critically analyse Krygier's contribution to the subject of rule of law. Part

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[14]   Martin Krygier, 'Marxism, Communism, and Narcissism' (1990) 15 *Law and Social Enquiry* 709, 730.

[15]   See generally, ibid.

[16]   University of New South Wales, above n 1. If you look at Martin Krygier's UNSW webpage, a significant proportion of his work has 'rule of law' in its titles and some are clearly on post-communism or transitional society, see, eg, Adam Czarnota, Martin Krygier and Wojciech Sadurski, *Rethinking the Rule of Law after Communism: Constitutionalism, Dealing with the Past, and the Rule of Law* (Central European University Press, 2005).

[17]   University of New South Wales, above n 1.

[18]   Academy of the Social Sciences in Australia, *Professor Martin Krygier* (2011) <http://www.assa.edu.au/fellowship/fellow/416>.

[19]   Australian Institute of Polish Affairs, *Exapnding the Dialogue: Ten Years of the Australian Institute of Polish Affairs* (2001) <http://www.aipa.net.au/aipa/expandingdialogue.pdf> 10.

II will discuss what the rule of law means. I intend to demonstrate that the rule of law comes in many varieties and most conceptions have something to contribute to an understanding of the subject, although it is subject to conflicts between themselves. I wish to highlight some of the possible limitations of the rule-of-law ideal as well. Part III discusses Krygier's contribution to the rule of law. It provides a 'genealogy of ideas' by pointing out some figures who have exercised a significant influence on the formation of Kygier's ideas, and how they have influenced the debate on the rule of law and Krygier's work. Part IV discusses Krygier's opinion of rule of law. Its purpose is to complete the picture with a summary of Krygier's theory and to give an understanding of what his conception of the rule of law implies. I will be focusing on his current perception about this legal phenomenon because Krygier has somehow revised his work over the last two decades or so, particularly after the fall of communism in Eastern Europe. Finally, Part V provides a conclusion of the work.

II   WHAT THE RULE OF LAW MEANS

'The rule of law is a quintessentially jurisprudential topic'.[20] To study it, one must take 'into account historical, cultural and sociological contingencies'.[21] The rule of law, in the words of Philip Selznick, is 'not a recipe for detailed institutional design'.[22] 'It represents rather a cluster of values which might inform such design, and which might be – and have been – pursued in a variety of ways'.[23] We must first explore what

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[20]   Philip Selznick, 'Legal Cultures and the Rule of Law' in Martin Krygier and Adam Czarnota (ed), *The Rule of Law after Communism* (Dartmouth, 1999) 21, 21.

[21]   Ibid.

[22]   Martin Krygier, 'Ethical Positivism and the Liberalism of Fear' in Tom Campbell and Jeffrey Goldsworthy (ed), *Judicial Power, Democracy and Legal Positivism* (Dartmouth, 1999) 59, 64.

[23]   Ibid.

is the rule of law before we can understand Krygier's work. I shall start with what Krygier says 'is the most influential account of the rule of law in English':[24] AV Dicey's famous conception of the rule of law. I think most people will agree with his description. The rule of law in general, is seen as encompassing these three features:

1   the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government …

2   equality before the law, or the equal subjection of all classes to the ordinary law of the land by the ordinary Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of ordinary tribunals …

3   as a formula for expressing the fact that with us the law of the constitution … are not the source but the consequence of the rights and individuals, as defined and enforced by the Courts … thus the constitution is the result of the ordinary law of the land.[25]

In short, the three elements are:

1   supremacy of law;

2   equality before the law; and

3   government by law.

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[24]   Martin Krygier, 'The Rule of Law' in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 1, 4.

[25]   Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan and Co, 8th ed, 1926) 198–9.

Dicey's formula represents the key and common concern of the rule of law, that is, a concern about freedom from arbitrariness. There are many other conceptions on what the rule of law is. There are, however, two basic types of conception. These are substantive and formal conceptions. Formal conceptions only deal with 'specific, observable criteria' in law or the legal system, that is, the 'formal' requirements for legality.[26] A V Dicey's rendition is rather a formal conception. Paul Craig sums it up as:

> Formal conceptions of the rule of law do not … seek to pass judgement upon the actual content of the law itself. They are not concerned with whether the law is in that sense good law or a bad law, provided that formal precepts of the rule of law are themselves met.[27]

Substantive conceptions go beyond formal conceptions of the rule of law.[28] Craig says:

> Certain substantive rights are said to be based on, or derived from, the rule of law. The concept [substantive rule of law] is used as foundation for these rights, which are then used to distinguish between 'good' laws, which comply with such rights, and 'bad' laws, which do not.[29]

In this sense, substantive conceptions are those that include concepts of 'justice' or 'fairness'.[30] This approach is not necessarily concerned with

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[26]   Matthew Stephenson, *Rule of Law as a Goal of Development Policy* (2005) The World Bank <http://go.worldbank.org/DZETJ85MD0>.

[27]   Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467, 467.

[28]   Ibid.

[29]   Ibid.

[30]   Stephenson, above n 26.

formal requirements of legality, but the realisation of a 'substantive goal' within the legal system.[31] The World Bank says:

> Unlike the formal approach, which eschews value judgements, the substantive approach is driven by a moral vision of the good legal system, and measures the rule of law in terms of how well the system being assessed approximates this ideal.[32].

Another famous rendition is from Hayek, who is responsible for a substantive conception of the rule of law. This conception distinguishes laws from commands.[33] Laws are 'general rules that everybody obeys'. It 'does not necessarily presuppose a person who has issued it' and is differentiated from a command 'by its generality and abstractness'.[34] 'Law in its ideal form might be described as a "once-and-for-all" command that is directed to unknown people and that is abstracted from all particular circumstances of time place and refers only to such conditions as may occur anywhere and at any time'.[35] The generality of law is a key feature in Hayek's rendition. Hayek also identified a key feature of the rule of law:

> The ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made … the rule of law is not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal. It will be effective only in so far as the legislator feels bound by it … it will not prevail unless it forms part of the moral tradition of the

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[31]   Ibid.
[32]   Ibid.
[33]   Friedrich August von Hayek, *The Constitution of Liberty* (University of Chicago, 1960) 131.
[34]   Ibid.
[35]   Ibid.

community, a common ideal shared and unquestioningly accepted by the majority.[36]

Krygier's work is characterised in making the rule of law part of the 'moral tradition' of post-Communist societies. This is of course a difficult task where the rule of law has systematically disappeared as in communist societies.

Lon L Fuller's *The Morality of Law*, presents the key formal ingredients of the rule of law. Fuller's eight conditions a legal system to comply with the rule of law are that laws must be:

1   general;

2   made public;

3   non-retroactive;

4   comprehensible;

5   non-contradictory;

6   possible to perform;

7   relatively stable; and

8   administered in ways congruent with the rules as announced.[37]

To further demonstrate the flexibility of rule of law conceptions, I shall give a brief account of Michael Oakeshott's conception of the rule of law, which is a formal conception. What is significant about Oakeshott, is that the foundation of his conception is more philosophical than legal.[38] Oakeshott is one of the 'most important philosophical voices of the

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[36]   Ibid 181.

[37]   Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianlugi Palomblla and Neil Walker (ed), *Relocating the Rule of Law* (Hart Publishing, 2009) 45, 45.

[38]   Guri Ademi, 'Legal Intimations: Michael Oakeshott and the Rule of Law' (1993) (3) *Wisconsin Law Review* 839, 839.

twentieth century'[39] and there has been many books written by him and in honour of him. It is thus useful to contrast his works with Krygier's, to show why Krygier's approach to the rule of law is superior, and I will briefly do so later. Oakeshott viewed the rule of law as best understood within three inter-related concepts. The first is that 'all human relationships and transactions take place within two distinct concepts of rules: instrumental and non-instrumental'.[40] 'The rule of law is an expression of adverbial, non-instrumental rules'. Adverbial means that 'law acts like the rules of grammar in language'[41]. The 'grammar' of law gives it validity, and the system of law, like any language, 'is open to interpretation and change'[42]. Oakeshott's other two concepts are:

> Second, both instrumental and non-instrumental adverbial rules are derived from a history of human practices: prudential and moral. Oakeshott argues that non-instrumental rules are derived from a history of moral practices. Finally, human practices, and consequently the rule of law, find their full expression in one of two modally distinct understandings of the state: purposeful enterprise and non-purposeful civil associations. Oakeshott argues that the rule of law is fully expressed in a state taking the form of civil association.[43]

These examples demonstrate how diverse one's view of what the rule of law can be. It comes as no surprise, therefore, that Krygier can come from a completely different angle and it is still a valid conception of the rule of law. In addition, in each conception an incomplete or perhaps adulterated picture of the rule of law is present. Krygier describes the

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[39]   Paul Franco, *Michael Oakeshott: An Introduction* (Yale University Press, 2012).

[40]   Ademi, above n 38, 839.

[41]   Ibid.

[42]   Ibid.

[43]   Ibid 840.

interaction between the rule of law and other ideals as containing 'internal tensions and can lead to conflict with commitment to other social ideals, because the ideals themselves are under strain, or because different interpretations of the same ideal, or attempts to realise different ideals, have different institutional logics'.[44] What then must we do to understand the rule of law in light of so many, sometimes conflicting conceptions? How do we reconcile the interaction of the rule of law with other ideals? F A Hayek and Geoffrey de Q Walker have advocated an approach, which Krygier acknowledges, whereby the simplest way to reconcile these 'tensions' is to 'hold fast to one interpretation of one ideal and reject whatever might compromise it in another'.[45] 'Another is to minimise the conflict and pretend no price is paid'.[46] Krygier then suggests another way of reconciliation, and that is 'more complex, but perhaps more realistic is to acknowledge that the rule of law is not consistent with every value one holds dear, and that, consequently compromises in one or other direction might be unavoidable'.[47]

Krygier recognises that the rule of law is 'not the only source of good in large modern polities'. This is very true, there are other sources of good such as democracy, constitutionalism, human rights, and other fields like economics. The rule of law is not a means to all ends. It is not 'automatically better the more you have of it'.[48] 'There are countless problems it does not and cannot solve'.[49] It is very important that a polity

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[44] Martin Krygier, 'Rule of Law' in Neil Smelser and Paul Bates (ed), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2001) vol 20, 13 403, 13 407.

[45] Ibid.

[46] Ibid.

[47] Ibid.

[48] Ibid.

[49] Martin Krygier, 'Marxism and the Rule of Law: Reflections after the Collapse of Communism' (1990) 15 *Law and Social Inquiry* 602, 645.

have other elements of good in order for things to improve. The rule of law is not a 'panacea'.[50] The rule of law also can generate problems.[51] Elements of the rule of law 'are nowhere fully realised but are approximated to greater or lesser degree in different societies, among different classes, races, and sectors of social life'.[52]

III   KRYGIER'S CONTRIBUTION TO THE RULE OF LAW

Krygier has written many articles and books for the past thirty or so years. He has been interested in legal sociology for as long or almost as long as he has been writing on law. His writings on legal sociology date back as early as 1982, where he produced an article on H L A Hart entitled *The Concept of Law and Social Theory*.[53] In that article, Krygier stresses that not all boundaries between legal philosophy and legal sociology are 'worth preserving, even those that should allow free passage where appropriate'.[54] This merging of legal philosophy and sociology has been a defining characteristic in Krygier's work. Note that Krygier, as mentioned earlier, is currently co-director of the Network of Interdisciplinary Studies of Law. Ruti Teitel offers a succinct description of his current work in more recent years, saying that Krygier is one of the scholars who have challenged any 'conceptualisation of transitions as exceptional in political life, claiming that the aspiration during transitional periods ought to be based on a general theory about the rule of law'.[55] The fall of communism since 1989 has dramatically influenced

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50   Ibid.
51   Ibid.
52   Ibid.
53   Martin Krygier, 'The Concept of Law and Social Theory' (1982) 2 *Oxford Journal of Legal Studies* 155.
54   Ibid 180.
55   Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69, 93.

Krygier's work. There are numerous reasons for this. For example, we do not have the answers as to how to export the rule of law.[56] By export, Krygier means to create the presence of rule of law in absent places. The collapse of Communism created 'a gap in Europe's 'conceptual geography' no less significant than that of 1918'.[57] Krygier describes the post-Communist scenario as 'complex and unpredictable'.[58] The 'great diversity of and within the countries that constitute the various worlds of post-Communist Europe' contributes to this.[59] What is more, he says, 'questions posed and answers given tell us more about a particular scholar's intellectual biography than they do about the matter of discussion'.[60] With regard to post-Communism, 'we did not know the nature of what was to follow, nor is it clear that we know today'.[61]

The post-Communist scenario is complex and challenging, and Krygier's work was born out of need. There are vast differences between his work closer to that year and recent work over the past ten years or so. One can see an example of this examining and contrasting his relatively early work of *Marxism and the Rule of Law: Reflections After the Collapse of Communism*[62] and Krygier's recent work, *The Rule of Law: Legality, Teleology and Sociology*.[63] Krygier published *Marxism and the Rule of Law* just a year after the fall of communism in Eastern Europe so his approach to the rule of law was more conventional at this time, only describing it by formal characteristics in this article, having not yet

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[56]   Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 57.
[57]   Martin Krygier and Adam Czarnota, 'After Postcommunism: The Next Phase' (2006) 2 *Annual Review of Law and Social Science* 299, 300.
[58]   Martin Krygier, 'Traps for Young Players in Times of Transition' in Martin Krygier (ed), *Civil Passions: Selected Writings* (Black Inc, 2005) 285, 286.
[59]   Ibid 286–7.
[60]   Ibid 288.
[61]   Krygier, 'After Postcommunism: The Next Phase', above n 57, 301.
[62]   Krygier, 'Marxism and the Rule of Law', above n 49.
[63]   Krygier, 'After Postcommunism: The Next Phase', above n 57, 301.

developed his teleological-sociological approach to its current form. Krygier did however, in *Marxism and the Rule of Law*, give a detailed account as to how Marxism is incompatible with the ideal of the rule of law, which I think is one of his most significant contributions but to go into too much detail would be a digression. Krygier has devoted some of his works to the understanding of Marxism's relationship with the rule of law, [64] reflecting his devotion to the analysis of Communism. [65] In *Marxism and the Rule of Law*, Krygier's initial conception of the rule of law was:

> a.   Government by law. When governments do things, an important source of restraint on power is to do them openly, announce them publicly, in advance, in terms that people can understand; according to laws with which officials are required to comply, which are according to laws with which officials are required to comply, which are overall stable and general, which are interpreted within a relatively stable and independent legal culture of interpretation. When they punish, it should be for offences known to be offenses ahead of time, etc ...

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[64]   Martin Krygier, 'Marxism, Communism, and the Rule of Law' in Martin Krygier (ed), *Marxism and Communism: Posthumous Reflections on Politics, Society, and Law* (Poznan Studies in the Philosophy of Sciences and the Humanities, 1994) 135.

[65]   Krygier, above n 14; Martin Krygier, 'Marxism and Bureaucracy: A Paradox resolved' (1985) 20(2) *Politics* 58; Martin Krygier, 'Saint-Simon, Marx and the Ungoverned Society' in Eugene Kamenka and Martin Krygier (ed), *Bureaucracy: The Career of a Concept* (St Martn's Press, 1979) 34; Martin Krygier, 'State and Bureaucracy in Europe: The Growth of a Concept' in Eugene Kamenka ad Martin Krygier (ed), *Bureaucracy: The Career of a Concept* (St Martin's Press, 1979) 1; Martin Krygier, 'Weber, Lenin and the Reality of Socialism' in Eugene Kamenka and Martin Krygier (ed), *Bureaucracy: The Career of a Concept* (St Martin's Press, 1979) 61; Martin Krygier, 'The Revolution Betrayed? From Trotsky to the New Class' in Eugene Kamenka and Martin Krygier (ed), *Bureaucracy: The Career of a Concept* (St Martin's Press, 1979) 89; Martin Krygier, '"Bureaucracy" in Trotsky's Analysis of Stalinism' in Marian Sawer (ed), *Socialism and the New Class* (Australian Political Science Association Monograph, 1978) 46.

b.   Government under law involves a legal/political culture so that even high political officials are confined and confinable by legal rules and legal challenge …

c.   Rights: ' … Nevertheless, the bare possibility [of a government being illiberal] reminds us that the rule of law is not sufficient for a good society, even though in large complex societies it is necessary for one.' In other words, the legal order must provide for, and protect zones of, individual freedom from interference, negative liberty.[66]

A close look at Krygier's rendition of these three aspects of the rule of law will reveal that he was still in the 'anatomical' frame of mind, describing what institutions make up for the rule of law. Hence, Krygier initially defined the rule of law as a 'recipe or précis of ingredients'.[67] This is in contrast to what he formulates later, which is teleological-sociological and flexible in terms of its contextual application. The original rendition, however, is similar to A V Dicey's conception mentioned earlier, with both advocating government by law; and equality before the law or government under law as Krygier puts it, although Krygier inserts elements of Fuller's theory by mentioning that government must announce laws publicly, etc. *Marxism and the Rule of Law* is another example of Krygier's early work regarding the rule of law, though this specific work overlaps with a discourse of Marxist jurisprudence. In this early work, influences from Philip Selznick and the Marxist historian E P Thompson were already present. Note, however, that Krygier's interest in Thompson is not because he sympathises with communists. Thompson had made significant observations on the rule of

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[66]   Krygier, 'Marxism and the Rule of Law', above n 49, 642–3.
[67]   Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 54.

law in *Whigs and Hunters: The Origin of the Black Act*, which Krygier uses. A quote that Krygier often uses, in one form or another is:

> [T]he 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 defence of the citizen from power's all-intrusive claims, seems to me to me an unqualified human good.[68]

This is from the conclusion of *Whigs and Hunters*. Recognising that this is a fascinating point made by a Marxist, Krygier uses this passage to contrast it with the traditional Marxist views on the rule of law in 'Marxism and the Rule of Law'. Thompson's short passage has been expanded to the embodiment of what defines Krygier's work. Krygier uses Thompson to create an understanding of how the rule of law looks like to a nonprofessional, and draws conclusions that are a significant contribution of Krygier's. Krygier concludes that Thompson understands the rule of law from the end that it achieves, not from its alleged anatomical constitution such as Fuller, Hayek [69] or most legal philosophers.[70] Krygier has followed suit.[71]

Krygier developed his ideas by borrowing interdisciplinary ideas and concepts. This ability to draw from various fields is one of his major

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[68]   Edward Palmer Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin, 1977) 266 cited in Martin Krygier, *Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?* (Working Paper Thesis, University of New South Wales, 2010) 36–7.

[69]   Although Hayek uses the substantive conception and has an end to his conception of the rule of law, Hayek prescribes anatomies for the rule of law, see: Hayek, above n 33, 131. Hence, Krygier places Hayek together with these other formalists not because Hayek does not conceive the end of the rule of law but because Hayek resorts to identifying anatomies of the rule of law to reach his end.

[70]   Ibid 37.

[71]   See, eg, Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 45.

achievements.   He is clearly contributing to an interdisciplinary understanding of the law. Krygier primarily draws from sociology, but also draws from political science, such as the works of Judith N Shklar. Shklar was a professor of government at Harvard University, she specialised in '18th, 19th and 20th century political and intellectual theory'.[72] She was the first female president of the largest American professional organisation of political scientists, the 'American Political Science Association'. [73]   She was exceptionally talented shown by Shklar's MacArthur Foundation fellowship award in 1984.[74]

It is clear that Judith Shklar was an exceptional individual and her ideas are well thought of and researched thoroughly. It is thus appropriate to briefly explore her work and see how Krygier has applied it. Briefly the 'liberalism of fear' is a response of 'damage control' to 'undeniable actualities' such as torture in societies, which threaten us and return even after being almost eradicated in Europe and North America.[75] Shklar says:

> The liberalism of fear, on the contrary, regards abuses of public power in all regimes with equal trepidation. It worries about the excesses of official agents at every level of government, and it assumes that these are apt to burden the poor and weak most heavily … The assumption, amply justified by every page of political history, is that some agents of government will behave lawlessly and brutally in small or big ways most of the time unless they are prevented from doing so.

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[72]   The New York Times, *Obituaries: Judith N Shklar, 63, Professor at Harvard* (19 September 1992) <http://www.nytimes.com/1992/09/19/obituaries/judith-n-shklar-63-professor-at-harvard.html>.

[73]   Ibid.

[74]   Ibid.

[75]   Judith Shklar, *Political Thought and Political Thinkers* (University of Chicago Press, 1998) 9.

This definition of liberalism is very much a reason as to why we would want restraint on arbitrary power Krygier takes this from Shklar to conclude from the 'liberalism of fear' that reduction of fear is a social outcome of the rule of law, and he has expanded these social outcomes into four related outcomes.[76] The focus on the social outcomes of law lends itself to sociology, and shows how Krygier builds a bridge between sociology and law.

Philip Selznick is perhaps the most significant inspiration to Krygier. However, Krygier does not always draw heavily from Selznick but there are considerable references to his work.[77] Krygier has admitted his influence, saying that his 'conceptual bias is to follow Philip Selznick who, though deeply concerned with identifying the conditions of social and institutional *flourishing* starts'. He also says 'we must secure the conditions of survival or existence, baselines, before we move on to flourishing'.[78] This is very much what Krygier is trying to do with his work, describing what conditions we need for the realisation of the rule of law. He is interested in creating 'institutional recipes that explain the rule of law'[79] instead of focusing 'on legal institutions and the norms and

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[76]   Martin Krygier, *Four Puzzles about the Rule of Law: Why, what, where? And who cares?* (Working Paper Thesis, University of New South Wales, 2010) 21.

[77]   See Krygier, 'Marxism and the Rule of Law', above n 49, 645 n 32; see generally Krygier, 'Ethical Positivism and the Liberalism of Fear', above n 22; Martin Krygier, 'The Hart–Fuller Debate, Transitional Societies and the Rule of Law' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publisher, 2010) 107; Martin Krygier, 'The Grammar Of Colonial Legality: Subjects, Objects, And The Australian Rule Of Law' in Geoffrey Brennan and Francis Castles (ed), *Australia Reshaped: 200 Years of Institutional Transformation* (Cambridge University Press, 2002) 220; Krygier, 'The Rule of Law', above n 24; Ibid.

[78]   Krygier, 'Marxism and the Rule of Law', above n 49, 43.

[79]   Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 57. Krygier's 'recipe' is not a recipe in any sense. If so, he would be purely formalist, which he condemns. It is a 'recipe that explains the rule of law', not 'a recipe for the rule of law' which means Krygier is not setting out lists of what the rule of law consists of in a legal sense only, that is not what he intends to do. What Krygier means is that he wants to create recipes that explain how the rule of law is realised,

practices directly associated with the rule of law ... a list of elements of such institutions and practices is presented as adding up to the rule of law'.[80] Philip Selznick is also Krygier's direct predecessor when it comes to analysing law with sociology. Selznick published *Law and Society in Transition: Toward a Responsive Law* in 1978 (reprinted 2001) together with Philipe Nonet. In addition from possibly drawing inspiration from that book and similar Selznick's works, Krygier may have taken from him the importance of legal cultures. Selznick stated:

> [T]he rule of law requires a culture of lawfulness, that is, of routine respect, self restraint, and deference … the rule of law requires public confidence in its premises as well as in its virtues. The premises include a dim but powerful understanding that positive law is always subject to correction by standards of truth and justice. In a rule of law culture, positive law does not have the last word.[81]

Selznick's views resonate with what Krygier says of legal orders:

> In strong legal orders, such as those of the Western liberal democracies, for example, there are large cadres of people trained within strong legal traditions, disciplined by strong legal institutions, working in strong legal professions, socialised to strong legal values. Western legal orders are bearers of value, meaning and tradition laid down and transmitted over centuries, not merely tools for getting jobs done. Prominent among the values deeply entrenched in these legal orders over centuries are rule of law

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which means that it must include extra legal measures. He says we 'do not have recipes' not because we do not, but that these recipes are ineffective, so we effectively have no recipes for explaining the rule of law, though we have recipes for the rule of law.

[80]   Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 48.
[81]   Selznick, 'Legal Cultures and the Rule of Law', above 20, 37.

values, and these values have exhibited considerable resilience and capacity to resist attempts to erode them.[82]

Krygier's recognition of the prevalence of legal values in Western legal orders is about the recognition of the importance of legal culture for the realisation of the rule of law. His observation that these values are resistant to attempts to erode them, is a reflection of Selznick's thinking, that 'positive law does not have the last word'. Selznick's work is influential to Krygier's though he has gone in another direction.

Krygier has noted that Selznick, 'in arguing for a legal order more "responsive" to changing needs, particular circumstances, principles of justice embedded in legal traditions but often not formulated as hard and fast rules, and considerations of justice more broadly'.[83] Krygier has extended this observation, drawing from the sociological work of John and Valerie Braithwaite:

> [The] Braithwaite[s], for example, compared the regulation of nursing homes in the United States and Australia. The former is based on a large number of very precise and detailed rules; the latter on a small number of vague and value-laden standards. The Braithwaites demonstrate that, contrary to their initial intuitions, the Australian system of "wishy washy and blunt" standards turns out to be far more reliable than the American law of detailed rules. There are many reasons for that, the most important of which is that conscientious staff are empowered and involved in the activity of particularising and satisfying the standards, rather than alienated and tempted to avoid or simply formally to conform to the host of detailed rules, while ignoring the goals which the rules were intended to serve. But there is a negative payoff as well: "Detailed laws can provide a set of signposts to navigate around for those with

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[82]   Krygier, 'Ethical Positivism and the Liberalism of Fear', above n 22, 76.
[83]   Ibid.

the resources to employ a good legal navigator … Marching under the banner of consistency, business can co-opt lawyers, social scientists, legislators and consumer advocates to the delivery of strategically inconsistent regulation of limited potency." Standards are often harder to evade.[84]

This lesson from Selznick, and from his own research, may be the reason why Krygier chose not to make something merely a 'what is' the rule of law, identifying only the institutional features of the rule of law, but created a 'how to' conception, with a recipe of conditions, not just a recipe of description. It is important to note that the 'recipe' Krygier espouses is not a 'recipe' in any sense, because if it were, Krygier would be no different from anyone else. Krygier's description of conventional conceptions of the rule of law is starting from means instead of ends.[85] He thinks that detailing all the institutions associated with the rule of law is unhelpful. This is why he does not favour the anatomical view of the rule of law. We do not need a list of rules for the rule of law; we need standards for the rule of law.

There is also evidence that the foundation of Krygier's conception has other roots of understanding from Selznick's work. In *The Moral Commonwealth*, Selznick says:

As applied to institutions, 'character' is a broader idea than culture. Culture is the symbolic expression of shared perception, valuation, and belief. Therefore, the idea of 'organisational culture' properly emphasises the creation of common understandings regarding purpose and policy. The character of an organisation includes its

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[84] Ibid 79–80.

[85] Martin Krygier, 'The Rule of Law: An Abuser's Guide' in András Sajó (ed), *The Dark Side of Fundamental Rights* (Eleven International Publishing, 2006) 129, 141.

> culture, but something more as well … Attitudes and beliefs account
> for only a part of an organisation's distinctive character.
>
> The hallmarks of character are special competence and disability.
> 'Character' refers to the commitments that help to determine the
> kinds of tasks an organisation takes on, the opportunities it creates
> or closes off, the priorities it sets, and the abuses to which it is
> prone.[86]

I suspect this is why Krygier refers to the 'character' of the institution rather than the 'culture' of the institution in his work. Character is much broader. Augusto Zimmermann also summarises Krygier's emphasis on 'social outcome':

> Krygier then suggests that the rule of law is not just a matter of
> 'detailed institutional design' but also an 'interconnected cluster of
> values' that can be pursued in a variety of institutional ways. As he
> also explains, the empirical fact that the rule of law has 'thrived best
> where it was least designed' provides the best evidence that this
> legal ideal is actually more about a 'social outcome' (ie the
> restriction of government arbitrariness) than just a 'legal
> mechanism'. In essence, Krygier postulates that the achievement of
> the rule of law rests primarily with extra-legal circumstances of
> 'social predictability', not just formal-institutional mechanisms.[87]

Krygier's emphasis on 'social outcomes' implies that, to be achieved in actual practice, the rule of law depends not only on institutional measures but also on social or cultural measures, which is therefore a sociological approach in line with Selznick's understanding of the rule of law. The

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[86]   Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press, 1992) 321.

[87]   Augusto Zimmermann, 'The Rule of Law as a Culture of Legality: Legal and Extra-Legal Elements for the Realisation of the Rule of Law' (2007) 14(1) *eLaw Journal: Murdoch Univerity Electronic Journal of Law* 10, 25 <https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw_rule_law_culture_legality.pdf>.

discovery of these social outcomes is a significant contribution of his, who has discovered the social ends we need to realise in order to achieve the overarching end of the reduction of arbitrariness. I will explain what these outcomes are later. Please note that social outcomes are not merely pointing to culture. As Selznick says, '"Character" refers to the commitments that help to determine the kinds of tasks an organization takes on.'[88] These social outcomes contribute to the 'character' of legality, not merely the 'culture' of legality, as a target outcome is a commitment.

Krygier, like Selznick, borrows from sociology. Selznick may or may not have brought to the attention of Krygier the 'Michels effect' of means displacing ends, goal displacement.[89] Krygier has used this concept of goal displacement in his work, adapting the concept to the rule of law.[90] The 'Michels effect' is of the work of Robert Michels, a German political sociologist who examined the experience of European socialist parties and trade unions before World War I, concluding that democracy and socialism are unattainable ideals:

> 'The socialists might conquer, but not socialism, which would perish in the moment of its adherent's triumph'. That was so, he argued, because leadership in democratic organisations is readily and fatefully self-perpetuating. Where collective action is contemplated, delegation of tasks and powers to leaders is indispensable. The unintended result is a concentration of political skills and prerogatives, including control over staff and channels of communication. Furthermore, the position of the leaders is strengthened by the member's political indifference and by the sense of obligation they have to those who guide them and do the

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[88]   Selznick, *The Moral Commonwealth*, above n 86, 321.
[89]   Ibid 330.
[90]   Krygier, 'The Rule of Law: An Abuser's Guide', above n 85, 141–2.

> main work … submit[ting] willingly rather than reluctantly to the widening power of the officials ... [a lack of supervision and participation by] the members free[s] leaders to subvert the aims of the association, whether in their own interests or in the interests of others.[91]

The 'Michels effect' is an established example of Krygier's goal displacement, where democracy, as a means of achieving socialism actually displaces the supposed ends of socialism, and something else is achieved instead of socialism's intended ends. Taking a sociological approach, Krygier thus takes what Selznick describes as a 'social science approach', treating 'legal experience as variable and contextual'.[92] As we will see later, he has adopted the spirit of this approach.

It is clear Krygier is not a one-man show. He refers to many thinkers to and he has built on their ideas. Krygier's contribution is making a unique extension of existing concepts from all kinds of fields, and he has made them his own. We will see elements of his theory below.

IV   KRYGIER'S OPINION ON THE RULE OF LAW

Krygier thinks that liberalism is a necessary product of the rule of law, condemning amongst despotic regimes the so-called 'illiberal democracies'.[93] The end of the rule of law, indeed its central aim, is according to him to reduce arbitrariness.[94] As mentioned before, Krygier starts from the end of the rule of law. He is quite strict in emphasising that the end of the rule of law provides for the reduction of arbitrariness,

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[91]   Philip Selznick, *The Moral Commonwealth*, above n 86, 245.

[92]   Philip Selznick, 'A Social Science Strategy' in Philippe Nonet and Philip Selznick, *Law & Society in Transition: Toward Responsive Law* (Transaction Publishers, 2001) 8, 9.

[93]   Krygier, *Four Puzzles about the Rule of Law*, above n 76, 24.

[94]   Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 58.

saying: '[M]oreover, if other values are added to one's conception of the rule of law, it would not actually augment my claim that it is those values that we should look first, rather than to institutional structures that too often threaten to be treated as ends themselves'.[95]

Despite this, Krygier accepts that the rule of law is not exclusively formal, and some substantive concept is required, saying in 2001: 'But if power is already substantially constrained by law, the rule of law might tolerate, even on occasion require, that some space be made for wisdom, judgment, particularity, and substantive justice'.[96] This implies that, assuming he still thinks the same, that he is at an effective level a substantivist, his current conception has not accommodated rights, unlike his earlier conception, or expressly described what is good or bad law. Nevertheless, he is conceptually in between formal and substantive conceptions, saying: 'A middle ground is available, however. It [values besides reduction of arbitrariness] needs to have a special connection with *law*, lest the rule of law come to mean the rule of whatever is good, in which case we have no need for the concept'.[97] Another way to look at it is that he is a minimalist-substantivist in the same way Fuller embraced the minimum content of the natural law.

Krygier, citing a number of times in his works, has noticed four general conditions to institutional contributions for the rule of law.[98] These conditions are sociological. They 'need to be fulfilled by whatever

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[95]   Ibid.

[96]   Krygier, 'Rule of Law', above n 44, 13 407.

[97]   Krygier, *Four Puzzles about the Rule of Law*, above n 76, 25.

[98]   As early as 2002 in Krygier, 'The Grammar of Colonial Legality', above n 77, 231–2; Krygier, 'The Rule of Law: An Abuser's Guide', above n 85, 134; Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 59–60.

normative and institutional setups available within a society'.[99] These four conditions in brief are: 'the institutions have to have sufficient *scope*, knowable and understandable *character*, and *administration* coherent with the announced rules; but above all, they have to *count* as a source of restraint and a normative resource usable and used in social life'.[100] Krygier says there are four social outcomes the rule of law must achieve. This is not definitive of arbitrariness, as he has yet to 'provide or find a sufficiently complex and textured analysis of what arbitrariness includes (what degree of caprice? whim? unreasonableness? unreasonedness? discretion? If not all discretion, how much? And so on) and excludes'.[101] Whether this is going to be detrimental to the magnitude of his contribution will be addressed later. However, people usually think of legal certainty as the opposite to legal arbitrariness.[102] At the very least, we know what is not arbitrary. Nevertheless, Krygier points out that 'law is an argumentative discipline' and:

> if we thus think the more certainty the better, then the argumentative nature of law appears to be a major problem, or at least a different, perhaps inconsistent, value, for law. For legal argument commonly upsets, indeed is often designed to upset, prevailing certainties. The more we can render contentious the possibilities offered by the law, it might seem, the less certain it becomes and so the rule of law suffers.

However, this cannot be the case, 'because the inherent uncertainties of legal interpretation make it impossible and because so many other

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[99]   Martin Krygier, 'False Dichotomies, Real Perplexities and the Rule of Law' in András Sajó (ed), *Human Rights with Modesty: The Problem of Universalism* (Martinus Nijhoff, 2004) 251, 263.

[100]   Krygier, 'The Rule of Law: An Abuser's Guide', above n 85, 134.

[101]   Krygier, *Four Puzzles about the Rule of Law*, above n 76, 17.

[102]   Ibid 22.

sources of uncertainty in the world render it unavailable as well'.[103] How then does Krygier reconcile the argumentative nature of law with legal certainty? He has implied that the legal certainty we should seek is not the legal certainty of legal decisions but the legal certainty of social outcome. As mentioned earlier, they are, the four outcomes are the reduction of:

1   domination;

2   fear;

3   indignity, and;

4   confusion.[104]

Krygier thinks that the application of the rule of law must fit the context of the socio-political environment whereby there is no universal formula but just universal conditions. He thus describes himself as a 'contextual universalist: universal about the value of it, deeply contextual on how to get there'.[105] His reasons are threefold, namely: conceptual, empirical, and practical:

> The conceptual reason is this: the rule of law is not a natural object, like a pebble or a tree, which can be identified apart from questions of what we want of it. Nor is it even a human artefact you can point to, like the statement of a legal rule, though its realisation or approximation might depend on such artefacts. The rule of law occurs insofar as a valued state of affairs exists, one to which we gesture by saying the law rules (not a simple notion and not one to be expounded simply by looking up two words in a dictionary, but let it lie for the moment). What we take to be its elements are

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[103]   Ibid.
[104]   Ibid 27.
[105]   Martin Krygier, 'Approaches to the Rule of Law' in Whit Mason (ed), *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge University Press, 2011) 15, 32.

supposed to add up to something, to be good for generating or securing that state of affairs. It is a teleological notion, in other words, to be understood in terms of its point, not an anatomical one, concerned with the morphology of particular legal structures and practices, whatever they turn out to do. For even if the structures are just as we want them and yet the law does not rule, we do not have the rule of law. And conversely, if the institutions are not those we expected, but they do what we want from the rule of law, then arguably we do have it. We seek the rule of law for purposes, enjoy it for reasons. Unless we seek first to clarify those purposes and reasons, and in their light explore what would be needed and assess what is offered to approach them, we are bound to be flying blind.

Krygier is of the opinion that we must know the end of the rule of law because empirical indicators are misleading. For example, take the indicator of judicial independence.[106] 'Unless independence is assumed *a priori* to be good for the rule of law, the relationship between indicator and indicatee is altogether more problematic than it may seem at first blush':[107]

> several post-communist countries quickly institutionalised internal judicial self government and independence from outside interference, as though their ideal of having a judiciary committed to the integrity and rule of law would best be reached by imagining it had already been attained. That made irremovable old, incompetent, corrupt, badly-formed hold-overs from earlier times. Indeed, in some legal orders 'in transition,' it seems that rendering judges irremovable was actually *intended,* by the first unrenovated excommunist leaders, to have that result so that if they lost

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[106]   Krygier, *Four Puzzles about the Rule of Law*, above n 76, 9.

[107]   Ibid.

electorally, they would still have their people on the bench, independent of pressures from their opponents.[108]

What this means is that sometimes it is better not to give corrupt judges separation from the executive, lest you perpetuate corruption. It may be better to sack the corrupt judges or prevent reappointment before giving them independence.   This is an example of Krygier's contextual application.

His practical reason 'for suspicion of accounts of the rule of law that start with institutional means rather than valued ends, follows from':

> Goal displacement. This occurs, simply put, when means are substituted for ends, often unconsciously, and people flap about with check lists (and check books), recipes, 'off-the-shelf blueprints', often modelled on alien and distant originals, with scant reflection on the purpose(s) of the rule of law, or the proper purposes of their own enterprise ... Particular institutions and institutional forms are taken to contribute to the rule of law, and focus becomes fixed on those institutions rather than the ends that, sometimes in a dimly remembered or clearly forgotten past, had inspired the development of those very institutions, but which they may well not be serving in any way.

Krygier recognises that 'social and political structures and cultural supports' are needed to have the rule of law, not just 'institutional features'.[109] In other words, 'the rule of law is as much a social and political achievement as it is a legal one'.[110] Krygier has also expressly noted that the rule of law is also 'a cultural achievement of universal

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[108]   Ibid 13.

[109]   Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 52.

[110]   Martin Krygier, 'Compared to What? Thoughts on Law and Justice' (1993) *Quadrant* 49, 52.

significance'.[111] He says 'law's norms must be socially normative'.[112]
Krygier says we can only know who has the rule of law by comparison
with other societies.[113] He is critical of conventional conceptions of the
rule of law. This problem does not escape itself merely because one is
using another field of thought to approach the rule of law as we can see
that Oakeshott suffers the same problems as the rest. Krygier sums up
the problem and solution as:

> They *start* with the wrong question, so their answers, however
> insightful, are often beside the point. The proper place to start, I
> believe, is with the question *why,* what might one want the rule of
> law *for?* not *what,* what is it made up of? And that matters, because
> no sensible answer to the second question can be given until one
> comes to a view on the first. And what counts as a sensible answer
> in one place might not be too sensible somewhere else.[114]

Krygier's rejection of the substantive or formalist box is because formal
conceptions 'are often too spare to amount to much', whereas substantive
conceptions are 'too rich to allow one to sustain any useful distinction
between the rule of law and whatever else you would like to find in a
society'.[115]

We can see Krygier's opinion on the rule of law by what he perceives as
misconceptions to the rule of law. He thinks it is a misconception to treat
the rule of law 'as a kind of technology, a product to be installed'.[116]
What the rule of law actually is according to him is not a 'production

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[111]   Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 55.
[112]   Ibid 67.
[113]   Ibid 53.
[114]   Krygier, *Four Puzzles about the Rule of Law*, above n 76, 6.
[115]   Ibid 25.
[116]   Krygier, 'Approaches to the Rule of Law', above n 105, 21.

technology', but an 'interaction technology'.[117] Interaction technology 'is harder to transplant, harder to generate, with more and more varied effects than production technology'.[118] Some legal philosophers, such as Lon Fuller, cited by Krygier, treated law as architecture rather than a technology.[119] However:

> [N]either technology nor even architecture captures a fundamental truth about what is necessary to catalyse the rule of law: some of its deepest conditions, and even more its most profound consequences, are not found within legal institutions. On conditions, the rule of law grows, needs nurturing, and has to be in sync with local ecologies. It can't be screwed in though it may be screwed up, and it depends as much on what's going around it, on the particular things in that ecological niche, as on its own characteristics.[120]

But it is important consider that Krygier's emphasis on a society's particular circumstance like culture is not his true focus, as mentioned earlier. He says 'just as legal institutions are only part of the solution, so culture is only part of the problem. In either case, mistaking the part for the whole is unwise'.[121] Thus, Krygier is more interested in the 'character' of legality, not the 'culture' of legality, as mentioned earlier. This is so because he analyses the totality of the rule of law, not one aspect only.

He has many reasons why other conceptions of the rule of law are insufficient. I shall go through some of his reasons. Citing Rubin, Krygier says:

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[117]   Ibid 22.
[118]   Ibid.
[119]   Ibid 23.
[120]   Ibid 24.
[121]   Ibid 29.

> The bulk of modern legislation is not, as Lon Fuller thought law to be, 'the enterprise of subjective human conduct to the governance of rules', but rather 'a series of directives issued by the legislature to government-implementation mechanisms, primarily administrative agencies, rather than as a set of rules for governance of human conduct'. A great deal of modern legislation is 'internal' that is, concerned at least initially with administrative agencies rather than individual citizens. Within 'external' legislation, more-over, much is 'intransitive', that is, though concerned ultimately with citizens, it does not specify precisely what rules an agency is expected to state and it 'did not arise out of some lapse of moral vigilance. It is central to our beliefs about the role of the government in solving problems and delivering services'. In relation to this legislation Rubin argues that Fuller's principles are unhelpful, and: Even for transitive statutes, most of Fuller's principles are unhelpful, and 'Even for transitive statutes, most of Fuller's principles are persuasive only when the statute relies on courts as its primary implementation mechanism. When a transitive statute is enforced by an agency, our normative system simply does not make the demands that Fuller perceives.[122]

Fuller's lists, as seen above, like, others that follow from Raz and Geoffrey de Q Walker are 'systematically inadequate' according to Krygier.[123]

Krygier regards the viewpoint that the rule of law does not do its job or what it promises to do, or at a cost too great as neglecting three elementary points.[124] They are:

> First, no one suggests that the ideal achievement of the rule of law, whatever that would be, is possible. The rule of law is something

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[122]   Krygier, 'The Rule of Law: Legality, Teleology, Sociology', above n 37, 56.
[123]   Ibid 60.
[124]   Krygier, 'False Dichotomies', above n 99, 261.

you either have or not, like a rare painting. Rather, like wealth, one has more or less of it. Whether one has enough of it is a judgment to be made along a continua – multiple continua – not a choice between binary alternatives. One seeks to reduce arbitrariness, to *increase* the sway of the rule of law, not to eliminate the former by installing a new, and fortunately unrealisable dystopia consisting of nothing but the latter. Second, the rule of law is obviously not *sufficient* for good society … Third, it is not the only game in town. Where other values conflict with it, they need to be taken into account and compromises in pursuit of one or another might be necessary.[125]

Although Krygier stresses contextual application, considering that 'local knowledge is important', not all forms of local knowledge are equally helpful in promoting the rule of law. Indeed, some local knowledge represents the problem rather than the solution.[126] 'What passes as 'local knowledge' can often mislead, just because it is local'.[127] 'Many locals in post-communist countries attribute virtues or vices to their specific presents and pasts, which actually can be found in societies without either'.[128]

Krygier's most practical ideas to date as to how to export the rule of law to transitional society is in his upcoming publication *Violence, Development and the Rule of Law*. He identifies themes and principles for a successful exportation of the rule of law. By heading, they are:

1   understand needs [of the rule of law] holistically;

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[125]   Ibid 261.
[126]   Martin Krygier, 'The Death of European Communism and the Birth of 'Rule of Law promotion': Socio-legal Reflections' in Piotr Kosicki (ed), *The Global 1989: Transnational Linkages in a Revolutionary World (tentative title) (forthcoming)* (Central European Press, 2011) 1, 15.
[127]   Ibid 16.
[128]   Ibid.

2   put public confidence at the centre;

3   confront or co-opt spoilers [of the rule of law] early;

4   reform police, the judiciary and corrections as parts of a single coherent *system;*

5   subordinate the past to the future;

6   foster cross-cutting identities;

7   reinforce political change and institution-building with cultural mechanisms and soft power;

8   ensure that rhetoric matches realities on the ground; and

9   provide protection to the most vulnerable.[129]

It would be impractical to go through summarising every heading, but Krygier frequently uses the Malayan emergency where the then High Commissioner of Malaya, Sir Gerald Templer, played a key role, though he provides other examples. The Malayan Emergency occurred in Malaya, now Malaysia in 1948 when the Malayan Communist Party engaged the government in armed conflict:

> Until 1951, however, counter-insurgency progress was slow and uneven. Supported by half a million Chinese 'squatters' on the jungle fringe, the communists were able to sustain their campaign. An enlarged police force and large-scale army 'sweeps' could contain but not eradicate the threat.[130]

The entry of Former High Commissioner Sir Gerald Templer in 1952 changed all that. Many scholars frequently use the Malayan Emergency

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[129]   Martin Krygier and Whit Mason, 'Violence, Development, and the Rule of Law' (forthcoming) in George Mavrotas (ed), *Security for Development: Confronting Threats to Survival and Safety* (Global Development Network, 2011) 1, 34–5.
[130]   Karl Hack, 'The Malayan Emergency' (1993) 4 *Twentieth Century British History*, 302, 302.

under Sir Templer as a counter-insurgency model response.[131] It is thus no surprise Krygier uses this as a prime example; analysing counter-insurgency would be useful in bringing the rule of law to transitional society, establishing the rule of law where the legitimacy of government is challenged. This resonates with Afghanistan and Iraq, mentioned in *Violence, Development and the Rule of Law*, and is an indicator that he is shifting focus to transitional society in general rather than solely post-Communist society.[132]

V   CONCLUSION

I can think of one metaphor to succinctly describe Krygier's theory. His theory is very much a 'pure theory of the rule of law' in the same spirit, but not the method, of Hans Kelsen's Pure Theory of Law. I am not saying this because Krygier approaches the concept from solely a legal perspective, nor am I implying he is a positivist, though he does discuss positivism and positivist ideas.[133] He does not approach things in a solely legal manner. I say this because he is distilling the values that he claims to involve the rule of law to one single core value: the reduction of arbitrariness. It does not matter that his theory can support other values; those values are incidental to the realisation of reduction of arbitrariness and thus he removes the contaminants of foreign values from the rule of law, reducing it to a single value and making it a pure theory of the rule of law. It does not imply that the approach is strictly legal, but rather it is a 'rule of law theory' making the rule of law a subject in itself, rather than a fragment of political or legal ideal or sociological phenomenon.

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[131]   See for example, Karl Hack, 'The Malayan Emergency as Counter-Insurgency Paradigm' (2009) 32(3) *Journal of Strategic Studies* 383.

[132]   See also Krygier's other contribution to the Afghan situation in Krygier, 'Approaches to the Rule of Law', above n 105, 15.

[133]   See generally, Krygier, 'The Concept of Law and Social Theory', above n 53; Krygier, 'Ethical Positivism and the Liberalism of Fear', above n 22.

 Even though he approaches to values other than the reduction of arbitrariness in such a manner as to reduce arbitrariness, Krygier's theory is likely to evoke two possible responses: relatively neutral to personal values or extra sensitive. This is not an empirical study so I cannot conclusively say the overall effect of his theory on one's personal views, but these two responses are what I think is possible. No one can deny that the end of the rule of law reduces arbitrariness, so the positivist or even natural lawyer can use it without much problem, or minimal clashes with their values. However, a strict adherence to the realisation of values outside Krygier's purist definition will mean a rejection of his theory. It is very much a one or the other effect, you either think it does not derogate from your view on the rule of law, or you are repulsed by it because it does not contain the good values, for example equality, to the fullest extent, as mentioned earlier; the response would be relatively neutral or extra sensitive.

Krygier's absence of considering the common good, most likely because his conception is somehow purist, is a disadvantage in terms of theories on justice, despite him dedicating some discussion to it.[134] However, if you were to assess Krygier's work as a 'pure' theory of the rule of law, this is no weakness. The distilling of the rule of law to its rawest elements is a useful contribution in itself.

His conception is more about 'how to' achieve the rule of law in actual practice, beyond 'what is' the rule of law only theoretically. Thus he starts from the end of the rule of law and then sets out conditions which not merely legal institutions like 'separation of powers', 'judicial independence' or even 'constitutionally guaranteed rights'. Rather, as seen earlier, he focuses on 'social outcomes', on 'conditions' for the rule

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[134]   Krygier, *Four Puzzles about the Rule of Law*, above n 76, 39–40.

of law rather than what specific legal institutions embody the rule of law. It would be a mistake to believe that Krygier does not devote some thought as to 'what is' the rule of law, because he does give some useful insights about this.

Regarding to his observation on standards,[135] I am inclined to believe that this is a question of causation. Do certain rules invoke the rule of law, or does the rule of law invoke certain rules? We do not know whether specific rules may realise the rule of law, the rule of law being a standard or a cause for the existence of these specific rules. If the rule of law causes us to have these rules, having these rules do not mean you have the rule of law.

Regarding Krygier's wariness of 'local knowledge',[136] I think he is suggesting that this is probably a form of goal displacement since the local knowledge can distort one's means away from the end of the rule of law. Hence, Krygier stresses context based on universal values of the rule of law in line with his self-description of being a 'contextual universalist'. It is definitely the right way to go as I believe his focus on the ends of the rule of law means he can achieve a contextual universalist exportation of the rule of law to transitional societies.

I shall now borrow from philosophy to further illustrate what I think Krygier's theory is. An autonomous teleology is 'a teleology not deriving from the agent's ends'.[137] 'An action has an autonomous teleology of this new sort when it involves the use of a machine: the teleology derives from the machine's purpose rather than from the

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[135]   Krygier, 'Ethical Positivism and the Liberalism of Fear', above n 22, 79–80.
[136]   Krygier, 'The Death of European Communism', above n 126, 15–16.
[137]   Matthew Hanser, 'Intention and Teleology' (1998) 107 *Mind, New Series* 381, 395.

agent's'. [138]   To illustrate why Krygier's theory is a machine I will illustrate from a philosophical example:

> Suppose an agent decides his ends can be achieved only by acquiring money. He need not work out from scratch how to acquire money, say by figuring out what products others might be willing to buy and then working out how to manufacture such products in his home. *Someone else might already have devised such a plan*, and be willing to pay him for his help in carrying it out. *If our agent accepts such a job, his intentional job-related doings will fit into a teleological ordering, but this ordering will not be of his making. Rather than create the entire teleology himself, he will have tapped into a pre-existing, autonomous teleology.*[139]

He is fabricating a form of autonomous teleology that produces specific results, like a machine. This implies that, being a machine, or more specifically a teleological machine, his teleological machine is not like a car, where there are set inputs, for set outputs eg switching on the light switch switches on the light. Contrast with traditional rule of law conceptions where the rule of law in formal conceptions is presence or absence of a list of characteristics, meaning the inputs are more like a limited set of buttons and switches. Krygier is closer to substantive conceptions where there are a variety of inputs for a single output. What Krygier is doing is creating a very specific kind of machine, a 'teleological software program'. I propose this metaphor for his theory because I believe his theory is very much like a 'software program'. This is because software has a variety of inputs. Some inputs do nothing, whilst others achieve the desired output. Furthermore, the correct operation of the program depends on the right input. The program

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[138]   Ibid.

[139]   Ibid 399 (emphasis added).

dictates what to do and what not to do. The program has one purpose, to produce the end of the rule of law, which is the reduction of arbitrariness. A program, much like a computer program, can be limited in its capability. This capability will depend on the 'code' you programme the program with, and this very much describes his work, the 'code' being his various conditions and outcomes.

Krygier may disagree with this metaphor, as it may be too similar to 'technology' in his eyes. However, I think the above analogy is suitable as the various cultures and socio-political structures and legal institutions are like inputs to a particular program of rule-of-law realisation. Moreover, I reiterate in different words; rubbish in, rubbish out. Hence, the correct inputs to Krygier's program will bring the results he promises if his 'code' (his various conditions, themes, principles and social outcomes, an ideological structure) is good.

In this sense, I propose that his understanding the rule of law is like a software program although the dynamic is slightly different. The quality of the output (reduction of arbitrariness) is determined by the quality of the code (legal, social, political, ideological structures, such as legal institutions). Moreover, the input that enters the program (actions that aim to instil the rule of law that interacts with or modifies these structures) determines the output. This being the case, the compatibility of the code depends on the operating system of the program (culture, socio-political environment). The code input and operating system are determinants of whether you get satisfactory output. However, the code input and operating system are not dependant variables of each other. This means you can have good code with bad input or bad code with good input, hence, good structures for the rule of law with ineffective actions and vice versa. Therefore, the code that is suitable for the

operating system depends very much on the operating system, or the structure's compatibility depending on the local culture, socio-political environment.   The metaphor of teleological software program encompasses both 'technology' and 'architecture' and is in line with Krygier's observation of the rule of law. You need to update the code of most softwares, (needs nurturing, grows)[140] and 'be in sync with local ecologies'[141] (the operating system). And yet, because no local ecology is the same, no operating system is the same, the structures (code) that will work need to be *sui generis*, like software, but unlike the environment of real life software use.[142] Remember, there must still be inputs to produce an output.

Krygier has lamented that he has yet to provide a definition of arbitrariness.[143] Nevertheless, he has shown his ability to adopt the best of the best, using Philip Pettit's definition:

> An act is perpetrated on an arbitrary basis, we can say, if it is subject
> just to the *arbitrium,* the decision or judgement, of the agent; the
> agent was in a position to choose it or not choose it, at their
> pleasure. When we say that an act of interference is perpetrated on
> an arbitrary basis … we imply that it is chosen or rejected without
> reference to the interests, or the opinions, of those affected. The
> choice is not forced to track what the interests of those others
> require according to their own judgements

Hayek focuses very much on generality of the law. If one makes judgement based on general rules, one is not making a judgment themselves but applying the rules. I agree with this definition because I

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[140]   Krygier, 'Approaches to the Rule of Law', above n 105, 24.
[141]   Ibid.
[142]   Ibid.
[143]   Krygier, *Four Puzzles about the Rule of Law*, above n 76, 17.

believe it is the rule of *the* law, hence it excludes the personal bias of a decision maker. Therefore, the lack of a definition of arbitrariness is likely to be of minimal detriment to his theory.

In conclusion, it is hard to find fault with Krygier's conception and he has made useful observations of the rule of law. Krygier advocates the teleological-sociological approach. He is very astute in his observation about the importance of teleology as well as the success of the teleological approach in the fields of physiology, experimental psychology, clinical psychology, and these fields extending indefinitely only indicates that he is on the right track.[144] Krygier's conception can also be described as a 'pure theory of the rule of law', a 'how to get' the rule of law, and a teleological software program. His 'program code' is therefore rather comprehensive. He has identified certain conditions for legal institutions, social outcomes for legal certainty, and identified themes and principles for a successful implementation of the rule of law, but like every program, newer and better versions can come out, you can add new layers to it. This may come as a surprise for him but Krygier's approach to the concept makes him very much like a revolutionary rule-of-law software engineer!

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[144]   Robert MacLeod, 'Teleology and Theory of Human Behavior' (1957) 125 *Science, New Series* 477, 479.