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Why the Rule of Law is too important to be left to lawyers*

Dlaczego kwestia rządów prawa jest zbyt ważna by pozostawić ją prawnikom?

Też tekst dotyczy nieco zaniechany, zdaniem autora, obszaru badań nad prawem i rządami prawa – ich społecznego aspektu. Argument na rzecz idei rządów prawa składają się z dwóch elementów: filozoficznego i socjologicznego. Refleksja na ten temat powinna być podzielona na dwa następujące po sobie pytania: po co w ogóle potrzebne są rządy prawa? i, jaki jest ich cel? Autor skupia się na tej drugiej kwestii; rozwija społeczne podstawy prawa i rządów prawa, wskazując, że zazwyczaj refleksja na ten temat wychodzi od zagadnień o charakterze prawnym, zamiast zagadnień teleologicznych, które również podejmuje niniejszy tekst. Wskazuje się w nim, że skoro rządy prawa mają znaczenie w sferze prawnjej i politycznej, to już z samej tej przyczyny są ważne społecznie, jednocześnie autor wskazuje, iż tak bliskie powiązanie tego zagadnienia z prawem i polityką działało na socjologów odstraszającco. Artykuł ma na celu wypełnienie tej luki.

1. Background

For some long time, and in a range of different contexts, I’ve been writing about the rule of law. It began innocently, one piece at a time, often in response to specific occasions and/or invitations. However, it came to take on a life of its own. I’ve become a rule of law guy.

Over time, a line of argument has emerged, been deployed and re-deployed, developed and redeveloped,

* An earlier version of this paper was presented to a legal theory seminar at Melbourne University Law School. I benefited from the discussion, and particularly from comments by Michael Crommelin, Raimond Gaita and Gerry Simpson.
cycled and recycled. I have recently decided that enough’s enough. I should try to do something with all these essays, even if that turns out to be to leave them behind. For the moment I’m thinking of a book, tentatively titled ‘the ideal of the rule of law’. I am not proposing to lump them between covers as they first appeared but will try to distil, develop and follow the implications of the argument that has come to underlie them. So while this might seem rather late in the day for a work-in-progress seminar, I am now at a nulling-moment. That might be viewed as progress of a sort.

The general argument, simply put, has two parts, one philosophical, the other sociological. They are connected, indeed I believe one necessarily leads to the other, but they cannot stand (and might fall) separately. This paper is an attempt to clarify and tighten the sociological element. However, for those who don’t know the other part, which forces this sociological complement, I will begin with a brief rehearsal of it then move onto the sociological branch. That latter forms the bulk of the paper but not necessarily of the argument as a whole.

Asked what the rule of law is, lawyers typically produce lists of characteristics of official legal institutions, rules, and practices. There are plenty of them about. There are problems with many of these lists taken individually, but my concern in this paper is more general. For what they share is as questionable as where they differ. Basically, all these lists - some shorter, some longer, some like Dicey’s parochially English, some blithely assuming some universalistic legal Esperanto - share two mistaken assumptions:

a) that the question ‘what is the rule of law?’ can be satisfactorily addressed by stipulating legal institutional bric-a-brac thought to make it up. Previously I called this approach anatomical. Now, instructed by Wikipedia, I will switch to ‘morphological,’ which appears to be the overarching category of which anatomy is only one part;

b) that we are in a position to stipulate, in terms at the same time general in coverage and specific in institutional prescription, what aspects and elements of these institutions and rules add up to the rule of law.

There are no surprises here. These moves conform to the well known tendency of technical professionals to view their subject as the centre of the world. Accountants see bottom lines, dentists teeth, plumbers taps and sewers, men with hammers see nails, and lawyers see law. In itself that is an understandable foible, and most people tolerate it and largely ignore it, until the moment comes when they’re in debt, pain, jail and so on. Then they enter the professionals’ world and the trouble starts. They take their understanding of that world for truth: if they think their problem is financial, the accountant’s truth; if their teeth hurt, the dentist’s; if their toilet overflows, the plumber’s. And if the rule of law is what you want, it seems obvious that it is lawyers, with their insider knowledge, who best understand it and seem best placed to understand and deliver it.

It certainly has seemed obvious to lawyers, and to those whose views of law are parasitic on lawyer-hosts, among them legal philosophers. There is today a huge literature on the rule of law and a huge, expensive, practice of rule of law promotion around the world. Within that literature and that practice there are many very different, and some competitive, accounts of the rule of law. My claim is, however, that at a deeper level they all agree in an unfortunate way, actually two unfortunate ways. Put briefly, they start with the wrong question, so their answers, however insightful,
are—In this case quite literally—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. Moreover, even with the first question answered, what counts in one place as a sensible answer to the second might not be too sensible somewhere else. Societies differ, so do their institutional traditions, practices, and capacities, and so do the patterns of practice, expectation and culture in which they are always embedded. So we will need to learn something about these things, not necessarily to be found in the works of the usual suspects.

My focus in this paper is on elements of the second, what, question, but since it makes no sense without the first, why?, I will briefly rehearse my argument on that.

2. Teleology

My philosophical complaint is that writings on the rule of law typically focus first on matters of legal morphology when they need to begin with teleology. Here I will be rather stipulative, merely stating what I have sought to establish elsewhere, but I'm happy to expand on any of this in discussion.

Whatever the truth in the perennial debates among positivists and natural lawyers, about the concept of law itself, the rule of law cannot adequately be explicated simply 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 is.

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 some reason or another. To say the rule of law exists in a society is to imply an accomplishment; among its partisans a valued accomplishment. An ideal connected with law has been approached.

For 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. To speak of it is to characterize a state of affairs in the world, to which law is thought 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 realised. 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

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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 recognisable as the rule of law.

In another context, Gianfranco Poggi spoke of Durkheim’s concept of society – what distinguishes it from a mere mass of people - as a contingent, ‘insofar as reality,’ ‘real insular as certain things go on: socially patterned behaviours, shared and internalized norms, and so on. 2 I think of the rule of law that way. It is a relative and variable achievement, not all or nothing. But one can say it exists in good shape or repair insular as a certain sort of valued state of affairs in society exists.

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

In relation to this value we have all those centuries of distinction between monarchs and tyrants for example, not to mention Aristotle on the rule of law versus that of men, available to help us. In English law, as the historian, John Philip Reid makes plain, there is a tradition alive since Bracton, talking about the rule of law, though not necessarily in those terms. 3 It is true that those centuries were not always full of the mantra we now use, nor were they commonly concerned with the specific institutional, formal and procedural prescriptions, recipes, which so dominate discussions of the rule of law today. And that is part of my point. If there is some common concern of partisans of the rule of law, it has been shared by many who did not know, and would not always accept the recent, purportedly ‘consensus position’ of the EU’s Venice Commission, 4 or the scores of other versions today touted as necessary, still less sufficient elements of the rule of law. And yet most contemporary accounts of the rule of law give us no way of saying, what most legal historians would agree, that the ideology of the rule of law goes back a very long way in England, or that the rule of law was better exemplified in sixteenth (actually any) century England than in Russia at the same time (or any time). Should we count the number of retrospective laws, check for their clarity, consistency, etc., according to familiar modern formulae? Well, one could but would be surprised. Some of these features today seen as defining were conspicuous by their absence. 5 It’s simpler and

2 Gianfranco Poggi coins the phrase to describe Durkheim’s conception of society. See his Durkheim, Oxford: Oxford University Press, 2000, 85.
3 John Philip Reid, Rule of Law (DeKalb, IL.: Northern Illinois University Press, 2004)
5 Recall Dicey’s boast (probably justified) about all those Continentals who on visiting England marvelled how evident the rule of law was there. Here his contemporary Maitland on eighteenth century English law:

“I take up a list of the statutes of 1786. There are 160 so-called public acts, and 60 so-called private acts. But listen to the titles of a few of the public acts: an act for establishing a workhouse at Havering, an act to enable the king to license a playhouse at Margate, an act
more enlightening to say that the law counted for more, in certain crucial ways, in England than in Russia. And still it does. Then one needs to ask why. You won’t find a clear answer in Dicey. Even Fuller and Waldron are likelier to lead us to symptoms than to causes of the differences.

My candidate for that state of affairs, the point, the immanent value, of the rule of law, reflects a recurrent and central theme in rule of law traditions: a contrast between the rule of law and arbitrary exercise of power. Unpredictable exercise of power is one way of treating its targets arbitrarily; another is its exercise, whether predictable or not, that takes no account of the perspectives of those whom it would affect. What makes both forms arbitrary is the fact that the act of power ‘is subject just to the arbitrium, the decision or judgement of the [power-wielding] agent; the agent was in a position to choose it or not choose it, at their pleasure.’ Conversely, those subject to such power cannot in the first case take account of it in choosing how to act ahead of time nor manifest their voice and perspective in the second.

Opposition to arbitrariness in the exercise of power motivates regard for the rule of law and associated attempts to institutionalize ways of reducing the possibility of such exercise. The rule of law is in relatively good order insofar as some possible behaviours, central among them the exercise of political, social, and economic power, are effectively constrained and channelled, so that non-arbitrary exercises of such powers are relatively routine, while other sorts, such as lawless, capricious, wilful exercises of power routinely occur less. The role of law in the rule of law is to contribute to this state of affairs.

I’m happy to debate this specification of the value at stake, my larger argument doesn’t depend on my being right here. But I believe that suppression of the possibility of arbitrary power is the pre-eminent rule of law value, whatever else one wants to add to it, and whatever else is believed to flow from it.

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for erecting a house of correction in Middlesex, an act for incorporating the Clyde Marine Society, an act for paving the town of Cheltenham, an act for widening the roads in the borough of Bodmin. Fully half of the public acts are of this petty local character. Then as to the private acts, these deal with particular persons: an act for naturalizing Andreas Emmerich, an act for enabling Cornelius Salvidge to take the surname of Tutton, an act for rectifying mistakes in the marriage settlement of Lord and Lady Camelford, an act to enable the guardians of William Frye to grant leases, an act to dissolve the marriage between Jonathan Twiss and Francis Dorrill. Then there are almost countless acts for enclosing this, that and the other common. One is inclined to call the last century the century of privilegia. It seems afraid to rise to the dignity of a general proposition; it will not say, ‘All commons may be enclosed according to these general rules,’ ‘All aliens may become naturalized if they fulfil these or those conditions,’ ‘All boroughs shall have these powers for widening their roads,’ ‘All marriages may be dissolved if the wife’s adultery be proved.’ No, it deals with this common and that marriage.” F.W. Maitland, *The Constitutional History of England*, Cambridge University Press, Cambridge, 1965 (first edition 1908), 383.

Either eighteenth century England had a strong measure of the rule of law or it didn’t. I think Dicey and Reid, not to mention E.P. Thompson (*Whigs and Hunters. The Origins of the Black Act* Harmondsworth, Penguin, 1977), are right to think it did. I also think the sources of this blessing need to be sought somewhere else than where lawyers are accustomed to seek them.

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6 See Reid, *Rule of Law*.
Not only is anti-arbitrariness a pre- eminent rule of law value; it is an immanent value, internal to the rule of law itself. It is common today to claim all sorts of goods as flowing from the rule of law - economic development, human rights, democracy etc. These claims are the lifeblood of the international rule of law promotion industry. But I'm not talking about those external, purported, blessings allegedly bestowed by the rule of law. Perhaps it is good for all these things, though the claims so popular in international circles today can be debated. 8 But if it is, it is because of what it does immanently, as a conceptual matter as it were, and my claim is that what it does is diminish the possibility of arbitrary power. If that occurs, one might argue, as Max Weber did, that 'sober bourgeois capitalism' is likelier to get off the ground, but that is a sociological argument about what reduction of arbitrariness that flows from the achievement of the rule of law might facilitate. It is not itself a quality of the rule of law itself. Nor are democracy, human rights and other things it is now fashionable to attribute to the rule of law. There are intuitively plausible reasons, and some evidence, to support the belief that lessening of the possibility of arbitrary power might support those further good things. But if it were shown that, in an order where the rule of law in the sense sketched here was strongly in evidence, the economy had tanked, this would not be in itself a reason to conclude that there was no rule of law. Nor that the diminution in the possibility of arbitrary exercise of power was therefore not a good.

One way of clarifying the distinction I am trying to make here has been suggested to me by Raimond Gaita. Law embodies values, central among them those of the rule of law, but these are not purposes of law. The law doesn't have purposes, though it may well be valuable. If we look at the distinctive features of, say, English law over long periods of time, we might be tempted to say that, compared with many other legal orders, it scores high on the rule of law. But this was not anyone's purpose nor the of the law. However, if we seek to promote the rule of law as a project because we think it good, say, for economic development, human rights, or restoring peace after conflict, these are purposes we have and that we surmise the rule of law serves.

Arbitrariness is a specific and obnoxious vice when added to power. Of course it is the combination that is lethal. If my acts do not have potential to harm, then I can be as arbitrary as I please; indeed my eccentricity might be part of my charm. And it is not power of itself that is obnoxious. We need it in many forms as well. We should not want to emasculate the capacity for power to be exercised to keep peace, defend populations, enforce legal judgments, balance other powers, and so on. Further, we need to distinguish between those exercises of arbitrary power that should be of public concern and those that should not. Lovers can act arbitrarily towards each other, and that can harm one or both of them, but most of us would, I imagine, think that, unless some threshold of injury has been crossed, they will just have to deal with that themselves. Not every hurt is or should be a matter of public concern.

What we don't want is to live in circumstances where significant power can be exercised over us in an arbitrary manner. There are many other vices which depend on the substance of the law, but arbitrary power is vicious enough even without

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8 See for example, Stephan Haggard and Lydia Tiede, 'The Rule of Law and Economic Growth: Where are We?' *World Development*, 39, 5, (2010), 673-85
them and moreover can be vicious even when the substance is fine. Arbitrary power is a free-standing vice, as it were.

Where arbitrariness is linked with significant power, it tends ineluctably 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 and Jeremy Waldron\(^9\) have emphasized, it threatens the dignity of all who find themselves mere objects of power exercisable at the whim or caprice of another. More can be said about all of this,\(^10\) but not today.

These are four good reasons to value reduction of the possibility of arbitrary exercise of power. 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 the exercise of power.

There is, of course, controversy about how that state of affairs should be characterized, how the law might contribute to it, and what it needs to be like to do that effectively. There are also controversies about the fundamental values of, and the worth of, the rule of law itself. Anti-arbitrariness is not an eccentric choice, but many would say it is not enough. I agree it is not enough for a good society, or even good law, but these are other goods. It is enough for that precious but limited good, the rule of law. But if you don’t agree, it’s not the end of the world. Such controversies are inevitable, and not unique to the rule of law. Recall democracy, justice, equality. Concepts that are contested, even ‘essentially contested,’ are not for that reason alone meaningless or useless. On the contrary, some of them are the most important we have. Indeed that importance is a central reason for the controversies that rage about them.

My own specification cannot put an end to such controversy. Ends and means are both in play and disagreements are common in both domains. I only want to suggest that the rule of law needs first to be approached by asking after its telos. You can’t usefully describe or explore the rule of law before clarifying what you think it’s good for.

To conclude and to repeat, people might reject my parsing of the immanent value of the rule of law, and we can discuss that. The more important point for my general argument is that what we look for to achieve this end can only be decided after we have clarified the end in view. The argument of the rest of the paper is this: If we value the immanent end(s) of the rule of law (whatever we conclude it or them to be), we cannot assume, without further investigation, that any particular assemblage of legal institutions or practices will generate such ends or, conversely, that such ends can nowhere be generated in quite other ways, ways of which we haven’t thought,


\(^10\) I discuss these four reasons more extensively in “Four Puzzles...” supra n.1, at 78–81.
which might be simply beyond our ken. We need to look, and not only within the professional frames within which lawyers and legal philosophers view the world. And that leads, inextricably I would say, to a need to know something about society, beyond merely what we might pick up by living in one.

3. Society

Unfortunately, I can’t point to a bunch of sociological writings that speak directly to these concerns. The sociology of the rule of law is not a well-populated field. Some decades ago, Philip Selznick argued that, given its centrality among legal values, the rule of law ‘must be a chief preoccupation of legal sociology,’ and he pointed to a good deal of research that spoke to that theme. Though they might have spoken to it, however, in the sense of bearing on it, most sociologists did not speak of the rule of law or analyze it particularly closely.

It is not obvious why, because if the rule of law, understood as at least in crucial part a brake on arbitrary exercise of power, matters legally and politically, it certainly matters socially. Arbitrary exercise of power is a common cause of social disorientation and in the worst cases catastrophe, and it is a proper matter of social concern what might be done to prevent or lessen it, as it is to understand its social preconditions. Conversely, and the point of this paper, legal institutions can’t do much without social support. Where that support might come from and what it might involve are proper questions for sociological investigation. It is also true that if the end is important, we need to investigate other means, besides law, that might help us approach it. I return to this in the final section of the paper.

But there are many things that conspire against close sociological exploration of the rule of law. Prominent among them are purists’ fears of disciplinary contamination. The rule of law is so associated with law, politics, and the state, that sociologists have tended to keep their distance from this hallowed legal ideal—too normative, too legal, too political, too formal, too disconnected from life; and how is it to be measured? That neglect is matched by legal and political theorists’ immaculate conceptions, untainted as they have remained by social theory or empirical social research. This mutual ignorance is unfortunate, for some of the central questions about the rule of law are sociological ones.


So, what I will sketch is not a mainstream sociological concern. It is rather conceived as a contribution to what one scholar has called, once referring to Selznick, once to Fuller, part of a 'social science that doesn't exist,' though some of its elements already do exist, if not usually considered in close connection with each other.

3.1. Law in Society

In 2005–06 I spent a year at an interdisciplinary centre for advanced studies at Stanford. One thing I was writing about there was the experience of rule of law promotion in post-communist societies. One of my colleagues was James House, a sociologist from Michigan, with whom so far as I knew I had nothing in common except that we enjoyed playing ping pong together every day. He was writing about health in the United States. One problem that the US faces is that while it spends much more, absolutely and per head, on health care than any other country in the world, its health results are worse than those of countries comparable in other relevant respects. Indeed they have declined. House argued that this problem would not be fixed by focusing on the usual suspects – hospitals, health care, medical technology, drugs – and trying to improve them. America led the world there already, but the results of all this money, technology, and expertise were disappointing. The cure would have to be sought elsewhere, in education policies, welfare, improving distressed socio-economic circumstances, and so on. The results of that research were later published in a co-authored book, Making Americans Healthier: Social and Economic Policy as Health Policy, which explored 'a growing paradox between its declining levels of population health relative to other wealthy nations – and even some developing ones – and its burgeoning spending on health insurance and medical care.'

At the time, I was struck by parallels between House's argument and the core assumptions of a certain tradition of socio-legal work, which I have been trying to integrate into thinking about the rule of law. The theme of this tradition is well captured by the remark of Marc Galanter, one of its more penetrating contemporary representatives: '[j]ust as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. People experience justice (and injustice) not only (or usually) in forums sponsored by the state but at the primary institutional locations of their activity – home, neighbourhood, workplace, business deal and so on.'

People might admit this about justice, but still draw back from seeing implications here for law. After all, it is common to observe that law and justice often

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come apart; rule of law too. Recall the lament in the 1990s of the former East German dissident, Barbel Bohley: ‘we wanted justice; we got the rule of law.’ Maybe justice is to be found in society, but law on this view is exclusively and for better or worse, what comes to us from the state and its agencies.

However, the point can be pushed further. It is common to gesture to law/society relationships with the phrase ‘law and society.’ The umbrella movement in the United States for those who study these things is the Law and Society Association. There are numerous ‘law and society centres’ there, the leading journal is the Law and Society Review, Britain, or at least Wales, has its own Journal of Law and Society. Yet the Harvard jurist, Lon Fuller, disapproved of this logo, not vehemently but firmly and in principle. He insisted that law was a part of social life, not merely a partner of it. So, ‘law in society,’ not ‘law and ...’ As Philip Selznick, himself head of a Law and Society Centre, was somewhat chastened to admit, Fuller disliked the phrase “law and society.” He objected to the “and” as a distancing imagery; it seemed to counterpose what should be understood as wholly intermingled. We may not wish to indulge that bit of purism, but the point is well taken.20

This is a very general point, of course, and in truth Fuller adorned it with little detail. It is pursued more vigorously, and for non-accidental reasons, in strands of socio-legal writings that have emanated from east European multi-national empires before the First World War. The key names are Petrażycki (intuitive law), Malinowskie (law without ‘central authority, codes, courts and constables’) and Ehrlich (‘living law’). I won’t pursue their writings here, but I think there is a lot to be drawn from them, in at least 2 ways.

The first has to do with the implications of the character of social relations for the rule of law. For societies are patterned in differing ways. Many of these patterns endure over time, and they matter for most things, among them legal institutional function, form, social salience and performance. Societies exhibit internal continuities and differences from each other, and within them, regions and sub-societies differ too, in the character and texture of relationships they generate, enforce, and suppress. The extent to which social configurations are apt to support and resist specific institutional arrangements also varies.

At least since Edward Banfield wrote of ‘amoral familialism’ in The Moral Basis of a Backward Society20 social scientists have discussed whether some sorts of pervasive social arrangements are more hospitable to the relatively impersonal social

19 'Jurisprudence and Social Policy: Aspirations and Perspectives,' (1980) 68 California Law Review, 216. Cf. Lon L. Fuller, 'Some Unexplored Social Dimensions of the Law,' in Arthur E. Sutherland, Path of the Law from 1967, Harvard University Press, Cambridge Mass., 1968, 57: ‘The intensified interest in the sociology of law that has developed in recent years has come to assume the proportions of something like an intellectual movement. In the United States this movement has found a kind of sloganized expression in the title, Law and Society ...

It would be cautious indeed to pick any serious quarrel with this innocent renaming of the familiar. ...

At the same time there are, I believe, some dangers in this new title and in the allocation of intellectual energies it seems to imply. By speaking of law and society we may forget that law is itself a part of society, that its basic processes are social processes, that it contains within its own internal workings social dimensions worthy of the best attentions of the sociologist.

20 Glencoe Illinois, The Free Press, 1953
relationships that one finds in modern societies, and to the impersonal rules that Weber considered distinctive of modernity, and writers on the rule of law take to be essential to it. Banfield thought what he called (though we would never do so now) 'backward' societies were inhospitable to impersonal connections and institutions, and could only be adapted with difficulty. Thus, in societies, or sub-societies characterized by 'amoral familism,' such as the Montagnesi of southern Italy that he studied, the underlying rule of social behaviour was, Banfield argued, 'Maximize the material, short-run advantage of the nuclear family; assume that all others will do otherwise.' 21 No one - indeed nothing - will be interpreted as public in purpose even where it might actually be so intended and 'the law will be disregarded when there is no reason to fear punishment.' 22 More pithily, a similar point has been expressed in Ernest Gellner's contrast between modern 'civil societies' and most historical societies, dominated by kings or cousins or some combination of both. 23

More recently, Robert Putnam has embroidered Banfield's theme, also on the basis of Italian data. Comparing Italian regions over 20 years since they all ostensibly received the same sets of public institutional reforms, he finds consistently over that period, and more ominously over centuries, that effective institutional performance was closely correlated with characteristics of social structure, and in particular the amount of civic association available to generate interpersonal trust among non-intimates. 24 Regions with plenty of such associations - football clubs, singing groups, etc. - had consistently better governmental institutions than those who lacked them. While he doesn't speak of the rule of law, some of his observations are suggestive:

Lacking the confident self-discipline of the civic regions, people in less civic regions are forced to rely on what Italians call "the forces of order," that is, the police. ... citizens in the less civic regions have no other resort to solve the fundamental Hobbesian dilemma of public order, for they lack the horizontal bonds of collective reciprocity that work more efficiently in the civic regions. [However] In the less civic regions even a heavy-handed government - the agent for law enforcement is itself enfeebled by the uncivic social context. The very character of the community that leads citizens to demand stronger government makes it less likely that any government can be strong, at least if it remains democratic. ... In civic regions, by contrast, light-touch government is effortlessly stronger because it can count on more willing cooperation and self-enforcement among the citizenry. 25

21 Ibid., 85.
22 Ibid., 92.
A more ambitious argument along related lines, and directed precisely at the rule of law, has recently been developed by the institutional theorist and political economist, Barry Weingast. Weingast distinguishes two social types that have developed to deal with the problem of violence in radically different ways. On the one hand, and for most countries in most periods of history, including our own, there are ‘limited access orders,’ which solve the problem of violence through distributing benefits differentially to and among those who are in a position to wreak it: ‘In this social order, the political system manipulates the economic system to create rents so as to control violence and sustain order.’

Open access orders, by contrast and as the label suggests, open up ‘entry to political and economic organizations. As a result, they exhibit political and economic competition, and this competition is central to political order and the prevention of violence. In contrast to the [limited access order] all citizens in open access orders have the ability to use the state’s courts to enforce the organization’s contracts. Open access therefore creates and sustains a rich civil society. Competition and open access in the economic system reinforces competition and open access in the political system, and vice versa.’

What the rule of law requires, and what most limited access orders cannot provide are accepted norms that transcend persons and statuses. Only thus can be generated ‘credible commitments that institutionalize political and social mechanisms that create incentives for both political officials and citizens to honor the rules so that not only today’s officials honor the rules but so too will tomorrow’s.’

The differences between these systems are, not matters of free, benevolent, or malicious choice or good or bad character. They are, Weingast argues, different institutionalized ways of insuring against the Hobbesian nightmare. The difficulty is to move from one to the other. Mere transplantation of institutions will not do the trick.

I am not interested here in defending the detail of these arguments. I am conscious that these are idealized distinctions and don’t account for everyone’s behaviour, and I would want to resist until intellectually forced the cosmic pessimism some of these authors exude. But a core element common to them is surely true: socially institutionalized behaviours, expectations and sources of legitimacy are not inerently malleable or trivial in their consequences. If anyone hopes that the ‘rule of law’ might transform social relationships in such a way that opportunities for the stronger arbitrarily to dominate the weaker are diminished, one needs to have thought hard about what the relationships in place are and what might be done to change them. Unless they do change, much that we graft will die, and even if it


27 Ibid., 33.

28 Ibid., 45.


survives the resulting amalgam is likely to operate in ways that surprise, sometimes astound, us. For, to use a distinction of Stephen Holmes’, legal and political orders are ‘interaction technologies’ rather than ‘production technologies,’ if (as I doubt) it make sense to speak of them as ‘technologies’ at all. Interaction technologies depend on the interactors and their routine, and their ways and existing norms and expectations of interaction, as much as or more than they depend on the technologies. And unless such matters are effectively taken into account, technologies introduced with great fanfare, money, blood and sweat, commonly end in tears.

The second significance of ‘law-in-society’ applies as much to modern, well-established, impersonal state legal orders as it does to those which rule of law promoters struggle to transform. Is it enough to focus on the characteristics of legal institutions, rules and practices there? Well certainly where the law counts, its nature does too. But law is still in society here too. First of all, consider the universal truism that an enormous amount of activity to which state law might relate will never find its way to state institutions, but will be dealt with, if at all, elsewhere. This is true everywhere, including in the highly state-developed and law-governed societies of the developed West. American socio-legal scholars speak, for example of the ‘disputing pyramid’.31 At its broad base is a hurt of some kind. This needs first to be noticed as an injury, rather than, say, a natural incident. It has, in the terms of the trade, to be named. Then to be attributed to a culprit, who only under this condition will be blamed. Only then can it form the basis of a claim, which often is never made. Injured parties often prefer to ‘lump it.’ Some claims will involve third parties, only some of them lawyers. Only then will a very small proportion of this small proportion enter, and even fewer begin to ascend, layers of the official hierarchy. Ultimately a handful of potentially law-relevant activity ends up as one of those rare superior court case that lawyers and legal philosophers often speak of as the central stuff of the law. Those cases indeed matter greatly to the skewed sample of litigants who endure them, and they might be of legal importance disproportionate to their numbers, but socially the situation is more complicated. Apart from definitive resolution of the relatively few disputes that come before the courts, there are other sources of such social importance as they have. And both depend upon favourable social circumstances.

What follows from this? Let me start with a key qualification that I have not made in previous iterations of this point. I had taken the implication of what I have just written to be that dispute settlement by official institutions was less important than conventionally assumed and than how it affects what goes on outside them. I now think mine was a confusion of quantity with quality. And we can see my mistake if we return to House’s and Galanter’s reflections on health and hospitals. The fact that ‘health is not found primarily in hospitals’ is not an argument for the unimportance of what happens in hospitals. Even if I have only one heart attack in my long life, it’s enough. And so with courts. Treated for the moment just in terms of what they do for those who reach them, these will include many who found nowhere else to go, no other independent institution capable of doing justice to their claims. There is an incalculable difference between societies where this possibility is available

to citizens, and ones where it is not, or is available only to certain categories, or deals so badly with them that they have no use for them.

Moreover, this is so, whether or not one ever has occasion actually to use the institutions. In the previous paragraph, I spoke only of individuals with disputes or grievances that actually do make their way to official institutions. But here hospitals differ from courts. A heart attack is a sad but individual event which may, of course, affect many apart from the sufferer. However, it is unlikely to set them on a path that might end with them tearing each other apart because there is no effective institution available to treat it. The absence of the real possibility of independent and enforceable third party intervention, by contrast, can have tragic social consequences. In such circumstances, people do not merely, as we often do, fend for themselves in the first instance, but are liable to do so without curb or limit, if they lack even the in principle anticipation that they might call on official agencies if all else fails. So, whatever implications might have been drawn from my earlier considerations of this point, I mean nothing I say in what follows to detract from the strategic, ultimate, significance of the provision by the state of institutions to hear and do justice to the parties who make their way to them, where circumstances are such that it can effectively do so. Of course, this is not news to most people, particularly lawyers but, driven far too far by a kind of sociological anti-institutional trajectory of my argument which I didn't intend but didn't avoid, I have made too little of this in the recent past.32

Though this concession is important, it remains consistent with two other truisms that I still maintain. First, that a crucial part of the social importance of state law stretches well beyond what it does to any specific litigants in legal proceedings. Second, that that significance can only be assessed in the light of other sources of social influence than the law itself, which may support, refract, rechannel, transform, or totally block that influence.

Legislation, of course, is always directed outwards, and court proceedings too have fundamentally important effects that radiate well beyond their direct participants. For apart from citizens’ (generally rare if, for the reasons just mentioned, important) direct invocations of official channels, there is the extent to which they are able and willing to use and to rely upon legal resources as cues, standards, models, ‘bargaining chips,’ ‘regulatory endowments,’ authorizations, immunities, in relations with each other and with the state. In this respect, as Marc Galanter has emphasized,33 courts do not act as magnets that draw disputes inward to be officially

32 This rethinking has been lurking for a while, but I owe its bursting out here to hearing and reading Hazel Genn, Path to Justice. What People Do and Think about Going to Law, Oxford: Hart, 1999; and Genn, Judging Civil Justice, The Hamlyn Lectures, 2008, Cambridge University Press, 2010. Dame Hazel argues powerfully for the importance of the quality of official dispute settlement in these works, and I realised that I was in the uncomfortable position of agreeing with her, while she might rightly be in disagreement with me. So I changed. (This puts me in mind of Hart’s reminiscence of a debate with Kelsen: Kelsen began by saying that their dispute was of a wholly novel kind because though he agreed with me I did not agree with him. H. L. A. Hart, ‘Kelsen Visited,’ in Essays in Jurisprudence and Philosophy, Clarendon Press, Oxford, 1983, 287)

33 See his ‘Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law,’ (1981) 19 Journal of Legal Pluralism, 1-47. As Galanter observes, “[t]he mainstream of legal scholarship has tended to look out from within the official legal order, abetting the pretensions of
resolved. If that were their primary function, they might well be accounted failures everywhere, given the very small proportion of disputes that reach them. Rather, apart from and at the same time in the very process of dealing with those disputes, they act as beacons, sending signals about law, rights, costs, delays, advantages, disadvantages, and other possibilities, into the community. This has been long understood, in the well-known phrase, as 'bargaining in the shadow of the law.'

Of course it helps if the beacons are bright rather than dim, focused and well directed, the signals sent clear and encouraging (or, in the case of criminal law discouraging). If the message is the Kafkaesque one that everything but justice happens in the courts, that is a bad message. Or the messages citizens receive from institutions might include confirmation that the courts apply 'telephone law,' or are in the pockets of oligarchs, or whatever they say won't be implemented (all often alleged in Russia), or that even if clean the courts are less powerful than local patrons (ditto and elsewhere), or that whatever one gets from the courts won't compensate for the costs, difficulties, delays and distress of the process (think family law). The old Bulgarian adage that 'the law is like a door in the middle of an open field. Of course you could go through the door, but only a fool would bother,' is not a good advertisement for the messages sent by the Bulgarian legal system.

So it matters to at least two constituencies (apart from those, lawyers, who make their living from them) how legal institutions settle disputes. The smaller and frequently atypical constituency is the litigants themselves, whose days in court are often of extremely highly charged significance to them and therefore significant in themselves, and who also are part of the second, much larger, constituency affected by law: all those who, often subconsciously, act and react, in their relations with other citizens and with the state itself, on the basis of their interpretations of signals that emanate from those institutions, or their attitudes towards those signals and to their sources. However even when signals are bright and visible, they do not necessarily signal or beckon engagement of the sort the signalers intend. For not everything depends on the message or the messenger.

This again might seem pretty vague. Let's sharpen it up a little with some more of the truisms I promised. Lawyers often talk of 'society' in one of two ways, and if they're very confused in both! Either the term is just a collective shorthand for 'all of us,' understood as a mass of individuals. To speak of society in this way is just to refer in a word to all the individual persons living in some bounded space. When Margaret Thatcher denied there was any such thing as 'society,' she was actually saying there was nothing more than individuals (and their families). Less polemical individualists might less fastidiously use the word, but say it adds nothing but economy of expression. Alternatively, however, society can be conceived of holistically, as a kind of collective entity. On some interpretations, that is how Durkheim

the official law to stand in a relationship of hierarchic control to other normative orderings in society. Social research on law has been characterized by a repeated rediscovery of the other hemisphere of the legal world. This has entailed recurrent rediscovery that law in modern society is plural rather than monolithic, that it is private as well as public in character and that the national (public, official) legal system is often a secondary rather than a primary locus of regulation" (at 20).


44 Prawo i Więź nr 2 (2) zima 2012
understood it. And this is often how the word is used when after dinner Bar Association speakers expatriate on the need for law to 'keep up with social change', 'serve the needs of society,' and so on.

But to live in a society is not merely to have neighbours, on the one hand, and unless it has been pulverised by war or totalitarian rule and typically even then, a society is not some sort of vast featureless porridge either. First of all, individuals are profoundly affected by the social relations in which they are embedded; as Philip Selznick reminds us, 'Human beings are products of interaction; they are embedded in social contexts. This is a truism, but on that must be taken seriously. It is a challenge to recognize how much we depend on shared experience, including nurture, communication, stimulation, and support.\(^{35}\)

On the other hand, society is not a thing, and certainly not an undifferentiated unit. Instead, it is made up of people who inhabit what one legal anthropologist has called 'semi-autonomous social fields',\(^ {36}\) usually several simultaneously. Such fields, or perhaps in today's language networks, include the organizations in which we work, our families, localities, perhaps ethnic and religious communities, people we trust. These generate connections, sometimes loose sometimes tight, sometimes egalitarian, sometimes clientelistic, sometimes honest sometimes corrupt.

To the degree that what goes on within these fields has salience for those within them, semi-autonomous fields are likely to generate distinctive ways of viewing and handling affairs including internal disputes and those with people in other fields. Even in the most law-observant country, these informal norms have sources other than state laws, and they will affect much that happens in the fields, sometimes without more, sometimes in interaction with external norms, including official ones; sometimes in ways that redirect those norms in unpredictable ways, sometimes in ways that block or frustrate their legislative or curial formulators, or would if they knew about it which they often don't. Much to which those laws might in theory relate that never comes within the purview of state institutions will be handled on the ground, often without reference to state laws at all, sometimes 'in the shadow of the law',\(^ {37}\) other times in some other shadow. Such dealings may at times be inconsistent with state law or reflect idiosyncratic interpretations of that law, or ignore it, and whether consistent or cognizant or whatever, will have effects that mediate, reframe, and often redirect and refashion the significance and consequences of state law, whatever lawmakers intended it to accomplish.

These, it should be stressed, are general truths, not just what happens in countries with little or no rule of law. Networks might, of course, be more autonomous and powerful in such countries, and lead to greater and more dramatic deviations from official aspirations. However, it is a common mistake to compare a society thought to be drenched with 'informal practices,' as legal pathologies in benighted countries are often characterized, with some idealized model of an impersonal and sovereign western legal order, with nothing in between the state's laws and its

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individual subjects. Sociologically there is no such order. The character, impact and salience of informal practices in relation to official law are almost infinitely variable, and these differences can matter greatly, but their existence is universal.

An upshot of the above is that again unless it is brutally enough administered to pulverise anything in its path - a rare event, even in totalitarian countries, and hard to sustain - the effectiveness of state laws will be heavily dependent on their degree of synchronization with the ‘indigenous’ orderings generated from within social fields. Indeed in totalitarian and authoritarian polities, the very lack of synchronization between exercise of state power and social realities and possibilities often generates informal practices in the society which at the same time subvert the official order and try to make up for its inadequacies. Both in these situations of chronic lack of sync and ones where the mesh is smoother, one can talk as much of the law in the shadow of indigenous ordering as of ‘bargaining in the shadow of the law.’

Finally, while the points made above are generally true, they also vary greatly in their significance and implication. Whenever law stakes a claim to rule, the upshot of the many potential sources of normative, structural, cultural and institutional overlap and collaboration and competition in every society will differ markedly between (and often within) societies. Whether and how people will interpret the state’s law and respond to it, how highly it will rate for them in comparison with other influences - these things depend only partly on what it says, how it says it, and what the law is intended by its makers to do. In complex and variable ways, people’s responses to state law depend on how, in what form and with what salience and force that law is able to penetrate all these intervening media, how attuned to it putative recipients are, and how dense, competitive, resistant or hostile to its messages they might turn out to be. So much writing on ‘the state’ and ‘law’ ignores how various are the phenomena and relationships clumped under these putatively simple and single concepts.

Again I should stress that this is not to say that state law is unimportant. Nor that we should simply upend legal centralism and put some vaguely characterized ‘society’ in its place. In modern circumstances, and virtually the whole of the developed and undeveloped world is affected by those circumstances, the state is a crucial institutional underpinning of the whole of society, and its laws are often crucially important. But how important, and even if important, in what ways their effects work out in the world, are heavily dependent on the complex social, economic and political contexts into which they intervene. That is a universal truth, and so those interested in the rule of law need to come to terms with it.

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40 See Galanter, op. cit., 17.

3.2. The Rule of Law

So much for law. What about the rule of law? How ‘social’ is that? Of course it has social consequences, but most people seek to find it in the properties and activities of legal institutions, and primarily concerned to constrain the activities of political ones, of the state. Of course, ‘social’, ‘legal’ and ‘political’ are analytical distinctions which map poorly the continuities and overlaps of the real world. However, in terms of where one looks and what one expects to find there, what is taken as figure and what ground, they do point to significant differences at least of focus and emphasis.

There is nothing original or even lonely in nominating opposition to arbitrariness as a fundamental concern of the rule of law. However, taking the point seriously and starting with it rather than lists of legal hardware, has a number of implications that have not always been noted. I mention three. These implications would follow, moreover, whether or not you agree with my specification of the point of the rule of law, just so long as you think it makes sense to begin thought about the rule of law with consideration of its point.

One is that the salience of features of legal institutions, formal and procedural characteristics usually nominated to constitute the rule of law, depends on how successfully they support the attainment of this value, in the wider society. To the extent they do, they have aided us in identifying what the law needs to be like to serve the end of the rule of law – at least there. To the extent that they do not, however, it is not at all clear why we fix on them so, still less try to extend them to places where they might merely have parodic roles. The challenge for anyone seeking the rule of law anywhere is not primarily to emulate or parody practices that seem to have worked elsewhere, but to find ways of reducing the possibility of arbitrary exercise of power, whatever that takes, here.

A second implication is that, if the arbitrariness of the exercise of power is the target and the danger one fears, there is no reason a priori to limit one’s attention to state power. If non-state power is arbitrarily exercised by oligarchs, Mafiosi, warlords, tribal elders, Al Qaeda, business executives or university administrators, it too has the potential to bring with it all the vices of arbitrariness mentioned above. So the rule of law is opposed to arbitrariness in the exercise of significant power, whoever is doing the exercise.

One last implication follows from the second, together with my earlier remarks: Taking the rule of law seriously may not only require different legal rules and practices from those we know, particularly in places we don’t know, but also recognition that many of the most significant sources of, goods generated by, and dangers to the rule of law are to be found in the wider society, not merely in or even near the obvious institutional centres of official law.42 There are numerous societies in which arbitrariness flows as much or more from extra-state exercises of power, sometimes aided by suborned official agencies, sometimes opposed to them. Sources of power are many. Moreover, possible constraints on it may come, or fail to come, from many domains of social life, and from many agencies other than legal ones. Not only might this happen, but as John Braithwaite emphasized at a recent conference, it already does, and in spades. To take just one example he considers.

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42 For more on this, see ‘Four Puzzles ...’
The institutions of the media are important checks and balances on the judicial branch of state (and international) governance and also a protector of the relative autonomy of the judiciary from executive domination. So when the Prime Minister criticizes the High Court for last week's [September 2011] momentous decision [re the ‘Asian solution’], media commentators are, and were, a check and balance on her not going too far with her excoriation of the Chief Justice.

I conclude that the media as a separated power is no more constituted by the law than the rule of law is constituted by undominated media. ... conditions of modernity require us to see private concentrations of power such as ratings agencies and private armies in places like Afghanistan and Iraq as both dangers and contributors to productive balances of power. Even powerful executive governments, such as that of the United States, can be captured by these private powers (Barnett and Zurich 2009). So can the UN. Hence, global media can become as critical as law to dynamic, pluralised separations of powers that help constrain arbitrary exercise of power (Krygier) by private and public powers.43

3.3 Contexts and Variation

There are great and salient differences between societies where the rule of law is well established and those where it is not. There are also enormous differences within each of these capacious categories. Legal orders differ greatly in the extent to which the values and practices of the rule of law are strongly embedded within them. Not every legal order is strongly socially embedded by institutions, provisions, culture, social structure, and prior experience of the law, and ways to secure such things will necessarily differ from society to society, and among social groups in any specific society. Legal orders can be bearers of value, meaning and tradition laid down and transmitted over centuries; some are some aren’t. Among those that are, some are imbued with the values of the rule of law, some are not. Among those that aren’t, the rule of law faces specific difficulties, often not of recent origin or open to a quick fix. In relation to this, lawyers are always relevant but not always particularly skilled.

Members of a strong rule of law order may not need to have as great or immediate a concern with the extra-legal foundations of what they have as those where legality is pervasively weak, simply because they have, as it were, been taken care of, if rarely by many in the generations that benefit from them. They may well, of course, want to improve what they have, and if the underlying conditions of legal effectiveness are to a considerable extent met, they are often right to concentrate on legal institutions. That is not because they live in a different world, but because some universal problems have been dealt with in their part of the world, and what the law is like counts here in ways it may not elsewhere. Other problems or opportunities have priority. It might be why so much talk of the rule of law, which emanates from such places, has so little to say about the extra-legal conditions of legal effectiveness.

It’s not clear, however, how far their understandings will travel. For what Stephen Holmes has observed about Russia can be generalized to other rule-of-law-poor countries:

43 John Braithwaite, 'Is Separation of Powers a Rule of Law Issue? The Media Case,' Speaker’s notes for conference on Media, Democracy, and the Rule of Law; September 2011, UNSW.
Lawyers are trained to solve routine problems within routine procedures. They are not trained to reflect creatively on the emergence and stabilization complex institutions that lawering silently presupposes. Ordinary legal training, therefore, is not adequate to the extraordinary problems faced by the manager of a legal-development project in Russia. The problem is not Russian uniqueness and exceptionalism, but the opposite. In Russia, as everywhere else, legal reform cannot succeed without attention to social context, local infrastructure, professional skills, logistic capacities, and political support... So legal knowledge alone is never enough.\(^4^4\)

An implication of this might be that all those international alphabet soups devoted to `building' the rule of law in benighted parts of the world – ABA, EU, HiIL, IMF, OSCE, UNDP, USAID, USIP, WTO, etc. - which generate reports written by lawyers for lawyers, might be most apt for societies that don't need them and little use to those who need them most. But that's not how the game is played. Instead, to adapt a remark originally directed to the administration of development programs more generally, "[d]onor activity often amounts to sending "experts" who operate institutions in "Denmark" to design institutions in "Djibouti". At best this would be like sending a cab driver to design a car. But it is worse, because institutions come with their own foundation myths that deliberately obscure the social conflict the institution was designed to solve."\(^4^5\)

Lon Fuller spoke of the lawyer as a social architect. He appears to have had in mind both the lawyer's design of, say, contracts for clients and also the design of public legal institutions. In relation to the latter, at least, the term is sometimes an exaggeration, for there are at least two enterprises going on here. Rule of law promoters in transitional and post-conflict societies too often think about the rule of law as though establishing it where it has not existed or is being shot to pieces, at times quite literally, is in principle the same sort of job, if harder and more dangerous, as cultivating it where it has long grown and has deep roots, and where its presence is an often unreflected-upon-ingredient of everyday life. Yet they are truly engaged in social architecture, often undertaken on hostile, unforgiving terrain.\(^4^6\) Those fortunate to live where the rule of law is strong may have a lot to do to defend, secure, sustain, improve and extend it, but those enterprises are, by comparison, more in the nature of running repairs. They may be major repairs, and there can be significant, and sometimes novel, threats. Wars are not great for the rule of law, and that includes wars on terror. But there is something, often a great deal, of structure and helpful material there to work with and on, and there is often helpful institutional and social resilience. The ultimate goals of these activities and their common ambition—lessening the potential for arbitrary abuse of power—are not unrelated in these different circumstances, but the means appropriate to serve them can differ enormously.


And this points to one more difference among contexts. In societies where the rule of law has long been secure, the fact that it is misconceived might not matter too much, since to a considerable extent it runs on its own steam. However, in conflictual, post-conflict and transitional societies, where efforts are made to generate, better to catalyze the rule of law, these problems can be catastrophic. For those most urgently seeking the rule of law are in the end concerned not with a package of legal techniques but with an outcome: that salutary state of affairs where law counts in a society as a reliable constraint on the possibility of arbitrary exercise of power.

Perhaps, though, I should end this section with some good news. The World Bank World Development Report 2011 calls for justice strategies that: 1) are grounded in understanding of the socio-political context—promoting “best-fit” rather than “best practice” solutions emerging from local demand, experimentation and adaptation; 2) focus on the social and economic dimensions of justice, not merely on the justice sector; ... That is a fairly recent declaratory change, at the level of rhetoric, after billions of dollars spent on best practice strategies of the Venice Commission sort. It’s way ahead of long-conventional assumptions, and at least shows some awareness of what is at stake. Moreover, within the World Bank, and other agencies, such as the US Institute of Peace, important work has been happening over the past few years trying to explore precisely these matters, and to find ways to design programs that reflect this developing understanding. But these are not majority activities, they go against many embedded bureaucratic and ideological imperatives, tendencies and constituencies, their impacts are yet to be assessed, and such goals are harder to achieve than to state, for reasons that again we need to go beyond legal knowledge to understand.47

4. Conclusions: Beyond (or beside) the Rule of Law?

This is roughly where I’ve got so far. I’m not sure it’s far enough, and I will end my report of progress with one question about which I’m puzzling. For some long years I’ve been arguing against conventional conceptions of the rule of law that I take to start with and be primarily and misguided focused on the rules, practices and activities of central legal institutions. I have suggested this is a misguided approach for two reasons. First, it starts with institutional features purported to add up to the rule of law, rather than with examination of the point, the relatos in view, in terms of which the significance and usefulness of these or other features can be gauged. Secondly, if the end is what matters then it is not clear that one’s view of what leads to that end should be confined to legal-institutional matters. It should range more broadly, and specifically more sociologically.

Sometimes I have felt that I was, to use what I imagine is an Australian expression, pissing into the wind. What could I possibly do to derail the rule of law train, which has such a head of steam these days. Perhaps I shouldn’t try, particularly since I’m a fan of the rule of law. Let them have their institutions and check lists. I’ll do something else. Recently I have been provoked to take this line of argument a little further, however, to what some might consider its logical, others its illogical,

47 See particularly the publications of the Justice for the Poor group in the Bank, among them by Deborah Isser, Michael Woolcock and their associates; and see http://blogs.worldbank.org/governance/towards-justice-in-development
conclusion. The provocation came (unintentionally, I think) at a conference I organized last year, on media, democracy and the rule of law.

At that conference, John Braithwaite delivered a powerful paper with the apparently innocent title ‘Is Separating Powers a Rule of Law Issue? The Media Case’. He pointed out that though many people speak of the rule of law as a ‘good thing for its own sake’, it was not that. Rather, he contended, it is ‘best thought of as part of a separation of powers rather than the reverse.’ Why should the order matter? According to Braithwaite, who is a card-carrying classical republican (NOT in the US sense of that word, no tea parties for him):

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

Later Braithwaite comments that:

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

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

I'm not totally on board yet. I don't believe, for example that separation of powers should be regarded as the ultimate end in view, and I hang on to constraint on arbitrary power as that. Separation seems to me one technique to that end, not to be valued in itself but for what, in certain forms and for certain purposes, it can support. We need power to accomplish and enable many good, some indispensable, purposes, but it must be constrained and channelled. Separations of certain sorts are important sources of constraint and channelling, but not the only ones and not to be applauded just because separation is accomplished. If separation disintegrates sources of salutary power (eg for peacekeeping, enforcement of bargains, etc.) we should not applaud. I don't believe that Braithwaite disagrees with any of this, and he certainly shares my hostility to arbitrary power, but I fear that putting separation front and centre might mislead.

However I do believe that we might gain greatly by following his suggestion that the rule of law should be viewed, not as the always-necessary centrepiece of power-taming policy to which other measures are inferior or supplementary addenda, but as one implement among several, in some respects and circumstances (as Genn stresses) 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.

That does not make it unimportant, but it might enable us to see its 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 which in its modish ubiquity threatens to obscure the valuable purposes for which it was once pushed into the fray, and to serve virtually any purpose you might want to name.

Now I don’t yet know what the substantive results of this might be, and it might turn out to be none. So just in case, I will leave open the option of reverting to my earlier persona, and banging on about the true nature of the rule of law, conceived in my ‘teleological, sociological’ way. Should people think I’m having it both wishy-washy ways, I have only the wisdom of Groucho Marx to fall back on: “Those are my principles, and if you don’t like them ... Well I’ve got others.”