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Comment

## The rule of law, arbitrariness and institutional virtue

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**Abstract:** This article summarises Professor Martin Krygier's work on the rule of law and his view that arbitrariness is its core and is under-theorised. From ancient philosophy, the author suggests that our rule of law settlement feels tentative because arbitrariness is a human characteristic that cannot be completely fixed with institutional checks and balances. The author observes that a variety of rule of law virtues are already expected of judicial decision-makers and suggests that these institutional virtues should be transferred into the administrative, executive and corporate decision-making space to advance the rule of law project.

### Keywords

Rule of law, arbitrariness, checks and balances, personal virtue, judicial, administrative and executive decision-making

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There have been many efforts to define the rule of law, perhaps most famously at the end of the 19<sup>th</sup> century in the work of Albert Venn Dicey.<sup>1</sup> There is discussion whether he captured a new concept or merely coined a description which has genealogy reaching back into the work of the most famous Greek philosophers including Aristotle and Plato.<sup>2</sup> My interest in the field has been most stimulated by the more recent work of Martin Krygier from the University of New South Wales. He has spent a significant part of his academic life working to identify the principles that underlie the idea of the rule of law,<sup>3</sup> but has chosen not to generalise beyond the idea that it is founded upon the rejection of any kind of arbitrary rule.<sup>4</sup> His confirmation that because the rule of law is a sociological instrument that can be

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<sup>1</sup> For example, Albert Venn Dicey, *Introduction to the study of the Law of the Constitution* (Macmillan, 1885).

<sup>2</sup> Tom Bingham, *The Rule of Law* (Penguin, 2011) 3.

<sup>3</sup> For example, Martin Krygier, *Fear, Hope, Politics and Law*, Papers on Parliament No 33, 1999 [https://www.aph.gov.au/~/~/link.aspx?\\_id=C6A9A0D3166348198EE463CB9E301777&\\_z=z](https://www.aph.gov.au/~/~/link.aspx?_id=C6A9A0D3166348198EE463CB9E301777&_z=z) (*Fear and Hope*); Martin Krygier, *Magna Carta and the Rule of Law Tradition* (2015) <https://www.ruleoflaw.org.au/wp-content/uploads/2015/11/Magna-Carta-and-the-Rule-of-Law-Tradition-final.pdf> (*Magna Carta and the Rule of Law Tradition*); and Martin Krygier, 'The Rule of Law: Pasts, Presents and Two Possible Futures' (2016) (12) *Annual Review of Law and Social Science* 199 (*Two Possible Futures*).

<sup>4</sup> Krygier, *Fear and Hope*, above n 3, [14]–[25], [39]–[42]; Krygier, *Magna Carta and the Rule of Law Tradition*, above n 3, 12–14; Krygier, *Two Possible Futures*, above n 3, 202–06.

abused by self-willed human leaders,<sup>5</sup> means that his conclusions seem tentative even though they do not rest on shaky ground.

In this article, I do two things. I tribute Martin Krygier as one of the foremost exponents of the idea that the content of the rule of law can only ever be generalised to the idea that any kind of arbitrary rule must be rejected.<sup>6</sup> While there is debate as to whether general 'laundry lists' of rule of law virtues advance the cause of limiting arbitrary power because every country is so different,<sup>7</sup> I suggest that the rule of law cause would be advanced if the list of virtues we recognise as justly limiting judicial power were transferred to limit executive, legislative and corporate power.

I explore the consequences of Martin Krygier's insistence that it is arbitrariness we must control if we are to succeed in the rule of law project, but I take it in a new direction. Though I have stated I do not believe that his conclusions about arbitrariness are tentative, I suggest they are tender and vulnerable because abuse of the idea of the rule of law by self-willed leaders brings the rule of law ideal into disrepute, no matter how well we hedge it with institutional checks and balances. The poor behaviour of wicked leaders<sup>8</sup> dilutes the confidence of citizens in the rule of law project as a whole, despite the accuracy of scholarly rule of law analysis to date. While ancient philosophers understood that no legal system was safe when it was administered and managed by wicked leaders, there was no obvious way to insist on personal virtue and genuine public service ideals in those leaders once they had assumed the reins of power.<sup>9</sup> Paragon leaders could cure the defects of any technically inefficient leadership system, but tyrants could destroy a perfect prototype.

While I would like to suggest a way to implement the ancient Greek and Roman philosophical view that rulers and administrators should be paragons of virtue, my more modest suggestion is that the virtue expectations we have of those who exercise judicial power ought to be transferable into executive, legislative and corporate space, since they are well understood and have convincing power.

I present this short thesis in three parts. In the first, I summarise some of the luminary work of Martin Krygier and set out the bones of his thought about the nature of the rule of law. In the second, I briefly review the place that some ancient philosophers saw in what we now call the rule of law project for personal human virtue. In the third part, I make some tentative 'institutional rule of law virtue' suggestions of my own, standing on the shoulders of both Martin Krygier and some ancient philosophers. While I would like to conclude that personal virtue in managers and political leaders is an essential element of any administration that aspires to the rule of law label, I settle for the idea that the same 'virtues' we expect of those we

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<sup>5</sup> Krygier, *Fear and Hope*, above n 3, [64]–[68]; Krygier, *Two Possible Futures*, above n 3, 209, 222.

<sup>6</sup> Philip Selznick has come to similar conclusions. See, eg, 'Legal Cultures and the Rule of Law' in Martin Krygier and Adam Czarnota (eds), *The Rule of Law after Communism* (Ashgate, 1999) 22–5.

<sup>7</sup> See, eg, Krygier, *Two Possible Futures*, above n 3, 204, 212 and 214 and Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James E Fleming (ed), *Getting to the Rule of Law* (New York University Press, 2011) 5–7, 11, 18 and 24.

<sup>8</sup> I have taken this term from David Dyzenhaus, *Hard Cases in Wicked Legal Systems* (Oxford University Press, 1991) where he characterised the South African apartheid regime as a wicked legal system.

<sup>9</sup> Krygier, *Two Possible Futures*, above n 3, 205–6.

appoint to exercise judicial power could be expected of those who exercise legislative and executive power wherever we find such power – that is, in both political and corporate contexts.

I conclude that the future of the idea of the rule of law should see us hold all those who exercise power in our lives to standards of conduct that are already well defined in the judicial context. This discussion also implies that we should vote for virtues in both political elections and in shareholder meetings.

## I. Martin Krygier on the rule of law

Professor Krygier is emphatic that there is no one true rule of law system.<sup>10</sup> A political system that conforms to rule of law ideals may be manufactured for any country no matter what its traditions, but that system's underlying traditions have to be analysed before we can work out a rule of law system that can work in it. Since (quoting Alasdair MacIntyre) traditions are arguments extended through time,<sup>11</sup> we have to determine not so much whether a country's traditions are right or wrong, but whether they are consistent with rule of law ideals. If law has not traditionally been used to enable human freedom, then to re-engineer that system in a manner that complies with rule of law ideals and enables and maximises human freedom, we will have to abandon traditions and ways of thinking that are inconsistent with the rule of law ideal.<sup>12</sup>

Professor Krygier also observes that, since all governments now seem to recognise that it is a human good to have a political system that satisfies rule of law standards, everyone claims that theirs is a rule of law system. But Professor Krygier is quite ruthless in identifying legal systems that do not meet those standards no matter how much the rule of law label may be claimed for them. Russia has not traditionally used law to enable human freedom and still does not after the Iron Curtain came down.<sup>13</sup> Poland is not a country where the rule of law ideal has flourished.<sup>14</sup> Modern Chinese communist party claims that their governmental system follows the rule of law are empty and even Singapore's tiger economy only gets 'two cheers' when measured against a rule of law checklist.<sup>15</sup> But it is harder to pick a rule of law winner between modern Germany and the UK. While the German economy has been ticking away like a well-oiled machine for hundreds of years, it does not have the release valves that the messy common law English system provides and its system and predictability has not consistently banished arbitrariness.<sup>16</sup> But the English rule of law system is not as long-standing as foundational invocations of Magna Carta would have us believe. Magna Carta did not take particularly quickly and has been ignored by English monarchs, and then by its parliaments, for most of its 800 years

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<sup>10</sup> Krygier, *Two Possible Futures*, above n 3, 200–2, 208, 210–211; Krygier, *Magna Carta and the Rule of Law Tradition*, above n 3, 9–12.

<sup>11</sup> Krygier, *Two Possible Futures*, above n 3, 202, 218; Krygier, *Magna Carta and the Rule of Law Tradition*, above n 3 6.

<sup>12</sup> Krygier, *Two Possible Futures*, above n 3, 222–4.

<sup>13</sup> Krygier, *Two Possible Futures*, above n 3, 208; Krygier, *Magna Carta and the Rule of Law Tradition*, above n 3, 6.

<sup>14</sup> Krygier, *Two Possible Futures*, above n 3, 208.

<sup>15</sup> *Ibid* 214.

<sup>16</sup> Krygier, *Fear and Hope*, above n 3, [58] and [65]-[66].

of existence.<sup>17</sup> The North American system is not perfect either. There, as others have pointed out, an obsession with the idea that religious and state institutions have to be entirely separated to enable a perfect rule of law settlement, stops political analysts understanding how European countries with established churches provide just as much human freedom as is enjoyed in the land of the free.<sup>18</sup>

Achieving a healthy rule of law national scorecard is not just about the structure of the legal system. The point is to create a system where citizens feel that they know what the law is; where it is certain enough to be predictable and nothing unexpected and arbitrary disturbs the peaceful enjoyment of citizen freedoms.<sup>19</sup> The rule of law does not seek to denude the state of its power to promptly implement wise decisions, but to constrain and temper state power so that state decision-making does not unpredictably interfere with citizen autonomy.<sup>20</sup> Krygier says that many would-be rule of law systems are motivated by a fearful need to prevent the state doing what it might otherwise do.<sup>21</sup> But where the fear remains, there is a sense that the rule of law settlement is uneasy and tentative, and that will constrain the entrepreneurial spirit of trustworthy law-obedient citizens. In other words, any rule of law settlement where the citizens feel uncertain about their future, for institutional reasons, falls short of the ideal, but that does not mean that the system entirely fails. All rule of law systems are 'works in progress'. Krygier also points out that governments are not the only institutions that cause citizen uncertainty. Corporations, including banks, 'can do a lot of damage'<sup>22</sup> and the resulting citizen fear is unlikely to be cured by institutional reform alone. 'These are exceedingly complicated matters'<sup>23</sup> and the solutions will likely lie 'beyond institutions'<sup>24</sup> and possibly in a 'social science that does not quite yet exist'.<sup>25</sup>

At core, it is arbitrariness that is the enemy. If citizens and their lawyers can predict the public outcomes in their lives without fear, the rule of law mission will have been accomplished.<sup>26</sup> All law-abiding citizens should feel safe in all their societal interactions. Where discretion has a place in their lives, it will be exercised in a

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<sup>17</sup> Krygier, *Magna Carta and the Rule of Law Tradition*, above n 3, 1-3.

<sup>18</sup> W Cole Durham Jr and Brett G Scharffs, 'Comparative constitutional perspectives on religion-state relationships' in Durham and Scharffs, *Law and Religion: National, International and Comparative Perspectives*, (Aspen Publishers, 2010) 113.

<sup>19</sup> Krygier, *Two Possible Futures*, 203-205.

<sup>20</sup> Ibid 205-8.

<sup>21</sup> Krygier, *Fear and Hope*, above n 3, [9]-[13].

<sup>22</sup> Krygier, *Two Possible Futures*, above n 3, 221.

<sup>23</sup> Ibid 223.

<sup>24</sup> Ibid.

<sup>25</sup> Krygier, *Two Possible Futures*, above n 3, quoting Karol Soltan, 'A Social Science That Does Not Exist' in Willem J Witteveen and Wibren van der Burg (eds), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press, 1999) 387 and Karol E Soltan, 'Selznick and Civics' in Robert A Kagan, Martin Krygier and Kenneth Winston (eds), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Rowman & Littlefield, 2002), 357. Krygier also notes Waldron's complaint 'about the narrow social and institutional focus of contemporary philosophical accounts of the rule of law' and his desire to broaden the project into 'how litigants are treated in courts' (Krygier, *Two Possible Futures*, above n 3, 204, referring to 'The rule of law and the importance of procedure' in Fleming, above n 7, 3) and 'what ordinary people are urging' about the Rule of Law (Krygier, *Two Possible Futures*, above n 3, 219 referring to the same Waldron essay 3-4), but he says that Waldron does not go 'anywhere near far enough' (Krygier, *Two Possible Futures*, above n 3, 220).

<sup>26</sup> Krygier, *Fear and Hope*, above n 3, [14]-[23].

predictable manner that maximises their freedoms.<sup>27</sup> But arbitrariness does not happen in a vacuum. If it is embedded in the system, it was put there by humans who did not properly forecast the results or did not want their system to be completely fair. And if the arbitrariness is not systemic and is the result of decision-making against the interests of a citizen or citizens by an unconstrained leader, then again it is human personality that is the ultimate engine of the resulting citizen discomfort. Here Professor Krygier notes that the idea of the rule of law has ancient roots. Plato, Aristotle and Cicero all had things to say about how to engineer an ideally just system.<sup>28</sup>

## 2. The rule of law in ancient philosophy

Indeed, Krygier's discussion of leader moderation and temperance as the solution to institutional caprice comes from ancient philosophy. While most modern advocates of the rule of law would moderate and temper the law by hedging it with institutional checks and balances, the ancients spoke of moderation and temperance as human virtues and saw them as the ultimate backstop in preventing the abuse of power. Krygier's summary of the ancient roots of the rule of law idea includes at least subliminally, the ancient view that some were more suited to rule than others because of their virtue:

[T]he point of the rule of law ... is to temper or moderate the exercise of power, to avoid its arbitrary use, not necessarily to weaken or shackle it. ... Such concerns are ... implicit in Aristotle's distinctions between 'true forms' of government, concerned with 'the common interest,' and those that 'regard only the interest of the rulers'. The latter 'are all defective and perverted forms ... for they are despotic, whereas a state is a community of freemen'. ... 'The rule of law ... is preferable to that of any individual ... even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law'. One reason for such rule of law is that it helps to prevent the overreaching (*pleonexia*) that Aristotle feared, and to engender that virtue exalted in Greek drama and Greek philosophy alike.<sup>29</sup>

Krygier also noted that the Romans saw temperance as the final protection from the abuse of power in the 'glosse[s of] Cicero and [the] Roman writers'.<sup>30</sup> This passing summary resonates with Plato's famous view that benevolent dictatorship was the most efficient form of government<sup>31</sup> because it did not unduly shackle the efficient exercise of power as Aristotle might have said. That is because the unfettered power bestowed upon a benevolent king was rendered harmless by his personal virtue.<sup>32</sup>

The ancient point, as the book of First Samuel in the Hebrew scriptures has also stated, is that institutional checks and balances alone cannot neutralise the wickedness of individual rulers. Once a bad ruler is in place, he cannot be dislodged

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<sup>27</sup> Ibid [22]–[26].

<sup>28</sup> Krygier, *Fear and Hope*, above n 3, [16]; Krygier, *Two Possible Futures*, above n 3, 205–6.

<sup>29</sup> Krygier, *Two Possible Futures*, above n 3, 205–6.

<sup>30</sup> Ibid 206.

<sup>31</sup> Plato, *The Republic* (Penguin, 2<sup>nd</sup> ed, 1974) Part Seven, 260, 'The Philosopher Ruler'. See also T Takala, 'Plato on Leadership' (1998) 17 (7) *Journal of Business Ethics*, 785, 792.

<sup>32</sup> Aristotle, *The Politics* (Penguin, revised ed, 1981) Book III, 209–32.

without bloodshed.<sup>33</sup> So why does our modern political science focus so much on institutional apparatus rather than on human virtues as the key to rule of law achievement?<sup>34</sup>

### 3. The place for virtue in 21<sup>st</sup> century political science

The simple answer may be that it seems easier to rearrange societal institutions than to convince society that we should prioritise personal virtue when we select our public office holders. But it is also difficult to define personal human virtue in a way that everyone can agree with, to separate the virtues we can agree on from how we deliver them,<sup>35</sup> and to guarantee or sustain an enduring vision of virtue after we have first bottled it.

The difficulty in identifying the human virtues that are essential if arbitrary decision-making is to be avoided, arises partly because the relevant virtues were different for Plato and Aristotle in ancient Greece than for Saints Peter and Paul in the first century of the common era. And their ancient virtues are different from those that would be agreed upon by the majority of voters in 21<sup>st</sup> century Australia.

But decision-making virtues are also difficult to separate from the institutional arrangements we make to protect the rule of law in modern societies. For example, decision-maker independence is a personal virtue that transcends culture, but it is also a virtue that we have developed legal rules to entrench. Decision-maker impartiality is the same. Impartiality is a personal virtue, but it is a personal virtue that can be identified, measured and institutionally enforced.

Decision-maker courtesy and civility, however, is not a virtue that is currently hedged with rule of law enforceability. Because society does not institutionally measure and enforce courtesy and civility, judges, public servants and politicians think it is less important to be civil than to be independent and impartial when they make public decisions. Most developed nations have established legal rules which require judicial decision-makers to give reasons for their decisions. But reasons and related transparency are not yet enforced in all administrative, executive and corporate decision-making contexts, despite recognition that transparency in all decision-making is a virtue.

The English common law idea – that decisions are not just and do not comply with the rule of law if they were not made in a procedurally fair manner – has its analogue in the US idea of due process from the Fourteenth Amendment. Again, the law in

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<sup>33</sup> *Holy Bible*, I Samuel 7, 8.

<sup>34</sup> Krygier, *Fear and Hope*, above n 3, [7]–[33]; *Two Possible Futures*, above n 3, 203, 205–8.

<sup>35</sup> Krygier notes three different ways in which the exercise of power may be arbitrary. The first is when tradition, convention or routines do not bind the ‘power-wielders’. The second is when those affected by law ‘cannot know, predict, understand or comply with the ways power comes to be wielded’. And then there is Jeremy Waldron’s third form of arbitrariness which occurs when legal procedures do not exist or are not observed to enable those targeted by law to be heard or have their interests taken into account when decisions affecting them are made (Krygier, *Two Possible Futures*, above n 3, 204, again referring to ‘The rule of law and the importance of procedure’ in Fleming, above n 7). All three forms of arbitrariness arguably conflate human behaviour with legal process but, as I suggest below, that may not interfere with the identification of relevant human virtues in rule of law analysis.

both traditions has developed rules which require procedural fairness and due process in judicial and administrative decision-making though not yet in all executive and corporate decision-making. Similarly, politicians making executive decisions do not yet feel obliged to always provide some form of hearing for all people affected by their executive decisions, even though that expectation is protected by law in the case of judicial and administrative decisions in both the English and US legal systems. It is the same when it comes to evidence. Those who are affected by judicial and administrative decisions will have a cause of action and a remedy if they learn that they did not have all the relevant evidence when they had their hearing. But the non-publication of all the relevant evidence does not yet consistently invalidate executive decisions though there may be political consequences for an executive decision-maker who does not publish all the evidence, especially if the non-availability of that evidence can also be characterised as the result of bias (a lack of the virtue of impartiality) or as purposeful obfuscation (a lack of the virtue of transparency).

This multiple or hybrid characterisation of absent virtue suggests that the rule of law virtues may most helpfully be seen as having a compound nature. That is, like freedom of thought, speech and association, the rule of law virtues can be separately identified, but they are at their strongest and most protective when they are found together.

### **Identifying and enforcing the rule of law virtues**

In this short discussion, I have suggested that there are at least nine rule of law virtues (not necessarily personal virtues) that 21<sup>st</sup> century voters and philosophers should be able to agree on. Separated from my narrative, they are: Independence, Impartiality, Courtesy, Civility, the provision of Reasons for decisions, Transparency, Procedural Fairness/Due Process, the provision of some form of Hearing, and the provision of all the relevant Evidence to all the parties potentially affected by a decision. None of these qualities that I have labelled as rule of law virtues are new. What may be new is the suggestion that all nine should apply to all forms of public administration and decision making, whether judicial, administrative, executive or corporate.

We generally accept and enforce all of these requirements in judicial decision-making, but our civilisation currently requires less rigour in administrative decision-making, and less still in the political, executive or corporate arenas. I suggest that this reduced rigour in administrative, executive and corporate decision-making contexts explains why our rule of law compliance, even in the most developed Western countries, feels tentative. That tentative feeling is the result of a lack of rigour in requiring all administrative, executive and corporate decision-makers to comply with all the requirements of the rule of law including the rule of law virtues, when they make any decision.

### **Ethics**

This brief discussion of decision-making virtues would not be complete without some mention of ethics. Again, rule of law compliance is more developed in judicial decision-making than in administrative, executive or corporate decision-making. That

is because a high level of personal virtue is already required from judicial decision-makers. That judicial virtue requirement is manifest in the ethical rules developed for lawyers during the last two centuries. Judicial decision-makers are seldom appointed without legal experience and modern lawyers are bound to extensive bodies of ethical rules in their pre-judicial practice. Post judicial appointment, judicial decision-makers are expected to continue to follow the ethical rules in which they were trained as legal practitioners, but they are also bound to additional ethical codes.

The same cannot be said for all administrative, executive and corporate decision-makers. They may be required to make oath or to affirm that they will faithfully serve their countries, or they may have fiduciary duties to their shareholders, but the exact nature of that faithful service is not spelled out in detailed ethical codes as it is for lawyers and judges. Administrative, executive and corporate decision-makers may be politically obliged to abide by contemporary moral standards, but detailed rule of law virtue rules have not yet been developed and made binding upon them.

## **Conclusion**

In this article, I have agreed with Martin Krygier that the rule of law project needs more work. The idea is sound but it is incomplete. Indeed, when it is treated as a technical thing, separate from social conditions and the human beings that operate the legal systems which the rule of law is intended to temper and moderate, it may be dangerous. That danger is that of misunderstanding and misrepresentation. When a society believes a legal system satisfies rule of law standards absent personal virtue in its operators, and when the institutional virtues expected of those who exercise judicial power are not applied to and expected of those who exercise legislative, executive and corporate power, that society falls short of its rule of law potential and is apt to pretend that it meets standards that it does not meet.

I have also suggested that there are at least nine institutional rule of law virtues that all societies which aspire to live according to rule of law standards should be able to agree on. But I have also suggested that the rule of law project is incomplete, even in the West, because western legal systems do not insist that all public and corporate decision-makers comply with these virtues every time they make a decision in their public and corporate offices. We have high expectations, and closely measure the performance, of all those who hold judicial office. But we have not yet imposed those obligations on all our administrative, executive and corporate decision makers. We should.

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