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Still A Rule of Law

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Abstract:
Marc Hertogh was a commentator at a public seminar on my thoughts on the rule of law, held at the Paul Scholten Center for Jurisprudence, University of Amsterdam on April 23, 2013. His comments are available at SSRN: http://ssrn.com/abstract=2285996, and will shortly be published, together with this response.

Hertogh commends me for advocating, but faults me for not pushing far enough, our supposedly common goal: a ‘sociological research agenda’ on the rule of law. In this response I argue that developing a ‘sociological research agenda’ is not my aim, or rather it is a secondary subaltern part of a conception that must begin with a philosophical question, and only then, as a necessary implication move on to sociology. The philosophical part argues that exploration of what I have variously called the goal, point, value or end of the rule of law must precede attempts to say what it is and how it might be achieved. Without some view on that first matter, we are flying blind on the second and third. I then propose such a value, opposition to arbitrary exercise of power. I acknowledge that the proposal is eminently, indeed essentially contestable, which is pretty obvious since it has been contested. I am committed to it, but the larger point about priorities doesn’t depend upon the particular value I propose.

Sociology doesn’t help with the first question, but the need for it follows. It is a necessary part of reflection on what might help or hinder the achievement of those values, why it is likely to vary between societies and over time, and in particular why a narrow legalism is unlikely to be the answer anywhere. In some pieces, the emphasis is more on the philosophical component, in others the sociological gets greater attention. Both are, and I argue need to be, always present.

Keywords: rule of law, sociological approach, law in society

JEL Classification: K10, K19, K40

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http://www.bjutijdschriften.nl/tijdschrift/rechtderwerkelijkheid/detail
1. Introduction

I am grateful to Marc Hertogh for his generous and thoughtful comments.¹ His article makes very clear why and how a highly intelligent positive sociologist, of an empirically-oriented sort, might take an interest in the rule of law: what he would look for, where, and why he might care. If I were such a person, it might be enough just to express my (sincere) thanks, and get on the same page. But what if I were a different sort of person, me for instance? I might think I was being enlisted rather than listened to.

Hertogh takes me to be promoting a ‘sociological research agenda’ on the rule of law. He commends me for advocating, but faults me for not pushing far enough, our supposedly common agenda. I’m happy he has such an agenda, and equally happy to see how he wants to pursue it. I will learn from what he finds. But developing a ‘sociological approach to the rule of law’ is his agenda, not mine. Or at least, it is a secondary recommendation, a crucial but subaltern part of mine.

At the start of a recent piece, cited several times by Hertogh but not on this point, I summarise the argument I have been developing for some time as having ‘two parts, one philosophical, the other sociological. They are connected, indeed I believe one [the philosophical] necessarily leads to the other [the sociological], but they can stand (and might fall) separately’ (2012b: 31).

The philosophical part argues that exploration of what I have variously called the goal, point, value or end of the rule of law must precede attempts to say what it is and how it might be achieved. Without some view on that first matter, we are flying blind on the second and third. I then propose such a value, opposition to arbitrary exercise of power. I acknowledge that the proposal is eminently, indeed essentially (see Waldron 2002) contestable (Krygier 2012b: 34), which is pretty obvious since it has been contested. I am committed to it, but the larger point about priorities doesn’t depend upon the particular value I propose.

The sociological part follows. It involves reflection on what might help or hinder the achievement of those values, why it is likely to vary between societies and over time, and in particular why a narrow legalism is unlikely to be the answer anywhere. In some pieces, the emphasis is more on the philosophical component (Krygier 2011a), in others the sociological gets greater attention (Krygier 2012b). Both are always present.

2. Values

a. in general

¹ I first heard these comments in the seminar to which Marc refers, organized by the Paul Scholten Centre for Jurisprudence, University of Amsterdam. I am grateful to him, the three other commentators — Adriaan Bedner, Andre Nollkaemper and Krijn van Beek, and all the participants in the seminar. I learnt a lot. My thanks to them all, and in particular to Ronald Janse for making this conversation possible. In this response to Marc’s written remarks, I have also had the benefit of discussion with Adam Czarnota, Arthur Glass, Whit Mason, and Theunis Roux.
So the philosophical element, with which I always start, for my purposes must start, has two elements: first, a claim that the proper way to begin in thinking about the rule of law is to ask what value or ideal is particularly associated with it, what is its distinctive, specific ‘virtue’ as Raz once put it (Raz 1979), why we should care about it. Secondly, I nominate and try to justify a particular candidate: reduction of the possibility of arbitrary exercise of power. Hertogh does not object to the question with which I start, but he finds my answer, ‘this particular element of his [my] approach quite puzzling.’ He asks of the particular value I nominate, ‘where does this so-called pre-eminent value of the rule of law come from? How did Krygier find this particular value? And which sociological tools were used to find empirical evidence for this important conclusion?’

It’s my turn to be puzzled. I specifically call this the philosophical part of my approach. Why should it be thought to depend on an empirical, sociological, answer? How could it? My discussion of arbitrariness is not intended as a report, but as a proposal. That is the way normative argument goes. If the analogy might be forgiven, imagine for a moment a response to Rawls which pointed out, as may well be the case, that 63.5% of people surveyed did not nominate fairness when asked to say what justice was about. Should Rawls pulp the Theory of Justice? He might instead say that, while this is interesting and properly the concern of many sorts of investigation, it is not make-or-break for his particular enterprise. It’s a long time since philosophers thought the examination of ordinary language was all they could do.

Because he doesn’t speak to any discipline other than sociology, it’s not clear whether Hertogh thinks that unless they are giving unadorned reports of people’s ‘social definitions,’ anyone who speaks of values is simply parading their personal biases, or whether this is a stricture addressed only to sociologists. If it is the former, and so includes me, then it would be interesting to see the argument, beyond the standard clichés of moral relativism which have been around so long, as have philosophical responses to them, that we can do it by numbers. Relativism might be true, but it can hardly be assumed to be self-evidently true. Since it is unclear which group is Hertogh’s target – everyone or merely sociologists – I will speak to both possibilities.

b. Arbitrary Power

Hertogh asks why I choose arbitrary power as a central target of the rule of law? Why not something else which has been identified by meticulous sociological investigators, who can tell us who and how many associate what with what? My answer, explicit here and in my other work, is that my concerns with the rule of law begin with normative engagement and with a normative question. That is where I start and why I started. Lots of things in the world are interesting enough, but I write about the rule of law because I associate it with values that have to do with the taming and channelling of power and that, I believe, matters. It’s not the only thing in the world that matters, or the thing that matters most. It does,
however, matter when power is exercised. It matters to me, has mattered to many, and should matter to others. Why? For reasons that I set out and seek to defend.

What if meticulously conducted social surveys reveal, repeatedly, that the Bongo Bongo\(^2\) don’t agree that arbitrariness is a particular evil when associated with power, and therefore the institutionalisation of brakes on it a ‘pre- eminent’ reason for valuing the rule of law? Well, I intuit that they might if they have experienced it on their flesh, because many respondents have and there are good reasons why they should. But of course I might be wrong about this. Should I change my views on the importance of constraint on arbitrary power and its connection to the rule of law? No. Unless their arguments are persuasive, I will continue to think they’re wrong. I think that too about honourable genital mutilators, foot binders, neck stretchers, and supporters of British boarding schools, all of whom boast a constituency that sociological investigation might find to be large.

I have often stressed that no one is in a position to lay down what such a contested phrase as the rule of law must mean. For the moment, and for what I regard as good reasons, I’m persuaded. If I become persuaded of something else, I will change, but I will start with the normative question, since that’s the one that matters to me. If it doesn’t matter to Hertogh, that’s ok, and it will not help him; but since it does matter to me, social surveys are not going to solve my problem. What is puzzling is not that he and I are interested in different questions, but that he doesn’t seem aware that there are any other legitimate questions, or ways to answer them, than his.

Of course, I didn’t invent the phrase ‘rule of law’, so it doesn’t pay to ignore how people use it. I don’t want to say the rule of law is green cheese, for example. It makes no sense and no one would understand. But it’s not hard to understand the assertion that it’s a means of combating arbitrary power. I take heart from observing that ‘[t]here is nothing original or even lonely in nominating opposition to arbitrariness as a fundamental concern of the rule of law’ (Krygier 2012c:242), and I observe how deep in certain traditions of thinking about the rule of law, such as the common law (Reid 2002), hostility to arbitrary power goes Nothing substantive flows from this however, except to emphasise that I am not claiming to be Christopher Columbus here. Yet many people will still disagree. They already do. It won’t be the first time, but that’s not the point. Numbers don’t count in normative debate.

Arguments do, however. So it makes sense to be alert to those of people to whom the rule of law has mattered, and who have thought deeply and well about it. We might learn something: not because, on matters of normative significance every view is as good as any other, but because some people have thought well about these things, and it’s good to know what they have thought, and to reflect on that. If you doubt it, read Montesquieu and take a deep breath. Like him, I think the moderation (not the extinction, but systematic,

\(^2\) My reference adapts an observation by Mary Douglas (2003, xxxvii) on ‘Bongo-Bongoisn, the trap of all anthropological discussion. Hitherto when a generalization is tentatively advanced, it is rejected out of court by any fieldworkers who can say: “This is all very well, but it doesn’t apply to the Bongo-Bongo.”
institutionalised moderation) of power is an important and good thing. And like many people who have thought this way, I believe this should be a central concern of the rule of law.

How would I defend that claim? Well, I have argued (Krygier 2011a, 2012b) that arbitrary power threatens freedom, dignity and social co-ordination, and spreads fear. I also maintain that these are unfortunate consequences, that there are circumstances in which law can play a role in averting them, and that such circumstances should be encouraged. I draw on the thought of moral and political theorists, indeed moralists of various stripes, the evidence of historians and social scientists, sometimes the inside knowledge of lawyers; occasionally, just to intimidate sociologists, some philosophical terms sneak in. If you disagree, and think arbitrary power doesn’t threaten the former three things or encourage the last, or even if it does it’s a good thing, or it has nothing to do with the rule of law, then we have an argument. But just as I don’t think better of Nazism on discovery that many people liked it, so I don’t think better of arbitrary power because power holders hate to give it up. Nor would I, even if I found lots of people didn’t mind it or even liked it or didn’t much care about it. Unless they came up with arguments or evidence more persuasive than those I’m familiar with, we would continue to disagree.

c. In sociology

Perhaps, however, Hertogh was not addressing the legitimacy of normative claims in the round. He just wanted to expunge them from the domain of social science. Perhaps all he is saying is that anyone who wants to engage with sociology must eschew evaluative language, except to report it. Here we disagree again, for two reasons, one internal to disciplinary boundary-drawing debates, the other – at least from me – external.

As to the first matter, on the proper boundaries of sociology and how porous they might be, neither I nor Hertogh can have much new to say. These seas have been charted and crossed many times and in many ways. Hertogh insists that a view on what might be central to the rule of law can only rightly be gleaned from what people say to sociologists; anything else is ‘personal, legal or normative bias.’ This excludes the legitimacy of normative argument, at least it excludes it from any role in sociology.

As Hertogh knows well, this exclusion is not self-evident. Not everyone agrees; in particular, Philip Selznick, a great sociologist about whom Hertogh and I have both written (see Hertogh 2009; Krygier 2012a), disagreed. Selznick’s life work was concerned with the fate of values in the world, and he didn’t think one could discern what was valuable simply from what people valued. Nor did he think that if ever a sociologist used normative language, other than to report how others used it, he would necessarily be indulging his ‘biases’ (see Selznick 1961). His view of sociology, which appeals to me, was profoundly ‘ecumenical’ and normatively charged. He thought it the business of sociology properly conceived to engage in many of the normative debates, and be instructed by traditions of thought about the
human condition, in which philosophers and others were also engaged. Indeed, the famous argument between Selznick (1973) and Donald Black (Black, 1972) turns on precisely these matters. And I’m honoured that Hertogh’s arguments against me are, as of course he knows, very similar to those he (and Black) used against Selznick. My response too echoes Selznick’s to Black: ‘It seems late in the day, after so much waywardness and so much sterility, to insist upon a full divorce of the theoretical and the practical. In social science, as elsewhere, we place our bets on the enterprise of self-correction, not on a claim to complete objectivity’ (Selznick 1973a: 1268).

I won’t take this debate further here, partly because I have very recently done so elsewhere (Krygier 2012a, chapter 9), and because – my second reason – the proper subjects and methods of sociology are not my central concern, though they were among Selznick’s. But, to allay any confusion, I’m not Selznick. I was drawn to his masterly intertwining of normative with explanatory and descriptive concerns, because I have such concerns too and I thought that sociology, particularly in the ecumenical way he practised it, illuminated many of them. But I don’t personally have the same stake in showing that the essence of the discipline of sociology is this or that.

The debate between Selznick and Black was one between two eminent figures in the discipline of sociology arguing over its core and indeed essence. I am drawn to Selznick’s side, but I occupy none of their positions in any discipline, and I don’t really have a dog in the fight. Being quite un-disciplined, I fancy myself, perhaps naively, to be relieved of the burden of these intra-mural quarrels. I side with Max Weber’s perhaps disingenuous retort to a critic who alleged he had strayed beyond his field: ‘I am not a donkey. I don’t have a field.’ I say disingenuous because of course Weber did have a field; indeed he was lord of many manors. But we can’t all be Weber. So I have more claim than he to the retort.

I am not a sociologist, then, indeed not much of an anything-ist, but I still advocate sociological concern with the rule of law, and rule of lawyerly concern with sociology. How so? Hertogh rightly notes that my interest in the rule of law is that of a participant. Not a participant in law especially, still less one whose ‘main purpose ... is to increase the impact of the rule of law in a legal debate.’ I have no interest in that at all. But I am interested in the value of the rule of law in life. Much of my own life has been spent thinking about despotism, violence, anarchy, and other such calamities, and I have come to believe that the achievement of some measure of the rule of law is better than all that. I would think so even if I had never studied law, just as E.P. Thompson (1977) came to think so, to the chagrin of so many of his erstwhile Marxist comrades, and for many of the same reasons. But it makes no sense to be a participant without being an observer, as Thompson certainly was; even if it might be possible – not always interesting, but possible - to be the reverse. In his life, I presume, Hertogh is a participant too, but he believes that is not a proper job for a sociologist, maybe not for any sort of academic.
There are large issues here, but not all of them are my issues. I am less concerned with defining, still less policing the proper content and methods of sociology of law and protecting its borders, than with discerning the conditions, among them social conditions, for advancing the rule of law. Like other non-lawyers who have written on the subject, among them Thompson and Judith Shklar (1998a and b) and Philip Selznick, I think the rule of law is a good thing, and I’d like to see more of it. That’s why I write about it, and why I read what I think might help me understand its conditions, its character, and its consequences.

To collect this up: my basic position is simple. If you have a normative belief, then you had better have reasons for it. They will depend on evidence and argument, of course, but ultimately they need to be your reasons, whether or not most people share them. If you think things should be done to secure and/or advance particular values, then you should know something about the world in which you want such security and advance to occur. If you think law might have something to do with that, then you should know something about how law operates. If you want to know that, then you should support sociological study that explores what in society might affect the ways law works in the world, what might advance, and what might challenge, the values in which you believe. Are these the only reasons to care about the paucity of sociological attention to the rule of law? Not at all. But they are not frivolous reasons.

3. The Need for Sociology

I come to the rule of law, then, not as an interesting sociological research project but because I believe it can help us secure values I believe to be important, indeed precious. So why do I stress the importance, and lament the weakness, of a sociology of the rule of law? Because I believe many of the key dangers to the values I defend are socially generated, many of the major goods of constraint on arbitrary power will be delivered, where they are, in the wider society, and many of the major sources of defence against arbitrariness are found there too (see Krygier, 2011a, esp. 85-91). And, yes, law is in society, so to understand how it does what it does, and why it doesn’t always do what we might like it to do, among other things effectively constrain the exercise of power, we need to understand the workings of law in society and of society in law. So accounts of the rule of law, billions of dollars spent on rule of law promotion, anatomical dissection of the ‘essential elements’ of the rule of law, which focus their energies almost exclusively on central, state, legal institutions are misconceived. If you want to reduce the sway of arbitrary power in a society, you need to know more about what happens in society, and how law happens in society, than lawyers commonly do. And these are exceedingly complicated matters, where lawyers’, or anyone’s, intuitions are unlikely to be helpful.

Take just one example - suggested to me by my colleague, Theunis Roux - from scores or hundreds: if you think an independent judiciary is valuable for the rule of law (itself much more open to social scientific investigation than lawyers assume; see Burbank, Friedman,
eds., 2002; Holmes, 2004), ‘is it better to staff the courts with politically unconnected (and therefore vulnerable) liberals or with political allies of the regime who have self-interested reasons to assert their independence?’\(^3\) The difference is not small, and the occasions where our intuitions might well play us false plentiful. We won’t know whether they have or not, however, until we have more information and social theory.

Like many, also over centuries (see Reid 2002), I still believe that law can play, often has played, a part in tempering the worst ways that power can behave. But it’s obvious that not any sort of law will do, so I try to think about what sorts are helpful. Since not even well-crafted legal institutions can do anything much on their own, I am drawn to think about what else might be needed. Indeed, since the effects of law are all socially (and politically) dependent, the idea of ‘well-crafted laws’ itself needs sociological and politological exploration.

It might not even be clear how much of a role law, as distinct from other social institutions, will always play in securing the values of the rule of law. For that reason I have begun to speculate that partisans of rule of law values might need to move beyond, or at least beside, the rule of law (see Krygier 2012b: 50-52), and give equal and even greater space to other social and political institutions, agents and practices that may contribute to reducing the arbitrariness with which power can be exercised. But speculation is not enough; again we need to call on the intellectual resources and strategies of social scientists.

Indeed, to say, with Fuller and Selznick, that law is in society — as Hertogh knows far better than I — is just the beginning. Law is not just one thing, nor society. Our shorthands refer to vast unruly assemblages of many and various sorts. Societies differ from each other, within societies different domains differ, and so with law. Moreover, law has difficulty making itself heard, what is heard is often not what is intended, what is done is often different from what is said, and law is never the only game in town, often no part of the main game, and sometimes not even in the game. So why think that lawyers’ intuitions can be much guidance, as to the role of law in contributing to effectively taming, while not emasculating, power? These are all matters where social science is relevant, and thus my plea for more of it, since on the matters that concern me it is sporadic and uneven. Untamed power complicates and often ruins lives. Taming power is a social art that I, like very many people, would like to see perfected and widespread. This is where and why I would like to see a richer, more fully worked out, sociology of the rule of law than we have. And this is where Hertogh’s project and mine intersect. I am happy to be instructed by him on these matters.

And so to sociology of the rule of law. If you share the normative concerns I mention, and believe that they are affected by the social conditions to which I allude, get to know more about them. Facts matter, and sociology knows some. Not all philosophers are even

\(^3\) Personal communication.
interested to know those facts. They think and say it is none of their business, and they are poorer for it. Lawyers too, in spades.

Over the years I have criticised many legal accounts of the rule of law as sociologically ignorant and therefore conceptually blinkered, sometimes tragically so (see Krygier 2011b). Particularly now that rule of law promotion is big business, mainly in the hands of lawyers, that is a shame. Since they so frame rule of law agendas today, they have often been my primary targets. Reflecting on Hertogh’s response, however, I find myself pulled in the other direction: do sociologists really have all the wisdom we need to think well about the rule of law? As our children tend to say these days, I don’t think so. Indeed there is a curious parallel between the sociological innocence of a lot of contemporary philosophy and law, and the attitude only slightly mischievously characterized by Selznick: ‘to put it bluntly, our keenest minds in the social sciences didn’t know what to do with an ideal except handle it gingerly and view it with alarm’ (Selznick, 1973b).

To conclude: I have no objection to Hertogh pursuing the rule of law in just the ways he describes, as a ‘sociology of law guy.’ There are many things to be learnt that way, though a lot that I want to know won’t be found there. I don’t think what interests him and me need collide and I hope I can learn from him, indeed it is more than hope, since I already have. But his and my motivations are different, not inconsistent just different. I’m still a rule of law guy. Like many who have written about the rule of law, I have a thing about taming the potential wildness of power. I will still have that thing, even if I find that there are people who don’t share it. For Hertogh, on the other hand, that’s not how a sociologist should behave. Perhaps he is right, though I’m doubtful. But fundamentally, it’s not my problem.

References


KRYGIER, M., 2012b, ‘Why the Rule of Law is Too Important To Be Left to Lawyers,’ Prawo i Więź 2, 30-49.


