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The rule of law and ‘the three integrations’

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The rule of law and 'the three integrations'

Martin Krygier

ABSTRACT: There are at least three sorts of difficulties that hamper successful promotion of the rule of law. Each of these would be lessened by integration of materials which RoL promoters commonly avoid. First, the rule of law depends upon many factors beyond what most lawyers know, or know how to know. These include non-state norms, attitudes, beliefs, practices and institutions. Secondly, this is not a peculiarity of societies where the rule of law is weak and in need of promotion, but true of all societies, including those of rule of law promoters. Recognition of this requires reconceptualisation of what is required for law to rule. And that, in turn, would benefit from integration of thought from domains and disciplines that RoL promoters have hitherto tended to consider other people's business. Such disciplinary ecumenism might make them more alive to the *ends* of what they are trying to promote; less aimlessly tied to particular institutional means.

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Promoting the rule of law, readers of this journal need not be told, is not a walk in the park. If it were, there might be more to show for the billions of dollars spent on it, and less need for a journal of this sort.

Though challenges abound, I will merely touch on one kind here: that of intellectual integration. Indeed this might be thought of as a meta-challenge, since it has to do with typical ways in which we understand the subject, as much as with the intrinsic difficulties it presents. We have trouble knowing what to look at, what to look with, and how to look. Materials and approaches of crucial importance to the rule of law are excluded, not necessarily as unimportant but as other people's business. That makes it hard to understand, or succeed in, our own business.

The difficulties I have in mind are evident in at least three connected but different domains. One is that of practical advice and implementation. This is specifically, and might seem peculiarly, troubling to anyone who seeks to promote the rule of law where it has been absent, weak or devastated. It is manifest in obvious practical difficulties that such seekers confront: they know about state law, but many of the problems that bedevil attempts to generate the rule of law arise from other sources, among them non-state norms, attitudes, beliefs, practices and institutions. The second problem goes in part to explain the first. Its compass is more

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general though, and has an important theoretical and conceptual aspect, that relates as much to the law in rule-of-law rich countries as in ones less privileged: law *everywhere* does its most important work – where it does any important work – outside official agencies, and it depends on successful collusion with many things that it can't control, also outside such agencies. The third problem stems from the, often quite technical, expertise of the promoters/experts themselves, framed and structured as it so often is by the particular disciplines they command, and that more deeply command them. What they know often limits them from acquiring what they need to know to match the complexity of the problems they seek to resolve. In particular, their disciplines often restrict their access to sources of insight into the *point* of all this frenetic and expensive endeavour to establish the rule of law. That threatens to make such activity, in a quite literal sense, pointless.

Each of these problems stems from a lack of integration adequate to the complexity of the subject. In this essay I will, therefore, stress the need for such integration. Indeed, and in tribute to the Sinological provenance of one of our editors, I commend the 'three integrations' enumerated below.

The first and practical integrative problem stems from the fact that, while the rule of law is typically viewed as especially the province of lawyers, who know what lawyers know, any attempt to promote it, even to understand it, overflows what they know. For whatever one does to

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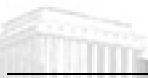
generate the rule of law where it has been weak or absent is hostage to things not typically thought of as legal. As a result, as Jensen and Heller point out:

> In legal circles in developing countries and in international development circles, *rule of law* has become almost synonymous with *legal and judicial reform.* Basic questions about what legal systems across diverse countries actually do, why they do it, and to what effect are either inadequately explored or totally ignored. In developed and developing countries, larger questions about the relationship of the rule of law to human rights, democracy, civil society, economic development, and governance often are reduced to arid doctrinalism in the legal fraternity. And in the practice of the international donor community, the rule of law is reduced to sectors of support, the most prominent of which is the judicial sector.[1]

It might turn out, however, that rule of law values are better served by building the economy than courthouses; certainly there seems to be a strong correlation between wealth and the rule of law. *A priori*, anything may turn out. However, rule of law 'packages' get their focus less from rigorous attempts to close such theoretically open possibilities than from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[1] Erik G. Jensen and Thomas C. Heller, eds., *Beyond Common Knowledge. Empirical Approaches to the Rule of Law,* 2003, pp. 1-2.

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assumptions, often false but believed by lawyers, about the legal-institutional sources and resources of the rule of law, and, needless to say, the importance of increasing and improving them.

Such lawyers are unlikely to know much, unless by accident or personal choice, about indigenous social structures, networks, patterns, and expectations; the *quality* of routine social interaction; the prevalence and chances of routine civility, restraint and self-restraint among citizens, particularly when they dispute; the existence or non-existence of circumstances which make such civilities reasonable or suicidal; the kinds and extent of interpersonal and impersonal forms of trust, or their opposites; the presence and strength of incentives to predatory or non-predatory behaviours; the character of local and often deeply embedded structures of social action, of rivalries, particularities of local culture, and so on. And yet the fate of the rule of law in a society, the chances of achieving it, depend on congenial conditions in many such spheres.

This can cause rule of law experts a good deal of frustration, well exemplified in Frank Upham's impatient observation that:

> When the revision of the criminal code does not prevent warlords from creating havoc in Afghanistan and the training of Chinese judges by American law professors does not prevent the detention

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> of political dissidents – or, perversely, enables judges to provide plausible legal reasons for their detention – political leaders on all sides may turn away from law completely and miss the modest role that law can play in political and economic development.[2]

Upham takes this to be a case of the rule of law not matching its sales pitch. A different, in my view more realistic, interpretation is that in such circumstances the rule of law has yet to be achieved, in part because that is inherently difficult to do but also because its promoters often do not understand what it might involve.

Who would say that the rule of law is in good shape in Afghanistan? And does anyone think that much would be different, if only it turned out that the criminal code was perfectly drafted? Unlikely, for the rule of law depends on a lot going right outside official practices and institutions, and a lot of what it depends upon is not what we conventionally take to be legal. And that should be no surprise. It is merely an example of Amartya Sen's salutary reminder, in his influential speech to the World Bank, that:

> Even when we consider development in a particular sphere, such as economic development or legal development, the instruments that are needed to enhance development in that circumscribed sphere may not be confined only to institutions and policies in that

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[2] 'The Illusory Promise of the Rule of Law', in András Sajó, ed. *Human Rights with Modesty. The Problem of Universalism,* 2004, p. 281.

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> sphere. … If this sounds a little complex, I must point out that the complication relates, ultimately, to the interdependences of the world in which we live. I did not create that world, and any blame for it has to be addressed elsewhere.[3]

This inescapable interdependence is slowly being recognised in official quarters, but it was ignored by RoL activists for considerable time and at considerable cost. Especially in the early years of deliberate attempts to build the rule of law where it was considered absent or weak, rule of law reformers commonly tended to take what Carothers has called a 'breathtakingly mechanistic approach' based on the notion that 'a country achieves the rule of law by reshaping its key institutions to match those of countries that are considered to have the rule of law.'[4] Though there are some notable exceptions,[5] the agenda that Carothers derided in 2006 is scarcely ancient history.

Today, however, such approaches are facing increasing criticism. Practitioners are coming to be urged to think *holistically* about their missions,[6] and to seek to make sure that the various 'sectors' that impact

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3 'What is the Role of Legal and Judicial Reform in the Development Process?', World Bank Legal Conference, Washington DC, June 5, 2000, 10.

4 Thomas Carothers, 'The Problem of Knowledge' in *Promoting the Rule of Law Abroad. In Search of Knowledge*, 2006, 21.

5 See Carothers, ed., *Promoting the Rule of Law Abroad*; Erik G. Jensen and Thomas C. Heller, eds., *Beyond Common Knowledge*; Kirsti Samuels, 'Rule of Law Reform in Post-Conflict Countries. Operational Initiatives and Lessons Learnt,' October 2006, *Social Development Papers,* Paper No. 37.

6 A good example is Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Right? Building the Rule of Law after Military Interventions,* 2006.

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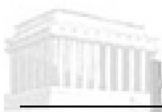
upon each other in aid endeavours interlace in harmonious and mutually reinforcing ways, rather than trembling at any contact, like some rickety house of cards. That is good advice, however hard it has been to teach, and however long it has taken – is *still* taking - to learn. Let us hope it will not be forgotten, and will be acted upon.

This first problem might seem simply to require recognition that in societies where many things are in poor shape, it is necessary to go beyond the rule of law itself, to ensure that it is supported by solid non-legal foundations. This would allow lawyers to acknowledge that law is never the only game in town, while sticking to their conventional understandings of what the rule of law is. However, there is a deeper sociological issue in play here. Legal pluralists have long insisted upon it, but it cuts against the grain of conventional law-thought, and has yet to be adequately theorised in relation to the rule of law. That is, that the life of the law, even in the well-appointed homes of exporters of the rule of law, lies outside official institutions as much as, arguably more than, it does within them.

According to Carothers, 'aid providers know what endpoint they would like to help countries achieve – the Western-style, rule-oriented systems they know from their own countries. Yet they do not really know how countries that do not have such systems attain them.'[7] That is certainly a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[7] Thomas Carothers, 'The Problem of Knowledge' in *Promoting the Rule of Law Abroad*, p. 21.

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problem, as we have seen. But it reflects a deeper ignorance: we do not really know how countries that *do* have such systems attained them.

One reason for this is that the strength and salience of the rule of law in any particular society are usually overdetermined: so many things seem to have gone right in societies where the rule of law is strong, and so many things wrong in societies where it is weak, that it is hard to separate causes from effects. But a second reason for our confusion is that typically we have a poor understanding of where the centre of gravity of law and the rule of law are to be found in our own societies, to say nothing of those we purport to help.

It is a banal observation, yet still important to acknowledge, that the major effects of central legal institutions, where they *have* major effects (which, as Upham's observation implies, is not everywhere), occur outside those institutions. That being the case, it should be just as obvious, but is rarely so to lawyers, that those effects are to variable extents and in varying ways dependent on the ways state laws interrelate with, are refracted, amplified, nullified by, existing non-state structures, norms, networks, and attitudes.[8] Nowhere is everyone waiting to hear just what

[8] Two articles where this point is splendidly made are Sally Falk Moore, 'Law and social change: the semi-autonomous social field as an appropriate subject of study', in Moore, *Law as Process*, 1978, pp. 54-81; and Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law', (1981) 19 *Journal of Legal Pluralism,* pp. 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 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

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the legislature and the courts have to say and, whatever they are listening to, there are many other generators of noise, some of it often louder and closer at hand than that generated by the law of the state. And states themselves make a lot of noise, not always through the law or in accordance with the rule of law.

Whenever law stakes a claim to rule, then, there are many sources of potential normative, structural, cultural, institutional collaboration and competition in every society, and they, and their interplay, differ markedly between (and often within) societies. 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, with what salience and force, that law is able to penetrate all these intervening media, how attuned to it putative recipients are, how dense, how competitive, resistant, hostile to its messages they might turn out to be.

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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 p. 20). These articles are concerned with law in general, rather than the rule of law in particular. I have often drawn upon them in writing about the rule of law, however, most recently in 'Teleology, Sociology, and the Rule of Law,' forthcoming in Gianluigi Palombella and Neil Walker, eds., *Relocating the Rule of Law,* 2008, and (with Whit Mason) in 'Violence, Development and the Rule of Law,' forthcoming in George Mavrotas, ed., *Security for Development: Confronting Threats to Survival and Safety?*, 2009.

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This is not to say that state law is unimportant. It is often crucially important, but how important, and even if important in what ways its effects work out in the world, are heavily dependent on the complex social, economic, and political contexts into which it intervenes. That is a universal truth. Recognition of it requires from many people a major reconceptualisation of what it might mean for law to rule, where we might find it, what it depends upon, and what we need to know to understand it. Such reconceptualisation has scarcely and somewhat haphazardly begun to filter into the rule of law promotion industry. It would be good were this journal to become a place where it is intensively pursued.

And that will require a third kind of integration, one of disciplines and traditions of thought about the rule of law. The point of that is not 'interdisciplinarity' for its own sake, but a better appreciation of what the rule of law might be *for*, and of the variety of ways in which it might be approached, than is common among its promoters.

The rule of law is better understood as an ideal than a specific recipe for institutional design. And if we are to resist disciplinary (and cultural) parochialism, we should concede that that ideal can be approached in more than one way. But the reasons for wanting to approach it are fewer and more universal.[9] After all, those most urgently seeking the rule of law are in the end concerned not with a package of legal techniques but with an *outcome*: a salutary state of affairs

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[9] I develop this argument in 'False Dichotomies, Real Perplexities and the Rule of Law,' in András Sajó, ed. *Human Rights with Modesty. The Problem of Universalism,* 2004, 251-77.

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where law counts more than it does or has in many places, at least as a reliable constraint on the exercise of power, and in particular as a brake on the possibility of *arbitrary* exercise of power. Unless that goal is kept in the forefront of attention, we can tinker as much as we like but still lose sight of why the tinkering might matter.

Understanding the value and sources of the rule of law, and the potential variety of its incarnations, requires us to absorb the lessons of those who have most concerned themselves with it, whether they be card-carrying lawyers, RoLspecs, political and moral theorists, dissidents used to the experience of 'crippled rights,'[10] or whatever. They certainly include political theorists, from Aristotle through Montesquieu to, in our time Judith Shklar, and many others. From them we will not be able to draw institutional recipes to cook up standard dishes in exotic trouble spots, but something more significant: cumulative traditions of thought, often profound thought, about the *point* of the rule of law and concern with it. Legal theorists, too, have long thought about the rule of law. Some of them, such as Lon Fuller, show deep wisdom about its significance in the world, and even the sometimes blinkered views of analytic jurists nevertheless can afford us, and require from us, some conceptual

[10] On insights to be gained from the experience of 'crippled rights,' see See Adam Podgórecki, 'Human Rights Revolution,' in *A Sociological Theory of Law*, 1991, pp. 102-03. Those insights are real, but they also have limitations, as I argue in 'The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law,' in András Sajó, ed., *Out of and Into Authoritarian Law*, 2002, pp. 221-56.

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precision. We have a lot to learn, too, from social theorists and sociologists of law, particularly those like Philip Selznick who share Lon Fuller's insight that we do better to speak of law *in* society than of law *and* society, and combine a textured understanding of the ways law works in the world with a normative vision that sees why the rule of law might be important. This combination of sensitivity to variety among *means* with clarity about values and goals requires intellectual openness and disciplinary integration.

Such openness and integration have their own challenges, but also their own rewards. Particularly in the context of rule of law promotion, moreover, they are indispensable for the other two sorts of integration and, arguably, for attainment of the goal itself.

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