Preface

Jeremy Waldron¹

Published online: 5 November 2019
© T.M.C. Asser Press 2019

In 30 years of writing about the rule of law, Martin Krygier has not reached a final understanding of this most important legal and political ideal, any more than anyone else has. But his writings have contributed a generous and interdisciplinary breadth of vision that is all too rare in this business. For that reason alone a special issue with essays devoted to his work is likely to be most profitable, intellectually and politically. Krygier's navigation of these waters over the years has charted a number of courses for us to explore.

The first is a critical approach to the familiar route of analytic understanding. The rule of law has been described as “a quintessentially jurisprudential topic,”¹ and generations of legally-inclined philosophers have devoted themselves to the study of it. Now, Krygier can be a philosopher when philosophy is needed, though he tends to a healthy skepticism about the value of analytic controversy for its own sake. Legal philosophers discuss the various requirements of the rule of law and they compete with one another to come up with more and more carefully formulated lists of these requirements: laws should be general, prospective, public, clear, and stable.² It is taken for granted that the rule of law requires some such list, though the items on the list seem to be based on nothing much more than what Krygier calls “unevenly informed intuitions” among philosophically-inclined lawyers about what matters in this area.³ Mostly the lists just feed on themselves and they reproduce each other's shortsightedness. For example, generations of rule-of-law theorists did not include the requirements of courtroom procedure in their account, simply because it did not show up in Lon Fuller's canonical list.

¹ Philip Selznick, “Legal Cultures and the Rule of Law” in Martin Krygier and Adam Czarnota (ed), *The Rule of Law after Communism* (Dartmouth, 1999) 21, cited in Clarence Ling, “Martin Krygier's Contribution to the Rule of Law,” *Western Australian Jurist* 4 (2013) 211, at p. 215.

² See Lon Fuller, *The Morality of Law* (Yale University Press, 1964), 33–94, John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) 270, John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 236–39, and Joseph Raz, “The Rule of Law and Its Virtue,” in his collection *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) 214.

³ Martin Krygier, “Rule of Law (and Rechtsstaat),” in James Silkenat et al. (eds.) *The Legal Doctrines of the Rule of Law and the Legal State* (Springer, 2014) 45, at 53.

✉ Jeremy Waldron
jeremy.waldron@nyu.edu

¹ New York University, New York, USA

Secondly, Krygier has often insisted that the question “What is the rule of law?” needs to be displaced in favor of a more teleological understanding: “What is the rule of law *for*?” According to Krygier, a teleological approach is not necessarily the same as an instrumental approach: it is not just a matter of the goods that the rule of law delivers. Instead it is a matter of the forms of government that legality helps constitute. Krygier wants us to pursue an account of the role that law and lawfulness play in various schemes and systems of rule.

That suggests, thirdly, an interest in the work of another constituency involved with the rule of law—development agencies working in transitional or post-conflict societies. Members of this constituency conceive of the rule of law as a method for helping Third World countries pursue economic development, human rights, and democracy. Instrumentally, these strategies have not been uniformly successful, partly once again because of the informal and unsystematic way in which the requirements of legality were defined, with “the rule of law” being used as a term for a grab-bag of legal and structural techniques. Krygier’s question is a good one: “[W]hat if the problem is less that the rule of law was installed but failed to do much good than that what was installed was not yet the rule of law but only bits of legal apparatus not on their own up to the job?”⁴

To my mind, this skepticism is refreshing—Krygier’s refusal to just accept the terms of what the rule of law is supposed to be. For it is not just destructive: Krygier’s perspectives provide much-needed illumination. Here’s an example, which I have found helpful in my own recent work.⁵

Development theorists commonly distinguish the rule of law from rule *by* law. “Rule by law” is seen as a debased version of the rule of law. It is the bad brother in the relationship, almost always associated in the literature with the use of law as a tool to serve the ends of power in an authoritarian regime. “Rule by law” means the state uses law to control its citizens but never allows law to be used by the people to control the state. Its connection to *the rule of law*—that noble ideal on which we rightly pride ourselves—is by way of perversion or, at best, imperfect approximation. Martin Krygier is alert to this concern, and I think it is fair to say that in his view the key to the rule of law is legal control of otherwise arbitrary power. At the same time, he has the good grace to acknowledge that rule by law is not just a bogus caricature. It has its own dignity: he associates rule by law not just with the tricks of authoritarian rule, but with the *Rechtsstaat* conception of governance:

What was distinctive of a *Rechtsstaat* was not that the state was subject to law that had other sources and independent guardians, but that it acts in a *rechtl*ich (lawful, legal) way; “according to some nineteenth century (and early twentieth-century) constructions, there is a relation of near-identity between the state

⁴ Martin Krygier, “Four Puzzles about the Rule of Law: Why, What, Where, and Who Cares?” in James Fleming (ed.) *Nomos 50: Getting to the Rule of Law* (New York University Press, 2011) 64, at 74.

⁵ See Jeremy Waldron, “Rule by Law: A Much Maligned Proposition,” available at <https://ssrn.com/abstract=3378167>.

and its law ... within the system of rule the law is the state's standard mode of expression, its very language, the essential medium of its activity".⁶

A state might operate in this way and still not be bound by any higher law, such as a constitution or a bill of rights. Equally, however, "[a] state could be controlled but act under decrees with quite particular targets, kept secret from citizens, or inconsistent with each other, or retrospective, or without any decrees, let alone laws, at all."⁷ Krygier concludes that probably "[f]rom the point of view of those subject to the exercise of power, both its control and its manner of exercise, government under and by law, are important. But they are not the same."⁸ This gives us a promising taste of Krygier's method and of how far his thoughtfulness takes us beyond purely analytic theorizing.

A final direction that he insists upon is the need for "sociological awareness" in rule-of-law studies.⁹ It is not enough for there to be legislatures promulgating norms and tribunals administering them in a way that conforms to a list of Fullerian principles. There also need to be strong cultures and institutions in civil society supporting this sort of governance. As Krygier puts it, "In strong legal orders, such as those of the Western liberal democracies, for example, there are large cadres of people trained within strong legal traditions, disciplined by strong legal institutions, working in strong legal professions, socialised to strong legal values."¹⁰ Not only that, but there has to be a substantial presence of law, lawyers, and legally sensitive officials in government agencies—a sense of legal constraint and obligation at mid- and low-levels, as well as in the upper echelons of government. Above all, there needs to be a sense of confidence in law and legality in the ordinary tissue of everyday life, not that everyone needs to be legalistic nor that the issues of everyday life need to be legalized, but that people see the point of law and understand the value of its operations well enough to lend a hand in its administration.

The refreshing character of these themes, the light they shed in the gloomy corners of a purely analytic understanding, and the care with which Martin Krygier pursues them are familiar to those immersed in the close study of his writings. Outside that circle, I worry that the virtues of his approach are not as well-known as they ought to be. I hope this volume will change that, because Krygier's willingness to explore these new directions and integrate them with one another is something that is sorely needed in the study of the rule of law.

⁶ Martin Krygier, "Rule of Law (and Rechtsstaat)" 48, quoting Gianfranco Poggi, *The Development of the Modern State* (Stanford University Press, 1978) 102.

⁷ Krygier, "Rule of Law (and Rechtsstaat)," 50.

⁸ Idem.

⁹ Ibid., 57.

¹⁰ Martin Krygier, "Ethical Positivism and the Liberalism of Fear," *Australian Journal of Legal Philosophy*, 24 (1999), 65 at 76.