14

Pressures Old and New

MARTIN KRYGIER

The rule of law is not a natural state of affairs. Nor is it simple to contrive, particularly when, as so often, unruly power comes to be concentrated in the big grasping hands of small numbers. Often despotism is simpler,[1] unruliness easier still,[2] the latter often leads to the former,[3] and the two frequently coexist.[4]

Almost everywhere and everywhen, the rule of law, where it can be said to exist at all, is bound to come under pressure. For power is at stake. Often those whose power matters most, and to whom power matters most, simply cannot imagine that theirs should or could be tempered.[5] Others understand the idea but reject it.[6] Successes occur and some have endured,[7] but they are

[1] *See* MONTESQUIEU, THE SPIRIT OF THE LAWS 63 (Cambridge Univ. Press 1992) (1748).

[2] *See* THOMAS HOBBES, *Of the Natural Condition of Mankind as Concerning Their Felicity and Misery*, in LEVIATHAN (C.B. Macpherson ed., Penguin 1968) (1651).

[3] *See* JOHN LOCKE, *Second Treatise*, *in* TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1689); PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 36–37, 39, 44 (Transaction 1978).

[4] *See* DARON ACEMOGLU & JAMES A. ROBINSON, THE NARROW CORRIDOR: HOW NATIONS STRUGGLE FOR LIBERTY 341 (2020) (on "paper Leviathans").

[5] "For my friends everything. For my enemies the law," attributed to OSCAR R. BENAVIDES, president of Peru 1933–39 (among others). *See also* RICHARD PIPES, RUSSIA UNDER THE OLD REGIME (1974); FERNANDA PIRIE, *Chinese Emperors: Codes, Punishments, and Bureaucracy*, *in* THE RULE OF LAWS: A 4,000-YEAR QUEST TO ORDER THE WORLD (2022) (on Imperial China).

[6] *See* Nick Cheesman, OPPOSING THE RULE OF LAW: HOW MYANMAR'S COURTS MAKE LAW AND ORDER (2015); Nick Cheesman, *Law and Order as Asymmetrical Opposite to the Rule of Law*, 6 HAGUE J. ON RULE L. 96 (2014); Donald C. Clarke, *Order and Law in China* (Geo. Wash. L. Sch. Pub. L. & Legal Theory Paper No. 2020-52, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3682794; Moritz Rudolf, *Xi Jinping Thought on the Rule of Law* (SWP Comment No. 28, 2021), www.swp-berlin.org/publications/products/comments/2021C28_Jinping_RuleOfLaw.pdf.

[7] *See* 1 HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983); 2 HAROLD BERMAN, LAW AND REVOLUTION: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 2006); FERNANDA PIRIE, THE RULE OF LAWS: A 4,000-YEAR QUEST TO ORDER THE WORLD (2022).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

historically rare[8] and typically unstable. So pressure is not an anomalous contemporary defect but a historically standard default. That has been a perennial challenge to admirers of well-tempered power.

The rule of law is not hostile to power, but it makes demands on how it can be exercised. Indeed, taming power takes a lot of power, and not everyone has it or can arrange and deploy it to good effect. In development literature, after all, "fragile state" is a sad term of art.[9] Well-tempered power needs resources; institutions; social and political supporting structures; norms and habits; effective technologies; incentives for good acts and protections against bad ones; and typically time and good fortune. Historically, these have come together rarely.[10] So, worldwide, a sturdy regime of rule of law has always been exceptional. Where realized in reasonable measure, something significant has been accomplished, arguably against the grain of human affairs.

However, from the early 1990s many people came to think things might be different. The rule of law came to be unprecedentedly exalted and optimistically proposed for an indefinite, sometimes almost infinite, range of problems. The phrase circumnavigated the globe, acquiring a kind of omnipresent rhetorical aura, up there with long-established and still unassailable icons such as justice, liberty, democracy, equality, constitutionalism, due process, legality, and the Rolling Stones.

In particular, in the last decade of the twentieth century and the first of the twenty-first, the rule of law came to be lauded as an indispensable condition for economic development, relief of poverty, democracy, human rights, security, peace, stability, and many other good things. Rule-of-law packages for export became standard, central, and pricey elements of international aid for benighted countries thought to lack it. Indeed, more and more international aid and financial packages became conditional upon various approved measures being undertaken to achieve the rule of law.

Asked what was the central failure of failed states, a stock answer came to be: absence of the rule of law. What was wrong with dictatorships?: same. Rule-of-law promotion boomed; states and agencies "programmed"

[8] *See* Douglass C. North, John Joseph Wallis & Barry R. Weingast, Violence and Social Orders (2009); Acemoglu & Robinson, *supra* note 4.

[9] *See* Fragile States Index, https://fragilestatesindex.org/ (last visited Feb. 20, 2024); Org. for Econ. Co-operation & Dev., States of Fragility 2022 (2022), www.oecd.org/publications/states-of-fragility-fa5a6770-en.htm.

[10] *See* Heinrich Popitz, Phenomena of Power. Authority, Domination, and Violence 41–42 (2017).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

it;[11] thousands were employed to develop it; billions of dollars have been spent on it. Rule-of-law programs were implemented at vast expense in countries from, literally, Afghanistan to Zambia. As Brian Tamanaha observed at the peak of this recent resurgence: "This apparent unanimity in support of the rule of law is a feat unparalleled in history. No other single political ideal has ever achieved global endorsement."[12]

This new ambitiousness quickly came to have a transnational character. It was borne by a variety of transnational actors, proposed in relation to more and more transnational activities, recommended to – indeed required of – nations themselves, by transnational organizations. Indeed, rule of law (ROL) promotion became a transnational *project*. It rose to be near the top of the declared agendas of organizations such as the UN, the EU, the World Bank, the IMF, OSCE, EUPol, bar associations, and financial institutions around the world, with dedicated departments charged with developing the rule of law internationally. Transnational corporations, mining companies, and investors came to demand it. This spawned many of the ventures that form the subject of this book.

The book is the work of many hands and has many parts. However, two distinctive themes are central and recur frequently throughout. The first is a distinctive approach to understanding the rule of law that, unlike most writing on the subject, begins by seeking to identify its central aspiration or goal rather than by postulating any particular checklist of legal rules and institutions taken to constitute its necessary institutional elements. It starts with the end, the point of the enterprise, as it were, rather than enumeration of any particular assemblage of purported institutional means. The point the editors identify, and most of the book's authors endorse, is reduction of the possibilities of arbitrary use and abuse of power.

The second distinctive feature of the collection is its geopolitical frame. Both the threats and the promises to and of the rule of law are discussed in a transnational, not merely domestic-national, context. As several authors stress, this framing is uncommon and uncommonly significant. Let us take these two features in turn.

[11] *See* Balakrishnan Rajagopal, *Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination*, 49 Wm. & Mary L. Rev. 1347 (2008).

[12] Brian Z. Tamanaha, On the Rule of Law 3 (2004).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

I What's the Point?

"The rule of law" is not a simple descriptive term, with obvious empirical instantiations, like "stick" or "stone." It is rather a conceptual placeholder for a range of concerns. Ideas about what we now seek to capture with this phrase can be plausibly identified in many traditions of thought, in many civilizations, over long periods of time.[13] The traditions differ in many ways, of course, and so too, many of the terms and ideas, but there are common concerns and themes that overlap and recur, over time and in many places.

Similar concerns have been expressed in various terms, in many languages, over centuries. In English, phrases such as "the supremacy of law," "government of [or "according to"] laws," and the "rule of laws and not men"[14] have long histories. Many other languages have overlapping, though not necessarily identical, concepts and traditions of concern, expressed in various ways. There are literatures devoted to the *Rechtsstaat, l'État de droit, lo Statto di diritto, praworządność*, etc.,[15] which, like so many of our most important contemporary ideas and ideals – indeed, as the sources of many of them – can already be found deeply considered among the ancient Greeks,[16] in Rome, in Jewish, Christian and Muslim writings, in medieval Europe, thirteenth and seventeenth-century England, and in many places at many times before and between then and now.[17]

The use of one particular phrase, "the rule of law," to express some of these ideas – globally – is, by contrast, relatively recent.[18] Indeed, the current ubiquity of the term is itself a transnational phenomenon. In the

[13] Fernanda Pirie's *The Rule of Laws* documents a "4,000-Year Quest to Order the World."

[14] *See* J.A. Sempill, *Ruler's Sword, Citizen's Shield: The Rule of Law and the Constitution of Power*, 31 J.L. & Pol. 333, 336–37 (2016).

[15] *See* Martin Krygier, *Rule of Law (and Rechtsstaat)*, in XX International Encyclopedia of the Social & Behavioral Sciences 780 (James D. Wright ed., 2d ed. 2015); Gianluigi Palombella, È possibile una legalità globale? Il Rule of law e la governance del mondo (2012).

[16] Mirko Canevaro, *The Rule of Law as the Measure of Political Legitimacy in the Greek City States*, 9 Hague J. on Rule L. 211 (2017); J.A. Sempill, *The Rule of Law and the Rule of Men: History, Legacy, Obscurity*, 12 Hague J. on Rule L. 511 (2020).

[17] *See* Pirie, *supra* note 7.

[18] Dicey famously discussed the rule of law in his *Introduction to the Law of the Constitution* of 1885, but the phrase appears earlier ("The precise issue we raise is this – that throughout our empire the British rule shall be the rule of law . . ."), *in* Frederic Harrison, Martial Law: Six Letters to "The Daily News" 4 (1867), *quoted in* Dylan Lino, *The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context*, 81 Mod. L. Rev. 739 (2018). And central elements of Dicey's ideas – but, so far as I know, not the phrase – were prefigured by W.E. Hearn, the first dean of the law faculty law at the University of Melbourne. *See* H.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

late nineteenth century, Albert Venn Dicey, Vinerian Professor of the Laws of England at Oxford, chose to deploy this phrase to explore, adapt, and appropriate for England (indeed, as peculiarly English), some of these very old (and frequently encountered) problems, concerns, and hopes. He did not coin the phrase[19] but launched it on a huge Anglophone career. His brief three-point distillation of the concept, usually torn from his larger discussion, was drummed into generations of Anglophone law students for much of the twentieth century: inability of authorities to exercise "wide, arbitrary, or discretionary powers of constraint"; subjection of all citizens, whatever their "rank or condition," to the same, ordinary, law administered by the same ordinary courts – no special courts for special purposes or people (as found in France, which was therefore *sans* the rule of law); and constitutional principles that flowed up from court judgments in particular cases rather than down from general written constitutional documents. Dicey had other and more interesting things to say, but this capsule account dominated discussion so much that Judith Shklar, who was not fond of Dicey's account, nevertheless acknowledged it as "the most influential restatement of the Rule of Law since the eighteenth century."[20]

But outside the law, and outside England, no one used this phrase much. Not every lawyer, particularly if they spoke French or German, had reason to be persuaded by "Dicey's unfortunate outburst of Anglo-Saxon parochialism . . . [whereby] the Rule of Law was thus both trivialized as the peculiar patrimony of one and only one national order, and formalized, by the insistence that only one set of inherited procedures and court practices could sustain it."[21] Nevertheless, the fortuitous coincidence of English becoming the "default language"[22] of the contemporary world with the (quickly waxing and perhaps already waning) moment of Western international and transnational hegemony after 1989 has given this phrase remarkable global reach in recent decades.

Indeed, the phrase has now so solidified that even one tiny change – "a" rule instead of "the"; "by" law instead of "of" – can be taken to suggest

W. Arndt, *The Origins of Dicey's Concept of the "Rule of Law"*, 31 AUSTRALIAN L.J. 117 (1957).

[19] ALBERT VENN DICEY, INTRODUCTION TO THE LAW OF THE CONSTITUTION (1885).

[20] JUDITH N. SHKLAR, *Political Theory and the Rule of Law*, *in* POLITICAL THEORY AND POLITICAL THINKERS 21, 26 (Stanley Hoffman ed., 1998).

[21] *Id.*

[22] *See* ANNA WIERZBICKA, IMPRISONED IN ENGLISH: THE HAZARDS OF ENGLISH AS A DEFAULT LANGUAGE (2013).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

very different things. On their own, however, the words do not tell you much. You won't get to the heart of the matter just by looking them up, individually or together. The ideas, not the words, are the thing. And some of them are not bad ideas.

Notoriously, understandings of this pivotal phrase and ideas that have been associated with it are many, various, and contested.[23] That is true in the world, and to a lesser extent it is also true in this collection. There is variety in the volume, and also some disagreement. However, the framing conception that is introduced by the editors, and adopted by many though not all of our contributors, follows a distinctive approach and embodies a particular substantive core.

The approach Shaffer and Sandholtz favor is what they and I call "teleological,"[24] in contrast to the "anatomical" ways in which the rule of law is commonly understood. Legal anatomists (who dominate the field) typically begin by stipulating one or other or several lists of legal-institutional components – rules,[25] procedures,[26] institutions,[27] content[28] of particular forms and character – that purportedly make up, and so are taken to define, the thing we call the rule of law.

On the account favored here, by contrast, we should instead move to any detailed specification of the ingredients necessary for the rule of law only in the light of, and therefore *after*, we have reached a view as to the *telos,* the purpose or good we invoke and seek its help to achieve. Only then, goal in view, does it make sense to try to stipulate what might be necessary to attain or approach it. That, in turn, will vary with time and context, so that what might be required to attain the goal of the rule of law cannot be specified in detail in advance, least of all in "formulaic check-lists based on specified, formal characteristics."[29] Understood in this way, the rule of law is what Jeremy Waldron has called a "solution concept."[30]

[23] *See* Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137 (2002).

[24] Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, *in* RELOCATING THE RULE OF LAW 44 (Gianluigi Palombella & Neil Walker eds., 2008); Martin Krygier, *Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?*, *in* GETTING TO THE RULE OF LAW 64 (James E. Fleming ed., 2011).

[25] LON L. FULLER, THE MORALITY OF LAW (2d ed. 1969); JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF THE LAW 210 (1979).

[26] Jeremy Waldron, The Rule of Law and the Importance of Procedure, *in* GETTING TO THE RULE OF LAW, *supra* note 24, at 3.

[27] DICEY, *supra* note 19.

[28] TOM BINGHAM, THE RULE OF LAW (2010).

[29] *See* Chapter 1.

[30] Waldron, *supra* note 23, at 158.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

If so, as with any postulated solution, we need to begin with the problem it is meant to solve.

The substantive problem Shaffer and Sandholtz identify for the rule of law is arbitrary exercise of power. Appeal to the rule of law signals the hope that there may be ways, and that the rule of law might be among them, to diminish the kinds and levels of arbitrary sway available to those who exercise (substantial)[31] power. The ambition, to use a term found in many traditions of thinking about these matters, is to reduce the chances of arbitrariness by "tempering"[32] the ways in which substantial power can be exercised. These are very old and widespread concerns, as well as ways of expressing them.[33]

Few people would deny that the rule of law has arbitrary power in its sights, and several authors in this collection adopt this approach explicitly. However, in Chapter 2, Brian Tamanaha questions the sense of starting this way, and more generally of narrowing the ends of the rule of law to just this one, or indeed any *one*. While not doubting that arbitrary power is among the targets of the rule of law, he points out that there are plenty of others, and a focus on each will stress different things from a focus on any of those others. Why give priority just to one? All the more, given that:

> the assertion that the rule of law serves a specific purpose (*telos*) that explains its existence (*raison d'être*) fits uneasily with how the rule of law has come about. The rule of law (whatever it means) was not designed or created by anyone for a particular purpose, but rather evolved over centuries owing to a confluence of beliefs, motivations, circumstances, and institutional developments in connection with cultural, religious, economic, political, legal, and other factors. Every rule-of-law society has a unique history, institutional arrangement, and set of consequences. Assertions about *the* purpose is a projection by given theorists based on their particular priorities.[34]

[31] *De minibus non curat lex* (the law is not concerned with trifles).

[32] *See* Martin Krygier, *Tempering Power*, *in* Bridging Idealism and Realism in Constitutionalism and the Rule of Law 34 (Maurice Adams et al. eds., 2016); Martin Krygier, *Poder atemperado: Cómo pensar, y no pensar, sobre el Estado de Derecho* [Tempering power: How to think, and not to think, about the rule of law], 25 Eunomía: Revista en Cultura de la Legalidad 22 (2023).

[33] *See* John Philip Reid, *In Legitimate Stirps: The Concept of "Arbitrary," the Supremacy of Parliament, and the Coming of the American Revolution*, 5 Hofstra L. Rev. 459 (1977); Sempill, *supra* note 14; David M. Beatty, Faith, Force and Reason: An Armchair History of the Rule of Law (2022); Pirie, *supra* note 7; Gerald Postema, Law's Rule: The Nature, Value, and Viability of the Rule of Law (2023).

[34] *See* Chapter 2.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

Tamanaha prefers to say that "*the rule of law exists in a society when government officials and legal subjects are bound by and abide by law.*" Such a "legally ordered community" might serve a variety of "functions" – among them, reduction of arbitrariness in the exercise of power, but that is just one among a number of others that include supporting freedom and dignity, security and trust, construction and institution of institutions, enhancement of economic development, and likely, he allows, others as well.[35]

It is impossible to legislate in these matters, given the currency of the term and the contending confusion, or confusing contention, about what it means. One can only propose and commend. In support of the approach and focus that the editors (and I) commend, I would offer two considerations. First of all, reduction of arbitrary power is distinctive in Tamanaha's list of "functions." This flows from its instrumental and foundational character. Whereas we might hope that a "legally constituted community" will support freedom, dignity, security, trust, etc., it is unlikely to do so if wielders of power are free (whether outside law or, as often occurs, authorized by it) to exercise power arbitrarily in the ways Shaffer and Sandholtz enumerate.

Law is *essentially* a vehicle and channel for the exercise and communication of power. That is what it does. There are many ways to exercise power, and different ways enable different functions to be performed. Power – whether legal or not – can support freedom, dignity, trust, and so on, but it can deny them as well, and often does. Frequently it does so by means of law, as chapters in this book show plentifully. What Haberkorn shows of Thailand – "[t]he primary tool of repression is the law itself"[36] – is true of many contemporary regimes and arguably transnational organizations of other kinds as well. It does the former more readily when it is reliably tempered, and the latter more easily when its wielders are free to exercise it arbitrarily. The hope of partisans of the rule of law is that power might be reliably, routinely tempered, in ways that both help guard against abusive uses and enable it to be channeled in fruitful ways and directions.

The ways that power can be exercised are, then, a specific, immanent concern of the rule of law. Tempering power to reduce the chances of its arbitrary exercise is a specific internal ambition. That achieved, many other possibilities flow, functions are enabled, that would otherwise be at

[35] See Chapter 2.
[36] *See* Chapter 12.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

risk or more difficult to attain. These include various moral, political, economic, and other goals, ideals, and functions, often larger than 'mere' tempering of power – among them, those Tamanaha suggests. Such tempering is not necessarily ultimately more important than other goals, but it is normatively prior in a different sense. It has a specific, immediate, instrumental importance not reducible to other things, commonly a condition for the best of them, and often not separately considered. Wheels perform many important functions, but they do most of them better if they are round. Unfortunately, what goes to reduce arbitrary power is more complicated and variable than a wheel.

Ways of exercising power, including nonarbitrary and nondominating ways, are in other words closely tied up with the concept of the rule of law, immanent in the idea. They are a *feature* (and certainly not a bug) of the ideal, not just a function it might serve or a consequence that might follow its observance. Other goods – say, freedom, dignity, security, trust, economic development, or democracy – may, as has in recent times commonly been claimed, flow from the rule of law (and are the only reasons many people today are interested in it[37]), but they are not immanent in this way. If the rule of law enables them, these are, as it were, external and contingent benefits that might flow from a well-constituted "legally ordered community," that is, one in which the likelihood that power will be exercised arbitrarily has been reduced. But legal communities are often not well constituted, and never so when arbitrary power is rife. For unfortunately, as we have seen frequently in recent years, and as the discussions of "rule *by* law" in several chapters in this book attest, a "legally ordered community" full of laws in appropriate forms, yet awash with arbitrary power, is no oxymoron or empirical oddity.[38] And where it occurs, the functions that Tamanaha attributes to such a community are unlikely to be well performed.

According to the view recommended here, then, one starts by thinking about how arbitrariness in the exercise of power might be reduced. This is because arrangements – deliberate or not, legal or other, intended for this purpose or not – that reduce the ability of power-holders to wield power

[37] *See* Martin Krygier, *Transformations of the Rule of Law: Legal, Liberal, Neo*, *in* THE POLITICS OF LEGALITY IN A NEOLIBERAL AGE 19 (Ben Golder & Daniel McLoughlin eds., 2017).

[38] *See* Martin Krygier, *Domestic Abuse: Populists and the Rule of Law*, 130 IWMPOST 3 (2022), www.iwm.at/publication/iwmpost-article/domestic-abuse-populists-and-the-rule-of-law; András Sajó, *The Rule of Law as Legal Despotism: Concerned Remarks on the Use of "Rule of Law" in Illiberal Democracies*, 11 HAGUE J. ON RULE L. 371 (2019).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

arbitrarily, and constitute, frame, and channel ways of nonarbitrary exercise of power, are foundational for the achievement of many other things we might value, not least those we might value more. Well-tempered power is less an alternative to any of them than a condition for them; at least for many of them, less an intrinsic value that should compete in some ultimate social ideal with, say, liberty, equality, security, or whatever, than a foundational achievement, necessary for the attainment of many other values unlikely to be attained when power is left to its holders' own devices. It operates at a different, earlier, foundational level. Ceilings are often more attractive than foundations, but the former are precarious unless the latter are secure.

The ideal of the rule of law – well-tempered power – is a relative and variable achievement, not all-or-nothing. But one can say it exists in good shape or repair insofar as a certain sort of valued state of affairs, to which law contributes in particular and variable ways, exists. According to this conception, the ideal is well served insofar as the exercise of political, social, and economic power in a society (or an "order") is effectively tempered, constrained, constituted, and channelled so that nonarbitrary exercises of such powers are relatively routine, while arbitrary ones are not.

Well-tempered power is, then, a complex, practical, and instrumental ideal. It is complex because a lot is needed even to approximate it and that lot varies and changes depending on the nature of specific problems, circumstances, and available responses. That is why Shaffer and Sandholtz, and several other authors here, such as Akinkugbe and Farrall and Halliday, are right to distrust "formulaic checklists."[39] The ideal is practical because it is neither a natural fact nor a Utopian fantasy we might only dream of, but a goal intended to be made good (even if only partially, to varying degrees) in the real world. It is instrumental since it is rarely anyone's ultimate passion, but rather is understood as a means to help solve a problem that threatens the attainment of other goals. And it is a normative-descriptive goal and ideal rather than a simple description. The concept is normative, the condition supposed to be valuable.

It is also important. Circumstances in which some are able to exercise significant power arbitrarily over others are at once pernicious and pervasive. As I have argued at greater length elsewhere, they threaten

[39] *See* Chapters 1 and 11. See also the discussion of TLO (nonformulaic) theory by Jeremy Farrall & Terence C. Halliday in Chapter 6.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

human dignity,[40] equality,[41] and liberty;[42] are liable to lead to domination[43] and fear;[44] imperil trust and social coordination;[45] and generate solipsistic short-sightedness and stupidity among the powerful, who foolishly fancy they benefit from being blocked from contestation and free flows of judgment and information.[46] More can be said about all of these values and the contribution of tempered power to them, but enough for now. Thought of this way, then, well-tempered power is not one among other good things that might flow from the existence of a "legally ordered community." It is, as it were, an ecumenical resource that the rule of law helps provide for such a community. That good secured, many other goods might flow.

Thus understood, the notion of "tempering" power has two implications, not always reflected in the rule-of-law literature. First, though it is common to believe otherwise, one does not temper power simply by *limiting* it, as writers on the rule of law often presume. Rather, well-*tempered* power is modified (and in Montesquieu's conception, "moderated") in various ways – mixed and balanced, refined, blended, separated, but also distributed, connected, and so in many ways *strengthened* – in order at the same time to make power available, disciplined, directed, and channeled, and thus better equipped to support the effective exercise of power for good purposes rather than bad. Weakness is not a virtue of the rule of law. Failed and fragile states exhibit the former and never the latter. If you slam a door, hope that the glass is tempered rather than not; tempered steel, too, is immensely stronger than its untempered elements. Both have been refined, and their elements blended and mixed, to be fitter for purpose. A society where the rule of law is strong is one where

[40] *See* FULLER, *supra* note 25, at 162–63; Waldron, *supra* note 26.
[41] *See* PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD (2016).
[42] *See* Charles Larmore, *Liberal and Republican Conceptions of Freedom*, 6 CRIT. REV. INT'L SOC. & POL. PHIL. 96 (2003); Christian List, *Republican Freedom and the Rule of Law*, 5 PHIL POL. & ECON. 201 (2006).
[43] Philip Pettit, Republicanism (1997); Gianluigi Palombella, *The Rule of Law as an Institutional Ideal, in* RULE OF LAW AND DEMOCRACY: INQUIRY INTO INTERNAL AND EXTERNAL ISSUES 3 (Gianluigi Palombella & Leonardo Morlino eds., 2010).
[44] *See* JUDITH N. SHKLAR, *The Liberalism of Fear*, *in* POLITICAL THEORY AND POLITICAL THINKERS, *supra* note 20, at 3; SHKLAR, *Political Theory and the Rule of Law*, *in* POLITICAL THEORY AND POLITICAL THINKERS, *supra* note 20, at 21.
[45] On the key importance of which in modern societies, see ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 26 (Liberty Classics 1981) (1776).
[46] Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CAL. L. REV. 301 (2009).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

power is also strong but balanced by other powers, internal and external, and well-tempered, neither weak nor ill-tempered.[47]

Another misleading commonplace in the literature, several times referred to in this volume, is a forced choice between "thin" and "thick" conceptions of the rule of law. That distinction has spawned a hackneyed debate among writers on the rule of law over whether it is enough to adopt the forms and restrict oneself to characteristics of institutions and rules thought to add up to the rule of law ("thin"), or whether that is not enough and one needs to take account of the moral purposes and content of the law as well. There are problems with lurching too far in either direction.

Arbitrary ways of exercising power are objectionable in themselves, even when the institutions seem to conform to rule-of-law checklists, and not merely when they are yoked to bad purposes. So this concern straddles that old divide. On the one hand, it cannot be restricted to any list of rules and institutions since not they themselves but whether they actually turn out to reduce arbitrary power is what matters. And often they don't, even when well formed. As several contributors to this collection emphasize, modern authoritarians are well-versed in ways of generating traditional legal rules and institutions in order to enable rule *by,* rather than *of*, law. So much so, that a new form of legal scholarship has emerged in recent years. It investigates what has variously been called "abusive constitutionalism," "stealth authoritarianism," "constitutional coups," "autocratic legalism," "abuse of the constitution," or "twisting and turning of the rule of law."[48] So, "thin" is not enough.

On the other hand, as the legal philosopher Joseph Raz long ago warned, if we equate the rule of law with "the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe

[47] *See further* JOHN BRAITHWAITE, MACROCRIMINOLOGY AND FREEDOM (2021).

[48] David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013); Ozan Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673 (2015); Kim Lane Scheppele, *Constitutional Coups in EU Law, in* CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM 446 (Maurice Adams, Ernst Hirsch Ballin & Anne Meuwese eds., 2017); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018); Grażyna Skąpska, *The Decline of Liberal Constitutionalism in East Central Europe*, *in* ROUTLEDGE INTERNATIONAL HANDBOOK OF EUROPEAN SOCIAL TRANSFORMATION 130 (Peeter Vihalemm, Anu Masso & Signe Opermann eds., 2018); András Sajó & Juha Tuovinen, *The Rule of Law and Legitimacy in Emerging Illiberal Democracies*, 64 OSTEUROPA RECHT 506 (2019).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

that good should triumph."[49] So, although the rule of law's recent iconic status has tended to move ambitions for it in such all-encompassing directions, that is not a good idea. The goal of the rule of law, as distinct from other goals one might seek, is to accomplish an immediate, specific, if complex, task, the achievement of which has the virtue of spawning or underpinning many other virtues, but it is not the same as them. That task is to reduce arbitrariness in the exercise of power. And so, the rule of law extends to matters of content, but only insofar as they affect the ability of power-holders to exercise arbitrary power. As legal autocrats in many countries today have demonstrated, that is many places. A common contemporary strategy is to do whatever they can by means of conventional legal institutions and rules, using the law to expand central power, reduce independence of institutions of adjudication and governance (in sometimes more and sometimes less subtle ways), and cement loyal incumbents in key positions so that they thereby open the already uneven playing field to only one team (as was frequently attempted by the former Polish government before losing the 2023 election), even after that team has ostensibly lost the power to govern.

To sum up, the rule of law is an *achievement,* at once modest and precious. It is modest because it will never be all we want, and it might conflict with other things we might want. If so, accommodations might be necessary. Nevertheless, it is precious because it is a condition for avoiding many things we should never want, indeed some of the worst things that can be done to us. Equally valuable, it enables many things that we do and should wish for.

So, we can maintain a teleological approach to the rule of law while acknowledging, as we must, Tamanaha's point that the rule of law has developed – where it has – in various ways, for various motives, conscious and unconscious, as a result of good and bad fortune, and so forth. Well-tempered power is the *telos* of the rule of law, not in the sense that whoever benefits from it must have had it in mind, still less because some canonical institutional checklist has been followed. Reduction of arbitrary power is an achievement to be valued, not a historical explanation of how or why it came about. There are, of course, many ways of getting there, or some way there, or not at all, or somewhere else, as Tamanaha says. Postulating what we find valuable in it is not to say this is what people have intended (though sometimes they have), but that it is a valuable kind of achievement, however attained, an ideal that might

[49] Raz, *supra* note 25, at 211.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

orient some of our practices and hopes, serve as a source of critique when they are denied, and help us attain others.

Indeed – and my second consideration in support of the approach recommended in this book – it is precisely because, as Tamanaha rightly observes, the ideal of the rule of law might be attained (and undone) in many ways and to many degrees that we should not begin with some purported institutional identikit checklist of elements of the *thing* supposed to help in attainment of the ideal. As the rule-of-law promotion industry has learnt at cost, there is no such one thing.

If one begins with the end of well-tempered power, the next step is to ask how to get there in the contexts one seeks to do so. The answer to that question must be contingent on facts and circumstances, and an implication of this way of proceeding is not simply that anatomy comes second, but that it cannot be assumed always to take any specific form that conventional rule-of-law promoters promote, nor indeed that it is to be found where they typically look for it. We need things in the world to achieve it, but what we need will depend on what we want to achieve as well as on the conditions and circumstances in which we seek to achieve it. Given that times, problems, institutions, imaginations, technologies, and social, political, legal and economic contexts differ and change, the specific answers to that second question will necessarily vary. So institutional checklists should come not second but third: goal, circumstances, institutional design. This is simply to generalize Akinkugbe's suspicion of "the parochial checklists that some Western scholars develop from their own legal traditions and universalize."[50]

Instead, the rule of law has too often been treated – in fact, even if not in rhetoric – as the product of some legal-institutional package or portfolio of packages, available for export all around the world. But it has become abundantly clear that in many contexts the conventional packages that the rule-of-law industry provides, or indeed that law provides, will not do the trick. First of all, particular rules and institutions are unlikely to be universally transferable since they depend on so much else where they come from (which is not packageable for export), like old traditions of thinking and behaving (*manières d'agir et de penser* in Durkheim's terms), and they enter into contexts with so much else that has not been developed for or with these transplants in mind. And yet there is the fundamental point, stressed by Shaffer and Sandholtz, that even if institutional templates were well designed by those who developed

[50] *See* Chapter 11.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

them, "[u]ltimately, for the rule of law to become effective, it must be institutionalized as part of a culture of conduct. It must become a *practice*."[51] That will not happen in a day, and standard rule-of-law legal-institutional packages on their own are unable to make it happen. For effective tempering of power is a complex cultural, social, and political, *as well as* legal achievement. It will not spring fully formed from any institutional fix. Conversely, as we have seen and as modern populists contrive to display every day, many hallowed 'rule of law' institutions appear to be readily available to be subverted without needing to be eliminated. And they can help in the subversion of the very values that were thought to underpin them.[52]

Notwithstanding these salutary lessons, as several chapters in this book make clear, many attempts to transplant such packages have repeatedly exhibited a quaint combination of confidence and cluelessness. As one, somewhat chastened, rule-of-law promoter observed at the height of rule-of-law promotional activity: "we know how to do a lot of things, but deep down we don't really know what we're doing."[53] The results have not often been glorious, and that should be no surprise.

II Transnational Rule of Law?

The second distinctive feature of this collection is its transnational focus. For, traditionally, when anyone discussed the rule of law it was with domestic models in mind. As Scheppele remarks of what she calls "the rule of law writ small," "[w]hat most . . . conceptions of the rule of law share . . . is the unstated assumption that the rule of law should be understood within the boundaries of national law. The rule of law analyst typically takes the national legal system as if it were the only system in which rule of law has any real purchase and analyzes it in isolation."[54] Even when, less commonly, discussion was extended to "the international rule of law," that was about relations *between* such states, and the first question typically asked was whether there could ever really be such a thing.[55] The rule of law was regarded as paradigmatically an

[51] *See* Chapter 1.
[52] *See* Krygier, *supra* note 38.
[53] Quoted in Thomas Carothers, Promoting the Rule of Law Abroad: In Search of Knowledge 15 (2006). *See also* Deval Desai, Expert Ignorance: The Law and Politics of Rule of Law Reform (2023).
[54] *See* Chapter 7.
[55] *See* Chapter 1.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

attribute or product of domestic state legal orders replete with institutions able to issue, interpret, and enforce "commands" in respect of subjects who, in the phrase of arch-positivist John Austin, were "habitually obedient or submissive to a certain and common superior."[56] These latter would be in luck, protected by the rule of law, when those laws took particular forms, were issued, interpreted, and enforced by particular types of legal institutions, especially courts, acting in particular types of ways. What then was to be said of a realm where the familiar institutions of the domestic rule of law were lacking, and where what institutions there were bore a very different relationship to their "subjects"?

Hence numerous hackneyed debates among lawyers, philosophers, and students of international relations about whether international law is law at all, given the absence, or at least paucity, of centralized and hierarchical institutional structures, serviced by legislatures, courts, and officials with powers of enforcement, that bear plausible analogies to those found within states themselves. And even if we can call it law, can such an institutionally impoverished setting support the rule of law?

The *trans*national domain – "transnational legal orders" and actors themselves, whether in their interactions with other organizations and actors or in the whole complex of multilevel interactions described in this book's introduction and throughout – might be considered in even worse shape. For they mix *everything* up: state/nonstate/transstate/interstate/intrastate; public/private; hard/soft; top-down/bottom-up; vertical/horizontal. All this generated by state and suprastate regulators, nonstate businesses, civil society actors, and other players, bearing few preformed hierarchical relationships and few regular institutions with generalized interpretive authority or powers to enforce. Multitudes of levels, legal (and nonlegal and quasi-legal) orders, actors, domains, problems, and attempts to solve them are, to use Shaffer and Sandholtz's word, thoroughly "enmeshed" in the transnational legal world. As Ginsburg and Schoppe stress, "[w]e thus have an ideal, operating at multiple levels of law that interact in complex ways. Enmeshment can take various forms."[57]

Domestic institutional analogies with all this color and movement are unlikely to be readily apparent. And yet, as cases discussed in this volume make clear again and again, arbitrary power is no less likely to be

[56] John Austin, The Province of Jurisprudence Determined 179 (Wilfrid E. Rumble ed., 1995).
[57] *See* Chapter 5.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

a problem within and between transnational organizations and arrangements and in their relationships with other orders, including states, than within national settings themselves. As our editors argue forcefully, the fates of the rule of law in domestic, transnational, and international settings are increasingly and often inextricably intertwined.

One "vexing question" all this enmeshment raises for conventional understandings of the rule of law, as Farrall and Halliday observe, is whether it is "empirically, theoretically, or normatively acceptable to extrapolate from institutional configurations within a state to the global order writ large?"[58] The implication of Part I of this chapter, and indeed of all the chapters in this book, is "no." As we have seen, legal-institutional "extrapolations" are frequently perilous even between different domestic contexts. Little reason, then, to believe that they can be relied upon to illuminate more brightly in the multifarious contexts and activities of transnational orders as their 'models' (are thought to) do at home.

This truism has two divergent implications. On the one hand, for the reasons already rehearsed, the transnational adoption of complexes of legal rules, institutions, procedures, etc. developed in particular domestic contexts cannot without more (and sometimes without less) be relied upon to enhance the rule of law, as understood here, in the very various and different circumstances of transnational arrangements.

This is all the more the case in circumstances (not rare) where such arrangements involve deployment of conventional rule-of-law standards and institutions to extract advantages for powerful transnational players at the expense of arbitrary interferences with the choices of governments and peoples dependent upon them or their activities. This can be a fraught aspect of transnational invocation of rule of law "guarantees." Thus, Jennifer Lander observes that:

> Virtually all "national" economic strategies now revolve around becoming *globally* competitive, whether in relation to financial services, agriculture and manufacturing, extractive and energy industries, technology and telecommunication, health and education . . . All of these economic sectors are governed by legal rules and norms that are increasingly *trans*-national in their scope, meaning that a body of legality has achieved regulatory resonance and effectiveness across scales of jurisdiction (international, regional, national, sub-national).[59]

[58] *See* Chapter 6.

[59] Jennifer Lander, Transnational Law and State Transformation: The Case of Extractive Development in Mongolia 5 (2019).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

As she documents in the case of Mongolia, international mining companies, financial institutions, foreign investors, and multinational corporations negotiate multiple conditions and demand guarantees (some of them indeed necessary to make investment secure) to be enforced by the state in which they offer to invest. Such states, keen to capture the investment, have strong incentives – pressure, indeed – to comply and require citizens to comply with conditions they might otherwise reject. The transnational legal ordering that results distorts local politics, governance, democracy, and economic and social options in ways not dreamt of by Alfred Dicey. All in the name of the rule of law. As Lander observes and documents in uncomfortable detail:

> In Mongolia we can see the influence of a distinctly *global* rule of law discourse in shaping expectations of state behaviour, promoted by both internal policy elites and external actors.[60]
>
> ... Where previously the Mongolian government promoted legal change in relation to the mining sector whilst maintaining a national conception of the rule of law, the post-2014 reforms implicitly presume the *stability* of the legal environment as a new criterion for the rule of law. In this sense, a version of the rule of law that privileges the stability of the investment environment functions as the new basic norm upon which the new extractive order rests.[61]

Akinkugbe's chapter suggests African parallels, as when he writes that:

> a noncontextual and historical analysis of the Burkina Faso military coups of 2022 fails to appreciate the limitations of traditional measurement of rule-of-law compliance. Beyond the abhorrent practice of military juntas and the cleavages that characterize the national context for the coups, the coup was also about geopolitical struggles between powerful Western countries such as France, the United States of America, and Russia. Western influence, though diminished, remains considerable for historical reasons, and because many African countries still look to the West for aid, investment, and sympathy in international lending bodies. In turn, powerful Western governments have been accused of supporting rival factions in states where their economic and military interests exist.[62]

[60] *Id.* at 228.

[61] *Id.* at 229; *see also* KINNARI I. BHATT, CONCESSIONAIRES, FINANCIERS AND COMMUNITIES: IMPLEMENTING INDIGENOUS PEOPLES' RIGHTS TO LAND IN TRANSNATIONAL DEVELOPMENT PROJECTS (2020); Kinnari Bhat, *Review Symposium: The Rule of Law in Transnational Development Projects – Private Actors and Public Chokeholds*, 17 INT'L J.L. CONTEXT 99 (2021).

[62] *See* Chapter 11.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

And the point is made at large by Stephen Humphreys:

> Versions of what Thomas Carothers once called (with deliberate irony) the rule of law "standard menu" have played an important role in concretising a vision of law and its institutions stripped of historical, local, cultural or social peculiarities: an easy universalism is instead constructed in these visions (laws are known and internally consistent, they are applied to all equally by independent judiciaries, and so on), which in turn translates quickly, when we look abroad, into a register of presence and absence, without needing to open questions of cultural specificity or historical cause.[63]

Secondly and conversely, however, it is not all bad news. For there is no reason – at least, the limitations of the "standard menu" by itself are not the reason – to deny the possibility of the rule of law in transnational contexts. For, viewed teleologically, the end, not the means, is the thing. Other than conventional legal arrangements are certainly likely to be necessary, and they might work. This, for example, is the burden of explorations of transnational "societal constitutionalism" by Gunther Teubner and others in his orbit and influenced by him, which "exceed the borders of the nation state in two ways. Constitutionalism beyond the nation state means two different things: constitutional problems arising outside the borders of the nation state in transnational political processes, and at the same time outside the institutionalized political sector, in the 'private' sectors of society."[64]

As Teubner argues, institutional experimentation and creativity are unavoidable in the many *different* settings *and sorts of settings* where needs and demands for new forms of "constitutionalization" emerge. He argues that such experimentation is plentiful and often successful, but it takes many different forms in the many transnational settings, where one might not be "blessed" with what Malinowski, after all, long ago found Trobriand Islanders did without – "central authority, codes, courts, and constables"[65] – and where often political power is not the currency of

[63] Stephen Humphreys, The Theatre of the Rule of Law. Transnational Legal Intervention in Theory and Practice 220–21 (2010).

[64] *See* Gunther Teubner, Constitutional Fragments. Societal Constitutionalism and Globalization 1–2 (2012); *see also* Angelo Golia & Gunther Teubner, *Societal Constitutionalism: Background, Theory, Debates, Debates*, 15 Vienna J. on Const. L. 357 (2021); David Sciulli, Theory of Societal Constitutionalism (1992); Chris Thornhill, A Sociology of Transnational Constitutions: Social Foundations of the Post-National Legal Structure (2016).

[65] Bronisław Malinowski, Crime and Custom in Savage Society 37 (Routledge, 2017) (1926).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

exchange. Old-school "formulaic checklists" might have no foothold, and yet power might be tempered and arbitrary exercise of it resisted in other ways. Rule-of-law anatomists might find that hard to accommodate, but teleologists are concerned with making a point rather than sticking to a script. And as theorists of transnational legal orders (TLOs) have tracked and shown,[66] there are many ways to make, and fail to make, that point, and these ways can differ and change.

Which is a good thing, too, since there are many transnational domains which raise just such rule-of-law issues, but for which it makes little sense to search for some national institutional model to "extrapolate." TLOs are of all sorts and do all sorts of things. What might or might not make sense within the UN Security Council is unlikely to have a close bearing on the World Trade Organization. And are we talking about tempering the power of and within transnational organizations themselves, or about their efforts to generate the rule of law elsewhere, including nation-states? What questions of feasibility and appropriateness arise in these different domains? Each context is likely to have different modalities of the exercise of power, and those hoping to temper power will need to address the specifics. Strategies, tactics, means, and ends will all vary.

Given what can be at stake where substantial powers are involved, and the variety of contexts, arrangements, means, and ends where attempts to temper them might be made, it would seem wise to combine modesty of the intellect with keenness of the will[67] – a combination that seems exemplified in Farrall and Halliday's account of how, in light of TLO theory, one might think of tempering the power of "the most symbolically powerful political entity in the world beyond the state":[68] the United Nations Security Council.

Comparing the recommendations of one group from the Austrian government and New York University's Institute for International Law and Justice (Austria/NYU) with another from the Australian government and the Australian National University (Australia/ANU), they emphasize the difference between the highly ambitious institutional assessment of

[66] *See* Chapter 1; Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* TRANSNATIONAL LEGAL ORDERS 3 (Terence C. Halliday & Gregory Shaffer eds., 2015).

[67] This is, of course, a riff on the phrase "pessimism of the intellect, optimism of the will," commonly attributed to Antonio Gramsci, who took it from Romain Rolland. *See* Francesca Antonini, *Pessimism of the Intellect, Optimism of the Will: Gramsci's Political Thought in the Last Miscellaneous Notebooks*, 31 RETHINKING MARXISM 42 (2019).

[68] *See* Chapter 6.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

the former and a more "pragmatic" approach of the latter. Austria/NYU "diagnoses the problem as a failure of the UN essentially to adopt an institutional and procedural configuration of ROL that is conventional in well-established ROL orders within states";[69] Australia/ANU, by contrast, "took a more pragmatic strategy, judging that reforms were only feasible and more probable if they were modest and able to be implemented within the constraints of extant UNSC procedures and structures."[70] Farrall and Halliday argue that:

> there endures a tension between the idealistic view of a classic institutional balancing of powers beyond the state and a pragmatic view that accepts this as a bridge too far. . . . In contrast to the leanings of the Austrian/NYU initiative towards the replication and extrapolation of a within-state institutional separation of powers into the transnational realm, the Australian/ANU iteration of reforms proceeds on the basis of the judgment that a macrocosm of the national in the international would require amendments to the UN Charter – a prospect so unrealistic as to be a nonstarter. The perfect would become the enemy of the good. Why should we expect a global institution to achieve in decades what has taken many countries centuries to accomplish . . .?[71]

The difference pointed to here might not be simply between perfectionism and pragmatism, however, but a deeper contrast of both principle and expectations between anatomical and teleological approaches to reform. Why imagine that institutional models plucked out of domestic settings, embedded in particular social and cultural histories and forms and functions and everything else that goes with governing a long-existing state, will even in principle be transplantable to a constructed organization of completely different character, functions, membership, challenges, and background? Nothing much in the history of international relations or transnational rule-of-law promotion gives warrant to anatomical adventurism in these matters. That is a truth not confined to the UNSC. It is general, perhaps universal.

Apart from the internal workings of transnational organizations themselves, half of the chapters of this book[72] are concerned with interactions between organizations purporting specifically to embody and promote the rule of law and nation-states. How have they fared? And should they have fared differently?

[69] *See* Chapter 6.
[70] *See* Chapter 6.
[71] *See* Chapter 6.
[72] Chapters 1, 4, 5, 7, 8, 9, and 10.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

One would be more confident about these matters if one could point to a healthy dose of experiments that actually worked. The scorecard, however, while not blank, is not hugely encouraging. Montoya and Ponce and Shaffer and Sandholtz track a steady decline in rule-of-law scores globally. Ginsburg and Schoppe emphasize the range of available outcomes. Strong regional ROL TLOs can come into tension with nation-states notionally part of them, but weak ones can buy harmony at the price of effectiveness. Regional TLOs might *complement* the rule of law within states, but then again they might *substitute* for it and then lead to anti-TLO and anti-RoL backlash. In Latin America, Pou Giménez finds that while the regional human rights regime had "critically supported" responses to "challenges to the rule of law by populist leaders . . . most constitutional resources are activated ex post and place an immense burden on the courts."[73] From her panoramic discussion of transnational organizations that seek to further the rule of law, Peters concludes that "both in Europe and in the Global South, the external constitutional assistance lent by international organizations has produced only moderate positive effects – if any at all – for the functioning of the rule of law."[74]

It appears, and might indeed be, that you're damned if you do and damned if you don't. Starting with the latter option, Kahn and Kurban point to dramatic failures in relation to Russia (Council of Europe) and Turkey (European Court of Human Rights), respectively, where the relevant "supervisory" transnational organizations seemed to bend over backward to encourage "therapeutic admission,"[75] avoiding close scrutiny of actually existing practices, in the hope that admission might soften and conciliate the recalcitrant leaders of those states. That their backs were bent, according to our authors, is pretty clear; that any therapy or conciliation occurred is doubtful.

The question Kurban raises is key: "Is the Turkish case a singular story of democratic transition gone wrong, or does it speak to broader issues concerning the ways in which human-rights and rule-of-law TLOs interact with authoritarian regimes?"[76] From the Turkish case, she concludes that the European Court of Human Rights specifically, with parallels

[73] See Chapter 10.
[74] *See* Chapter 4.
[75] This wonderful term was coined by Peter Leuprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 313, 332 (1998), and is quoted by Jeffrey Kahn in Chapter 8.
[76] *See* Chapter 9.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

among rule-of-law-promoting TLOs more generally, "not only permit illiberal states to violate those norms but also themselves undermine such norms."[77]

Kahn restricts his discussion to the Russian case, but his meticulous account of the mutual courtship of the Council of Europe and postcommunist Russia, proceeding through "therapeutic admission," accelerating violations that caused damage not only to Russia but to the "load-bearing structures" of the Council itself, to the point of eventual and perhaps eternal breakdown of the relationship, does not give cause for comfort.

After a slow start, by contrast, the European Union has in recent years become more assertive – at least against Poland and Hungary – in attempting to promote and sustain the rule of law among its member states, in particular by beginning to call out domestic regime rule-of-law "backsliding." Ten new states were admitted to the EU in 2004, when "end of history" optimism had not yet disappeared. Others followed. As Ginsburg and Schoppe point out, "[t]he idea that supranational, European rule-of-law principles may need to be enforced *against* a nation-state seemed far-fetched at the time."[78] So far-fetched, indeed, that it appears to have been thought possible that *at the moment of accession* candidates could satisfy the EU that, after bringing their laws and institutions in line with the 80,000 pages of the *acquis communautaire*, they had achieved "stability of institutions guaranteeing democracy, the *rule of law*, human rights and respect for and protection of minorities . . . Membership presupposes the candidate's ability to take on the obligations of membership . . . "[79] The sentence is an anatomists' parody gone wild: "have achieved"? "stability"? "institutions guaranteeing"? Where could any of that have ever been imagined to come from, fifteen years after the collapse of a multinational political order that had systematically denied all those values, had none of those institutions, and rested on the back of long histories where these were rarely among the rules of any of the games played in any local town?[80]

And now things have changed – in some cases, such as Poland (at least until 2023) and Hungary, for the worse. Other acceders (e.g., Bulgaria,

[77] See Chapter 9.
[78] *See* Chapter 5.
[79] Conclusion of the Presidency, European Council in Copenhagen (June 21–22, 1993) at 13, quoted by Peters in Chapter 4.
[80] *See* Martin Krygier, *Introduction*, *in* SPREADING DEMOCRACY AND THE RULE OF LAW? THE IMPACT OF EU ENLARGEMENT FOR THE RULE OF LAW, DEMOCRACY AND CONSTITUTIONALISM IN POST-COMMUNIST LEGAL ORDERS 1 (Wojciech Sadurski, Adam Czarnota & Martin Krygier eds., 2006).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

Romania, Slovakia, and Slovenia) wobble this way and that. The jury is out on whether regional organizations such as the EU can do much to further the rule of law in member states once the authoritarian genie has, as it were, made it back into the bottle. Certainly, Polish and Hungarian "backsliding" in recent years has shocked the system, though the EU has in recent years tried harder and harder to toughen several vertebrae in its own spine.

The picture remains mixed. In her report of volatility, backsliding, and worse in Latin America, Pou Giménez nevertheless rightly insists that

> The fact that democracy has for three decades remained the only road to political and legal authority in Latin America is in itself an immense historical watershed. In general, civil society has been revitalized, there is widespread public recognition of social and cultural pluralism, and the constitutionalism of rights has given the law a centrality it had never enjoyed before in the region.[81]

Ginsburg and Schoppe show that the least tensions occur between TLOs and states within their orbit when the former ask for least. But then their effects are unlikely to be great either. Perhaps all the tension in the EU will prove worthwhile. After all, where the EU has been most active, member states have not done the worst things they might have and indeed not so long ago actually did. Though opponents of the government might be sued and sacked in Poland, no one is killed or jailed. Elections are held and they are free, if not fair. And in Poland, though not Hungary, the government lost an election (an event whose consequences they are vainly trying to undo as I write). Critics come and go. Part of this chapter was written in Budapest, capital of an undemocratic country where the EU is having great difficulty restoring semblances of the rule of law. Its ruler has proclaimed Hungary under his regime an "illiberal state," and he has been true to his word. However, while the Central European University, the parent teaching body of the institute with which I am affiliated, has been kicked out of the country, the members of the CEU Democracy [research] Institute go about their business, which has a lot to do with investigating and criticizing the unruly and undemocratic acts of the local government (and others). This does not happen in Russia, China, Venezuela, and many other rule-of-law miscreant states, unpoliced, or policed by weak regional organizations. There have been no coups in the EU.

[81] *See* Chapter 10.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

But then Poland and Hungary, for all their huffing and puffing, are keen to stay in the club. They abuse it (after the Polish elections of October 2023 one might have to say "abused," though it is too soon to tell), if only because they have drawn heaps of money from it, and hope to get more. Moreover, even though the inveterately abusive Kaczyński might compare the EU to Russia, given the Poles' eons-old (and well-grounded) distrust of Russia, he knew there was a difference, and anyway the Poles have nowhere else to go. His successors don't abuse and don't want to go anywhere else. Orbán hopes to play both sides, as he performs his "peacock dances" at the EU, plays hard to get on Ukraine, but eventually backs down at crucial moments. And the EU slowly, cumbersomely, and uncertainly makes occasional (small) advances. What should we expect, however, as Carlos Closa recently asked,[82] if real heavyweights, such as Germany or France, the largest contributors to EU budgets, were to go rogue, as they might yet do? What pressures would or could the EU apply?

Whatever the answers to such questions turn out to be, a normative question remains: Apart from what rule-of-law-leaning transnational organizations should *expect*, what should they *do*? Is the fate of the rule of law within states any business of anyone outside those states? Tamanaha argues that "it is not acceptable to penetrate state sovereignty for other than the most blatant violations of human rights."[83] It is not clear whether he thinks that, say, the EU's demand that Poland and Hungary honor agreements to observe the rule of law, which they made to enter the organization in the first place, amounts to such an unacceptable penetration of state sovereignty. However, it is clear that several states would find his argument welcome, brandishing not only their sovereignty but their "constitutional identity"[84] as shields against transnational intervention. As Ginsburg and Schoffe point out, "even if they are appalled by how Poland and Hungary . . . behaved, defenders of the traditional view of member states' sovereignty might, as a matter of principle, feel uneasy when the European level enforces quasi-constitutional norms such as the rule of law."[85] And Anne Peters surveys

[82] At the "From Rule of Law Backsliding to A Sustainable Rule of Law" conference, September 21–23, 2023, Radboud University, Nijmegen, The Netherlands.

[83] *See* Chapter 2.

[84] *See* Julian Scholtes, The Abuse of Constitutional Identity in the European Union (2023); Anti-Constitutional Populism pt. IV: EU Responses (Martin Krygier, Adam Czarnota & Wojciech Sadurski eds., 2022); *see also* Chapter 4.

[85] *See* Chapter 5.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

the efforts of international and regional organizations around the world, to supervise constitutional developments in states within their orbits. She reports (presumably local) sentiment "that the international organizations' various techniques of cajoling, persuading, and motivating states to adopt constitutions that embody the rule of law constitute an unlawful intervention into the domestic affairs of the receiving states, a risk of infringement of state sovereignty and national self-determination, or simply unfairness and normative inappropriateness, due inter alia to selectivity and hypocrisy."[86] Peters responds thoughtfully and with nuanced care to such accusations, allowing that there might be something in them but certainly not everything. However, and of course, populist leaders seize upon them as evidence of the malign insensitivity of new transnational "imperialists."

Scheppele disagrees. Transnational law now "increasingly . . . enters into national law itself and modifies (or at least is supposed to modify) the operation of what had been imagined by legal philosophers as a hermetically sealed-off space."[87] Given that national, transnational, and international are inextricably enmeshed, they must be harmonized, lest "legal subjects will be left wondering which apparently binding rule applies to them."[88] The resultant harmonized order Scheppele calls the "rule of law writ large." If nation-states legally subject to such orders seek to object, they are, as it were, hoist by their own petard:

> We can take advantage of the fact that many of the now rogue states are still bound by the membership requirements [of the transnational organizations to which they belong] even as their national autocrats have violated these standards through backsliding. The standards of the transnational organizations can now be enforced by restoring the rule of law writ large. Best of all, since the now backsliding states undertook these transnational obligations of their own accord in a not too distant past, enforcing the standards of these transnational organizations simply holds the backsliding states to standards they once committed to follow at a more democratically robust moment.[89]

Enforcing such standards might even include countenancing "asymmetric rupture: breaking the law to establish the rule of law in recovering democracies."[90]

[86] *See* Chapter 4.
[87] *See* Chapter 7.
[88] *See* Chapter 7. Under PiS, Polish courts and subjects were already in exactly that position in several spheres.
[89] *See* Chapter 7.
[90] *See* Chapter 7.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

I have much sympathy with Scheppele's position, particularly in relation to the European countries we both know best and which have committed to, and benefited hugely from, the agreements they have made. However, I think that to be persuasive the argument needs some more *normative* support (which includes legal support) than mere membership and numbers of entities involved. Certainly (nor is this Scheppele's argument), that support will not come simply from the discovery that "rogue states" deviate from the "formulaic checklists" of old, and of some transnational, bodies. To them, Viktor Orbán already has a well-rehearsed and superficially effective response: "cultures are different, constitutional traditions are different, so there is no single European definition and no single European standard. And if you create a case without these, the result will be not 'the rule of law' but the 'rule of man.'"[91] As we have seen, there is something in the argument. The idea that different constitutional traditions have generated different ways of doing things, and might be driven by different concerns, is both true and the reason why legalistic checklists so often fail to take in inhospitable climes. However, constitutional identity is a concept that can be, and is, easily abused. Blurring the difference between a plausible "margin of appreciation" that allows that cultures are not identical, on the one hand, and a wall of "constitutional solipsism,"[92] on the other, simply enables, and is often intended to enable, authoritarians to do their own thing, whatever be the values to which they claim to adhere. That is why, as Keleman and Pech have argued, "autocrats love constitutional identity"[93] and are actually fond of battling on the terrain of forms and checklists. On the one hand, recent authoritarian-populist regimes around the world have contrived to undermine the ideal of the rule of law with the assistance of hallowed legal forms.[94] It turns out it's not so hard. But if it is, they can play the "constitutional identity" card: "That's not the way we do things here."

Forms of chicanery multiply, whereby one pretends fidelity to formal rules in order to achieve purposes alien to the underlying (and often

[91] Balázs Orbán (@BalazsOrban_HU), X (Jan. 7, 2023, 11:30 AM), https://twitter.com/BalazsOrban_HU/status/1611671705101176833.

[92] Scholtes, *supra* note 84.

[93] R. Daniel Kelemen & Laurent Pech, *Why Autocrats Love Constitutional Identity and Constitutional Pluralism: Lessons from Hungary and Poland* (RECONNECT, Working Paper No. 2, 2018), https://tinyurl.com/a6wuppk8.

[94] *See* Gianluigi Palombella, *The Abuse of the Rule of Law*, 12 Hague J. on Rule L. 387 (2020).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

unwritten) aims, values, practices, and institutions on which the substance of the rule of law was supposed to rest.[95] Moreover, because those aims and values have no weight with these leaders, they can be constitutionally pedantic when it serves their ends,[96] and "constitutionally shameless"[97] when pedantry does not work for them. Given the often-sophisticated legalistic pretences that accompany these subversive practices, conventional partisans of the rule of law have difficulty knowing how to respond. Thus, as Scheppele has observed of Orbán's mock objection quoted above: "Here is Viktor Orbán's approach to the rule of law – making every requirement so detailed that the forest is lost in the trees. He loves checklists because they can always be gamed. But he hates general principles because he violates them all."[98]

But if the rule of law requires that power be tempered so as not to be arbitrary, these gambits are less persuasive. Though particular ways of achieving this result might vary greatly, the rule of law calls for key powers to be checked, balanced, and separated (and then connected). Instead, anti-rule-of-law populists seek to consolidate and concentrate power in their own hands. Where well-tempered power depends on substantial independence of power-adjudicators from power-wielders, such populists increase their dependence. Where one mediates power and calls for a patient filtering of decisions through institutions, the other seeks to make it all personal, unmediated, and unconstrained: it endorses an instantaneous quasi- or pseudodemocracy in which a decision by the leader may become law the next day.

Rule-of-law backsliding should be rejected, not because some item or other in a checklist goes unticked but to the extent it can be shown that the practices in question violate the *point* of the enterprise, which is the reduction of the possibility of arbitrary exercise of power. Among regimes that have undertaken to support the rule of law, legalistic tricks that aid arbitrary power are not sacrosanct elements of "constitutional identity" but violations of it. Indeed, there is point in Scheppele's argument that successor governments might be justified in breaking the law to restore the possibility of the rule of law where it has been

[95] *See* ANDRÁS SAJÓ, RULING BY CHEATING (2022).
[96] *See* Kim Lane Scheppele (@KimLaneLaw), X (Jan. 8, 2023, 2:56 PM), https://tinyurl.com/ye22ywdn.
[97] Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 L. & ETHICS HUM. RTS. 49 (2020).
[98] Kim Lane Scheppele (@KimLaneLaw), X (Jan. 8, 2023, 2:56 PM), https://tinyurl.com/ye22ywdn.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

significantly abused and undermined. However, there is a significant step short of that which it would be wise to try first. This is what András Sajó calls "militant rule of law":

> the aggressive use of tried-and-tested rule of law standards and rules tailored to specific circumstances. Militant rule of law allows for exceptions to the rule of law which are already recognized in rule of law standards and a principled reinterpretation of rule of law precepts. When it comes to reliance on the recognized exceptions of the rule of law, it is vital that these exceptions be temporary, subject to proportionality and independent control.[99]

Standards that Sajó has in mind include intent analysis, reasonableness review, abuse, bad faith, and others in a similar vein. He is expanding his analysis as I write.[100] There's plenty of material to work on in backsliding nation-states.

III The Geopolitical Dimension

Still, however much we tinker with the law, ultimately we must recognize that pressures that both support the rule of law and those that deny it are never all legal. That is a general truth,[101] but particularly in the transnational context there are specific circumstances and pressures quite beyond the powers, intentions, and even domains of concern of the specific actors engaged. One is geopolitics. We would not be discussing this subject but for them.

It has already been stressed in this book and this chapter, and it is worth stressing again, how new all this is. In world-historical terms, the global apotheosis of the rule of law began virtually a moment ago. As Farrall and Halliday point out,[102] though lip service was occasionally paid to it earlier, the rule of law became an agenda item in the UN General Assembly only in 1992.[103] By 2012, it was, also for the first time, the

[99] András Sajó, *Militant Rule of Law*, VERFASSUNGSBLOG (Dec. 23, 2023), https://verfassungsblog.de/author/andras-sajo/.

[100] *See* András Sajó, *Militant Democracy and Not-So-Bad Law* (Democracy Inst. Working Paper No. 2024/21, 2024), https://tinyurl.com/2psw89j6.

[101] *See* Martin Krygier, *Why Rule of Law Promotion is Too Important to Be Left to Lawyers*, *in* WHO'S AFRAID OF INTERNATIONAL LAW 133 (Raimond Gaita & Gerry Simpson eds., 2017); Martin Krygier, *The Ideal of the Rule of Law and Private Power*, *in* RESEARCH HANDBOOK ON THE POLITICS OF CONSTITUTIONAL LAW 14 (Mark Tushnet & Dimitry Kochenov eds., 2023).

[102] *See* Chapter 6.

[103] *See United Nations and the Rule of Law*, UNITED NATIONS, www.un.org/en/ruleoflaw/ (last visited Feb. 20, 2024).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

exclusive subject of a "high-level meeting" of the Assembly, which, in its "declaration on the rule of law at the national and international levels," affirmed "that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations" (even though the Assembly had explicitly begun to register the place of the rule of law in this pantheon only twenty years before, in its forty-sixth year of existence). Over the same period, as Farrall has noted elsewhere, there occurred a

> transformation of the rule of law from curiosity to familiar friend [] in the term's increasing appearance in the Council's resolutions. During the Cold War, rule of law featured in Security Council resolutions a mere handful of times. By contrast, in the nine years from the beginning of 1998 until the end of 2006, the phrase "rule of law" appeared in no fewer than sixty-nine Council resolutions.[104]

Moreover, as we have seen throughout this book, this recent eruption of concern for the rule of law was not confined to the United Nations; it was standard. Whereas in earlier decades, it would be hard to underestimate its global rhetorical significance, from the 1990s and in the first decade of this century it would be hard to exaggerate it. At least at the level of transnational rhetorical endorsement, by the beginning of this century "rule of law" quickly scooped the pool.

So much so, that transnational supply often outpaced domestic demand, indeed stimulated much of it, even took on a life of its own. Of course, the rule of law is notably absent from many of the places and predicaments the UN and TLOs more generally encounter, so there was reason for demand to have been high in any event, but then that absence was already evident for decades before the UN began to talk about the rule of law. There must have been other reasons for its invocation than the need for it, given that that need has been perennial but rule of law only became such an omnipresent hurrah phrase yesterday. And, as many of the chapters in this volume attest, a similar acceleration of interest at the end of the last century can be observed among scores of other international and transnational organizations concerned with scores of different subjects and places and peoples.

Why this occurred just when it did is an intriguing story, including several novel trends that converged around the 1980s: in theories of

[104] Jeremy Matam Farrall, United Nations Sanctions and the Rule of Law 22 (2007).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

development,[105] democratization,[106] economics,[107] and regional governance.[108] These ideas might have stayed in the academy, however, were it not for one world-historical geopolitical development that moved them from theory to practice. Though some general impulse came from the "third wave" of democratization[109] in Latin America and Southeast Asia in the 1980s, the burst of the rule of law into dramatic prominence only came on the unanticipated crest of that "wave": the collapse of European communism.[110]

For none of this occurred in a geopolitical vacuum. Indeed, it is far from clear that it was the irresistible charms of the rule of law that accounted for the recent transnational vogue for it. It was carried along by geopolitical changes that, in the first instance, had nothing particularly to do with it. During the Cold War, the rule of law played no part in the glorifying myths and narratives of one of the two grand competitors, and no role in what Eric Hobsbawm described as "the special house-style [communism] imposed on its successors."[111] And while in the West, by contrast, law and the rule of law were indeed vaunted, sometimes even

[105] *See* F. Charles Sherman, *Law and Development Today: The New Developmentalism*, 10 GERMAN L.J. 1264 (2009); JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS (2006); Deval Desai & Michael Woolcock, *The Politics of Rule of Law Systems in Developmental States: "Political Settlements" as a Basis for Promoting Effective Justice Institutions for Marginalized Groups* 5 (Effective States & Inclusive Dev., Working Paper No. 8, July 2012), https://tinyurl.com/y23p99x4; Kevin Davis & Michael Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895, 945–46 (2008).

[106] Guillermo O'Donnell, *The Quality of Democracy: Why the Rule of Law Matters*, 15 J. DEMOCRACY 32 (2004).

[107] *See* DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006); Stephen Haggard & Lydia Tiede, *The Rule of Law and Economic Growth, Where Are We?*, 39 WORLD DEV. 673 (2011).

[108] *See* Ronald Janse, *Why did the Rule of Law Revive?*, 11 HAGUE J. ON RULE L. 341 (2019).

[109] *See, e.g.*, SAMUEL HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991).

[110] I have sought to explain why this explosion of the global promotion of the rule of law began in the 1990s and could not have occurred earlier, in Martin Krygier, *The Rule of Law After the Short Twentieth Century: Launching a Global Career, in* LAW, SOCIETY AND COMMUNITY: ESSAYS IN HONOUR OF ROGER COTTERRELL 327 (Richard Nobles & David Schiff eds., 2014); revised and updated version published in THE LONG 1989: DECADES OF GLOBAL REVOLUTION 161 (Piotr H. Kosicki & Kyril Kunakhovich eds., 2019).

[111] ERIC HOBSBAWM, THE AGE OF EXTREMES: THE SHORT TWENTIETH CENTURY 1914–1991, at 4 (1994).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

considered national treasures, there were hefty barriers to export since "we" only owned a part of things, and no one thought that was going to change in a hurry. As Farrall and Halliday point out, just as Security Council peacekeeping operations awaited the end of the Cold War,[112] so too, given the competitive struggling and posturing that dominated the world, the rule of law could never be part of any inter and transnational lingua franca. There was no room then for a global career, for the rule of law to be invoked with reverence by international agencies and the great and the good of all types around the globe.

The collapse of European communism, and with it the world-historical communist mission, quite literally changed the "conceptual geography"[113] of the world. In a moment, it appeared to many that the twentieth century's great ideological and systemic struggles were over. And there was a winner. To put it crudely, of the two contestants that had survived World War Two, one of which denied and denounced the rule of law, while the other boasted of it, the former collapsed and the other was left standing. One was out the window; the other came confidently through the door, keen to fill the room and rearrange (and replace) much of the furniture with its own styles and brands. Prominent in all models for refurbishment was the rule of law (with, if the mangled metaphor be allowed, its two partners – democracy and human rights – all rhetorically attached at the hip). As we have seen, the idea, if not the achievement, quickly attained unprecedented global prominence and was proclaimed to have well-nigh universal salience. For once and for a moment it seemed to lack rivals and gained apparently eager constituencies: some because they believed in it; some because it was a condition for other things they wanted, such as admission to hitherto exclusive clubs like the European Union or Council of Europe; some because there was a buck in it; and some for the whole cascade of reasons. Many constituents were happy in every way. For a while.

The career prospects of the rule of law, then, were transformed by the same historical transformations that prompted Francis Fukuyama to ask whether the world had reached or might be approaching the end of history. Around the world, countries were encouraged to join the winning team and adopt its models of democracy, human rights, and rule of law – the last now claimed as central to the others. For some time, the enthusiasms of promoters were reciprocated by promotees as "the rule of

[112] *See* Chapter 6.
[113] Tony Judt, *The Rediscovery of Central Europe*, 119 DAEDALUS 1, 25 (1990).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

law became the big tent for social, economic, and political change generally."[114] The question mark[115] that followed the four words in Fukuyama's famous/notorious provocation was little noticed at the time and did not make its way into his subsequent book.[116] It should have, since the answer seems to be "no." Still, for a while many key liberal notions, central among them the rule of law, seemed, if not at the end, then at least high on the wave, of history.

It was not always so, and it might pass; I am tempted to say it must pass. Indeed, it might well be passing as I write and you read.[117] If geopolitical and transnational forces accounted for the rule-of-law moment, they might also come to account for its passing. The future global career of the rule of law, within nations and among them, might turn out to depend less on people's attachment, or lack of it, to the ideal of the rule of law itself than on what is thought, for whatever reason, of its avatars and homes. The prestige of "the West" was high for a moment after 1989. All sorts of features, real or imagined, attributed to the available option were considered valuable and important to emulate, just because of their provenance, associations, and apparent success appeal. This assumption of virtue by association is unlikely to continue, after these once hallowed sources of influence and prestige have seen their lustre dim in so many aspects – internal, external; national, transnational – justifiably or not.[118] Given all these challenges, one should expect them to be reflected in the future career prospects of the rule of law, both as a cliché with which everyone seeks to be associated and, far more important, as embodying or serving ideals that all should value. Today, after all, it is not only Xi Jinping who believes that "the East is rising and the West is declining."

Quite apart from those transnational actors that might be thought to have their hearts in the right place on this issue, even if their heads wobble about, there are others, and other actors within them, whose hearts appear to be in a different place. The bad news from many sources in this book and elsewhere is that the climate for the rule of law appears –

[114] Agnès Hurwitz, *Towards Enhanced Legitimacy of Rule of Law Programs in Multidimensional Peace Operations, in* Agnès Hurwitz & Kaysie Studdard, Rule of Law Programs in Peace Operations 1, 4 (2005).

[115] Francis Fukuyama, *The End of History?*, 16 Nat'l Int. 3 (1989).

[116] Francis Fukuyama, The End of History and the Last Man (1992).

[117] See the bracing data in Chapter 1.

[118] *See Discrediting Democracy in "Sharp Power" Battle of Ideas*, Democracy Dig. (Nov. 1, 2021), www.demdigest.org/discrediting-democracy-in-sharp-power-battle-of-ideas/.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

nationally and transnationally, and not coincidentally but enmeshedly – increasingly to be turning sour.

Thus, as we have seen, several countries around the world – many of them prominent "beneficiaries" of rule of law programs in the Global North, South, East, and West – are now ruled by illiberal populists who have little time for the traditional *ideals* of the rule of law, even if for many reasons they still claim to be implementing it, albeit in their own way, infused with their own "national characteristics."[119] Indeed, such populists have come to form transnational ambitions and organizations of their own.[120] Politically, they routinely connect the likes of Steve Bannon, Viktor Orbán, Marine Le Pen, Giorgia Meloni, former Australian prime minister (and, I confess, my former student) Tony Abbott, and many other populist worthies, cronies, and supporters. They build transnational organizations, such as the Danube Institute, and exchange illiberal advice. Legally, they indulge in routine "abusive constitutional borrowing," to borrow the title of an excellent recent study.[121]

On the one hand, while these regimes typically flout the ideals and assault the institutions associated with the rule of law – deliberately, systematically, and often together – they vehemently deny that is what they are doing and invest a good deal of effort to pretend they are doing otherwise. They might cheat to do so, but, like hypocrisy, this is still some sort of tribute, for "legal cheating is pretending to be faithful while violating underlying principles. It is not a defiant gesture."[122] Part of the reason for such pretence, as discussed in several chapters in this book, is that these regimes are trying to persuade various transnational promoters (and policers) of the rule of law that their impostures should be taken literally.

On the other hand, those illiberal regimes that pretend to observe the rule of law do not seem much embarrassed when they are caught out and, notwithstanding heaps of rule-of-law-based critique, that does not seem

[119] *See* Anti-Constitutional Populism (Martin Krygier, Wojciech Sadurski & Adam Czarnota eds., 2022).

[120] *See* Jonathan Kuyper & Benjamin Moffitt, *Transnational Populism, Democracy, and Representation: Pitfalls and Potentialities*, 12 Glob. Just.: Theory Prac. Rhetoric 27 (2020); Thorsten Wojczewski, The Inter- and Transnational Politics of Populism, Foreign Policy, Identity and Popular Sovereignty (2023).

[121] Rosalind Dixon & David Landau, Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy (2021).

[122] András Sajó, Ruling By Cheating: Governance in Illiberal Democracy 285 (2023).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

likely to change. For the rhetorical power of the rule of law and professed attachment to its animating values have undoubtedly waned considerably in the last few years. Some of its putative exemplars have let it down, its opponents have muscled up, and its real prospects and significance in the life of nations are coming under varied, sustained, and imminent threats from many familiar and some quite novel quarters.

We are, then, in an ambiguous – one might say, fraught – moment. Even though the term is still everywhere, it's hard to say we see more rule of law in the world. Certainly, inhabitants of Myanmar or Belarus or Afghanistan or Russia or Ukraine or any of the countries discussed in Chapters 7 to 13 of this book have seen little of it recently. In Hong Kong, it is a fast-disappearing memory. In China itself, the term has not disappeared but is embraced within sinister qualifiers like "socialist rule of law with Chinese characteristics."[123] That term is not empty of significant content, but if it has anything to do with tempering power, it is not the power of those who propagate the term. More generally, Anne Peters is right to speak in this volume of "[t]he current backlash against the 'international liberal order' with the rule of law at its core."[124] One might add, following Shaffer and Sandholtz, that this is not merely an international but also, and not coincidentally, a transnational and national phenomenon at the same time.

On the other hand, while the momentum of rule-of-law enthusiasm is already slowing down or at least facing some stiff pressures, its end is not yet in sight or inevitable. The expression still has global presence and rhetorical force. The UN, World Bank, EU, the American Bar Association, and other international organizations still laud the rule of law and expend much sweat and treasure, and sometimes blood, in efforts to bring it about. The programs generated in those times of enthusiasm have not evaporated, though their promoters today appear less confident – a confidence perhaps always unfounded – that they know what they are doing.[125] At least in the West and its appendages, rule of law still remains in the foreground of publicly professed political and legal ideals, with such others as justice, democracy, and human rights, where not so long ago it stood in their shadows.

Whatever settles from all the shocks, challenges, and disappointments will be different from what seemed possible, even likely to some, at the

[123] *See* Rudolph, *supra* note 6; Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 58 VA. J. INT'L L. 306 (2019); *see also* Chapter 13.
[124] *See* Chapter 4.
[125] *See* DESAI, *supra* note 53.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

end of the twentieth century. If these are signs that we might be moving from the end of history to "no one's world"[126] (or to someone else's world), this is certain to be reflected in the international and transnational popularity and career prospects of the rule of law, and the ideals associated with it.

IV Conclusions: Take Your Time

As Yogi Berra sagely cautioned, it is hard to make predictions, especially about the future. Only time will tell, or perhaps more bleakly, "Time will say nothing but I told you so."[127] So many unpredictable factors are involved that the longer-term results must remain uncertain. All the more is this the case when the transnational enters the domain. It is all so vast and so new. Just as it was folly to imagine initial institutional enthusiasms would be quickly vindicated, so we should not be too quick to abandon worthy projects – if that is what we judge them to be – because they have run into predictable, if often unpredicted, bumps in the road.

Time makes a difference in another sense as well, and one that we should take more into account than we typically do. It encapsulates the magnitude of the challenges facing friends of the rule of law, but it might offer some consolation/explanation for the many immediate difficulties their activities have faced. For, apart from institutions and goals, time is an under-understood, or even thought-about, ingredient and variable in all these experiments. Expectations for "growing" and "grafting" the rule of law (metaphors of cultivation are altogether more apt than ever optimistic, can-do ones of "construction" and "building") need to take account of the time one might expect one's seedlings to sprout, even in the best of all possible worlds. For, as Michael Woolcock has observed, development professionals, among them ROL development professionals, always need to ponder whether they are in the sunflower or the oak tree business. It makes a difference:

> If one wants to grow an oak tree, it helps to have both an acorn and a working knowledge of the conditions under which an acorn is most likely to become an oak tree. One also needs to know how long the

[126] Charles Kupchan, No One's World: The West, the Rising Rest, and the Coming Global Turn (2012).

[127] W. H. Auden, *But I Can't, in* Selected Poems 119 (Edward Mendelson ed., rev. ed. 2009).

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015

> germination process is likely to take – in the case of the red oak, upwards of two years from flowering to acorn to sapling. Absent such knowledge, one might reasonably (but incorrectly) infer that, upon seeing no outward signs of life six months after planting the acorn, one's efforts had been in vain. It is only assessment against informed expectations at any given point after planting the acorn that allows one to make accurate inferences regarding success or failure. Needless to say, if one wanted to grow sunflowers instead – which have a wildly different growth trajectory to that of oak trees – one would need knowledge of that trajectory in order to accurately assess the effectiveness of one's horticultural skills.[128]

If one is seeking reliable, institutionalized, well-tempered power – the priceless goal of the rule of law, and not merely within particular nations but throughout the transnational world – it's oak trees all the way down.

[128] *See Guest Post: Michael Woolcock on the Importance of Time and Trajectories in Understanding Project Effectiveness*, DEV. IMPACT (2011), https://tinyurl.com/2f7cfx6j.

Downloaded from https://www.cambridge.org/core. IP address: 18.119.19.18, on 09 Jan 2025 at 15:58:24, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009460286.015