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WELL-TEMPERED POWER: "A CULTURAL ACHIEVEMENT OF UNIVERSAL SIGNIFICANCE"**

When I was still young, and so a long time ago, a remarkable controversy erupted over a book by the eminent British historian, ex-communist, unorthodox Marxist, and peace activist, E. P. Thompson. The work, *Whigs and Hunters*,[1] was a close reconstruction, from masses of fragmentary evidence, of the origins, social meaning, and significance of the so-called Black Act passed by the United Kingdom Parliament in 1723. The Whigs of the title governed Britain for much of the eighteenth century, the hunters were mainly forest dwellers and farm labourers who caught game and caused other disturbances in parks and forests owned by the King, nobles and gentry. The "Black" of the Act referred to the blackface camouflage used by these hunters/poachers ("Blacks") on the job, and the Act "at a blow" created around fifty new capital offences. It provided, Thompson writes, "a versatile armoury of death apt to the repression of various forms of social disturbance."[2]

As one might expect from one of the most distinguished Marxist historians of his generation, Thompson revealed ways in which this and other laws were made and used by the government and those whose interests, particularly economic interests, they

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1 Edward Palmer Thompson, *Whigs and Hunters. The Origin of the Black Act* (London: Allen Lane, 1975).
2 *Ibid.*, 191–92.

served. In a conflict between "users", often asserting customary rights and "exploiters", "petty predators" and "great predators" who ignored those rights, the Act was crafted and employed, he argued, by the latter, "men who had developed habits of mental distance and moral levity towards human life, or more particularly towards the lives of the "loose and disorderly sort of people".[3]

Had Thompson stopped there (which he almost did, given that the offending section starts at page 258 of 269 and according to his wife was added at her prompting as an "afterthought"[4]), his readers could have emerged edified and instructed but not surprised by the direction the narrative took. Ruling classes exploited the ruled; who knew? However, to the dismay of erstwhile comrades and the (occasionally pleased) surprise of many others, unused to Marxist books ending in this way, Thompson concluded his exposé of ruling class manipulations with some immediately notorious reflections on the rule of law. At their heart was his insistence that "there is a very large difference, which twentieth-century experience ought to have made clear even to the most exalted thinker, between arbitrary extra-legal power and the rule of law."[5] Notwithstanding all the distasteful legal and extra-legal machinations and manipulations he had chronicled,

> the notion of the regulation and reconciliation of conflicts through the rule of law - and the elaboration of rules and procedures which, on occasion, made some approximate approach towards the ideal - seems to me a cultural achievement of universal significance.[6]

A page later, he explains that:

> I am insisting only upon the obvious point, which some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath the law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims,

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3 *Ibid.*, 196.

4 In a letter to Daniel H. Cole, cited in Daniel H. Cole, "An Unqualified Human Good": E.P. Thompson and the Rule of Law," *Journal of Law and Society* 28, no. 2 (June 2001): 183.

5 Thompson, *Whigs and Hunters,* 264–65.

6 *Ibid.*, 265

seems to me an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretentions of power continue to enlarge, a desperate error of intellectual abstraction.[7]

He reinforces both these claims – "unqualified good" and "cultural achievement of universal significance" – on the next page:

> if the actuality of the law's operation in class-divided societies has, again and again, fallen short of its own rhetoric of equity, yet the notion of the rule of law is itself an unqualified good.
>
> This cultural achievement – the attainment towards a universal value …[8]

Few who had learnt from him over the years were happy with these conclusions, least of all coming from *him*. Friedrich Hayek could be expected to say such things but who in the mid-1970s, and on the Left, cared about him? But comrade Thompson!

Thompson was excoriated by former colleagues for this paean to the rule of law, and, indeed, excommunicated by a former colleague of mine: "The nub seems to be that Thompson is not a Marxist historian."[9] A harsher condemnation from within the tribe is hard to conceive. After all, as one commentator censoriously observed, Thompson's "position threatens, of course, to slide into a wholesale acceptance of the Rule of Law."[10] That was not praise. A more recent writer, more sympathetic to Thompson, aptly summed up the puzzled reaction of contemporaries: "He [Thompson] had shown throughout the book – convincingly and repeatedly – that the law was being used to the benefit of "the ruling class", even as the composition of that class was changing ... Why, then, did he turn around at the end of the book and call the rule of law "an unqualified human good?"[11]

For these critics were confident that the rule of law was neither universal nor much of an achievement, still less an unqualified good. Not universal, since after the

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7 *Ibid*., 266.

8 *Ibid*., 267

9 Adrian Merritt, "The Nature of Law: A Criticism of E.P. Thompson's Whigs and Hunters," *British Journal of Law and Society* 7, 2 (1980): 210.

10 Hugh Collins, *Marxism and Law (*Oxford University Press, 1996), 144.

11 Nancy Lee Peluso, "Whigs and hunters: the origins of the Black Act, by E.P. Thompson," *The Journal of Peasant Studies* 44, no 1 (2017): 310.

revolution there would be no place for it and, on some views (such as those of the Soviet Marxist, E. B. Pashukanis, doyen of Soviet law in the 1920s, liquidated as a "Trotskyite saboteur" in 1937),[12] before capitalism there *had* been no place for it. Not such an achievement, since it was an instrument and ideological crutch of the bourgeois order. And certainly no unqualified good. Although with the waning popularity and then the collapse of the Soviet experiment, the rule of law might need to be tolerated, perhaps even preferred to some alternatives, i not was certainly not to be applauded.[13] On the contrary, as Hugh Collins explained rather late in the day, "[t]he principal aim of Marxist jurisprudence is to criticize the centre piece of liberal political philosophy, the ideal called the Rule of Law".[14] And so Thompson was rebuffed, rebutted and rebuked, by people half his size.[15]

In those days, I was about the only person I knew who found these pages attractive, but then I was not a Marxist. Today, I no longer know many Marxists, and of course the rule of law has had multitudes of supporters in recent decades. However, the views of Thompson's critics still find echoes, albeit from very different ideological starting points. In Orbán's Hungary, Kaczyński's Poland, Modi's India, Chávez' and Maduro's Venezuela, Duterte's Philippines, Bolsonaro's Brazil, Obrador's Mexico, Netanyahu's Israel, Trump's United States, Putin's Russia, and many other places, there appears to be little enthusiasm – at least from those in power – for the "imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims." This time, however, these sentiments come less from the Left than from the Right.

I could draw upon examples from many parts of the world, but I will focus on Europe, which I imagine is of most relevance to my immediate audience. In recent

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12 Evgeny Pashukanis, *The General Theory of Law and Marxism* (London: Routledge, 2017).

13 I discuss these claims at length in "Marxism and the Rule of Law: Reflections after the Collapse of Communism," *Law & Social Inquiry* 15, no. 4 (1990). That discussion in turn caused some controversy. See the debate in the same issue at 665–730.

14 Hugh Collins, *Marxism and Law* (Oxford: Oxford University Press, 1996).

15 This paragraph is taken from my "False Dichotomies, True Perplexities, and the Rule of Law", in *Human Rights with Modesty: The Problem of Universalism*, ed. András Sajó (Dordrecht: Springer, 2004), 252. See Collins, *op. cit.*; Bob Fine, *Democracy and the Rule of Law. Liberal Ideas and Marxist Critiques* (Pluto Press, 1984); Morton J. Horwitz "The Rule of Law: An Unqualified Human Good?" *Yale Law Journal* 86 (1977): 561; Merritt, "The Nature". There is a later and more sympathetic discussion of Thompson's claims and the controversy they caused among the believers in Cole, "An Unqualified."

years, there have been continual struggles between EU institutions, on the one hand, which claim that the rule of law is a fundamental pan-*European* value which they have a right and responsibility to uphold, and leaders and their followers in several countries, on the other, who insist that it is not such a value, or that it is not *their* fundamental value, or that it must be subordinated to other, more important values, or that they honour it, but in their own, sovereign, nationally and culturally appropriate ways. Thus, we learn from a recent article that in Hungary,

> the rule of law was described as a "buzzword" by the country's justice minister; a fiction by a Fidesz MP; and a "magic word" by the Fidesz-KDNP Delegation to the European Parliament. Not to be undone, a judge from Hungary's (captured) constitutional court, has presented the rule of law "as a normative yardstick" which is little more than an empty nineteenth century ideal and a political joker [sic] for all purposes.[16]

One needn't look far within governing circles in Poland, and many other places, to find similar sentiments. A rationale was provided by the late Polish activist and MP, Kornel Morawiecki, father of the present Prime Minister. In November 2015, defending the President's unconstitutional first move (of many) in taking over the Constitutional Tribunal, by refusing to appoint three validly selected judges and appointing three government appointees, he explained:

> The law is an important thing, but it is not holy … Above the law is the good of the Nation! If the law disturbs that good, then it is impermissible for us to regard it as something we cannot touch and change. I am saying – the law must serve us. Law which does not serve the nation is lawlessness.[17]

This explication received an extended standing ovation from all the government parliamentarians in the Polish *Sejm*, the opposition having left in protest. A few months

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[16] Laurent Pech, "The Rule of Law as a Well-Established and Well-Defined Principle of EU Law", *Hague J Rule Law* 14, (June 2022): 128.

[17] "Kornel Morawiecki w Sejmie: Nad prawem jest dobro Narodu! "Prawo, które nie służy narodowi to bezprawie!" Reakcja? Owacja na stojąco," *Wspólnie brońmy Polski i prawdy*, listopada, 26, 2015, https://wpolityce.pl/polityka/273101-kornel-morawiecki-w-sejmie-nad-prawem-jest-dobro-narodu-prawo-ktore-nie-sluzy-narodowi-to-bezprawie-reakcja-owacja-na-stojaco-wideo

later, when both the (as yet un-"reformed") Constitutional Tribunal and the Supreme Court sought to resist a raft of unconstitutional measures taken against them by his government, the actual ruler of Poland, Jarosław Kaczyński, himself a doctor of laws, is reported to have said without any apparent trace of irony,, "We are going to settle this matter … We will not permit anarchy in Poland, even if it is promoted by the courts."[18]

However, Kaczyński did not claim that real, authentic rule of law was a bad thing. Like so many modern populists once they gain power,[19] he claims to be delivering the real deal. And like them, though he cheats often, his government pretends to be reforming the existing legal order to restore the rule of law. Often indeed they employ a legalistic hyper-scrupulous legalism to undermine the rule of law itself, but in its name. As one Polish writer has observed:

> Everything [in Poland, with regard to the judiciary] seems to happen on the basis of some legal provision or other, and in case any are missing PiS will enact something overnight, in a trice. And yet we sense that in fact it is happening by force, contrary to the constitution and to the spirit of the laws, to the principles accepted by civilized people.[20]

These regimes typically deny that they have any intention of ignoring law or undermining the rule of law properly understood. Rather, the line is that they respect it in their own *echt* (though German words are suspect) national sovereign ways, not on the basis of alien pan-European dictates. Even if they concede that the rule of law is a European value that new member states of the EU signed up to respect, they insist that how they manifest that respect is their own business, to be handled in their own ways, according to their own traditions, values, institutional arrangements and practices. Criteria for adequate manifestation of such respect must come from inside not out. As Orbán recently insisted, while claiming to respect Hungarian rule of law, the EU "rule

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[18] "Kaczyński Announces Aim to Change Polish Constitution," *Radio Poland*, May, 2, 2016, http://archiwum.thenews.pl/1/9/Artykul/251137,Kaczynski-announces-aim-to-change-Polish-constitution

[19] Martin Krygier, Adam Czarnota, and Wojciech Sadurski, eds., *Anti-Constitutional Populism* (Cambridge: Cambridge University Press, 2022).

[20] Łukasz Bojarski, **"**Bez żadnego trybu," *Dziennik Gazeta Prawna*, 22, May, 15, 2018, https://prawo.gazetaprawna.pl/artykuly/1123347,brak-podstaw-prawnych-do-dzialania-organow-w-polsce.html

of law" procedure … is a serious nail in the coffin of the EU that should be pulled out as soon as possible!".[21]

Thompson was not a philosopher. His arguments do not march in cumulative succession, one building upon and strengthening the other. He moves back and forth between a number of themes, in a fashion more literary than logical, rhetorical than rigorous. And yet I have found myself drawn back to these eleven pages time and again. They figured in many courses I have taught over decades, and in several articles I have written.[22] I think they can help throw some light on current controversies. In any event, I propose to enlist them in that effort. In particular, I will seek to draw out some implications of his claim that the notion of the rule of law is "a cultural achievement of universal significance." I will not here explore his allied claim that it is an "unqualified human good." Though I have sympathies with the sentiment, I know few unqualified goods. A cultural achievement of universal significance is quite enough for me.

I do not claim that Thompson would endorse everything I say, or even my interpretations of everything he says, and in fact I don't agree with everything he says. However I think he is a deeply perceptive and powerful source of inspiration. Certainly he has inspired me. In what follows I will try to identify some elements of his brief discussion of the rule of law that deserve consideration, emulation and development, if also some amendment. What follows are my views, but they are developed from consideration of what I take to be valuable in his.

I . THE RULE OF LAW

However much they differ in their answers, when lawyers and indeed most people talk about rule of law, they typically start with some definition, specification, model, or checklist of particular legal institutions, or legal principles, or formal (and sometimes substantive) elements of legal rules.

[21] Balázs Orbán, "The 'rule of law' procedure is in fact disintegrating the whole European Union," X, January, 7, 2023, https://twitter.com/BalazsOrban_HU/status/1611671705101176833

[22] Some of which, until I looked, I forgot having written. There might be more. See, eg. Martin Krygier, "Rządy prawa: kulturowe osiągniecie o znaczeniu universalnym", *Res Publica*, IV no. 12 (1990); Krygier, "False Dichotomies"; "The Rule of Law between England and Sudan: Hay, Thompson, and Massoud," *Law & Social Inquiry* 41, no. 2 (Spring 2016).

Thompson by contrast starts elsewhere, with a valued *accomplishment*. Indeed, far from identifying the rule of law, as he found it in eighteenth century England, with any particular checklist, recipe book, or template of legal and institutional hardware, he expressed disdain for many of the particular institutions he was discussing. The Black Act itself was "a bad law, drawn by bad legislators, and enlarged by the interpretations of bad judges."[23] On his interpretation, it was spawned by an ascendant and obnoxious ruling Whig oligarchy "which created new laws and bent old forms in order to legitimize its own property and status",[24] "inventing callous and oppressive laws to serve its own interests."[25] More generally:

> The law when considered as institution (the courts, with their class theatre and class procedures) or as personnel (the judges, the lawyers, the Justices of the Peace) may very easily be assimilated to those of the ruling class.[26]

Thompson did not identify the rule of law with any of these laws and institutions. Instead, he began with ends rather than means, by stressing the "obvious point" that "there is a difference between arbitrary power and the rule of law." On this account, then, the rule of law is what in another context the sociologist Gianfranco Poggi called an "insofar as reality".[27] It exists insofar as "the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims" is achieved. It is such an *achievement,* not any particular array of legal bits and pieces that might (or might not) achieve it, which he characterised as the rule of law. His approach, in other words, is what I have elsewhere called *teleological,* starting with the point of the enterprise, rather than *anatomical,* stipulating elements taken to form some legal configuration to be anointed with the title, rule of law.[28]

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23 *Ibid.,* 267.
24 *Ibid*.
25 *Ibid.,* 265.
26 Thompson, *Whigs and Hunters,* 260.
27 Poggi coined the phrase to describe Durkheim's conception of society as not just a random collection of individuals but something that exists insofar as these individuals share 'manières d'agir et de penser'. See Gianfranco Poggi, *Durkheim* (New York: Oxford University Press, 2000), 85.
28 For the distinction, see Martin Krygier, "The Rule of Law: Legality, Teleology, Sociology", in *Relocating the Rule of Law*, eds. Gianluigi Palombella and Neil Walker (Oxford: Hart, 2008).

His is a good way to start. The rule of law is not self-justifying, nor is it like a painting or piece of music, to be valued for the intrinsic aesthetic or technical fineness of its composition. Rather, the rule of law is an answer to a question, a solution to a problem. Purported solutions need to be matched to real problems in real circumstances, not the other way around. Given the variety of histories, traditions, institutions, beliefs and practices we inherit, and circumstances we encounter, what in particular it takes to solve such problems will vary.

Questions precede answers to them. Only *after* we come to a view on what the problem is, why we don't want it, and then what a solution might do to help solve it, does it make sense to ask where specifically to look, for what, and what we might find, to do that, in the particular circumstances that do confront us, and others that might.

What, then, is the rule of law problem? Thompson argued, as multitudes over millennia have[29] and so do I, that the central problem which we want the rule of law to deal with is arbitrary exercise of significant power. Arbitrariness is not the only thing we don't want yoked to power, but it is significant, and countless thinkers have taken its reduction to be the particular task of the rule of law. Other problems, other solutions. For arbitrary power is obnoxious. Opportunities to exercise it should be minimised. Easy to say; hard to do. One resource, commended over millennia, has been the rule of law. Terms vary, but the idea is exceedingly old.[30]

Unfortunately, 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

[29] See John Philip Reid, "In Legitimate Stirps: The Concept of "Arbitrary," the Supremacy of Parliament, and the Coming of the American Revolution", *Hofstra Law Review* 5, no. 3 (1977).

[30] See David M. Beatty, *Faith, Force and Reason. An Armchair History of the Rule of Law* (University of Toronto Press, 2022); Fernanda Pirie, *The Rule of Laws. A 4,000-Year Quest to Order the World*, (Profile Books, 2022); Gerald Postema, *Law's Rule*, (Oxford University Press, 2023), chapter 1; John Phillip Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries*, (DeKalb: Northern Illinois University Press, 2004); Julian Sempill, "Ruler's Sword, Citizen's Shield: The Rule of Law & the Constitution of Power," *Journal of Law and Politics*, 31 (2017).

big grasping hands of small numbers. Often despotism is simpler,[31] unruliness easier still,[32] the latter often leads to the former,[33] and the two frequently co-exist.[34]

Arranging power, so that it is not available for arbitrary exercise, is not one task, nor is it simple. It is not one, since the particular sources of arbitrary power, the circumstances in which it is amassed and wielded, the technologies – including institutional technologies – apt for any particular incarnation will vary. It is not simple, because reducing the possibilities of arbitrariness in the exercise of power takes a lot of power, and not everyone has it or can arrange and deploy it to good effect. It requires 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.[35] So, world-and-history-wide, a sturdy regime of power not given to arbitrary eruptions and interruptions has always been exceptional. Where realised in reasonable measure, something significant has been achieved, arguably against the grain of human affairs.

II A CULTURAL ACHIEVEMENT

What *kind* of achievement is that? Typically and unsurprisingly, the rule of law is thought of as a *legal* achievement, to be accomplished by well-ordered legal arrangements. After all, it's the rule of *law* we are talking about. But as we have seen, though he too thinks law is crucial for the achievement, Thompson several times calls it something else, a *cultural* achievement. What could that mean? He gives some clues.

We have already seen that he did not start from particular legal institutions but from a valued state of affairs, and though he stressed that it was a legal accomplishment he did not attribute it to any particular legal institutional arrangements. More was

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31 See Montesquieu, *The Spirit of the Laws*, (Cambridge University Press, 1989), 63.

32 See Thomas Hobbes, *Leviathan*, Introduction by J. C. A. Gaskin, (Oxford University Press, 2023), chapter 13.

33 See John Locke, *The Second Treatise on Government*, ed. C. B. Macpherson, (Hackett Publishing, 1980), chapter XI; Philipe Nonet and Philip Selznick, *Law and Society in Transition. Toward Responsive Law*, (Routledge, 1978), 36–37; 39; 44.

34 See Daron Acemoglu and James A. Robinson, *The Narrow Corridor. How Nations Struggle for Liberty*, (Penguin Books, 2020), 341 – on 'paper Leviathans'.

35 See Heinrich Popitz, *Phenomena of Power. Authority, Domination, and Violence*, (New York: Columbia University Press, 2017), 41-42.

involved. Thus, when he acknowledged that the specific institutions of eighteenth century English law could easily and rightly be seen as instruments of a ruling class, he went on: "But all that is entailed in "the law" is not subsumed in these institutions."[36] So what else was there?

He sets some store by the "forms of law". They are important in themselves, he thinks, for "It is inherent in the especial character of law, as a body of rules and procedures, that it shall apply logical criteria with reference to standards of universality and equity."[37] Already there is some cultural element here, since these criteria must be learnt, thought about and applied. But who would take them seriously and why, particularly if they might thwart powerful interests?

Well, those involved in the administration of the law, what has been called the "legal complex",[38] might be acculturated to do so. According to Thompson, "[i]n the case of an ancient historical formation like the law, a discipline which requires years of exacting study to master, there will always be some men who actively believe in their own procedures and in the logic of justice. The law may be rhetoric, but it need not be empty rhetoric. Blackstone's *Commentaries* represent an intellectual exercise far more rigorous than could have come from an apologist's pen."[39] As Karpik, Halliday and their collaborators, and Polish judges and lawyers in recent years, have shown, there is considerable evidence for this claim, particularly in relation to civil and political rights (and protection of legal forms). Still, to adapt Stalin, how many divisions do lawyers have?[40] Not enough, on their own.

But they are not always on their own. In England, Thompson insists, law was not merely a bunch of thunderbolts thrown by Whig oligarchs from on high, but was deeply embedded in everyday ways of life themselves, "often a definition of actual agrarian *practice,* as it had been pursued "time out of mind" … deeply imbricated within the very basis of productive relations which would have been inoperable without this

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36 Thompson, *Whigs and Hunters,* 260.

37 *Ibid.*, 262.

38 See Lucien Karpik and Terry Halliday, "The Legal Complex," *Annual Review of Law and Social Science* 7 (2011).

39 Thompson, *Whigs and Hunters,* 263.

40 See Pascal Tréguer, "History of the Phrase "How Many Divisions Has the Pope?", *World Histories*, accessed January 6, 2023, https://wordhistories.net/2019/08/23/how-many-divisions-pope/

law."[41] Law was not merely a matter of commands which one needed to know how to obey or avoid, but rather sources of felt entitlement and, when thwarted, grievance. For the law did not inhabit a vacuum. At least in eighteenth century England, "this law, as definition or as rules (imperfectly enforceable through institutional legal forms), was endorsed by norms, tenaciously transmitted throughout the community."[42]

This is a key observation. Even if Hobbes was right that "covenants, without the sword, are but words and of no strength to secure a man at all,"[43] swords are not enough for the rule of law. Particularly since those with most power typically have the sharpest swords. But in some cultures, cultural frames and content – traditions, norms, and other sources of social imaginaries – exercise (often invisible) framing, channelling, limiting, constituting influence over ways of thinking, acting, feeling, imagining. These are the sorts of cultural achievements that Thompson described. On the one hand, much of the past remains present even though unbidden and unnoticed (*especially* where unnoticed) but just there, as the result of age-old accretion, becoming "second nature." On the other, the present-past continually changes, partly because much that was past is forgotten or rejected, but also often as a result of deliberate additions, the acceptability of which in turn is to varying extents aided and limited by what stays around of what has gone before. Neither past nor present is fully sovereign.[44]

These various cultural strands – lawyers' consciousness, popular normative assumptions and understood practices – vary in strength and pervasiveness between and within societies and over time. In some societies, few have what H.L.A. Hart called an "internal" attitude to law, that treats it as "as a general standard to be followed by the group as a whole." [45] It is widely regarded something to be exploited or avoided, used or abused. "Informal practices" not only exist, as they do everywhere, but often

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41 Thompson, *Whigs and Hunters,* 261.

42 *Ibid.,* 261.

43 Thomas Hobbes, *Leviathan,* Introduction by J. C. A. Gaskin, (Oxford University Press, 2023), chapter 17.

44 See Martin Krygier, "Law as Tradition", *Law and Philosophy* 5 (1986); "The Traditionality of Statutes," *Ratio Juris*, 1, no. 1 (1988); "Tradition," *Dictionnaire Encyclopédique de Théorie et de Sociologie du Droit,* (1988); "Thinking Like a Lawyer," in *Ethical Dimensions of Legal Theory,* ed. Wojciech Sadurski (Leiden, The Netherlands: Brill, 1991); "Too Much Information," in *A Cosmopolitan Jurisprudence: Essays in Memory of H. Patrick Glenn*, ed. Helge Dedek (ASCL Studies in Comparative Law. Cambridge: Cambridge University Press, 2021).

45 See H. L. A. Hart, *The Concept of Law,* (Oxford University Press, 1961), 55.

contradict or ignore or supplement or replace law.[46] But where such strands are intertwined and in sync with each other, culture matters.

This remains true, even where law works, as it so often does, to serve those with more power than those with less. Marxists were familiar with the idea that law supports ruling classes not simply as their sharp or blunt sword but - full of handsome and self-justifying words as it typically is - as legitimating *ideology.* Thompson accepts, indeed emphasises these ideological components, but gives them a twist. For he insists that as ideology, law is two-edged. To be effective in legitimating power an ideology must be plausible, both to those subject to it and even to those who benefit from it. As for the former,

> it is not often the case that a ruling ideology can be dismissed as a mere hypocrisy; even rulers find a need to legitimize their power, to moralize their functions, to feel themselves to be useful and just. In the case of an ancient historical formation like the law, a discipline which requires years of exacting study to master, there will always be some men who actively believe in their own procedures and in the logic of justice. The law may be rhetoric, but it need not be empty rhetoric.[47]
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> And though those in power used the law for their purposes, this is not the same thing as to say that the rulers had need of law, in order to oppress the ruled, while those who were ruled had need of none. What was often at issue was not property, supported by law, against no-property; it was alternative definitions of property-rights … For as long as it remained possible, the ruled - if they could find a purse and a lawyer - would actually fight for their rights by means of law; occasionally the copyholders, resting upon the precedents of sixteenth-century law, could actually win a case. When it ceased to be possible to continue the fight at law, men still felt a sense of legal wrong: the propertied had obtained their power by illegitimate means.[48]

And so, even though it was not false to identify law as "ideology" and "rhetoric", those very characteristics made it possible for law occasionally to trouble the powerful and enable the powerless.

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46 See e.g., Alena Ledeneva, *Russia's Economy of Favours, (*Cambridge University Press, 1998); Alena Ledeneva, *How Russia Really Works. The Informal Practices that Shaped Post-Soviet Politics and Business,* (Cornell University Press, 2006).

47 Thompson, *Whigs and Hunters,* 264.

48 *Ibid.*, 261.

At least in eighteenth century England, Thompson insists, though the law was full of ruling class rhetoric, "so far from the ruled shrugging off this rhetoric as a hypocrisy, some part of it at least was taken over as part of the rhetoric of the plebeian crowd, of the "free-born Englishman" with his inviolable privacy, his *habeas corpus,* his equality before the law."[49] Thompson was aware that English public culture in the eighteenth century was particularly law-suffused, in comparison with earlier ages (where, for example, religion was more important) and with other societies where laws might have little cultural resonance.[50] So while some passages do sound as though these cultural supports for the rule of law inhere in law simply because it is law, he also concedes that he does "not know what transcultural validity these reflections may have."[51]

This is an important concession, even though he does not put enough weight on it, and some of his reflections seem more general than they should. But acknowledgment of variation is suggested by his talk of *cultural* achievement. There are, we know, times and places where the notion that power should be tempered by law is weak or non-existent, and/or other ideologies than law prevail, and/or legal ideologies are purely instrumental and betray no sense that law might be, should be, binding on those who make it and benefit from it. And, as we have seen, cultural assumptions and practices are of many sorts. All these things vary, and in many circumstances the rule of law is hard to achieve, even to conceive. Certainly, given what is pitted against the achievement, one cannot rely on it happening naturally, nor can one rely on law alone, nor can one always rely on culture to support the law, still less the rule of law. There is, then, no necessity that the rule of law will be supported by culture in such ways. In principle, it is as possible that the law will be undercut by inconsistent norms, or overwhelmed by more powerful ones. But it is also possible that law and cultural norms reinforce each other, and where that is the case, something significant is happening.

And here I think we need to attend to one word in Thompson's discussions, which I believe has gone unnoticed. At least, after over 40 years of reading and teaching these 12 pages, and writing about them, I have only noticed it now. Typically, the conclusion

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49 *Ibid.,* 264.
50 *Ibid.,* 262-64.
51 *Ibid.,* 263.

to *Whigs and Hunters* is taken to be a full-throated praise of the rule of law *itself,* and of course it is that. However, when he writes of the rule of law as a cultural achievement, he several times focuses not on the actual achievement of the rule of law itself, but on what he calls the *notion* of it. Thus, he remarks, "Turn where you will, the rhetoric of eighteenth-century England is saturated with *the notion of law*."[52] Again, it is "*the notion* of the regulation and reconciliation of conflicts through the rule of law - and the elaboration of rules and procedures which, on occasion, made some approximate approach towards the ideal – [that] seems to me a cultural achievement of universal significance," When we see his despised Whigs manipulating the law, "we feel contempt for men whose practice belied the resounding rhetoric of the age. But we feel contempt not because we are contemptuous of *the notion* of a just and equitable law but because this notion has been betrayed by its own professors."[53]And finally, while Thompson is usually remembered for saying that "the rule of law" is a universal good, he also says that it is "*the notion* of the rule of law [that] is itself an unqualified good."

Arguably, the notion of the rule of law is as important as the thing itself, or at least a necessary element of it. In many societies and cultures, those whose power matters most, and to whom power matters most, simply cannot *imagine* that theirs should or could be tempered.[54] It has, for example, been argued by scholars that for most of their history neither China[55] nor Russia[56] knew the notion that law might temper rulers' power, still less that it should. When known it was rejected, at least by those with power. In many cultures, the role of law is to help rulers impose "order" or "tranquillity."[57] None of this is past history.

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52 Thompson, *Whigs and Hunters,* 263. In all these references to 'notion', the italics are mine.

53 *Ibid.*, 268.

54 'For my friends everything. For my enemies the law,' attributed to Oscar R. Benavides, President of Peru 1933-1939. And see Richard Pipes, *Russia under the Old Regime* (Penguin, 1974); Pirie, *The Rule of Laws,* 2022, chapter 3 (on Imperial China).

55 Pirie, *The Rule of Laws,* 2022.

56 Pipes, *Russia under the Old,* 1974.

57 See Nick Cheesman, *Opposing the Rule of Law. How Myanmar's Courts make Law and Order* (Cambridge University Press, 2015); Nick Cheesman, "Law and Order as Asymmetrical Opposite to the Rule of Law," *Hague Journal on the Rule of Law* 6 (2014); Donald C. Clarke, "Order and Law in China", *GWU Legal Studies Research Paper, GW Law School Public Law and Legal Theory Paper* 52 (August 2020); Moritz Rudolf, "Xi Jinping Thought on the Rule of Law," *Stiftung Wissenschaft und Politik Comment 28* (April 2021).

Consider this telling epitome of the long-lived Russian legal tradition: "Count Benckendorff, the chief of police under Nicholas I, once said: "Laws are written for subordinates, not for the authorities." As a logical consequence, laws did not need to be made public in order to go into effect. Those who broke the law would find out anyway".[58] Clearly when Benckendorff spoke of laws being written for subordinates, he did not mean "for their sakes", or "for their protection, guidance and use." The Russian tradition is particularly striking in its starkly top-down, instrumental view of law, but it is far from unique. More rare, indeed, are political and legal cultures where laws, or a substantial proportion of them, *are* supposed to be written for the protection, guidance and use of citizens, where this is widely expected to be the case and thought properly to be so, to varying extents by both rulers and ruled. To the extent that such "notions" are alive in a society, the rule of law gains often invisible but significant cultural support.

The early history of my own country, Australia – from penal colony to a free society (for white settlers) in the space of some 50 years – cannot be understood without recognising that it was not just convicts who were transported to the other end of the world, but particular ideas and ideals about the legal rights of "native born Englishmen" that they (and their rulers) carried "as part of their cultural baggage."[59] Central to that baggage was belief in the rule of law, that it should be respected by their rulers and that it could and should form the basis of constraint on and challenge to these rulers. "A cluster of ideas known as the rule of law provided the major institutions, arguments, vocabulary and symbols with which the convicts forged the transformation."[60] Convicts fought battles for status and recognition in terms of their entitlements under the law, believed that the rule of law should apply to them, insisted that the authorities should respect it, demanded rights that they believed flowed from it. A great deal flowed from these beliefs. Convicts were rather liberally granted legal rights; and they made use of them, often to good effect. When they won, it was because their opponents'

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58 Stefan Hedlund, "Can Property Rights Be Protected By Law?" *East European Constitutional Review* 10, no. 1 (Winter 2001), 50.

59 David Neal, *Rule of Law in a Penal Colony* (Cambridge University Press, 1991), xi. Neal's argument was heavily influenced by *Whigs and Hunters,* and mine in turn by Neal's.

60 *Ibid.*, 62.

hands were tied. They too, after all, had the same baggage in their heads. And even where they didn't, the courts often did, insisting on their independence under British law, and the subordination of the apparently (and in many ways really) autocratic governors to that same law.

It didn't have to be like this. What if the convicts and their Governors had come from Russia? There would have been fewer tricky arguments making their way through the courts, about the legal rights of free-born Russians. Indeed the penal colony would likely not have had - from the very beginning – courts in which convicts could sue their masters, and oftentimes win, and this for two reasons: courts would not have been provided, and had they been few people would have thought to use them. There would have been no fuss about trial by jury, still less about who had a right to serve on juries. Nor would the Governors have constantly had to battle against prickly judges, conscious of their independence and attached to their traditions, or free settlers against far-too-smart ex-convict ("emancipist") lawyers, who were often able to best them in court.

Of course, not everyone benefited equally from that law. The tragedy of Australia's Aborigines, about which I have written elsewhere,[61] had many sources and was indeed overdetermined, but it was without doubt the harshest example of the "human blindness" that was also part of the cultural baggage that English colonists brought with them. Far from undermining Thompson's argument, however, this poignantly confirms its two-pronged point: the rule of law *is* a cultural achievement, not a matter simply of legal rules and institutions (which theoretically were for some time the same for Aborigines and whites). In England itself, the haves came (and commonly still come) out ahead, and the notion of the rule of law was unevenly achieved. In relation to Australian Aborigines, the cultural ground for that notion was dramatically infertile,

[61] Martin Krygier, "Letter from Australia. Neighbours: Poles Jews, and the Aboriginal Question," *East Central Europe/L'Europe du Centre Est. Eine wissenschaftliche Zeitschrift* 29, no. 1–2 (2002); Krygier, "False Dichotomies"; Martin Krygier, "The Grammar of Colonial Legality: Subjects, Objects, and the Australian Rule of Law," in *Australia Reshaped. 200 Years of Institutional Transformation*, eds. Geoffrey Brennan and Francis G. Castles (Cambridge: Cambridge University Press, 2002); Martin Krygier & Robert van Krieken, "The Character of the Nation," in *Whitewash. On Keith Windschuttle's Fabrication of Aboriginal History*, ed. Robert Manne (Melbourne: Black Inc. Books, Melbourne, 2003).

both among Aborigines, who knew nothing of it and settlers who typically cultivated it only for their own benefit.

The differences in availability of the rule of law to convicts and Aborigines derived both from a complete absence of cultural common ground between indigenous and settler Australians, as well as from a deep split in the moral imagination of the dominant early Australian law-makers, enforcers, and, more generally, of settlers. In early contact with Aboriginal society the baggage that convicts shared with their rulers and benefited from, was simply not extended or made available to Aborigines, even where the will to make it so was. And commonly it was not. That did not in the first instance depend upon the law but underlay it and conditioned the ways it worked in the world. This then made its way - often, one imagines, unconsciously, as part of obvious taken-for-granted views of the world - to be reflected in the practices, character, forms and obligations embodied in the institutions of law, and in the entitlements, or lack of them, of its subjects. Better, its subjects and objects. Among the former, the "notion" of the rule of law was remarkably strong. Between the former and the latter, it often had no standing at all. The notion of the rule of law occasionally had some purchase, but commonly not. It took a long time for that to change, in many respects it has yet to be fully achieved, although the constituency for "the notion" – both among Aborigines and the (now multicultural) majority - has expanded considerably.

Of course, a notion is not enough. Even where it exists, it is typically only partially, fitfully, unevenly realised. Nevertheless, the rule of law will never be established or sustained by law alone. Though law can offer distinctive resources of focus, experience, authority and enforcement,[62] its effects are always mediated and often thwarted by complex interactions with cultural - and not just cultural but also political, social, and economic - forces. The cultural aspects are often the hardest to spot and to talk intelligently about. And yet they are key.

III UNIVERSAL SIGNIFICANCE

[62] See Postema, *Law's Rule*; Stephen J. Toope, *A Rule of Law for Our New Age of Anxiety*, (Cambridge University Press, forthcoming).

What could it mean to say that the notion of the rule of law has universal significance? It follows from what I have already said that we should be chary of assuming that any particular arrangement of legal institutions has this significance, given the variety of social, political, legal and cultural configurations and contexts. That should have been understood as a matter of social theoretical principle, and surely we might have learnt from the prevalence in the practice in international "rule of law promotion" of the now notorious problems of "isomorphic mimicry … adopting the camouflage of *organizational* forms that are successful elsewhere to hide their actual dysfunction",[63] where institutions and rules are shipped or copied but the outcomes expected do not eventuate. Does one then have the rule of law because the institutions appear to be in place, or lack it because nothing works as it should? I believe Thompson would instantly have opted for the latter alternative, and I with him.

Instead, he finds universal significance in "the obvious point … that there is a difference between arbitrary power and the rule of law." I agree. However, in endorsing his point, I would reframe it in one respect, and reword it in another. Like most who have written about the rule of law, Thompson describes its aim primarily in terms of what it rules *out* rather than what it facilitates, what it constrains rather than what it makes room for. Above all, he praises it for "the imposing of effective *inhibitions* upon power and the defence of the citizen from power's all-intrusive claims."

And yet he has another way of writing, as when he stresses its role as "definition of actual agrarian *practice,* as it has been pursued "time out of mind"[64], which set out rights and entitlements as well as limitations and prohibitions. Indeed, the same laws could serve to do both. Thus, after acknowledging throughout the book that the Black Act was made and used by rulers as standard Marxism 101 would predict, he goes on to say:

> But this is not the same thing as to say that the rulers had need of law, in order to oppress the ruled, while those who were ruled had need of none. What was often at issue was not property, supported

[63] Lant Pritchett, Michael Woolcock, and Matt Andrews, "Capability traps? The mechanisms of persistent implementation failure," *Center for Global Development. Working Paper* 234 (2010).

[64] Thompson, *Whigs and Hunters,* 261.

by law, against no-property; it was alternative definitions of property rights …For as long as it remained possible, the ruled – if they could find a purse and a lawyer – would actually fight for their rights by means of law; occasionally … could actually win a case. When it ceased to be possible to continue the fight at law, men still felt a sense of legal wrong: the propertied had obtained their power by illegitimate means.[65]

This suggests what is often missed in conventional accounts of the rule of law purely as aimed to "limit" or "inhibit" governing power. For limitation is not all we want, and at times, it is *not* what we want. As well as wishing to block bad ways of exercising power, we want to *augment* the ability of power-holders to exercise power in non-arbitrary ways. We need to generate means of channelling and *strengthening* certain ways of exercising power, indeed *creating, constituting* forms of power that otherwise would not exist, to achieve positive effects otherwise unavailable,[66] as much as we do to limit arbitrariness.

Power is unavoidable in human society, and often indispensable for things we value, so getting rid of it is not an option. Moreover, some sorts are better than others, and need to be facilitated. Like most skills – speaking, writing, swimming …- power needs to be *disciplined.* This does not make it weaker but stronger and more fit for purpose. The notion of the rule of law should therefore not be understood purely as a negative instrument[67] for limiting [68] power, for it should be as much a positive means of channelling and *strengthening* certain ways of exercising power, to achieve positive effects otherwise unavailable. At the same time, and often with the same means, possibilities of malignant uses of power must be strengthened, while benign ones are enabled and facilitated.[69] The rule of law on this understanding is not power's enemy, but its potentially ennobling friend.

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65 *Ibid*.

66 See Michael Mann, "The Autonomous Power of the State: Its Origins, Mechanisms and Resources" in *States, War, and Capitalism: Studies in Political Sociology* (Oxford; New York: Blackwell, 1988), 32. See also his *Sources of Social Power,* (Cambridge University Press, 1986), vol. 1, 477.

67 See Joseph Raz, "The Law's Own Virtue", *Oxford Journal of Legal Studies* 39, no. 1 (Spring 2019): 'the rule of law is essentially a negative value'.

68 See F. A. Hayek, *Law, Legislation, and Liberty,* vol.3, (Chicago: University of Chicago Press, 1979), 128. See too Judith N. Shklar, "Political Theory and the Rule of Law," in *Political Thought. Political Thinkers,* ed. Stanley Hoffmann (Chicago, University of Chicago Press, 1998), 21–37.

69 See Stephen Holmes, "What Russia Teaches Us Now. How Weak States Threaten Freedom," *The American Prospect* (July/August 1997); and his *Passions and Constraint* (Chicago, University of Chicago Press, 1995). See also

So, rather than focus on limitation of power I recall and would recommend to Thompson an old and evocative notion strong in rule of law discussions, in many languages, over millennia: power should be *tempered.* Traditionally, as first a personal "cardinal virtue", classical uses of the term (and its direct Greek predecessor, *sôphrosyn*ê) emphasised self-restraint, flexibility, blending, balancing, and thoughtfulness in the exercise of power.[70] Similar virtues were later attributed, after the Greek was translated by Cicero as *temperantia*, to institutional tempering of power A third, metallurgical, use of the term refers to judicious blending of materials, to render the resulting product tougher, stronger, less fragile, and better fit for important purposes than its individual components. [71] This sort of tempering, say of steel or glass, renders power stronger than untempered power for many (good) purposes, while also less apt for bad ones.[72] The fact that in some languages,[73] finally, to temper is to sharpen also serves my purposes. Only metaphor, but it helps one think. Thus armed, I join, and only slightly adapt, Thompson to say that well-tempered power is an achievement of universal significance. I doubt that he would object.

This is not an anthropological claim, that either the notion or the achievement of the rule of law is universal, in the sense either that everyone everywhere supports it or has it. We know that is not true. Nor even that it is readily universalisable, made available to everyone everywhere. It is an *achievement*, after all.

Instead, it is a normative claim. Arbitrary power is never - or if not never then so rarely as to be in need of explanation and strenuous justification – a good thing. More

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Daron Acemoglu and James A. Robinson, *The Narrow Corridor. How Nations Struggle for Liberty* (UK: Penguin, 2020) and Jeremy Waldron, "Constitutionalism: A Skeptical View," *NYU School of Law, Public Law & Legal Theory Research Paper Series*, no. 10-87 (December 2010). From another angle, Hilton L. Root, *Political Foundations of Markets in Old Regime France and England* (University of California Press. 1994).

[70] See Helen North, *Sophrosyne: Self-Knowledge and Self-Restraint in Greek Literature* (Cornell University Press, 1966); Helen North, "Temperance (Sôphrosynê) and the canon of the cardinal virtues," in *Dictionary of the History of Ideas*, vol. 4 (New York: Charles Scribner's Sons, 1973); Helen North, "A Period of Opposition to Sôphrosynê in Greek Thought," *Transactions and Proceedings of the American Philological Association* 78 (1947).

[71] See John Braithwaite, "Hybrid politics for justice: The Silk Road for restorative justice Part II," *Restorative Justice* 5 (2017), 25; John Braithwaite, "Tempered Power, Variegated Capitalism, Law and Society," *Buffalo Law Review* 67 (2019); Martin Krygier, 'Tempering Power,' in *Constitutionalism and the Rule of Law. Bridging idealism and realism*, eds. Maurice Adams, Ernst Hirsch Ballin, Anne Meuwese (Cambridge University Press, 2017); Postema, *Law's Rule.*

[72] See Mann, *States, War,* 32. See also his *Sources of Social Power,* and Holmes, *Passions and Constraint*; Stephen Holmes, "In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror," *California Law Review* 97 no. 2 (April 2009).

[73] The Polish word for pencil sharpener is *temperówka*. See Jacek Żakowski, "Jak temperować władzę," in *Wirus,* ed. Jacek Żakowski (Sic, 2020).

precisely, there is a huge presumption against it. Anyone seeking to justify it carries a huge burden, extremely hard to discharge. By contrast, the *notion* that power should be reliably tempered, still more actual approaches to realising that notion, are achievements universally worth striving for.

Elsewhere, I have sought to distil from rule of law writings four sources or kinds of arbitrary power - for short: uncontrolled,[74] unpredictable,[75] unrespectful,[76] ungrounded[77] power. Each is obnoxious, together they are toxic. For they threaten human dignity,[78] equality,[79] liberty,[80] lead to domination[81] and fear,[82] imperil trust and social co-ordination,[83] and generate solipsistic short-sightedness and stupidity among the powerful, who foolishly fancy they benefit from them.[84] More can be said about each of these sources and each of these vices. Since they are likely to flow from the availability of arbitrary power in most circumstances of which I can conceive I am happy to stand on the "very narrow ledge"[85] that Thompson imagined he had placed himself, and to say that the notion, and then the reality, of organising ways to avoid them by tempering power, are "cultural achievement[s] of universal significance."

IV RETURN TO EUROPE

Let us return to where we began, current controversies over the rule of law and European values. What are the implications of the foregoing discussion of a few

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74 See Philip Pettit, *Republicanism* (Cambridge University Press, 1997), 55; Locke, *The Second Treatise*, chapter XI, 137.

75 Lon Fuller, *The Morality of Law* (Yale University Press, 1969), chapter 2; Joseph Raz, "The Rule of Law and its Virtue," in *The Authority of the Law* (Oxford, Clarendon Press, 1979).

76 Jeremy Waldron, "The Rule of Law and the Importance of Procedure," in *Getting to the Rule of Law*, ed. James Fleming (New York: New York University Press, 2011.

77 Montesquieu, *The Spirit*, 189; Joseph Raz, "The Law's Own",5

78 See Fuller, *The Morality*, 162-163; Jeremy Waldron, "The Rule of Law".

79 See Paul Gowder, *The Rule of Law in the Real World* (Cambridge University Press, 2016).

80 See Charles Larmore, "Liberal and Republican Conceptions of Freedom," *Critical Review of International Social and Political Philosophy* 6 (2003). Christian List, "Republican freedom and the rule of law," *Philosophy, Politics and Economics* 5 (2016).

81 Pettit, *Republicanism*; Gianluigi Palombella, "The Rule of Law as an Institutional Ideal," in *Rule of Law and Democracy: Internal and External Issues*, ed. G. Palombella and L. Morlino (Brill, 2010).

82 See Judith Shklar, "The Liberalism of Fear" and "Political Theory," in *Political Thinking* 3–20; 21–37.

83 On the key importance of which in modern societies, see Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol. 1 (Indianapolis: Liberty Classics, 1981), 26.

84 Holmes, "In Case of Emergency".

85 Thompson, *Whigs and Hunters*, 260.

concluding pages of an old work by a late (though great) historian, for contemporary problems in countries he says not a word about? I detect two.

The first is that the European claim is correct but too modest. The ideal of the rule of law is indeed European, but not just that. It may not be "an unqualified human good" – there are few such things - but it is truly "a cultural achievement of universal significance." Each word in that phrase, I have sought to demonstrate, deserves emphasis and respect.

However, and this is the second implication, it makes a huge difference what one takes the rule of law to be. What is universal is the notion and realisation of a state of affairs in which power is reliably tempered so as not to be available for arbitrary abuse. It is a mistake to identify it, as so many do, with any allegedly canonical arrangement of forms and institutions and rules that are enlisted or assumed to embody it.

This has some important implications. Where one is fortunate, the *notion* is a cultural achievement, embodied variously in practices, beliefs, norms and imaginations, some very old, and substantially realised. Good inheritances are a bonus, but their lack or weaknesses does not mean that the rule of law is out of one's grasp, though it is harder. Cultures, and we who inhabit them and are inhabited by them, change, mix, learn, and develop. And people are not just creatures of culture but creators as well. Secular societies were once religious. Since ancient Greece, there were no democracies until the end of the eighteenth century. That changed. Germans were not Nazis once and most are not Nazis now. Indeed the notion of the rule of law is deeply embedded in contemporary German culture, and the practices are strong also. Gays and Blacks were not always "proud." A lot, if not enough, has changed for them, and a lot has probably changed in their own notions of what they are entitled to. That notions of Gay and Black Pride are prominent today is a recent cultural achievement, arguably of universal significance.

Sometimes we can attribute such changes to tectonic cultural shifts of which we are unaware. Other times they are the results of deliberate action, mobilisation, demand and transformation. We might judge some such changes positively, others negatively. We cannot deny that they occur. However, whatever their sources, and all the more

where they cut against strong contrary notions, formal rules and organisations are unlikely easily to make inroads on their own. They need to be nurtured, inculcated, defended, promoted, supported by other cultural, political, and social forces, and they need to be *institutionalised* in the sense proposed by the great American sociologist, Philip Selznick: "*infuse[d] with value* beyond the technical requirements of the task at hand."[86] Apart from inheritance, as Selznick showed in his many writings on institutional leadership, cultural notions, attachments and loyalties can be encouraged inculcated, be *projects* to be realised, though again that will not be a merely technical affair of laying down rules, and will have to take into account already existing and institutionalised bodies and forces.[87] It requires more than installation or routine management.

Over time, institutional inheritances and deliberate institutionalising projects can be intertwined and modified, and in the case of law, it is important that they are, if "law in action" is going to have any resemblance to "law in the books." As Selznick observed:

> The starting mechanism [of institutionalisation] is often a formal act, such as the adoption of a rule or statute. To be effective, however, the enactment must build upon preexisting resources of regularity and legitimacy and must lead to a new history of consistent conduct and supportive belief. Institutions are established, not by decree alone, but as a result of being bound into the fabric of social life. Even so weighty an enactment as the United States Constitution cannot be understood apart from the legal and political history that preceded it, the interpretive gloss given it by the courts, and the role it has played in American history and consciousness. The formal acts of adoption and ratification were only part of a more complex, more open-ended process of institution-building.[88]

That sort of institutionalisation, however, is not easy or inevitable. Such higher-order values might be unknown in a particular order. Alternatively, they might be well known

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86 Selznick, *supra* n. 11, p. 17.

87 See Philip Selznick, *TVA and the Grass Roots: A Study in the Sociology of Formal Organization* (Berkeley: University of California Press, 1949); *The Organizational Weapon: A Study of Bolshevik Strategy and Tactics* (New York: McGraw-Hill, 1952); *Leadership in Administration: A Sociological Interpretation* (New York: Harper & Row, 1957). And as applied to the rule of law, see Martin Krygier, "The Challenge of Institutionalisation: Post-Communist "Transitions", Populism, and the Rule of Law," *European Constitutional Law Review,* 15 (2019).

88 Philip Selznick, *The Moral Commonwealth* (University of California Press, 1992), 232.

but not institutionalised, because they conflict with, maybe are alien to, the animating ideals or practices of existing institutions which *are* institutionalised, or because significant actors are hostile to them, or because no one gives them any heed, or because they are difficult in particular circumstances to institutionalise, even where there is a will to do so. So while legal rules and arrangements are commonly central to the institutional architecture of states, the extent to which the notion of the rule of law is institutionalised in and around them varies greatly across space and time.

Not much of this was appreciated in the 1990s, by those who sought to "build" the rule of law to post-communist Europe. Instead that enterprise had much less to do with cultural nurture, adaptation, development and patient grafting, than with imitation and insertion. As I have argued elsewhere:

> We have much more to say about "international best practice" in institutional *design* than we do about how to generate local institutional *attachment*, and yet without the latter, the former is unlikely to matter much. …
>
> Post-communist, democratic, legal, and constitutional transformations were much more given to *emulation, adaptation and installation*, than to *institutionalisation.*[89]

Again, there was something strangely naïve in the pretence of the EU that its acceptance of 10 new members in 2004 and several others later, was based on their showing they had "achieved stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities," by aligning their legal rules and institutions with 80,000 pages of the EU *acquis*. A second's thought about the complexity of such a cultural achievement shows this to be implausible. But then those both at the centre and the peripheries were desperate to expand the club. Today it seems that, in a parody of Groucho Marx, some seem reluctant to be part of a club that would have them as members.

This might sound like an endorsement of the Hungarian and Polish objections to EU rule of law requirements as culturally insensitive quasi-imperial impositions. After all,

[89] Krygier, "The Challenge of Institutionalisation," 559.

am I saying anything else than Victor Orbán recently has, that "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". [90]

Well, there is, indeed, one thing in common. Technical legal conformity is not of itself adherence to the rule of law. It is certainly not sufficient, and in any particular legalistic detail it might not be necessary. What *is* necessary, however, is the notion and the reality of the "regulation and reconciliation of conflicts through the rule of law." And, for all their pretences and, to use a technical term - cheating,[91] that is precisely what modern authoritarian populists seek to undermine.

Orbán and Kaczyński are well aware of the difference. It plays into their hands to focus on legal technicalities. On the one hand, they can accuse critics of cultural insensitivity, and simply insist to despised Eurocrats that "this is the way we do things here". On another, they can go shopping to find some country somewhere which has legal provisions like their own. If it's good enough for Germany, or Liechtenstein, why not for us? And if one does not pay heed to Thompson's stress on the rule of law as a *cultural* achievement, that question is hard to answer. A committee of government appointees is formed to take over the appointment of judges in Poland and, at the time of writing, this looks likely to be legislated by the new far-Right government in Israel. S.72 of the Australian Constitution requires all federal court judges, including those of its single highest appeal court, to be appointed effectively in the same way. Forms aside, the government appoints the judges. But Australia's High Court is one of the least politicised in the world, at times to a fault. Poles and Israelis who value the rule of law are right to fear the consequences, but so far Australians have done ok. The difference lies not in provisions but in political and legal culture.

And, if I may be granted a third hand, notwithstanding his protests, rulers like Orbán are actually fond of battling on the terrain of forms, for unlike many earlier authoritarians who explicitly and altogether had little time for law at all, still less the

90 Orbán, "The "rule of law".

91 See András Sajó, *Ruling by Cheating* (Cambridge University Press, 2022).

rule of law, recent authoritarian-populist regimes around the world have contrived to undermine the rule of law with the assistance of hallowed legal forms.[92] It turns out it's not so hard.

These techniques of legal self-mutilation have metastasised and spawned a variety of neologisms: abusive constitutionalism, stealth authoritarianism, constitutional coups, autocratic legalism, abuse of the constitution, or twisting and turning of the rule of law.[93] The forms these pathologies take are interesting and various, and I commend them to those with a taste for dark arts.

Forms of chicanery multiply, whereby one pretends fidelity to formal rules, in order to achieve purposes alien to the underlying (and often unwritten) aims, values, practices and institutions on which the substance of the rule of law was supposed to rest.[94] Moreover, because those aims and values have no weight with these leaders, they can be constitutional pedants when it serves their ends,[95] and "constitutionally shameless"[96] 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 Kim Lane 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

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92 See Gianluigi Palombella, "The Abuse of the Rule of Law," *Hague Journal on the Rule of Law* 12 (2020).

93 See David Landau, "Abusive Constitutionalism," *University of California Davis Law Review* 47 (2013); Ozan O. Varol, "Stealth Authoritarianism," *Iowa Law Review* 100 (2015); Kim Lane Scheppele, "Constitutional Coups in EU Law," in *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, eds. Maurice Adams, Anne Meuwese and Ernst Hirsch Ballin (Cambridge University Press, 2017); Kim Lane Scheppele, "Autocratic Legalism," *University of Chicago Law Review* 85 no. 2 (March 2018), 545; Grażyna Skąpska, "Znieważający konstytucjonalizm i konstytucjonalizm znieważony. Refleksja socjologiczna na temat kryzysu liberalno-demokratycznego konstytucjonalizmu w Europie pokomunistycznej," *Filozofia Publiczna i Edukacja Demokratyczna* 7, no. 1 (2018); Grażyna Skąpska, "The decline of liberal constitutionalism in East Central Europe," in *The Routledge International Handbook of European Social Transformation* eds. P. Vihalemm, A. Masso & S. Opermann (London: Routledge, 2018); András Sajó & Juho Tuovinen, "The rule of law and legitimacy in emerging illiberal democracies," *Osteuropa Recht* 64 (2019); Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing. Legal globalization and the subversion of liberal democracy* (Oxford: Oxford University Press, 2021); Regitze Helene Rohlfing & Marlene Wind "Death by a thousand cuts: measuring autocratic legalism in the European Union's rule of law conundrum," *Democratization* 30 no. 4 (2022).

94 See Sajó, *Ruling by Cheating.* Orbán, "The "rule of law".

95 See Kim Lane Scheppele, "Here is Viktor Orbán's approach to the rule of law…" X, January, 8, 2023. https://twitter.com/KimLaneLaw/status/1612085837709074432?cn=ZmxleGlibGVfcmVjcw%3D%3D&refsrc=email

96 Tarunabh Khaitan, "Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India," *Law & Ethics of Human Rights*, 14 no. 1 (2020): 93.

trees. He loves checklists because they can always be gamed. But he hates general principles because he violates them all."[97]

But if we return to Thompson, 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, separated (and then connected). Instead, anti-rule of law populists seek to consolidate and concentrate power in their own hands. Where its achievement 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 pseudo democracy in which a decision by the leader may become law the next day.

Deliberately and insidiously, it is made difficult to tell that anything particularly sinister is happening. Institutions are "deflated rather than demolished by populist authoritarians."[98] The rule of law is typically brought down by "a thousand cuts,"[99] many of them small and often unseen, while the cumulative result is blood-letting of the *notion*, on a torrential scale. All done with the active assistance of law.

Europeans who have watched the cat-and-mouse games played between the European Commission and lawyers representing Poland and Hungary, or who have witnessed Hungary's Prime Minister Viktor Orbán's self-vaunted "peacock dances" in Brussels might have a sense of how these legal games are played. Apparently earnest and technical points of law are raised by regime lawyers: about interpretation, inclusion or exclusion of this or that provision, sacking and packing, dismantling or inventing, this or that court, "disciplining" this or that disobedient judge —all replete with poker-faced legal argumentation, typically of a highly formalistic sort. If critics allege that an institutional innovation is intended, say, to threaten judicial independence from the executive, the hunt will be on for some ostensible, context-free, in-any-way-similar-

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97 See the thread of posts on a search "Orban Victor Rule of Law", e.g. The Kyiv Independent, "EU launches processes to slash Hungary funds over rule-of-law breaches," X, April, 5, 2022; Brian Klaas, "Donald Trump just endorsed Victor Orban," X, January, 3, 2022, etc.
https://twitter.com/search?q=orban%20viktor%20rule%20of%20law&src=recent_search_click

98 Wojciech Sadurski, *A Pandemic of Populists*, (Cambridge: Cambridge University Press, 2022), 54.

99 Khaitan, "Killing a Constitution".

looking arrangement, cherry-picked from anywhere that might serve. That these comparisons and purported borrowings are radically superficial, selective, decontextualised, and hostile to the achievement Thompson writes about[100] is rarely obvious to laypersons and never, naturally enough, emphasised by their sponsors.

Several governments have sought in these and other ways to undermine key legal and other sites and processes that might temper their power. Where they can, they then seek to take them over. These governments have expressed disdain for the notion that their power should be tempered, though they claim to be serving the rule of law in their own way, "with Chinese, Hungarian, etc, characteristics." These attempts to eliminate competing sources and resources of power and destruction of opposition are often complex in form but they are not complex to understand, and they have little to do with the sanctity of canonical institutions. They have to do with the point of the enterprise.

Where the achievement of which Thompson wrote is undermined in such ways, what we are seeing is an often refined form of *abuse* of the rule of law, but in its own name. Law is *used* precisely so that the purpose and the fundamental principles of the rule of law can be abused.[101] For the idea advanced by various leaders and sympathisers, that we are witnessing the birth of a culturally distinct but equally legitimate "Polish [or Hungarian, or Venezuelan, or Israeli] rule of law", is simply absurd when the whole direction of travel is away from any measures and practices that might temper the exercise of ruling power, and so serve the rule of law. Not because some particular, imported, western institution is lacking, but because by their actions these governments are subverting the very "notion" of the rule of law and, thereby, the chances of its realisation. Perhaps Polish circles are square, and Polish squares are circular, but that's not my experience or expectation. The achievement of universal significance that is the rule of law might be approached from many different locations and in many different ways. But not by systematic movement in the opposite direction.

100 Dixon and Landau, *Abusive Constitutional Borrowing*.
101 See Palombella, "The Abuse of the Rule"

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Мартін Кригер. Врівноважена влади: “культурне досягнення універсального значення”

Анотація. В статті протиставляються дві основні позиції щодо верховенства права. В межах першої верховенство права характеризується як “модне слово” та “нормативне мерило,” яке є не більшим ніж ніж порожній ідеал дев’ятнадцятого століття та політичний жартівник для всіх цілей” (Лоран Пех). В межах другої, сумно відомий і неоднозначний англійський історик Е. П. Томпсон, назвав верховенство права «культурним досягненням

універсального значення.” Автор доводить, що Томпсон мав рацію і кожне слово в цій фразі заслуговує на увагу та повагу.

Однак дуже суттєвою є різниця в тому, як хтось думає про верховенство права та що це таке. Універсальним є поняття та реалізація стану речей, у якому влада надійно стримана, щоб не бути доступною для свавільного зловживання. Це те, що є культурним досягненням загального значення. Помилково ототожнювати його з будь-яким нібито канонічним упорядкуванням форм, інститутів або правил, які враховуються або припускаються як його втілення.

Багато людей роблять цю помилку. Деякі роблять це, тому що наївно думають, що створення знайомих інституцій, які вони асоціюють із “верховенством права,” — це те саме, що генерувати верховенство права. Невтішна історія просування верховенства права в усьому світі показує, що це не так. З іншого боку, сучасні неліберальні, часто популістські режими охоче схвалюють таку помилку та вдають, що вони віддані верховенству права, показуючи відповідність правовим формам, водночас систематично підриваючи та зловживаючи самим верховенством права . Слід відкинути як наївні, так і зловмисні тлумачення.

Ключові слова: верховенство права; культурне досягнення; універсальне значення; політичний популізм; зловживання верховенством права.

Martin Krygier. Well-tempered Power: “A Cultural Achievement of Universal Significance”

Abstract. This article examines two central perspectives on the rule of law. Within the former, the rule of law is characterized as a “buzzword” and a “normative yardstick” that is no more than an empty nineteenth-century ideal and a political joker for all intents and purposes.” (Laurent Pech). The controversial and ambivalent English historian E.P. Thompson described the rule of law “a cultural achievement of universal significance.” The author proves that Thompson was right and every word in this phrase deserves attention and respect.

However, it makes a huge difference how one thinks about the rule of law, and what one takes it to be about. What is universal is the notion and realization of a state of affairs in which power is reliably tempered so as not to be available for arbitrary abuse. It is that which is a cultural achievement of universal significance. Identifying it with any allegedly canonical arrangement of forms, institutions, or rules that are enlisted or assumed to embody it is a mistake.

Many people make that mistake. Some do so, because they naively think that installation of familiar institutions they associate with ‘the rule of law’ is the same as generating the rule of law itself. The disappointing history of rule of law promotion around the world shows that is not the case. On the other hand, modern illiberal, often populist, regimes are happy to endorse such a mistake and pretend that they are committed to the rule of law by making a show of conformity to legal forms, while systematically subverting and abusing the rule of law itself. Both naïve and malicious interpretations must be unequivocally rejected.

Keywords: rule of law; cultural achievement; universal significance; political populism; abusing the rule of law.

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