

Centre for Asian Legal Studies

15 October 2012, Monday ✦ 10.00am – 11.00am ✦
Federal Conference Room, Federal Building, NUS (BTC)

Why the Rule of Law is too Important to be Left to Lawyers

by Gordon Samuels Prof. Martin Krygier

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ABSTRACT

If the rule of law is what you want, it seems obvious that it is lawyers, with their insider knowledge, who best understand it and seem best placed to deliver it. It certainly has seemed obvious to lawyers, and to those whose views of law are parasitic on lawyer-hosts, among them legal philosophers and rule of law promoters.

And when they are asked what the rule of law is, lawyers typically produce lists of characteristics of official legal institutions (Dicey), rules (Fuller), and practices. There are plenty of these lists about. There is today a huge literature on the rule of law and a huge, expensive, practice of rule of law promotion around the world. Within that literature and that practice there are many very different, and some competitive, accounts of the rule of law. My claim is, however, that at a deeper level they all agree in an unfortunate way, actually three unfortunate ways.

Firstly, they start with the wrong question, so their answers, however insightful, are, quite literally, beside the point. The proper place to start comes earlier, with the question why, what might one want the rule of law for? And that matters because no sensible answer as to what the rule of law *is* can be given until one comes to a view on what its *point* is. In this way the concept of the rule of law is like that of 'hospital', rather than of some random and pointless feature of the world, say 'pebble'. Too many people keen to say what the rule of law is, however, forget, or never knew, why they should ever want to know. That makes it very hard to say which of the myriad features of a legal order have any bearing on the rule of law.

Moreover, even with the first question answered, what counts in one place as a sensible answer to the second might not be too sensible somewhere else. Societies differ, so do their institutional traditions, practices, and capacities, and so do the patterns of practice, expectation and culture in which they are embedded (or, as in some societies extruded, treated as irrelevant), many of which have nothing to do with official institutions. So we will need to learn something about these things, not necessarily to be found in the works or favoured institutions of the usual suspects. The paper will suggest some of the things we have to try to learn.

Thirdly, and centrally, legal recipes for the rule of law are usually sociologically innocent, with no clue, and rarely any interest, in the non-legal conditions of legal effectiveness and ineffectiveness. But without some reflection on those matters, even the best-laid plans of rule of law promoters and reformers will be routinely waylaid. And so they have been.

ABOUT THE SPEAKER



Martin Krygier is Gordon Samuels Professor of Law and Social Theory at the University of New South Wales, co-director of its Network for Interdisciplinary Studies of Law, and Adjunct Professor at the Regulatory Institutions Network, Australian National University. He is a fellow of the Australian Academy of Social Sciences. His most recent book is Philip Selznick. Ideals in the World (Stanford University Press, 2012). In 2005, he published Civil Passions, a selection of his essays on matters of public debate. He delivered the 1997 Boyer radio lectures, Between Fear and Hope. Hybrid Thoughts on Public Values, for the Australian Broadcasting Commission. He has written, edited and co-edited a number of works, including Spreading Democracy and the Rule of Law? (Springer Verlag, 2006); Rethinking the Rule of Law after Communism (CEU Press, 2005); Community and Legality: the Intellectual Legacy of Philip Selznick (Rowman & Littlefield), 2002), The Rule of Law after Communism (Ashgate, 1999), Marxism and Communism. Posthumous Reflections on Politics, Society, and Law (Rodopi, 1994), Bureaucracy: The Career of a Concept (Edward Arnold, 1979), and apart from academic writings contributes to journals of ideas and public debate.

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