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Tempering Power

Abstract

Realism and idealism do better together than apart, and not merely as separate and independent viewpoints that might be gathered together but as interdependent ingredients of a whole that is generally more satisfactory than the sum of its parts taken separately. Realistic-idealism is not an oxymoron, but a salutary combination. Ideals are part of the human world. 'Realism' that does not take their existence and significance into account is empirically impoverished and programmatically unhelpful. Conversely, idealism is at worst empty or at best Utopian, if undisciplined by the real. Utopias might have their attractions and uses as regulative principles,[1] but not as practical ideals, intended to be made good (even if only partially) in the real world. And constitutionalism and the rule of law are intensely practical ideals.

Though closely related, they are not identical. So the first section of this article sketches some areas of overlap and distinction between constitutionalism and the rule of law. The second suggests one central aim they have in common: hostility to arbitrariness in the exercise of power. I then discuss different interpretations of this value, to illustrate the mutual and indispensable inter-twinings of realism and idealism involved in its pursuit. One of these interpretations, usually captured with terms such as 'limiting', 'curbing', 'restraining' power, prides itself on its tough-minded realism, and in truth it does focus on significant aspects of reality that should never be ignored. At the same time, however, it misses fundamental elements of what it seeks to describe and at the same time diminishes an ideal central to it. More readily to encompass that ideal I introduce the idea of tempering power, rather than 'limiting …', etc., and propose some reasons to prefer this term. Central is its ready availability for larger purposes, more positive ideals, for constitutionalism and the rule of law, than the crimped, negative, implications of the concepts in common use. This more positive spin turns out more realistic as well, so long as it neither forgets nor undermines the realistic foundations on which it depends.

[1] See Leszek Kołakowski, 'The Death of Utopia Reconsidered,' in *Modernity on Endless Trial,* (University of Chicago Press, 1990).

Tempering Power[2]

Martin Krygier

If ideals are to be taken seriously, there must be genuine concern for their embodiment in action, and especially in the routines of institutional life.

(Philip Selznick, *TVA and the Grass Roots,* x)

John Dewey was famously hostile to attempts to carve up the world, and approaches to the world, with 'pernicious dualisms.' His objection was that such dualisms set up and reify as dichotomies in thought things that are not in fact dichotomous in life. Thus they block recognition of continuities and interdependencies.

Forced confrontations between realism and idealism are apt examples. For realism and idealism do better together than apart, and not merely as separate and independent viewpoints that might be gathered together but as interdependent ingredients of a whole that is generally more satisfactory than the sum of its parts taken separately. Realistic-idealism is not an oxymoron, but a salutary combination. Ideals are part of the human world. 'Realism' that does not take their existence and significance into account is empirically impoverished and programmatically unhelpful. Conversely, idealism is at worst empty or at best Utopian, if undisciplined by the real. Utopias might have their attractions and uses as regulative principles,[3] but not as practical ideals, intended to be made good (even if only partially) in the real world. And constitutionalism and the rule of law are intensely practical ideals.

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[2] The first version of this article was delivered at the Tilburg Rule of Law Workshop *Bridging idealism and realism in constitutionalism and Rule of Law,* October 2-3, 2014, which issued in this book. It was also discussed at a seminar at Scuola Superiore Sant'Anna, Pisa, 4 June, 2015 I am grateful to the participants in the workshop, and particularly my discussant, Hans Lindahl, to colleagues in the Sant'Anna seminar, particularly Gianluigi Palombella and Giuseppe Martinico, and to my colleagues Arthur Glass and Theunis Roux, for their comments.

[3] See Leszek Kołakowski, 'The Death of Utopia Reconsidered,' in *Modernity on Endless Trial,* (University of Chicago Press, 1990).

power, rather than 'limiting …', etc., and propose some reasons to prefer this term. Central is its ready availability for larger purposes, more positive ideals, for constitutionalism and the rule of law, than the crimped, negative, implications of the concepts in common use. This more positive spin turns out more realistic as well, so long as it neither forgets nor undermines the realistic foundations on which it depends.

1. Constitutionalism and the Rule of Law

Constitutionalism and the rule of law have different historical, institutional and discursive/rhetorical trajectories and incarnations, but they are also closely related, and they overlap. There is a certain, perhaps necessary, vagueness to both ideals and many of their concerns are shared, so overlap is great. A great deal that can be said of one can be said, in the same terms, of the other; both terms being protean and their concerns interwoven, few differences are categorical or uncontroversial.

Moreover, whatever else differentiates or connects them, they both have to do with the exercise of power. For centuries the power in question was taken to be that of the state, but in recent decades (and arguably in the pre-Westphalian past), it has been acknowledged that states are/were not the only entities to which constitutionalism can be ascribed. There are supra-and-infra-state levels of governance that can plausible be regarded as subjects of constitutionalism. That might be a bitter pill for many to swallow, but it seems unavoidable.[4] This is equally, I would argue even more starkly, [5] true of the rule of law too, though recognition of this is still uncommon. The rule of law can only with considerable artificiality be cabined within the boundaries, and activities, of nation states. And within those boundaries, the 'public law presumption,' that ties the rule of law to the state and is so common in rule of law discussions, is misplaced.[6]

For what it is worth, my own preference is to understand the rule of law as the more encompassing notion, which extends to relations among citizens as much as it does to acts of governments or governance, indeed to the activities of all persons and institutions capable of exercising significant power in a society. To say that the rule of law is strongly or weakly in evidence is to appraise a social *state of affairs,* with complex, multi-layered elements of various provenances, rather than simply to characterise any particular set of legal institutions. The rule of law is 'a contingent reality, real *insofar as* certain things go on',

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4 See Neil Walker, 'The Idea of Constitutional Pluralism,' (2002) 65 *Modern Law Review,* 317-59; 'Taking Constitutionalism Beyond the State,' (2008) 56 *Political Studies* 519–543; Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', (2006) 19 *Leiden Journal of International Law* 579–610

5 See Martin Krygier, 'Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?,' in James E. Fleming, ed., *Getting to the Rule of Law,* Nomos no.50 (New York University Press, 2011), 64-104 at 85-91.

6 See Lisa M. Austin and Dennis Klimchuk, eds., *Private Law and the Rule of Law,* (Oxford University Press, 2014).

to borrow a phrase from another author and context.[7] You have it insofar as, to the extent that, power is routinely exercised in ways consistent with the ideal, and certain other ways of exercising power – wildly, capriciously, wilfully, arbitrarily, say –are rare. Since many of the major threats to the ideal of the rule of law come from outside governments, and many means of achieving that ideal are also to be found in the wider society, the rule of law must be sought there too. Not merely in 'law in the books' but not merely in 'law in action' either. For the rule of law can be subverted by things other than law.

To the extent that non-governmental organisations are in a position to exercise significant power in ways that offend the values of the rule of law, they diminish its sway, whatever the state of legal rules or institutions. Once, but far from always in human history, one might have been confident that governments were uniquely more powerful than all other forces, and that is why they were rightly the centre of attention for anyone concerned with the values of the rule of law. But it is an empirical and variable matter whether threats to those values are going to come from governments or somewhere else or both. And today things are more complicated. If non-governmental power is arbitrarily exercised by oligarchs, Mafiosi, warlords, tribal elders, Al Qaeda, NGOs, business executives, currency speculators, international ratings agencies, financial institutions, or indeed university administrators, it too has the potential to bring with it the vices of arbitrariness mentioned above. Banks can do a lot of damage too, and in recent relatively unregulated years and countries, they have. We have an interest in tempering power that has significant public consequence, whoever or whatever wields it.

And if one thinks of what might be necessary to approach the ideal the rule of law is supposed to serve, it is plain that legal texts and institutions can never be the answer on their own. Governments and laws should be viewed, not as the always-necessary centrepieces of power-tempering craftsmanship to which other measures are inferior or supplementary addenda, but as implements among several, in some respects and particular circumstances of potentially unique importance, but dependent for their success on many other things, and often arguably not more important for the achievement of its own goal than they.

Though I am not the only person to argue it, it is certainly controversial whether the concept of the rule of law should extend so far. Even more so, in this case I think rightly, of constitutionalism. Given the long political associations of constitutionalism and its modern association with written constitutions addressed to governments, my own bias would be to treat the rule of law as a more encompassing notion, and see central aspects of constitutionalism as part of that large enterprise. Margaret Jane Radin has recently argued powerfully that mass-market 'contractual' boilerplate can offend the rule of law.[8] This does

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7 Gianfranco Poggi coins the phrase to describe Durkheim's conception of society. See his *Durkheim,* (Oxford: Oxford University Press, 2000), p. 85.

8 See her 'Boilerplate: A Threat to the Rule of Law?', in Austin and Klimchuk, eds., *Private Law and the Rule of Law,* 288-305.

not seem strained because, while we may not always talk this way, it squares with the understanding of rule of law as not merely a 'mode of governance,' but also and more deeply a 'mode of association', to use Postema's distinction.[9] It seems to me less plausible to see such contractual boilerplate as an offence against constitutionalism, however, because the connection with governance is tighter there. But stipulations are vain in these contested and changing fields, so I just state my preference.

Constitutionalism, as the name suggests, focuses on the way the exercise of public power is *constituted*, made up. It is a large ideal having to do with the legal architecture and frame of a polity, its institutional design, foundations, structure, as well as the character of its major institutions and their occupants, their interrelations among themselves and with the subjects of power.

It is also an old ideal, incarnations of which have altered dramatically in recent centuries. 'Old-fashioned, historic'[10] constitutions are often unwritten or spread among an array of documents. They do not claim to found, but rather to express, to codify, the nature of an existing political order. A few such constitutions remain – in the United Kingdom, the Netherlands, New Zealand, the Nordic countries - but they have been outflanked, if not completely surpassed by constitutions of a different sort. For since the American Constitution, constitutionalism has typically incorporated what Martin Loughlin describes as:

> the establishment of the altogether novel idea of a constitution. Political constitutions were no longer to be conceived as some ideal expression of a nation's culture, manners and traditional forms of rule. A constitution in the modern sense was to be a document drafted in the name of the people to establish and regulate the powers of the main institutions of government, to specify the relationship between government and citizen, and to take effect as fundamental law.[11]

Thus, though it was not always so, from the end of the eighteenth century and now around the globe, constitutionalism has had a recognisable and single centrepiece: a written document, the constitution. That in turn has a central subject: institutions of governance. Constitutional law is fundamentally a branch, and a fundamental branch, of public law.

If a constitution of this sort is to contribute to constitutional***ism***, it must be real and not sham,[12] the architecture must not be that of a Potemkin village, or its later legal parallel, a Soviet constitution. It must be implemented and effective in the institutions and practices of the political order; it must *count* both within the offices of state, in their interactions with

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9 Gerald J. Postema, 'Fidelity in Law's Commonwealth,' in Austin and Klimchuk, eds., *Private Law and the Rule of Law,* 24.

10 Lonard F. M. Besserlink, 'The Notion and Nature of the European Constitution after the Reform Treaty, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086189

11 'The Constitutional Imagination,' (2015) 78 (1) *Modern Law Review,* 2

12 See David S. Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 *California Law Review* 863-952.

the lives of citizens and in the interactions among citizens themselves. So too, of course, the rule of law.

The ideal of the rule of law differs in several ways from constitutionalism, however, particularly of the modern variety. Apart from the issue of modes of association that I have already mentioned, constitutionalism involves locating, allocating, distributing and channelling jurisdiction and powers among specified, 'constituted' legal institutions. Today it typically also specifies certain fundamental rights of citizens that agencies of government are legally obliged to respect.

Constitutionalism has to do with the frame and architecture of governance, always formal and often substantive. The rule of law is less architectonically focussed, more process-oriented, than constitutionalism. Whatever the constitutional frame, the rule of law is primarily concerned with *ways* in which power is exercised, specifically non-arbitrary ways. Not every aspect of the rule of law is a constitutional matter, and not everything likely to be found, in a modern constitution at any rate, is part of the rule of law. Though they should not be inconsistent with the ideal of tempering power common to both, constitutions have other purposes such as clear and functional allocation of jurisdiction and competences, about which the ideal of the rule of law might be agnostic. Again, constitutions typically specify permissible *content* of laws, whereas many accounts of the rule of law limit it more austerely to matters of form and procedure.[13] And finally, on many mainstream views the rule of law has a great deal to do with the *character* of laws, with formal or procedural aspects of the system of legal rules, that allow subjects to confidently be able to predict the operations of public power when they plan to act. That confidence depends in part upon legal rules and institutions (and I would add other social institutions and practices as well) being of some kinds – knowable, relatively clear, predictable, coherent - and not others. These characteristics are rarely mentioned in constitutions, unless through medium of a rule of law clause.

Again, the rule of law does not necessarily have a specific or even any documentary anchor or focal point, such as a written constitution, though many contemporary constitutions specify the rule of law as a constitutional principle, and many people believe written constitutions are good for the rule of law. And while a written constitution is not necessary for the rule of law, without the latter you might well have a constitution but no *-ism,* as is the case in many constitution-rich constitutionalism-poor despotisms around the world. Further if, as Neil Walker argues, 'a *sine qua non* of constitutional status in *all* circumstances … is the existence of a self-conscious discourse of constitutionalism,'[14] it is not obvious that

[13] Lon Fuller, *The Morality of Law,* 2nd edition (New Haven, Yale University Press) 1969; Joseph Raz, 'The Rule of Law and its Virtue,' in *The Authority of Law,* (Oxford, Clarendon Press, 1979), 210-29; Jeremy Waldron, 'The Rule of Law and the Importance of Procedure, In J.Fleming, *Getting to the Rule of Law, Nomos no.50* (New York University Press, 2011), 3-31;

[14] Walker, 'The Idea of Constitutional Pluralism,' 343.

the existence of the rule of law requires there to be a discourse of rule of law, though it may well help.

Other differences could be identified, though given the overlaps none is clearcut. In any event, they are not my special concern. For if constitutionalism and the rule of law are not identical, they are pretty clearly in the same line of business. A central part of that business is to channel, discipline, constrain and inform – rather than merely serve – the exercise of power, in ways that prevent it being arbitrary.

2. Arbitrary Power

Over centuries, as countless thinkers have observed, a pervasive problem with power is that left to their own devices, power-holders cannot be relied on to avoid exercising it capriciously, and at worst wildly. And as too many people over too many centuries have not only observed but experienced, capricious power is terribly unsettling and wild power is simply terrible. More generally, the potential is alive even when power is not wild but merely, to use the more commonly identified term for this order of vice, arbitrary. Arbitrary power is not necessarily wild but it is usually and already objectionable, and that for many reasons.[15]

Though it is commonly used and understood, the notion of arbitrariness is not, to my knowledge, the subject of much refined conceptual analysis. It is beyond my brief or competence to give it that here. I content myself with the following observations. If they are not adequate to delineate the concept, they will at least mark out some of the territory it occupies.

Arbitrary power can be examined in terms of input and output. When power-wielders are not adequately controlled, the grounds for their exercise of power unspecified and untestable, that power beyond serious question or review, there's an input problem. But even if you have all that, but power-wielders are inclined and able to use their power without any need to provide space for its targets to be heard, to question, to inform, or to affect the exercise of power over them, there's an output problem. Commonly, input and output defects go together, but they might not. There might be rules governing power, that require or allow power-wielders to take no account of the needs, interests, voice or point of view of those subject to it. Alternatively, it might be a matter of caprice or whim or simple absence of consideration how those subject to power are treated, even though from time to time such treatment might be solicitous. Neither option is a good one to have.

It is important to note, since it is often not noted, that the problem with wild or arbitrary power is not the noun *per se,* but what the adjective does to it. Contrary to the view of Hayek, which he attributes to 'the great individualist social philosophers of the nineteenth

[15] I discuss four of these reasons at some length in 'Four Puzzles about the Rule of Law' at 78-81.

century,' that 'power itself has always appeared the archevil,'[16] we could not do without power in many forms and for many purposes. We should not want to deny the need or emasculate the capacity for power to keep peace, defend populations, enforce legal judgments, collect taxes, balance other powers, and so on. And we don't want ordinary citizens to be impotent either. Anyway, we're stuck with power; it won't disappear.

But arbitrariness is a specific and obnoxious vice when added to power. Masochists aside, few favour circumstances where significant public power can be exercised over them in an arbitrary manner. There are many other vices which depend on the particular purpose or consequences of the exercise, but arbitrary power is vicious enough even without them and moreover can be vicious even when intentions are honourable. It is a free-standing vice, as it were, that has to do with the *ways* power is exercised. Appeal to constitutionalism and the rule of law signals the hope that there may be ways, and that law might contribute, to diminish the level of arbitrariness and worse, in the exercise of power.

3. 'Negative' Realism

How should we interpret this hope? One way in which people purport to show that they are hard-headed rather than tender-hearted in their 'realism' about constitutionalism and the rule of law is to understand both in a negative, defensive manner, to characterise both constitutionalism and the rule of law as good less for what they enable and create, than for what they might prevent; to identify their purpose with what they rule out rather than what they rule in; what they seek to prevent, rather than what they might generate and encourage to flourish.

The reasoning is familiar. The world's a tough place where 'the strong do what they can while the weak suffer what they must.'[17] The signal contribution of constitutionalism and the rule of law is to try to reduce the suffering of the weak by restricting what the strong can do. On this interpretation, the point is to *block* and *limit* the possibility of unruly power, to curb and restrain power's exercise. This is not a new view, and it is still popular among liberals, even more among neo-liberals. Thus Hayek once more: 'The effective limitation of power is the most important problem of social order'.[18] It is the job of constitutionalism and the rule of law to impose the limits: 'Constitutionalism means limited government. ...indeed, what function is served by a constitution which makes omnipotent government possible? Is its function to be merely that governments work smoothly and efficient, whatever their aims?'.[19] When questions are posed in such starkly dichotomous terms, what surprise that they are merely rhetorical?

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16 *The Road to Serfdom,* 50th anniversary edition with a new introduction by Milton Friedman, (University of Chicago Press, 1994), 159

17 'The Melian Dialogue,' in Robert R. Strassler, Richard Crawley, Victor Davis Hanson, eds., *The Landmark Thucydides*, (New York, The Free Press, 1998), 352.

18 *Law, Legislation, and Liberty,* vol.3, (University of Chicago Press, 1979), 128

19 Hayek, *Law, Legislation, and Liberty,* vol.2, (University of Chicago Press, 1973), 1.

And it's not just 'neos' who think this way. Thus Judith Shklar, a profound analyst and exponent of liberalism, reads Montesquieu to argue that the rule of law:

> really has only one aim, to protect the ruled against the aggression of those who rule. While it embraces all people, it fulfills only one fundamental aim, freedom from fear, which, to be sure, was for Montesquieu supremely important. … [t]his whole scheme is ultimately based on a very basic dichotomy. The ultimate spiritual and political struggle is always between war and law ... The institutions of judicial citizen protection may create rights, but they exist in order to avoid what Montesquieu took to be the greatest of human evils, constant fear created by the threats of violence and the actual cruelties of the holders of military power in society.[20]

Shklar's own choice between these two accounts is clear: 'If one then begins with the fear of violence, the insecurity of arbitrary government, and the discriminations of injustice, one may work one's way up to finding a significant place for the Rule of Law, and for the boundaries it has historically set upon these the most enduring of our political troubles.'[21] As befits a devotee of 'the liberalism of fear' who 'begins with what is to be avoided,' Shklar insists that the prevention of evil, rather than a quest for the good, is the signal virtue of the rule of law.

A similar, if less passionate, thought underlies the somewhat tepid praise (two cheers) for the rule of law offered by the legal philosopher, Joseph Raz. He describes it as 'a purely negative value … merely designed to minimize the harms to freedom and dignity which the law might cause in its pursuit of its goals however laudable these might be.'[22] Shklar does not share Raz's lukewarm tone, but the precious service she lauds is also negative. The bottom line is 'damage control.' [23]

This negative, constraining, controlling aspect of the rule of law is both realistic and of fundamental importance. It responds to 'the circumstances of politics'[24] as they often have been found to be. It finds in constitutionalism and the rule of law expressions of 'a politics of scepticism as opposed to a "politics of faith" and of absolute ends.'[25]More deeply it is a

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20 Judith N. Shklar, 'Political Theory and the Rule of Law,' in Shklar, *Political Thought and Political Thinkers,* edited by Stanley Hoffmann, (Chicago: University of Chicago Press, 1998), 24-25.

21 Shklar, 'Political Theory and the Rule of Law'*,* 36.

22 'The Rule of Law and its Virtue,' in *The Authority of Law,* 228.

23 Shklar, 'The Liberalism of Fear,' *Political Thought and Political Thinkers,* 9.

24 See Jeremy Waldron, *Law and Disagreement,* (Oxford: Oxford University Press, 1999).

25 Aurelian Craiutu, *A Virtue for Courageous Minds*, 5. Craiutu goes beyond this sceptical perspective, however. He speaks frequently and more interchangeably than I of both moderation and tempering (both as character traits and institutional arrangements), with the former making the conceptual running and the latter supporting or exemplifying moderation but carrying no conceptual emphasis. He may or may not be interested in the sort of distinctions I want to make in this section, but there is little of substance that separates us. Indeed, though I only came across his book while revising the manuscript of this article, I would fully endorse the dual argument that he, unlike Shklar, finds and applauds in Montesquieu (at 64): 'Montesquieu's pluralist perspective followed, to some extent, in the footsteps of Hobbes, who also believed that in the political sphere there is always a *summum*

realistically pessimistic reflection on dangers, not contingently visited upon us from elseqhere, but endemic to the human predicament, of the sort famously expressed by Alexander Hamilton in *The Federalist* #51:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[26]

The exercise of public power carries terrible risks. It is wise to be aware of them and to think seriously and realistically about what may be done to minimise them, both because they are directly threatening in themselves and because where such threats are realised, nothing much else good will occur. Partisans of both constitutionalism and the rule of law are clearly deeply informed by such thought. It is aptly identified as realistic, in the sense identified by Philip Selznick, according to which it is:

> not enough to think of specific evils as problems to be solved or as obstacles to be overcome. Rather, the perspective of moral realism treats some transgressions as dynamic and inescapable. They can be depended on to arise, in one form or another, despite our best efforts to put them down.[27]

And not just 'moral realism' but specifically *political* realism is necessary in the case of constitutionalism and the rule of law, for thinking about such things is not, as both Bernard Williams and Jeremy Waldron have emphasised against much conventional academic unwisdom, 'just applied moral philosophy.'[28] Politics and the wielding of power more generally are, after all, not simply – perhaps not primarily - a matter of the ideal ends we should seek, but of conflict, violence, oppression, domination, their consequences, and what might be needed and feasible to avoid them.[29] The liberalism of fear articulated by Shklar and others is a sober, sombre, response to such realities.

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malum on which people agree. In Montesquieu's political writings, this absolute evil was despotism, characterized by cruelty and arbitrary power, and the political good was defined by the absence of cruelty.
Nonetheless, one might argue that Montesquieu made an equally important argument for the existence of a *positive* political good – moderate government – which represents much more than the opposite of a despotism based upon fear and arbitrary power.'

26 *The Federalist Papers,* #51 (Hamilton), (New York, New American Library, 1961), 322.

27 *The Moral Commonwealth,* (Berkeley, University of California Press, 1992), 175.

28 Jeremy Waldron, '*Political* Political Theory: An Inaugural Lecture,' (2013) 21,1 *Journal of Political Philosophy,* 1-23

29 See Bernard Williams, 'The Liberalism of Fear,' in *In the Beginning was the Deed. Realism and Moralism in Political Argument,* (Princeton University Press), 2005, 52-61.

So realism has a kind of foundational priority over other concerns, not necessarily chronological but normative or to use Rawls' term, lexical: you can be realistic (in a normatively limited sense) without further ideals, but practical ideals are always precarious in the absence of realism. However, a purely negative, defensive, interpretation of the liberalism of fear can also reduce and distort one's understanding of politics, and of law. This negative perspective does not exhaust realism, and it most certainly should not exclude idealism. Violence and oppression are not the sum of what politics and power well exercised can and often do deliver, and limitation of power is not the sum of what constitutionalism and the rule of law can contribute to a well-ordered public order.

4. Tempering

That is one reason the umbrella term that I have come to prefer for such contributions is *tempering* power, rather than limiting it, or any of the other words – taming, restraining, controlling, etc., - commonly invoked. Not that they are wrong, but they are insufficient to grasp some core features of both constitutionalism and the rule of law. For the rule of law and constitutionalism are not merely about constraint, they also depend upon, and in turn are intended to produce, salutary positive results impossible without them.

To speak of tempering power is not likely to raise alarm, particularly since Aquinas and Bracton in the thirteenth century, and Montesquieu in the eighteenth, not to mention many Greeks and Romans before them, did so. Still, though only a word, and a metaphor at that, this is not the most common way of putting things, and typically, even where the word is used in connection with the rule of law, it is not chosen for a distinctive purpose; it seems simply to be thrown in to amplify common concerns, e.g. 'constrain, moderate, temper, etc.'

Thus Montesquieu lauds both the tempering and moderating of power, but for him moderation is the concept that does the work, 'tempering' is conceptual embroidery. I might have followed him,[30] since I certainly favour moderated power too. But for reasons I will seek to explain, this terminological difference has a few implications. Even moderation misses something, though not nearly as much as is missed in locutions such as: limit, restrain, constrain, restrict, curb. As we have seen, these are the terms typically used by people who think themselves realists about power, the rule of law and constitutionalism. Though there is something to their boast, indeed something important, I think they are wrong to think so well of themselves. The rule of law and constitutionalism can and should serve larger, more positive, ideals as well.

Since the Greeks, temperance has after all been considered one of the primary, cardinal, virtues. Used of persons, it certainly included restraint, particularly self-restraint, and was the opposite of *hubris*, but it also suggested moderation and self-knowledge as positive self-

[30] See Aurelian Craiutu, *A Virtue for Courageous Minds. Moderation in French Political Thought, 1748-1830,* (Princeton University Press, 2012).

generated virtues, aspects of the character of people and institutions, not necessarily imposed. The example of self-knowledge is important. As Helen North comments on the Greek tragedians:

> If the Aeschylean conception of sōphrōsynē [glossed by Cicero and writers thereafter as *temperantia*] can be glossed by the Apolline "Nothing in excess" and "Think mortal thoughts", the Sophoclean virtue is closer to "Know thyself." The failure in sōphrōsynē that marks such heroes as Ajax, Antigone, Oedipus, Electra, and Deianaira is a failure in self-knowledge, amounting sometimes to delusion, sometimes almost to madness. The hero is blind to something essential in himself or his situation, and tragedy arises from the interplay between his circumstances and his admirable but imperfect nature.[31]

Many aspects of both constitutionalism and the rule of law are intended to encourage such virtues of moderation and thoughtful self-knowledge, not merely to curb wild power. They are *encouraged by* constitutional and rule of law practices and institutions, not contained or constrained by them.

The examples so far only relate to personal behaviour. There are also institutional senses of tempering, and they seem to me helpful for two reasons. First, tempering suggests both a moderating balance of elements (eg justice with mercy; strength with moderation), a *blending*. In early medieval representations, *Temperantia* had a mixing bowl, 'in keeping with the translation of "temperamentum" as measure/proper mixture/moderation.'[32] In Lorenzetti's marvellous Allegory of Good Government, in Siena's town hall, Temperantia holds a sandglass rather than a mixing bowl, but it is surely no accident that, of the seven virtues depicted, she is placed between Justitia on one side holding the severed head of some felon and Magnanimita disbursing coins from a large dish, on the other. The juxtaposition is unlikely to be accidental. Justice is good, magnanimity is good, but temperance patiently mediates between them. There is nothing of this in the usual vocabulary. Indeed, though negative constraining conceptions of constitutionalism often speak of separation of powers, as everyone knows that is not enough: mixing is key. As Craiutu observes: 'Montesquieu in fact favoured a blending rather than a strict separation of powers and referred in his book to *pouvoirs distribués* and not *pouvoirs séparés.*'[33]

A second distinctive aspect of tempering is that the concept lends itself less automatically, as 'limiting' lent itself to Hayek and many others, to the view that power is its foe, and weakening it its purpose. Indeed, an ambition to 'temper' power is consistent with acknowledging that among what is hoped for from constitutionalism and the rule of law are

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31 'Temperance (sōphrōsynē), *Dictionary of the History of Ideas,* vol.!V, (New York, Charles Scribner's Sons, 1973), 367.

32 Gerhard Dohrn-van Rossum, *History of the Hour: Clocks and Modern Temporal Orders* (University of Chicago Press, 1996, 5.

33 *A Virtue for Courageous Minds,* 49.

salutary forms of *strengthening* of the power to which it is applied. Tempered power is not necessary manacled, or gutted. It does not necessarily suggest weakening; rather, harnessing of power to good purpose. Tempered steel, after all is stronger, more fit for purpose, than iron or untempered steel; as Wikipedia informs us, it is intended 'to achieve greater toughness by decreasing the hardness of the alloy.'

Applied to constitutionalism and the rule of law, then, tempering can suggest some judicious combination of mix, balance, moderation, self-knowledge, all contributing to particular and salutary sorts of strength. These suggestions need to be kept in mind, for the negative conception, the flint-edged realism of Shklar or other sceptics, is not the only way of viewing constitutionalism and the rule of law, and not on its own the best.

5. 'Positive' Idealism

Jeremy Waldron has criticised views of constitutionalism according to which '[e]verything is seen through the lens of restraint and limitation,'[34] and has insisted on the empowering role and potential of constitutional provisions. As we all know, constitutions, after all *constitute* the elements of a polity, and *empower* particular institutions. They *distribute* power to some institutions and actors and not others, they establish fora for discussion and decision, 'so that public deliberation becomes a structured enterprise'.[35] All this crucial work is given short shrift by a perspective in which '[e]verything is seen through the lens of restraint and limitation.'[36]

Again, Stephen Holmes has long stressed the empowering consequences of constitutionalism and the rule of law; what, in contrast to the more common negative conception, he calls 'positive constitutionalism'.[37] Appropriately configured laws, on this view, provide 'enabling constraints.'[38] For the 'paradoxical insight' here, as Holmes describes it, is that:

> Limited government is, or can be, more powerful than unlimited government. ... that constraints can be enabling, which is far from being a contradiction, lies at the heart of liberal constitutionalism ... By restricting the arbitrary powers of government officials, a liberal constitution can, under the right conditions, *increase* the state's

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34 'Constitutionalism: A Skeptical View,' NYU School of Law, Public Law & Legal Theory Research Paper Series, No. 10-87, December 2010, 25

35 Waldron, 'Constitutionalism: A Skeptical View,' 26.

36 Waldron, 'Constitutionalism: A Skeptical View,' 25.

37 *Passions and Constraint,* (Chicago University Press), 1995

38 See David Stark and Laszlo Bruszt, *Postsocialist Pathways,* (Cambridge University Press, 1998), ch.6. See too Martin Loughlin, *The Idea of Public Law,* (Oxford University Press, 2003) and Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints,* (Cambridge University Press, 2000).

> capacity to focus on specific problems and mobilize collective resources for common purposes.[39]

On this view, like a swimmer (or a scholar) whose effective performance requires mastery of, and in a sense coming to be mastered by, techniques and disciplines that allow one to marshal and channel raw energy (or intelligence), so the ability to concentrate power, where and how it should be concentrated to serve good purposes, is enhanced by certain requirements, procedures and institutions which, among other things, redirect its movements so it doesn't splash around where and how it shouldn't.

Or to use two other apt metaphorical variations from Holmes, one is that we should think of constitutional provisions and the shaping, channelling presence of the rule of law as constitutive, like the grammar of a language, rather than restrictive like, though he doesn't make this analogy, censorship. Without grammar we cannot speak, at least not in a way that communicates effectively with interlocutors. It disciplines what we can say comprehensibly but it doesn't thereby weaken our ability to communicate. On the contrary; it is a condition of it:

> The rule*s* of grammar do not hinder but rather facilitate the ability to communicate, and that includes the ability to communicate surprising, unnerving, rude, unpopular, and even anti-constitutional ideas. It would obviously be inaccurate, therefore, to conceptualize such rules merely as don'ts, prohibitions, barriers, injunctions, no-trespass signs, or purely negative limitations on permissible behaviour. True, the rules of grammar introduce certain rigidities into ordinary language. But rigidities, for a variety of reasons, can be prodigiously enabling.[40]

Grammar is one thing, but constitutions in particular don't merely enable us to communicate, they also allot roles, responsibilities, and powers among actors in the polity. And here too Holmes has another suggestive analogy:

> If we think of constitutional rules as scripts, rather than ropes ... it is easier to understand why powerful actors, looking for protocols to facilitate rapid coordination, might be willing to Incorporate them into their motivations as obligatory principles of conduct. They are not incapacitating but capacitating. They are not shackles making unwanted action impossible, but guidelines making wanted action feasible. Seen in this way, their binding power becomes more commonsensical than mysterious.[41]

These are not new discoveries. Thus Holmes traces the awareness of enabling constraints to Bodin in the sixteenth century. Montesquieu was well aware of them too. The whole of *The*

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39 Holmes, *Passions and Constraint,* xi

40 'Constitutions and Constitutionalism,' in Michel Rosenfeld and András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law,* (Oxford University Press, 2012), 192.

41 Holmes, 'Constitutions and Constitutionalism,' 202.

Spirit of the Laws was bent to investigating the sources of moderation of government and recommending institutional ways to ensure it. He notes that, despite the horrors of despotism and the attractions of moderation, the world has seen many more despotic governments than well-ordered moderate ones. He laments that but finds it unsurprising, because a moderate government is a much more complicated achievement. The language with which he makes the contrast is suggestive, for it is not a language of brute impediments:

> Despite men's love of liberty, despite their hatred of violence, most peoples are subjected to this type of government [despotism]. This is easy to understand. In order to form a moderate government, it is necessary to combine the several powers; to regulate, temper, and set them in motion; to give, as it were, ballast to one, in order to enable it to counterpoise the other. This is a masterpiece of legislation; rarely produced by hazard, and seldom attained by prudence. By contrast, a despotic government leaps to view, so to speak; it is uniform throughout; as only passions are needed to establish it, everyone is good enough for that.[42]

This is a language of difficult and complex balancing, tempering, regulating, not shackling, and certainly not weakening. Indeed Montesquieu emphasised - with profound if counter-intuitive insight - that although restrained government was not fearful, as despotism was, it was in a crucial sense stronger than any despot could be, for:

> A moderate government can, as much as it wants and without peril, relax its springs. It maintains itself by its laws, and even by its force. But when in despotic government the prince ceases for a moment to raise his arm, when he cannot instantly destroy those in the highest places, all is lost, for when the spring of the government, which is fear, no longer exists, the people no longer have a protector.[43]

Montesquieu died in 1755, thirty four years before the French Revolution. Yet he understood that the French king's position was in effect weaker than that of the English monarch, notwithstanding that, as one author has observed, '[a]t every step the absolutist ambitions of the English Crown were thwarted: consent of Parliament was needed for taxes; consent of the law courts was needed for legal enforcement of alternative revenue sources;

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[42] *The Spirit of the Laws,* translated and edited by Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone, (Cambridge University Press, 1992), 63. Cf. Craiutu, *A Virtue for Courageous Minds,* on 'the strong connection between moderation and institutional complexity, an idea that would resonate … with Montesquieu, Mounier, Necker, Mme de Staël, and Constant … classical authors praised the institutional framework of mixed government, not only because the latter blended various social interests and elements, allowing them to coexist harmoniously, but also because it made it extremely difficult for any group to impose its will over others and exercise arbitrary power.' 31-32.

[43] Montesquieu, *The Spirit of the Laws,* 28.

and, most important, consent of the gentry was needed for daily implementation of monopolies'[44]. Nevertheless, appearances were deceptive. As the same author explains,

> legislation enacted by Parliament was usually implemented, whereas the will of the much stronger executive in France was less frequently carried out. A significant implementation gap existed under absolutism. ... there were no legal limits on the French king's power or, by extension that of his ministers, yet time and time again his ministers succumbed to cabals within the court ... Despite the legal limits on the Crown's power imposed by Parliament, the English king managed to maintain his position and policies. It seemed to many contemporaries that George III's ministers were more powerful and more likely to be obeyed than the unaccountable and theoretically stronger ministers of the French king.[45]

Not only was English government more effective than French, more able to raise taxes, more deeply embedded in society, but the English economy was more powerful than the French, and the people of England were freer than the people of France. This is not an accidental combination. And, though France had an apparently far more powerful system of centralised rule than England, the French *ancien regime* was swept aside in 1789, while the English system has survived with only evolutionary change since the seventeenth century. The French head of state had enormous discretionary power, which proved worthless when his own head was removed. The English kings - after being forced in the seventeenth century to accede to legal limitations on their personal power (and also losing a head) - regularly died in bed.

Montesquieu's insight into the relative strengths of moderate and despotic governments was even more prophetic than this comparison between England and France suggests. The most dramatic recent evidence of it is the house-of-cards collapse of the Soviet Union and its dominions. This was one of the most despotic empires the world has known, and almost no one apart from Montesquieu predicted its collapse. But it was not the first occasion when apparently overwhelmingly powerful despotisms have wilted before forces which hardly seemed up to the task. Like the collapse of communism, the French and Russian Revolutions, the end of the Marcos regime, the fall of the Shah, all seemed overdetermined *after* the event. But they revealed that extraordinary fragility of despotisms which keeps taking us by surprise. It shouldn't.[46] One last recent example might serve. Thus in the last moments of Yanukovych's rule in Ukraine:

> The absence of institutional checks on the presidency made the state-society standoff worse. Yanukovych used his free hand to rush through parliament a law

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44 Hilton L. Root, *Political Foundations of Markets in Old Regime France and England,* (Berkeley, University of California Press, 1994), 156.

45 Root, *Political Foundations of Markets in Old Regime France and England,* 214.

46 The last few paragraphs are drawn from my Australian Broadcasting Commission radio lectures (the Boyer lectures), *Between Fear and Hope. Hybrid Thoughts on Public Values,* (Sydney, ABC Books, 1997), 112-13.

> that decreed new fines and even criminal penalties for various types of unsanctioned protests. This move too backfired, stoking tensions between police and demonstrators and helping to spread the protests well beyond Kyiv.
>
> Lack of institutional oversight also created a sense of impunity in law-enforcement ranks. Riot police used excessive force against anyone viewed as a potential protester and even resorted to deadly tactics in the final weeks of the confrontation. Undercover agents abducted protest participants, brutalizing or killing them to intimidate others. As for aboveboard efforts to prosecute demonstrators, these had no hope of legitimacy given the judicial system's notorious subordination to the president. With no impartial enforcement institutions, the legal order quickly disintegrated.[47]

Not all jurisprudential arguments have dramatic practical implications, but this one does. For it is not only partisans of constitutionalism and the rule of law who consider its main contribution to be negative. Consider the often-voiced claim that in situations of emergency, elements long believed central to constitutionalism and the rule of law need to be waived or suspended in confrontation with terrible threats or emergencies. The arguments often occur in civil emergencies and wars, and they have recurred with a vengeance in the 'war on terror.' On the negative view, it seems at least plausible to argue that there are inbuilt tensions and unavoidable tradeoffs between the logic of urgent, strong and effective action in emergencies, and that of the restraints and constitutionalism and the rule of law. Though we might approve of both, the thought is that we need to recognise that one lives in inexorable tension with the other.

But what if the effective exercise of power depends on precisely those constraints on arbitrary power that impatient politicians are eager to discard? And what if this is especially true in emergencies. Stephen Holmes might have spent the rest of his life trading polemics with other political theorists about negative and positive constitutionalism, were it not for the fact that on September 11, 2001, he witnessed the destruction of the Twin Towers from the balcony of his apartment in Manhattan. That traumatic moment led to at least one fruitful result: his adaptation of his general views on constitutionalism and the rule of law to the intensely practical problem of how governments should respond to emergencies such as this. His argument is that, so far from being a reason to discard the rule of law, times of emergency are precisely when pre-tested, often long-evolved, measures to discipline the exercise of power are typically most needed. He explores a range of contexts, such as intensive care medicine, in which emergencies are the stuff of life (and death), pointing out that 'emergency-room doctors and nurses are not the only professionals who, when faced with a disorienting crisis, limit discretion and abjure gut-reactions, embracing instead a strict

[47] Serhiy Kudelia, 'The House that Yanukovich Built,' (2014) 25, 3 *Journal of Democracy,* 29.

adherence to rules and protocols that provide them with a kind of artificial "cool head"'[48]; 'only those who fail to appreciate the gravity of a looming threat would advocate a wholesale dispensing with rules that professionals have developed over time to reduce the error rate of rapid-fire choices made as crises unfold'.[49]

Holmes is thus critical of the common wish of governments to 'release the shackles' of constitutionalism and the rule of law in situations seen as emergencies – to rule without open, calculable rules, to dispense with safeguards of procedural fairness, suspend *habeas corpus,* diminish or discard the ordinary protections and contestatory opportunities traditionally associated with legal hearings. Such ambitions, even when well-motivated, pay no heed to the positive, enabling, competence-protecting role of the rule of law, and particularly to the dangers of panicked flailing about, overinclusion, plain unaccountable incompetence, ignorance, and lack of exposure to tests of the reliability of information, that often attend the acts of power-wielders acting in secret and on the fly.

Unfortunately, Holmes insists, 'defenders of unchecked (or only weakly checked) executive discretion in the war on terror typically ignore the liberal paradox and its corollary, that legal and constitutional restraints can increase the government's capacity to manage risk and crisis' .[50] To ignore this paradox is also to misunderstand the powerful constructive significance of the rule of law. Yet '[t]o reject the rule of law is reckless because it frees the government from the need to give reasons for its actions before a tribunal that does not depend on spoon-fed disinformation and is capable of pushing back. A government that is not compelled to give reasons for its actions may soon have no plausible reasons for its actions'.[51]

Too often, defenders of the rule of law feel pressure to choose between effectiveness in defence of security, on the one hand, and what can be portrayed as effete, pedantic and (usually in a pejorative tone) 'idealistic' concern with civil liberties, that our enemies will exploit to do us in, on the other. It is Holmes' singular achievement to show that this apparently irresistible conflict is often quite spurious. As Confucius might have said, governments that act in the dark too often lose their way. They do the wrong things, catch and harass the wrong people, miss the right ones. Often they blunder, and if ill-motivated they do worse than blunder, because they can conceal their blunders. The simple need to justify one's actions before independent bodies backed by long legal traditions familiar with the dangers of criminality, the temptations of prosecution, the virtues of process, and those of liberty, actually does have the power to generate a level and kind of *thoughtfulness* that

48 Stephen Holmes, 'In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror' (2009) 97(2) *California Law Review,* 302

49 Holmes, 'In Case of Emergency', 303

50 Holmes, 'In Case of Emergency, 304-05.

51 *The Matador's Cape,* (Cambridge University Press, 2007), 6.

Waldron[52] has rightly argued is a benefit of both constitutionalism and the rule of law, and to those subjected to them both.

One trouble with the view of constitutionalism and the rule of law as out to brake power *per se* is that it doesn't recognise the significant differences that exist between *kinds* of power. Thus the historical sociologist, Michael Mann, has distinguished between what he calls *despotic* power - 'the range of actions which the elite is empowered to undertake without routine, institutionalised negotiations with civil society' - and what he calls *infrastructural* power - 'the capacity of the state to actually penetrate society, and to implement logistically political decisions throughout the realm.'[53]

For the release and development of social and economic energies, as well as for political decency, it is infrastructural power that is crucial. Despotic states combine arbitrariness and lack of political or legal limits with chronic incapacity to mobilise social energies and make use of social potential. As a colleague of Mann's, John Hall, puts it,[54] they sit like capstones atop the societies they dominate; they do not penetrate organically and effectively into the social structure. They dominate from above, but do little to contribute from within.

The connection between despotic strength and social weakness is not accidental. Though despots can repress effectively for a time, and mobilise for limited specialised purposes such as war, they have proved very weak in the capacity to penetrate, mobilise, and facilitate energetic and resilient social forces. On the contrary, they typically seek to block them, and they stunt their development. In other terms, despotically strong states go along with weak societies. And this is centrally because of the arbitrariness and unpredictability with which they exercise power. These states are predatory and their societies are prey. They are not productive, and neither are their societies. Constitutionalism and the rule of law get in the way of despotic power, but they also channel, direct, facilitate, and inform infrastructural strength. When they are understood to do both, real and ideal come together in salutary and mutually beneficial ways.

A somewhat paradoxical implication of these reflections is that negative constitutionalism, both as understood by those most committed to it and by those who think it must be traded against power in emergencies, does not merely slight positive ideals for the rule of law and constitutionalism. It is also unrealistic, since it inadequately captures the key significance of enabling constraints. And there is more.

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52 See Waldron, 'Thoughtfulness and the Rule of Law,' *British Academy Law Lecture,* 2011, and 'Constitutionalism: A Skeptical View.'

53 'The Autonomous Power of the State: Its Origins, Mechanisms and Resources', in his *State, War and Capitalism,* (Oxford: Blackwell, 1988), 32. See also his *Sources of Social Power,* vol. 1, (Cambridge University Press, 1986), 477: Here, and more crisply, Mann contrasts 'power over civil society, that is, *despotism'* and 'the power to coordinate civil society, that is, *infrastructural power.'*

54 John A. Hall, *Powers and Liberties. The Causes and Consequences of the Rise of the West,* (Berkeley: University of California Press, 1985).

Philip Selznick also saw reduction of arbitrariness as the central point of the rule of law, and he also viewed protection against the brute vices of unrestrained power as normatively prior to, though not necessarily more important than, more expansive moral aspirations. On the one hand, he understood the realistic appeal of the negative conception, and he often emphasised its importance. Thus, he agrees with those political realists who stress the importance of legality as a restraint on, and see the rule of law as a precious protection against abuse of, power.[55] But, he observes, that is not always and everywhere a problem of the same intensity and urgency. Moreover, Selznick makes a profound point which is often ignored in the thrust and counter-thrust between the fearful and the hopeful. For he observes that people, institutions, systems, communities, undergo what he calls 'moral development'.[56] At certain stages in the development of social institutions, for example, particularly formative stages, or when they are weak, or when assailed by strong forces hostile to them, certain values need strong support - because they are not yet established or institutionalised, or because they are at risk. All the more so, when there are powerful forces which put them at risk. Such values must be secured and it is dangerous to compromise them. When, however, they are institutionally, socially, ideologically and in other ways relatively secure, the balance of emphasis in our moral ambitions can change. Striving toward aspirational ideals can more safely supplement the establishment and defence of realistic baselines. We can even take some risks. This is not because the baselines become less important, just that they are more firmly in place and risks are less risky. Where they are sufficiently secure we should be prepared to hazard more improvement, temper fear with hope, just as in more precarious circumstances we must temper hope with fear. The reverse, of course, also applies. Values which might be fruitful where institutions are strong, might be dangerous where they are weak or absent. Both conditions of survival and those of flourishing demand attention. Thus we must be alert to:

> the identification of reliable incentives and recurrent vulnerabilities. This leads readily to what we may call *baseline* morality—the idea that moral requirements should be closely tied to urgent problems . . . A baseline morality is often the most we can aspire to; and it is always a precondition for further development.
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> Nevertheless, we need not be content with limited aspirations. Once a baseline morality is secure, we can respond to opportunities for extending responsibility and enriching fellowship. The conditions of *survival* are easier to meet than those of *flourishing*, which are more complex and more fragile. It does not follow, however, that we should fail to treasure what is precarious or cease to strive for what is nobly conceived.[57]

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55 *The Moral Commonwealth,* (Berkeley: University of California Press,1992), 174.

56 See Philippe Nonet and Philip Selznick, *Law and Society in Transition. Toward Responsive Law*, (New Brunswick, NJ: Transaction Publishers, 2001), 18-27.

57 Selznick, *The Moral Commonwealth,* 38.

There are no all-purpose bright line guides to the exact mix of fear and hope that our institutions should respect and reflect; no political and institutional recipes, stable and apt for every time and circumstance, which realism demands that we should follow without deviation, or idealism beckons us to pursue. Nor are there any useful fixed ideological positions which provide detailed solutions to whatever problems trouble us, particularly since these problems constantly change. Nor still a fixed range of preoccupations to be hammered, with the same tools, and always as insistently, whatever the circumstances. Rather, as Lord Keynes is alleged to have retorted on being accused of inconsistency, 'When the facts change, I change my mind. What do you do, sir?' That is simply a plea for realism, but it allows for idealistic possibilities as well.

Arbitrariness, just to stay with that, comes in many kinds and degrees, and a successful legal-political order needs to attend to many things short of war, cruelty and fanaticism. One might also hope for more from rule of law constraints on the exercise of power than avoidance of such terrible forces. In well-established legal orders with strong traditions, institutions and professions, one can ask more of legal institutions than mere restraint on power, notwithstanding the preciousness of that. Rather,

> In contemporary discussions of the rule of law we find much that goes beyond the negative virtue of restraining official misconduct. . . . This thicker, more positive vision speaks to more than abuse of power. It responds to values that can be realized, not merely protected within a legal process. These include respect for the dignity, integrity, and moral equality of persons and groups. Thus understood, the rule of law enlarges horizons even as it conveys a message of restraint.[58]

Selznick is particularly insightful about the dynamic pressures that a legal order will tend to generate, both when it fails to satisfy subjects' expectations as when it succeeds. Unusual among writers on the rule of law, Selznick was a distinguished sociologist, and in part his objection to a purely limited conception of legality is that:

> We cannot really separate the negative and positive aspects of the rule of law. Indeed it would be highly unsociological to try to do so, for we would then miss the moral and institutional dynamics which create demands for justice, and which induce rulers to accept accountability. ... we should not reduce the rule of law to its most rudimentary forms.[59]

In this understanding, arbitrariness, and its antidotes constitutionalism and the rule of law, each takes on a larger meaning, attached to values to be vindicated, rather than simply to a set of institutions and practices imagined to guard them against threats. Arbitrariness is not found merely when a strict rule is overstepped but equally when law is 'inflexible,

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[58] 'Legal Cultures and the Rule of Law,' in Martin Krygier and Adam Czarnota, (eds), *The Rule of Law after Communism* (Aldershot: Ashgate, 1999), 26.

[59] Selznick, 'Legal Cultures and the Rule of Law,' 25-26.

insensitive, or justified *only* by history or precedent.'[60] 'Going by the book'[61] generates its own forms of arbitrariness, as anyone who has sought to deal with officious bureaucrats might testify. To counteract such forms of arbitrariness, space needs to be made for a larger understanding of the contributions of constitutionalism and the rule of law, more 'idealistic', more open-ended and open to the complex realities of the world we seek uncertainly to navigate.

Finally, as with most political values, constitutionalism and the rule of law are not the only games in town. If tensions occur between limiting the dangers of arbitrariness and using power to release aspirations, or between tempering power and other important values, or indeed between negative and positive aspects of such tempering itself, such tensions need to be examined and dealt with; sometimes mediated, softened; sometimes simply put up with, lived with. We do that with tensions all the time, as we do with those between realism and idealism, after all. We have few absolute and universal trumps in these games, and we should resist pressures to sacrifice something valuable - such as idealism - just because something else - realism, say - is valuable too.

60 *Ibid*., 27.

61 See Eugene Bardach and Robert Kagan, *Going by the Book,* (Philadelphia: Temple University Press, 1982).