ACCESS TO JUSTICE AND THE RULE OF LAW

"[P]assion . . . can both inspire and blind":
HLA Hart, Book Review (1965) 78 *Harvard LR* 1281-1296 at 1295.

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Is there an entitlement to access to justice? Many of us in the common law jurisdictions think so and our reasons seem independent of guarantees like that contained in Article 6 of the ECHR and various cases and statutes. But what might the basis of this alleged entitlement be? The rule of law ideal is perhaps most commonly invoked to support it and the supposed connection between these two notions is my topic here. More specifically, I interrogate the assumption that this connection is so obvious as to need no explication. When Karakatsanis J claimed that "without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined", she was thinking this way.[1] So, too, was the Law Society of England and Wales in affirming that "[t]he rule of law underpins the very foundations of access to justice", a claim closely echoed by Liz Curran and Mary Anne Noone: "[i]f people cannot access legal help and assistance to seek remedies or enforce their rights, then their participation in society is diminished and the rule of law undermined".[2] These and similar remarks assume a strong connection between access to justice and the rule of law, not regarding it as necessary to argue the point.[3] While it would be churlish to complain about argumentative

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[1] In *Hryniak v. Mauldin* [2014] 1 SCR 87, para 26 (cited with approval by Chief Justice McLachlin in *Trial Lawyers Association of BC and Canadian Bar Association v AG of BC* [2014] SCR 59 at para 38).

[2] The Law Society, Policy Campaigns: Our Vision for Law and Justice (https://www.lawsociety.org.uk/policy-campaigns/articles/our-vision-for-law-and-justice-2019/;last accessed 20 January 2020) ; L Curran and MA Noone, 'The Challenge of Meeting Unmet Legal Need' (2007) 21 *Journal of Law and Social Policy* 63-89 at 84-85.

[3] Two instances: "[t]he rule of law requires that any persons with a bona fide reasonable legal claim must have an effective means of having that claim considered, and, if it is justified, being satisfied, and that any persons facing a claim must have an effective means of defending themselves": Lord Neuberger, 'Justice in an Age of Austerity', Tom Sargant Memorial Lecture 2013 at 9 (https://www.supremecourt.uk/docs/speech-131015.pdf; last accessed 25 June 2018) and "[t]he Rule of Law and a strong independent judiciary are empty ideals if

haste in judgements and policy documents, it is surely always permissible to highlight and question the assumed and the taken for granted.

To examine the connection between the rule of law and access to justice, terms must be specified. Section I offers an account of access to justice while section II examines the more problematic notion of the rule of law. My argument is that: (i) on one core sense of the rule of law, there are connections, some more direct than others, between it and access to justice (hereinafter '*AtoJ*'); and (ii) that some other putative connections between the rule of law and *AtoJ* are not made out. We must therefore be circumspect about the assumed link between *AtoJ* and the rule of law: it is almost always too quickly asserted. This is perhaps an instance in which our passion for the rule of law blinds us to its limits. The worth of every juristic notion need not derive from that one source.

I. ACCESS TO JUSTICE

Some commentators have noted that discussions of *AtoJ* almost always become preoccupied with the issue of 'access' to the exclusion of the question of 'justice'.[4] The observation is intended as a criticism, but there are two good reasons for this apparently skewed emphasis. The first is that the notion of 'access' is surely the least complicated of the two in play and it seemingly bears its ordinary meaning in all discussions of *AtoJ*.[5] Access is therefore undoubtedly a matter of degree, of more or less. But to what? A tempting answer for lawyers is: to the 'justice' meted out in the legal systems of contemporary nation-states, with their various sub-systems of criminal justice, civil justice, family justice etc. One advantage of taking 'justice' in *AtoJ* to mean 'legal justice' is that it facilitates fairly

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people cannot access the courts": K Lindgren AM, QC, 'The Rule of Law and Some Aspects of the Current Legal Scene in Australia', University of Sydney Law School Distinguished Speakers Program 18 July 2013 (http://www.academyoflaw.org.au/publication?id=2; last accessed 19 January 2020). I think the taken-for-granted connection evidenced here is widespread.

[4] See R MacDonald, 'Access to Justice and Law Reform' (1990) 10 *Windsor YB of Access to Justice* 287-337 at 287-315 (hereinafter '*Access*') and his 'Theses on Access to Justice' (1992) 7 *Canadian Journal of Law and Society* 23-45 at 26-27.

[5] Or, at least, in all of them with which I am familiar. A sample, to which we can add the two sources in n 4, is: C Coumarelos *et al*, 'Legal Australia-Wide Survey: Legal Need in Australia' in (2012) 7 *Access to Justice and Legal Needs* (Sydney: Law and Justice Foundation of New South Wales 2012); M Trebilcock, A Duggan and L Sossin (eds), *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) parts 1 and 2; P Pleasance, *Causes of Action: Civil Law and Social Justice* (London: LSC 2nd ed., 2006), ch 1; H Genn, *Paths to Justice* (Oxford: Hart 1999); H Genn and A Patterson, *Paths to Justice Scotland* (Oxford: Hart 2001); Consortium on Legal Services and the Public, *Legal Needs and Civil Justice: A Survey of Americans* (Chicago: American Bar Association 1994) 8; and Ab Currie, *The Legal Problems of Everyday Life* (Department of Justice Canada: Ottawa n.d.), ch II.

immediate measurement of the degree of access, both across legal systems as a whole and within some of their justice-subsystems.

There is another advantage, which constitutes the second reason why an emphasis upon *access* rather than *justice* is permissible. Justice is complicated. This unsurprising news holds not only of the attempt to realise justice in the circumstances of particular societies, but also of the task of elucidating exactly what justice is and requires. As to the latter, complexity arises from at least two sources. First, our notion of justice undoubtedly has numerous aspects – we speak quite properly of corrective, retributive and distributive justice and often draw a distinction between procedural (or 'formal') and substantive justice – and, second, those aspects are often difficult and contested.

Judging by the amount of academic work devoted to the topic over the last fifty years, distributive justice, taken to refer to the proper distribution of the benefits and burdens of social cooperation,[6] is currently justice's most difficult and contested aspect. That could explain why the various philosophical conceptions of distributive justice that currently dominate academic discourse and, sometimes, animate policy discussion, are rarely invoked in discussions of *AtoJ*.[7] Appreciation of the complexity of competing accounts of justice and of the task of assessing and comparing them, even when they are commensurable, should breed an understandable reticence.[8] Moreover, the task of assessing and comparing accounts of distributive justice is the fulcrum of much contemporary legal and political philosophy and is surely sufficiently demanding as to require independent treatment. Is it therefore permissible to set aside the topic of distributive justice's true nature when developing an account of *AtoJ*?

Roderick MacDonald thought not. He suggested that deferring discussion of the requirements of distributive justice when analysing *AtoJ* is harmful, serving either to

[6] This is John Rawls's statement of the domain of principles of social justice: *A Theory of Justice* (Oxford: Clarendon Press, rev. ed., 1999) 4.

[7] For two exceptions, see M Mayo et al, *Access to Justice for Disadvantaged Communities* (Bristol: Policy Press 2015), Introduction, chs 1 and 2 and Macdonald, *Access*, n 4 at 290-294. The norm is to invoke a non-defined notion of social justice: two examples are Curran and Noone, above n 2, at 89 and R Abel, 'Law Without Politics: Legal Aid Under Advanced Capitalism' (1984-5) 32 *UCLA Law Review* 474-642 at 475.

[8] Some recent accounts of justice seem incommensurable, being different answers to quite different questions: compare Rawls's account, n 6, with A Sen, *The Idea of Justice* (London: Allen Lane 2009), parts I and III and R Dworkin, *Sovereign Virtue* (Cambridge, Mass.: Harvard UP 2000), part I. Rooting an account of *AtoJ* in different accounts of justice or other competing values (contrast D Rhode's equality based account in *Access to Justice* (New York: Oxford UP 2005), ch 1 with C Parker's deliberative democracy account (*Just Lawyers* (Oxford: Clarendon 1999), chs 3-4) either imports or ignores this overarching difficulty.

represent the law as a justice-free zone, or to obscure the role conceptions of justice play in legitimating the distribution of entitlements constitutive of all existing legal systems.[9] But this putative harm can be easily avoided. First, by acknowledging, as anyone must, that legal systems maintain distributions of benefits and burdens; and, secondly, by taking MacDonald's warning to heart. We must recognise that deferring the topic of justice's true nature risks losing sight of that topic altogether. Yet this very act of recognition can function as a prophylactic against that risk.

There is another risk of which we must be aware and it is the opposite of that which MacDonald highlighted. It arises from hasty recourse to the topic of justice when discussing *AtoJ* and it can lead to several mistakes about law's relationship with justice. One mistake is to overlook the actual conceptions of justice that might be realised or latent in existing legal systems by turning too quickly to philosophical accounts of justice. Is it wise to assume, before scrutinising a particular legal system, that an account of *AtoJ* appropriate for that system must invoke some or other contemporary or classical philosophical conception of justice? That assumption seems dubious in the absence of *a priori* reasons to think that the notion of justice in legal justice must be exactly coextensive with the content of some or other philosophical account of justice. Why think that those accounts set the parameters within which all discussions of justice must take place?

A related mistake is to take the acknowledgement that legal systems maintain distributions of benefits and burdens to imply that those systems must realise or embody a single, uniform conception of distributive justice. We have no more reason to believe that than to believe that different areas of a single legal system realise different conceptions of distributive justice. Furthermore, it might be the case that different areas of a single legal system embody and uphold altogether different aspects of justice, like corrective or retributive justice, which are themselves available in different and competing conceptions. Nor need we assume that these areas of a legal system will never come into competition with those areas that realise some or other conception of distributive justice. The mistake here is to assume that justice is a uniform notion and that legal systems realise such a notion.

[9] Thus "[t]he liberal theory of justice is seen neither as a cause of substantive injustice, nor, surprisingly, even as an important contributor to its rectification": Macdonald, *Access*, n 4 at 292.

An account of *AtoJ* which holds that it is a matter of access to legal justice might strike some as alarmingly thin and uninformative. Anyone familiar with the *AtoJ* literature will know that the notion is often regarded as entailing much more than that. But what, beyond the thin claim, must a plausible account entail? If we assume that there are at least two plausibility conditions for such an account – (i) that, wherever possible, it be more rather than less informative and (ii), again wherever possible, it be a reasonable fit with many pre-existing discussions of the notion – then we can add three more specific components to the thin claim. The latter can then be understood as the animating goal of these more specific components, the 'thing' that they aim to realise, maintain or increase.

The first component concerns the production and promulgation of legal knowledge.[10] In common law jurisdictions the promulgation of legal knowledge is mainly a matter of publicly reporting the outputs of the legislative process, in the form of statutes and related instruments, and the decisions of courts in contested cases. In these jurisdictions, legal knowledge therefore consists of case-law and statute law, as well as the rich bodies of technically demanding commentary upon both that exists in legal textbooks and other forms of juristic analysis. The current relatively easy availability of cases and statutes in electronic form means that, once citizens are made aware of these sources, they can acquaint themselves with the law. And that is exactly as things should be, if law is indeed a means of subjecting human conduct to the governance of rules.[11] Rules can only be used by addressees to inform their conduct if they are knowable in advance. This requirement that the law be easily available to its addressees can be labelled the legal-knowledge component of *AtoJ*.

The relative ease with which much legal knowledge can be accessed may lead one to wonder why the second component of *AtoJ* is necessary.[12] This is the legalexpertise component and it insists that guidance be available about what the law requires. But if the law is accessible to almost everyone, then why is such guidance necessary? Posing this question shows, for lawyers at least, its naivety. Legal knowledge is complex. Why? Even if we set aside a sceptical explanation – that the law's complex (or recondite or

[10] This and following five paragraphs draw upon section I of my 'The Normative Standing of Access to Justice: An Argument from Non-Domination' (2016) 33 *Windsor Yearbook of Access to Justice* 231-261.

[11] This claim about law's general purpose belongs to LL Fuller: see *The Morality of Law* (New Haven: Yale UP, rev. ed., 1969) at *inter alia* 46 and 53 (henceforth referred to as '*ML*' with accompanying page numbers).

[12] This thought underpins R Susskind's *The Future of Law*: *Facing the Challenges of Information Technology* (Oxford: OUP 1996) and his *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford: OUP 2008).

esoteric) nature is a consequence of its guardianship by a professional elite seeking to maintain its power – a number of non-sceptical explanations remain. Some complexity arises because current legal knowledge draws upon a long tradition and rich vocabulary of legal concepts that do not always overlap with ordinary common-sense concepts. Furthermore, even when legal concepts have obvious equivalents in ordinary language (think, for instance, of causation or intention) the apparent correspondence is often inexact. There also appear to be some legal concepts that either have no analogues in ordinary understanding or, when they do, the legal counterpart is esoteric: the legal notion of ownership in English land law is an obvious example.

Complexity marks legal knowledge for another reason. It arises from the process of integrating current legal developments into the narrative of existing and past law. Rarely do newly decided cases make pre-existing cases in that area of law completely redundant; similarly, new statute law almost never eradicates the pre-existing law in some area.[13] Nearly all current legal developments are cognisant of the law that has gone before and usually re-evaluate aspects of it. The governing idea here is that the law as a whole, and its particular doctrinal departments, should be a coherent system. One aspect of legal complexity therefore arises from this aspiration, since the task of integrating current legal developments into the story of recent and older legal history is only occasionally straightforward.

The third component of *AtoJ* is the legal-fora component. It concerns access to those bodies, such as courts and related institutions, which constitute the primary dispute resolution fora of most legal systems. The most obvious way to limit access to courts and cognate institutions, besides explicitly discriminatory provisions, is via charges for use. Modest charges will cause little difficulty, but any charging regime must be sensitive to cases of specific hardship.[14] If the justice system is indeed to be open to all, then those unable to afford even modest fees cannot be excluded. The issue of court fees does, however, pose another difficulty, which concerns their rationale. For, according to some economists and social choice theorists, legal systems with dispute resolution

[13] Even ostensibly bold legislative changes often draw upon previous law: the Consumer Rights Act 2015 is a recent instance in England and Wales. See A Burrows 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 *LQR* 232-259 for reflections on the general issue.

[14] This being the view of the Canadian and English courts in civil cases: see *Trial Lawyers*, above n 1, and *R v Lord Chancellor, Ex parte Witham* UKDC [1998] QB 575. In the United States matters are more complicated: see *Lassiter v Department for Social Services* 452 US 18 (1981) and *Turner v Rogers* 387 SC 142 (2011).

structures like courts are impure public goods, sharing enough features with pure public goods as to warrant being regarded as pure public goods.[15] From this perspective, the imposition of a full-cost recovery regime upon litigants is problematic, since it transforms an impure public good into a private good.[16] The imposition of modest court fees has no such radical effect and might, for instance, be justified as a method of deterring hasty recourse to the courts.

Since 'access' in *AtoJ* bears its ordinary meaning and is therefore a matter or more or less, the degree of access to each of the three components can differ. Legal systems are conceivable in which legal knowledge is non-technical and easily accessible, while the court system is redundant because extremely costly and inefficient. We could equally imagine a justice system in which the courts were cheap, quick and efficient but in which litigation was rare because members of the population had no knowledge of or recourse to the law. The legal-knowledge component of *AtoJ* is the least likely of the three to be constrained by considerations of cost or scarcity, provided the labour involved in publication is not onerous. That this component has some cost implications undermines the assumption that *AtoJ* is solely a matter of meeting the cost of legal advice and representation, an assumption often behind glib recourse, in this context, to 'legal-aid' as a synonym for *AtoJ*.[17] Understood as a scheme of assisted payment for advice and representation, legal-aid is only one element of our relatively expansive conception of *AtoJ*.

By contrast with the legal-knowledge component, access to court systems and access to legal expertise look like options likely to be foreclosed or reduced by scarcity and related considerations. A shortage of lawyers and a lack of funding (however sourced and however distributed) would affect the availability of both. And this reminds us of the near-ubiquity of time and money in any effort to calculate the 'costs' of *AtoJ*: the time involved is

[15] JM Buchanan, *The Limits of Liberty* (Indianapolis: Liberty Fund 2000 (originally published 1975)) chs 3, 4 and 7 is a classic statement of the argument that legal systems are public goods.

[16] Recouping the full cost of the court service from users (litigants) is a mantra of the British Ministry of Justice ("The MoJ's policy is that fees in HM Courts & Tribunal Service reflect the full cost of the services provided": Regulatory Policy Committee Impact Assessment: Court Fees, Cost Recovery (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336513/2014-03-27_-_RPC13-MOJ-1959_2_-_Court_Fees_-_Cost_Recovery.pdf; last accessed 19 January 2020). A compelling indictment of this policy is F Wilmot-Smith, 'Court Costs' 30th July 2015 *London Review of Books* 1.

[17] In speaking of *AtoJ*'s 'descriptive aspect' as entailing only "access to legal services", T Cornford is close to this view, although he accepts that *AtoJ* has a 'normative aspect' which extends further: 'The Meaning of Access to Justice', ch 2 of E Palmer, T Cornford, A Guinchard and Y Marique (eds.), *Access to Justice* (Oxford: Hart 2016) at 2-3.

both that of the users and operators of the justice system, the money that of the users and of those that pay the system's operators (which need not be two different classes).

What can be said in support of this conception of *AtoJ*? I hope that its relatively expansive nature means it is both informative and that it captures much of what is spoken about when *AtoJ* is discussed in a range of policy, legal and other contexts.[18] As to the former plausibility condition, this conception reminds us of the notion's relative complexity, holding that it concerns not just access to institutions, but also access to expertise and to legal knowledge itself. These are not the same. Nor do the three components raise the same issues when we consider the relative availability of each. The three conditions do, however, lend themselves to measurement, since each can be straightforwardly formulated and thus assessed against actually existing legal systems. With regard to the second – fit – plausibility condition, my claim is certainly not that the relatively expansive conception fits everything that has been said about the alleged nature of *AtoJ*. There are, in fact, accounts of *AtoJ* which insist upon supplementing the three components and their animating goal with other putative components.

Two such components are the right to a fair trial and the right to participate in the law reform process. I have offered some reasons why these components should be excluded from an account of *AtoJ* elsewhere.[19] It has also been suggested that an adequate account of *AtoJ* must include a commitment to ameliorating the difficulties that give rise to legal or 'justiciable' problems in the first place.[20] Those difficulties are almost invariably a product of social and related disadvantage and run along various intersecting axes, including poor health, poor housing and limited educational and employment opportunities. Creating an account of *AtoJ* that, in addition to embodying the three components and their animating goal, also tackles these difficulties is an ambitious task; it is not surprising that such accounts are called 'expansive' by their proponents.[21] They are also deeply problematic, for two reasons.

[18] See n 5 for studies with which my analysis is a good fit.
[19] See n 10 at 238-239. For the right to participate in law reform, see Coumarelos *et al*, n 5 at iii.
[20] For two examples which exemplify this position, see Currie, n 5, chs V and VI and Pleasance, n 5 at chs 1, 2 and 5. The language of 'justiciable problems' belongs to Hazel Genn: see n 5.
[21] I think the term originated in Canadian *AtoJ* scholarship: see J Bailey, J Burkell and G Reynolds, 'Access to Justice for All: Towards an "Expansive Vision" of Justice and Technology' (2013) 31 *Windsor Yearbook of Access to Justice* 181-207 at 182.

The first returns us to some of the complexities that beset the relation between law and justice noted above. Insofar as expansive accounts of *AtoJ* must rely upon an account of distributive justice in order to identify and provide a rationale for ameliorating the problems that generate legal or justiciable problems, on the one hand, and those legal problems themselves, on the other, they run the risk of a number of potential errors. They include the mistake of assuming, rather than showing, that legal systems embody only a single conception of justice, distributive or otherwise, and that of assuming that different areas of legal systems cannot realise different conceptions of justice, distributive or otherwise. Expansive accounts of *AtoJ*, in other words, risk taking too simple a view of the nature of justice and of the connections between it and law.

The second reason comes into play if and when such accounts eschew recourse to some or other conception of distributive justice. For, without such a conception, expansive accounts lack a general rationale for regarding justiciable problems and their underlying causes as problematic: a piecemeal or incremental account of the problematic nature of those problems and their causes must instead be provided. Such an account is, no doubt, possible. But to expect an account of *AtoJ* to illuminate and solve the diverse types and bases of social and personal disadvantage that generate justiciable problems is to expect far too much. The complexities of that task are surely better left to the raft of social scientists currently grappling with it.[22]

II. THE RULE OF LAW

My claim on behalf of the relatively expansive account of *AtoJ* is that it is informative and that it captures much of what is meant by that term in a good deal of legal and policy talk. The account is based upon what many of those (lawyers and policy-makers) whose behaviour and beliefs constitute a segment of the social world (the juridical) think about a sub-component of that world (*AtoJ*). It purports to capture the internal or participants' point of view.[23] Unfortunately, we cannot proceed in exactly the same way when offering an

[22] Three crucial starting points are: S Bowles, H Gintis and M Osborne Groves (eds), *Unequal Chances: Family Background and Economic Success* (Princeton, NJ: Princeton UP 2005); D Dorling, *Injustice: Why Social Inequality Still Persists* (Bristol: Policy Press 2015); and A Deaton, *The Great Escape: Health, Wealth and the Origins of Inequality* (Princeton, NJ: Princeton UP 2013).

[23] Initially put on the English-language jurisprudential agenda by HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 3rd ed., 2012), where it was used both to characterise rule-governed behaviour (at *inter alia* 55-56) and as a methodological injunction (at *inter alia* 90, 103-105 and 239-243). In the latter guise it was and

account of the rule of law. The problem is that the term 'rule of law' is used in a rich variety of ways by lawyers and non-lawyers alike, there being no broadly shared usage that could qualify as the internal or participants point of view. Furthermore, the variety of usages is reflected at the level of philosophical accounts of the idea.[24] Such variety undoubtedly informs some sceptical responses to the rule of law, the tendency being to move from apparent disagreement and conflict about its meaning to the conclusion that it is meaningless.[25]

I reject this sceptical conclusion because I hold that many competing accounts of the rule of law are competing *conceptions* of an agreed *concept*: there is, therefore, one 'thing' that these competing accounts are about. Moreover, while conflicts between competing conceptions might not be rationally resolvable, they are explicable and intelligible.[26] This invocation of the concept/conception distinction is not deeply significant for what follows, serving only as a starting point. I say little about specific conceptions of the rule of law in this section because my task is to examine whether or not an entitlement to *AtoJ* flows from the *concept* of the rule of law. Two conceptions of the rule of law feature in section III.

A. Concept and Conception

The concept/conception distinction holds that disagreement about the content of some of our ideas has this structure: there is a general and fairly abstract account of the idea available to and accepted by most of those who disagree about it, their disagreement arising upon this shared argumentative plateau.[27] Those who disagree about what 'good football' entails, for example, usually agree insofar as they accept an account of what association football is; their disagreement must then arise over matters like what counts as doing that 'thing' well and it is possible to deploy different criteria to assess that. For Coach

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is a commonplace of methodological discussions in the social sciences and Hart was drawing upon Max Weber via the medium of P Winch's *The Idea of a Social Science and its Relation to Philosophy* (London: Routledge and Kegan Paul 1958): see *The Concept of Law* at 289 and 297.

[24] A nice overview of some such accounts is B Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: CUP 2004) chs 1-8.

[25] Judith Shklar is of this view: see her 'Political Theory and the Rule of Law', ch 1 of A Hutcheson and P Monahan (eds), *The Rule of Law: Ideal or Ideology?* (Toronto: Carswell, 1987) 1.

[26] For a plausible account of how such disagreements might be structured see WB Gallie, 'Essentially Contested Concepts' (1955-56) 56 *Proceedings of the Aristotelian Society* 167-198 at 188-192.

[27] My account of the distinction draws upon Rawls, n 6, 5-6; R Dworkin, *Law's Empire* (London: Fontana 1986) 70-73 and 90-96; W Connolly, *The Terms of Political Discourse* (Oxford: Blackwell, 3rd ed., 1993) chs 1, 5 and 6; and A Mason, *Explaining Political Disagreement* (Cambridge: CUP 1993).

B, good football is a matter of playing an aesthetically pleasing attacking game, whereas Coach C maintains that good football is whatever brings victory. It might be difficult, perhaps even impossible, to reconcile these two views, but the disagreement is explicable and based in reason – it is neither an unreasoned prejudice nor is it akin to a reflex reaction.

Is there an argumentative plateau that proponents of apparently different accounts of the rule of law share? Even on the assumption that there are numerous genuinely different accounts of the rule of law, my answer is affirmative. I suggest that for anything to count as an account of the rule of law, it must include Lon Fuller's eight desiderata.[28] The desiderata hold that in order to subject human conduct to the governance of legal and other types of rule (i) rules must be made and (ii) promulgated; furthermore, such rules must be (iii) consistent and (iv) non-retrospective; and they must (v) neither require the impossible nor (vi) be radically unclear; nor can they be (vii) contradictory. Finally, within a system of such rules there must be (viii) congruence between official action and the content of those rules. These desiderata not only follow directly from the claim that law is a means of subjecting human conduct to the governance of rules; they also, says Fuller, either flow from or serve to create a bond of reciprocity between law-givers and addressees of the law. Since reciprocity is the trickiest element of Fuller's account of the rule of law, I treat it separately from the eight desiderata and their animating general purpose.

Why regard Fuller's list as constituting the concept of the rule of law? There are at least two reasons. The first is an intelligibility condition, holding that talk about the rule of law is senseless unless it either implicitly or explicitly incorporates the eight desiderata. Think, for example, of an account of the rule of law that did not insist that legal rules be made: can that plausibly be about the rule of law? Isn't it absurd to insist that rules need not exist for law and the rule of law to exist? Or suppose we met an account of the rule of law that required legal rules be created but neither that they be made public nor, in the cases in which they were promulgated, that they be clear or consistent or possible to comply with. That would strike us as a satire or parody of the rule of law, designed to illustrate the significance of the desiderata it claims are unimportant.

In making these points, I do not hold that everyone amused by 'accounts' of the rule of law such as these explicitly judge them, and find them wanting, against Fuller's

[28] See Fuller, *ML*, ch II.

desiderata. We need not have read Fuller to know the importance of the desiderata. It is not only professional jurists who would object to receiving a parking fine when parked in a zone completely free of information about parking restrictions. Nor is it only lawyers who would complain that fines or prison sentences imposed for being in a particular place, it being impossible to avoid being in that place, are the "acme of strict injustice".[29] Fuller's eight desiderata formalise and make more explicit precepts that float near the surface of common sense.

The second reason why the desiderata constitute the concept of the rule of law is that they float near the surface of juristic common sense. There is thus near unanimity among a number of leading jurists and philosophers that any account of the rule of law must include something like Fuller's desiderata. That these writers often include principles or desiderata in addition to Fuller's eight, or that they attempt to reduce the number of desiderata by recasting them into fewer meta-principles, should not blind us to their near ubiquity.[30] Since there is neither space nor time for a full survey of thought about the rule of law, what follows is limited to the work of three jurists written during the last half century.[31]

John Finnis's account of the rule of law is not unusual in almost exactly replicating Fuller's desiderata. It does, however, stand out in one respect: it adds nothing to them.[32] The differences between Finnis's account and Fuller's therefore have nothing to do with the content of the desiderata, but might instead reside in their views concerning the role and moral standing of the desiderata. As to the latter, Fuller was clear that the desiderata were best conceived as law's inner morality, a view Finnis comes close to endorsing.[33] As to the former, Finnis regards the desiderata and the understanding of the legal enterprise they embody as a means of facilitating, but not guaranteeing, the common good and various

[29] This is Jerome Hall's verdict on the English decision in *Larsonneur* (1933) 149 LT 542 (CCA), in his *General Principles of Criminal Law* (Indianapolis: Boobs-Merril, 2nd ed., 1960) 329 at fn 14.

[30] See J Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) 21 *Law and Philosophy* 137-164 at 154-155 for a slightly hasty statement of the point.

[31] Even this very limited historical frame means that many accounts of the rule of law have to be left out, most notably those offered by R Dworkin, 'Political Judges and the Rule of Law' (1980) 64 *Proceedings of the British Academy* 259-287 and NE Simmonds in *Law as a Moral Idea* (Oxford: Clarendon Press 2007) ch 2.

[32] See *Natural Law and Natural Rights* (Oxford: Clarendon Press, 2nd ed., 2011) at 270-273.

[33] Ch II of Fuller's *ML* is entitled 'The Morality that Makes Law Possible'; see also *ML* at 4 and 42 for Fuller's earliest mentions of the desiderata constituting an "internal" or "inner morality" of law (the notion had also appeared in his 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard LR* 630-672 at 645). For Finnis's view, see n 32 above at 273-276.

forms of human flourishing.[34] Although we cannot be sure that Fuller would have disagreed with Finnis on the broad contours of this point, we can be certain that he said little about the forms of human flourishing and the common good as Finnis understands them. We can be equally certain that Fuller was clear as to the values he thought the rule of law embodied or served.[35] The difference between his and Finnis's positions is not great.

Joseph Raz's account of the rule of law is more typical than Finnis's because, while incorporating the eight desiderata, it adds to them. We will examine one of Raz's additional desiderata in section III but, for now, we need only note his endorsement of the eight. They are subsumed within four of the eight principles Raz regards as vital components of the rule of law. The principles are (i) that all laws should be prospective, open and clear; (ii) that they should be relatively stable; (iii) that the making of particular laws should be guided by open, stable, clear and general rules; and (iv) that the discretion of crime preventing agencies should not be allowed to pervert the law.[36]

Raz's discussion shows that his four principles explicitly overlap with only six of Fuller's desiderata – generality, promulgation, non-retroactivity, consistency, clarity and congruence. However, Fuller's remaining two desiderata – possibility and non-contradiction – are nevertheless implied by Raz's general claim, echoing Fuller on law's guidance function, that "the law must be capable of guiding the behaviour of its subjects".[37] How can law's addressees be guided by either contradictory injunctions or by injunctions with which it is impossible to comply? Given the significant overlap between some of Raz's principles and the eight desiderata, it is puzzling that Raz takes himself to "abandon. . . some of . . . [Fuller's] principles".[38] I see no explicit act of abandonment in Raz's discussion, save perhaps his failure to mention the possibility and non-contradiction desiderata by name. But that cannot be a rejection of those desiderata because they follow directly from Raz's claim about the underlying rationale of law and the rule of law. In fact, Raz offers a

[34] Finnis, *ibid* at 274.
[35] See *ML* at 162 (the value(s) of dignity and self-determination) and my 'The Rule of Law and Private Law', ch 2 of L Austin and D Klimchuk (eds), *Private Law and the Rule of Law* (Oxford: Clarendon Press 2014) at 59-60.
[36] J Raz, 'The Rule of Law and Its Virtue', ch 11 of his *The Authority of Law* (Oxford: Clarendon Press, 2nd ed., 2009) 214-216. For some slight changes in Raz's general view, see his 'The Law's Own Virtue' (2019) 39 *OJLS* 1-15.
[37] *Ibid* at 214.
[38] *Ibid*, at 218, fn 7.

more accurate characterisation of the tenor of his treatment of the eight desiderata when he says Fuller's "discussion . . . is full of good sense".[39]

The third account of the rule of law is what Margaret Jane Radin dubs a substantive account. She distinguishes substantive from instrumental accounts of the rule of law, her primary instance of the latter being Fuller's account.[40] Radin examines only one substantive account of the rule of law, namely, that offered by John Rawls. She holds that it, like all substantive accounts, "encapsulate[s]… many of the traditional precepts of the Rule of Law".[41] There are four such precepts for Rawls, the key fact being that they overlap with the eight desiderata.

Of those four precepts – ought implies can, similar treatment for similar cases, no crime without law and natural justice[42] – it is the first and the third which overlap most obviously with the desiderata. The former requires not just that laws be possible to comply with, but that they be made (generality), promulgated, be consistent, reasonably clear and non-retroactive. The latter also demands generality, promulgation, non-retroactivity and clarity. What of Fuller's eighth desideratum? Rawls does not explicitly invoke it in Fuller's form – congruence as between official action and stated rules – but it is assuredly in play in Rawls's insistence that a legal system is a

> "coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just, they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely upon one another and rightly object when their expectations are not fulfilled".[43]

Do not assume that the expectations and reliance Rawls highlights here hold only between addressees of the law *qua* addressees; they can arise equally as between addressees of the law and law-makers (and enforcers). Another, briefer way of characterising the importance of this second set of expectations and reliance is by using Fuller's term, 'congruence'. Such expectations and reliance can arise only if there is congruence between official action and declared rule.

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[39] *Ibid*. One of Raz's other essays on the rule of law ('The Politics of the Rule of Law', ch 16 of his *Ethics in the Public Domain* (Oxford: Clarendon Press 1994)) makes no reference to Fuller.
[40] MJ Radin, 'Reconsidering the Rule of Law' (1989) 69 *Boston University LR* 781-819, 785-786.
[41] *Ibid* at 788.
[42] Rawls, n 6, at 208-210.
[43] *Ibid* 207.

The moral is plain: Rawls's substantive account of the rule of law includes the eight desiderata. This should not surprise us, since Radin is surely right that the desiderata feature in substantive and instrumental accounts of the rule of law. This fits with my claim that the desiderata constitute the concept of the rule of law. Just as Fuller insisted that a legal system properly so called cannot exist if it completely failed to live up to one of the desiderata – and that that was so, even though satisfying all but one of them is a matter of degree – we can insist that an account of the rule of law lacking the eight desiderata cannot be an account of the rule of law, properly so called.[44]

B. Access to Justice

Of *AtoJ*'s three components, only the legal-knowledge component flows directly from the concept of the rule of law.[45] It follows from a commitment to the first two desiderata of that concept. The first – generality – desideratum holds that rule by law requires that law exist in the form of rules with some degree of generality; *ad hoc* individual directives to specific agents only count as law if made under the auspices of a more general empowering rule. The second (promulgation) desideratum insists that those rules be made known in some way: published or otherwise conveyed to their addressees. Since the legal-knowledge component requires that addressees of the law have the means of learning the law's content, it is all of a piece with these two desiderata. Affirming the latter while denying the former is contradictory. To this extent, devotees of the rule of law must also be devotees of the legal-knowledge component of *AtoJ*.

Does the legal-expertise component follow just as directly from the concept of the rule of law? No. For no single desideratum directly requires access to legal expertise: certainly, neither the generality nor promulgation desiderata do. That law must take the form of reasonably general directives which are knowable in advance is mute as to the necessity for legal expertise. So, too, with regard to the remaining six desiderata: clarity, consistency, non-retrospectivity, possibility, non-contradictoriness and congruence. None of them requires or even refers to access to legal expertise. The picture changes, however, if

[44] See *ML* at 39 (the total failure point) and 43 (the desiderata are (or 'legality' is) a morality of aspiration).

[45] To make absolutely explicit what has been implicit so far, the terms 'direct', 'immediate', 'strong', 'unproblematic' and their cognates mean this: a short entailment relation consisting of few argumentative steps.

we assume that the legal system in which we are attempting to realise the eight desiderata is complex.

Complexity in the substance and procedures of a legal system makes the task of knowing the law, and of ensuring it is rule-of-law compliant, difficult. Think of the English law of real property, which is arcane and complex. Simply informing oneself about this body of law, never mind mastering it, is a demanding task, as generations of law students will attest. And, while students receive expert help learning the law, ordinary citizens without legal training are doubly hampered, having available neither expert guidance nor trade knowledge about where to start learning. When we add to the difficulty of simply knowing the law the additional task of a rule of law audit, by which we measure land law's degree of compliance with the eight desiderata, then matters become more burdensome. Knowing whether or not the law of real property is clear, or consistent, or non-retrospective, to name but three desiderata, requires a detailed understanding of the law. Since many other areas of law are just as complex and as arcane as property law, the necessity for expert guidance repeats across the spectrum of most contemporary legal systems. Expert advice is therefore a precondition of knowing the law in complex legal systems.

Note that there are two distinct connections here between the rule of law and the legal-expertise component. In a complex legal system access to expert knowledge is necessary simply to know the law and knowledge of the law, or the capacity to inform oneself about it, follows quickly and closely from the generality and promulgation desiderata. The point of law being promulgated and taking the form of rules (general directives) is surely to facilitate knowledge of it: what other rationale could these desiderata have? The other connection between the legal-expertise component and the rule of law is this: in a complex legal system access to expert legal knowledge is necessary if addressees of the law are to carry out a rule of law audit of some or other segment of law or of the system as a whole.

Neither connection between the rule of law and the legal-expertise component is as direct as that between that concept and the legal-knowledge component. For, while the latter is entailed by the generality and promulgation desiderata, none of the rule of law desiderata entail the legal-expertise component. The latter follows from those desiderata only if two conditions hold. First, that members of the society in question think something sufficiently important is at stake in knowing the law as to take steps to find out about it.

And, second, that complexity marks the legal system in question. In a simple legal system the legal-expertise component will not flow from the concept of the rule of law; it might not even feature as a significant component of our understanding of *AtoJ*. Yet, since complexity is ubiquitous in contemporary legal systems, why does it matter if the connection here is slightly less direct than that between the rule of law and the legal-knowledge component? For this reason: if giving the concept of some 'thing' is a statement of that thing's necessary conditions, then the legal-expertise component is not among the necessary conditions of the concept of the rule of law.[46] The eight desiderata are among those conditions and they do not, on their own, entail the legal-expertise component. Nor is it entailed by law's general guidance purpose, that of subjecting human conduct to the governance of rules.

This view of what it is to elucidate a concept, although favoured by some contemporary jurists, is not the only one available.[47] That task can alternatively be regarded as involving illumination and discrimination, as showing the important features of a concept and how they differ from those of other, related concepts, without attempting to state the concept's necessary conditions or even believing that it has any. On this view it is possible for a concept's distinctive features to change over time, for the understanding of concept A at time 1 to be quite different to the understanding of concept A at time 10, although A must share a family resemblance at both points. On what we could call the 'necessity view' of conceptual elucidation, this is impossible, since elucidating a concept is to illuminate the necessary conditions for its application, those conditions supposedly obtaining across all possible worlds.[48] If the necessary conditions of concept A hold at time 1, then they must also hold at time 10 if concept A genuinely exists at time 10. If people still speak about concept A at time 10, but its necessary conditions have changed, then proponents of the necessity view will regard those folk as mistaken: they must be speaking about a different,

[46] For an excellent overview, see F Schauer, 'On the Nature of the Nature of Law' (2012) 98 *Archiv fur Rechts-und Sozialphilosophie* 457-467 and his *The Force of Law* (Cambridge, Mass.: Harvard UP 2015) at 3-5 and 35-41.
[47] Two leading proponents of the approach are: Raz, above n 36, at 104-105 and S Shapiro, *Legality* (Cambridge, Mass.: Harvard UP 2011) 8-22. For some complaints about this view and for an instance of an alternative view in action see: B Bix, 'Conceptual Questions and Jurisprudence' (1995) 1 *Legal Theory* 465-479 and his 'Raz on Necessity' (2003) 22 *Law and Philosophy* 537-559; D Priel, 'Jurisprudence and Necessity' (2007) 20 *Canadian Journal of Law and Jurisprudence* 173-200 and, of course, most of Ronald Dworkin's later work: see note 27 above and the Introduction and chs 6, 7 and 8 of his *Justice in Robes* (Cambridge, Mass.: Harvard UP 2008).
[48] On which see D Lewis *On the Plurality of Worlds* (Oxford: Blackwell Publishing 1986).

possibly related concept – concept A+1, say – and/or be confused about the nature of concept A.

On the necessity view of the concept of the rule of law, that concept does not and cannot entail the legal-expertise component. Neither the eight desiderata nor law's guidance function entail it. The existence of complexity in a legal system and the society of which it is part provides the bridge between the legal-expertise component and the concept of the rule of law but, of course, that bridge is contingent: it is not a necessary conceptual truth that legal systems are complex. Matters stand differently on a non-necessity view of the concept of the rule of law. For such a view would regard the eight desiderata and the notions of purpose and reciprocity as only tentative conditions of the concept: the non-necessity view accepts that those conditions could change, being added to or subtracted from at different places and times. It is not bizarre, on the non-necessity view, to see legal complexity as a feature of our concept of law – the 'our' here referring to those of us living in contemporary legal systems in a range of jurisdictions but not, of course, to all human beings who ever have or ever could live under law. Nor is it bizarre to hold, on this view, that 'our' understanding or concept of the rule of law must also accommodate that feature of our concept of law.

On the non-necessity view, then, we could conclude that the legal-expertise component is entailed by our concept of the rule of law because the latter must embrace the complexity that marks law according to our (here and now) concept of law. On the necessity view, no such entailment exists because complexity is not a necessary feature of the (universal) concept of law; it need not therefore feature among the conditions of our concept of the rule of law. As a contingent matter, however, legal complexity is rife in the jurisdictions with which we are familiar and an account of law's nature in those jurisdictions, and of the rule of law, must register it. Since on either view there is a connection between the rule of law and the legal-expertise component, what difference does it make that on one it is 'contingent' (but ubiquitous) while on the other it is not 'necessary'?

The tempting answer to questions such as this is: practically speaking, none. But that might be wrong. For it could make this difference: if one adopts the non-necessity view, then the connection between our concepts of law, the rule of law and the legal-expertise component will be taken as obvious by virtue of the ubiquity of legal (and other) complexity; whereas on the necessity view the connection between the rule of law and the legal-

expertise component holds only because complexity holds and argument must be provided on that point. This difference manifests itself in different attitudes as to what must be argued and when. On the first, the connection is assumed or taken for granted; on the second, argument must be offered. That is not a negligible practical difference.

What connection exists between the legal-fora component of *AtoJ* – the requirement that there be relatively easy access to courts and related bodies – and the rule of law? Courts are not central in Fuller's discussion of the eight desiderata: "[i]t is important to note that a system for governing human conduct by formally enacted rules does not *of necessity* require courts or any other institutional procedure for deciding disputes about the meaning of rules".[49] And that, of course, is a clear denial of any entailment relation between the desiderata and the legal-fora component. This denial is nevertheless accompanied in Fuller's subsequent discussion by the claim that

> "[i]n a complex and numerous political society courts perform an essential function. No system of law – whether it be judge-made or legislatively enacted – can be so perfectly drafted as to leave no room for dispute. When a dispute arises concerning the meaning of a particular rule, some provision for a resolution is necessary. The most apt way to achieve this resolution lies in some form of judicial proceeding".[50]

What leads Fuller from the first to the second claim is the nature of the society in question. Courts and related fora are not a necessary feature of the concept of the rule of law because it is conceivable that the latter can exist and flourish, in the form of the eight desiderata, in "a small and friendly society governed by relatively simple rules".[51] In such a society disputes about the content and application of either those rules or the eight desiderata may not arise. Furthermore, if they did, they could be resolved by "voluntary accommodation of interests"[52] rather than recourse to courts and tribunals. When might the latter institutional forms become salient? When three conditions – two of which are already familiar – obtain: first, the society in question is 'complex and numerous', that complexity also being reflected in its legal system; second, the members of that society have something sufficient at stake, alongside the psychological wherewithal, to push disputes

[49] *ML* 55 (emphasis mine).
[50] *ML* at 56.
[51] *ML* 55.
[52] *Ibid*.

toward a legal resolution; and, third, no better alternative form of dispute resolution exists. These conditions can, obviously, trigger disputes about both the content of the law and about the law's compliance with the eight desiderata.

What, then, of reciprocity? If law is a means of subjecting human conduct to the governance of rules, then the eight desiderata are fundamental to that enterprise. Without this guidance assumption, or a closely related assumption such as Raz's – that law exists to guide behaviour – the rule of law is pointless. If we have no interest in guiding human conduct by rules, why bother with the eight desiderata? The relation between the guidance assumption and the rule of law is therefore a close one and, when we affirm connections between the concept of the rule of law, on the one hand, and components of *AtoJ*, on the other, we are in effect affirming connections between the latter components and the guidance assumption. But, when we do that, are we also affirming connections between those components, the concept of the rule of law *and* Fuller's notion of reciprocity?

There is no easy answer to this question. That is because, although Fuller sees a relation, perhaps even a series of them, between reciprocity and the concept of the rule of law, we cannot be sure, on the basis of what he says, (i) whether reciprocity flows from the guidance assumption and the eight desiderata or is presupposed by them; nor (ii) whether he has a thick or thin conception of reciprocity in mind.[53] While the former issue matters little for our purposes, since reciprocity as either a presupposition or consequence of the rule of law could connect with *AtoJ*, the latter is more momentous. That is because each conception of reciprocity might have a different connection with one or more components of *AtoJ*.

What does reciprocity amount to for Fuller? The first element in his discussion is a thin 'social contract' strand. Reciprocity highlights a relationship

> "between government and the citizen with respect to the observance of rules.[.] Government says to the citizen in effect, "These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct." When this bond

[53] Some suggest that the thick conception is the only genuine one in play in Fuller: see K Rundle, *Forms Liberate* (Oxford: Hart Publishing 2012) at 8-10, 91-92, 128 and 140. If it is, then Fuller himself is not a particularly reliable guide on this matter: he doesn't distinguish between the two and his words are compatible with both. Indeed, some of his remarks about reciprocity suggest a middle way between thin and thick conceptions: see *ML* 19-27. One of the earliest book length discussions of Fuller says almost nothing about the place of reciprocity in his thought: RS Summers, *Lon L Fuller* (Edward Arnold: London 1984) at 38-39, 84, 95 and 100; an insightful counterbalance is P Eleftheriadis, 'Legality and Reciprocity: A Discussion of Lon Fuller's *The Morality of Law*' (2014) 10 *Jerusalem Journal of Legal Studies* 1-17.

> of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules".[54]

He characterises this relationship as a matter of "tacit reciprocity" and its rupture by government as a "breach of contract" that may justify "revolution".[55] The reciprocity in play is best characterised as thin because it duplicates the give and take found in standard transactions between parties, usually for gain, along the lines of 'if you do X, then I'll do Y': if you paint my fence, then I'll pay you £50 on completion. There needs be no sympathy or meeting of minds between such parties. The content of the reciprocal conduct or arrangement on the social contract strand, just like the parties' concern for one another in a standard transaction, is also thin, being in effect a law-making compact: we'll use these rules and, if you abide by them, then so will we. Kenneth Winston captures the thin nature of this stand of reciprocity nicely, noting that "Fuller took seriously the idea that the relation between law maker and citizen *is, while not personal, at least interpersonal*, to be understood in terms of meaningful direction provided by one to the other".[56] For meaningful direction to be possible, there must be both shared meaning and constancy in the issuing of directives, the latter reflecting the fact that one is guiding, not simply forcing or manipulating, other human beings. Such constancy can be achieved by the kind of social contract the thin strand embodies.

The second, thicker element in Fuller's discussion of reciprocity is not characterised as an aspect of reciprocity by him, but its content shows the felicity of that label. It is the dignity strand of reciprocity. Fuller holds that it entails the following commitment:

> "[t]o embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.
>
> Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey your indifference to his powers of self-

[54] *ML* 39-40. Fuller invokes the work of Georg Simmel on both occasions when he delineates the social contract strand of reciprocity: at the beginning of this passage (at 39) and again at 61. Simmel does not feature in the earlier discussion of reciprocity and the morality of duty at 19-27.

[55] The three quotes are from, respectively, *ML* at 61 and 62.

[56] KI Winston, 'Three Models for the Study of Law' in W Witteveen and W van der Burg (eds), *Rediscovering Fuller* (Amsterdam: Amsterdam UP 1999) 51-77 at 56. For more from Fuller on thin reciprocity, see *ML* at 233-237.

> determination. Conversely, when the view is accepted that man is incapable of responsible action, legal morality loses its reason for being".[57]

This notion of reciprocity is thicker than in the first strand by virtue of its content. It is not merely a matter of regarding one another as human beings and thus seeing the law-making relationship as 'interpersonal'. That is because the parties to this relationship are responsible – or have the capacity for responsibility – and thus see themselves as bearers of dignity. That move is of greater moral significance than the invocation of the interpersonal viewpoint constitutive of the thin sense of reciprocity.

It is implausible to suggest that there is no reciprocity on this thicker view because the idea of dignity invoked might be an assumption made by only one party, the law-maker, about the standing and capacities of the other, the addressees of the law. This is dubious insofar as the same assumption, albeit about the standing and capacities of the law-maker, cannot but be made by addressees of the law. For one being to be treated as responsible by another implies that that other knows what it is to be a responsible being. Knowing that does not entail that the other is indeed a responsible being. But, as a matter of ordinary human conduct, the assumption that a human being who treats other humans as responsible beings is 'therefore' itself a responsible being, is natural. It is the default setting of most human interaction, special reason being needed to dislodge it. So, if applied in anything like the world with which we are familiar, the dignity strand of Fuller's account of reciprocity will display both mutuality of expectations and resultant give and take: addressees of the law and law-makers will regard one another as responsible beings and as bearers of dignity.

What have these two strands of reciprocity got to do with *AtoJ*? With regard to the first, there is an obvious connection. Since this strand entails a social contract of the form 'these are the rules; if you abide with them, then so will we', it cannot but be connected with the legal-knowledge component of *AtoJ*. The rules constitutive of the social contract must be knowable in order for the contract to come into being. If some of those rules are legal rules, then a condition of the social compact's existence – that knowable rules (including legal rules) exist – clearly overlaps with the legal-knowledge component, which

[57] *ML*, 162-163.

holds that the law must be easily available to its addressees so they can inform themselves of its content.

The thin strand might also be connected with the legal-expertise and legal-fora components of *AtoJ* in a complex legal system. For, if the rules constitutive of the social contract are complex in ways similar to the complexities that beset bodies of legal rules, and we also assume the existence of incentives to contest and resolve such complexity, then the reasons that provide a rationale for the legal-expertise component also provide a rationale for expert guidance with regard to the content of the social contract. Complexity, plus incentives toward contestation and resolution, can also provide a rationale for access to those forums in which contests can be resolved: courts and tribunals, with regard to legal rules, and some presumably similar kind of fora for the rules of the social contract. There might, therefore, also be a connection between the thin strand of reciprocity and the legal-fora component.

My statement of these two connections is tentative, for this reason: the complexity that besets most legal systems seems unlikely to beset the terms of the social contract as Fuller envisages it. That contract has only one term – if you do X, then we, too, will do X – and surely cannot give rise to a great deal of complexity or uncertainly. This is so even in light of Fuller's compelling lessons about the nuances of rule interpretation and application. In some circumstances applying rules like 'No Vehicles in the Park' or 'if you do X, then we'll do X' can undoubtedly become problematic, but the simplicity of the rules limits the number and range of problems they can generate.[58]

Is there a link between the components of *AtoJ* and the thicker, dignity-strand of reciprocity? Yes. That strand is tightly connected with a number of rule of law desiderata, as is evident from the long quotation from Fuller, above. A law-maker cannot treat her addressees as responsible beings if she refuses to make general rules by which they can guide their conduct or does not bother to tell them the rules by which she will judge them, or announces impossible or retrospective or inconsistent or unintelligible or utterly contradictory rules. Nor will she treat them as responsible beings, capable of guiding their conduct by reference to general rules, if she announces rules of conduct by which she and they will be bound but never or rarely adheres to them. Since these eight desiderata flow

[58] To some degree only; for illuminating discussion of the complexities, see Fuller, note 33, at 662-669.

from the dignity strand of reciprocity and since, as was shown above, two of those desiderata are directly tied to the legal-knowledge component of *AtoJ*, there is plainly a bridge between reciprocity as dignity and *AtoJ*. Furthermore, since the remaining desiderata are indirectly tied, via the medium of legal complexity and some other conditions, to the legal-expertise and *legal-fora* components, that link is strengthened.

There might be another link. It arises if treating others as responsible beings means allowing them space to interrogate and contest the rules by which their conduct is governed. Some degree of dialogue about the content and application of rules surely follows from the fact that both parties to the relation – law-maker and addressee of the law – regard themselves as responsible in the requisite sense. If the rules are complex, and there is sufficient at stake in their interpretation and application, then it seems both makers and addressees of the rules could require expert guidance on those matters and, in addition, access to fora in which competing interpretations are resolved. The legal-expertise and legal-fora components of *AtoJ* might thus flow directly, without recourse to the eight desiderata, from reciprocity as dignity.

Finally, a summary. Not all of the links elucidated above between the concept of the rule of law and *AtoJ* are particularly strong or direct. The strongest or most direct was that between the legal-knowledge component and the generality and promulgation desiderata. One cannot affirm those two desiderata and deny that component. The legal-expertise component does not flow from any of the desiderata of the concept of the rule of law in such a direct way. It follows from a commitment to the desiderata only if (i) complexity marks the legal system in question and (ii) addressees of the law have good reason to want to know the law's content. The legal-fora component, too, is only required by commitment to the rule of law if those two conditions hold alongside a third: (iii) addressees of the law have good reason to want to contest claims about the law's content. Both senses of reciprocity are also connected to some of the desiderata but, again, principally through the medium of the three conditions just stated. Without those conditions obtaining, there would be few links between reciprocity, the eight desiderata and *AtoJ*.

It is no exaggeration to say that the links between *AtoJ* and the rule of law are explained by legal complexity, incentives to contestability and the need for fora in which to resolve contested claims, rather than by any of the particular constituents of those two ideas. The ubiquity of those three conditions should not blind us to the gaps that exist

between some of the components of *AtoJ* and some desiderata of the concept of the rule of law.

III. OTHER CONCEPTIONS, OTHER LINKS

Given those gaps, we should consider possible links between conceptions of the rule of law and *AtoJ*. For an account of the rule of law to be a conception of the rule of law it must add to the eight desiderata. Since there could be numerous conceptions on this measure and we cannot examine them all, how should we proceed? I focus upon two exemplary conceptions of the rule of law. The first is a relatively recent, much cited and much praised account from the perspective of a legal practitioner: its author – Tom Bingham – was a Senior Law Lord. The second is also much cited, praised and, given the fractious ways of jurists, much criticised. It is jurisprudential in orientation and is already familiar, belonging to Raz. These two conceptions share a double similarity: both affirm a link between the rule of law and *AtoJ* and both fail to unpack the exact the nature of that link.[59]

Bingham's conception of the rule of law consists of eight principles arising from a core principle which holds that "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered by the courts".[60] The eight principles overlap with but go considerably beyond Fuller's desiderata.[61] It is the sixth principle that is salient here, since it holds that "[m]eans must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve".[62] This seems similar to the legal-fora component of *AtoJ* and a closer look confirms the likeness: "[i]t would seem to be an obvious implication of the principle that everyone is bound by and entitled to the protection of the law that people

[59] Finnis is another interesting example. Having invoked the eight desiderata as his account of the rule of law, he expands one of them (promulgation) to include the *L-E* and *L-F* components of *AtoJ*: see note 32 at 271. He does not argue the point, but simply assumes the existence of the two of the conditions elucidated in section II, above.

[60] T Bingham, *The Rule of Law* (London: Allen Lane 2010) 8 (see also 37).

[61] They are: (i) the law must be accessible, intelligible, clear and predictable; (ii) legal questions must be resolved by application of the law, not the exercise of discretion; (iii) the law should apply equally to all; (iv) public power holders must exercise those powers in good faith; (v) the law must protect fundamental rights as well as providing both (vi) quick and accessible means for resolving disputes and (vii) the means for ensuring fair trials; and, finally, (viii) the state should comply with its national and international obligations: *ibid* at, respectively, 37, 48, 55, 60, 66, 85, 90 and 110.

[62] *Ibid* at 85.

should be able, in the last resort, to go to court to have their civil rights and claims determined".[63]

What, then, is the relationship between this principle and Bingham's core principle? The connection is close because courts are a vital component of the latter: it insists *inter alia* that law be publicly administered by courts. That being so, the need for access to the courts is as important as the argument for the core principle is powerful. But Bingham provides no argument in support of the core principle, intimating only that it accords with much thought about the nature of the rule of law.[64] He does not, for example, rely upon the guidance function invoked by Fuller and Raz or the former's notion of reciprocity. Furthermore, reliance upon Fuller would be a double-edged sword for Bingham. For, while the claim that law is a means of subjecting human conduct to the governance of rules would undoubtedly provide a rationale for a number of Bingham's sub-principles, it would also both block the move to the sixth principle and problematize the core principle. Why? Because both place courts at the centre of Bingham's account of the rule of law and Fuller – although not in his statement of law's guidance function – sets his face against such a 'court-centric' view.

We have noted that Fuller does not regard courts as a vital instrument in the task of subjecting human conduct to the governance of rules; nor does he see them as necessary means of resolving disputes about the application and content of those rules. Courts become important in legal systems and for the rule of law, for Fuller, only when certain conditions obtain: the societies in question are large, marked by complexity (both generally and, presumably, also in relation to law), and contain incentives to both find out and contest what the law requires. We can imagine societies in which these conditions do not obtain; some, indeed, actually exist.[65] So, while it is unsurprising that a former Senior Law Lord places courts at the centre of his conception of the rule of law, it is important to realise why and how they get there: not as a necessary component of any acceptable analysis of the concept of the rule of law, but as a result of attempting to realise that concept in particular, historically significant conditions. Bingham elides the gap between the rule of law and *AtoJ* because he assumes that courts are always and ever a component of the former.

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[63] *Ibid*.

[64] I take this to be the thrust of chs 1 and 2 (the latter being an historical survey) of the *The Rule of Law*, *ibid*.

[65] Or have existed: see S Roberts, *Order and Dispute* (Louisiana: Quid Pro Quo, 2nd ed., 2013) chs 5, 6, 7, 9 and 10 for an excellent overview. Also wonderfully informative are E Adamson Hoebel, *The Law of Primitive Man* (New York: Atheneum 1972 (1954)) Part II and K Llewellyn and E Adamson Hoebel, *The Cheyenne Way* (Norman: University of Oklahoma Press 1941).

The eight principles Raz thinks constitute the rule of law exceed the range of Fuller's eight desiderata. That is because some of Raz's principles are multi-faceted, explicitly including six of Fuller's desiderata and adding at least three more.[66] Moreover, as already noted, two of Fuller's desiderata are implied by Raz's claim about law's guidance function. Of the three principles Raz adds to the eight desiderata, only one is salient here: it is Raz's seventh principle which holds that "[t]he courts should be easily accessible".[67] *AtoJ* – or its legal-fora component – is thus once again built into a conception of the rule of law. Is this another instance of argumentative haste?

Yes, and for much the same reason as that in play in the discussion of Bingham. Note, however, that as a general matter an obvious way of justifying or explaining the desiderata of any conception of the rule of law is to do the same thing as one would do when explaining and justifying the desiderata of the concept of the rule of law: have recourse to its point. All eight of Fuller's desiderata flow from the animating ideas of the concept of the rule of law – they are necessary components of the enterprise of subjecting human conduct to the governance of rules and they embody both notions of reciprocity. But Raz's version of the legal-fora component cannot flow directly from that enterprise if, as Fuller maintained, courts are not a necessary condition for engaging in the enterprise of subjecting human conduct to the governance of rules.[68]

This point might be misguided because ascribing Fuller's view of the guidance function of law to Raz is a mistake. Yet Raz's view of that function is virtually identical to Fuller's. Raz holds that "the basic intuition from which ... the rule of law derives ... [is that] law must be capable of guiding the behaviour of its subjects".[69] If the legal-fora component is not easily derivable from the enterprise of subjecting human conduct to rules, then it is unlikely to be easily derivable from the enterprise of guiding human behaviour. How, then,

[66] Raz's conception has eleven desiderata because, although he mentions only eight principles (above, note 36 at 214–219), the first contains three, and the third four, sub-principles, two of the latter not overlapping with those in the first principle.

[67] Raz, note 36, at 217.

[68] For an attempt to extend Fuller's first and second desiderata into a broader "publicity condition" that is assumed to include the *L-F* component, see D Dyzenhaus, 'Normative Justifications for the Provision of Legal Aid' in *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (1997) 2, 475-502 at 480–482; also, see Roberts, note 65 above, for an excellent reminder of the variety of dispute resolution processes available.

[69] Raz, above note 36 at 214.

might Raz show that the legal-fora component genuinely follows from his conception of the rule of law? There are two possibilities.

The first follows Bingham's path. For Raz builds courts into some principles of his conception of the rule of law. After the brief statement of the seventh principle above, Raz elucidates thus:

> "given the central position of the courts in ensuring the rule of law (see principles 4 and 6) it is obvious that their accessibility is of paramount importance. Long delays, excessive costs, etc., may effectively turn the most enlightened law to a dead letter and frustrate one's ability to guide oneself by the law".[70]

If we ask why courts assume this central role in Raz's conception of the rule of law, he offers no answer. But an answer can be built upon one of his observations. It is not that the necessity of access to the courts flows from law's guidance function; rather, that necessity arises from "the particular circumstances of different societies".[71] Such circumstances, says Raz, confer "validity or importance" on many of the principles or desiderata of the rule of law.[72] What might those circumstances or conditions be? Those we and Fuller have already identified: complexity at the social and legal levels, conjoined with incentives to both find out what the law requires and to contest some of its alleged requirements. The existence of these conditions make courts a salient but not the only means of resolving legal disputes. These circumstances can thus confer 'validity or importance' on Raz's seventh principle.

Since I have already invoked an argument of this form in the discussion of Fuller, it may seem foolish to complain about Raz's reliance upon it. But the complaint is not about the argument as such. It is about regarding this argument as establishing a direct connection between the rule of law and the legal-fora component of *AtoJ*. The argument indeed establishes a connection, but only *via* the medium of certain conditions: if societies and their legal systems are not complex, and if there are no incentives to determine the law's content and to contest that alleged content, then neither courts nor the legal-fora component will be necessary. The connection between this component of *AtoJ* and the rule of the law is not, therefore, a necessary consequence of features of those two ideas. It arises only as a result of attempting to realise the rule of law in particular historical

[70] *Ibid*, 217.
[71] *Ibid*, 214.
[72] *Ibid*, 214.

circumstances. My complaint against Raz is thus conditional: if he regards the connection between *AtoJ* and the rule of law as direct or non-conditional, then he moves too quickly.

The second way Raz could show that the legal-fora component arises from his conception of the rule of law is by showing that it derives directly from the values informing that conception. What might these be? There is only one candidate. In addition to invoking a notion of dignity almost identical to Fuller's thick strand of reciprocity, Raz invokes the idea of individual freedom.[73] Regarding the protection of individual freedom as a virtue of the rule of law, says Raz, "is right in the sense of freedom in which it is identified with an effective ability to choose between as many options as possible. Predictability in one's environment does increase one's power of action[.]".[74] Since the rule of law is one means of ensuring a reasonable degree of such predictability, then "[t]he rule of law may be yet another way of protecting personal freedom".[75] Does the rule of law's protection of freedom support or require the legal-fora component of access to justice?

It might, but only if we assume the existence of a society and legal system embodying the conditions discussed when examining Raz's first gambit. In a complex society, which has a complex legal system the content of which addressees of the law have an interest in both learning and, in some circumstances, contesting, the protection of freedom requires a commitment to all three components of access to justice. Knowledge of the law is necessary in order to know the limits of one's freedom. Expert guidance as to the content of the law is required insofar as the law is complex, if one is indeed to know the limits of one's freedom. And access to legal fora (or the like) is needed so as to allow competing claims about what the law requires to be resolved, the resolution of those claims determining the limits of one's freedom. Note again, and finally, the nature of this connection: it is indirect, not flowing immediately from features of either the rule of law or freedom or *AtoJ*. The connection arises between these three only through the medium of the three conditions with which we are now familiar.

It turns out that neither of these conceptions of the rule of law establishes a tight, direct connection with *AtoJ*. The links they affirm are incompletely developed. When unpacked, the links that do exist are weaker than some that obtain between the concept of

[73] *Ibid* at 221–222.
[74] *Ibid* at 220.
[75] *Ibid.*

the rule of law and *AtoJ* and no stronger than the remaining connections between those two notions.

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The importance of *AtoJ* is not diminished by subjecting the connection between it and the rule of law to close scrutiny. But the task of speaking up for *AtoJ* must, on the evidence of the arguments herein, range more widely: there might, for example, be other values more closely related to *AtoJ* which better illuminate its value.[76] The rule of law should not be the touchstone for all elements in the juristic landscape.

[76] For discussion of one such value, see n 10.