Preface

HIROHIDE TAKIKAWA

In the early summer of 2018, Professor Kristen Rundle, guest speaker for the 12th Kobe Lecture, and other participants assembled at Doshisha University in Kyoto, the venue of the inaugural IVR Japan International Conference. By ill luck, the first day was hit by heavy rain that broke historical records, and almost all the trains ceased operations in the area. Nevertheless, participants from many countries struggled to the conference venue. I must confess that I was very touched by seeing them engaging in vigorous discussions of various issues on legal and social philosophy even in such terrible weather.

On behalf of the Japanese National Section of the International Association for Philosophy of Law and Social Philosophy (IVR Japan) and the Japan Association of Legal Philosophy (JALP), it is with great pleasure that I present the proceedings of the 1st IVR Japan International Conference and the 12th Kobe Lecture.

The keynote speaker, Professor Kristen Rundle[1], read her Kobe Lecture *Fuller's Relationships* on July 7, 2018 at Doshisha University in Kyoto, Japan. Another invited lecturer, Professor Tetsu Sakurai, read his paper *Democracy's Border* the following day. More than 80 researchers from around 20 countries participated in the inaugural IVR Japan International Conference. From July 6 to July 8, the two guest lectures were delivered, two selected panels of speakers were organized, and more than 60 peer-reviewed papers were presented.

This volume contains the 12th Kobe Lecture and the articles selected through peer review that were originally presented at the inaugural IVR Japan International Conference. Before introducing the inspiring contents of the lecture and articles, I would like to mention the origins of the Kobe Lectures and the IVR Japan International Conference.

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1 Associate Professor at Melbourne University

History

The Kobe Lecture is an international lecture program founded in 1988 to commemorate the 13th World Congress on Philosophy and Law and Social Philosophy held in August 1987 in Kobe, Japan. The lectures are administered by IVR Japan, in cooperation with the JALP. Every two or three years, a scholar engaged in creative research on basic issues of legal, social, and political philosophy is invited to Japan. The lecture is usually given in a major city of Japan.

Professor Ronald Dworkin gave the inaugural lecture in 1990. Professor Ralf Dreier was the second lecturer in 1992. In 1994, Professor Joseph Raz gave the third in the series of lectures. The fourth lecture was an exception in that it was given during the First Asia Symposium in Jurisprudence, which had the theme of "Law in a Changing World: Asian Alternatives" in 1996. Professor Will Kymlicka gave the fifth lecture in 1998. The sixth was given in 2000 by Professor Randy Barnett. In 2002, Professor Emilios Christodoulidis gave the seventh lecture. IVR Japan and the JALP decided to hold subsequent Kobe Lectures every three years instead of two. The eighth lecture was given in 2005 by Professor Ulfrid Neumann. Professor Cass Sunstein gave the ninth lecture in 2008. In 2011, Professor David Miller gave the 10th lecture. The 11th lecture was given in 2014 by Professor Brian Tamanaha. The lectures were published in the ARSP (Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy). The proceedings of the fourth, fifth, ninth, 10th, and 11th lectures have been published as a special issue (Beiheft 72, 96, 132, 139, and 152, respectively) of the journal, as is this 12th lecture.

The Kobe Lecture is intended to advance our understanding of the legal, social, and political spheres of life. Important theoretical issues are explored from a perspective that is philosophical yet sensitive to practical problems.

In 2015, IVR Japan decided to hold a new series of international conferences connected with the Kobe Lecture from 2018. The IVR Japan International Conference (the official name of this series of conferences) is intended to offer good opportunities to present recent research outcomes and to enhance academic exchanges among international researchers on legal and social philosophy, including Japanese colleagues and promising young scholars. Holding the inaugural IVR Japan International Conference has been a considerable challenge for the Japanese branch of IVR. We hope that this series of IVR Japan International Conferences will provide a wonderful opportunity for international researchers to exchange opinions and ideas here in Japan.

The 12th Kobe Lecture

Kristen Rundle gave the 12th Kobe Lecture a very impressive heading–*Fuller's Relationships*–following her excellent book with a similarly impressive title: *Forms Liberate*.[2] In her *Forms Liberate*, she has offered a fresh, attractive, and convincing understanding of Lon L Fuller's jurisprudence and extracted the significant implications of the form of laws based on a thorough investigation of his published works, working papers, and letters. In the Kobe Lecture, Rundle recapitulates her work and proceeds to illuminate the importance of relationships in Fuller's jurisprudence, especially that between legal officials and legal subjects.

Kristen Rundle commences her lecture by mentioning the letters between Lon Fuller and Ryosuke Inagaki, a leading Japanese researcher on natural law theory and translator of Fuller's *The Morality of Law*. Fuller wrote to Inagaki that "procedure, process, and institutional forms" can never be "ethically neutral."[3] Rundle shows in her lecture that this implies a relational conception of the authority of law.

Rundle reexamines the famous debate between H. L. A. Hart and Fuller. While Hart defends the core claim of legal positivism that law and morality are necessarily separable, or the separability thesis, Fuller opposes it. The bottom line is that Fuller did not present his arguments as a follower of the natural law tradition, which stresses the morality of the content of law, but rather focused on the morality of the form of law, which he calls "the inner morality of law." Fuller points out that King Rex would fail to make law in no less than eight ways, and from that draws the eight principles that law must be: (1) general, (2) publicly promulgated, (3) nonreactive, (4) clear, (5) noncontradictory, (6) possible to obey, (7) constant, and (8) congruent with official action.[4] Rundle shows that these principles are not offered as "the required features of individual laws within a condition of the rule of law," but rather as "the conditions from which legal as opposed to other modes of ordering can emerge."[5] She finds a distinctly relational feature of these conditions in Fuller's analysis of the story of Rex and its implications when he discusses law as a cooperative effort between lawgivers and subjects. According to Rundle, Fuller accurately understood that his arguments were about what kind of job law-making is. In other words, he illuminates a collaborative relationship between lawmakers and citizens. However, Hart did not properly grasp the point of Fuller's arguments and simply objected that the eight principles had some implications for the effectiveness of law but no intrinsic connection to anything moral.

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2 Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller*, 2012, Oxford: Hart Publishing.
3 Rundle, Fuller's Relationship (this volume), 18
4 Lon L Fuller, *The Morality of Law*, 1969, 33–44
5 Rundle, Fuller's Relationship (footnote 3), 22

Rundle sheds a new light on the internal morality of law by putting Fuller's arguments in the context of his wider research program to produce a "science or theory of good order and workable social arrangements,"[6] which he called *eunomics*. In this understanding of Fuller's project, the internal morality of law shows itself to be a distinctive character of the forms of law to achieve the goal of building good order. Rundle draws our attention to an important remark by Fuller: "Every departure from the principles of the internal morality of law is an affront to man's dignity as a responsible agent."[7] According to Rundle, law presupposes and constitutes agency on the part of the subject of law. In other words, law gives humans legal agency and then enables them to interact with each other. Only legal officials engaged in role morality who then meet the relational demands for the appropriate regard of citizens can claim legitimate authority. Simply put, legal officials acquire legitimate authority over their subjects only through law. This is what Rundle names the "relational conception of authority." This intrinsic effect on agency by interaction through law is what the *internal morality* of law is all about.

With these insights, Rundle returns to the Hart–Fuller debate to clarify why it is important to look at the relationships between legal officials and legal subjects. Hart argues that to obey the principles of the internal morality of law is merely an effective way to achieve legal ends. Fuller disagrees with Hart, saying that Hart confuses managerial direction and law. If legal positivism is just a conception of managerial direction, it would be safe to say that the principles are morally neutral. However, as the principles of generality, nonretroactivity, and congruence between official action and declared rule clearly show, the eight principles can never be morally neutral requirements of managerial direction; they are the internal morality of *law*. Without realizing the distinction between managerial direction and law, according to Rundle's understanding of Fuller's arguments, we cannot explain the phenomenon of fidelity of law.

Moreover, Rundle draws practical implications from Fuller's understanding of the rule of law. She finds the core of his idea in the enterprise of framing governing relationships according to the demands of legality. From this perspective, it is clear why the public are worried about a contemporary trend of "contracting out" governmental functions to private actors. Concern arises because contracting out to private sectors is likely to obscure the governing relationships between legal officials and legal subjects in which political legitimacy should be grounded. Based on her relational conception of the authority of the law, she also convincingly explains public concerns about wide discretion within administrative decision-making structures. The granting of wide discretion should be carefully examined because it would give the decision-maker arbitrary power and damage the healthy relationship between the decision-maker and

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6 Ibid., 23

7 Lon L Fuller, *The Morality of Law* (footnote 4), 162

the person subject to his authority. According to Rundle, these examples show that the eight principles of the internal morality of law are important demands for the relationship between lawgiver and subject, but are not criteria that should be met in all cases. Fuller would admit that one of them should be compromised if to do so would improve legality.

Rundle concluded her lecture by showing what Fuller was seeking in legal philosophy. On the last page of *The Morality of Law*, complaining about contemporary legal philosophers, Fuller calls for more research not on "conceptual models" but on "social processes that constitute the reality of law."[8] In this phrase, Rundle finds the core of Fuller's program of legal philosophy, that is, the significance of "procedure, process, and institutional forms," which Fuller mentioned in his letter to Inagaki. Her lecture clearly shows us the overall aim of Fuller's jurisprudence.

Selected Articles

Part Two of this volume is a collection of seven papers on the borders and grounds of democracy.

Tetsu Sakuai claims that we should pay more attention to the borders of law because they are indispensable to maintain our basic rights, but at the same time, they threaten our important values. By illustrating a dreadful predicament for stateless people, Sakurai reminds us that a national government can be the only protector of their basic rights. On the other hand, he shows that democracies require borders for self-governance and necessarily imply exclusion. It follows that a national government can be both an angel and a devil in human society.

To address this paradox of democratic self-determination, Sakurai urges us to face the problem of law's spatiality. The Treaty of Amsterdam, signed in 1997, describes the European Union as "an area of freedom, security and justice," that is, a sharply bounded space imbued with democracy and the rule of law. This implies that there is an outside in which servitude, insecurity, and injustice stand. It assumes that a political entity provides a set of liberties and equality only in a strictly bounded community. Confronting the discrepancy between the universal values of freedom, equality, and other basic rights and the requirement of a bounded community to protect them, Sakurai stresses our commitment to the project of further advancing these values and the institutions that implement them, and maintains that we should give more weight to civic boundaries than to territorial ones. He argues for the primacy of civic boundaries because they play an essential role in constituting the borders of law.

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8 Ibid., 242

Hirohide Takikawa argues that it is morally permissible to draw national boundaries to achieve a better institutional arrangement for global justice in spite of cosmopolitan objections to borders. Takikawa shows that it is important to draw national boundaries territorially, but not temporally, elementarily, or personally to discharge our moral duty of justice more effectively and thoroughly. Takikawa also argues that the national boundary between citizens and foreigners can be defended as a better way to ensure that each territory has its own responsible governing agent.

Chuang Shih-Tung carefully examines the controversial relationship between democracy and hate speech. Some argue that hate speech injures basic democratic values, but others hold that bans on hate speech damage democracy. Ronald Dworkin takes the latter position, asserting that upstream intervention against hate speech damages the legitimacy of downstream laws. Chuang objects to Dworkin's claim and maintains that the prohibition of hate speech does not necessarily diminish the legitimacy of downstream legislation.

Takayuki Kawase argues for liberal nationalism by showing that the liberal integration of nation is an effective way to implement those egalitarian liberal policies. By focusing on the important roles of a national language and mutual trust, Kawase states that liberalism and nationalism are not only compatible but also complementary, and urges multicultural national education for their prosperous union.

Shinichi Tabata explores the relationship between deliberative procedures and truth-tracking outcomes in theories of democracy. Arguing against David Estlund's objection that deliberative democracy cannot evaluate whether its outcomes are right, owing to its lack of procedure-independent standards of rightness, Tabata attempts to show that it has both procedural values and substantive criteria by examining Jürgen Habermas's conception of deliberative democracy as quasi-pure procedural justice.

Dai Oba sheds light on the internal relationship between democracy and procedure by carefully examining and clarifying the idea of pure procedural justice and its relationship with property-owning democracy in John Rawls's theory of justice. After drawing several requirements from the notion of pure procedural justice, Oba shows that we can regard property-owning democracy itself as an institutional arrangement of pure procedural justice, and can therefore explain its wide endorsement.

Laÿna Droz explores the idea of environmental civil disobedience. It is certain that democratic mechanisms are important to address environmental problems, but they are sometimes delayed in coping with the urgency of the environmental crisis and less inclusive of those beings that are vulnerable to environmental problems such as minority groups, non-human living beings, ecosystems, and future generations. Droz maintains that environmental civil disobedience is not only compatible with but also complementary to democratic decision-making procedures about environmental matters.

Part Three of this volume is a collection of seven papers on the rule of law and aspects of jurisprudence.

Chueh-an Yen carefully examines and interprets the concept of law proposed by Gustav Radbruch. Arguing against Robert Alexy's influential interpretation of this concept, Yen offers a refined understanding that law is a special kind of cultural reality in the sense that it is based on value-related attitudes, intended to serve important values, and motivating legal subjects–including jurists–to follow legal reasoning.

Imer B. Flores defends the thesis that law is an artefact and elaborates on the idea of an artefact. Referring to theories of artefacts from Aristotle to modern scholars, he proposes a general theory of artefacts and situates law in that theory. Flores carefully discusses authorial intention as a condition for the artefact, and he provides an artefactual account of law that enables us to explain customary laws as well as statutory ones.

Teresa Chirkowska-Smolak and Marek Smolak examine a precondition for the rule of law, namely a judge's superiority over moral reasoning. Referring to recent psychological theories and their own research, they assert that judges do not have special moral competence. Chirkowska-Smolak and Smolak suggest that judges should pay more attention to the reasons provided by the legislature to follow faithfully the idea of the rule of law.

Mitsuki Hirai carefully examines legal positivism by distinguishing subjective positivism–a first-order claim that law and morality should be separated–from methodological positivism, a second-order claim that legal theory and moral evaluation should be separated. Hirai argues against legal positivism by showing that the value neutrality underpinning subjective positivism in turn impairs methodological positivism.

Alessio Sardo attempts to draw out a useful set of tests for judicial review beyond the dispute between positivism and nonpositivism. By carefully examining nonpositivist Robert Alexy's and positivist Frederick Schauer's theories of law, Sardo suggests that both are engaged in a joint project to elaborate a set of tests for judicial review that include an over/underinclusive test and a proportionality test.

Monika Zalewska argues that Hans Kelsen's pure theory of law defends the rule of law and democracy despite its supposed value neutrality. While some scholars claim that it simply describes the general features of a legal system, Zalewska insists that it supports the rule of law and democracy by analyzing the idea of supervenience, which would naturally imply both the principle of equal treatment and the requirement for a rational lawgiver.

Kumie Hattori carefully compares two competing conceptions of the rule of law, the positivist conception of Joseph Raz and the nonpositivist one of Lon L Fuller. After clarifying some differences between their conceptions, Hattori argues for the Razian conception of the rule of law by showing that it can illuminate the serious social problem that good men can enact good rules that others will misapply.

Acknowledgements

On behalf of IVR Japan, let me express our deep gratitude to all those involved in the 12th Kobe Lecture and the inaugural IVR Japan International Conference. I would like to express my deepest gratitude to Kristen Rundle for her wholehearted cooperation in preparing for the Kobe Lecture and this publication. She has always been punctual, or actually more than punctual, and responded promptly to my requests and questions. It is a great honor to count her in the Kobe Lecture Hall of Fame. I would also like to express my profound gratitude to Tetsu Sakurai and other contributors to this volume for their kind cooperation.

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PROF. HIROHIDE TAKIKAWA
College of Law and Politics, Rikkyo University, 171-8501 Tokyo, Japan,
President of IVR Japan (then), Member of the Executive Committee of IVR,
tkkw@rikkyo.ac.jp

Part 1
The 12th Kobe Lecture