The Rule of Law:
its rhetoric and meaning in global politics

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In the trailer for the film of the stage play *Frost/Nixon*, a quote from the original interview of May 19th 1977 was used, spoken by the actor playing President Nixon: 'When the President does it, that means that it is not illegal'. Clearly intended to be a shock by virtue of David Frost's in-film response, this helps to demonstrate how widely the norm of the Rule of Law is accepted as a common sense of politics, even by those who would probably find it difficult to describe its more formal dimensions. What is most striking is that while the idea of the rule of law itself can claim a long and distinguished history, its popular use, outside the realm of jurisprudence and political science, to evaluate political practice(s) is a much more recent phenomena. Thus, for example, while twenty years ago *The Economist* provided a gloss on the term when it was deployed in leaders (Economist 1988a; 1988b) and sometime even surrounded the term with scare quotes, by 2008 the editors felt sufficiently confident that it was a well enough understood term to deploy it with little if any contextual definition or detail (Economist 2008), now merely referring to Putin as 'understanding why the rule of law matters'.

This is to say, as Pietro Costa and Danilo Zolo have pointed out, today 'the expression the "rule of law" is remarkably widespread, not only in political and legal literature but, most notably, in newspapers and political language' (Costa and Zolo 2007: ix), as Lord Bingham puts it in his new book: the expression is 'constantly on people's lips' (Bingham, 2010: vii). It is not merely the use of the term that is widespread, frequently the notion of the rule of law lies behind prescriptions when democracy and modern governance are being promoted. Thus, in Paul Collier's recent book on *Guns, War and Votes*, much of the discussion of accountability and democratic governance is implicitly based on the introduction, or reinforcement of the rule of law (made explicit in only a few places, most obviously in a section of the chapter on prescriptions for development) (Collier 2009: 199-201). The legal community frequently agrees (perhaps unsurprisingly); in its *Rule of Law Resolution* (Prague, 29th September 2005), the International Bar Association asserted that the 'Rule of Law is the foundation of a civilised society'. Likewise, there is considerable interest and policy-oriented discussion of the manner in which the rule of law may support economic development (Dam 2006; cf. Mattei and Nader 2008), where the introduction of the rule of law is seen as the pathway to development and social progress.

The terminology of the rule of law (and thus an implied appeal to the norm itself) is much deployed: moreover, that governments and the state apparatus they manage (the makers of the law) can violate the rule of law is a common trope. Commentators often suggest that there is an external set of norms that can be appealed to that merely changing the law itself does not nullify; the rule of law is about more than merely the rules themselves. Indeed, this has often been the position of civil rights movements: as John Brenkman point out, civil disobedience is 'a temporary, disciplined crossing of the boundary of lawfulness for the purpose of achieving something *on behalf of* the rule of law, that cannot, in the judgment of those taking action, be accomplished by merely obeying the law' (Brenkman 2007: 75, fn23, *emphasis in original*). This distinguishes between the law's inherent values, existing independently of some specific legal procedures, and thus makes the rule of law

itself the site of political mobilisation; *a universal legality can be served by particular illegality*.

This has led to much of the contemporary jurisprudential debate about the norm of the rule of law focussing on the distinction between what is often termed the 'thick' Rule of Law, encompassing a wider set of legal norms such as equity and justice, and a narrower 'thin' rule of law limited to procedural and organisational matters. (I will now capitalise the thicker Rule of Law, to distinguish it from the thinner conception.) These contrasting depictions are both ideal typical and thus often it is more likely that definitions of legality would appear to move in one direction or another where the division between thick and thin conceptions is seen as a continuum between nodal points rather than two clearly distinguishable modes of thought. It is worth stressing here that even the thinner procedural notion of the rule of law is of course normative in the sense that it supports a view about good and proper modes of procedure that cannot be said to be natural or non-social. Thus, the rule of law/Rule of Law continuum is a range of normative positions and while tendencies and relative positions can be identified it is unlikely that one would find anyone expressing the ideal typical end-points themselves.

Francis Fukuyama sees this distinction as spatial; generally Americans view the rule of law as procedural and as such it cannot encompass social objectives (although clearly views within the US differ widely), while Europeans are happier to accept a thicker Rule of Law with social policy ends introduced through adjudication (Fukuyama 2004: 156/157). However, for Boaventura de Sousa Santos thinner approaches reflect ‘the streamlining of the emancipatory potential of the rule of law and the conversion of the latter into just one more technique of regulation’ (de Sousa Santos 2002: 341). Indeed, he argues that the thicker approach to the Rule of Law has now become a central aspect of the counter-hegemonic resistance that confronts contemporary neo-liberal (globalised) capitalism (de Sousa Santos 2002: 278-311; 445-446). Thus, a thicker approach to the Rule of Law, is not merely a wider analytical treatment of legality, it is also a political tool itself.

As a critique of the thin conception, the thick Rule of Law makes a claim that conceptions at the thin end of the continuum have removed any concrete notion of the good society from the evaluation of accordance with the rule of law (Kratochwil 2009: 196). We must consider the content of the law itself and the manner in which the law interacts with the society which it purports to govern or regulate. This distinguishes between a claim for the rule of law that merely seeks to identify a society that deploys legal procedures to regulate and shape behaviour, and a society where the Rule of Law itself precludes and forbids certain (ab)uses of political power. However, as those proposing a thin depiction of the rule of law attest, there is nothing to guarantee that the extra-legal norms recognised in this manner will be progressive or liberal, and thus legality itself should be confined to just practice and leave the social outcomes for the political realm.

The problem for some scholars, such a Judith Shklar, is not the question of which definition of the 'rule of law' best encompasses a reasonable political aspiration, but rather that the term itself has become an empty signifier because those who deploy it 'have lost a sense of what the political objectives of the rule of law originally were and have come up with no plausible restatement' (Shklar 1987: 1); it has no more meaning than (in Jeremy Waldron's paraphrase) a manner of cheering 'Hooray for our side' (Waldron 2002: 139). This is to say that in debates about governance and government, the rhetoric of the rule of law is common, but it also remarkably indeterminate; it is frequently evoked on both sides of an argument. How we understand the 'rule of law' is therefore a political issue of some importance. Lord Bingham's new book brings these debates to a more general audience.

Acknowledging the problems I have set out above, Bingham seeks not to establish a definitive set of criteria but rather to introduce the non-legal reader to the range of issues that are encompassed by the term, and which it is vital for them to understand. To this end he starts his account with a short

and schematic history focussing on twelve moments he regards as vital to the development of the Rule of Law: starting with Magna Carta 1215, and ending with the Universal Declaration of Human Rights in 1948 (Bingham, 2010: 10-33). Unlike Harold Berman, who traced the origins of the norm to the Papal Revolution of the twelfth century (Berman 1983: 94-99), Bingham prefers to keep his history firmly located in the British legal tradition, partly as a recognition of the central rhetorical role of A.V.Dicey, often regarded as if not the originator of the term, then certainly its first populariser in the famous part two of his *Introduction to the Study of the Law of the Constitution* (Bingham 2010: 2-5). While willing to admit some non-British precursors, it is Dicey's influence that secures him the pole position in Bingham's brief history. Bingham's is not so much the history of the norm itself, but an account of its ascendance to a central ideal of liberal politics.

Once this brief history has established that the Rule of Law has been developed through not only through the arguments of jurisprudence (which he seems relatively uninterested in), but also through legal and juridical practice, Bingham turns to explore its key elements in Part Two. In a series of short chapters he sets out eight key components of the Rule of Law:

1. 'The law must be accessible and so far as possible intelligible, clear and predictable.' Here the key issue is that we can hardly expect law-abiding behaviour if it is impossible for those so governed to be unable to ascertain what the law actually is (Bingham, 2010: 37-47).
2. 'Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.' This is not to argue that there can be no discretion, only that any discretion must be exercised *within* the bounds of the law, and therefore no decisions should be arbitrary and without recourse to some law or another (Bingham, 2010: 48-54).
3. 'The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.' In other words all must be equal before the law, with no distinction between, for instance the rich and the poor, the weak and the powerful. Where the law distinguishes responsibility by age, there may be some reason to treat people differently, but only when these differences are 'objective' and not social, political, or economic (most importantly arguing against discrimination by race and gender) (Bingham, 2010: 55-59).
4. 'Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the power were conferred, without exceeding the limits of such powers and not unreasonably.' Bingham, actually intends this to underpin judicial review, so that the state can be held accountable to the laws parliament has enacted and does not go beyond that democratically grounded intent (Bingham, 2010: 60-65).
5. 'The law must afford adequate attention to fundamental human rights.' Here Bingham explicitly rejects the thin reading of the rule of law in favour of the thick Rule of Law, spending some time exploring various articles of the European Convention on Human Rights. For Bingham, as for many supporters of the thick norm, the Rule of Law cannot be said to obtain where there the procedures of law explicitly are intended to underpin injustice (Bingham, 2010: 66-84).
6. 'Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.' This, is to some extent, the extension of the first point about accessibility; if effective representation is blocked by costs to all but the most wealthy defendants then the law cannot be said to be treating all equally. Here, Bingham offers a clear defence of legal aid and expeditious legal process as crucial to the maintenance of the Rule of Law (Bingham, 2010: 85-89).
7. 'Adjudicative procedures provided by the state should be fair'. This is to say, the judiciary and legal profession must be independent of the state, allowing both sides (prosecution and defence) a fair trial. This also indicates that the dependent must know the charges against him or her and be able to properly interrogate the evidence (Bingham, 2010: 90-109).
8. 'The rule of law requires compliance by the state with its obligations in international law as in national law.' Here, Bingham expands his purview from the previously rather domestic

orientation of his discussion to argue that the state's obligations do not end with its own law, but rather extend to the realm of global politics. As he has already noted this includes invocations of human rights, but also the rules of war and other international regulatory arrangements. Unlike the Political Realists in International Relations, Bingham does not recognise a moral difference between inside and outside the state (Bingham 2010: 110-129).

Throughout this discussion Bingham refers to cases he has adjudicated (and thus knows well) as well as to other relevant judgements. Unlike Raymond Plant's recent discussion of the *Neo-liberal State* (Plant 2010), Bingham does not seek to establish the veracity of the Rule of Law through an argument from jurisprudential or political theoretical principles; rather reflecting his understanding of common-law, it is an account based on custom, precedent and the development of law in response to political pressure. Thus, while Plant tests neo-liberalism against its internal logic, asking how thick the Rule of Law needs to be to serve liberalism's moral ends without it becoming a threat to (a neo-liberal idea of) freedom, Bingham sees the thick Rule of Law threatened and perhaps even undermined by the state itself. However, while neo-liberals in Plant's reading express concerns about the constraint of economic rights by the legal structures of the welfare state, for Bingham it is political rights that seem most threatened by the contemporary state.

The final section of the book deals with two political issues which exemplify these threats. The first of these is relation between the Rule of Law and the (so-called) War on Terror. He points out that unlike the US Government, and drawing on the experience of Northern Ireland, the UK Government has prosecuted terrorists as criminal not as combatants (Bingham 2010: 137). The UK Government has also not sought the considerable extension of powers that has been accorded to the Executive in the US, nor has it sought to use third countries (utilising extraordinary rendition) as a site for extra-legal measures (Bingham 2010: 138-142), although of course there are some questions about how far the UK has distanced itself from these practices. However, Bingham goes on to argue that unfortunately there are also issues where both countries have compromised the Rule of Law in their bid to confront terrorism: ranging from discrimination against non-nationals to detention without trial and surveillance (Bingham, 2010: 143-158). Like others Bingham concludes, however, that this merely lets the terrorist win; if we abrogate the Rule of Law, one of our key political values, then we compromise our own claims to be on the side of the good.

Bingham's second threat is perhaps a little more surprising than his critique of the Government's actions in the War on Terror: he concludes that perhaps the major threat to the Rule of Law is the sovereignty of Parliament. While one can hope that Parliament will not legislate in a manner that conflicts with the (thick reading of the) Rule of Law, there is actually nothing to stop this happening (Bingham, 2010: 160-170). As someone who worked for Charter 88 in the early 1990s, such a conclusion has a familiar ring: this was Charter's key demand; a constitution to ensure that our rights would not be dependent on the good will or good faith of Parliament.

So why is it that the 'rule of law' has become such an extensively deployed trope in politics? This question does not seem to particularly excite Bingham's interest: like others before him, he implies a relatively teleological tale of the Rule of Law as broadly a story of social progress. However, if one was to be perhaps a little more cynical, another relatively simple answer is that around 20% of all politicians worldwide come from the legal profession (Economist, 2009). Additionally, if as Paul Kahn contends, in general terms American political identity is 'peculiarly dependent on the idea of law' (Kahn 1999: 9), then the rise of American global power might also be expected to impact on the manner in which (global) politics was perceived and characterised. Certainly, Pierre Bourdieu agrees that the social and political role of law (and in his terms, therefore the relative strength of the juridical field) is notably stronger in the US, and hence the weight accorded the rule of law is that much greater (Bourdieu 1987: 823). Thus, the rise of the rule of law as norm and rhetoric could be directly linked to the post-1989 (political) establishment of a single general (US inspired) development trajectory focussed on democratisation and liberal market economy (Carothers 2006:

6-7). In other words, the triumph of neo-liberalism, and the concomitant defeat of communism shifted the focus of global politics, bringing with it a clear and established role for the rule of law.

The professionalization of the (global) political classes, leading to a more 'professional' and formalised notion of political debates, may have also played an important role. For Harold Perkin the professionalization of society includes a move from a focus on capital either as investment or activity based, to a focus on property (which is to say scarcity) in the delivery of services (Perkin 1990: 377-380; *passim*). A major aspect of the 'professional project' undertaken by many professions is the development and promotion of a higher status for themselves in the social (and political) order (MacDonald 1995: chapter seven). This status is established by the control exercised over the discourse and definition of the field in which the (nascent) profession seeks to operate. This control is then extended through the process of abstraction and reduction: particular problems are reconceived in abstract terms and then reduced to problems that fall within the jurisdiction of the profession (Abbott 1988: 98). One of the key professions that seeks to establish and maintain the scarcity (and thus value) of its expertise is, of course, the legal profession (Bourdieu 1987). Social problems are increasingly re-conceptualised as issues of regulation, and then reduced to issues of the development, application and interpretation of law, where lawyers can claim expertise.

This has led to an interest in constitutionalism. As Jan Klabbers puts it: 'constitutionalism carries the promise that there is some system in all the madness, some way in which the whole system hangs together and is not merely the aggregate of isolated and often contradictory movements' (Klabbers 2004: 49). The rule of law allows the continual competition for authority over contentious issues to be presented not as political contest, but rather as legitimate choice, overseen by lawyers and technologists, not politicians with sectional interests. Indeed, historically, as David Sugarman points out, lawyers' political role has partly been facilitated by the written form of the Western legal tradition.

> Writing enabled lawyers to claim to be, and sometimes to appear to be, above and beyond the individual acts of power involved in legal practices and the application of the law. In manifold ways, the written form of law abrogated power to those lawyers claiming specialist expertise in the "interpretation" of the law.
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> (Sugarman 1993: 292-293)

This has not been passive nor reactive development but rather is linked to the professional project of lawyers to promote their expertise and skills (and to reify the law, to ensure it needs interpretation). Working in a long Western political tradition that has in one way or another promoted law as a technical ordering device to promote the good political life, lawyers have emphasised the specialist and technical character of their undertaking, and sought to maintain and increase social status by closely guarding entry to the profession. The professional project of lawyering has involved both the careful fostering of a closed group (the lawyers) alongside the promotion of their tool (law) as a solution to problems of order.

Thus, one element for understanding the rise of the Rule of Law norm is to attribute at least part of the cause to the number of lawyers entering politics alongside a more general professionalization of the global polity which has moved legal forms of organisation to the forefront. The political self-maintenance of the legal profession alongside a trend towards professionalization in modern society have reinforced each other to prompt the increasing normative deployment of the rule of law. However, the value of professions to politics is by no means uncontested; Perkin notes that the idea of a scarcity in expertise and professional service (driving the increase of value of the profession's work) was firmly rejected by the new right in the UK and elsewhere in the 1980s (Perkin 1990: chapter 10). This gives one indication of why much of the work on Rule of Law has been driven by critical and oppositional groups of one sort or another. While the neo-liberal/new right agenda saw law (to simplify a little) as merely a thin procedural mechanism to deliver the order required for capitalist expansion, for those seeking to maintain professional norms the thicker Rule of Law was

preferred as a conception of legal development that supports the values of social justice and fairness that continue to lie at the heart of the self-conception of various professions; self-conceptions maintained by the professionals' representative bodies acting in a guild like manner.

If we accept that professionalization has played some role in the establishment of the rule of law as an overarching norm of politics, this cannot merely have happened spontaneously across the world. And indeed, we know that there have been, and continue to be, extensive programmes that seek to (re)establish the rule of law in developing countries, in post-conflict societies and elsewhere. Only in the post-colonial period did the form of legal re-engineering move from forced and imposed legal structures to a mode of co-development and assistance in the development of local legal regimes. Certainly, some might still regard this as a form of imperialism (see for instance Mattei and Nader 2008), but there has been some semblance of political negotiation and flexibility, that was mostly absent in the imperial period. Leaving aside the contentious history of law and development interventions in Latin America (see Gardner, 1980; Trubeck, 2006) it is perhaps little surprise that when legal education once again moved up the international political agenda, development and law assistance was relocated to a range of international organisations (including post-conflict UN Transitional Administrations), and became a key (mostly, but not exclusively regional) activity of the European Union.

The majority of the EU's rule of law work is focussed on democracy promotion regionally, and most specifically as part of the preparation for the accession of new members to the Union itself. As policy and governmental elites in accession countries are eager to fulfil the conditions of membership set by the EU, the political landscape of these technical assistance programmes is perhaps a little different than it was in the 1960s and 1970s. Certainly there seems to be a more complex appreciation of the sequence of developments required to instigate a specific form of the rule of law within a particular state. The EU's programmes broadly adopt three key stages of development (which overlap): rule adoption; rule implementation; and rule internalisation. While forms of conditionality (tied to EU membership) have played a role, a recent survey of these programmes concludes that a key element in 'rule adoption' is the willingness or otherwise of local elites to work towards these ends (Magen and Morlino 2009: chapter eight). Thus, the rule of law's technical elements (procedures; the thin norm) seem to be dependent on a normative acceptance of the wisdom of adopting this mode of ordering, the rule of law.

However, this has sometimes led to what Amichai Magen and Leonardo Morlino have referred to as 'subversive compliance' where the form of laws are adopted but politically emptied of content if the normative outcomes of laws do not accord with already established political mores (Magen and Morlino 2009: 243). We might depict this as the enacting of a thin vision of the rule of law with the rhetoric of the thicker Rule of Law as a legitimisation device. Here the laws, and forms of legality the EU requires are established, but without the social internalisation of the thicker normative content.

As this implies, developing the political culture that supports and facilitates the Rule of Law (in its thicker guise) as a central element of the liberal state is not something that can necessarily merely be technically implemented, it needs an organic relationship with state's polity, society and history. This suggests, any external programme to introduce the Rule of Law in a particular state therefore involves firstly the assessment that such a situation does not obtain. Here, methods of evaluating the existence of the rule of law become crucial. If a thin depiction is adopted then the focus is on the mechanisms of the rule of law - courts, clear laws, enforcement procedures and other elements discussed above - but if a thicker conception of the Rule of Law is deployed then the politico-legal culture itself is the key issue.

If countries are regarded as deficient as regards the rule of law then international organisations and

non-governmental agencies seek to busy themselves with legal education, support for institution building and so forth. However, only the depiction of the rule of law as a technical 'lack' can really drive this process forward, and thus failings attributed to a lack of a thicker Rule of Law may be rendered as technical rather than political issues. Thus, for instance political questions around resources allocated to legal measures, and the political choices thereby involved (both by states and external funders) are rendered as concerns about corruption (when often, but not always, a lack of financial security is what drives the demand for side payments in a legal system). Here the remedy becomes training and professionalization of the judiciary, not a concern for the political economic structures in which the rule of law functions. Indeed, the failure to recognise that informal practices in the already existing political economy often undermines the introduction of a formalised set of legal institutions, and this has recently become something of an abiding criticism of many programmes to establish the rule of law in transitional or post-conflict societies (Bull 2008).

The Rule of Law, then, may come to mean different things to different people, in different places, and as such the argument put forward by those who argue for a thin reading of the rule of law is that this is all we can hope for. Certainly we can identify where formalised law-like procedures obtain, but to ask more of our definition is to violate the key local dimension of law's rule; its connection to and with the society which it governs. However, for Bingham (and others who argue for the thick definition) this is no answer as the rule of law then becomes merely a mechanism that can deliver both justice *and* injustice. What is perhaps most interesting is that while we argue whether a thick Rule of Law or merely a thin rule of law is the marker of a democratic and liberal society, we seem to have moved beyond the point when we might ask: is there any other way of ruling society. The Rule of Law has become so tied up with the definition of the good society, we no longer seem to reflect on how the rule of law has itself become so central to (progressive) politics as to be beyond the question: how has this normative dominance happened? The Rule of Law has been so normalised to be beyond anything but reformist critique, and as such while Bingham's exploration is useful in presenting a nuanced and historical understanding of the norm, it leaves this political question both un-posed, and unanswered.

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