

# Between Thompson and Schmitt: Engaging with the rule of law in (Global) Political Economy

## Abstract

The Rule of Law too often has become an uncritically rehearsed social good of the nascent global society. In this paper I seek to disaggregate elements of the Rule of Law as a political idea, distinguishing between a thin representation that focuses merely on the practices of (westernised) modern legal structures, and a thicker characterisation that is concerned with a normative commitment to certain extra-legal mores and ethical concerns as part of its depiction of the Rule of Law. The paper reflects on E.P.Thompson's position on the social value of the Rule of Law, whatever its political bias; a position that seeks to maintain some political value for the Rule of Law despite the criticisms, centred on indeterminacy that worry a number of critics, and *in extremis* leads Carl Schmitt to dismiss its value altogether. The paper uses this discussion to begin to understand how the concept of the Rule of Law is deployed in the global political economy, and ask how *might* it be deployed differently.

For: ECPR – Turin 2007

***work in progress; uncompleted draft - cite with caution***

Christopher May  
Professor of Political Economy  
Lancaster University, UK  
email: [c.may@lancaster.ac.uk](mailto:c.may@lancaster.ac.uk)

## **Between Thompson and Schmitt: Engaging with the Rule of Law in (Global) Political Economy**

At the end of 2006 in the UK we were treated to an excellent example of the contemporary problem of the Rule of Law:<sup>1</sup> for claimed reasons of national interest, a Serious Fraud Office investigation of allegations of bribery was halted before it reached the stage when formal charges were issued. The SFO was 'encouraged' to call off its long-running investigation into the defense supplier BAE Systems and the largest ever defense sale from the UK, the al-Yamamah contract to sell arms to Saudi Arabia, which had, it was alleged, involved a number of bribes and other 'facilitation payments'. While this deal had taken place before the UK had signed, and subsequently enshrined in domestic law the OECD anti-bribery code, some of the continuing dealings were clearly covered by the UK's obligations under this international agreement. Although there was considerable suspicion that the move to halt the investigation was related to Saudi Arabia's threats to take the follow-up contract worth around £ 6 billion to another country's defense contractors, the government explicitly cited the need to maintain good relations with a leading ally in the 'war on terror', although the impact on jobs in the UK was also alluded to.

The UK's international commitments under the OECD Anti-Bribery Convention, of course, do not allow such flexibility, as the OECD and a number of foreign government representatives pointed out, while both the Economist and the Observer (from different sides of the political spectrum) condemned the move as it would undoubtedly undercut the UK's and other countries' attempts to stem corruption in developing countries.<sup>2</sup> Since the original decision the OECD has remained unimpressed with the UK government's reasoning, and the US Department of Justice has launched its own investigation (paralleling the original SFO case) into the allegations of bribery.<sup>3</sup>

Of most interest for my concerns in this paper was Attorney General Lord Goldsmith's invocation of 'the need to maintain the rule of law' while at the same time deciding that in the interest of national security a legal investigation by the SFO must be halted. Thus we see in the very same moment the identification of the Rule of Law as a clear and important normative standard, and a claim that the rule of law has limits expressed by the governmental officer on whom the responsibility for the maintenance of the rule of law must surely fall. Thus, the question that I want to ask in this paper is how can we understand the Rule of Law in the contemporary global political economy?; not as easy a question to answer as we might have hoped.

The idea of the Rule of Law has been the subject of much thought and analysis in the realm of jurisprudence and legal theory for many years. However, elsewhere in the academy, and specifically in the realm of International/Global Political Economy (I/GPE), there has been little interest in what exactly is meant when the Rule of Law is invoked. Especially in a period when it is under increasing strain, under the rubric of the 'war on terror', never has the lack of interest in the rule of law within political economy been more problematic. In this paper I engage with this lacuna and start to develop a more nuanced and sophisticated treatment of the rule of law within political economy.<sup>4</sup> In the next two

---

1 When I refer to the concept/ideology I shall capitalise: the Rule of Law; when I discuss the processes I shall leave the term in lower case: the rule of law. I would also like to thank Graham M Smith who offered some useful advise on clarifying the argument I make in this paper.

2 'The BAE affair sends all the wring signals' *The Observer* 17 December 2006: 24; 'Barefaced: Corruption and the law' *The Economist* 23 December 2006: 18.

3 Peter Gumbell 'The endless cycle of corruption' *Time* 12 February 2007: 34,36; Dominic O'Connell 'BAE flies into American flak' *The Sunday Times (Business section)* 1 July 2007: 9.

4 I have discussed the character of this lacuna elsewhere at more length, see May (2007, *forthcoming*).

sections I briefly explore one exacting, if uncomfortable, criticism of the Rule of Law and then a defense based at least on a pragmatic view of the protection (albeit partial) that the rule of law extends to the weakest and powerless in society in the face of their domination by more powerful groups or classes. Leading on from this second position I explore some elements of a definition of the rule of law before concluding with some suggestions for the role that an understanding of the rule of law should play in Global Political Economy.

### **Carl Schmitt: dismissing the ‘rule of law’**

Carl Schmitt's critique of the liberal notion of the Rule of Law, when it turns to the question of international law, finds an easy subject for a discussion of the political problem of indeterminacy in law. However, although identifying the aspects of this critique that are useful, it is necessary to explicitly state (following, William Scheurman 1999: 142) that this is a treatment of Schmitt that uses his identification of the weakness of argument for the international rule of law *against* the grain of Schmitt's own political conclusions. As Scheurman points out:

Schmitt repeatedly argues that the recourse to typically liberal forms of legal conflict resolution (for example, international tribunals) necessarily rests on a fiction – the existence of a functioning international political community in which existential life-and-death political conflicts have been resolved (Scheurmann 1999: 147).

For Schmitt, writing between the wars and during the perceived humiliation of the Weimar republic, this fiction not only could not be maintained, but undermined any claim for legality by the League of Nations and its (liberal) supporters.

Moreover, because in Schmitt's critique, international law (like all law, in his analysis) is beset by a radical indeterminacy, this political problem cannot be solved by the assumption that there exists an international legal system that all states have agreed to. Even if such a system could be established analytically, as the legal terms from which it would be built would still be subject to rival interpretations, depending on the interests and position of various states within this system, it would be unable to resolve conflicts as these are where the joint understandings on which the system was built would break down (Scheurman 1999: 148). After the war Schmitt reworked this critique of the validity of international law to argue that international law could only become global when the foundations of law in land-appropriation were surpassed by a new *nomos* of the earth (Schmitt 1974 [2003]: Part II and *passim*). In other words a globalised legal realm needs a global (re)imagined jurisdictional space, an idea that he developed through a historical treatment of the European-derived development of international law. Thus, an original *nomos* of the earth was destroyed by the emergence of the European states' system but may now be re-established through the hegemonic domination of a victorious super-power. However, for Schmitt, this dominator must be more directly linked to the overall global population than any single state-derived domination, such as that of the US. Because law has been built on the appropriation of space, and on earth such space, by definition must be limited, the appropriation by an expanding state power will itself prove problematic; by its very character such widened appropriation must be subject to competition and resistance, and thus produce not the order that Schmitt saw as central to law, but rather continuing (or even expanding) *disorder*: conflict can be contained but not eliminated (Zarmanian 2006: 56-58). This is to say any universalising project, be it liberal or otherwise, stimulates its own enemies and thus the expansion of peace will be confronted by those whose notion of 'peace' is not the same. The domination by a single state (rather than the emergence of a global state) however powerful and/or liberal leaves the difficulty of interpretation of the rule of law in the hands of a delimited political group with partial (political economic) interests. This question of interpretation leads us back to Schmitt's most famous contention.

At the centre of much of Schmitt's legal thinking is the notion that the key aspect of legal authority is not the rules, but the power and ability to decide on the exception to these rules: 'The exception, which is not codified in the existing legal order, can at best be characterised as a case of extreme peril... it cannot be circumscribed factually and made to conform to a preformed law' (Schmitt (1934 [1988]: 6). This suggests that, when the state is under political duress, an existential threat, the limits of the rule of law become apparent (having previously been obscured);

What characterises an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains whereas law recedes. Because the exception is different from anarchy and chaos, order in a juristic sense still prevails even if it is not of the ordinary kind (Schmitt (1934 [1988]: 12)

This further indicates to Schmitt that,

All law is 'situational law' ... The exception reveals most clearly the essence of the state's authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law (Schmitt (1934 [1988]: 13).

Although originally developed to discuss the rule of law of the liberal state, this question of the exception was then deployed by Schmitt to examine and critique the international rule of law in the 1930s. Thus, turning to the use by successive US governments of non-intervention treaties to dominate states in Latin America, Schmitt points out that, as the US reserves the right to intervene in various, loosely defined circumstances, these treaties are in fact a mechanism to legalise intervention by the hegemonic power despite the general legal system of sovereign non-intervention. By maintaining the ability to decide on the exception, the US demonstrates its utilisation of the rule of law for its own political ends, not for the liberal maintenance of order (Scheurmann 1999: 148-149). This use of authority to rule on the exception immediately finds a parallel with the BAE Systems case set out above. Thus, we might ask, given this clear example of the British government's view of the extent (and limits) of the rule of law, how can we understand its continued invocation by legislators and diplomats in the contemporary global system?

On one hand the rule of law can clearly be seen to have some practical limits, especially in the face of 'national interest', however the concept of the Rule of Law itself is invoked as an absolute standard to which political processes should be measured. As Schmitt argues elsewhere: 'The worst confusion arises when concepts such as justice and freedom are used to legitimise one's own political ambitions and to disqualify or demoralise the enemy' (Schmitt 1976: 66). Here the appearance of independence that the domain of law popularly enjoys is deployed to refute and destabilise competing political claims. For Schmitt, there is no escape from this politicisation of the law:

First law can signify here the existing positive laws and law-giving methods that should continue to be valid. In this case the rule of law means nothing else than the legitimisation of a specific *status quo*, the preservation of which interests particularly those whose political power or economic advantage would stabilise itself in this law. Second, appealing to law can signify that a higher or better law, a so-called natural law or law of reason, is set against the law of the *status quo*. In this case it is clear to a politician that the rule or sovereignty of this type of law signifies the rule and sovereignty of men or groups who can appeal to this higher law and thereby decide its content and how and by whom it should be applied (Schmitt 1976: 66-67).

In other words, even the suggestion that the Rule of Law is something that must be understood as going beyond the mere practice of legal process, an understanding that suggests the Rule of Law has some normative content, will fail to rid the legal realm of the enactment of power and domination. The ability to frame and define the normative claims that the rule of law might appeal to, is itself a political process of power relations and dominance; for Schmitt these claims while dressed up in normative

terms can only be understood as existential, as a question of state sovereignty and survival, which any normative content merely seeks to hide or obscure.

Thus, the rule of law can never in Schmitt's assessment fulfill the widened political project of justice and equity that its supporters claim for it, and this is as true at the international level as it is at the domestic, if not more so. Schmitt, then, is concerned with the Rule of Law as the key underpinning for order, not some transcending instrument of justice. However, this order is not final nor stable. As Thalin Zarman suggests, for Schmitt 'legal order, even if it is durable, is never definitely stable: the sovereign decision, in fact, in that it elevates one of the possible options, does not exclude the possibility that a different one might be taken and that, therefore, a new state of exception arises that requires a new decision and a new legal order' (Zarmanian 2006: 53). Or, as Scheurman (1999: 120) sums it up, for Schmitt, in 'a modern pluralistic universe, legal determinacy is simply unachievable, because the demise of a widely shared, homogeneous world view means that those who interpret even more the most crystal-clear legal concept will do so in different ways'. This would suggest that the idea of a normative reading of the Rule of Law should be abandoned as a hopelessly compromised political concept and critical engagement should be focused elsewhere; we should recognise that the rule of law while bringing order, does not produce *the* order above all other political orders, but rather is a manifestation of the political ability to bring order in the first place: legal critique should focus on political power.

However this is not the only response one can have to the recognition that the rule of law is far from a fixed and settled set of values; we might accept that the rule of law is not as presented by the ideology of the Rule of Law, while still recognising that it has a certain social value outside the ruling elite, a perspective missing from Schmitt's critique.

### **E.P. Thompson: rehabilitating the 'rule of law'**

For E.P. Thompson the 'greatest of all legal fictions is that the law itself evolves, from case to case, by its own impartial logic, true only to its own integrity, unswayed by expedient considerations' (Thompson 1975: 250). This is not to suggest that the law merely reflects the needs and interests of the ruling class (or perhaps now a transnational capital class); it is not merely 'superstructure'. Rather as Thompson argues there is an 'imbrication' (overlapping) of law and productive relations, that means that legal institutions and the capitalist market economy are always interconnected and impossible to completely separate. At the same time that laws structure productive relations (most obviously, but by no means exclusively, through property rights and legalised commodification), such law also changes in reaction to shifts in political economic relations mediated through the legal apparatus. This imbrication of law and productive relations is 'endorsed by norms' although such norms are always subject to conflict and need to be constantly (re)produced (Thompson 1975: 261). The structures of the law and the social relations of capitalist economic activity are not related in a uni-directional manner but rather are intertwined in a simultaneous layering, each one affecting the other.

This is to say, in the words of Phillip Corrigan and Derek Sayer, that the law 'works on and with wider moral classifications to "encourage" some ways of seeing (and being) and outlaw others... [and] rules least noticeably yet most directly through its forms: through the ways in which it "encourages" us to present and represent ourselves' (Corrigan and Sayer 1981: 40-41). It shapes and influences societies' practices at the same time that it reflects the both the deliberations over these practices, and reflection on their individual applicability. Moreover, Thompson suggests, the 'rhetoric and the rules of a society are something a great deal more than sham... They may disguise the true realities of power, but at the same time, they may curb that power and check its intrusions' (Thompson 1975: 265). It is not merely

the relatively powerless whose world is shaped and influenced by the rule of law, rather it is society as a whole.

The rule of law is therefore much more than merely the operation of certain mechanisms and practices, rather it is a normative influence on a society's self-characterisation - we are ruled by law, not the arbitrary decisions of our rulers. However, this self-characterisation can easily shade into a reification of the law as it stands: as Thompson once put it; 'The reification of the rights of some may mean in practice the limitation of the rights of the rest of the community' (Thompson 1994 [2001]: 293). The question, therefore, becomes whether the possibility that the rule of law may be partial and privilege certain interests, so completely compromises its value that it is necessary to disregard its normative value altogether. Certainly, for Thompson:

The law when considered as an institution (the courts with their class theatre and class procedures) or as personnel (the judges, the lawyers, the Justices of the Peace) may very easily be assimilated to those of the ruling class. But all that is entailed in 'the law' is not subsumed in these institutions. The law may also be seen as ideology, or as particular rules and sanctions which stand in a definite and active relationship (often a field of conflict) or social norms; and finally, it may be seen simply in terms of its own logic, rules and procedures - that is, simply *as law*. And it is not possible to conceive of any complex society without law (Thompson 1976: 260).

In other words Thompson seeks to stress that the law, however compromised by the social forces that underpin its authority, also if it is to operate in a complex society must rule *as law*; which is to say the Rule of Law is something more than mere the formal rules of law.

Thompson himself was keen to emphasise that the rule of law was an 'unqualified human good' (Thompson 1975: 266), even while stressing the injustice of particular laws. The acceptance that class relations may be mediated by the law 'is not the same thing as saying that the law [is] no more than those relations translated into other terms, which masked or mystified the reality. This may, quite often, be true but *it is not the whole truth*' (Thompson 1975: 262, emphasis added). Thompson's understanding of law is richer than a mere reduction to political power articulated through mechanisms of governance. The Rule of Law to be regarded as legitimate (and thus serve to govern complex societies) must go beyond this class function. As Thompson notes: 'If the law is evidently partial and unjust, then it will mask nothing, legitimise nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just' (Thompson 1975: 263). And because justice is a social value independent of the rule of law itself, to be seen as just, the law must make a reasonable approximation to justice: 'For the trouble about law and justice, as ideal aspirations, is they must pretend to absolute validity or they do not exist at all' (Thompson 1975: 268). Therefore, Thompson was keen to emphasise that because in its pretence of universal validity law actually had to a large extent to deliver the equitable rule of law to underpin the claim.

This also reveals two assumptions that Roberto Unger suggests are central to many casual appeals to the rule of law: firstly is that the most significant forms of power are (or can be) concentrated in government, which is then governed by, and governs through the rule of law; secondly that the rule of law itself can constrain and limit subjectively articulated power over individuals that does not conform to the (objective) strictures of the law (Unger 1976: 178-179). Of course, Thompson (like Unger) is aware that the law may not be able to fulfil these hopes: there are forms of social power that are articulated outside the purview of the law; the hoped for objectivity can never be achieved because the

rule of law must by definition be the rule of lawyers and judges who interpret and deploy the law; and modern democratic states' governments as legislators can never be separate from the interaction of conflicting social interests. Interestingly, working on the same historical period as Thompson, when analysing the use of pardons to spare wealthy (well-to-do) criminals from the gallows, Douglas Hay also notes: 'the peculiar genius of the law [was that it] allowed the rules of England to make the courts a selective instrument of class justice, yet simultaneously to proclaim the law's incorruptible impartiality and absolute determinacy' (Hay 1975: 48). Here, the threshold of the Rule of Law becomes effectively in the gift of a specific class interest, a parallel to Schmitt's critique, but Hay like Thompson is unwilling to therefore condemn the rule of law itself.

Thompson's point is that whatever the compromises and shortcomings of the rule of law, it can deliver a better approximation of social justice than the absence of law is likely to achieve. As he points out, 'law has not only been imposed *upon* men from above: it has also been a medium within which other social conflicts have been fought out' (Thompson 1975: 267). Indeed, for the rule of law to serve the interests of the powerful, of class interest, it cannot do so exclusively nor uniformly; the claim to the Rule of Law as ideology or normative project, itself requires that some value above class or sectional interest underpins the hegemony of the law that is utilised to govern society. And it is this paradox, that for power to rule through law, its rule must be curtailed and constrained, is for Thompson what saves the Rule of Law from its more strident critics.

We do not have to accept Thompson's view that the Rule of Law is an unqualified human good to prefer it to other (authoritarian) forms of rule (Fine 1984:175), but what is (re)introduced into political economy through an appeal to Thompson is a normative essentialism that depicts the Rule of Law as a value that is separate from, and can be corrupted by, the enactment of the rule of law in any specific case (Fine 1984: 179). This presents a problem for Thompson, the Marxist historian, as this very essentialism paradoxically, as Bob Fine argues, 'expresses the very fetish of law as a force remote from productive relations that Thompson so powerfully criticises' (Fine 1984: 188). While this may present some problems in Thompson's overall analysis of capitalism, for our purposes here Fine's critique suggests that while we should recognise that the rule of law has its advantages, we also need to enquire, who sets the agenda for its presentation as a human or social good (an agenda the Thompson recognises as having considerable social weight in an increasingly globalised liberal society).

### **Defining (?) the Rule of Law**

Having examined two critiques of the Rule of Law, one more dismissive of its claims than the other, we are left with the question: should we merely dismiss claims to be following the rule of law as political expediency? Certainly, adopting Schmitt's powerful critique would suggest this path, however, as Thompson's treatment points out, while there are certainly problems with the Rule of Law, its very claims allow space to open up an immanent critique based upon its own justifications (its own depiction of the essentials of justice and equity). This suggests that a positive and constructive critique can be developed using Thompson's position, while keeping in mind Schmitt's more cynical view of the claims underpinning the rule of law. Thus, to deploy the critique of the rule of law in the manner that Thompson might suggest requires us to establish what this more essential idea of the Rule of Law might be. This prompts two questions: firstly what does the Rule of Law entail? and secondly, how has the Rule of Law been deployed in the global political economy (recognising Schmitt's concerns)?

There are a number of places to start: for instance Vasudha Dhagamwar counter-poses the rule of law to its opposite, 'rule by personal whimsy'; 'Rule of law is characterised by all that rule by personal whimsy lacks. It has certainty, universality and before it all are equal, not excluding the state itself'

(Dhagamwar 1998: 120). Certainly any conventional historical account of the rule of law would depict a progression from the personal rule of sovereign individuals through periods of state building into a modern realm where the state itself while reserving the constitutional right to maintain and expand the realm of law, was also held to account by law. However, again as Dhagamwar points out, citing the examples of Nazi Germany, and India during the Emergency, there may be circumstances where the rule of law may bring about unjust outcomes (Dhagamwar 1998: 122-132). This suggests that when we consider the Rule of Law we might also 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. Elsewhere, and following other writers (May 2007) I have termed this a thick view of the Rule of Law, as opposed to the process and institution focused thin Rule of Law that seeks only to specify method rather than content.

This thick Rule of Law is not well defined and understood universally, but is nevertheless often invoked in discussions: indeed citing a number of varied examples, in his Sixth Sir David Williams Lecture last year, Lord Bingham noted that the Rule of Law was most often invoked, as Jeremy Waldron had put it, to express the celebration 'Hooray for our side', and went on to suggest that even in recent legislation the Rule of Law was depicted as a principle too well understood to need describing, or conversely was possibly recognised as too difficult to authoritatively define and thus was left to the courts to grapple with if the occasion arose (Bingham 2006: 2-4). This led Lord Bingham to offer his own (self-avowedly synthetic) definition of the Rule of Law.

His is an eight part definition of the Rule of Law, which also links to the idea of a democratic state, as the only state form likely to be able to deliver in a meaningful sense the full range of elements that make up this depiction of the Rule of Law:

- 1) The law must be accessible: not only should it be physically accessible, but it should also be relatively clear, a standard that while hardly upheld in practical terms, does require some openness as regards language even if those able to understand the law are the relatively small group of justices empowered to make legal decisions based on it;
- 2) Disputes should be resolved by the application of law and not through the exercise of discretion, on the basis that discretion is the route through which arbitrary decisions become legitimated and arbitrariness cannot be part of the rule of law. Certainly evaluative judgments are constantly required but these need to be closely circumscribed and kept within observed principles and practices;
- 3) The law should apply to equally to all. Indeed, Lord Bingham goes further (following Lord Scarman) to argue where in the distinction between nationals and non-nationals granted leave to remain might be regarded as offering a legitimate differentiation as regards to the legal position, nevertheless, all those subject to national law should also receive the protection of it (in the instance discussed of *Habeas Corpus*);
- 4) The law must protect fundamental human rights. Although he recognises this is a difficult area, Bingham asserts that 'A state which savagely repressed or persecuted sections of its people could not... be regarded as observing the rule of law' even if the denial of human rights was conducted through judicial means;
- 5) Disputes should be resolved without inordinate cost or delay, and thus there should be unencumbered access to the mechanisms of the law. Here issues of wealth effects loom large and Bingham notes, in the UK, the current difficulties around legal aid, and other barriers to free litigation of disputes;
- 6) Public officers, officials and other state servants must exercise their authority in good faith, and should have their activities open to judicial review. Moreover, state post-holders should refrain from trying to influence legal processes through alternative means (such as via the press);
- 7) The legal process should be fair and open, and most obviously those accused should have full

knowledge of the case against them (currently, under the war on terror, a principle that is being stretched almost to breaking point);

- 8) Lastly the state itself must abide by *its* obligations under international law (Bingham 2006: *passim*)

As Lord Bingham notes, little of this might be regarded as anything but a restatement of received opinion in the field of jurisprudence, but this typology allows an immediate engagement with the idea of the Rule of Law, not least of all as within the eight points above are both normative commitments and issues of procedural application. Indeed, this depiction crosses the distinction I have drawn between thin and thick depictions of the Rule of Law: while items four, five, six and seven clearly are concerned more with evaluation of specific forms, and thus part of a thick treatment, the other elements of Bingham's schema are to various degrees more procedural and process oriented. The question of equality under the law, while procedural, also of course, has some more normative content, while the last point while procedural, is the point at which in the BAE case, the UK government argued that rule of law ended in certain circumstances.

Establishing any form of a wider (or perhaps thicker) view of the Rule of Law in the international realm leads to an immediate problem. If states agree international (positive) law among themselves, as they need to do in an international system lacking a final overarching authority, what if firstly states-made law conflicts or is in tension with one or more of the elements that might be included within a depiction of the normative agenda of international law?; and secondly if we accept states have the ability to make international law as sovereign actors, what happens when their assessment of the political needs that laws reflect changes? In other words if we accept that the claim for a natural law is difficult to substantiate (especially in a global system of diverse cultures), then the thicker depiction of the rule of law must be established on grounds some other invocation of self-evident (liberal) values. There is considerable debate about how this might be achieved, offering a number of contending analytical alternatives if it is to be that the Rule of Law is to be grounded in Liberalism, rather than the merely the rule of the values propounded by certain powerful groups (and thereby merely seen as a set of arguable premises). The easy response, is that this suggests that the definition of the Rule of Law might usefully be collapsed down into a set of processes and institutions, without any claim to relating to equity, openness or other normative values articulated in Lord Bingham's synthetic depiction. Conversely, one might argue that if the law is itself subject to argument, interpretation and rhetoric (MacCormick 2005), then to limit the Rule of Law merely to the formal rules obscures and masks the operations of the law in action - what actually happens when judicial authorities make judgments.

As Martti Koskenniemi notes, the difficulty with the rule of law in the international realm is that 'arguments from legal principles are countered with arguments from equally legal counter-principles. *Rules are countered with exceptions, sovereignty with sovereignty*' (Koskenniemi 2005: 543 *emphasis added*). Thus, as we have seen, in the BAE case, whatever the formal and/or normative considerations, very clearly the UK government reserves to itself a the Schmittian power to decide what the limits to the rule of law are; when other values (here, national security) should be privileged. And this exception is regarded by the UK government as perfectly legitimate (and thus legal) whatever other states or the OECD may claim. Thus, the question of the exception looms over the exercise of the rule of law. If we accept Schmitt's argument, then this retention of the power of exemption undermines any real claims for a rule of law at the international level and what should rather be rather recognised is that the resource to the Rule of Law is merely a rhetorical tactic meant to mask, and perhaps legitimise, the actions of state power. However, as Thompson implies, for this rhetorical move to have any weight in global politics, then the narrative of the Rule of Law itself must have some wider legitimacy, from which states borrow in specific circumstances.

For a critical IPE, concerned not merely with social forces and political economic relations, but also with how these are presented (or performed) as legitimate social facts, the assumption of the Rule of Law as a human good requires an analysis that seeks to uncover the social power and processes that have established and maintained this particular (global) value. It is easy enough to see how the procedure-linked thin conception of the Rule of Law is increasingly being globalised through the programmes of capacity building and technical assistance that have been established both by state aid programmes and international organisations (Carothers 2006; Trubek and Santos 2006), but perhaps less easy, as Bingham notes to say how the wider principles are established as often the Rule of Law is presented as too well understood to need setting out, or too difficult to define authoritatively leaving jurists and other interested parties to seek or develop specific guidance as the occasion arises. For a critical IPE this is insufficient: given the currency of the wider/deeper idea of the Rule of Law, we need to understand how this idea is replicated and maintained, especially as even if it is 'honoured in the breach', it retains significant political rhetorical importance.

### **(Re)Introducing the Rule of Law into IPE**

I have discussed elsewhere some models for introducing the Rule of Law into IPE (May 2007) and thus merely summarise my conclusions here, before moving on to make a more substantive attempt to think through the analytical path that might be taken. To develop a full account of the rule of law, a critical IPE will: understand the rule of law as a structure of power and not a neutral realm of political economic activity; will explicitly analyse the interaction between the Rule of Law and other sets of values and norms that enter legal deliberation through the work of lawyers and justices in various international fora; examine and account for the historical reproduction of the valorisation of the Rule of Law; and seek to reveal the forms of 'support' that aim to socialise and inculcate non-western elites into the dominant discourse of the Rule of Law. These four elements work together to construct a more plausible and reflexive treatment of the Rule of Law in IPE. This approach to understanding the political economy of the rule of law would seek to account for the history of the notion of the Rule of Law as well analysing the mechanisms and political processes that continually (re)establish the rule of law as a preferred norm for the conduct of global politics.

Taking this approach, what can a critical IPE say about the rule of law, that responds both to the Schmittian critique outlined above, but also recognises the continuing value of the rule of law even to those groups who might be regarded as the dominated and exploited in the global system. If, as Neil MacCormick suggests, the Rule of Law is not compromised by the common understanding of the law as being arguable, that arguments about the exact content of the law are always taking place (what is sometimes referred to as indeterminacy), what this reveals is the dynamic character of the Rule of Law itself (MacCormick 2005). We can then follow David Clark to argue that the Rule of Law encompasses a recognition that states and their rulers are far from infallible. Hence, the Rule of Law allows challenges to be mounted, and revisions/reformation of governance arrangements and practices to be developed. Thus, utilising the Rule of Law can be an important avenue for the articulation of political opposition in liberal societies, and for rulers whose idea of their rule is more personalised (as mother or father of the nation, for instance), this presents a significant challenge to their authority, and may be suppressed (Clark 1999: 34-35). In one sense then, the expansion of an organised political community at the global level (international advocacy groups and campaigns) that argues for revisions and changes to the structures of global governance reflects an acceptance of the Rule of Law as an international norm that underpins political mobilisation. This may be the result of the increasingly professionalised character of non-state, non-governmental global politics, but also suggests, whatever its cause, the widened salience of the idea of the Rule of Law in the global realm of social action.

The challenge is to move beyond an analysis that merely sees the increased acceptance in political groups disputing the current practices of global governance as the professionalisation of global politics (the employment of legally trained staff and other graduates), and rather seek to explain how this norm, set out as the Rule of Law, has become so prominent. One argument, that implies a link back to earlier discussion of the rise of international institutions, suggests that the rise of the increasingly globalised rule of law reflects a functional need among an increasingly interconnected international system. For instance Sabino Cassese argues in a recent statement of this position, that

legal globalisation is a consequence of problems emerging that no domestic legal order can solve on its own... There exists a circle: the more communication, the more we apprehend the world, the more differences are manifest, the more global instruments are applied to resolve these differences, the more we care about the democracy and accountability of these instruments, the more we seek to strengthen the ties between global institutions and civil society, and the greater the frustration with a world that has 'governance' without having a government.

This is ultimately a cumulative process, marked by both the ongoing development of a global legal order and the growing dissatisfaction with it; this dissatisfaction in turn drives further developments (Cassese 2005: 989).

In other words, the utilisation of the Rule of Law as a political tool for reform is a response to the global institutions that have been developed to engage emerging international problems in an interdependent system, and which operate on the basis of a set of legal procedures and practices.

If this functional view is largely a depoliticisation of the expansion of the normative realm encompassed by the Rule of Law, building on the work of Stephen Gill, we might argue that there is a more positive political project being undertaken: the establishment of a global constitution for capital. At the centre of Gill's analysis is the suggestion that rather than a relatively neutral set of spatial processes, globalisation has involved the establishment of a 'market civilisation' that represents the latest phase of the expansion of a neo-liberal capitalism (Gill 1998: 27-29; Gill 2003: 118). Although this a complex process that has a number of important facets, one of its central elements has been the increasing marketisation of social relations. Furthermore, drawing from Foucault, Gill sees this process as being furthered and supported by a set of 'disciplinary practices' (Gill 2003: 130), of which a key element is the use of legal institutions to structure and shape both state and international political forms of regulation and governance. Gill defines this 'new constitutionalism' as

A macro-political dimension of the process whereby the nature and purpose of the public sphere in the OECD has been redefined in a more globalised and abstract frame of reference... [It is] the political project of attempting to make transnational liberalism, and if possible liberal democratic, the sole model for future development (Gill 2003: 131/132)....

It mandates a particular set of state policies geared to maintaining business confidence through the delivery of a consistent and credible climate for investment and thus for the accumulation of capital... It stresses the rule of law ... [and expands] state activity to provide greater legal and other protections for business (Gill 1998: 38).

Emphasising 'market efficiency; discipline and confidence; economic; economic policy credibility and consistency; and limitation[s] on democratic decision-making processes' this new discipline establishes 'binding constraints' on fiscal and economic policy (Gill 2003: 132). Perhaps most importantly, this

‘new constitutionalism’ seeks to confer privileged rights of citizenship on global corporate capital.

As Gill notes, ‘traditional notions of constitutionalism are associated with political rights, obligations and freedoms, and procedures that give an institutional form to the state’ (Gill 2003: 132). However, this new constitutionalism is carried forward at the global level and rather than focussing on the rights and obligations of the global citizenry as related to some form of globalised governing body (or bodies), it is concerned with a much smaller group, global capital and its operating agents, corporations (both national and multinational). A key aspect of this constitutionalism is to hold separate the political and economic realms for the purposes of (globalised) governance, ensuring that the economic remains uncontaminated by the political.

Gill notes that there are a number of levels at which this fragmented constitution for global capital is being established: the regional (most obviously through the European Union, and the North American Free Trade Agreement) but also bi-laterally through free trade agreements, and at the global level through the consolidation of trade governance at the World Trade Organisation. Furthermore, the national governance practices that are promoted as ‘bench-marks’ or ‘best practice’ by the World Bank are also intended to support this constitutional settlement in favour of property rights, by constraining political impulses against such rights (especially when held or enjoyed by non-nationals) (Gill 1998: 32ff.). Although the World Bank emphasises both judicial independence and the separation of powers as good constitutional practice, the Bank also identifies a key third *external* ‘mechanism of restraint’. As Gill notes the Bank suggests that international agreements help states ‘strengthen commitments’ by raising the (international) political costs of policy reversal; states risk international censure for breaking international law.

At the centre of this notion of ‘new constitutionalism’, therefore, is the manner in which specific forms of capitalist social relations are normalised through multilateral agreements on the rights of property owners and investors, and the institutionalisation in domestic legislation of these rights. Although requiring the recognition and protection of non-national property, requiring unrestricted access to national markets, and establishing compensation (‘damages’) for state actions that impede these rights, such benefits are all set out in supposedly neutral, technical, trading and investment agreements, they are merely the operation of the rule of law. Although not fully developed in Gill's work, the Rule of Law is therefore a mobilising ideology for these legal developments.

However, this notion of constitutionalisation is not limited to Gill's critique; a number of scholars have set out the current political economy of the WTO as a mode of ‘constitutionalism’ (e.g. Petersman 2002; Cass 2005).<sup>5</sup> Here, unlike Gill's critique, the rule of law and its consolidation through a formal constitution are presented not as the operations of power to shape the political economy, but rather a legal arena in which conflicts can be helpfully ameliorated and adjudicated, what I have referred to above as a thin reading of the Rule of Law. Here political power is not actuated through direct political influence nor force, but rather appeals to the norm of the Rule of Law: how could expropriation of property be just (it is after all theft!), opening markets allows competition to bring efficiency which, by definition, be socially valuable, and indeed in Petersman's case is directly linked to a putative human right to trade. However, Deborah Cass concludes her study of WTO constitutionalization by arguing for an approach she terms ‘trading democracy’, which would put development at the forefront of the concerns of the WTO (Cass 2005: 242/243). Here, the notion of constitutions as potentially empowering a democratic polity is foregrounded (and as Clark suggests, empowering opposition

---

5 Neither should Gill's approach to ‘constitutionalism’ be confused with the sort of constitutional political economy that draws its inspiration from James Buchanan and Frederick Hayek. For a discussion of this approach see Vanberg (2005).

groups), rather than Gill's argument that the constitution of the WTO can only be an artefact of sectional political economic power.

For Gill, unlike Cass, legal codification 'locks in' specific free market policies, and these agreements do not merely recognise and codify already existing and politically legitimised rights, but rather are intended to provide and establish rights for global capital that previously had been incomplete and unevenly enforced (and in some cases rights that previously did not exist in any formal manner). Perhaps most importantly, for Gill, these legal mechanisms are intended to shield global capital from local, popular democracy (threats 'from below'), to insulate property rights from either democratic or oligarchic interference (Gill 1998: 25, 30). Political choices are masked or cloaked by their presentation as legal requirements, but Gill does not fully explore what normative values are also imported into states that are seeking to establish the rule of law through the national promotion of the Rule of Law as a political ideal. Thus, while Gill is able to clearly account for the political economy of constitutionalism as a political economic development by the particular interests of capital towards a specific institutional settlement, why the Rule of Law has become the master narrative is more obscure.

Certainly the normative value of the Rule of Law has some existence and weight over and beyond its deployment by the forces of capital to support and extend accumulation (although it may also serve this purpose). Indeed as Martti Koskenniemi recently noted:

international law may often appear as the only available surface over which managerial governance may be challenged, the sole vocabulary with a horizon of transcendence... International law appears here less as this rule or that institution than as a place holder for the vocabularies of justice and goodness, solidarity and responsibility... the tradition of international law has often acted as a carrier of what is perhaps best described as the regulative idea of universal community, independent of particular interests or desires (Koskenniemi 2007: 30).

The international Rule of Law has an independent existence from the political project of constitutionalism which suggests that the very idea of the Rule of Law contains within itself the possibility of an imminent critique, and also reveals the depiction of the thin view of the Rule of Law in particular aid, capacity building and technical assistance programmes, not as merely a technical convenience, but rather as an attempt to control and limit the potential for resistance to a specific manner of legal development.

This also suggests a vital and interesting political relationship between the thick and thin forms of the Rule of Law. While the functional advantages of the procedural (thin) view of the Rule of Law are relatively clear - stability, predictability, confidence - it is less clear what role the thicker normatively rich view plays. Is it merely a justificatory device to garner support for the more basic institutional measures brought together under its rubric? Even if this was the case, the question remains: how and why has the Rule of Law become such a dominate master narrative for both supporters and critics of globalised capitalism? And it is to this research project that I now turn in the final section, not, I am afraid to offer any answers, but rather an agenda of possible research questions towards establishing an answer.

### **The domination of the Rule of Law in global politics**

Although in some sense the norm of *jus cogens*, that there are some (established) norms of international law from which there can be no derogation (a notion at odds with Schmitt's views, of course), could be taken as a parallel norm to the Rule of Law, here I want to distinguish between them. This is to say, it

seems to me that the Rule of Law, is a norm over and above that which is encompassed by *jus cogens*, which rests on the acceptance in the first place that there should be some systemic rule of law *including* a set of rules/principles that are binding on all parties, not least of all as it is a norm that has been developed most often in relation to treaty law (Shelton 2006: 306). *Jus cogens* is not fully coterminous with the political narratives and claims that are mobilised when the Rule of Law is deployed in arguments about the practices and character of global politics.

After the debacle of the US Presidential vote in Florida in 2000, Jeremy Waldron was moved in response to all sides in the dispute's use of the rule of law as a rallying cry, to seek to explore the character of the Rule of Law. His view was that the problem was that the Rule of Law was an essentially contested concept (in W.B.Gallie's sense), and that the fault lines could be mapped in two ways.

There is contestation about the content and requirements of the Rule of Law ideal, *and* there is contestation about its point. The two forms of contestation of course feed off one another. To put it slightly differently, the lead idea of the Rule of Law is that somehow respect for law can take the edge off human political power, making it less objectionable, less dangerous, more benign and more respectful. But we disagree on how this can be done, and whether it can be done completely. We also disagree on the precise nature of the danger posed by human power in its unmitigated form, and on the values that would be served by introducing law into the picture. We disagree about the ailment, the medicine, and the character of the cure (Waldron 2002: 159).

Hence we should not be surprised that there are debates around the meaning, and that there are many political positions adopted between the ideal typical thin and thick depictions of the Rule of Law. However, this still does not fully answer the question of why it is the notion of the Rule of Law that has established itself as a value all sides willingly adopt; indeed it sidesteps this issue by merely accepting it is a concept which disputants deploy differently, not seeking to ask why they deploy it at all.

Reflecting on British law in the eighteenth century, Douglas Hay suggested that at this time when the Rule of Law started to become an established norm in Britain (this is of course the period that also prompted Thompson's more general remarks, noted above), its content was built on two key elements: a Christian view of justice, leading to equality before the law; and the 'justice' of property rights (Hay 1975: 35). If Hay is also right in suggesting that it is at this time that the modern view of justice finally is consolidated, then it is significant that already a division between a rich/thick view of the Rule of Law (Hay's 'Christian view') and a thinner/procedural view focussing on the exercise of property rights had been expressed. In other words, the thicker view of the Rule of Law, at its inception, was essentially *extra-legal*.

Brian Tamanaha suggests that this *extra-legal* set of norms, sometimes gathered together under the notion of Natural Law (that which is prior to positive/formal law), have been dissipated and rejected in American jurisprudence (and specifically through the operation of the Supreme Court) that has focussed increasingly in a formal, and positivist recourse to the US Constitution (Tamanaha 2006: 217). Extra-legal norms have been replaced by the 'self-evident truths' of the US Constitution. Another strand of a thicker view of the Rule of Law, focussing on the idea of the common good has also been undermined in the US not least of all by a political collapse of the notion of a singular idea of the public (Tamanaha 2006: 223). Given the influence of the US legal system on the international realm (not least of all in the manner as Schmitt warns, that a specific dominant state's interests will construct the international order, where a more general authority is lacking), this formalist thinner Rule of Law

has clear (national) origins. However, the thicker notion of Rule of Law can hardly be said to have disappeared. Following David Lyon, Tamanaha suggests law to achieve a specific social purpose cannot also be law that follows set rules: 'A legal system in principle cannot combine being rule-bound and trying to achieve ends... It is not just that these are contrasting orientations, but that achieving ends swallows up being rule bound' (Tamanaha 2006: 229). However, while judges in the US system undoubtedly are often swayed by purposeful considerations, the (exportable) ideology remains rule-oriented.

What is interesting is that this richer view of the Rule of Law that still finds its way into US domestic legal processes is denied and obscured for the most part when the Rule of Law becomes an exportable ideology of development. However, for critics of global governance the fuller normative Rule of Law is a key (immanent) critique, allowing ideas of justice and fairness to enter the otherwise more positivistic international discourse. If the Rule of Law is an essentially contested concept, as Waldron suggests, then what requires explanation is how these contrasting views are (re)produced, and why the Rule of Law (however contested it might be conceptually) has become a key terrain of political contestation. Is it because as Schmitt's critique attests, the Rule of Law is hopelessly compromised by the political role it plays, and can only be understood as the operation of sovereign power?; hence arguments are always about the needs of order. Conversely, is this because, as Thompson's engagement with the Rule of Law suggests, the more universal values the Rule of Law carries with it are ammunition for a social critique from within?; here argument is about the enacting of these values in the workings and practices of the rule of law. This is in one sense an empirical question, requiring work with advocacy groups to uncover their political ethnography, but in another sense also a question about the political economy of the reproductive cycle of (legal) ideology.

## Bibliography

- Lord Bingham (2006) 'The Rule of Law' The Sixth Sir David Williams Lecture, Cambridge University [needs URL]
- Carothers, Thomas (2006) *Promoting the Rule of Law Abroad: In search of knowledge* Washington DC: Carnegie Endowment for International Peace.
- Cass, Deborah Z. (2005) *The Constitutionalisation of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System* Oxford: Oxford University Press.
- Cassese, Sabino (2005) 'The Globalization of Law' *New York University Journal of International Law and Politics* 37 (Summer): 973-992.
- Clark, David (1999) 'The Many Meanings of the Rule of Law' in: J. Jayasuriya (ed.) *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* London: Routledge.
- Corrigan, Phillip and Sayer, Derek (1981) 'How The Law Rules: Variations on some themes in Karl Marx' in: B. Fryer, A. Hunt, D. McBarnet and B. Moorhouse (eds) *Law, State and Society* London: Croom Helm.
- Dhagamwar, Vasudha (1998) 'Rule of Law: Squaring the Circle' in: Satish Saberwal and Heiko Sievers (eds) *Rules, Laws, Constitutions* (New Delhi: Sage Publications)
- Fine, Bob (1984) *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* London: Pluto Press.
- Gill, Stephen (1998) 'New Constitutionalism, Democratisation and Global Political Economy' *Pacifica Review* 10, 1 (February): 23-38.
- Gill, Stephen (2003) *Power and Resistance in the New World Order* Basingstoke: PalgraveMacmillan.
- Hay, Douglas (1975) 'Property, Authority and the Criminal Law' in: D. Hay, P. Linebaugh, J.G. Rule, E.P. Thompson and C. Winslow *Albion's Fatal Tree: Crime and Society in Eighteenth Century*

- England* London: Allen Lane.
- Koskenniemi, Martti (2005) *From Apology to Utopia: The Structure of International Legal Argument* (Reissue with new epilogue) Cambridge: Cambridge University Press.
- Koskenniemi, Martti (2007) 'The Fate of Public International Law: Between Technique and Politics' *The Modern Law Review* 70, 1 (January): 1 -30.
- MacCormick, Neil (2005) *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* Oxford: Oxford University Press.
- May, Christopher (2007) 'The "Rule of Law" and International Political Economy: Starting a conversation' *Zeitschrift fuer Anesthesiologist*, 28, 2 (December), *forthcoming*.
- Petersman, Hans-Ulrich (2002) 'Constitutionalism and WTO Law: From a state- centred approach towards a human rights approach in international economic law' in: D.L.M. Kennedy and J.D. Southwick (eds) *The Political Economy of International Trade Law: Essays in Honor of Robert E.Hudec* Cambridge: Cambridge University Press.
- Scheurman, William E. (1999) *Carl Schmitt: The End of Law* Lanham: Rowman and Littlefield.
- Schmitt, Carl (1934 [1988]) *Political Theology: Four Chapters on the Concept of Sovereignty* (Translated by George Schwab) Cambridge, Mass.: The MIT Press.
- Schmitt, Carl (1974 [2003]) *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Translated and Annotated by G.L. Ulmen) New York: Telos Press Ltd.
- Schmitt, Carl (1976) *The Concept of the Political* (Translation, Introduction and Notes by George Schwab) New Brunswick, NJ.: Rutgers University Press.
- Shelton, Dinah (2006) 'Normative Hierarchy in International Law' *American Journal of International Law* 100: 291-323.
- Tamanaha, Brian Z. (2006) *Law as a Means to an End Threat to the Rule of Law* Cambridge: Cambridge University Press.
- Thompson, E.P. (1975) *Whigs and Hunters. The Origin of the Black Act* London: Allen Lane.
- Thompson, E.P. (1994 [2001]) 'The Grid of Inheritance' *reprinted in*: D. Thompson (ed.) *The Essential E.P. Thompson* New York: The New Press.
- Trubek, David M. and Santos, Alvaro (2006) *The New Law and Economic Development: A Critical Appraisal* Cambridge: Cambridge University Press.
- Unger, Roberto Mangabeira (1976) *Law in Modern Society: Towards a Criticism of Social Theory* New York: The Free Press.
- Waldron, Jeremy (2002) 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' *Law and Philosophy* 21: 137-164.
- Zarmainian, Thalin (2006) 'Carl Schmitt and the Problem of Legal Order: From Domestic to International' *Leiden Journal of International Law* 19: 41-67.