Introduction

In June 2008, a 'blue ribbon' Commission issued a report claiming that 'four billion people around the world are robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law'.[1] According to a report in *The Economist*, the Commission had difficulty, over its three years of work, reaching consensus on how precisely 'the rule of law' would 'empower' the poor. Nevertheless, the *articulation* of the problem in this form commanded unanimous support.[2] A month later, the press release of an equally high-level 'World Justice Forum' in Vienna announced its participants' 'collaborative programs to strengthen the rule of law and thereby solve problems of corruption, violence, sickness, ignorance and poverty in their communities'.[3]

Whatever else we might think about these two proclamations, they feel firmly anchored in a certain *zeitgeist*. The claims appear both breathlessly novel and yet somehow already on the cusp of anachronism. They seem tense and stretched: extraordinarily broad in the scope of the challenges they address (poverty, ignorance, violence, corruption) and yet strangely narrow in their proposed remedy (something called 'the rule of law'). They assume a kind of immanent agency: they are

[1] See Empowerment Commission (2008a), 1, discussed further in Chapter 6. The Commission was chaired by Madeleine Albright and Hernando de Soto, and included Lawrence Summers, Arjun Sengupta, Ernesto Zedillo, and Justice Anthony Kennedy. Robert Zoellick, President of the World Bank, was a member of the Advisory Board.

[2] 'The Law Poor', *The Economist*, June 5, 2008.

[3] American Bar Association (ABA), 'Proposals to Strengthen the Rule of Law Incubated at World Justice Forum; Funding for Projects Announced' (July 7, 2008). The World Justice Forum is the successor to the ABA's Rule of Law Symposia of 2005 and 2006. Participants included Presidents Jimmy Carter, Petar Stoyanov and Ferenc Mádl, Justices Richard Goldstone and Ruth Bader Ginsburg, and leading scholars.

both oddly passive (who has 'robbed' and 'excluded' these people?) and exuberantly active ('strengthen … and thereby solve'). Their evident hubris appears to derive from faith: the term 'rule of law' seems to play a magical, or at least talismanic, role in both pronouncements. Such faith is possible, presumably, when its object has reached a position of such normative pre-eminence, political authority and discursive ubiquity that its key tenets are largely assumed to be broadly shared, understood and unquestioned.

Pronouncements of the kind cited above rely upon or embed some shorthand grasp of their motivating terms, a grasp that is presumably shared, at a minimum, by a relevant target audience. In this case, the audience is relatively clear: 'policy-makers' or 'opinion-shapers' in international organisations, private foundations and bilateral and multilateral development agencies; a coterie of academics (political science, economics and law), think tanks and research institutions and international organisations; and the governments of, as well as the general public in, those countries known as 'developing'. If the above statements function as shorthand for this audience, it is a result of almost thirty years of circulation and augmentation of a particular register about their object, something called 'the rule of law'. In that time, ambitious programmes have been undertaken and vast sums spent to 'promote the rule of law' throughout the world. An enormous body of work – writings, projects, convened conferences, public education programmes – had served, by 2008, to buttress and disseminate the notion that this thing called 'the rule of law' is necessary to most policy ends.

This wider contemporary phenomenon – 'rule of law promotion' – is my subject in what follows. I will look at the phenomenon both in terms of the activities undertaken under this broad rubric and of the ideas about law that are promulgated through and in support of those activities. I will do so in two main parts, the first investigating the parameters of the concept of the rule of law itself, the second undertaking an extensive exploration of the documents and literature produced by the various development agencies who conduct rule of law promotion. I will also, in an intermediary section, look briefly at historical precursors to this current work.

Throughout I will adopt a vocabulary that borrows from and embellishes that used in the field itself. So I will be talking interchangeably about 'donors' and 'funders', both of which refer to development and aid agencies – whether bilateral, multilateral or private – who fund

and implement rule of law work. I will frequently use 'rule of law' as a modifier, to denote aspects relevant to the worldview or objectives of these actors – thus, for example, 'rule of law work' to fulfil a 'rule of law vision' of a 'rule of law society', 'rule of law economy' or indeed 'rule of law state'. I will likewise be referring to rule of law 'activities', 'projects' and 'programmes' – referring to concrete operations that range from the training of police officers or judges or other legal professionals in the application of certain bodies of law (or on 'the rule of law' itself) to the building and equipping of 'rule of law institutions' such as court houses and administrations, prisons and police forces, to 'technical assistance' in drafting laws, to providing financial support for bar associations, law schools and law students. These activities are in turn frequently referred to as rule of law 'reform', 'assistance', 'promotion' or even 'export'. I will speak of 'project literature' and 'strategic literature' in reference to the extensive documentation produced by donor agencies in the course of their work, and which provide the raw material for much of Part II.

It seems appropriate to begin this introduction – which will lay out the argument as a whole in synopsis – with a brief discussion of what we mean when we talk about 'the rule of law'.

What we talk about when we talk about the rule of law

'The rule of law': four clipped syllables, two iambs, two hard nouns. What could be more concise? And yet, perhaps because the nouns are near synonyms, yet neither is semantically unambiguous, its meaning is not really self-evident at all. 'Rule of law' sounds like tautology. What is law if it doesn't rule? Or: isn't it precisely the fact that it 'rules' that distinguishes a 'law' from a 'rule'? What, in short, does the phrase 'rule of law' capture or add that mere 'law', the positive law itself, lacks?

In both the above illustrations, something called the rule of law is posited as the answer – or an essential element of the answer – to a profound malaise, indeed to the somewhat epic problems afflicting a global society. Such claims cannot be made on behalf of 'law' per se. In a given context, law may condone or underpin poverty, violence, or ignorance. Here, however, reference to the 'rule' of law is apparently thought to supply some extra ingredient, injecting some *quality* into law, or denoting a particular configuration of law, that insures against these outcomes.

But what? Let me step back a little. The above examples are characteristic of the particular story of the rule of law that is the focus of the present book. But it is worth noting at the outset that there are other stories available and that this particular framing does not command universal assent among those who would claim 'the rule of law' as part of their professional vocabulary. Few constitutional or administrative lawyers, for example, and few philosophers of law, would accept that the rule of law can or should 'cure' poverty or ignorance. Many would offer a modest definition of the 'quality' of law denoted by the expression 'rule of law'. Some would, like Joseph Raz, consider it to signify the 'specific excellence of the law'.[4] The rule of law is to law, Raz said, as sharpness is to a knife: it is that which permits law to function effectively. But if that is all it is, the rule of law has little to say directly about social or economic goods. Extreme poverty, for example, is quite compatible with the rule of law according to Raz.[5] This point, that the rule of law is primarily about the *procedures* of law rather than its substance (and so that procedure and substance can be strictly separated), runs through numerous accounts of the rule of law.[6]

And yet, in most rule of law narratives, the formal-substantive distinction constantly threatens to collapse. Tom Bingham, who provides a recent exemplary account of a procedural rule of law, finds he must add that '[t]he rule of law must, surely, require legal protection of such human rights as, within that society, are seen as fundamental.'[7] Raz himself includes 'the principles of natural justice' as inherent within the rule of law, without really explaining what these are or where they come from.[8] Both accounts nod to Lon Fuller's famous suggestion that law contains an implicit morality: that if it is to function at all (if 'law' is to 'rule'), the procedural apparatus for the task will necessarily embed certain substantive qualities: equality before the

[4] Raz (2001), 303.

[5] Raz (2001), 291: 'a non-democratic legal system, based on denial of human rights [and] on extensive poverty … may, in principle, conform to the requirements of the rule of law better than any of the … Western democracies.'

[6] See for a good account, Craig (1997). Or for a recent example, Tom Bingham: 'the core of the existing principle is … that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.' Bingham (2007), 69.

[7] Bingham (2007), 77. [8] Raz (2001), 296.

law, publication of laws, transparency of legislation, procedural predictability, non-retroactivity of criminal law, access to courts, equality of arms, and so on.[9] At what point do these 'fundamentals' and 'principles' slip into the 'promiscuity' or 'perversion' that Raz identified in the New Delhi Declaration of the International Commission of Jurists? That document claimed, fifty years before the above examples, that the rule of law requires 'not only the recognition of [each individual's] civil and political rights' but also 'the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality'.[10] While this formula would seem to foreshadow those of the blue ribbon commissions cited above, there is clearly a very different tone here.

What are we to make of all this? Clearly we are on contested rhetorical terrain: the expression 'rule of law' is a locus of numerous, varied, and sometimes apparently incompatible claims. But what if it were the very existence of this contest that is the most salient feature of the rule of law? What if its significance lies in the fact that *something is at stake* whenever the rule of law is invoked? If so, the stakes are evidently high – they concern the very structuring of the political, the social, and the economic. What is at stake, presumably, is the values or objectives that may attach to the fact of law: what kind of 'quality' does the invocation of a 'rule of law' add to the (mere, positive) law? Is it, perhaps, that the expression 'rule of law' tends to unsettle the very idea that there is such a thing as 'mere positive law'? Might it be, perhaps, that to speak of the rule of law is to suggest that law is *always* freighted with values? If so, reference to the rule of law in any given context might tell us *how* to interpret the law, how to read the law such that our reading remains truly *lawful*, that is, faithful to the law. The set of values assumed in the phrase 'rule of law', then, would allow us to determine the *legitimacy* of both law and of legal interpretation in any given instance. They would provide the master key to law: the 'rule of law' would be a kind of meta-law, the law of law.

[9] Fuller (1969). [10] Cited in Raz (2001), 290.

Rule of law promotion as a field

The notion that 'the rule of law' captures a particular *quality* of law or of a legal system, a quality that may be more or less present or absent in a given legal system and that thus provides a basis for evaluating such a system, imbues most accounts of the rule of law. The present book explores one such account among many, one that today, however, is sufficiently prevalent as to be potentially transformative of the term's normative terrain. This is the particular register adopted in international development work and applied liberally to a range of activities undertaken by hundreds of agencies around the world as a means of framing, explaining and justifying their activities.

In this book, then, I will not be attempting to determine what the rule of law 'actually is'. I treat the systematic overburdening of this necessarily fungible expression as a symptom of a more generalised tendency which comprises my main concern: the intensive exportation of laws and institutional models around the world, under the rubric of 'rule of law' promotion. For the deliberate sponsorship and financing of 'rule of law reform' by leading private, bilateral and multilateral agencies in most of the world's countries has, it seems, been successful on at least one count: rule of law language is ubiquitous and increasingly associated with a broad span of public goods. In what follows, I am going to ask about the 'quality' or qualities that attach to the expression 'rule of law' in this register. I am going to look into the origins, both theoretical and practical, of this way of thinking and speaking about law. I will investigate the implicit, and often, explicit, assumptions about the relationship between law and 'society' and 'politics' and 'economy' that are found within it. And I will ask how this register is mobilised – what it is supposed to do, and what it actually does in practice.

The book thus aims to lay out for inspection the extravagant claims made on behalf of a field of practice that, despite having grown exponentially in size and reach in recent years, nevertheless remains barely explored *as a field*. Beginning in the mid-1980s, initially financed primarily by the US government's Agency for International Development (USAID) and the World Bank, rule of law promotion soon becomes a staple of every major donor.[11] It has undergone two phases of

[11] These include: bilateral donors particularly the United Kingdom (Department for International Development; DfID) and Swiss (Swiss Development Agency for Development and Cooperation; SDC) governments; multilateral donors, including

significantly accelerated expansion: first with the end of Communism, where it became the rallying call for the 'transition' to 'free market democracies' in Eastern Europe and beyond. Then again after 2001, with the surge in counter-terrorism and wars in Afghanistan and Iraq, both reinforcing and escalating calls for the creation and nurturing of robust rule of law institutions in 'fragile states'. A steadily increasing amount of time, money and effort has thus been devoted, over the last quarter century, to helping most of the world's countries 'improve the rule of law' through 'technical assistance' in drafting laws, direct support for courts and judiciaries to strengthen 'independence', training for security services, including police, army and prisons, and support for 'civil society' and private associations to advocate in favour of human rights and against corruption. Rule of law reform is now at the forefront of the UN's 'peacebuilding' mandate and has become the rallying banner around which a broad variety of old-style law-and-order activities are conducted in countries characterised as 'developing', 'post-conflict' or 'transitional'. At the same time a long-standing policy of economic restructuring continues to drive international development policy under the rule of law rubric.

Rule of law promotion is, in short, explicitly bound up with the primary currents of international political and economic development, and today provides a leading language for the articulation and justification of overarching public policy orientations. The work undertaken beneath this sprawling heading has now begun to spawn a significant literature of its own.[12] That commentary, like the work it refers to, deals

the EU (the Commission and Council), the Council of Europe, the Organisation for Economic Cooperation and Development (OECD – whose Development Assistance Committee (DAC) provides a forum for coordinating donor policies) and Organisation for Security and Cooperation in Europe (OSCE, notably its Office for Democratic Institutions and Human Rights (ODIHR)); and multilateral banks – the European Bank for Reconstruction and Development (EBRD) and the Asian, African and Inter-American Development Banks. There are also many privately funded institutions promoting the rule of law, including operational programmes and funders (notably the American Bar Association (ABA), the Ford Foundation and the Open Society Institute (OSI)) and some research institutions/ think-tanks (such as the International Peace Academy and the Carnegie Endowment for International Peace).

[12] See, for examples, Allen *et al.* (2005), Belton (2005), Carothers (2006) (and contributions therein), Caruso (2006), Channell (2005), Chong and Calderon (2000), Clarke (2003), Dam (2006a), Dam (2006b), Davis (2004), Davis and Kruse (2006), Djankov *et al.* (2002), Faundez (2000), Golub (2007), Hurwitz and Huang (2008), Jansen and Heller (2003), Jayasuriya (1999), Kossick (2004), Li (2006), Magen (2004), Mattei and Nader (2008), Mednicoff (2005), Michaels and Jansen (2006), Nader (2007), Neumayer

with serious stuff: the deliberate re-engineering, at a legal-structural level, of the economic, political and social basics of countries throughout the world. And yet the burgeoning literature remains essentially unreflective with regard to the field's overarching self-justification and rationale. With few exceptions,[13] it is fundamentally technocratic in its overall thrust, broadly credulous of practitioners' claims to be mere functionaries, and sanguine about the prospects for eventual 'success' of this work, despite few examples. It is as though the association between something called 'the rule of law' and contemporary ideas of the good life has grown so strong as to inoculate efforts undertaken in its name against serious scrutiny. Although critical views exist, they tend to be limited to specific projects, methodologies and orientations; the most ambitious concern is with, as one collection has it, 'the problem of knowledge' – how is the rule of law to be measured; how can it be improved; what examples are there of successes and how can they be emulated; what can be learned from the many failures?[14]

My concerns in the present book extend beyond these essentially (and self-consciously) technocratic considerations. I aim rather to describe the *inner logic* of rule of law promotion: what kind of world is imagined in these programmes; what theoretical and historical drivers orient and legitimate it; and how do donors go about making that world a reality? Given how heavily the field has come to rely on the expression 'rule of law' itself as its guiding rhetoric, the book is also concerned with the changing parameters of this term of art: what does 'the rule of law' now encompass, how does current usage differ from its past referential scope, and what factors have contributed to its evolution? The present book couches its critique of this field in the field's own world, through immersion in the repeated self-sustaining narratives that permeate the programmatic and strategic literature, set against the broader history and conceptual evolution of the rule of law 'itself', as it has come down to us.

What that examination finds is that rule of law promotion relies for its normative force on the consistent reproduction of a particular narrative embedding a certain set of assumptions about the optimal role

(2003), Ohnesorge (2003), Peerenboom (2002), Purvis (2006), Sachs and Pistor (1997) (and contributions therein), Spence (2005), Stephenson (2006), Stromseth *et al.* (2006), Thomas (2007), Trubek and Santos (2006) (and contributions therein).

[13] Among the few exceptions, contributions to Trubek and Santos (2006), Mattei and Nader (2008), Purvis (2006).

[14] Among many examples, contributions to Carothers (2006).

of law in society – rather than relying on, say, theoretical or critical inquiry, historical analogy, reasoned deduction, or empirical demonstration. For this reason – its reliance on the techniques of story-telling and intuitive appeal rather than on the tools of analysis and demonstration – rule of law promotion is perhaps best viewed as a sort of theatre, a morality tale staged as a spectacle, drawing on the techniques of rhetoric and the power of performance.

The rule of law at home and abroad

The tremendous drive among development agencies and other donors to 'promote' the rule of law cannot be entirely dissociated from a larger preoccupation with the rule of law in contemporary life. On the one hand, the rise of rule of law language in international development is concomitant with, and indissociable from, deregulation and the gradual pruning of the welfare state back home: in each case something called the rule of law is pitted against the overpowering and stifling discretion of an intrusive, 'bloated', ineffective and/or corrupt bureaucracy, that is to be made leaner, more efficient and more accountable. On the other, rule of law language has contrasting associations with counter-terrorism measures at home and abroad. At home, the accumulation of executive powers in the war against terrorism is regularly challenged as violative of something called 'the rule of law'. Abroad, by contrast, the training and arming of security forces to counter terrorism is *itself* carried out under the rule of law banner. In both cases, the parameters of state capacity to project coercive violence are at issue, but rule of law language is deployed to dramatically different, even opposite, ends in each.

There is thus both a relation and a distinction between the rule of law 'at home' and the rule of law 'abroad'. For whereas the language has a comparable sphere of reference in each domain, it has different specific significations. In the field of development assistance, rule of law language is deployed to eclipse or minimise entire areas of government activity (social welfare and public spending) that are considered quite compatible with the rule of law 'at home'. Rule of law state-building, moreover, is more strictly concerned with reinforcing and channelling than merely constraining or interrogating the state's coercive capacity. Furthermore, whereas – at least at the rhetorical level – the rule of law at home is a good in itself, an *end*, the rule of law abroad is rather a *means*, motivated by other goods, notably prosperity

(a market economy) and stability ('peace and security'). Indeed, rule of law promotion rhetorically links and buttresses these two objectives: global security to underpin global prosperity. These distinctions in the applications of a rule of law register at home and abroad are not quite contradictory; it is the weight, or centre of gravity, of the expression that has shifted, not its entire associative canvas.

Rule of law promotion is premised on a further core distinction: the *presence* of the rule of law at home is contrasted with, and privileged over, its *absence* abroad. Whereas donor countries are thought to 'have' the rule of law, recipient countries do not, or not yet, or not sufficiently: the rule of law is the basis for prosperity/stability at home; its relative absence is a contributory cause or explanation of comparative poverty/insecurity abroad. This distinction again mobilises a relation – *we* can (and should) help *them* attain the rule of law. To assist in establishing the rule of law abroad is thus a moral duty; but it is also enlightened self-interest: in an increasingly integrated world everyone everywhere stands to benefit from an improvement in the rule of law (and so prosperity and stability) anywhere. This relation is not formal – it is not a product of international obligation. Rather it is voluntary, a matter of charitable 'assistance'.

Rule of law promotion is thus an activity undertaken by agents in (and of) one set of countries but conducted in another set of countries. It is a *transnational* activity. The term 'transnational' is appropriate here, rather than 'international', because the relationship is both non-obligatory (it is moral rather than legal) and unidirectional (it flows from one set of parties to another but not vice versa), in contrast to the binding and reciprocal relations that characterise international law. But I also use the term 'transnational' for three other reasons.[15] First, the relationship between donors and hosts is neither a relation of equals (it is premised on inequality) nor truly a free association (it is a riddled with conditions and incentives), two conditions generally thought necessary to an association under international law. Second, rule of law promotion is not fundamentally concerned with relations *between states*; it does not result from or express the interaction of formally equal sovereigns. Rather it is concerned with

[15] See on this subject the special 2004 issue of the *Penn State International Law Review* compiling papers from the American Society of International Law symposium on 'Transnational Law: What is it? How Does it Differ from International Law and Comparative Law', 23 *Penn State International Law Review* 795 (2004), especially Reimann (2004).