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978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice

Stephen Humphreys

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## Theatre of the Rule of Law

*Theatre of the Rule of Law* presents the first sustained critique of rule of law promotion – the drive to shape laws and institutions that pervades international development and post-conflict reconstruction policy today. While successful in disseminating a comparable set of ideas about law and policy, this expansive global enterprise has largely failed in its stated goals of alleviating poverty and fixing ‘fragile states’. Moreover, in its execution, the field deviates sharply from ‘rule of law’ principles as commonly conceived. To explain this, Stephen Humphreys examines the history of the rule of law as a term of art and considers a spectrum of contemporary interventions as well as earlier examples of legal export to other ends. Rule of law promotion, he suggests, is best understood as a kind of theatre, a staged morality tale about the good life, intended for edification and emulation but blind to its own internal contradictions.

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# Theatre of the Rule of Law

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*Transnational Legal Intervention in Theory and Practice*

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Stephen Humphreys

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For My Parents

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Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

---

## Short table of contents

<i>Prologue</i>	page xii
<i>Acknowledgements</i>	xxvii
Introduction	1
<b>Part I Parameters: ‘rule of law’ as a term of art</b>	27
Chapter 1 Society	29
Chapter 2 Economy	57
Chapter 3 Sovereignty	89
Interlude Precursors: colonial legal intervention	109
<b>Part II Theatre of the rule of law</b>	123
Chapter 4 Market	125
Chapter 5 State	149
Chapter 6 Public	175
Conclusion	219
<i>Bibliography</i>	233
<i>Index</i>	287

Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in

Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

---



Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in  
Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

## Contents

<i>Prologue</i>	page xii
<i>Acknowledgements</i>	xxvii
Introduction	1
What we talk about when we talk about the rule of law	3
Rule of law promotion as a field	6
The rule of law at home and abroad	9
The theory and the practice of rule of law promotion	12
Part I: the rule of law as term of art	14
Interlude: colonial precursors	17
Part II: theatre of the rule of law	18
<b>Part I Parameters: ‘rule of law’ as a term of art</b>	27
1 Society	29
The immanent rule of law	29
Dicey: ‘the habit of self-government’	30
Oakeshott: a ‘moral association’ (the jus of lex)	35
Habermas: mutual respect among strangers	38
Summary: the ‘modern’ rule of law	41
Between state and society	45
The public sphere	45
A tripartite distinction	53
Conclusion	55
2 Economy	57
Two perspectives on law and the state	59
Dicey on <i>droit administratif</i>	59
Weber on ‘compulsory political association’	62

Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in  
Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

x

CONTENTS

The realist critique: four charges of judicial bias	66
Bias one: the choice of rights	69
Bias two: the choice of policy	70
Bias three: the choice of evidence	72
Bias four: the blindness to bias	73
After the realists	75
The rule of law and welfare as mutually incompatible	77
Social rights within a rule of law framework	83
Conclusion	84
3 Sovereignty	89
Aristotle: Nomarchy (the sovereignty of law)	89
Law's umpire	93
The Aristotelian tradition	96
Agamben: the law of sovereignty	98
Sovereign exception	99
Sovereign extension	101
Sovereign expansion	104
Conclusion	106
Interlude Precursors: colonial legal intervention	109
<b>Part II Theatre of the rule of law</b>	123
4 Market	125
US foreign assistance	125
The world according to USAID	128
The World Bank	131
After 1989: governance and PSD	132
The economy of law	138
Conclusion	147
5 State	149
The United States	149
The United Nations	155
The rule of law and order?	162
The lure of law	166
Conclusion	173
6 Public	175
The theme: modernisation	176
The reform constituency	183

Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in  
Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

	CONTENTS	xi
Lead roles: public and private		187
Governance		190
Corruption		191
Privatisation		193
A public sphere of private ... investors?		194
Supporting roles		195
The judiciary: autonomy and prestige		196
Civil society: public education		204
‘The poor’: investors in waiting		207
Denouement: global integration		213
Conclusion		217
Conclusion		219
<i>Bibliography</i>		233
<i>Index</i>		287

Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in  
Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

## Prologue

With the fall of the Berlin Wall still fresh in 1991, I drove to Prague, just to see what it looked like. Beautiful and drab at once, it was a city that preserved a copious history, both ancient and recent, and a sensibility quite unlike any I had come across before: erudite, yearning and humble all at once. A few years later I moved to Budapest, a very different city, but one that shared a similar sense of wounded magnificence and of informed, tentative hope. Remaining there over much of the decade, I developed some sense of what it means to live through history. For these countries were, in those years, at the centre of a tremendous transformation, one that spiralled quickly outwards and came to engulf much of the rest of the world – extending, as I learned during a two-year stint in Senegal some time later, to Africa and beyond. As the Cold War thawed, it seemed to unleash all sorts of flows across the world's previously unyielding borders: of money, of people and, perhaps most of all, of ideas.

This book began life in my desire to understand and articulate my personal and professional experiences from those years, much of which I spent working in a field that has come to be known as 'rule of law promotion'. That is the name given to an immense and still expanding body of practice aiming to reform and improve the laws and institutions of countries across the world. I wanted to make sense of the contrast I perceived between, on one hand, the exuberant rhetoric that was then (and is still today) habitually deployed to describe and explain the extensive interventions into the economic and legal structures of the countries I spent time in, and, on the other, the difficult and often deteriorating conditions of life I witnessed in my time living in and visiting the same 'beneficiary' countries. Was there a connection?

Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

To begin *in medias res*, I agreed in 2000 to oversee a project that was part of a wider programme to monitor compliance with the Copenhagen criteria, as they are called, for accession to the European Union, in ten countries that were then ‘candidates’ for EU membership. The criteria are remarkably concise. They state:

Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.<sup>1</sup>

In retrospect, the criteria – proclaimed in 1993 – are a product of their era. In the midst of familiar perennials from the lexicon of liberal constitutionalism – democracy, human rights, minority protection – another keyword appears that, despite comparably deep roots, was only then, in the early 1990s, acquiring at last a mien of impartiality: the market economy. It is now difficult to recall, but in previous decades, particularly in Europe, the invocation of ‘market forces’ had retained a controversial, even combative, colouring. After 1989, however, the Copenhagen criteria signalled not only the budding confidence of this language in mainstream political discourse, but also the abandonment, in the same gesture, of another key aspirational vocabulary of the postwar settlement: social welfare and a whole accompanying register of solidarity, economic equality, social justice, and so on. Absent from the criteria, these aspirations were apparently not sought – or were disavowed – for the candidate countries. In this, the criteria endorsed and ratified a change in the prevailing political wind that had been gaining throughout the 1980s. They proclaimed a triumph of a kind, even if it was, at the time, essentially rhetorical.

And there, in the middle, sits this curiously bland term: ‘the rule of law’.

It took me some time to admit that, if I was honest, I wasn’t fully sure what ‘the rule of law’ meant. It took me a little longer to realise that, in fact, few others were either, and more time still to begin to be able to articulate my sense of the significance of a term that was, at the time, something of a newcomer in the arena of ‘international assistance’.

<sup>1</sup> SN 180/1/93 REV 1, European Council in Copenhagen, June 21–22, 1993, Conclusions of the Presidency, 13. The criteria also state: ‘Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.’

Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

## xiv PROLOGUE

But it was a fast mover. For I soon discovered that the rule of law was not simply a ‘condition of membership’ for aspiring EU countries. In the very recent past, it had become a key new term in the vocabulary of international affairs, increasingly cited as both a goal and a condition of assistance of all kinds in countries all over the world. But what did it mean? And what was it doing in the field of international development?

I put these questions at the heart of my doctoral research, begun in 2003, of which the present book is the outcome. I looked in detail at the principal texts comprising the history and theory of the concept of the rule of law and at the extensive literature in which the promoters of rule of law programmes explain their objectives and rationale. Recourse to a vocabulary of the rule of law had become, I quickly discovered, extraordinarily widespread in international activity. Moreover, its usage escalated throughout the period of my writing, to the extent that what was already an elusive and fungible term seemed to become, over time, ever more abstracted from real world referents. So widely is the term ‘rule of law’ used today, so many desirable political, economic and legal attributes are incorporated within it at a stretch – and it is repeatedly stretched – and so few common elements are required across the visions channelled through it, that it has become something of a challenge simply to capture what is specific about ‘the rule of law’ today.

And yet, from the perspective of my starting point – the turn to the rule of law in international development assistance – it was clearly not adequate to say merely ‘the rule of law is a site of contestation’. After all, a striking aspect of contemporary international usage is how little scope for argument or contestation it leaves – how quickly and thoroughly it seems to dominate the space of political debate. One thing everyone can agree on, it seems, whatever the context, is that the rule of law is a good thing, and more of it must be good too. Even though its specific content is often murky, to invoke the rule of law is nevertheless to posit that we already know a lot about how things work and (more to the point) how they *should* work, that ‘the challenge’ is ‘to implement’ this knowledge, and that to open up discussion on ‘the basics’ ‘again’ would be fruitless, counterproductive or wrong-headed. Transnational funders may argue over how best to improve the rule of law: no-one argues against the thing itself.

Mindful of the ubiquity and plasticity of this notion, I chose to pursue it through its associations, locations and effects. If its deployment

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Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

could have a chilling effect on political possibility, I conjectured, perhaps that was in part *because* of its rich associative history – it can encompass *so much*. It can reveal itself (to revisit the Copenhagen criteria) as an indispensable condition of both ‘human rights’ and the ‘market economy’, while leaving the content or effects of these and other desiderata essentially empty. To speak of ‘the rule of law’ could, it seemed, substitute for all sorts of questions about what society should look like – how to organise the political and economic. And yet, the inhibiting effect of rule of law language on political debate might also be because it is *itself* so comparatively empty of determinative content. When the rule of law is raised, talk turns easily to processes and procedures: monitoring, arbitrating, adjudicating, and so on, with reference to a set of procedural principles: transparency, efficiency, accountability, generality, and so on. To invoke the rule of law is to prioritise procedure over substance and to defer discussion of the latter; a focus on ‘building the rule of law’ suspends, for the time being, questions about the direction and effects of public action.

But there is also, I gradually realised, another reason the rule of law register can apparently void the policy space. A certain hostility to the policy function itself runs through many influential accounts of the rule of law. Key exponents of the term – Albert Dicey, Michael Oakshott and Friedrich Hayek – explicitly invoke the rule of law to warn against or ward off government intervention of any but the most minimal kind. Today, still, the concrete procedures associated with rule of law act as brakes on the policy apparatus and provide limits on public action, preferring private over public ordering and prioritising courts as decision-makers. The problem of policy, when framed in rule of law terms, can quickly reduce to an assumption that there is *already too much* of it; the immediate task is to fend off, guard against, or roll it back – to liberate the private by constraining the public. This association, it turns out, is embedded in its conceptual history.

If the turn to ‘rule of law promotion’, then, as a guiding motif in the work undertaken by the principal development bodies – the international financial institutions, bilateral aid agencies, private foundations and main organs of the UN – tends to forestall political possibilities, this was, it seemed to me, not only because it is consistently presented as *apolitical*, as above or prior to politics, and not only because the measures it announces are not *policy* steps in the ordinary sense – they are rather structural or procedural – but also because the expression is habitually deployed to query the policy-making apparatus

Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

## xvi PROLOGUE

itself, on *moral* as well as practical grounds. If to talk about the rule of law is, as I began to realise, always to take a position on the proper ordering of society, it is also always to signal a studied neutrality on that same question.

And yet, it did not seem correct to describe the role of the rule of law in contemporary development as ‘apolitical’ or anti-policy, I realised, if only because the *actual* policy orientation of this immense body of work is, in fact, stark and unmistakable. From the outset, the World Bank, the prime sponsors of this vocabulary from 1989, placed it at the centre of a new vision of wealth-creation: ‘private sector development’, supposed not only to generate growth but ultimately to eliminate poverty (the Bank’s motto is ‘working for a world free of poverty’). And over time, as other development actors acquired the language, the rule of law label began to appear in proliferating contexts, notably, from about 2000, in relation to security and crime in post-conflict and ‘fragile’ states. New goals and subgoals were continually added: ‘encouraging investment’, ‘achieving governance’, ‘strengthening civil society’, ‘protecting human rights’, ‘fighting impunity’, ‘combating corruption’, even ‘ending the cycle of hatred’.

Despite an insistent suspicion about ‘central planning’ and indeed planning of any kind in economic affairs, the programmes to make all this happen are themselves centrally planned by a small group of large organisations based in a handful of world capitals, and, notwithstanding some inter-agency jockeying, working in close coordination. Rule of law programmes are implemented uniformly (if not always successfully) wherever development assistance is delivered: that is, in much of the world. It struck me that recourse to a rule of law register in this context can mute or disguise the extent to which strong policy preferences do, in fact, accompany and structure its promotion country by country. So my questions began to change. What becomes of this thing called ‘the rule of law’, if it is invoked specifically to produce broader policy goals? What do we learn about the immense body of contemporary work under the rule of law rubric by acknowledging and articulating its policy function?

The more I looked at the history of this idea, the more paradoxes like the above I uncovered. Sure, the ambitious policy to construct and reform many of the world’s states in fulfilment of a given set of economic goals essentially reverses a classic vision of the rule of law as a bulwark against, in Michael Oakeshott’s words, ‘teleocracy’ or a ‘technological conception of the state’. But this is not the only way in



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Stephen Humphreys

Frontmatter

[More information](#)

which the field of rule of law promotion deviates from the tradition it lays claim to. Three other examples quickly became apparent. First, rule of law is classically conceived as describing the normative base or *legitimacy* of the law in force, a legitimacy derived, in turn, from the community itself that is subject to that law. That is, the rule of law is intended to express a minimal societal consensus or ‘deal’ about ‘the rules of the game’. In development work, however, local laws and procedures are consistently perceived as problematic – as, for example, informal (customary), discriminatory, outdated, or corrupt – with a notional ‘rule of law’ imported from outside as solution. Persistent attempts to promote ‘local ownership’ of rule of law projects, as I had witnessed, merely underline this structural reality.

Second, the existence and pursuit of a procedurally rigorous legislative process grounded in a representative and legitimate legislature are generally regarded as fundamental to most conceptions of the rule of law. However, funders are typically impatient with these processes, preferring to push through legislative templates developed elsewhere with the help of ‘reform-minded’ executives and elites, bypassing legislative process where possible. In this, the programmes reproduce their own political origins, for they too arrive into the toolbox of development actors not through agreement with ‘beneficiary states’ but through decisions of the Security Council (in the case of much UN rule of law work, notably in peacebuilding operations), or of the executive boards of the international financial institutions, or of the executive arms of donor states themselves, operating through bilateral aid agencies. Ironically, since the rule of law is deemed to be ‘apolitical’, it is also essentially non-negotiable.

Third, despite the insistent assumption of a non-intrusive state in rule of law literature, the work itself has increasingly focused, in its state-building mode, on the construction of a state apparatus that is both pervasive and coercive: whose coercion is, indeed, pervasive. Increasingly, as the rule of law became the moniker of choice for state-building, particularly in ‘fragile states’ perceived as prone to becoming ‘havens’ or ‘breeding grounds’ for terrorists, its meaning is practically indistinguishable from ‘law and order’ – the consolidation of a trained and equipped police force and of a functioning criminal law system, including through increasing prison capacity and setting targets for arrests, prosecutions and convictions. As policy measures pursued through development agendas, these are somewhat novel. But what is really surprising is how they too have been housed under the rule

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978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in  
Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

## xviii PROLOGUE

of law umbrella, which, for all its polysemy, has never before stood behind the policing state quite so unequivocally. Here, as elsewhere, the term is apparently stretching towards novelty.

At this juncture, there is a danger of drawing a too sharp contrast between the contemporary practice of rule of law promotion and some earlier ‘purer’ or more ‘authentic’ notion which has, if this account were to run, been sidelined, undermined or overturned in a contemporary practice that might therefore seem hypocritical or conspiratorial. So I should note that the intended contrast is with an ideal or concept, not a historical fact. There is every reason to believe that the classic vision of the rule of law is itself largely mythical or idealised. Certainly, when he advanced the expression in his 1885 *Introduction to the Study of the Law of the Constitution*, Albert Dicey embarked on deliberate mythmaking. Harking back to a fabulous land of rights and freedoms acquired in habit and legal practice, he grounded the rule of law in a combination of chauvinist accounts of the English legal system, on one hand, and assimilated elements of modern European statehood, on the other. As many have noted since, this picture, constructed explicitly to counter the rise of a modern bureaucracy in England, was neither theoretically coherent nor empirically accurate on the actual functioning of law in contemporary England. Another view, most coherently articulated by Max Weber in 1921, saw the rise of extensive administration as *inhering* in a modern rule of law state, a view shared by later commentators on Dicey (including in apologetic prefaces to later editions of his work).

The broader European tradition encompassing these related visions was laid out in some detail in an early text by Jürgen Habermas. In this tradition, as Habermas recounts it, the emergence of constitutional government was conceived as the triumph of an autonomous (modern) private civil society over an authoritarian (medieval) public sovereign. This new ‘public’ – that is, the aggregate of private persons – comes into being through rational discussion in a notional ‘public sphere’ by means of which the ‘public interest’ is determined. The public becomes the source of legitimacy for government, which is set the task of assuring both the public interest and the private freedoms that underpin it, but its powers are bounded within sharp limits.

According to this story, then, the state (that is, the public sector) is both the product of the public sphere and its guarantor. The rule of law comes to describe the system of legislative and judicial balances and mechanisms that underpin this construction. As Habermas points out, however, this picture of the European state has always constituted

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Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

an idealised archetype rather than a historical reality, a package of eighteenth-century political ideals recast retrospectively, in the late nineteenth century, as historical directives. As such – a ‘regulative idea’ (to use Immanuel Kant’s term) towards which the modern state should ideally strive – it constituted a powerful tool in contests over the ordering of European society through the late nineteenth and twentieth centuries. More worryingly, Habermas suggests that the relative hegemony of this ideal leaves the ‘public sphere’ (i.e. the media and other channels of public discourse) open to manipulation by powerful private or public interests with the capacity to do so. Given the assumptions of formal equality and private freedom that the ‘rule of law’ instantiates, manipulation of this sort may be difficult to perceive.

Habermas’s account is enormously helpful in explaining much of the *latent* theory that appears to underpin rule of law work today. A similar set of assumptions about the respective roles of public and private actors, the existence and purpose of a public sphere, and the role of the rule of law in maintaining this set of conditions, runs through the field as a whole without apparently needing to be demonstrated or queried. Obvious questions arise here about the appropriateness of basing contemporary actions on a model of state and society derived from a particular moment in European history, and one that was largely mythical even then. But setting these doubts aside momentarily, I found myself wondering how to square the central notion of an *autonomous public* in this picture – of the public sphere as a meeting place for a society in congress with itself to determine the public interest – with the equally central fact, in rule of law promotion, that the relevant principles and procedures, and even expressions of the public interest, amount essentially to ready-made imports from elsewhere. Are there precedents that explain what seems an obvious contradiction?

In search of an answer, I looked at the *practical* precursors of this body of work: earlier attempts to transplant laws and procedures across borders in the service of social, political and economic goals. The obvious antecedent is, of course, European colonialism. Focusing on colonial interventions in Africa, I found numerous parallels with contemporary rule of law promotion, both substantive and performative. These included a clear consonance of motivating themes, on one hand – economic development, humanitarianism, and progress, or modernisation; and, on the other, of modes of intervention – a concentration on policing (and peacekeeping), constructing criminal systems, building market structures, establishing judiciaries, training administrators,

Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

## XX PROLOGUE

all with a view to allocating and safeguarding economic and political capacities. Like colonial authorities, rule of law promotion prefers expedient legislative processes, working with small groups of 'reform-minded' locals to achieve lasting effects. There are clear differences of course, dictated at least in part by the quite different conditions of operating in post-independence states. But the similarities are nevertheless striking.

And yet, while the continuities between contemporary rule of law promotion and the colonial legal intervention that preceded and indeed laid the foundations for it are stark, if often obscured from view (including by terminological shifts, such as the turn to rule of law language itself), there is at least one innovation in contemporary work that has no obvious parallel in the colonial era. That is its concentration on the *public* itself, a notion generally neglected or treated ambiguously in colonial times. The rule of law literature orients itself towards a notional public as its relevant audience and justifies itself in terms of the specific benefits that will accrue to 'the public'. Moreover, it often speaks as though *representative* of a wider public. But beyond all this, and perhaps most strikingly, considerable resources are expended on bringing a public into being. This is done through projects to fund and 'strengthen' civil society, to expand and 'diversify' the media (in the name of 'freedom of expression'), to train lobby groups, including chambers of commerce and NGOs, and so on. In keeping with the public/private divide that runs through rule of law programming generally, these latter projects are generally (though not exclusively) the domain of private rather than public funders.

Rule of law work, I began to perceive, doesn't simply presuppose a certain vision of society that is reliant in particular on the distinction between public and private actors, the latter a locus of freedom and entrepreneurship, the former a space of discipline and security. It proactively sets about creating such a vision, by funding, 'nurturing' and training whole sections of society – judiciaries, police, soldiers and civil servants, of course, but also private lobbying groups, the media, and 'civil society' itself. Underlying rule of law promotion, it turns out, is a fairly complete vision of what society is and how it should look. The goal of 'rule of law programmes' is not simply to construct or reform 'institutions', it is actively to reform the way people, *in general*, in host countries behave, public and private persons alike. The aim is, apparently, to normalise and universalise very specific ideas about state and society and their inter-relation.

Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in  
Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

Ambitious though the programme literature – to which I turned for detailed accounts of the field – is, it rarely expresses the full implications of its own presuppositions. These larger claims, hopes and intentions are rarely openly acknowledged or proclaimed, indeed, they are perhaps not always fully appreciated, as I could myself attest. And yet they are pervasive. They are indicated by, and necessary to, a consistent narrative which is thoroughly embedded in the body of programmes wherever performed. They are *staged* rather than stated. (I will come back to this idea of ‘staging’ in a moment.) Furthermore, the extraordinary scale of ambition behind this work is, unsurprisingly, not generally met in practice; indeed it is difficult to see how it could be. Yet, perhaps because the larger premise is so rarely articulated, the literature evinces recurrent surprise and disappointment at the failure to achieve its stated aims, as though these more modest objectives could somehow be uncoupled from the wider transformation that rule of law programmes mutely expect.

Certainly this work is not easy. Practitioners struggle hard in difficult circumstances to produce modest change, and then struggle again to demonstrate to their sponsors that the change is real. A number of ironies or tensions run through all this that may contribute to the pervasive perception of failure. For one, there is an evident tension between the purported emphasis on diversity of opinions and interests in the public sphere, on the one hand, and the thorough consistency of the message transmitted through the programmes in support of rule of law, on the other. In the same way, second, there is a remarkable tension between the constant talk of transparency and accountability in the literature and the relative absence of these qualities when it comes to the key institutions themselves, certainly in relation to their ‘beneficiaries’. A third source of tension arises between the insistent emphasis on the importance of lobbying in the public interest, on one hand, and the relative inaccessibility of the key funders to actual expressions of the public interest from those in host countries, on the other. That is to say, the particular set of principles and modes of intervention found in rule of law promotion are not supplied from within target countries and adapt only marginally in response to pressure from the recipients – channels to ‘lobby’ the key funders are, ironically, not readily available. Fourth, there is a niggling tension between the formal equality and diversity presumed to be constitutive of the public sphere in principle and the importance in practice of access to funding, generally from these same (foreign) funders, in determining which voices actually get heard.

Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in  
Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

## xxii PROLOGUE

Taking account of all this – the repeated narrative tropes, the moral overtones, the ambiguous or contradictory motives and reflexes, the recurring set of principal actors and motifs – it gradually struck me as most appropriate to characterise rule of law promotion as a kind of theatre or performance. As the *staging*, in the way I suggested earlier, of a certain story or morality tale about the good life – about state and society, law and economy, about the appropriate way to set priorities and the appropriate priorities to set. As pedagogical: rule of law promotion is theatrical in its mode of persuasion: it does not attempt to *demonstrate* the rightness of its propositions through empirical evidence (there is little), nor through the discipline of reasoned competitive discourse in the public sphere (it is not itself open for debate), nor through the clarity of historical analogy (no analogy seems appropriate). Rather, the field bases its appeal on the force of repeated narrative itself, and on the consistent reproduction of a cast of strangely inscrutable terms that follow a similar choreography regardless of context. These comprise, on one hand, a set of immutable themes (governance, corruption, privatisation, transparency, accountability, impunity, judicial independence) and, on the other, a group of recurrent morally-tagged actors (civil society, the judiciary, ‘the poor’, ‘the elite’, the media, public officials, ‘reform-minded constituencies’).

The plotlines too are simple, bold, familiar and repeated. Governments tend to tyranny. Independent courts protect the rights of ordinary people. Corruption obstructs ‘governance’ and constitutes a tax on the poor. Privatised services are more efficient than public. An ‘enabling environment’ for investment is a prerequisite of ‘development’. ‘Integration’ in the global economy is good for everyone, local and global alike. ‘The poor’ are essentially entrepreneurial, waiting for the right environment to step forward and contribute to (and benefit from) wealth generation. The ‘right environment’ is a matter of incentives.

I will end this prologue soon, but first I want to flag two further points that emerged from my investigation. First, there is a striking contrast between the state-bounded nature of ‘the public’ as ordinarily (and historically) conceived, and of the government tasked with responsiveness to it, on one hand, and the *essentially* transnational nature of the public as it consistently appears in rule of law programme literature, on the other. Who is this transnational public? Presumably it is the aggregate of private interests with an identifiable stake in how a given government organises policy, which would seem to mean, as rule of law literature

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978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in  
Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

indeed clarifies, private firms and investors large enough to operate in multiple states. Can the interest of these relatively powerful actors really be understood as equivalent, or indispensable, to the ‘public interest’ of host countries? Does the mismatch of boundaries between state and public not distort the principles supposedly underpinning rule of law work? Or does it point to the emergence of something quite novel: a nascent public body at the global level to match the public sphere to which it is to respond? If the latter, such a global public sector might be thought to reside in the very institutions themselves promoting rule of law globally. And of course, this body *does* appear responsive to precisely the same transnational public so often cited as ‘beneficiary’: a transnational private sector and a global ‘civil society’. And yet, if this is right, even roughly, it receives no acknowledgement in rule of law literature, which remains relentlessly state-centric. Why so? These intriguing questions deserve more scrutiny than I can give them here.

Second, there seems to be at least one way in which rule of law promotion has been a clear if qualified success – and that is precisely in its performative or pedagogical dimension, in the dissemination of rule of law language itself, and of the morality tale it transmits, at least at the rhetorical level. There seems little doubt that the turn to rule of law language has consolidated its hold in international relations, in international development assistance, and in the shared discourse of public authorities and civil society organisations everywhere. Adopted now by all the major international actors, extending to bilateral and UN-based agencies as well as private funders, the language has also, unsurprisingly, become increasingly common among government bodies that must perforce deal with and respond to these agencies. Governments are evaluated on their adherence to this notional rule of law, investment flows towards it, funding is made conditional upon it. And NGOs too find themselves having to invoke this register to expedite funding applications. To have near-universalised a particular vocabulary in regard to fundamental concerns of state and society is no mean feat. Perhaps the question is not so much whether all this rhetoric is leading to ‘improved rule of law’ ‘on the ground’, as the literature often wonders, but rather, what sort of international and transnational transactions are facilitated by this widely shared language, and who benefits from them?

This set of themes, broadly, comprise my focus in the book that follows. I look first at a range of arguments that have played out on the ground of the rule of law in the century-odd since the term was first



Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in  
Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

## XXIV PROLOGUE

introduced. I then provide a brief account of earlier efforts to mobilise law abroad to achieve development, focusing in particular on colonial Africa. Finally I turn to a thorough analysis of a large body of project and explanatory literature from a number of key rule of law funders and implementers – in particular, the US Agency for International Development (USAID), the World Bank and various organs of the United Nations.

It should be clear, I hope, that I am not attempting in what follows to fix a final definition of ‘the rule of law’: to the contrary, I am querying whether such a fixed definition is attainable at all for a term which appears to owe its prominence to its plasticity. Likewise it should be clear that the grander values and desires that implicitly or explicitly underpin articulations of the rule of law are not themselves the object of my critique here: such a study would require another book-length investigation. Here, it is rather the radically uneven application of these principles in this particular field of practice that I wish to interrogate.

It might be worth clarifying a number of other things I am *not* doing in this book. As indicated above, I am not attempting to assess whether ‘rule of law promotion’ as a technique ‘works’ or not – that is, whether it successfully ‘improves’ certain attributes of state or society articulated beneath a rule of law rubric. There is a considerable literature already evaluating rule of law export, much of which concludes that it is *not* successful on its own terms. I am content to allow those studies to tell their own story: poor self-assessment within the field provides a backdrop to my own research, but not its impetus. I do not presume to offer any such assessment, neither as to the *existence* of the rule of law (however defined) in a given context, nor the extent to which funded programmes can ‘improve’ it (if at all), nor the degree to which it would be possible to measure such improvement, should it take place.

Neither am I making any claims about whether something called the rule of law really *is* good for development or not. There has been an extraordinary surge in global economic growth over the last thirty years, coincident with the promotion of the rule of law and in particular the ‘integration’ of ‘emerging markets’ and ‘transitional economies’ into the global economy, with which it is frequently associated. There has been, at the same time, an unprecedented rise in economic inequality both within and between countries – hence the deterioration I have seen at first hand in countries I visit often. It seems reasonable to assume that these trends are inter-related and that they may all have something to do with the injection of a uniform vision of



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978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in  
Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

economic relations channelled through the replication of legal forms and institutions. If so, this would appear to indicate another kind of 'success' for rule of law promotion, but it is not part of my goal in the present work to establish such a connection.

Furthermore, I have made no attempt in the following to represent the views of those in recipient countries who are subject to, or beneficiaries of, rule of law assistance. It is common in this field to pursue case studies aiming to show what the impact of these programmes is 'on the ground'. My focus, however, is quite different: it is to look at the field in terms not of its targets, nor of its substantive impact, but of its rationale. What are rule of law funders promoting exactly? How do they explain this work? What are the underlying assumptions? What is the worldview that sustains the field of rule of law promotion? If the field has developed to a degree in response to its reception in its countries of operation, and to obstacles met in implementation, the reflexive response has generally been to translate these hurdles back into the familiar language of the overarching rule of law narrative, rather than to introduce new themes or undertake fresh inquiry. My focus on implementers – on the agents of the rule of law, so to speak, rather than on those at the receiving end – has entailed a choice not to attempt to speak for the latter. The degree to which these programmes are embraced, resisted or simply ignored in their countries of implementation – and the politics of embrace, resistance or indifference, important though these clearly are – remain beyond my scope in this book.

Lastly, I do not wish to question the intentions, motivations, or achievements of the many individuals involved in rule of law promotion. Having had the privilege to work within the field myself, and with some truly remarkable individuals, I am aware of the extraordinary commitment common in this field to bettering the conditions of life for persons who have been victims of political and economic upheavals beyond their control. By corollary, I am not suggesting that some particular public goods frequently ushered under the rule of law moniker are not themselves valuable objects of study and pursuit. The present study would suggest that as a blanket term intending to cover multiple public goods, 'the rule of law' is overused, of limited analytic or descriptive value, and potentially distorting. But that is not, of course, to say that identifiable injustices swept into the broad embrace of rule of law rhetoric are not deserving of engagement. I am conscious that specific interventions frequently result in outcomes that

Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in  
Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

---

xxvi PROLOGUE

are genuinely beneficial to specific individuals and communities and that, where they are not, the causes are often complex. I know that those working from the best motives operate in a strategic environment requiring careful framing of aims, methods and objectives. My goal is not to question their integrity. Rather, it is to take a few steps back from the self-evident decency of the acts and intentions in this field, to scrutinise the language that frames and sometimes (therefore) channels or redirects them, and to place them within their systemic context, with a view to the 'big picture'.

Some things are easy to miss when working at the coalface, so to speak. It is my hope that the investigation that follows will be read by people working in the field not as an indictment, but as an invitation to a conversation, as an opportunity, or perhaps a provocation, to think a little further into the causes and consequences of a hugely significant enterprise which leaves few in the world untouched today.

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Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

## xxviii ACKNOWLEDGEMENTS

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Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

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Cambridge University Press

978-1-107-00078-0 - Theatre of the Rule of Law: Transnational Legal Intervention in  
Theory and Practice

Stephen Humphreys

Frontmatter

[More information](#)

xxx ACKNOWLEDGEMENTS

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