
Introduction to the *Handbook on the Rule of Law*

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The rule of law is one of the few (global) norms that few if any would go on record as doubting; indeed it is difficult to imagine a world in which the rule of law was rejected and the good life was maintained. This is not to necessarily claim that the rule of law is indispensable, but rather to note that the norm itself has reached the status of a global common sense.¹ This handbook explores the range of ideas and issues that the initially simple sounding term the ‘rule of law’ encompasses; as such it is intended to help readers knowing relatively little about the norm to explore and appreciate the range of debates about what the rule of law is *and* how it might work. Certainly, in jurisprudential writings and legal studies there is a well-established body of literature discussing the rule of law and its political or legal character and/or implications, but these discussions have seldom reached out beyond law’s own (technical) community. The major exception is Lord Bingham’s book on the subject which was published by a trade publisher (Allen Lane/Penguin) and was widely reviewed in the broadsheet and general political news media;² hence later in this introduction we use this as a basis for an inclusive baseline definition of the rule of law to provide readers with a starting point for the varied discussions set out by our contributors.

At the heart of this project is the view that many non-legal researchers, and non-lawyers interested in regulation and/or governance, as well as non-academics working in civil society organisations, and government officials, would value a single volume resource where the range of issues that lie beneath the water of the great rule of law iceberg can be easily accessed. Thus, to be clear, this volume is not intended to tell lawyers much they do not already know, although they may too find the breadth of discussion in a single volume of some use; rather it is for the non-adept who would like to know more about a term that is often deployed as if we all know what it means, but which is seldom stipulated as part of those discussions.

Before we give the floor to our various contributors who we have asked to examine specific issues around the rule of law, in this introduction we will set the scene in a way which we hope will allow those with an interest in, but who perhaps have had little exposure to the debates around the rule of law, to get a clear idea of our starting point. Therefore in the next section we review (albeit relatively briefly) the rhetoric of the rule of law, before then setting out Bingham’s very helpful and inclusive definition of the norm. We then widen this focus to discuss perhaps the most ambitious project to both define and assess the rule of law in the contemporary global system: the World Justice Project’s *Rule*

* All websites live at 23 November 2017.

¹ May, Christopher *The Rule of Law: The Common Sense of Global Politics* Cheltenham: Edward Elgar Publishers, 2014.

² Bingham, Tom *The Rule of Law* London: Allen Lane, 2010.

of Law Index. The final section, while not offering a guide to the chapters, is intended to offer an overview of why we commissioned these particular chapters. We hope this will help readers see how the diverse range of interventions in the subject collected together in this handbook are relevant not only to the issue at hand but to each other.

THE RHETORIC OF THE RULE OF LAW

The rhetoric of the rule of law is particularly pervasive and often deployed in political discussions as a criterion of critical evaluation. A common line of political critique is the negative impact on the rule of law of a particular action, legislative move or continuing political practices: 'doing X undermines the rule of law'. Elsewhere, May has argued that the rule of law has become a ubiquitous common sense appealed to across the political spectrum, but with little agreement on its substantive meaning.³ Indeed, it is not uncommon to find both sides of a dispute claiming the rule of law supports their actions/positions while at the same time arguing the other side is violating the norm. In an attempt to stabilise its meaning some international organisations, most notably the United Nations and the European Union, have sought to assert control over its definition through the deployment of an authoritative 'script' across a range of communicative actions.⁴ This has had some impact in official pronouncements, where official reports' definitions are referenced in subsequent discussions, but the use of the term outside these agencies of global governance remains flexible and indeterminate.

As this might suggest, the popular rhetoric of the rule of law exhibits two opposing tendencies: on the one hand the rule of law is an increasingly ubiquitous political terminology, the term is frequently invoked in the news media, in political discourse, by oppositional pressure groups and in debates about what is wrong with other countries; however, on the other hand there is also a notable lack of discussion of the meaning or definition of the term outside the specialised jurisprudential literature, resulting in it being taken for granted, with the inferred supposition that its (political) meaning is secure. In many ways this central ambiguity underpins its political deployment, it is at once both generally accepted as a normative value (in its rhetorical use) while also covering a wide range of legal settlements which may diverge from each other quite significantly. The term's indeterminacy allows its widespread use while also resulting in its evaluative role remaining contested and limited in practice. One might say it functions both as an invocation of 'civilisation' and as a site of negotiation as regards the character and/or actuality of what it is to be 'civilised'. As Nasser Hussain has argued, the rule of law (in its specifically British form) is intertwined with the racial politics of British colonialism and the *civilising mission* of Empire.⁵ In a less critical manner, popular historian Naill Fergusson once referred to the rule of law (in a triumph of anachronism) as one of the

³ May *The Rule of Law*.

⁴ Taylor, Veronica L. 'Regulatory rule of law' in: P.Drahos (ed.) *Regulatory Theory: Foundations and Applications* Acton: Australian National University Press, 2017: p.398.

⁵ Hussain, Nasser *The Jurisprudence of Emergency: Colonialism and the Rule of Law* Ann Arbor: University of Michigan Press, 2003.

'killer apps' of civilisation.⁶ The rule of law is the route to civilisation, shaping the form of civility established, but at the same time may mask the unequal distribution of its benefits.

While popular politics has little engagement with the jurisprudential debates, the more general notion of the importance of the rule of law has much more salience and has considerable political rhetorical purchase (not least as it is amenable to quite radical simplification). Moreover, this may relate to popular conceptions of what constitutes a country's political character, with many developed states announcing that they abide by the rule of law when contrasting their actions to others'.⁷ Indeed, one aspect of what is sometimes referred to as the *neoliberalisation* of the global political economy is not the abandonment of the rule of law, but rather its shift to an instrumental technology of economic governance, and away from an emphasis on its support for political justice.⁸ The rule of law becomes the terrain over which market-enabled competition between individuals takes place without recourse to wider issues of equality and justice, but is also a badge of the refinement and accomplishments of the modern developed state. In the terms we deploy in the next section, this is to say the rule of law is becoming thinner, but the widespread rule of law talk may depend on thicker implications for its rhetorical strength.

The notion of the rule of law certainly has significant popular currency. For instance, in the trailer for the film of the stage play *Frost/Nixon*, a quote from the original interview of May 19th 1977 was used, and spoken by the actor playing President Nixon: 'When the President does it, that means that it is not illegal.' Clearly intended to be a shock by virtue of David Frost's in-film response, and where it was placed in the trailer, this suggests how widely the norm of the rule of law is valued in opposition to the rule of the individual, or as more commonly put the rule of men. Thus, the norm may be widely accepted, even by those who would probably find it difficult to describe its more formal dimensions. Indeed, as the administration of President Donald Trump has gone from one public dispute to another, the call has often been for the return to the rule of law, with some commentators explicitly linking Trump and Nixon's disregard for the rule of law in the former's recent pronouncements and actions.

Nor should we forget that law and its practices have become a key element in popular culture: US TV series such as *Perry Mason*, *Boston Legal*, *Law & Order*, *The Good Wife*, *Ally McBeal* and *LA Law*,⁹ as well as UK series like *Rumpole of the Bailey*, *North Square*, *Silk*, *Judge John Deed*, *Kavanagh QC* have all aired on primetime TV and have no doubt contributed to the familiarity many have with legal terminology and even legal debates. Indeed in her presidential address to the *Law and Society Association* in Glasgow 1996, Susan Silbey suggested that through such programmes the 'practices and ideals of the law,

⁶ Ferguson, Naill *Civilisation: The Six Ways the West Beat the Rest* London: Allen Lane, 2011.

⁷ Loomis, Andrew Joseph 'Legitimacy norms as change agents: examining the role of the public voice' in: R.Falk, M.Juergensmeyer and V.Popovoski (eds) *Legality and Legitimacy in Global Affairs* Oxford: Oxford University Press, 2012: p.87.

⁸ Brown, Wendy *Undoing the Demos: Neoliberalism's Stealth Revolution* New York: Zone Books, 2015: p.67; here is not the place to explore the debates about neoliberalism, but good discussions can be found in: Brabazon, Honor (2017) (ed.) *Neoliberal Legality: Understanding the role of law in the neoliberal project* Abingdon: Glass House/Routledge, 2017 and Eaglton-Pierce, Matthew *Neoliberalism* (Routledge Key Concepts) London: Routledge, 2016.

⁹ For the top 25 legal TV series as voted for by the American Bar Association see: http://www.abajournal.com/magazine/article/the_25_greatest_legal_tv_shows/ (accessed 5 June 2017).

the history and the fictions, become part of the engagement between social movements and corporate capital in diverse corners of the globe'.¹⁰ If one might doubt the legal impact of TV programmes, Phillippe Sands has identified the role that the Fox TV series *24* played in contributing to the belief that torture was both effective and (legally) acceptable at Guantanamo Bay prison camp. As he makes clear in a number of places in *Torture Team* both military personal and government legal advisers were enthusiastic watchers of *24* and explicitly referred to it in their discussions with Sands about procedures of interrogation at Guantanamo. This is not to claim a direct causal link but as Sands suggests it (de)sensitised various individuals to the illegitimacy of torture, indicating some influence over their views of the (rule of) law.¹¹

Moreover, all this talk of the rule of law has led anthropologists John and Jean Comaroff to observe that it 'is not unusual any more to hear the Euro-language of jurisprudence in the Amazon or Aboriginal Australia. Or among the poor of Mumbai, Madagascar, Cape Town and Trench Town'.¹² In their overview of anthropological studies of governance they find numerous and widely spread examples of the shift of politics into the law, and the use of the idea(s) of the rule of law as a language through which the poor now often articulate their political demands. For instance, in political upheavals around the treatment of the judiciary in Pakistan, Abdullah Freed Khan has noted that across the country in interviews with farmers, workers and others mobilising behind the popular lawyers' movement, the idea of the value of the rule of law had considerable popular currency.¹³ This is also reflected in the reception of the work of Hernando de Soto and the Commission for the Legal Empowerment of the Poor (discussed by Dan Banik in Chapter 25); de Soto's work has been much debated and again has expanded the recognition of the idea of the rule of law in the analysis of development and economic inequality.

To give one further example, and summarising an extended analysis May has published elsewhere, we would also note the growth in the use of the term 'the rule of law', and use of elements of its normative content in the OpEd section of the *Economist* over the last 40 years.¹⁴ *The Economist* is one of the few magazines that can make a reasonable claim to be a global publication, and although it is clearly not part of the 'popular press' it has consistently positioned itself as the journal of record for the global business elite. Indeed, Martha Starr has argued that it seeks to develop for its readers an authoritative view of the globalised economy.¹⁵ *The Economist's* articulation of the rule of law in the twenty

¹⁰ Silbey, Susan S. "'Let Them Eat Cake": Globalization, Postmodern Colonialism, and the possibilities of Justice – 1996 Presidential Address' (1997) 31(2) *Law and Society Review* 207–35, at p.221.

¹¹ Sands, Phillippe *Torture Team: Deception, Cruelty and the Compromise of Law* London: Allen Lane, 2008: pp.73–4; 87–9; 272.

¹² Comaroff, John L. and Comaroff, Jean 'Reflections on the Anthropology of Law, Governance and Sovereignty' in: F.von Benda-Beckman, K.von Benda-Beckman and J.Eckert (eds) *Rule of Law and Laws of Ruling: On the Governance of Law* Farnham: Ashgate, 2009: p.34.

¹³ Khan, Abdullah Freed 'The Pakistani lawyers' movement and the popular currency of judicial power', (2010) 123(7) *Harvard Law Review* 1705–26.

¹⁴ *May Rule of Law*, pp.xx–xxv.

¹⁵ Starr, Martha 'Globalisation in popular media and through *The Economist's* lens:

years either side of 1989 (the end of the Cold War), offers some interesting evidence of the normalisation of the rule of law as a global common sense.

The rule of law may not be central to the concerns of *The Economist* but it is easy to see an expansion of its interest across these 40 years. At the beginning of this 40-year period *The Economist* seemed relatively uninterested in the rule of law, but by the 1990s, there is a shift both in the frequency of discussions of the rule of law, and their focus. Editorials start to make the link between law and development much more explicit and the rule of law is presented as a multidimensional norm, including politics, law and economic aspects. Most obviously, during the 1990s editorials increasingly set out the need for reform in other countries to facilitate their economic development and (re) integration into the international economic system; this is to say for *The Economist* the rule of law has now become a key element of the global political economy. Moreover, while earlier in the period it was felt necessary to (even if briefly) stipulate what the rule of law might be, by the second decade of the new millennium, *The Economist* felt confident of its readers' knowledge to just deploy the term with no attendant definition or elaboration. In presenting the rule of law as a vital component to the contemporary global political economy, *The Economist* has certainly contributed to, and reflected, the move to recognise law as contributing to progress and development; in the last 20 years it slowly normalised its treatment of the rule of law. The editors now just assume you know what they mean when they write the 'rule of law'; they expect readers to have become acclimatised to the rule of law.

However, this appeal to the idea of rule of law is not limited to the (global) political economy; its normative influence spreads much further. In summer 2011 after a controversy regarding the conduct of an English cricketer, James Lawton of the *Independent* entitled his discussion of the day's troubles: 'Rule of Law is trampled on to protect "spirit of the game"'.¹⁶ The discussion did not invoke the norm in any detail, but clearly assumed that the rule of law itself (including the 'laws' of cricket) is an important value to be upheld. Perhaps more in line with normal usage, one also finds much commentary on the disputes among the smaller countries that are seeking to resist Chinese actions in the South China Seas, citing one government or another demanding a return to the (international) rule of law over the sea's many disputed islands. Elsewhere, much of the discussion of recent political developments in Poland and their relation to the country's membership of the European Union have been expressed as issues around the respect for (and violation of) the rule of law.

This is to say, more normally the appeal to the rule of law is focussed on the political realm, whether (in the UK) it was controversy over Archbishop Williams comments on Sharia law (leading to critics invoking the rule of law against such legal pluralism), or complaints about the UK government's suspected complicity in the illegal rendition of terrorist suspects for interrogation. From discussions of the reach of News International's control of the press to the role of twitter in libel cases; from the death of UK nationals

knowledge, representations and power', in D.F. Ruccio (ed.), *Economic Representations: Academic and Everyday*, London: Routledge, 2008: p.35.

¹⁶ Lawton, James 'Rule of Law is trampled on to protect "spirit of the game".' *The Independent* 1st August 2011: [available at: <http://www.independent.co.uk/sport/cricket/james-lawton-rule-of-law-is-trampled-on-to-protect-spirit-of-the-game-2329584.html> (20th July 2016)].

in foreign countries (such as the investigation of the murder of Neil Heywood in China in 2012) to discussions of corporate power, it is seldom long before someone refers to the rule of law as the standard against which behaviour and practices should be judged.

Finally, it is worth noting that the contemporary rhetorical strength of the rule of law articulated and promoted by key international agencies also encourages states to adopt this language or terminology (even if their actions may fall short); to celebrate being a state that *does not* accept the rule of law no longer seems to make much sense. As Shirley Scott and Olivia Ambler observe:

States often demonstrate their acceptance of the ideology of international law by referring in their rhetoric to the 'rule of law'. . . [but this] ideology of international law is integral to the international distribution of power, and hence the rhetorical emphasis that the US has for many decades placed on the importance of the rule of law has served not only to strengthen international law but [also] to reinforce a source of legitimacy on which the US has frequently drawn.¹⁷

The rhetoric may serve different states' governments differently, with some using it to demonstrate an interest and willingness to be seen as part of the 'international community' while more powerful states (most obviously the United States) use the rule of law as a method to legitimate their position.

It is possible that the expansion of the rhetoric of the rule of law is a response to perceived illegality (and its costs) in the now globalised political economy. If 'deviant globalisation' is as widespread as some commentators believe,¹⁸ and criminal activities are integral to the flows and structures of the global political economy,¹⁹ then one response would be for governments to ratchet up the calls for the rule of law globally. This would especially be the case as black markets and illegal activity, centred on morally suspect services and products (drugs and the sex trade) are frequently an adjunct to 'legitimate' globalisation. Of course, in one sense it is the rule of law itself that 'produces' the criminal activity, by establishing the distinction legal/illegal, but its rhetorical use also leaves aside political discussions about the value or otherwise of prohibition or the question of what encourages such activity, to focus on issues of enforcement, security and stability. Here, the rhetoric of the (lack of) rule of law becomes a way of summarising problems in the international system that stem from the ability of criminal actors and organisations to enjoy sanctuary from which they can operate across the global system. The use of the rhetoric of the rule of law to identify the 'lawless' has been an abiding theme of US political development: repeatedly 'lawless others' have been subjected to domination and/or violence in the service of the greater civilising project of manifest destiny.

To a large extent the rhetoric we have briefly discussed in this section is generated and used by the media, and one might regard this as a reflection not so much of social norms as the normative concerns of social elites. While there has been much less work conducted

¹⁷ Scott, Shirley V. and Ambler, Olivia 'Does legality really matter? Accounting for the decline in US foreign policy legitimacy following the 2003 invasion of Iraq' (2007) 13(1) *European Journal of International Relations* 67–87 at pp.72, 74.

¹⁸ See for instance Gilman, Nils, Goldhammer, Jesse and Weber, Steven *Deviant Globalization: Black Market Economy in the 21st Century* New York: Continuum, 2011.

¹⁹ Friman, H Richard (ed.) *Crime and the Global Political Economy* (IPE yearbook Volume 16) Boulder: Lynne Rienner Publishers, 2009.

on the everyday narratives of the rule of law,²⁰ once we have offered an inclusive definition we turn to the World Justice Programme's ambitious and extensive attempt to identify the commitment to, and valuing of the rule of law in wider populations. While this may remain partial it does suggest, a considerable level of non-elite valorisation of the rule of law as the common sense of politics.

AN INCLUSIVE DEFINITION OF THE RULE OF LAW

While accepting that part of the logic of this handbook, as well as the underlying implication of the discussion above is there is no easily established definition of the rule of law that would garner widespread and uncritical support, nevertheless we need to start somewhere a little more specific than the usual invocation of the norm with little contextual discussion. At its most basic we might contrast the rule of law to the rule of men; as Gianluigi Palombella puts it:

law can satisfy the rule of law ideal when 'rule of men' turns out to be legally channelled, up to a point where the ruling power would face some other man made rule and legal institutions sufficiently stable to prevent a monopoly on legal production and contents.²¹

This is to say, individuals mobilising the rule of law, for instance judges or legislators, always at some point abut up to limitations of discretion and action under the rule of law. However, while this distinction would likely generate widespread acquiescence, we also need to go beyond this position if we are to understand the norm in any detail. Therefore, partly due to its life beyond law schools and legal practice, we start with the inclusive notion of the rule of law that Lord Bingham set out in his book of the same name.

The reason we deploy Bingham's depiction of the rule of law is twofold: first, working in an extended tradition that can be traced back a couple of centuries at least, Bingham's work is anchored in the disciplinary discussion that has been subsequently globalised, not least by his work as Lord Chief Justice in the UK; secondly, Bingham's final intervention in these debates explicitly sought to set out his views on the content of the norm of the rule of law for a non-legal, or even a popular audience. As such his definition acts as a good bridge between the legal and the common-sense understandings of the rule of law that this volume is intended to construct.

Tom Bingham did not seek to establish a simple definition of the rule of law but rather to introduce the non-legal reader to the range of issues that are encompassed by the term, and which it is vital for them to understand. To this end he starts his account with a short and schematic history focusing on 12 moments he regards as vital to the development of the rule of law: starting with Magna Carta 1215, and ending with the Universal

²⁰ On the developing approach to everyday narratives in world politics see Stanley, Liam and Jackson, Richard 'Introduction: Everyday narratives in world politics' (2016, special issue) 36(3) *Politics* 223–5.

²¹ Palombella, Gianluigi 'The rule of law as an institutional ideal' in: L.Morlino and G.Palombella (eds) *Rule of Law and Democracy: Inquiries into Internal and External Issues* Leiden: Brill, 2010, at p.10.

Declaration of Human Rights in 1948.²² Unlike Harold Berman, who traced the origins of the norm to the Papal Revolution of the twelfth century,²³ Bingham prefers to keep his history firmly located in the British legal tradition, partly as recognition of the central rhetorical role of A. V. Dicey.²⁴ Bingham's is not so much the history of the norm itself, but an account of its ascendance to a central ideal of (British) liberal politics (which is also discussed at length in John Allison's chapters in Part II). Nevertheless the key point here is that the rule of law only really makes sense as a norm if it retains a significant historical continuity, even as it has developed as a norm. This 'enduring continuity with its own past' as Palombella argues, acts as a buttress against any 'alleged coincidence with the exclusive substance of one contemporary ideology' be it liberal or otherwise.²⁵ This is to say, while the rule of law has its own (varied and multiple) history it must also be understood as politically transcendent; a (now) global norm.

Bingham sets out a range of issues that together can be said to constitute the rule of law as such a global norm. In a series of short chapters he proposes eight key components of the rule of law which he regards as making up a rounded or inclusive understanding of the idea or norm:

1. 'The law must be accessible and so far as possible intelligible, clear and predictable.' We can hardly expect law-abiding behaviour if it is impossible for those so governed to ascertain what the law actually is.²⁶
2. 'Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.' This is not to argue that there can be no discretion, only that any discretion must be exercised within the bounds of the law; no decisions should be arbitrary and without recourse to some law or another.²⁷
3. 'The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.' All must be equal before the law, with no distinction between, for instance the rich and the poor, the weak and the powerful. Where the law distinguishes responsibility by age, there may be some reason to treat people differently, but only when these differences are 'objective' and not social, political, or economic (most importantly he is arguing against discrimination by race and gender).²⁸
4. 'Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the power were conferred, without exceeding the limits of such powers and not unreasonably.' This is intended to underpin judicial review, so that the state can be held accountable to the laws Parliament has enacted and does not go beyond that democratically grounded intent.²⁹

²² Bingham *Rule of Law*, pp.10–33.

²³ Berman, Harold J. *Law and Revolution: The Formation of the Western Legal Tradition* Cambridge, Mass: Harvard University Press, 1983: pp.94–9.

²⁴ Bingham, *Rule of Law*: pp.2–5.

²⁵ Palombella, 'The Rule of Law as an Institutional Ideal': pp.17–18.

²⁶ Bingham *Rule of Law*, pp.37–47.

²⁷ *Ibid.*, pp.48–54.

²⁸ *Ibid.*, pp.55–9.

²⁹ Bingham *Rule of Law*, pp.60–65.

Up until this point Bingham's elements are essentially procedural; requiring little or no judgement of the content of the law, they are compatible with a thin depiction of the norm. This sort of thin definition is often preferred by those who wish to ensure the law is uncontaminated by politics (or social norms) and can reflect the common legal grounds of a diverse range of societies. Even the invocation of objective differences under point three can hardly be said to be normative towards a liberal sense of equality, as 'objective' differences are often in the eye of the (political) beholder; for instance racists see differences between ethnicities as objective. These elements can often be differently ordered: to take one example, Postema puts Bingham's fourth element right at the centre of his depiction of the rule of law, making accountability (understood as a reciprocal recognition of the law by rulers and ruled) a vital and necessary element of the rule of law.³⁰ The next four elements of his depiction move Bingham firmly towards a more substantive or thicker reading of the rule of law.

5. 'The law must afford adequate attention to fundamental human rights.' Bingham explicitly rejects the thin reading of the rule of law, spending some time exploring various articles of the European Convention on Human Rights. For Bingham, the rule of law cannot be said to obtain where the procedures of law explicitly are intended to underpin injustice.³¹
6. 'Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.' This extends the point about accessibility; if effective representation is blocked by costs to all but wealthy defendants then the law is not treating all equally. He offers a clear defence of legal aid and expeditious legal process as crucial to the maintenance of the rule of law. Given questions about the impact of economic inequality and the measures needed to ameliorate these difficulties, this element reflects a political position about the good society which evokes issues of extra-legal inequality.³²
7. 'Adjudicative procedures provided by the state should be fair.' The judiciary and legal profession must be independent of the state, allowing both sides (prosecution and defence) a fair trial. The defendant must know the charges against him or her and be able to properly interrogate the evidence. Given this requires a judgement about political organisation rather than the procedures of the law itself, again this might be regarded as a thicker reading of the rule of law.³³
8. 'The rule of law requires compliance by the state with its obligations in international law as in national law.' Here, Bingham expands his purview from the previously essentially domestic orientation of his discussion to argue that the state's obligations do not end with its own law, but rather extend to the realm of global politics. This includes his invocation of human rights, but also the rules of war and other international regulatory arrangements. Bingham does not recognise a moral difference between politics inside and outside the state.³⁴

³⁰ Postema, Gerald J. 'Law's Ethos: Reflections on a Public Practice of Illegality' (August 2010) 90 *Boston University Law Review* 1847–68.

³¹ Bingham *Rule of Law*, pp.66–84.

³² *Ibid.*, pp.85–9.

³³ *Ibid.*, pp.90–109.

³⁴ *Ibid.*, pp.110–29.

The discussion of these elements of the rule of law is intended to demonstrate that the norm itself is multifaceted but also that for Bingham merely recognising procedural norms should not be sufficient for any state to be accorded the recognition of being governed by the rule of law. More generally, any particular claim that the rule of law obtains in a particular socio-political context might be best understood as sitting on a continuum which runs from the thinnest view of the rule of law one might imagine (a series of legal procedures largely, but not completely shorn of any normative content) to the thickest view (where social justice, equality and claims of specific social value are encompassed by the law). The movement between these two nodes might be regarded as starting at the thinnest end with merely a normative concern for order, and with further norms added to legal instruments as the position moved toward the thicker end. As this reveals there are a wide range of positions along this continuum that might be regarded legitimately as reflecting the rule of law.

However, despite the relative complexity hiding behind the simple term ‘the rule of law’ the epistemic community of lawyers (a community of practice that has promoted the notion of legality across the various fora of global politics) has established the rule of law as a multipurpose and non-political social technology.³⁵ The world view of law, or perhaps the grammar of the rule of law,³⁶ reflects socialisation into the rule of law as a common sense of global politics. That this common sense is inclusive, multifaceted and indeterminate creates a range of issues that are discussed in various chapters in this handbook. More immediately it also raises a question of assessing when and where the rule of law might exist (or not exist).

THE RULE OF LAW, MEASUREMENT, AND THE RULE OF LAW INDEX

One might assume that given the manner in which the rule of law is so often utilised in political discussions as an evaluative norm, there would be a relatively consensual way of measuring its existence or extent. However, this is not the case; there are many ways of trying to measure the rule of law (as Tom Ginsburg will discuss in Chapter 3), but none have reached anything like the general level of acceptance that other social measures have achieved. In this section we briefly introduce one important and developing project to establish a global measure of the incidence of the rule of law.

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so . . . *but I know it when I see it.* . . .

If only Supreme Court Justice Potter Stewart’s admonition for quantifying obscenity in *Jacobellis vs Ohio*³⁷ was enough to satisfy our need to recognise and measure the rule of

³⁵ *May Rule of Law*, p.72.

³⁶ D’Aspermont, *Jean Epistemic Forces in International Law* Cheltenham: Edward Elgar, 2015: p.10.

³⁷ *Jacobelli vs Ohio* <https://supreme.justia.com/cases/federal/us/378/184/case.html> (20th November 2017).

law. Certainly, it is clear that researchers desire ever more accurate data on the rule of law, not least to allow comparison and commentary as well as underpinning further theories of what the rule of law's social role might plausibly encompass.

Fortunately, the rule of law (or at least its constituent parts) lends itself easily to quantification, as long as we are addressing what is commonly referred to as the 'thin version' of the rule of law.³⁸ As Jørgen Møller notes in Chapter 1, taking the principles of Joseph Raz or Lon Fuller regarding formal legality, one might say the core of the rule of law can be easily quantified.³⁹ The number of judges per capita could give a clear numeric value to a question about the amount of access to justice. We might say the percentage of cases returned on appeal and subsequently overturned by higher courts provides an indication of the levels and effectiveness of the judiciary's independence. Determining whether laws are proscriptive, clear, and well promulgated is an exercise in quantification, related to textual assessment and coding, with little subjective input, as results based on accepted modes of clarity and inclusivity can be simply counted and tabulated.

However, as the definitions of the rule of law begin to incorporate 'thicker' and more substantial versions,⁴⁰ with more constituent parts, then the possibility of measurement becomes fuzzier as the perspective shifts from aspects one might regard as objective to those that are clearly subjective. Measuring a country's human rights performance or the participation of the population in the civic or political spheres is not the same (or as simple) as counting how many judges or lawyers a country may have registered. Certainly, the thin view allows a relatively accurate snapshot of a country's formal and legalistic parameters, of potential use to those legal/lawyer based-civil society organisations of various sorts in the field of promoting and advising on formal legal practice and organisation. However, the accuracy and meaningfulness of an assessment of a thicker set of normative elements generally degrades as attempts to codify and quantify the subjective aspects of interest to social scientists are added to the range of metrics being assembled.

Therefore, the conundrum is that the thin perspective offers the most accurate accounting in formal terms but fails to really measure what is of most interest to political and social scientists. When those parameters are inputted the results become less reliable, more open to interpretation, and more vague which is exactly what most researchers and analysts are seeking to avoid with any measurement tool. However, a decade ago, the World Justice Project (WJP),⁴¹ offered the tantalising prospect of producing a more definitive and authoritative measure of rule of law outcomes across the globe.

Prior to the *Rule of Law Index* (and just before the 'rule of law' became an important element of the political zeitgeist), one could find the rule of law's constituent parts measured or quantified, but spread across various published indices leaving one to, in effect, aggregate one's own 'snapshot' of a country's rule of law situation. Researchers and analysts could and did refer to; Transparency International's *Corruption Index*⁴² to gauge corruption; the World Bank's *Ease of Doing Business Index*⁴³ to measure regulatory and

³⁸ This volume. Chapter 1.

³⁹ Ibid.

⁴⁰ This volume. Chapter 2.

⁴¹ <https://worldjusticeproject.org/>.

⁴² <https://www.transparency.org/country>.

⁴³ Ibid.

administrative efficiency in the protection of property rights; the World Bank's *Worldwide Governance Indicators*⁴⁴ to quantify government accountability, political stability, and the effectiveness of civil society; Freedom House's *Freedom in the World Reports*⁴⁵ to include press freedoms; and the Economist Intelligence Unit's *Democracy Index*⁴⁶ for a measure of a country's democratic mien. Armed with this data (and a general knowledge of international current affairs) the analyst could assemble a relatively robust overview of a country's health in factors pertaining to the rule of law.

Even though this method allowed anyone to parse the data to include rule of law factors they deemed more important or noteworthy, it remained an inefficient and overly cumbersome method. Reflecting the well-known difficulty of this assembling to produce comparable data, the WJP developed its flagship report: *The Rule of Law Index* (of which a bold claim to definitive authority is included in its very title).⁴⁷ *The Rule of Law Index* is an annual offering based on two separate but connected questionnaire surveys, one for the general population and another for a country's 'experts' (lawyers, legal professionals, judges, academics).⁴⁸ The Index considers 44 measurable indicators based on eight broader themes of:

- *Constraints on government power*
Assessing constitutional and institutional, formal and informal checks on government power, whether that is by law or convention, in order to measure the extent to which those that govern are subject to the same laws as the populace.
- *Absence of corruption*
Assessing the occurrence of bribery, influence peddling, or the misappropriation of government funds, to measure levels of corruption in the Executive, the Legislature, the Judiciary, or in Law enforcement.
- *Open government*
Assessing the quality of the information the government makes public, the right to that information, the civic participation that information engenders, and the mechanisms in place to petition of complain to the government so as to measure the empowerment of the population in civic participatory action and policy deliberations.
- *Fundamental rights*
Assessing the individual's right to life and liberty, the security of the person, access to due process free from discrimination, and the guarantee of the rights to freedom, privacy, association, faith, and expression so as to determine that a limited core of basic human rights are being guaranteed by the government.

⁴⁴ <https://data.worldbank.org/data-catalog/worldwide-governance-indicators>.

⁴⁵ <https://freedomhouse.org/report/freedom-press/freedom-press-2016>.

⁴⁶ <https://www.eiu.com/topic/democracy-index>.

⁴⁷ <https://worldjusticeproject.org/our-work/wjp-rule-law-index>.

⁴⁸ It should be noted for sake of disclosure that both editors of this volume have been contributors to the *Rule of Law Index* (although with differing opinions regarding its efficacy and utility).

- *Order and security*
Assessing the absence of civil strife and the control of crime, as well as the redress of grievances through formal channels rather than direct personal action or violence, so as to measure the effectiveness of the government's action in securing both persons and their property.
- *Regulatory enforcement*
Assessing the enforcement of government regulation and the speed and quality of administrative action and redress so as to measure the extent to which both legal and administrative regulations are fairly applied.
- *Civil justice*
Assessing whether the access to and outcomes of civil justice are timely, affordable, enforceable, impartial, and effective so as to measure whether the system in place facilitates the peaceful and effective resolution of grievances by the ordinary population.
- *Criminal justice*
Assessing if the criminal, investigative, and correctional facets of the justice system are effective, timely, and result in a reduction of criminal behaviour while being impartial, incorrupt, and respecting due process so as to measure and evaluate the criminal justice system as the conventional mechanism to redress grievances and promote the security of the person and property.

Like any attempt at definition and measurement, *the Rule of Law Index's* utility is defined by the indicators that have been included and those which have been excluded. It is the marquee product of the WJP and as such reflects their desire to create the most authoritative and expansive index possible without sacrificing inclusiveness and usefulness; too narrow a focus (aligned with a 'thin' view) retards the utility of the Index to political and social scientists; while a focus more in line with the thicker view and reflecting the western liberal model (including expansive human rights or democracy) may alienate certain illiberal or undemocratic countries which would limit any claim of the Index being truly representative as a global instrument of measurement. It is beyond the scope of this short introduction to make an assessment as to whether the WJP has succeeded in balancing these concerns and any political discussion of the success or otherwise of the project will reflect these concerns as its time-series data becomes more potentially useful in assessing changes in the global incidence of the rule of law.

Unsurprisingly, *the Rule of Law Index* is a reflection of its particular 'parentage' inasmuch as the WJP's genesis is solidly located in the legal tradition, being the philanthropic brainchild of former President of the American Bar Association and Lead Counsel at Microsoft; William Neukom. However, there would be limited utility and authority if the Index simply measured and reported on the formal and technical legal conditions on the ground. To be relevant to a much broader audience the *Rule of Law Index* had to reflect broader expectations, not just of the political and social sciences but of a general (Western) population who would consider it irreconcilable that in quantifying the rule of law, themes such as social justice and human rights were not included and accounted for.

The WJP has therefore developed a definition of the rule of law which is then reflected in the *Rule of Law Index*. This definition is an aggregate of what the WJP considers to be four separate and universal principles:

1. *Accountability*

The government and private actors are both equally accountable under the law;

2. *Just laws*

The laws are clear, publicised, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights;

3. *Open government*

The processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient;

4. *Accessible and impartial dispute resolution*

Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.

It is interesting to note that of these four universal principles that the WJP identifies as being their categorical definition of what constitutes the rule of law, only one (*Just laws*) can be regarded as being from the normative 'thick' end of the spectrum, while three are more representative of the thin formalistic and legalist view, and even that inclusion has been qualified.⁴⁹

In the end, how the WJP decided which indicators it uses and which it ignores is not readily apparent nor explained, but given the range of debates about the rule of law, all such decisions possess some degree of arbitrariness. We can be sure there are robust technical reasons that human rights or democracy don't figure more as constituent parts of the *Rule of Law Index*, not least as there are already indices which purport to quantify the human rights performance or levels of democratic efficacy within states. However, taken to a logical conclusion, such a position would see the *Rule of Law Index* reduced to measuring just the thin and legalistic account of a country's rule of law performance, rather than the broader, more authoritative index that the WJP clearly envisage as its major contribution (and unique proposition). This leads to the question: why *does* the WJP include only a limited accounting of some fundamental human rights but not others, and why ignore democracy altogether as a category, preferring instead to measure *civic participation* as an indicator under the rubric of *Open Government* which seems to measure what democracy would entail without actually calling it 'democracy'?⁵⁰

As the terminology of the rule of law has escaped the technical realms of, first, the legal profession, and then the political and social sciences, it has entered the consciousness of both political actors and increasingly (via the media) what we might term global civil society. Should there be a corresponding shift in what a rule of law index purports to measure? Politicians and the media utilise the term 'rule of law' as, if not interchangeable

⁴⁹ <https://worldjusticeproject.org/our-work/wjp-rule-law-index>.

⁵⁰ *Ibid.*

with democracy, at least as a permanent adjunct, indivisible from its ideals with the UN having declared: ‘human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations’.⁵¹ So should the *Rule of Law Index* with its authoritative and definitive title, reflect what we the end-users consider the rule of law to mean rather than what the WJP think it should mean? In other words, does the *Rule of Law Index* distort, to an unquantifiable and thus unacceptable degree, the value of its time series data and extensive perception-based global research?

The Rule of Law Index is certainly imperfect and even the authors gave a nod to this when they noted that:

... the findings should be interpreted in light of certain inherent limitations.

While the Index is helpful in taking the ‘temperature’ of the rule of law in the countries under study, it does not provide a full diagnosis or dictate concrete priorities for action.⁵²

Whether it is the indicators selected or ignored, the ‘inherent limitations’ of canvassing entire countries and condensing the qualitative data into quantitative form, or the reductionism of distilling these reams of country data into a single numerical rank, any approach to such a global task will be flawed. What may be of greater importance is the divide between the potential end-users: there are those who believe that it is better to have some data produced (regardless of the flaws) and then there are those who feel the unavoidable flaws (which often cannot be fully accounted for) mean that any results from such data would be too unreliable to draw meaningful conclusions. In the end, for readers of this volume, the best thing is to examine the Index yourself and make of it what you will.

Perhaps in the end this is a question of the utility, not just of the *Rule of Law Index* but of measurement indices in general; on one side, there are academics and researchers who value the data and time-series which can underpin analysis, the development of models and theories of the rule of law and can help the development of publications (as we know required within the academy). On the other side are the practitioners and professionals ‘in the field’, who may be less forgiving of flawed or generalised data, especially when the use of such metrics to compare national projects and programmes would have tangible, real world effects on real communities and people. Here, we merely note that in the realm of the rule of law the WJP’s index, with all its flaws represents the most detailed attempt to provide a level of data, information and assessment that would be required if the assertions tied up with the rule of law’s common sense invocation are to be assessed fully.

A (VERY BRIEF) GUIDE TO THE FOLLOWING SECTIONS/ CHAPTERS

As will be clear to the reader of this handbook the chapters we have commissioned take a range of approaches to the rule of law and its connection with various (global) political

⁵¹ <https://unchronicle.un.org/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices>.

⁵² https://worldjusticeproject.org/sites/default/files/documents/WJP_Rule_of_Law_Index_2011_Report.pdf p.2.

issues. Broadly speaking our contributors have either approached the rule of law from below (via detailed cases studies of specific examples of how the norm has played out) or from above, seeking to establish the analytical place of the norm in a particular set of legal and/or political issues. The important point is that there is no definite way of interrogating the rule of law; when choosing one or other of the various approaches deployed by our contributors, the reader needs to be aware of, and factor in the insights from the other slices through the subject. Thus, the point of this volume is to help the (relatively) new researcher interested in the rule of law to find a range of approaches in one place. Thus, here we do not detail the arguments of each of our contributors in turn, but rather briefly set out the logic of the organisation of the volume as a way of suggesting different routes through the handbook.

In our first section we offer a range of approaches to defining the rule of law. Above we have already offered what we have called an inclusive definition of the rule of law drawn from the work of the late Lord Bingham, but in this first section we essentially muddy the waters somewhat, but this is purposeful. Having offered some conceptual *terra firma* in this introduction, the first section suggests that really there is much less that is fixed about the idea of the rule of the law. Our contributors take a series of slices through the subject, and the section is completed by Antje Wiener's contextualisation of the rule of law 'problem' in the wider field of norms research. This first section will help those new to the debates about the rule of law get a feel for the contours and scope of these debates, and perhaps most importantly offers a set of resources that will allow a definition to be stipulated for particular and specific uses as required by any researcher seeking to develop their own work on the rule of law.

This process of contextualisation is then taken up in the second section where the history of the development of the norm of the rule of law is explored and revealed. These four chapters are not intended to provide an established, singular and consensual story of the rule of law, but rather, again, are intended to stress that as a norm even its history is far from certain or even fixed. That the rule of law has a history, that it is a social and political artefact is clear, and in these four chapters (including some important new analyses by John Allison that we are privileged to have been able to include here), the contested contours and shifting histories are laid out for readers to assess and respond to in their own work. In some senses the history of the rule of law is a history of forms of institutionalisation and so in the next section we move to examine through six very differently focused chapters, how the rule of law interacts with a number of important institutions from global governance to the epistemic communities of law and legal education. Here we hope that our readers' understanding of the rule of law will be enhanced by an appreciation of its various and varying institutional politics.

In the last two sections we present a wide range of studies in which our contributors both offer a a series of contexts within which we can appreciate the impact of the rule of law and some case studies that allow us to push the possibilities of analysing the rule of law in a number of different directions. Overall these last two sections map out the terrain over which much debate on the rule of law travels. Our intent in commissioning these studies has been both to collect together some innovative and interesting research on the rule of law and to demonstrate the various ways that rule of law research intersects with other areas of social, political and economic research.

To be clear, we do not intend this volume to be read through in the order the chapters are presented, rather the handbook is a resource for thinking about the contemporary rule of law in different and contrasting ways. Surfing the index, dipping into chapters that seem particularly salient at the time, we hope readers of these compelling contributions will come away from the volume each time they open it with both useful insights and ideas for pushing their own research into the rule of law in interesting and innovative directions. This research handbook is not intended to present the last word on the rule of law, but instead is intended to help scholars, researchers, analysts, commentators, and activists to both appreciate the centrality of the rule of law as a common sense of (global) politics to our everyday lives and political selves, and to understand its continuing indeterminacy and contested character.

