Reflections on C[3] series – # 2 Approaching Law

What is law? The question is deceptive because most people believe the answer seems obvious. And that answer quickly leads to the notion that 'rule of law' is above reproach and beyond question. When George W. Bush declared that the West was going to invade Iraq for the second time, he did so partly on the basis that it was to protect the 'rule of law' (and democracy), and yet history has put us in a position to be able to see that this was far from being the case. But what is the case?

The phrase 'rule of law' seems to imply that legal justifications made in courts and by governments are somehow politically neutral. The domain of criminology provides a real-world foundation for looking at these issues which, in law schools, come under the banner of legal theory or jurisprudence. So, what in the world is law?

For a long time, and despite good sociological reasons for not doing so, I unthinkingly participated in repetition of the lazy trope that 'police ought to be accountable to the rule of law'.[1] That came to an end in 2007 after I was invited to present a paper on transnational organized crime and policing at Shandong University Law School. In advance of it, I shared my paper with a Mandarin-speaking colleague who was a regional specialist. My friend pointed out a terminological pitfall in using the phrase of 'rule of law'. Since I did not speak Chinese and my presentation would be rendered to the audience by a simultaneous translator, I was told to be aware that the phrase 'rule by law' would probably be inserted in its place. Ah, that's not quite what I mean to say. After long thought, I came to distinguish between the ideas 'rule of law', 'rule by law' and 'rule with law'.[2] According to the later formulation, law is always a tool in the hands of knowing social actors. Politically conservative legal theorists in the United States today recognize legal practice as 'lawfare', a neologism combining the words law and warfare. Clearly, law and conflict are inextricably intertwined, and therefore the point ought to be how best to ensure all protagonists have equal access to the instruments of legal battle.

In *Conflict, Crime and Criminology* a theory of rule with law is implied, and in one chapter (concerning human rights) it is explicitly engaged. Throughout the book it is demonstrated that recourse to law is politics by other means. The book shows how political and cultural conflict involving moral entrepreneurs established legal rules concerning, among other things, the criminalization of psychoactive drugs and gender-based violence. The architecture of law is manufactured by legal engineers. Legal power tools are means to manage the politics of social conflict. People use legal methods to get things done in social organizational and institutional contexts. *Conflict, Crime and Criminology* demonstrates the discretionary use of legal tools by police agents and other government officials, showing that law practically comes into being only when it is a tool used by people securing some perceived interest in the context of conflict.

Courtroom activity and judicial decision-making is the acting out and attempted resolution of conflict. Law never told anyone to do anything, as the phrase 'rule of law' implies, and it is not neutral since it is ridiculous to speak of neutrality in the absence of neutral consequences. The phrase 'rule of law' is an obfuscation masking the power struggles and conflicts of social ordering wherein the maintenance of hierarchies of domination must be ensured or risk the possibility that the social edifice that makes rule *with* law possible comes crashing down.

Rule with law is not arbitrary, since it is confined to actions that legal tools have to offer, and it is preferable to lawlessness. The rule with law concept draws attention to the paradoxical effects of counter-law, that is when law is used against law. The enforcement of social order in a rule with law system is a conflicted process that involves the use of criminal, administrative and civil laws by which social networks consisting of watching watched watchers locked in conflict are the bearers of their own, and each other's, control.[3]

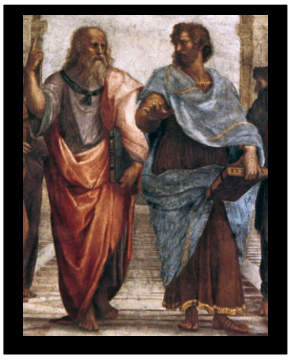
Concepts like law, justice and fairness are essentially contested. That is, their meanings are contingent, are never absolute, and always subject to intellectual conflict. Similarly, since human rights are values, not facts, that concept is also essentially contestable. Following W.B. Gallie, recognition that a given concept is essentially contested allows that rival uses of it (such as oneself repudiates) are not only likely and logically possible but are also of permanent potential critical value to one's own interpretation of the concept in question.[4]

The danger in politics at the present time is that that terms like law, justice, fairness and human rights have become not essentially contested, but radically confused. In the not-too-distant past conflicts surrounding the terms of political discourse were conducted by participants who shared a common background of assumptions, what Wittgenstein called a 'form of life', that shaped the conditions of possibility of disagreement. In the form of life Zygmunt Bauman called liquid modernity, political rivals regard their opponents' language to be, quoting Gallie, "anathema, perverse, bestial or lunatic" and social conflict looks like it could tip over into outright lawlessness.

Where there is conflict, there is power. Where there is power there is control. Where there is control, there is criminality. Since legal power tools are instruments of control, the domain of criminology – including within it the study of policing political conflict, rioting and social dissensus – offers a useful vantage point from which to look at law and legal practice in the world. From in, one can see, for example, war criminals appealing to law in the fight for their position.

Law is rooted in ancient history, since civilization cannot exist without it. The Code of Hammurabi (*circa*, 1750 BCE), classical Chinese legalism of the *fa* tradition (*circa* 450 BCE), and the Edicts of Ashoka (*circa* 250 BCE), are all different from each other but nonetheless can all be characterized as rule *by* law. Law in this sense is, as the early modern British legal scholar John Austin defined it, 'the command of the sovereign'. In these traditions, all power resides in, and emanates from, the sovereign ruler who alone is responsible for maintaining and adjudicating the order and harmony of society.

The Athenians were among the first peoples of the ancient world to adapt customary traditions into a recognizable form of rule with law. Historical legend has it that sometime around 620 BCE feuding among the aristocratic clans and between classes had brought Athens into circumstances approaching anarchy. So bloody was the interminable conflict that the high born appointed one among their number to be Archon and, in that capacity, he formulated a set of written laws available to all literate citizens. These are sometimes said to be the first written constitution. Drako's code was famously bloody, hence the modern word Draconian, and the obvious purpose of the laws was to terrify people into compliance with them. Among Drako's conceptual innovations was one that drew a distinction between murder and manslaughter. But, because his laws were so Draconian, they fell into disuse. Solon, 'the lawgiver', became Archon under similar circumstances around 594 BCE. He repealed Drako's code and instituted new laws. Among them were ones that standardized weights and measures and others that established a set of rules so that legal decisions could be appealed to higher courts. Solon's written constitution provided a set of legal tools available to all literate people, whether high or low born and, although his laws solemnized class differences and power differentials (and slavery), they nevertheless allowed citizens to govern themselves and each other. Legend has it that, after completing his reforms of the political order of ancient Athens by creating a legal order that balanced the interests of competing groups, Solon surrendered his authority and went travelling around the Mediterranean world so that he could not be pressured into changing the legal system or interfering in the social order it was used to maintain. He left the citizens of Athens to rule themselves with law.



The ancient history regarding the genesis of legal order is, of course, much more complicated than such a brief consideration can relay. The political evolution of law and legality is marked by social conflict, war and civil war. It is not the product of 'great men' acting on society. By the time Aristotle anatomized the variety of political constitutional forms in the *Politics* (*circa* 350 BCE) the city-states of the Mediterranean world had been experimenting with different types of government – ranging from kingship and Tyranny, to oligarchic Timocracy, to proto-democracy – for more than three centuries.

When the Whig jurist and constitutional theorist Albert Venn Dicey published his *Introduction to the Study of Law and the Constitution* in 1885 – propounding principles that established the British Parliament as sovereign, constitutional conventions that esteemed the separation of powers, and the 'rule of law' idea – he did so by drawing on Aristotle and the ancients and synthesizing their thought with British common law traditions. His appealing notion of the 'rule of law' was a linguistic translation from ancient sources, and it was appealing to a social order in which a rising bourgeois class, in competition for power with an already established aristocratic one, along with a dominated working class, were altogether conflicted and yet conspiring in a global project of colonial and imperial domination. The 'rule of law' idea conferred legitimacy and an appearance of political neutrality in the governance of a domineering, highly iniquitous, hugely competitive, conflicted and violent system of social ordering, ultimately based on theft and conquest, and intent on ruling *with* law. Perhaps Dicey's articulation of the 'rule of law', which was said to have been borrowed directly from the ancient authoritative source of Aristotle's *Politics*, involved a similar trick of translation my Chinese colleague warned me about in 2007.

A consistent theme in *Conflict, Crime and Criminology* is that too much thinking in the social science disciplines suffers from chronocentrism, an intellectual pathology which neglects the past. The aim is to inspire bigger and broader thinking in the reader concerning the relationship between power and control, and how the resulting political, social and cultural conflicts create conditions of which criminality is symptomatic, and in which legal power tools are instrumental. Undeniably, the domain of criminology offers an important vantage point for looking at law in the world.

Another theme it explores is the palpable authoritarian drift towards a post-democratic, oligarchic, techno-society termed Technopoly. One of the aims is to promote dialogue about the role of rules and the part played by legal fictions in managing relations of cultural, social and political conflict. The plurality of legalisms available in global society is a register of conflict and a recipe for criminality. It is by no means the final word, but it provides an interdisciplinary approach that readers might draw on in furthering their quest for insight and knowledge. I hope you read the book.

Read more from James Sheptycki:
https://thereluctantcriminologist.wordpress.com

[1] See for example: Cotterrell, Roger (1992) *The Sociology of Law; An Introduction,* London: Butterworths; Ericson, Richard V. (1983) *The Constitution of Legal Inequality; The 1983 John Porter Memorial Lecture,* Ottawa: Carleton University Press

[2] Sheptycki, James and Bowling, Ben (2015) 'Global Policing and Transnational Rule with Law' *Transnational Legal Theory,* Vol. 6 No. 1, pp. 141-173

[3] Ericson, Richard, V. (2007) *Crime in an Insecure World*, Cambridge: Polity

[4] Gallie, W.B. (1955) 'Essentially Contested Concepts' *Proceedings of the Aristotelian Society* Vol 56, pp. 167-198