

BOOK REVIEW

“THE RULE OF LAW”

***Tom Bingham* (Allen Lane, London 2010) 224 pp
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Writing this piece, in the aftermath of the worst civil unrest to have afflicted our major cities in a generation, I am struck by how infrequently “the rule of law” has been invoked by those who have spoken out in condemnation of the violence. In that respect, the riots of 2011 stand in marked contrast to those of 1985 and 1990, following the miners’ strike and the introduction of the controversial “poll tax” respectively, when politicians (for whom, evidently, the term was little more than a synonym for “law and order”) seemed to be falling over each other to assert that “the rule of law must prevail”.

In some ways, this is surprising, since it is not easy to attribute any obvious political motivation to the majority of the 2011 rioters, as compared with their 1985 and 1990 counterparts. Perhaps, so soon after the “Arab Spring”—supported as it was by most Western democracies—such simplistic usage of the term is no longer tenable, even on the part of politicians. It would be nice to think so—indeed, it would be nice to think that, finally, there is recognition amongst the political classes of something that lawyers have known for generations, namely that despite—or possibly because of—the fact that “the rule of law” means different things to different people and is in consequence difficult to define succinctly, it cannot, nor should it, be reduced to a “soundbite”.

The receptive reader of Tom Bingham’s incisive essay would, I am sure, share that recognition and, quite possibly, conclude—like Bingham himself—that despite the difficulties described above, the rule of law continues to be “...one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal religion”.¹ Thus, whilst the rule of law might remain an ideal, it is “...an ideal worth striving for, in the interests of good government and peace, at home and in the world at large.”²

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¹ P 174.

² Ibid.

An ideal, perhaps, but as Bingham points out, the rule of law has in fact been explicitly recognised in a recent – and, constitutionally speaking, very important – British statute. Section 1 of the Constitutional Reform Act of 2005 provides that the Act “...does not affect (a) the existing constitutional principle of the rule of law; or (b) the Lord Chancellor’s existing constitutional role in relation to that principle.” Furthermore, section 17(1) requires the Lord Chancellor, on taking office, to swear to respect the rule of law and defend the independence of the judiciary (which many, of course – including Bingham – have argued is itself a feature of the rule of law or, at the very least, a precondition for its effective existence). Thus, Bingham (quite reasonably) suggests, “the rule of law” must *mean* something. And it is that meaning which he seeks to explore in this concise, but informative and provocative essay.

The Rule of Law runs to 12 chapters, followed by a brief Epilogue. These are assigned, in turn, to three parts of differing length, with chapters 1 and 2 (“The Importance of the Rule of Law” and “Some History” respectively) forming Part 1, which sets the scene. In chapter 2, for instance, Bingham suggests that, whilst not necessarily mentioning the concept by name, a succession of statutes and other “milestones” (as he describes them) have had, as their basis, one or another of the fundamental principles of which the rule of law consists: thus, the rule of law had in fact received a degree of “formal” recognition long before the Constitutional Reform Act was passed. These “milestones” include Magna Carta, the Bill of Rights, Habeas Corpus, the abolition of torture and associated legislation, the Petition of Right and the US Constitution, as well as the International Declaration of Human Rights (in which, mention of the rule of law is explicit: as the preamble puts it “...it is essential... that human rights should be protected by the rule of law”).

In Part 2 (Chapters 3 to 10), Bingham expands on the meaning of the rule of law and whilst (perhaps somewhat unfashionably) he takes the analysis of Professor AV Dicey³ as an important starting point (that analysis is itself admirably summarised in Chapter 1), he follows the approach of that other well-known protagonist, Professor Joseph Raz, in proposing eight principles.⁴ Several – but not all – of these (“The Accessibility of the Law”, for example, which is discussed in Chapter 3) correspond broadly with one or another of Raz’s principles. However, he also weaves Dicey’s three-fold analysis into his narrative. This he does both explicitly (by including the principles of “Law not Discretion” in Chapter 4 and “Equality before the Law”, in Chapter 5) and implicitly. Perhaps unsurprisingly, for someone who has held, at one time or

³ A V Dicey *An Introduction to the Study of the Law of the Constitution* (McMillan, 9th edn, 1945).

⁴ Joseph Raz “The Rule of Law and its Virtue” in J Raz *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1997).

BOOK REVIEW

another, all of the most senior judicial offices in the land, he shares much of Dicey's confidence in the Common Law (at least as broadly understood) as an effective vehicle for the rule of law, but he is less wary than his predecessor of provision in other jurisdictions, including international law. Thus, the other principles explored in this part of the book (Chapters 6 – 10) involve “The Exercise of Power”; “Human Rights”; “Dispute Resolution”; “A Fair Trial” and “The Rule of Law in the International Legal Order”.

Part 3 of the book contains something of a surprise, at least as far as programming is concerned. As well as a (predictable) chapter on “The Rule of Law and the Sovereignty of Parliament” (which, though both considered to be fundamental, have frequently been described as “uneasy bedfellows”), Bingham devotes an entire chapter – Chapter 11, by far the longest in the book – to “Terrorism and the Rule of Law”. But if this is a surprise, it is one of programming only. Bingham's analysis of the responses of the US and UK governments to the terrorist threat (and to the events of 9/11 in particular), highlighting the differences – and similarities – in their respective approaches, provides us with numerous telling instances of a failure on the part of the governments concerned to do much more than pay lip- service to the rule of law. Such instances, he demonstrates, expose some of the “fault lines” in both societies which may (he argues) actually pose a threat to the rule of law. (Bingham's dismissal of the then Prime Minister Tony Blair's statement after the London bombings in 2005 – and not only because of the (rather unfortunate) phrase “...let no one be in any doubt, the rules of the game are changing...” – is particularly telling in this respect). Thus, whilst the UK comes out of it, in some respects, rather better than the US (thereby to some extent vindicating the Diceyan argument that a codified, entrenched Bill of Rights is not necessarily more effective in protecting human rights than the common law) it still comes in for criticism, particularly for the restrictive legislative measures it has introduced, post 9/11; the apparent ease with which it resorted to prolonged detention of suspects without trial; the erosion of fair hearing guarantees; its willingness to engage in what Bingham argues was an illegal invasion: and in what he describes as “a certain ambivalence” on its part over the use of torture.

In chapter 11, then, the principles discussed in Part 2 are further explored and, rather in the manner of a composer of symphonies or grand opera, Bingham uses this penultimate chapter to draw together many of the themes (“*motifs*”) previously introduced and explored – or even merely hinted at – to consolidate and conclude his main argument.

That Bingham was of the view that (in the circumstances in which it occurred, without the necessary authorisation of the UN Security Council) the invasion of Iraq in 2003 was a violation of International Law has already been noted. But that matter is discussed quite late on in the book: the “*motifs*” of which I speak begin to appear much earlier.

In Chapter 7 (Human Rights), for example, speaking of the protections afforded us by the Human Rights Act (HRA) 1998, Bingham argues that the rights concerned (which include the rights to life, to liberty and to a fair trial), are:

“...“fundamental” in the sense that they are guarantees which no one living in a free democratic society should be required to forego; and that protection of these rights does not, as is sometimes suggested, elevate the rights of the individual over the rights of the community to which he belongs.”⁵

Thus, Bingham issues a corrective to those who, whether due to ignorance or for populist motives, tend to misrepresent the effects of the Convention and HRA – those who have suggested, for instance, that, because of the HRA, the police may not put up “wanted” posters in respect of dangerous criminals, or that they have been obliged to provide the food of choice to a suspected criminal during a “standoff”, or that the prison authorities are obliged to supply a convicted and dangerous killer with pornography, or that state schools may not celebrate Christmas.

Similarly, later in the same chapter, where speaking of the rights protected by the European Convention; in particular the effects of Article 14 (which provides that the enjoyment of those rights must be extended to all, equally and without discrimination on any ground such as sex, race, colour, language religion, political or other opinion) he says:

“...it is unpopular minorities whom charters and bills of rights exist to protect. In almost any society, the majority (which usually includes the rich and powerful) can look after itself.”⁶

Unlike many of the critics, however, Bingham is measured – even charitable. He acknowledges that their criticisms are based on misunderstandings. However, those critics are not “let off the hook” completely; to them he addresses two simple questions: first, which of the rights protected by the Convention/Act would they discard? And secondly, would they rather live in a country in which these rights were not protected by law?

Another theme which he consolidates when dealing with the so-called “war on terror” is that discussed in chapter 9: “A Fair Trial”. Few would nowadays argue against the proposition that the interests of a democratic society are best served by an independent judiciary, free from political

⁵ P 82.

⁶ P 83.

BOOK REVIEW

involvement, especially from the Executive. (Here, interestingly, Bingham points out how, in recent times, instances of the possible “politicisation” of judges and their decisions appears to be more commonplace in the US than in Great Britain – the case of *Bush v Gore*, in which the presidency of the USA was effectively decided by the US Supreme Court, being just one example.)

However, in chapter 9, Bingham also makes the seemingly throwaway comment:

“Scarcely less important than an independent judiciary is an independent legal profession, fearless in its representation of those who cannot represent themselves, however unpopular or distasteful their case may be.”⁷

The point – implicit though it may be – seems clear. Attacks on members of the legal profession, and others, who take it upon themselves to defend or to speak out for the human rights of individuals tried for (or even merely suspected of) acts of terrorism, have nowadays become depressing in their predictability and for their apparent vindictiveness and sometimes personal nature. To those who engage in such attacks, Bingham sends a clear message: the rule of law requires that justice must not only be done but must also manifestly and undoubtedly be seen to be done in all cases, without exception, including those involving offences which attract the worst kind of opprobrium – child-abuse, for instance, as well as terrorism. (Indeed—though Bingham is not explicit on this – it is at least arguable that it is especially important that justice is both done and seen to be done in such cases.)

After chapter 11, the final chapter – on “The Rule of Law and Parliamentary Sovereignty” – might seem something of an anti-climax. It is, it must be admitted, less immediately interesting or provocative than much that has gone before: indeed, it may be that, despite Bingham’s claim that his book is not addressed to lawyers, the final chapter will go unread (or at least “unread”) by many laypeople. But, on the other hand, the two principles – the Rule of Law and Parliamentary Sovereignty – are so fundamental, and their somewhat uneasy relationship so well-known, that the book might be thought incomplete without some comment on these matters. In the event, chapter 12 also contains something of a surprise: despite his credentials as one of its finest advocates, Bingham clearly does not subscribe to the view (as argued by Lord Steyn in the *Hunting Act* case⁸, for instance) that Parliamentary Sovereignty is a “construct” of the common law. As he puts it: “...the judges did not themselves establish the principle (of Parliamentary Sovereignty) and they cannot, by themselves, change it”. Thus, (paraphrasing Professor

⁷ PP 92-3.

⁸ *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262.

Goldsworthy) the judges cannot, even in the name of the rule of law, repudiate parliamentary sovereignty, for in so doing, they would be claiming for themselves the very authority they repudiate.

The danger here is obvious – and Bingham himself identifies it, when he observes

“...our constitutional settlement has become unbalanced, and the power to restrain legislation favoured by a majority of the Commons much weakened, even if, exceptionally, such legislation were to infringe the rule of law as I have defined it. This calls for consideration as a serious problem”. He goes on “The last ten or twelve years have seen a degree of constitutional change not experienced for centuries. Important questions.... remain unresolved. One may hope that the sovereignty of Parliament and its relationship between the rule of law may be seen as a matter worthy of consideration if, as I have suggested, there are some rules which no government should be free to violate without legal restraint.”⁹

Thus, for Bingham, the problem is not one which can be left to the judges to resolve, relying only on some legal “construct” to do so. If legal restraints upon the powers of Parliament are to be imposed, they must derive from elsewhere – nothing less than a new constitutional settlement; a written Constitution, incorporating an entrenched Bill of Rights.

But (as he concludes):

“To substitute the sovereignty of a codified and entrenched Constitution for the sovereignty of Parliament is, however, a major constitutional change. It is one which should be made only if the British people, properly informed, choose to make it.”¹⁰

When reviewing a book of this kind, it is customary to attempt to assess, in conclusion, the author’s success (or otherwise) in achieving the objectives he has set for himself. In this instance, that is not easy –partly, it must be said, because Bingham is somewhat circumspect in this regard. In his preface (where such things are usually set out) he avoids any grand statement of intent: indeed, he even confesses that he, like most other people, had been unsure as to what “the rule of law” actually meant. Accordingly, he says “In any event, I thought it would be valuable to be made to think about it”.

⁹ PP 169-170.

¹⁰ Ibid.

BOOK REVIEW

No matter, then, that this readable, incisive and informative essay illuminates the subject in a way few have done, at least in recent years. The real question is: is the reader made to think about the rule of law?

In answer, I think I can safely say that he – or she – most certainly is!