Rule of Law

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Tom Bingham. *The Rule of Law* (London, Allen Lane, Penguin Press 2010), 213 p., ISBN 978-1-846-14090-7

The rule of law is *en vogue*. These days, this 'highly contested principle'[1] is being analysed and described from all angles – not only as a principle of the national legal order, but recently of the international legal order as well.[2] It has even proved to be a popular export product.[3] Shortly before his death, Tom Bingham, who had successively been Master of the Rolls, Lord Chief Justice of England and Wales, and Senior Law Lord of the United Kingdom (UK), and who was said to be the most eminent of the British judges,[4] dedicated his last book to an analysis of the rule of law in the UK.

Remarkably, his book is explicitly written for the larger public, not for lawyers. It is

> addressed to those who have heard references to the rule of law, who are inclined to think that it sounds like a good thing rather than a bad thing, who wonder if it may not be rather important, but who are not quite sure what it is all about and would like to make up their minds. (p. viii)

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[1] J. Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', 21 *Law and Philosophy* (2002) p. 137.

[2] Cf. J. Waldron, 'The Rule of International Law', 30 *Harvard Journal of Law & Public Policy* (2006) p. 15 et seq.; B. Zangl, 'Is There an Emerging International Rule of Law?', 13:1 *European Review* (2005) p. 73 et seq.

[3] Cf., e.g., the so-called German-Chinese rule of law dialogue (*Rechtsstaatsdialog*), led by the German Federal Ministry of Justice.

[4] M. Kettle, 'We Need Leaders Who Better Understand the Rule of Law', *The Guardian*, 25 Nov. 2006, available on <www.guardian.co.uk/commentisfree/2006/nov/25/comment.law>, visited on 30 April 2011. This article is also a review of Bingham's 2006 Cambridge University lecture on the rule of law (*see* Lord Bingham, 'The Rule of Law', 66 *Cambridge Law Journal* (2007), p. 67 et seq.) that grew into his book.

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Even though the monograph is aimed at an interested lay public, it is an exciting and important contribution to the present academic rule of law discourse: Bingham takes a stand on several contentious issues in Britain, such as the question of whether to promote a formal or a substantial rule of law.[5]

As becomes clear right from the beginning (ch. 1: 'The Importance of the Rule of Law'), the book reads as an impassioned plea for the rule of law as an 'existing constitutional principle' as referred to in section 1 of the Constitutional Reform Act 2005. Bingham focuses on the principle's British roots, thereby underlining its long-standing British tradition which, admittedly, has undergone recent changes and additions. His historic approach connects the first few chapters like a thread. In giving such great prominence to the principle of the rule of law, Bingham partially parts with the Diceyan constitutional orthodoxy that has always given more weight to the concurring constitutional principle, the sovereignty of Parliament.[6] This is why Bingham dedicates one full chapter (ch. 12) to the intricate relationship between these 'not […] entirely harmonious bedfellows' (p. ix). At the end, however, he is not willing to resolve the potential collision between the two principles and shies away from giving priority to the rule of law. In doing so, and in trying to pay tribute to the supremacy of Parliament, his statements are not without contradiction: While Bingham promotes a 'thick rule of law', encompassing human rights (see below), and considers a legislative infringement of the rule of law not as improbable (p. 168), he still adheres to the supremacy of Parliament thereby admitting that this approach is less consistent with the thick definition (p. 162).[7]

The consequences of his methodology become especially visible in Bingham's historical chapter (ch. 2). Excluding almost all foreign influences, the author avows himself to an 'Anglocentric' (p. viii) approach.[8] The reader is confronted with all famous events of Anglo-American (legal) history, amongst them the signing of the Magna Carta, the development of habeas corpus, the Petition of Rights of 1628, the Bill of Rights of 1689, the Act of Settlement of 1701, and the Constitution of the USA.

The 'heart of the book' (p. viii) comprises chapters 3 to 10. Each of the eight chapters stands for one of the sub-principles that, according to Bingham, collec-

[5] Cf. P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law* (1997) p. 467 et seq.

[6] Cf. T. Bingham, 'Dicey Revisited', *Public Law* (2002) p. 39 at p. 43.

[7] Cf. on the two concurring principles G. Sydow, *Parlamentssuprematie und* Rule of Law (Tübingen, Mohr Siebeck 2005).

[8] But *see* H. Hofmann, 'Geschichtlichkeit und Universalitätsanspruch des Rechtsstaats', 34 *Der Staat* (1995) p. 1 at p. 12 et seq., who stresses the Pan-European North Atlantic tradition of the principle of the rule of law.

tively form the rule of law.[9] These sub-principles – meant both in a descriptive and a normative sense – are:

1 'The law must be accessible and so far as possible intelligible, clear and predictable' (p. 37);
2 'Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion' (p. 48);
3 'The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation' (p. 55);
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 powers were conferred, without exceeding the limits of such powers and not unreasonably' (p. 60);
5 'The law must afford adequate protection of fundamental human rights' (p. 66);
6 'Means must be provided for resolving, without cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve' (p. 85);
7 'Adjudicative procedure provided by the state should be fair' (p. 90);
8 'The rule of law requires compliance by the state with its obligations in international law as in national law' (p. 110).

This list of sub-principles is not to be understood as comprehensive. Rather, and fairly pragmatic, Bingham aims to present 'at least a partial definition' (p. 8) of the rule of law: a definition which might serve as a starting point for judges who have to interpret the principle. It goes without saying that Bingham's eight sub-principles owe much to Dicey's famous three-partite definition of the rule of law.[10] However, Bingham goes far beyond Dicey's definition. Against a widespread assumption in academia, with Joseph Raz as its main proponent,[11] Bingham rightly acknowledges a 'thick' (p. 67) rule of law which encompasses human rights.[12] His inclusion of civil liberties is hardly surprising, given that he was one of the

[9] Cf. K. Sobota, *Das Prinzip Rechtsstaat* (Tübingen, Mohr Siebeck 1997) p. 254 et seq., who notoriously distilled 142 sub-principles of the German principle of *Rechtsstaat*.

[10] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn. (London, Macmillan 1961) p. 187 et seq.

[11] J. Raz, 'The Rule of Law and Its Virtue', in J. Raz, *The Authority of Law: Essays on Law and Morality*, (Oxford, Oxford University Press 1979) p. 210 at p. 211 and 221; *see also* J. Finnis, *Natural Law and Natural Rights* (Oxford, Oxford University Press 1980) p. 270 et seq.

[12] Although it is controversial, whether Dicey included what we now call civil liberties in his concept of the rule of law, *see* G. Marshall, 'The Constitution: Its Theory and Interpretation', in V. Bogdanor (ed.), *The British Constitution in the Twentieth Century* (Oxford, Oxford University Press 2003) p. 29 at p. 58.

strongest supporters of the Human Rights Act of 1998.[13] From that point of view, Bingham's book can also be read as a celebration of the Act's 10th anniversary.

The structure of chapters 3-10, each of which is dedicated to one sub-principle, follows the same pattern. At the beginning, Bingham briefly outlines the meaning of the respective sub-principle. Next, Bingham describes the sub-principle's common law tradition as well as the various gaps, most of which have been closed during the last decade by way of constitutional reform. Finally, he illustrates the sub-principle's meaning in practice. To do so, he presents recent case-law. He does not, however, enter into a systematic case-law analysis. This approach is exemplified by Bingham's remarks in his chapter on human rights (ch. 7):

> I shall briefly review the rights which most regularly feature in discussion and court decisions, suggesting a number of conclusions: that the common law and statute have for many years given a measure of protection to such rights; that there were gaps in such protection; that the rights and freedoms embodied in the European Convention on Human Rights, given direct effect in this country by the Human Rights Act 1998, are in truth 'fundamental', in the sense that they are guarantees which no one living in a free democratic society such as the UK should be required to forgo; 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. (p. 68)

None of the eight sub-principles is dispensable or even objectionable. From a comparative point of view, however, one might wonder why certain elements that count as central for the principle of *Rechtsstaat* are not mentioned as one of Bingham's sub-principles, namely separation of powers or the principle of proportionality.[14] What is more, Bingham shows little interest in the legislative process of the rules he wants to see respected. This becomes obvious in his chapter on the rule of law in the international legal order (ch. 10):

> The point is not infrequently made that there is no international legislature, which is, of course, strictly speaking true, and that international law, as a result, lacks the legitimacy which endorsement by a democratic legislature would give. This does not impress me as a very powerful argument. (p. 112)

Bingham depicts the recognition of the principle of the rule of law in Britain as relatively favourable, especially compared to Ewing's recent book on the same

[13] *See* T. Bingham, 'The European Convention on Human Rights: Time to Incorporate', 109 *The Law Quarterly Review* (1993) p. 390 et seq.

[14] On a comparison between the principle of the rule of law and the German *Rechtsstaatsprinzip see* N. MacCormick, 'Der Rechtsstaat und die Rule of Law', *Juristenzeitung* (1984) p. 65 et seq.; *see also* E.-W. Böckenförde, 'The Origin and Development of the Concept of the *Rechtsstaat*', in E.-W. Böckenförde, *State, Society and Liberty* (New York, Berg 1991) p. 47 et seq.

topic.[15] One might, therefore, criticize Bingham for having given an all too positive account of the state of affairs in Britain.[16] This reproach touches on some sore points: Not all of the high hopes that had been attached to the Human Rights Act have been fulfilled. It is, for example, more than doubtful whether the ethos of public administration has been altered in the way the Act wanted it to.[17] Nevertheless, such a critique of Bingham's account would be partially unjustified, and that is for three reasons.

Firstly, Bingham writes from a judge's point of view. At one point, he even anticipates the above-mentioned reproach, claiming that judges cannot protect civil liberties if human rights cases are not brought to the courts.

Secondly, and above all, Bingham's book has a different thrust: it does not primarily want to critically analyse the situation of human rights in Britain. Rather, it is critical with those who consider the rule of law an elusive principle,[18] or who promote a thin rule of law.[19] Above all, Bingham turns against all those who oppose recent constitutional reforms,[20] partly because the opponents perceive legislative reforms as an undesirable approximation to the continental legal order.[21] Bingham's criticism is a logical prior step to an analysis of law in action: he is interested in achieving a theoretical consensus before judging the principle's recognition in practice. To put it in Bingham's words: 'Which of the rights discussed above would you discard?' (p. 84). Indeed, the practice can only be evaluated once one has gained a certain theoretical consensus. Thirdly, Bingham does evaluate the principle's (ch. 11) application when he turns to the problem of terrorism.

In his analysis of Britain's reaction to terrorism, Bingham is anything but uncritical. It is true that Bingham's comparison between the legal reaction to terrorism in the US and the UK casts British laws in a better light than American law.[22] However, Bingham refers to seven similarities between the US and the UK

[15] K.D. Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (Oxford, Oxford University Press 2010).

[16] *See* A.L. Young, 'The Rule of Law in the United Kingdom: Formal or Substantive?', in K. Lachmayer et al. (eds.), *The Rule of Law* (Vienna, facultas/Nomos 2011, forthcoming) on the comparison of the two books. Young speaks of 'Rhetoric versus Reality.'

[17] Cf. D. Oliver, *Government in the United Kingdom* (Oxford, Oxford University Press 1991) p. 167.

[18] Bingham, at p. 5, mentions J. Raz, J. Shklar, T. Carothers, J. Waldron and B. Tamanaha.

[19] *See supra* n. 11.

[20] Cf. K.D. Ewing, 'The Futility of the Human Rights Act', *Public Law* (2004) p. 829 et seq., and K.D. Ewing and J.-C. Tham, 'The Continuing Futility of the Human Rights Act', *Public Law* (2008) p. 668 et seq.

[21] In 2005, the Conservatives, together with the tabloid press, still attacked the Human Rights Act, *see* A. Lester, 'The Utility of the Human Rights Act', *Public Law* (2005) p. 249 at p. 249.

[22] Bingham is quoting D. Cole, 'The Brits Do It Better', *The New York Review of Books*, 12 June 2008, p. 68 et seq., also available on <scholarship.law.georgetown.edu/facpub/5>, visited 1 October 2011.

responses to terrorism. They range from excessive lawmaking (although Parliament had already enacted a comprehensive Terrorism Act in 2000) to discrimination against non-citizens, indefinite detention of suspects of international terrorism without charge or trial (leading to the famous *Belmarsh* case)[23] to the erosion of fair hearing guarantees that fill the reader with horror. Bingham sees the risk that the UK might be sleepwalking into a surveillance society. As things are, the UK, according to Privacy International, is already the leading surveillance society in the EU.[24]

Bingham has composed a book that is easily read and understood by the lay public to whom it is addressed in the first place. This is not to say that it does not contain several valuable insights for those who have paid closer attention to the rule of law already. However, at the outset of the twenty-first century, one might suppose that nothing could be clearer than the content of Bingham's eight sub-principles. Democratic societies should have realized this for some time now.

[23] *A* v. *Secretary of State for the Home Department* [2004] UKHL 56 [2005] 2 AC 68.

[24] The figures were gathered in 2010, *see* <www.privacyinternational.org/ephr>, visited 1 October 2011.

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