



## THE GLOBAL ECONOMY AND THE RULE OF LAW

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### About the Bingham Centre

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The Bingham Centre for the Rule of Law is honoured to have organised this session and as its Director I am honoured to chair it, particularly after the rousing warm-up from the Mayor of London.

Lord Bingham, Tom Bingham, after whom the Bingham Centre is named, was a great British judge and wrote his accessible book on The Rule of Law in which he showed so convincingly that the rule of law is not a vague and academically abstruse concept but that it which contains a set of clear and practical ingredients. In addition, he showed that, as the former Attorney General of India, Soli Sorabjee said, "*It needs to be emphasised that there is nothing Western or Eastern or Northern or Southern about the rule of law. It has a global reach and dimension.*"

Our distinguished panel this afternoon encapsulates precisely that global reach and dimension. We have the Chief Justice of Hong Kong, The Hon. Geoffrey Ma. Lord Mandelson from the UK, Justice Catherine O'Regan, from South Africa and Harish Salve from India. I will introduce them one by one in a moment.

Let me set the scene by setting out briefly what we mean by the rule of law and the context of the global economy. In summary, the Bingham ingredients amount to four straightforward features of the rule of law: legality, optimum certainty, equality and access to justice and rights.

The first, *legality* requires that we live under a system of law which is not arbitrarily applied and where feasible is enforced. No person is above the law. The rule of law is thus distinguished from anarchy, on the one hand, and tyranny on the other. And public officials are as much constrained by the law as anyone else. That is the principal message of Chaps 39 and 40 of Magna Carta.

The second feature of the rule of law is *optimum\ legal certainty*. The application of law must be predictable. Laws must not generally be retrospective. Fair warning should be given about any change in the law.

The rule of law's third requirement is *equality*. Equal application of the law ensures that law is applied equally against all: rich and poor, the powerful and the marginalised. Thus corruption offends this sense of the rule of law, by preferring those who can afford to purchase justice; by permitting the highest bidder to gain law's benefits.. As Magna Carta also said:

40: To no one will we sell, to no one deny or delay right or justice.

Those three features - legality, certainty and equality - consist of the formal or procedural features of the rule of law. However, the rule of law is not fulfilled if a law is simply clear and equally enforced, but provides that property may be expropriated at a whim; that contracts may be selectively ignored, or that the rule of the politburo or party always goes. This is rule by law, not rule of law.

The necessary quality that brings rule by law into rule of law is the fourth element, namely, *access to justice and rights*. This aspect of the rule of law brings the first two to life. It requires that everyone is able to challenge decisions made about them; to assert their rights. It is thus an instrument of empowerment and accountability. Whatever degree of legality and legal certainty there may be, if an individual is not able to hold the government legally accountable and to assert his or her rights, including human rights, the rule of law cannot be said to pertain. In fact, it could be said that perhaps the most important defining feature of a state based upon the rule of law is that a person in a rule of law state has the opportunity of challenging the government of the day with a reasonable prospect of success in an appropriate case.

Access to justice requires a system of courts or their equivalent to which a person with sufficient interest in the matter has a fair chance of making a legitimate claim through a fair trial or due process. It requires a minimum degree of legal assistance to those who cannot afford claims or defence of their rights and above all, it requires an independent judiciary, and also the independence of other actors such as the public prosecutor and indeed the legal profession so that they may advocate for their clients without fear or favour.

How do these features of the rule of law link to the global economy?

Is there really any positive correlation between the rule of law and economic development?

One way to answer that question might be to look at the correlation between the rule of law and a country's relative wealth in terms of GDP.

To test this I googled the richest country in Africa per head of population. Answer, Equatorial Guinea where oil is plentiful and the population small – only 650 thousand. I also discovered that Equatorial Guinea is the country which has Africa's longest serving dictator. It is also listed by Transparency International at the top of its list of the most corrupt state in the world and it is the country which the UNDP estimate has the highest proportion of its population living in abject poverty and where fewer than half its population do not have access to clean water and where about 15% of its children die before the age of five.

Justice O'Regan will soon question the notion of economic development that relies solely on measures such as GDP and ignores questions of distribution. As was discussed in an earlier session of this Summit, it is amazing that there is so much prevarication round the acceptance of the rule of law in the draft Post-2015 Sustainable Development Goals when it is one of the best antidotes to the repetition of the old story of the accumulation of wealth by the elite alone, as is shown in places such as Equatorial Guinea..

An example from a case before the South African Constitutional Court on which Justice O'Regan sat illustrates this starkly: Rule of law was incorporated as a founding principle of the post-apartheid South African constitution and South Africa was the first constitution in the world to establish a constitutional right to just administrative action – the right to challenge public officials for breach of legal, fair or unreasonable acts. The President of South Africa at the time denied anti-retroviral drugs to newborn children at risk of becoming infected with HIV by mother-to-child transmission. His decision was challenged by an NGO and the Constitutional Court held against the country's president. It was the application of administrative review principles to this case and the provision of a fair trial before an independent judiciary that has probably done more to shift policy towards improving the well-being of women and children in Africa than any other recent measure.

Another way to comprehend the effect of the rule of law on economic development is to put ourselves in the shoes of investment directors. Would you invest in a country where the government was practically immune from legal challenge? Where contracts were not enforced? Where property could be seized arbitrarily? Where the law could be changed retrospectively? Where judges were cronies of government ministers and inevitably ruled in their favour?

Or would you simply seek a quick return and hope for the best?

There is in fact little hard evidence on that question. but I am pleased now to announce the preliminary results of a survey which the Bingham Centre has carried out with the law firm Hogan Lovells together with the Investment Treaty Forum of the British Institute for International and Comparative Law. The survey, conducted by the Economist Intelligence Unit, sought the opinion of

**301 senior decision makers** at Forbes 2000 companies with global annual revenues of at least USD1bn.

Most companies surveyed were **headquartered** in the US and Canada (40.9%), Western Europe (32.9%) and Asia (9.3%), in keeping with general trends as to **outbound capital flow** worldwide.

Respondents represented companies operating in a variety of **industry sectors**, including financial institutions (18%), technology, media and telecoms (16%), energy and natural resources (15%) and life sciences and healthcare (15%).

**Our preliminary findings are these:** That rule of law considerations routinely influence foreign investment decisions. While FDI decisions are principally driven by economic and commercial factors ('pull' factors), rule of law conditions in host states can and do represent strong disincentives for investment ('push' factors).

Respondents identified China, Bangladesh and Brazil as the countries in which they experienced the most significant **rule of law incidents**.I cannot now reveal all our findings but assure you that one of our most interesting findings is that the most developed economies are by no means universally thought to be beyond reproach.

Among the types of shortcomings most often encountered by respondents in the context of their FDI were the lack of transparency of the host country's regulatory and/or legal rule-making process, unexpected and/or retrospective changes to regulatory and legal measures and arbitrary or discriminatory treatment by the host country government.

We asked what action was taken to mitigate rule of law damage. Only in a small minority of cases, respondents faced with RoL issues decided not to take action. In general, the surveyed companies adopted a variety of **methods of resolution** ranging from negotiation, to host country judicial processes and contractual or international arbitration.

**Bilateral Investment Treaties** can be an effective way of addressing concerns arising from the absence of RoL guarantees in the host country. However, the investment guarantees and protections enshrined in a host country's national legal system appear to remain the key factor influencing FDI decisions.

**Voluntary codes of conduct** have become a key component in international business and foreign investment, with an overwhelming majority of respondents stating that they have subscribed to such codes, which they regard as effective, and that adherence to such codes is important in the selection of business partners. This no doubt reflects the growing effect of the UN Guiding Principles on Business and Human Rights in 2011.

So there we have some hard evidence of the push and pull factors of the rule of law in relation to economic development. However economic development, like the rule of law, has broader objectives than short term wealth creation. Our survey appears to show that investors are alive not only to their own self interest in the forum of legal certainty that ensures that their contracts are enforced and that their property is protected. They seek more broadly an environment where the substantive as well as formal aspects of the rule of law are observed. Good human rights conditions in the host country were high on the list of investment conditions in the interest of a stable and peaceful environment for them and their local employees.

I started by saying that the rule of law is a universal concept. It is also true, as our survey shows, that resistance to the rule of law is also universal. Governments of any hue, in all parts of the world, want to get things done without too many impediments, delays or challenges. This is a natural and understandable drive for efficiency. They should realise, however, that impediments to the rule of law come at a price, to development for sure. But they also threaten the enduring benefits of a culture of accountability and of respect for equal human dignity.