

ANNUAL BINGHAM LECTURE 2016

SPREADING THE RULE OF LAW: MISSION IMPOSSIBLE?

A conversation on the internationalisation of the rule of law, chaired by Lord Neuberger (President, Supreme Court of the UK), with addresses by:

Professor Sir Jeffrey Jowell QC
Founding Director, Bingham Centre for the Rule of Law

Christopher Stone
President, The Open Society Foundations

Justice Angelika Nußberger
European Court of Human Rights

www.binghamcentre.biicl.org



The Bingham Lecture

The Bingham Lecture is named for former Lord Chief Justice of England and Wales, Lord Bingham of Cornhill. The lecture is convened by the Bingham Centre for the Rule of Law and, in keeping with the Centre's mission and the ideas so eloquently expounded by Tom Bingham not only in his judgments and speeches but in his book, *The Rule of Law* (2010), invited speakers are asked to focus on a rule of law issue. The inaugural lecture was held in 2013.

In 2016 the lecture marked the end of the term of the Bingham Centre's Founding Director, Professor Sir Jeffrey Jowell QC.

- 2013** **Professor Harold Koh, 'Twenty-first century problems – twentieth century law'**
Sterling Professor of International Law, Yale University; formerly Dean of Yale University Law School and Legal Adviser to the US Department of State 2009-12
- 2014** **Sir Alan Moses QC, 'Wearing the mourning robes of our illusions: justice in a spin'**
Inaugural chair of the Independent Press Standards Association; formerly Lord Justice of Appeal
- 2016** **'Spreading the rule of law: mission impossible?'** A conversation, chaired by Lord Neuberger (President, Supreme Court of the UK) with addresses by:
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Christopher Stone, *President, The Open Society Foundations*
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About the Bingham Centre for the Rule of Law

The Bingham Centre for the Rule of Law was launched in December 2010 to honour the work and career of Lord Bingham of Cornhill – a great judge and passionate advocate of the rule of law. The Centre is dedicated to the study, promotion and enhancement of the rule of law worldwide. It does this by defining the rule of law as a universal and practical concept, highlighting threats to the rule of law, conducting high quality research and training, and providing rule of law capacity-building to enhance economic development, political stability and human dignity: www.binghamcentre.biicl.org.

The Bingham Centre is a constituent part of the British Institute of International and Comparative Law (BIICL), a registered charity and leading independent research organisation founded over 50 years ago: www.biicl.org.

SPREADING THE RULE OF LAW: MISSION IMPOSSIBLE?

Jeffrey Jowell¹

Before taking up the question posed in this evening's title, I feel I must briefly consider what is meant by the rule of law. This is because there are a surprising number of rule of law sceptics, some influential in the development world, who maintain that it means all things to all, that it is unduly vague or, as Jeremy Waldron has put it, a 'contested concept'.

Tom Bingham decisively refuted that assertion. He showed persuasively, in his 2010 book, *The Rule of Law*, that it consists of 8 'ingredients' – each somewhat distinct, but each contributing to the whole. Over the initial 5 years of the Bingham Centre we have found it useful to conflate his 8 ingredients into four: legality; certainty, equality and access to rights.

Legality requires that we are all under law and not under arbitrary power (and this includes the obligation of public officials to act within the limits of their conferred powers). Certainty requires that laws should be accessible, not be retrospectively applied and that change in the law should require fair warning.

Taken alone, legality and certainty can amount to rule by law or legalism, as is found in contemporary China or apartheid South Africa. So it is the third and fourth elements of the rule of law – equality and access to justice that are necessary to complete the dots on the rule of law picture.

Equality requires law to be enforced equally against the rich and poor; the powerful and marginalised, without unjustified discrimination. At a deeper level it requires equal concern for everyone's human dignity. Finally, the fourth element, access to justice and rights, springs the rule of law to life by allowing individuals to assert their rights- private or human rights - through challenge by way of fair trial and before an independent court.

Like it or not, this rule of law is not vague.

Turning now to the question - the spread or transferability of the rule of law – this country has been inconsistent over the years in its assertion of our constitutional values overseas. At times we have been confident in our promotion of democracy, human rights and the rule of law, even imposing it as a condition of receiving aid. At other times we have been more restrained. For two reasons. First, in the belief that the rule of law is a Western concept only. Let's reject that belief immediately as both wrong and condescending. Would one wish on any country arbitrariness, inequality, uncertainty and no opportunity to challenge decisions about their lives? In fact it is the rule of law which avoids constitutions being dead letters (a problem in many places), by providing means for democracy to be policed and rights to be asserted. It shifts oppression to equal concern and respect. And it shifts arbitrariness to accountability. Is this only for us?

But even if it is accepted that the rule of law is a universal aspiration, there has often been reluctance in the UK to impose our constitutional principles and our institutional arrangements elsewhere. This reluctance was driven by a combination of two factors: First, post-colonial remorse (and indeed we must be cautious about telling others how to lead their lives). Secondly, a view among some that our systems of government are either too sophisticated for transplantation, or too nebulous due to our lack of an accessible codified constitution.

¹ Professor Sir Jeffrey Jowell KCMG QC, Inaugural Director of the Bingham Centre for the Rule of Law.

This last was the reason why it took 10 years for a UK member to be appointed to the Council of Europe's Venice Commission (the Commission for Democracy through Law), which assists with constitutional advice to the countries of the former Soviet Union. Once we joined, it was found that our systems of justice and government are greatly admired. Of course, they need adjustment so that they can be rooted and thrive in local conditions, but there was great demand in these emerging democracies for our judicial review, court administration, system of judicial appointment, equality legislation, anti-corruption systems, electoral systems and others.

In the Bingham Centre we found that countries as far apart as Kenya and the Palestine Authority, while not slavishly adopting our institutional models, are deeply interested in how they might be adapted in their countries. In Kenya we are assisting the Katiba Institute there with the adaptation of a version of our civil service manual on administrative law called here "The Judge over your Shoulder". On the West Bank we have been assisting, with the Slynn Foundation, with mediating a division of functions between the Chief Justice and Minister of Justice that respects judicial independence. Although they were more interested initially in Middle Eastern models, after a study visit to London, they were taken with the model of our Court Services.

That project was funded by the FCO's Arab Partnership Fund and indeed it should be acknowledged that the FCO and DFID are increasingly recognising that we can shed our diffidence (pun intentional) about sharing our rule of law, through new projects such as RoleUK which provides funding to cover deployment costs to enable UK legal experts to provide pro bono assistance in the 28 DFID priority countries. The FCO's new "Magna Carta Fund for Human Rights and Democracy" sets out to tackle "the root causes of human rights violations, strengthening institutions of governance, and supporting the promotion and protection of human rights, democracy and the rule of law." The Bingham Centre has been pleased to have participated in both those welcome new programmes.

Of course there are limits and obstacles to the spread of the rule of law. There are some countries where it cuts against the grain of the political culture, where authoritarianism is either the preferred way of life, or is in practice very difficult to dislodge, for various reasons. Contemporary Russia comes to mind, as does Hungary, with its 'illiberal democracy'. Egypt gave promise for a while but has now slipped back into a country where an army-business elite demand total deference, implemented by a heavy-handed and unaccountable police. Hard choices are needed as to whether to avoid contact with such countries which could legitimise its leaders or tarnish our reputations (as recently arose in respect of assistance with Saudi prisons). On the other hand, engagement can also yield results, particularly if there is a sufficient core within the country who support change and will not be victimised by their participation in rule of law projects. Despite appearances on our television screens, there are some countries where the current is moving in the direction of rule of law. Tunisia (despite its enormous problems) may be one of them; as is Sri Lanka, Burma/Myanmar, and Nigeria after their recent elections. After the riots in Bahrain the King accepted the findings of the Bassuini Commission that recommended greater respect for the rule of law and we worked with the government on a new law enshrining rights to assembly and expression. As it is unclear whether these reforms will ever see the light of day in that fraught region we suspended our work there, but there is more hope in Burma/ Myanmar. It is interesting that when Aung Sang Suu Kyi was elected to the Burmese parliament in 2011 with a small cohort of party supporters, she elected to head a new parliamentary committee for 'The Rule of Law and Tranquility'. The judiciary there consists of military-appointed, non-qualified and apparently corrupt judges. Aung Sang Suu Kyi has put her faith for the moment in new rule of law centres as a way of providing justice, but there are many other models of transformation of the judiciary from which to draw. Our seminars over the past three years with members of parliament and also at grass roots level across that country were considered by some to be premature or futile, but there are at least a cohort of MPs now in the new Burmese parliament (which sat

for the first time this week), who are reasonably informed about constitutional and institutional models from which they have been isolated for over 50 years.

What can be employed as incentives to the rule of law's spread - even in authoritarian or totalitarian states? One answer is the need for foreign investment. But do foreign investors care about rule of law? You might think that no prudent investment director, assessing risks, would invest in a country where the government was practically immune from legal challenge. Where contracts are 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 are immediate profits of more interest to them? The Bingham Centre considered the literature on that issue and found that it provided little consistent evidence of a positive correlation between the rule of law and foreign investment. To test that question we, with Hogan Lovells together with the Investment Treaty Forum of the British Institute for International and Comparative Law commissioned a survey by the Economist Intelligence Unit which sought the opinion of 301 senior decision makers at Forbes 2000 companies with global annual revenues of at least USD1bn.

Our findings were that rule of law considerations routinely influence foreign investment decisions. The rule of law (defined in accordance with the Bingham definition) was one of two top factors guiding Foreign Direct Investment (FDI).

But here there is a final issue that we must confront: Who will benefit from that economic growth? Will it be the elite alone, or will it be shared more generally? There may be some trickle down, but across the world political leaders who occupy positions of authority too often regulate access to resources that they themselves control. This poses another open research question: Is the rule of law an engine for the fair distribution of wealth? Do its virtues extend to being an instrument of empowerment?

My bet is that they do, because benefits retained or denied by the ruling elite will be open to challenge. Compare Equatorial Guinea and South Africa. I mention Equatorial Guinea because it is in fact the richest country in Africa per capita. (Or was before the oil price collapsed). It is also 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 states 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.

Contrast South Africa which in 1994 committed itself in its constitution to furthering the rule of law. Its efforts to improve the conditions of all has by no means yet been accomplished, and corruption is rife. But the courts dockets show several cases challenging corruption even in the highest places and asserting rights when they are threatened. And recall too the time when the previous President, Thabo Mbeki, an AIDS-denier, refused anti-retroviral drugs to new-born children at risk of becoming infected with HIV by mother-to-child transmission. His decision was challenged by a courageous Civil Society Organisation called the Treatment Action Campaign and the Constitutional Court held against the country's president. It was the assertion of constitutional rights through a fair trial before an independent judiciary that has probably done more to shift government policy towards the improvement of the health of woman and children in Africa than any other recent measure.

There are places today alas where the rule of law has slim chances of immediate implementation. But it would be folly to relax or abort its mission for, as Tom Bingham said in the final page of his book, the rule of law is an ideal 'which even countries who clearly subscribe to it find difficult to apply all its precepts quite all the time'. [And indeed, although I have not mentioned it, and lest we become complacent, one

of the surprises over our first 5 years was that so much of the Bingham Centre's work has involved defending the rule of law in this country].

After 5 years of deep immersion in rule of law issues I for one am more convinced than ever that its spread is possible and that Tom Bingham was right that it is "an ideal worth striving for, in the interests of good government and peace, at home and in the world at large."

NURTURING THE RULE OF LAW

Christopher Stone²³

We should begin with a contrast. Let us contrast spreading Western laws and legal institutions on the one hand, with spreading the rule of the law on the other. And to appreciate the contrast between those two activities, let us begin in China.

In the early years of this century, I had the privilege of studying the work of the Supreme People's Court. My particular focus was the application of the death penalty in China, and I was eager to understand how certain judges of the Supreme People's Court were using their judicial power to reduce its frequency. At the time, in 2005 and 2006, China was responsible for the vast majority of the death sentences in the world. While the actual number was and remains a state secret, informed sources speculated that as many ten thousand death sentences were imposed annually in those years. Legislation to reduce this number was highly unlikely, so a number of reform-minded judges were crafting other ways to achieve that goal, and I was eager to understand their methods.

During these same years, Chinese jurists were also studying how the United States and other countries dealt with a wide range of legal problems, including corruption and organized crime. One day, a delegation from the U.S. Department of Justice arrived in Beijing to encourage the Chinese legal community to adopt legislation similar to the RICO statute in the U.S., which provides severe penalties for those engaged in so-called Racketeer-Influenced Criminal Organizations. After the American presenter was done, one of the Chinese judges pointed out to the US delegation that a week earlier a delegation from Germany had visited and presented the German legislative response to organized crime. Which statute, the Chinese judge asked, did the Americans think was better suited to China: the US RICO statute, or the German law? Of course, the American guests knew nothing of the German approach and said as much. "We assume you've invited us here because you're interested in how we handle this in the United States." But the point was clear: the Chinese already knew more than their American tutors about how the world dealt with these problems, and they intended to make their own judgments about how Chinese law would develop.

We'll return to China's judiciary in a moment, but for now just consider what these Americans were doing in Beijing, what they *thought* they were doing. They thought they were spreading the rule of law, while what they were actually doing was attempting to spread Western laws. And that visit has been replicated hundreds of times in dozens of countries around the world where American and European lawyers, legislators, and judges with the best of intentions have found themselves promoting Western legal institutions as if the germ of the rule of law was to be found like a seed at the core of these legislative fruits. This is what Thomas Carothers of the Carnegie Endowment has criticized as a check-list conception of the rule of law: the vain hope that the rule of law can be disseminated through the replication of specific legislation and judicial procedure.⁴

Happily, there is an alternative understanding of where the rule of law comes from. The English social historian, Edward Thompson, in his superb study of the 18th century Black Act, described the rule of law

² President, The Open Society Foundations

³ This essay is adapted from my contribution to the annual Bingham Lecture, "Spreading the Rule of Law: Mission Impossible?" delivered on 4 February 2016 at the Bingham Centre for the Rule of Law, Gray's Inn, London. My thanks to Jeffrey Jowell, the director of the Centre and fellow contributor that evening.

⁴ Thomas Carothers, "The Problem of Knowledge," in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006)

as “a cultural achievement of universal significance.”⁵ In that study and in others, Thompson describes the rule of law established in England through the occasional willingness of juries to defy the requests of state prosecutors, the resistance of courts to the overt manipulations of the King’s ministers, and the principled rebellion of ordinary people against venal encroachments on longstanding usage. For Thompson, the rule of law established itself in England not through legislation and judicial training, but through conflict and resistance. This cultural achievement belonged as much to the commoners of eighteenth century England and the gentlemen on its juries as it did to England’s jurists.

It is a description that those attempting to spread the rule of law would do well to bear in mind.

In 2012, shortly after beginning his third term as President of the Russian Federation, Vladimir Putin signed what would become known as the Foreign Agents Law, a set of amendments to the criminal code and other legislation that required organizations engaging in political activity and receiving foreign funding to register as foreign agents and to submit to stricter regulation, label all of their printed and on-line communications as the product of foreign agents, and register all of their political activities with authorities before participating in them. The law came into force in November that year, but it was only weakly enforced until Putin gave a speech in February 2013 promoting the law. In March 2013, the government began a series of inspections of non-governmental organizations intended to force them to register as foreign agents. But what happened next is the interesting part.

The Anti-Discrimination Centre (ADC) Memorial, a St. Petersburg-based human rights group, was charged in April 2013 as failing to register as a foreign agent, based on a report published on police abuse of Roma, migrants and civil activists, which ADC presented to the UN Committee Against Torture. The court returned the case to the prosecutor’s office as unsubstantiated; the prosecutor’s office protested the court’s ruling, but higher courts dismissed the appeal.⁶

The “Side by Side LGBT Film Festival” was found guilty of failing to register as a foreign agent and fined 12,500 Euros. Side by Side lost a first appeal in July 2013, but in October, a second appeal ended in a win for the organization: the two previous decisions were annulled and the fine was withdrawn. An administrative fine against the Festival’s director was also overturned in appeals court.⁷

Coming Out, a St. Petersburg-based LGBT organization was found guilty in June 2013 of not registering as a foreign agent and fined. In July, the ruling was overturned on appeal, both in district-level and city-level courts.⁸

Finally, GRANI (the Center for Civic Analysis and Independent Research), a Perm-based organization, was able in July 2013 to overturn the administrative charge against it for failing to register as a foreign agent, and it did not need to pay the fine levied against it.⁹

This is what the rule of law looks like. It is an impressive, but not yet a strong force in Russia. After losing these and other cases, the government amended the law, allowing it to register organizations as foreign agents on the government’s own assessment, and the numbers so registered has now climbed to over a hundred. ADC and “Coming Out” were each subjected to additional legal actions, and by the end of 2013 were found to be acting as foreign agents. They each liquidated their legal entities rather than register. GRANI, too, was involuntarily registered as a foreign agent after the law was amended.

⁵ E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975), page 265.

⁶ See <http://adcmemorial.org/www/7271.html?lang=en>.

⁷ See <http://www.bok-o-bok.ru/news/archive?pid=25&lan=1&tid=992>.

⁸ See <https://www.frontlinedefenders.org/node/23460>.

⁹ See <http://hro.rightsinrussia.info/hro-org/foreignagents-81>.

Still, we should notice—and indeed celebrate—the 2013 court decisions that refused to follow the clear preferences of the Russian President. In those simple acts of resistance, we see the rule of law in action.

Who were those Russian judges who defied the country's President? What were they reading? With whom did they discuss their decisions? Whose example inspired them? Of course, it is not the individuals here that matter as much as the culture that allowed them to rebuff the government's attempts to repress the activities of these nonprofit organizations. By 2013, a culture had evolved in Russia that allowed these judges as part of their formal, professional duties, to deny the government the result it sought, a culture that supported these professional acts of resistance. This is the culture of the rule of law.

Let's return now to the prevalence of the death penalty in China. The number of death sentences imposed in China is reputed to be the highest in the world by several orders of magnitude, but the numbers themselves are state secrets, unavailable publicly. Scholars estimate that death sentences peaked about ten years ago, with estimates of annual executions as high as 10,000. Estimates today range from about 3,000 to 5,000. The numbers themselves are unreliable, but there is substantial evidence for a dramatic decline in the use of the death penalty between 2006 and 2009, with reasonable estimates of a 50 percent reduction. The reduction coincided with the decision of the Supreme People's Court in 2007 to reassert control over the penalty, requiring that every death sentence be individually reviewed by a panel of the Supreme People's Court, rather than remaining in the hands of the High Courts of each province. Scores of judges were recruited and trained for the task and a large building in Beijing dedicated only to these new reviews.

The dramatic reduction in the use of the death penalty was not just a matter of adding an additional layer of review. A robust debate on the use of the death penalty played out during these years, both in the corridors of power and in the Chinese media, with the Supreme People's Court leaning toward restraint and reform. As one close observer explained at the time:

The Chinese approach...is to conceive the appropriateness of applying the death penalty in terms of (relative) lenient or severe punishment. The newly revived revolutionary dictum *Shaosha Shensha* (Kill Fewer, Kill Cautiously) occupies the leniency side of the debate, while the long-lived *Yanda* (Strike Hard) policy occupies the severe side. The Supreme People's Court's (SPC) interpretation of a newly touted policy, *Kuanyan Xiangji* (Balancing Leniency and Severity), is to err on the side of relative leniency when sentencing all but the most egregious crimes.¹⁰

But how does the Supreme People's Court spread its interpretation of the law throughout the judiciary in country as vast as China when it lacks the power to make law itself? China does not follow the common-law tradition of publishing appellate decisions and treating these as binding precedents on future cases in lower courts. Instead, judges decide each case based on their own application of legislation. The Anglo-American notion of "case law" or judicial precedent is foreign to the Chinese system.

One part of the answer is found in the stories that appear in the *Legal Daily*, the official daily newspaper of the Supreme People's Court distributed to all judges across the country and read as well by a large swath of the country's lawyers. In August 2009, the editors of the *Legal Daily*, themselves judges of the Supreme People's Court, prominently published a set of five "typical" cases on the death penalty, each describing how a panel of judges dealt with a death penalty case sent to them for the final review. All five cases concerned convictions for murder followed by a sentence of death.

¹⁰ Susan Trevaskes, "The Death Penalty in China Today: Kill Fewer, Kill Cautiously" in *Asian Survey*, 48:3 pages 393-413 (2008).

To Western eyes, the case reports are bizarre. The Supreme Court judges are depicted as working overtime to review the mountain of papers in each case, but also getting in cars, driving to the villages where the murders took place, and engaging in “incidental civil mediation” as part of the review. As the editors explained:

Good incidental civil mediation, on one hand, makes it possible to maximally safeguard the legitimate rights and interests of the victims, so victims of crime who suffered material losses are compensated, mental trauma is consoled and to a certain extent remedied, and the harm caused to society by crime is reduced. On the other hand, it alleviates and effectively resolves social conflicts, increases harmonious factors to the maximum, and reduces discordant factors.

Victim compensation is a familiar element of criminal procedure almost everywhere, but the role of the judges themselves in these stories is extraordinary. They telephone the families of murder victims, they visit relatives of the defendants to test their ability to pay compensation, they examine petitions from villagers seeking retribution or leniency, they interrogate the accused, and they discuss the case with judges who presided over the original trials. Throughout the stories, the Supreme Court judges offer explanations to the reporters—instructions clearly intended for the nation’s judges.

In one of the five cases, for example, the presiding judge of the Supreme Court panel conducting the review contacts the victim’s family, only to discover that they remain angry and insistent on the death penalty. The panel members then go to village themselves where they interview residents, the police chief, and other officials who tell the judges that the accused “acted on impulse” and “should be given the chance to turn over a new leaf.” The Legal Times editors then insert a subhead: *The judge must correctly determine public opinion, eliminate hatred, and actively settle the case.* The story recounts further discussions among the judges, and finally a Supreme Court decision to overturn the death sentence. The presiding judge of the review panel is then quoted at length, as a clear instruction to the nation’s judges reading this “typical case”:

"As long as the case has a glimmer of hope, we make our best effort. Even in a case where the death sentence is pronounced after the first and second trial, we work actively to save a person's life....

"For heinous crimes like kidnapping, robbery, murder, drug trafficking, and other serious violent crimes, the sentence should be the death penalty, otherwise the sentence is not faithful to the law and also it dishonors our career. But in regard to killings caused by ordinary disputes, we should not insist on the death penalty: this is not faithful to the law."

To drive the larger point home, the story then goes on explicitly to consider how judges in future cases should conduct their own inquiries. The reporter begins this section with a pair of rhetorical questions:

So, when the criminal judges handle and review cases, what conviction should they have? Why do the judges become involved in civil mediation? The president of the Supreme Court Third Criminal Tribunal, Gao Jinghong, explained: "In our country in the past thousands of years, whoever kills should die. This is specified by law and this traditional idea has been well established. But a person lives only once and a victim’s family may face many real problems that need to be solved, such as when the husband or son is killed and the family loses economic support and has difficulties living. In some families, only an old couple remains. They need financial compensation to overcome their real difficulties in maintaining family life. At this time, if the judge has a clear idea and knowledge of the circumstances, proceeds with great effort, and adopts effective measures and strategies, this has a great significance in resolving the case

successfully, eliminating hatred, and forgiving the accused. This is because we firmly believe that, after all, human beings are of the greatest value."

In other cases, however, the death sentences are overturned even without the victim's family "forgiving the accused." In one such case, the judge explains to the readers, even if "great efforts to persuade the victim's family are of no avail and no understanding and forgiveness are achieved...if the defendant's crimes are not so serious [based on our] considering the defendant's usual conduct, how vicious his character is, and the likelihood of causing more serious conflicts—we do not approve the defendant's death sentence."

The five "typical cases" were not all heat-of-passion domestic disputes, but included premeditated murders, a murder combined with robbery, and defendants who flee the jurisdiction. Nonetheless, in all five cases the Supreme Court judges overturn the death sentences. There is no mistaking the Supreme Court's purpose in publishing these case reports: to strengthen the resolve of judges in trial courts across the country to resist calls for the death penalty in most homicide cases. As we saw in Russia, in China, too, a culture is evolving that allows judges as part of their formal, professional duties, to turn away such demands. To read these stories is to observe the rule of law under construction right before your eyes.

I focus on Russia and China here precisely because they are objects of some of the cynical—and mistaken—commentary on the rule of law in the West. If we simply look for replications of American or British legal institutions, we will fail to see the rule of law sprouting up, even in rocky ground, and we will fail to see that its roots extend across continents and time. If we imagine that the rule of law effectively prevents the perversion of justice, the violation of human rights, or the capture of legal institutions by corrupt political actors, we will simply miss the chance to see it anywhere at all. The culture of the rule of law is subtler than that, both weaker and stronger than its loudest proponents imagine.

The rule of law is weak in the same way that gravity is weak. Physicists rank gravity as the weakest of the forces in the universe, and, as every flight reminds us, it can always be overcome with the exertion of sufficient force. So, too, the rule of law; but the point is that overcoming it requires force. The rule of law offers resistance. And, like gravity, despite its inherent weakness, it holds our world together. That is its surprising strength.

When Edward Thompson published his exhaustive study of the enforcement of 18th century England's Black Act, he told a story of a governing elite who saw the niceties of law as a nuisance, who manipulated and bent the law to their own purposes. But he also saw in that same system of law a bulwark against arbitrary power:

I have shown in this study a political oligarchy inventing callous and oppressive laws to serve its own interests. I have shown judges who...were subject to political influence, whose sense of justice was humbug.... But I do not conclude from this that the rule of law itself was humbug. On the contrary, the inhibitions on power imposed by law seem to me a legacy as substantial as any handed down from the struggles of the seventeenth century to the eighteenth, and a true and important cultural achievement....¹¹

I am no more starry-eyed about Russia and China today than Thompson was about eighteenth century England. Russia's bad law on foreign agents has been followed by an even worse law on "undesirable organizations," among which the Russian authorities recently listed the charitable foundation over which I preside. Despite the early court victories I have described here, there are now approximately a hundred

¹¹ Thompson, page 265.

organizations on the list of foreign agents, and more of them are among the liquidated every month. The reductions in the use of the death penalty in China have stalled, and the current regime has been detaining and prosecuting human rights activists, student protesters, and even lawyers themselves in a blatant campaign of intimidation.

Perhaps for this very reason, we need to train ourselves to recognize the rule of law in these paradoxical contexts. The law, in both Russia and China, has become a meaningful forum in which conflicts between citizens and the state are fought out, even if the field is terribly uneven and the rules established to suit those in power. The rule of law is developing there, and elsewhere around the globe, following much the same logic that has proved so potent in the West.

We spread the rule of law today, not by promoting American legislation or British judgments, but by feeding the culture that made possible those Russian judgments of 2013 and Chinese case reports of 2009. The rule of law is not a product made for export. Rather, the rule of law is a culture that thrives when nurtured, and is nourished through a root system that extends across continents and centuries. One can only imagine the countless sources of inspiration, encouragement, and support that gave those Russian and Chinese judges the confidence to decide their cases as they did, and to put themselves forward as examples to others. To strengthen the rule of law anywhere strengthens it everywhere; and so to nurture that culture in our own countries as well as others is our common work.

SPREADING THE RULE OF LAW – MISSION IMPOSSIBLE?

Angelika Nußberger¹²

Spreading the rule of law is a difficult and demanding mission, be it worldwide or “only” on the European level. It may seem to be easier in Europe where rule of law is closely connected to long-standing traditions, forms an essential part of history of thought and has been institutionalized in the European integration process, both on the level of the European Union and of the Council of Europe. Rule of law figures as a basic principle in many European documents such as the Lisbon Treaty and the Statute of the Council of Europe. Nevertheless, all that glitters is not gold. It is not sufficient to take up such a principle in solemn declarations; it is also necessary to fill it with life.

Looking at rule of law from a European perspective, we can tell two different narratives: a success story, and a story of mere hopes and clear disillusionions.

Let’s start with the success story.

We can argue that rule of law has been accepted as a basic principle of constitutional law in all European States, and, what is more, that it can be enforced by the judiciary, including international courts, and above all the European Court of Human Rights.

Half a century ago, when Europe started from the scratch after the catastrophe of World War II and the break-down of the old world order, only half of the European States accepted rule of law as a basic principle for organizing State and society. All the countries proclaiming to be “socialist” or “communist” ferociously denied its value. While paying lip service to the principle of democracy and codifying long lists of socialist human rights in all the constitutions established on the basis of Stalin’s model of 1936, rule of law remained an outcast of the socialist value system. It was considered to be a remnant of the bourgeois capitalist world view and had to be replaced by what was first called “revolutionary legality” and later on “socialist legality”. This meant a basically positivist and formal approach to written law, though one which could, however, at any time be given up for the sake of what was demanded for the accomplishment of revolutionary aims. Instead of legal certainty it thus enshrined a specific form of legal uncertainty and arbitrariness as it was never foreseeable what might be demanded by “the Revolution”. It was only in the late 1980s that the idea of a State based on rule of law (“pravovoe gosudarstvo” in Russian) was introduced in Soviet constitutionalism, in the beginning still linked to the attribute “socialist” as if there were different models of rule of law, a capitalist one and a socialist one.

The sudden career of the principle of rule of law in all the newly elaborated constitutions after the break-down of communism can be considered as one pillar of the success story of rule of law in Europe. Now, rule of law has been taken up in all the European written constitutions, even in Belarus.

It is important to note in this context that the principle of rule of law is not understood as having only declaratory value. On the contrary, it is used by the courts as a tool for deciding cases. This is also true for the European Court of Human Rights, although the principle of rule of law has not been integrated into the text of the European Convention on Human Rights, but only in its preamble. It was in the famous

¹² Judge at the European Court of Human Rights, elected on behalf of Germany, Professor of Law at Cologne University. The views expressed are solely those of the author in her private capacity and do not in any way represent the views of the Court.

judgment *Golder v. United Kingdom* where the Court explicitly referred to it for the first time and explained its role in the Convention system:

“It may also be accepted..., that the Preamble does not include the rule of law in the object and purpose of the Convention, but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, ..., that it would be a mistake to see in this reference a merely "more or less rhetorical reference", devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" was their profound belief in the rule of law.”¹³

This far-reaching statement was not accepted by all the judges of the Court at that time. It is interesting to note that the British judge Sir Gerald Fitzmaurice found it necessary to dissent on this point:

“The importance attributed to the factor of the "rule of law" in paragraph 34 of the Court's Judgment is much exaggerated.”¹⁴

But he was all alone in this approach. By the time of the *Golder* judgment rule of law had become a part of the common European value system and could be enforced on the basis of binding judgments.

The second pillar of the success story is the elaboration of a concept of rule of law that is both sophisticated and workable. It is true that it is a most difficult task to define such a broad and vague concept. Lord Bingham enumerated in his famous book “Rule of Law” the eight “ingredients”. They coincide to a large extent with what the European Court of Human Rights has elaborated in its jurisprudence over the last decades. The starting point can be a negative one: rule of law is the opposite of arbitrariness. It is considered to be part of the “spirit” of the Convention and to underlie all the Convention provisions. It comprises elements such as independence of the judiciary, legal certainty, procedural guarantees, *nulla poena sine lege*, *ne bis in idem*, etc. Traces of all these elements could be found in the Court’s case-law. In the context of the present speech it might be sufficient to highlight just three important aspects.

First, rule of law is more than legality. Whenever State authorities interfere with human rights protected by the Convention, such interference has to be “based on law”. For the Court the existence of a legal provision in the respective national legal order as such is not sufficient. It also controls what it called the “quality” of the law. Thus the Court often repeats the following standard formula:

“The requirement of lawfulness ... is not satisfied merely by compliance with the relevant domestic law; domestic law must itself be in conformity with ... the principle of the rule of law, The notion underlying the expression “in accordance with a procedure prescribed by law” is one of fair and proper procedure ...”

Second, the principle of proportionality is considered as an essential feature of rule of law. The text of the Convention generally allows limitations of rights if they are “necessary in a democratic society”. This implies that the rights of the individual have to be weighed against the rights of the community. One prominent example of the application of the principle of proportionality is the recent judgment of the Court on the French law prohibiting the full-face veil. In this context the Court felt bound to weigh the value of “living together in society” against “individual self-fulfillment”:

¹³ *Golder v. United Kingdom*, App no 4451/70, ECHR 21.02.1975, A18 para. 34.

¹⁴ *Golder v. United Kingdom*, App no 4451/70, ECHR 21.02.1975, A18, Dissent of Judge Fitzmaurice

“... there is no doubt that the ban has a significant negative impact on the situation of women who, like the applicant, have chosen to wear the full-face veil for reasons related to their beliefs. As stated previously, they are thus confronted with a complex dilemma, and the ban may have the effect of isolating them and restricting their autonomy, as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for their private life. It is also understandable that the women concerned may perceive the ban as a threat to their identity.

Furthermore, admittedly, as the applicant pointed out, by prohibiting everyone from wearing clothing designed to conceal the face in public places, the respondent State has to a certain extent restricted the reach of pluralism, since the ban prevents certain women from expressing their personality and their beliefs by wearing the full-face veil in public. However, for their part, the Government indicated that it was a question of responding to a practice that the State deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of “living together”. From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society (see paragraph 128 above). It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.”¹⁵

The same is true in the difficult fight against terrorism. Even if the individual’s rights are protected under Article 3 of the Convention, which is considered to be an absolute right, in defining the threshold of what is to be considered “inhuman” the Court applies the proportionality principle, even if in a hidden manner. Thus, to give just one example, in the case *Ramirez Sanchez v. France*, the Court did not find a violation of Article 3 although the applicant was held in solitary confinement for eight years. In this context that Court took into account that the applicant was considered to be the most dangerous terrorist in the 1970s and that he was convicted for terrorist-related offences. The Court explained:

“The Court shares the CPT’s concerns about the possible long-term effects of the applicant’s isolation. It nevertheless considers that, having regard to the physical conditions of the applicant’s detention, the fact that his isolation is “relative”, the authorities’ willingness to hold him under the ordinary regime, his character and the danger he poses, the conditions in which the applicant was being held during the period under consideration have not reached the minimum level of severity necessary to constitute inhuman treatment within the meaning of Article 3 of the Convention.”¹⁶

Third, it has to be emphasized that the Court has added a specific new dimension to the principle of rule of law. State authorities are not only responsible for human rights violations they commit themselves, but also for those they enable to be committed. A State based on rule of law cannot close its eyes to the consequences of its actions and omissions even if they happen outside its territory. This might be called responsibility “beyond one’s nose”. The famous first example of the relevant jurisprudence is the case *Soering v. United Kingdom*¹⁷ where the Court held the British authorities responsible for potential human rights violations by the American authorities after extradition. This idea has been generalized since and is relevant for the case-law in extradition and expulsion cases such as *MSS v. Greece* and

¹⁵ *S.A.S. v. France*, (GC) App no 43835/11, 01.07.2014, RJD 2014 para. 153.

¹⁶ *Ramirez Sanchez v. France*, (GC) App no 59450/00, 04.07.2006, RJD 2006-IX, para. 150.

¹⁷ *Soering v. United Kingdom*, App no 14038/88, 07.07.1989, A161.

Belgium¹⁸ and *Taraqel v. Switzerland*.¹⁹ In the case *Omar Othman v. United Kingdom* this approach has been stretched to potential violations of Article 6 of the Convention, the right to fair trial:

“It is established in the Court’s case-law that an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country.”²⁰

Thus, rule of law is, to a certain extent, exported by the European Court to countries outside Europe.

The narrative of the success story of rule of law in Europe is based on solid grounds. It suggests that real progress has been achieved. Nevertheless, it has to be asked if this is true. A deeper analysis might lead to a less optimistic result. Let me therefore play the *advocatus diaboli* who argues that rule of law in Europe is a story of lost illusions.

The cases brought to the European Court of Human Rights every year do not suggest that there would be any progress in implementing human rights based on rule of law. There are many cases which might be called “anti-rule-of-law-cases” as they manifest complete arbitrariness and violence on the part of the State authorities, above all the police and the prison guards. I might just tell a short anecdote. When I started working for the Court I found in a Ukrainian file a report on a short interview of a policeman. He was asked if he had mistreated the detainee and answered: “No, I have not mistreated him. He had already confessed.” This proves an attitude towards others in a vulnerable situation which, according to Lord Bingham, should have been outlawed already in the 17th Century. Nevertheless, the finding of a Convention violation because of the use of violence in order to obtain confessions can be regarded as routine in Strasbourg. There are no signs that this will change in the future.

Other “hard cases” concern flagrant violations of the right to liberty and the reign of arbitrariness. The Court had repeatedly to deal with pretrial detention ordered to prevent people from participating in demonstrations or to silence political opponents. The case of *Mammadov v. Azerbaijan* might serve as an example:

“The Court considered that Mr Mammadov, who had a history of criticising the Government, had been arrested and detained without any evidence to reasonably suspect him of having committed the offence with which he was charged, namely that of having organised actions leading to public disorder. The Court concluded that the actual purpose of his detention had been to silence or punish Mr Mammadov for criticising the Government and publishing information it was trying to hide.”²¹

Although the Court judgment dates back to 2014 it is still not executed; Mr. Mammadov is still in prison.

Similar cases are to be reported from other countries where basic guarantees of rule of law are denied during trials and pretrial detention is ordered without any or without sufficient reasoning.

There are also examples of courts applying the law in a completely arbitrary manner. A good illustration is provided by the case *Khamidov v. Russia* in which the house of a Chechen family was occupied by Russian police without any legal basis. The damage to the house was acknowledged by the authorities

¹⁸ *M.S.S. v. Belgium and Greece*, (GC) App no 30696/09, 21.01.2011, RJD 2011.

¹⁹ *Tarakhel v. Switzerland*, (GC) App no 29217/12, 04.11.2014, RJD 2014.

²⁰ *Othman (Abu Qatada) v. the United Kingdom*, App no 8139/09, 17.01.2012, RJD 2012, para. 258.

²¹ *Ilgar Mammadov v. Azerbaijan*, App no 15172/13, 22.05.2014, Press Release, ECHR 144 (2014) 22.05.2014.

as well as in one court judgment. Nevertheless the court judgment was ignored and the relevant reports were not accepted by the competent Russian court. The European Court used very strong language:

“The Court is perplexed by this conclusion and cannot see how it could be reconciled with the abundant evidence to the contrary, and, first of all, with the findings made in the judgment of 14 February 2001, or the replies from public officials. In the Court's view, the unreasonableness of this conclusion is so striking and palpable on the face of it that the decisions of the domestic courts in the 2002 proceedings can be regarded as grossly arbitrary, and by reaching that conclusion in the circumstances of the case the domestic courts in fact set an extreme and unattainable standard of proof for the applicant so that his claim could not, in any event, have had even the slightest prospect of success.”²²

Confronted with such repetitive cases it may be permissible to ask if the inscription of the principle of rule of law in constitutions and the ratification of an international treaty based on rule of law is more than lip-service.

Looking back at the decades of human rights jurisprudence it might even be asked if the standards already achieved are lowered again. Is progress an illusion? One sign of retrogression might be that the Court's authority is undermined by the deliberate non-execution of its judgments. One recent example is the judgment of the Russian Constitutional Court claiming that the legislature has to develop a judicial mechanism justifying the non-execution of specific judgments which are considered to be incompatible with basic principles of the Russian constitutional order. The respective law was enacted in December 2015. The first request for non-execution was sent to the Constitutional Court at the end of January 2016. It concerns the judgment in the case *Anchugov and Gladkov v. Russia*.²³ The problem is the same as in the case *Hirst against Britain*,²⁴ i.e. prisoners' voting rights.

Even if many different aspects of the principle of rule of law have been elaborated by the Court in the last decades, essential questions remain unanswered. One important controversy concerns jury trial. The different approaches are illustrated in the 4:3 judgment of the Second Section of the Court in the case *Lhermitte v. Belgium*.²⁵ It concerns the jury trial against a mother who has murdered all her five children. While in the opinion of the three experts the mother could not understand what she was doing, the jury answered “yes” to the question on guilt. No further explanation was given by the jury itself; it was confined to answering the “yes-or-no”-question put before it. The professional judges as well as the Supreme Court tried to explain the jury's vote. Nevertheless, the question remained whether the applicant could understand the verdict without any reasoning provided by those who had taken the decision. The majority of the Chamber argued that the judgment was compatible with fair trial and rule of law. The minority opposed this view with strong arguments. The case is currently pending before the Grand Chamber. The basic question is whether the requirement of giving reasons for a decision taken is an essential part of the principle of rule of law or whether it can be dispensed with in jury trials which function on other premises. This touches upon the constitutional identity of some member States of the Convention system, which consider the introduction of jury trials as a major achievement in implementing rule of law. It is worth quoting the arguments of the Irish Government acting as a Third Party intervener in the case *Taxquet v. Belgium*:

²² *Khamidov v. Russia*, App no 72118/01, 15.11.2007, para. 174.

²³ *Anchugov and Gladkov v. Russia*, App no 11157/04 and 15162/05, 04.07.2013.

²⁴ *Hirst v. the United Kingdom (no. 2)*, App no 74025/01, 06.10.2005, RJD 2005-IX.

²⁵ *Lhermitte v. Belgium*. App no 34238/09, 26.05.2015.

“In the Irish Government’s submission, the system of jury trial in Ireland was the unanimous choice of accused persons and of human-rights advocates and was viewed as a cornerstone of the country’s criminal-law system. There had never been a complaint that the system lacked transparency or impinged on or inhibited the rights of the accused. The system inspired confidence among the Irish people, who were very attached to it for historical and other reasons.”

....

“The Irish Government wondered how a system of trial that had been in operation for centuries and long predated the Convention could now be considered to breach Article 6 § 1.”²⁶

Similar seemingly insurmountable differences are to be seen in the attitude towards trials in absentia. While according to Italian procedural law the accused is not provided with the opportunity to have a new evidentiary hearing at the appeals stage after a condemnation in absentia, the German Constitutional Court considers such a trial as incompatible with human dignity and the rule of law. It argues that in such a case an extradition would violate German constitutional identity and a European Arrest Warrant could not be executed.

“The minimum guarantees of the rights of the accused in criminal trials that are mandated by the principle of individual guilt also have to be observed when deciding on an extradition executing a sentence rendered in the absence of the requested person.”

“The court that decides on an extradition is under the obligation to investigate and establish the facts of the case, an obligation that also falls within the scope of Art. 1 sec. 1 GG. The relevant facts in particular include what kind of treatment the requested person will have to expect in the requesting state. It does not follow from this obligation that the German courts always have to review in detail the reasons for a request for extradition. This holds true in particular in the context of extradition proceedings within Europe, where the principle of mutual trust applies. However, this trust is shaken if there are factual indications that the requirements that are absolutely essential for the protection of human dignity will not be met if the requested person is extradited.”²⁷

While the argumentation of the German Constitutional Court largely draws on the interpretation of Article 6 by the European Court of Human Rights, it is questionable how far the creation of an “identity control” is at odds with the European Court of Justice’s argument about the “principle of trust” underlying cooperation among European States.

The interpretation of the principle of rule of law is at the centre of debate among national constitutional and European courts. Many questions remain open, not only the secondary, but even the fundamental ones.

The question for today’s panel discussion was whether spreading the rule of law is a “mission impossible”. I am convinced it is not. It is rather a mission of Sisyphus. Those fighting for rule of law have a huge boulder in front of them, they see the mountain, they get up on top of the mountain. And they know that, should the boulder roll down again, they must never give up. I want to use this mythological story in Camus’ perspective. The last words of his philosophical study are:

²⁶ Taxquet v. Belgium, (GC) App no 926/05, 16.11.2010, RJD 2010, para. 78.

²⁷ Order of 15 December 2015, 2 BvR 2735/14; English summary of the official press release, <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html>

« La lutte elle-même vers les sommets suffit à remplir un cœur d'homme. Il faut imaginer Sisyphe heureux.»

We have to imagine that Sisyphus was happy. We also have to imagine that those who are fighting for rule of law are happy, especially if the boulder has just been pushed up on top of the mountain. And that's where I see Jeffrey Jowell at the end of his work for the Bingham Centre of Rule of Law.