

The Rule of Law and Migration: Some General Themes

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Introduction

I am honoured and pleased to be here at such an occasion, and especially during the famous Asilah cultural festival. Indeed, it seems most appropriate that a discussion on the theme of the rule of law and migration should occur at an event that celebrates diverse cultures and encourages breadth of ideas.

I bring warm greetings from Lord Bingham. He is disappointed that he cannot attend but he is still recovering from an operation. I am grateful to Mahmoud Salih for his acting so generously to enable me to attend in place of Lord Bingham. Thank you.

The thoughts that I offer here today are my own and not Lord Bingham's. However, he and I share a passion for the Rule of Law. Indeed, the desire to ensure the Rule of Law is understood and applied internationally has been, for over 50 years, one of the key purposes of the British Institute of International and Comparative Law, of which Lord Bingham is the President and I am its Director. The Institute is a unique body in the United Kingdom and is one of very few in the world. It brings together scholars and practitioners, serving as an invaluable focal point and network for both its members and others who participate in its work. It engages with all legal practitioners, government officials, civil society and many others, through its various high quality research projects, in its seminars, conferences and other events, and by its publications.

The importance of the Rule of Law, and the universal admiration for Lord Bingham, as one of the greatest lawyers of his generation, has led the Institute to create the Bingham Centre for the Rule of Law. The Bingham Centre for the Rule of Law will focus on developing the rule of law, understanding the challenges it faces, providing an intellectual framework within which it can operate optimally, creating the legal and policy tools to support it, and applying it practically worldwide, including through engagement with experts and capacity-building across the globe. We are delighted that one of the leading experts in the area, Professor Jeffrey Jowell QC, has agreed to be the first Director of the Bingham Centre, which will commence operations in October this year. We would be enormously grateful for further financial support for this important endeavour and, I am happy to talk with anyone who is interested in providing such support.

I now turn to the topic of my talk. I will consider some general themes about the Rule of Law and Migration, to set the scene for the discussion by the large and distinguished panel here. My focus is on what is the Rule of Law and its application internationally. I will then suggest some ways in which it is needed in relation to migration issues, leaving the main substantive issues and cases to be considered by the rest of the panel.

Rule of Law

Concepts

The modern conception of the rule of law in the common law tradition centres on the work of Dicey, who identified three aspects of it: the absolute supremacy of the law over government power; equality before the law; and enforcement before the courts.¹ The civil law tradition has generally focused less on the judicial process and more on the nature of the state, in the form of *Rechtsstaat*, or the law-based state.² More recently, the key work has been that of Lord Bingham, who has encapsulated the core of the idea of the rule of law as being ‘that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered by the courts.’³

The rule of law is most succinctly set out by Lord Bingham in terms of eight sub-rules or principles:

- (1) The law must be accessible and, so far as possible, be intelligible, clear and predictable;
- (2) Questions of legal right and liability should ordinarily be resolved by application of the law and not by the exercise of discretion;
- (3) The law should apply equally to all, except to the extent that objective differences justify differentiation;
- (4) The law must afford adequate protection of human rights;
- (5) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
- (6) Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred, and without exceeding the limits of such powers;
- (7) Judicial and other adjudicative procedures must be fair and independent; and
- (8) There must be compliance by the state with its international law obligations.⁴

These principles are necessary to ensure that there is legal order and stability in the state, equality of application of the law, protection of human rights and settlement of disputes before an independent legal body. These principles separate the rule of law from the rule by power and from the rule by law (as having law by itself does not mean that it meets the requirements of a *rule of law*).

Lord Bingham includes in his definition a requirement that the law afford adequate protection to human rights. Other definitions have tended to emphasise the rule of law as involving procedural, rather than substantive, protections, with a strong focus on judicial independence.⁵ Bingham’s approach is adopted here, not least because the rule of law must include justice in a substantive sense as part of its elements, and that part of modern justice requires respect for human rights, including, for example, the right to a fair trial, freedom from discrimination, freedom of movement and (appropriately for where we are located today) cultural rights.

Additionally, many attempts to define the rule of law do so, if only implicitly, by considering the rule of law as an “all-or-nothing” concept. However, the reality is that the existence of the rule of law is a matter of degree, with all legal systems being on a spectrum with no rule at all at one end and a complete actualisation of the rule of law at the other. For example, the ‘Rule of Law

¹ A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885), Macmillan, 1902 (2005 facsimile), Part II.

² See, for example, H. Kelsen, *Pure Theory of Law*, 2nd edn, University of California Press, Berkeley, 1970. See also the summary in S. Chesterman, ‘An International Rule of Law’, (2008) 56 *American Journal of Comparative Law* 331.

³ T. Bingham, ‘The Rule of Law’, 66 *Cambridge Law Journal* (2007) 67 at 69.

⁴ *Ibid*, pp 69-84.

⁵ S. Chesterman, *op cit*, at 340, although arguably the procedural version also contains inherent assumptions about substance, see H. Charlesworth, ‘Comment’ (2003) 24 *Adelaide Law Review* 13 at 14.

Index', pioneered by the World Justice Project, has sought to measure the *relative* compliance of legal systems throughout the world with the ideals of the rule of law.⁶ Therefore it is not possible to conclude if states *have* or *do not have* the rule of law.⁷

Rather, the issue is the extent to which rule of law principles are operative within a particular system. While the objective must be towards complete actualisation of the rule of law, the lack of this does not mean that there can be no rule of law at all. In the same way, a lack of compliance by all states with their national legal obligations in regard to criminal law enforcement by an independent judiciary does not mean that enforcement does not exist. Instead, the state is seen as being far from complying with the rule of law. So it is necessary to consider the relative compliance of states with a rule of law.

Application

It may be possible to argue that the idea of a rule of law is really a developed world view or another way of imposing a particular form of democracy on all states. Yet the rule of law and democracy are not the same. A simple democracy is about the power of the majority. It is about the laws passed by that majority being imposed on all in the state. In contrast, a rule of law includes protections of minorities, it includes limiting unfettered discretion by authorities and it aims to support all of society.

Its application to all states is seen in the fact that there are many international documents and statements that address the rule of law. For example, the Declaration on Principles of International Law Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations 1970 (which is often seen as clarifying the terms of the United Nations (UN) Charter) referred to the 'paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations'.⁸ Further, in matters of collective security, many UN peacekeeping operations have included the restoration or establishment of the rule of law as part of their aims, in the context of the overall purpose of enhancing peace and security.⁹

In economic and development matters the rule of law has also featured, with the World Bank considering that the practical application of the rule of law means that people in a society 'have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence'.¹⁰ This view was echoed in the World Summit Outcome Document 2005, which declared that 'good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger'.¹¹ Indeed, the (then) UN Secretary-General, Kofi Annan stated that:

[The rule of law] refers to the principle of governance to which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the

⁶ World Justice Project, 'Rule of Law Index', available at <http://www.worldjusticeproject.org/sites/default/files/Index%20%200%20-%20Feb-6-2009.pdf>.

⁷ I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff Publishers, The Hague, 1998) at 14.

⁸ UN GAOR Res 2625 (XXV) (1970).

⁹ See, e.g., Security Council resolution 152 (2004) (concerning Haiti) and Security Council resolution 1756 (2007) (concerning the Democratic Republic of Congo).

¹⁰ World Bank, *A Decade of Measuring the Quality of Governance* (2006), p.3.

¹¹ UN Doc A/Res/60/1.

law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.¹²

These statements are strong and powerful. Indeed, Annan's statement largely repeats the rule of law principles of Lord Bingham, especially in terms of transparency, accountability, good governance and justice. They reassert the need for a rule of law in every state and demonstrate agreement at the international level by all states that the rule of law should operate in national systems. They are intended to clarify why states should actualise the rule of law in their jurisdictions, as there are consequences for the state if the rule of law is not complied with. For example, issues of good governance, which are part of the rule of law, may affect the extent to which the state has access to international financial support.

I want to add in passing that there is also a need for an international rule of law that applies to the international legal system. Sir Arthur Watts, [a former United Kingdom (UK) government legal advisor], expressed it this way:

The protection of the interests of all states and the creation of international stability requires that state-to-state relations be subject to a long-term framework [of an international rule of law], which ensures that international law is applied in conformity with principles of justice.... [and enables states to have a] stable, safe and predictable world in which they can better pursue their political and economic goals.¹³

An international rule of law would benefit all states, so that each of them have confidence in reaching binding legal agreements to secure their own interest and to assist in attaining international peace and security. It would also benefit those who travel from one state to another or are otherwise subject to the many aspects of the international legal system. Certainly, the large number of international courts and tribunals deciding cases across a very wide area of international law, from investment to maritime boundaries, from crimes to trade, show that there can be some accountability and adjudication of international issues. Indeed, Lord Bingham has noted that:

[I]f the daunting challenges now facing the world are to be overcome, it must be through the medium of rules internationally agreed, internationally implemented, and if necessary, internationally enforced.¹⁴

Therefore, what is required for a rule of law to be operating fully is where there is full transparency, accountability, good governance and justice in the operation of a legal system. I will now turn to consider these matters in relation to migration.

¹² Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616 (2004), para 6.

¹³ A. Watts, 'The International Rule of Law', 36 *German Yearbook of International Law* (1993) 15, 25, 41.

¹⁴ T. Bingham, *The Rule of Law* (Penguin (2010))

Migration and the Rule of Law

Migration comes in many forms: from the ordered processes of managed immigration of skilled people and families, to the chaotic consequences of armed conflict; from the determinations of refugee status under the Refugee Convention to the irregular movements of economic migrants and those subjected to trafficking. Migration also changes over time, with the numbers entering the European Union diminishing with the combination of its increased membership and tougher conditions for entry,¹⁵ and the increase in asylum seekers and other migrants in areas such as North Africa,¹⁶ though the constant reality is that most migrants are within and between developing states. While migration also has profound social and economic effects, the legal regulation of migration has significant effects on some of the most vulnerable people in the world, who are crossing territorial boundaries in hope, in expectation and always in fear.

I will focus on just one of these many important issues of migration: the determination of refugee status. This should be a matter that can operate in compliance with the rule of law across most states, with transparent regulations, accountability of decision-making, clear procedures and application of human rights protections. After all, there is one definition of a refugee under the Refugee Convention 1951,¹⁷ which defines a “refugee” as:

any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

This definition is largely repeated elsewhere, though the OAU Convention on Refugees does include broader aspects than persecution in its definition.¹⁸

Despite understandable concerns about this Convention, it is incorporated by many states into their national law, or applies to most states as a matter of their ratification of the relevant treaty or through general practice (customary international law), or operates in effect in many states by virtue of the activity of the United Nations High Commission for Refugees. In addition, there is a clear trend in national judges being informed by decisions of foreign courts and by international courts in their decisions. This is happening in the common law world, where Lord Bingham has noted that ‘there is a new dawn of internationalism’,¹⁹ across European national courts, especially through the European Court of Justice and the European Court of Human Rights,²⁰ and, increasingly, by courts around the globe.²¹

A recent survey by Guy Goodwin-Gill and H el ene Lambert has shown that hopes of application of the rule of law in this area are largely unfulfilled.²² They note that their survey of the European Union:

[h]as shown how great are the obstacles in the way of developing a coherent, harmonized, case-based approach to the Refugee Convention, notwithstanding the common history of refugee protection, recent institutional and regional initiatives, and a range of technological developments.²³

¹⁵ See, for example, E. Guild, ‘The Europeanisation of Europe’s Asylum Policy’ (2006) *International Journal of Refugee Law*, 630.

¹⁶ See J. van der Klaauw, ‘Multi-Dimensional Migration Challenges in North Africa’, (2007) 28 *Forced Migration Review*, 13.

¹⁷ The Convention relating to the Status of Refugees 189 UNTS 137.

¹⁸ The OAU Convention on the Specific Aspects of Refugee Problems in Africa 1969, Article 1, includes also external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of the country of origin or nationality, as criteria for refugeehood.

¹⁹ T. Bingham, ‘There is a World Elsewhere: The Changing Perspectives of English Law’ 41 *ICLQ* (1992) 513, 515.

²⁰ T. Koopmans, ‘Comparative Law and the Courts’ 45 *ICLQ* (1996) 545.

²¹ See, for example, J. Stapleton, ‘Benefits of Comparative Tort Reasoning’ 1 *Journal of Tort Law* (2007)

²² G. Goodwin-Gill and H. Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonisation and Judicial Dialogue in the European Union* (CUP, 2010)

²³ *Ibid* p.202.

They show how different courts take different approaches, and how some courts pick and choose cases from other jurisdictions without a clear principled justification and often without understanding the particular structure of the court system in that other jurisdiction. As a consequence there is unpredictability, with many interpretations and many changes in views, with even disagreement if the Convention should be interpreted as a 'living instrument' and so, like human rights treaties, subjected to understandings in light of contemporary events and ideas.²⁴ Yet different cultural and legal values in states can lead to different understandings. For example, just two weeks ago the UK Supreme Court held unanimously that two homosexuals might be granted refugee status if their fear of persecution was such they would have to conceal their sexuality on their return to their home states due to a well-founded fear of persecution.²⁵ This is an obviously contentious matter but one that courts are increasingly facing and deciding differently.

It is essential for the rule of law that these issues are determined by independent courts. These decisions about such matters cannot be decided by an immigration official acting on his or her own views. There needs to be full information provided to the courts, including comparative law sources and information about the states in issue, so that their decision is well-informed. Government and asylum seeker must come to the courts as equals and the courts need to be able to make decisions affecting government actions, and weighing up human rights and broader justice issues, for there to be a rule of law.

But for these decisions to be compliant with the rule of law it is not solely about an independent judicial system applying rule of law principles. It is essential that the procedures to determine eligibility for refugee status are transparent and just. However, too often the procedures are difficult to follow by applicants and it has been shown that most applicants 'have a difficult task to convince decision-makers of the veracity of their stories'.²⁶ Indeed, one commentator has noted that those who are benefitting from the new European systems to deal with asylum seekers are those with financial resources, economic mobility and an element of power, which and not the most vulnerable, including those who are trafficked.²⁷ In addition, states do sometimes include within their decision-making procedures issues that are about that state's national interests and not about the state of origin of the applicant. For example, the proposal by the French government, to ban women wearing a full face covering in public can have a direct impact on both refugee determination and on migration more generally, including potentially loss of personal security for the migrant. Yet it is seen as an issue of supposed French national security and supposed French identity and not, as it should be, a matter of protection of the dignity of the person involved or a clear balance of rights by an independent judiciary.

²⁴ See Lord Bingham in *R v. Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477, 500

²⁵ *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] SCUK 31, 6 July 2010

²⁶ H. Lambert, *International Refugee Law* (Ashgate, 2010), p.xvii.

²⁷ N. El-Enany, 'Who is the New European Refugee?' LSE Law, Society and Economy Working Papers 19/2007.

Conclusions

I have attempted here to set out what the parameters should be for a rule of law to operate within an aspect of migration: the determination of refugee status. The rule of law includes core principles of transparency, accountability, good governance, order, human rights protections, justice and independence of the judiciary. These principles have been shown to be applicable to all states and should be complied with by all states. Compliance with the rule of law can create conditions of stability, certainty, accountability in decision-making, and independence and efficiency in the settlement of national (and international) disputes according to law, which can also assist states in economic and legal development.

These rule of law principles should be applied in all aspects of migration, especially as they deal with vulnerable people crossing boundaries. State practices, including within the European Union, show that the operation of the rule of law is less than it should be. Yet it is essential that the rule of law operates in all aspects of migration, especially with refugees. Indeed, I finish with this appropriate statement by Lord Bingham in one of the key cases on refugee status before the UK courts:

[The Refugee Convention must be interpreted] in accordance with its broad humanitarian objective and having regard to the principles expressed in the preamble, that human beings should enjoy fundamental [human] rights and freedoms without discrimination and that refugees should enjoy the widest possible exercise of these rights and freedoms.²⁸

²⁸ *Fornah v. Secretary of State for the Home Department* [2007] 1 AC 412, para 10.