

Bingham Centre Event – ‘Does Our Tax System Meet Rule of Law Standards?’

The Bingham Centre was launched in December 2010 and is an independent research centre devoted to the study and promotion of the rule of law worldwide. Tax law is a vital part of the public law structure and, for this reason, in March 2013, the Bingham Centre gathered experts to discuss various aspects of the UK tax framework in the light of the rule of law standards set out in ‘The Rule of Law’ by Tom Bingham, from whom the Centre takes its name. Specific issues such as accessibility, foreseeability, equal treatment, access to justice and adherence to international law were discussed, with a view toward holding a larger public event later in the year. The role of tax law in the development of the modern rule of law, and principles such as legitimate expectations, were also examined.

The seminar opened by asking, ‘**How clear, transparent, accessible and foreseeable is tax law and practice?**’ It was noted that the length, language and structure of UK tax legislation contributes to a lack of foreseeability and accessibility. A comparison was drawn in this respect with the simplicity of the Hong Kong tax system. It was suggested that this difference is not attributable to a need to collect higher tax revenues in the UK nor to greater fairness in our system. The impact on the rule of law of the General Anti-Abuse Rule (the ‘GAAR’) was also discussed.

From there, the discussion moved to the topic of **equal treatment and selective enforcement**. It was noted that tax legislation should be applied equally to all segments of society, and that inequality in administration leads to unequal treatment and unfairness. The administrative burden placed on small businesses and the impact of the closure of the HM Revenue & Custom (HMRC) network of local tax enquiry offices on vulnerable individuals were highlighted during the seminar. The need for sufficient parliamentary scrutiny of all primary and secondary tax legislation was also stressed.

The seminar also considered issues of **access to justice and the new Tribunal system**. It was emphasised that the Tribunal’s rules are reasonably clear, accessible and comprehensive; and that the majority of its decisions are published. It was also noted that the majority of decisions taken by HMRC are appealable and almost all hearings are open to the public. The speaker also noted that the Tribunal has an ancillary, statutory reasonableness jurisdiction (not a judicial review jurisdiction as such) which fits well with rule of law requirements. One area of concern highlighted was in respect of the costs of litigation – except in complex cases, litigants cannot recover their costs at first instance, which it was suggested might dissuade applicants, though it was noted that there are no court fees. In addition, the passing of the Administrative Justice & Tribunals Council, which is described as keeping “under review the administrative justice system as a whole with a view to making it accessible, fair and efficient”, was criticised. However, the inclusion of external specialists sitting on cases was welcomed.

One speaker noted that the rule of law is not, and should not be seen as, an impediment to effective action on the part of governments, but that it provides a boundary which protects all of us from the related risks of arbitrary action and uncertainty. It was emphasised that the rule of law is of primary importance to **HMRC**, which can only undertake functions and carry out activities that it is permitted to do by statute. It was noted that together with the department’s operational independence, the duty of confidentiality ensures that HMRC can administer the tax system in an impartial way. Specific issues such as the use of retrospective legislation, HMRC’s powers of collection and management, the GAAR, HMRC’s Litigation and Settlement Strategy, and the Bank Code of Practice were also addressed.

The rule of law requires **compliance by the state with its obligations in international law** as in national law. Compliance with obligations in international law and with EU law

obligations were discussed in detail with reference to specific case examples. It was noted that the UK is party to more than 120 tax treaties. The increased use in the 21st Century of “treaty override”, whereby treaties are unilaterally altered by subsequent domestic legislation, was also examined.

Overall, the discussion was an analysis of whether UK tax law and practice sufficiently provides rule of law protection to individuals and businesses of all sizes. It was commented that tax law is fundamental to the relationship between citizens and the state but that this is often overlooked leading to the **risk that tax law may be regarded as separate from the mainstream of public law**. The key question is whether tax law and practice reflects the values inherent in the rule of law, such as **equality, fairness and access to justice**.

The Bingham Centre intends to continue this conversation with a one-day public conference on **Wednesday 20 November 2013**. The purpose of the conference is to initiate a dialogue on taxation and the rule of law with a view to developing best practice in this area. It is intended that a detailed paper will be produced.

The Bingham Centre wishes to thank **Berwin Leighton Paisner** for its generosity in hosting this event and the one-day conference in the autumn.

More details and booking information to follow soon.