

The Rule of Law in an Age of Populism

Bingham Lecture 2024

The Rt Hon Lord Hermer KC, Attorney General

The 2024 Bingham Lecture was hosted by the Bingham Centre at Gray's Inn Hall on 14th October 2024 and chaired by Baroness Kennedy of The Shaws LT KC.

Opening remarks

Thank you Helena for that introduction.

It is a particular privilege to be introduced by a friend who I admire and respect so much and by someone who has spent a lifetime promoting the rule of law and protecting human rights.

Thank you also to the Bingham Centre for inviting me to speak to you this evening.

For nearly fifteen years, the Bingham Centre has been an essential voice for the advancement of rule of law values at home and abroad. Its work to promote a better understanding of the rule of law and to help build the capacity to give it practical effect, has never been more vital than it is today.

It is a record of which Tom Bingham, in whose name I am honoured to give this lecture, would surely have been proud. It is wonderful to see so many of his family here tonight, Lady Bingham, Dame Kate, Kit and Mary.

Lord Bingham's judicial and non-judicial writing, his stature as one of the great postwar judges, has been an inspiration for generations of lawyers, myself very much included. I had the privilege of appearing in front of Lord Bingham as a junior in a series of interesting cases before the House of Lords in which I was led by a promising young silk called Keir Starmer.

But like many in this audience I also felt a personal tie to Tom Bingham. I applied for silk in 2009 and Lord Bingham was one of my referees but sadly my father, who was a lawyer, died shortly before my appointment.

My sense of loss at not being able to share the news with my dad was softened by the fact that before he died I was able to show him a letter that Lord Bingham had written to me. The letter was filled with the warmth and support that many who knew Tom Bingham will recognise. Thus I will always feel a very personal debt of gratitude to him for the joy and pride that his letter gave to my dad.

It was in his cogent and elegant account of the rule of law that Tom Bingham encapsulated in his eight principles. Such was the authority and clarity of his analysis that the principles are now a necessary reference point for any discussion (or indeed speech) on the subject.

As Sir Jeffrey Jowell put it when he spoke at the launch of this Centre back in December 2010:

“Tear open the Bingham package of requirements for the rule of law and, as each of his ingredients falls away, we progressively observe the stark outlines of tyranny- at worst; or authoritarianism - at best”.

That remark has a particular resonance today. And what better illustration of the enduring contribution of that book could there be than the sight, earlier this year, of its Ukrainian translation being launched in Kyiv, on the frontline of the ongoing struggle for democratic, rules-based values.

Introduction: setting the scene, and the challenge

As that scene attests, we are living through uncertain and challenging times, with threats to the rule of law on a number of fronts.

This evening, I would like to talk about the necessary response to these challenges, through restoration of our reputation as a country that upholds the rule of law at every turn and by embedding resilience to rebuff the populist challenge.

Restoration and resilience. I'm going to begin by setting out the nature of the challenge as well as proffering some thoughts on the relationship between the rule of law, democracy and human rights. I will then turn to three themes that I consider lie at the heart of the restoration and resilience project firstly, the rebuilding our reputation as a leader in the field of international law and the international rules based order; secondly, the strengthening of Parliament's role in upholding the rule of law and thirdly the promotion of a rule of law culture.

Our starting point is not a happy one. Conflict currently affects more countries than at any time since the Second World War. As too many people around the world are driven from their homes by wars and instability, there is a sense of an international system that is unable to act. That is unable to prevent wars of aggression and to address desperate humanitarian need.

As the Prime Minister said at the General Assembly in New York, those “institutions of peace” that the UK and others worked so hard to establish after the horrors of the Second World War are struggling. Those rules that we have all worked so hard to maintain are being undermined. And faith in international law, and the international rule of law, is being chiselled away in communities who are told, time and again, that the system is failing to deliver for them.

The challenges we face are increasingly global – whether the development of AI, the threat of climate change, growing inequality, or increased migration – and we need a functioning global order, underpinned by a strong commitment to the rule of law, to even begin to tackle them. At home, too, we cannot afford to be complacent about the extent to which values that once were taken for granted have been undermined.

A near decade of crisis and political instability has, at times, stretched the fabric of our constitution to its limit. I don't wish to make a party political speech, indeed I am determined to make the promotion of the rule of law a project we can all sign up to irrespective of our political allegiance. Nevertheless it cannot go unsaid that as a lawyer and citizen concerned with our constitutional framework, I watched aghast from the sidelines a moment that I never thought conceivable in this country when a Secretary of State informed Parliament that sections of the UK Internal Market Bill were designed deliberately to breach international law – a departure from our tradition of respect for international law so grave that it provoked a suite of resignations. I then watched with a mixture of fury, disbelief and profound sadness as the previous government introduced the Safety of Rwanda Act.

I will leave it to my colleagues to make the obvious points about the workability and costs of the scheme – what to my mind was even more significant were the constitutional heresies contained the Act. The Act starts with the otiose and therefore crass assertion of parliamentary sovereignty; it moves to the express disapplication of fundamental international law obligations owed, including under the ECHR and the Refugee Convention, and even customary international law; and it ousted the role of the courts in determining relevant facts except where individual circumstances were in issue, indeed obliging them to accept as true facts that may well have been false – it felt, not so much as though we had fallen through the Looking Glass but rather dived head first into it. It is unsurprising therefore that on the international stage, the UK – once a leading player in the establishment of our global structures and institutions – has seen its rule of law leadership called into question. However, at a time when there is a desperate need for cooperation and solutions, we are increasingly confronted by the divisive and disruptive force of populism.

This is not a new phenomenon. But in recent years we have grown accustomed to diagnosing its symptoms, on both right and left. We face leaders who see politics as an exercise in division; who appeal to the 'will of the people' (as exclusively interpreted by them) as the only truly legitimate source of constitutional authority.

Their rhetoric conjures images of a conspiracy of 'elites'; an enemy that is hard to define, but invariably including the people and independent institutions who exercise the kind of checks and balances on executive power that are the essence of liberal democracy and the rule of law. Judges. Lawyers. A free press. NGOs. Parliament. The academy. An impartial and objective civil service. Populists work to diminish their legitimacy or, at worst, actively remove them from the scene altogether.

Allied to this, we have also seen how populism, in its most pernicious forms, works to demonise other groups, usually minorities – to discredit the legal frameworks and institutions that guarantee their rights, and dismantle, often through calculated misinformation, the political consensus that underpins them.

The argument

Times of crisis and challenge are fertile ground for this kind of politics. And they can create a receptive audience for the populists' argument that the rule of law is somehow in tension with democratic values.

It is this dynamic that I want to address in tonight's speech – I want to argue that this is precisely the time for us to reaffirm that the rule of law – both domestically and internationally – is the necessary precursor to those democratic values, providing the foundations for political and economic flourishing.

And I want to be clear that by the rule of law, I do not just mean rule by law; a purely procedural and formal conception that populists and authoritarians can themselves so often use as a cloak of legitimacy.

One of Lord Bingham's great contributions was to promote a more substantive conception of the rule of law, including the idea that the law must afford adequate protection of fundamental human rights. I too believe that human rights – both at the level of principle, and in practice through how they are enforced – are an essential element of the rule of law and a stable democratic culture. As well as recognising and protecting the dignity of all, they guarantee the essential rights and freedoms which underpin our system.

Far from being at odds with democracy, as some populists would have us believe, the rule of law is the bedrock on which it rests. What good is democracy – indeed, can democracy exist – without the right to free and fair elections or freedom of speech, guaranteed by the right of access to the courts and an independent judiciary? And I would go further. Democracy, in my view, is inextricably related to the rule of law, properly understood. For what good is the rule of law without democracy, which confers essential legitimacy on the rules that govern the relationship between citizen and state?

Lord Bingham's conception of the rule of law also recognises that international law is the 'Rule of Law' writ large, and that States must comply with their international obligations, just as they must comply with domestic law. This, too, is crucial. International law is not simply some kind of optional add-on, with which States can pick or choose whether to comply. It is central to ensuring our prosperity and security, and that of all global citizens. As will develop later, our reputation as a country that can be trusted to comply with its international law obligations, and has a robust adherence to the rule of law, is essential to our ability to grow the economy, as grow it we shall. And maintaining our international reputation also enhances our ability to work with our partners to get things done in this time of global challenge. Rather than isolating ourselves from our closest allies, it means we can strengthen cooperation on issues like migration; whether that's the Anti-Smuggling Action Plan, which the Home Secretary secured with G7 partners in Italy earlier this month; or closer working with international law enforcement partners to target smuggling gangs.

To shore up the rule of law against the forces of populism, we must also emphasise its importance as an idea that unites, rather than divides us. The work to rebuild a political consensus around these values will not be easy. It must be proactive, cross-party and internationalist. It must be sensitive to any legitimate reasons why people have lost faith in the rule of law and its institutions. It will require patient, long-term thinking, hard work and consistent commitment to build the necessary coalitions, and to produce and implement detailed policy proposals.

So, to meet these challenges it is my view that we need to take immediate steps to restore the UK's reputation as a rule of law leader whilst at the same time also seek to build and secure the rule of law's long term resilience in the face of threats known and unknown, domestic and international. Restoration and resilience.

Restoration and resilience. In this speech, I want to talk about three themes that will guide this Government in this project. As I outlined earlier, my first theme, is rebuilding the UK's international rule of law leadership before turning next to the role of Parliament and then finally embedding a rule of law culture.

Theme 1: rebuilding the UK's international rule of law leadership

The UK's international rule of law leadership.

Historically, the UK has been a leader in developing and promoting international law and the institutions on which its effectiveness depends. British lawyers and politicians have been at the forefront of drafting and negotiating the most important treaties that underpin our international legal system and building the institutional machinery that breathes life into those paper agreements.

The UK will again demonstrate that leadership – so essential in today's highly-connected, but highly fragmented, world – and sadly so absent in recent years.

That starts by clearly, and without question, honouring our obligations under international law. Since taking office, this Government has already taken steps to uphold those obligations and demonstrate our deep commitment to international law. We have reached agreement with Mauritius to settle the historic sovereignty claims over BIOT/Chagos Archipelago in a manner that successfully marries our international law obligations with vital national security requirements; we have applied our IHL obligations by compliance with our arms licensing criteria – applying law not politics; we have made plain our commitment to our cornerstone international institutions not least the ICJ and ICC.

And we will continue to abide by and unequivocally support the European Convention on Human Rights, including by complying with requests from the Court for interim measures. Walking, or threatening to walk away, would be a total abdication of our international law responsibilities and send out precisely the wrong message at a time when the rule of law is under threat in so many places.

But we will go further than simply meeting our obligations under the Convention specifically and international law generally – that we will do so should go without saying. My point is that the UK will once again be a champion for international courts and institutions, taking positive steps to promote their importance and to rebuild the respect for them that the populists have sought to destroy. As the Prime Minister has said, having discovered the Convention in a law library in Leeds some 40 years ago, the rights it sets out speak about the dignity of every human being, and are a source of inspiration from which we can all draw strength and value.

After the First World War, the UK championed the establishment of a Permanent Court of International Justice. British Judges sitting in that Court and many subsequent international courts and tribunals have delivered judgments that have brought clarity to all areas of international law.

I am therefore delighted that the UK National Group has announced its intention to nominate Professor Dapo Akande – who will be well known to many in this room – as the UK's candidate for election to the International Court of Justice in 2026. I cannot think of a better

representative for the UK's expertise in international law and I am delighted to personally endorse Dapo's campaign.

And it is through international courts that we hope to finally see justice for Ukraine. I have dedicated my professional life to fighting for justice and accountability, and nowhere was the need for that more apparent than in my recent visit to Ukraine. I was profoundly struck by the stories I heard at Bucha's cathedral and in Irpin.

Despite the unimaginable suffering that the people of Ukraine have endured, they remain clear-eyed about the importance of the international rule of law and accountability. I – and the whole Government – remain steadfast in our support for Ukraine, on the battlefield and in the courtroom. This includes support for work towards establishing a Special Tribunal on the Crime of Aggression against Ukraine.

But these systems, and the promise offered by international law, only work when we work in partnership with our friends and partners around the world.

In many parts of the world, especially in the Global South, the international rules-based order and human rights are often seen as imperialist constructs, selectively invoked by western governments when it suits their interests. It is incumbent upon us to first, listen, to those who feel unheard. And secondly, to demonstrate – not just with warm words, but with concrete actions - that international law can deliver real benefits to all. And those actions must be consistent, we must show that we will hold ourselves to the highest standards.

We will advocate for reform of the Security Council, to ensure that those with seats at the top table truly represent the global community. That means permanent representation from Africa, from Brazil, India, Japan and Germany. And our approach to international development will show that we have learnt the lessons of history that, to be sustainable, the rule of law cannot be imposed on developing countries by former colonial rulers, but must be grown organically from within by working closely with local communities and institutions.

And we will be unwavering in our commitment to tackling climate change, where we know that many of the worst effects are felt by those who have made the smallest contributions to this existential threat.

Theme 2: defending and strengthening Parliament's role in upholding the rule of law

My second theme is closer to home. A crucial part of restoring the rule of law, and building resilience in the face of future threats, involves thinking about the respective roles of our own institutions in upholding these fundamental values.

This must start by recognising that upholding the rule of law cannot just be left to the courts. All branches of our constitution must see the rule of law, in its fullest sense, as a guiding force for their own actions.

Speaking as a relatively new member of two of these branches, I hope my colleagues in this room will not mind if I offer some initial reflections on the role of Parliament in this regard; both in terms of its own functions, and the Government's relationship to it.

Parliamentary sovereignty is one of the fundamental features of our constitution and the ultimate legal authority of Parliament to make or unmake any law is crystal clear. However, viewing the rule of law through this distorting lens of ultimate decision-making authority alone risks mistaking it for a purely formal, and thin, conception of 'rule by law'.

As lawyers know, Parliament's authority in our constitution is legal authority, an authority that requires that Parliament maintains in its legislation the ideals of the rule of law, of government under law, one of the contributions to the modern world of which we in the UK are justly proud. And as I (following Lord Bingham) have explained, those ideals are much thicker and more substantive than the thin gruel of a formal conception of 'rule by law'.

We have seen in recent years where that disregard for our constitutional rule of law heritage can lead. It is crucial that all institutional actors understand their role in a government under law. When Government invites Parliament to breach international law, or oust the jurisdiction of the courts, it not only undermines the rule of law, but also the mutual respect that historically has been one of the great strengths of our constitution. It risks pitting one institution against another in ways that damage our reputation both inside and outside our borders as a law-abiding nation.

We must also work to counter the false choice, offered by some, between parliamentary democracy and fundamental rights. For almost a quarter of a century, the Human Rights Act has shown how it is possible, with imagination, to provide a legal framework for the protection of fundamental rights which can co-exist with parliamentary sovereignty. Indeed, the Act specifically preserves Parliament's ultimate decision-making authority through its regime of non-binding Declarations of Incompatibility, defences, and section 19(1)(b) statements.

And the enforcement of the Act otherwise by the courts, far from being at odds with democracy, is its vindication. Because it was our democratically elected Parliament that legislated for the Human Rights Act, and provided the mechanisms by which individual rights should be given meaningful effect in domestic law. It is testament to the framers of the Act that no Parliament elected since 1998 has chosen to fundamentally alter that position.

It is also right to reflect on how Parliament can itself actively protect and enhance rule of law values. It does this through its scrutiny of legislation, most notably through the expertise of my colleagues in both Houses, but also through its Select Committee system. And it is incumbent on any government to ensure that those Committees are able to do their jobs effectively. I welcome the contribution that committees such as the Lords Constitution Committee, the Delegated Powers Committee and the Joint Committee on Human Rights make to the debate on human rights and the rule of law, and I look forward to working constructively with them in this Parliament.

But there are aspects of Government's relationship with Parliament that require more careful examination. Most pressingly, there is in my view a real need to consider the balance between primary and secondary legislation, which in recent years has weighed too heavily in favour of delegated powers.

The twin challenges of Brexit and the Covid pandemic had the effect of concentrating immense power in the hands of the executive, through the conferral and exercise of broad delegated powers, including so-called Henry VIII powers. Some of this can be explained by the exceptional character, and unique demands, of both events. However, it would be a mistake to view this as an aberration. As the Delegated Powers and Regulatory Reform Committee have noted, Brexit and Covid did not mark the beginning of the shift in the balance between Parliament and the executive, so much as an acceleration and intensification of an existing trend.

As technical as these issues may sound, they raise real questions about how we are governed. I said earlier that I see democracy as inextricably related to the rule of law. In our system of Parliamentary democracy, consent to be governed is expressed through the delegation, every four or five years, of powers by the governed to Parliament. It is the importance of this model of consent that explains in very large measure why I have been so concerned, on entering Government, to improve the standards we adhere to when we make policy and law – and specifically to ensure that the processes we adopt support the rule of law.

Secondary legislation has an indispensable role to play in a modern, regulated society. There is no suggestion that the Government should not take or exercise delegated powers. However, excessive reliance on delegated powers, Henry VIII clauses, or skeleton legislation, upsets the proper balance between Parliament and the executive. This not only strikes at the rule of law values I have already outlined, but also at the cardinal principles of accessibility and legal certainty.

In my view, the new Government offers an opportunity for a reset in the way that Government thinks about these issues. This means, in particular, a much sharper focus on whether taking delegated powers is justified in a given case, and more careful consideration of appropriate safeguards.

Theme 3: promoting a rule of law culture, which builds public trust in the law and its institutions

Finally, in my third theme I want to talk about culture and how we promote a rule of law culture which builds public trust in the law and its institutions – a vital task if the rule of law is to be made resilient enough to withstand the threats I have described in this age of populism.

We begin this task from a difficult place. Too often, the starting point for debate is that law is part of the problem. At best, an abstraction that is disconnected from the realities of people's lives. At worst, it can be held up by populists as a force that is somehow illegitimate. All of us who care about this subject – and particularly those of us in Government - need to work hard to counter these attitudes, and to foster a better understanding of the rightful place of law in a liberal democratic society.

For Government, this means leading by example. I hope you take some comfort in the fact that the importance of the rule of law and the constitutional balance is embedded in my DNA and that of a Prime Minister who not only rose to the top ranks of the Bar but served his country as DPP. Vitally, it is also a principle deeply cherished and jealously protected by the Lord Chancellor who has overarching constitutional authority as the guardian of the rule of law not least to protect the independence of the judiciary. Anyone who knows the Lord Chancellor and her determination to champion the rule of law will know that there will be no repeat of failures to defend attacks on the judiciary under her watch.

Of course, we will be judged by what we do, not what we may have done in the past let alone what we say now – and we will demonstrate our commitment to the rule of law in real and practical ways. By way of example only, in the coming weeks I will issue an amended guidance for assessing legal risk across government that will seek to raise the standards for calibrating legality that the thousands of brilliant lawyers working in every part of government

activity apply to deliver for the people of this country – I want them to feel empowered to give their full and frank advice to me and others in government and to stand up for the rule of law.

But the challenge to rebuild a broad consensus around rule of law values, cannot be left merely to politicians. It is a project that can only succeed if it is taken up by all of us, politicians, judges, lawyers, civil society, citizens.

We need to recognise that the populists have stolen a march – it is nearly always easier (often in the form of 3 catchy words) to deride and denigrate than it is to promote complex but vital principles. We cannot stand by idly as rule of law principles and the human rights idea are undermined, sometimes without challenge, on television screens, the pages of newspapers and most effectively and invidiously of all, on social media.

The challenge is to get out and explain the importance of the principles that we hold so dear – we have a fantastic story to tell and tell it we must. We need to explain that the rule of law is not the preserve of arid constitutional theory.

We need to explain how it provides the stable and predictable environment in which people can plan their lives, do business and get ahead; in which businesses can invest, the economy can grow; people can resolve disputes fairly and peacefully, and express and enjoy their basic rights and freedoms. We must illustrate how systems that do not hold to these values can be arbitrary and capricious. And backsliding from Rule of Law values, once it begins, can take an unpredictable course.

The story that we must tell is how the rule of law matters for growth, jobs and people's livelihoods – how it impacts upon the pound in their pocket and on the type of future their children deserve to enjoy. Governments that undermine, or take a 'pick and mix' approach to these values, disincentivise investment. Today, we have hosted the Investment Summit with a clear message that Britain is open for business. Britain has many commercial advantages, but one of our greatest is the trust that businesses can have in our courts, and the confidence they can have in a stable and transparent business environment, underpinned by a strong rule of law.

Education has a crucial role to play. We must take these messages to our schools and wider communities. I commend the work of civil society groups and charities such as Young Citizens and the Citizenship Foundation, and the Bingham Centre itself, who work with schools to promote a better understanding of the law and its importance in society. I believe it is right to think about whether even more can be done to strengthen the role of citizenship education as a means of promoting a better understanding of our constitution and, particularly, the importance of the rule of law.

But we must also talk about these issues in a way that resonates with the public and in language that everyone understands. Because most people would instinctively recognise rule of law principles as values that are part of the very fabric of our society. Fair play. Justice. Rules that apply equally to all; not one rule for them, and another for the rest of us. And where disputes do arise - whether with a business, an employer, or a neighbour – an independent courts system which provides the means for their just resolution.

And in the public realm, law is the great leveller that holds the powerful to account, and ensures that individual rights are respected. Those rights – human rights – are our rights, and belong to us all.

So it is we must proudly own the story of the European Convention on Human Rights, not least because in so doing we expose the wanton superficiality of many of its critics. We must explain how the values of the Convention are not foreign to us. They are universal. Closely connected rights are found deeply embedded in the heart of our own legal tradition. Echoes of habeas corpus, Magna Carta, and the Bill of Rights, can all be located in Articles 5 and 6 ECHR. This country banned torture long before our continental cousins, never mind the promulgation of Article 3. It is no coincidence that it was British lawyers, most notably the Conservative David Maxwell Fyfe, who helped to frame the European Convention after the Second World War, drawing of course inspiration from the Universal Declaration of Human Rights but also centuries of our own legal values. It is simply legally fatuous and historically ignorant of armchair critics of the Convention to declare that its supporters somehow seek to undermine our traditions or should be dismissed as naive snowflakes.

To the contrary, the Convention was drafted by men and women who had witnessed the very worst that humans can do to each other, their views were forged not in a Tufton Street seminar but in the trenches and the battle grounds, in the prisoner of war camps and the historic prosecutions of the Nazi war criminals at Nuremberg. The drafting and adoption took place not in a time of overindulgence but when societies were rebuilding from rubble and indeed this country was still under rationing. They were hard-nosed men and women from a generation who had seen conflict and vowed 'never again'. The structures they helped to create, the values that underpin them, have served us well as a bulwark against totalitarianism, and a foundation for European peace. And they remain the best hope of protecting us from the threats we face today.

For too long, populists have been able to frame the debate on human rights too narrowly, by reference to issues which, important as they are, can often feel disconnected from the everyday. We have to work to change this, not only by busting myths, but by showing how human rights positively touch so many aspects of wider society. The right to be treated equally. The right to express ourselves. The freedom to live in the way we choose, without undue interference from the state. These are the values we cherish and have chosen, collectively, to protect.

So too must we work to combat disinformation and misinformation about law and lawyers. The disgraceful scenes of violent disorder over the summer, including threats against immigration law firms and advice centres, showed only too vividly that what is said online can have dangerous consequences in the real world.

But the response to the riots also showed something more hopeful. People took to the streets not only to clean up and repair the damage, but to stand together against the forces of reaction and division. It is that spirit of decency and fairness that we must harness in our cause.

When I went to Liverpool I visited the library that had been burnt down in the riots and met a group of children who had been cowering under beds and in cupboards as the mobs went by at night but who the next morning got up and came to volunteer to rebuild. I talked with them about the books that we were donating to the library (including Helena's latest) which all concern how law and justice work for everyone – and we discussed the meaning and significance of the inscription that my office had placed inside each cover, taking the words of Dr Martin Luther King – that although the arc of humanity is long, it bends towards justice.

Conclusion

Restoration and resilience. These are the watchwords that will guide our defence of the rule of law in the face of populism. It is by renewing our commitment to rule of law values, as a Government and as a nation, at home and abroad, and patiently rebuilding the political consensus underpinning that commitment, that we will ensure that the rule of law is safe for future generations; so we may continue to work together towards achieving the Bingham Centre's vision of 'a world in which every society is governed by the Rule of Law in the interests of good government, peace at home and in the world at large'.

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