

The rule of law lies at the heart of the UK's system of government. It has been recognised in Parliament as a 'fundamental British value' - a value which must be protected just as carefully and resolutely as the other values which form the basis of our society, such as democracy, individual liberty and respect for diversity. The UK is also recognised internationally for its commitment to the rule of law, and the benefits that it has brought.

This briefing outlines key findings from a Bingham Centre for the Rule of Law study of how MPs and Peers engaged with the rule of law in the 2015-16 parliamentary session. The full report is available at www.biicl.org/bingham-centre/projects/ruleoflawreview2016

Why is talking about the rule of law in Parliament important?

The rule of law has practical implications for almost every aspect of government and parliamentary decision-making and so parliamentarians consider rule of law issues frequently. Every decision to grant a discretion to a Minister or bureaucrat in an Act of Parliament engages the rule of law, questions of access to the legal system such as fees, legal aid and legal process are rule of law issues, and holding the government to account is an example of applying the rule of law. Most often, parliamentary debates on these and other rule of law issues are focused on practical outcomes. Under the pressure of decision-making on complex and technical policy and legal issues with numerous interests to balance, including budgets, fundamental constitutional values, like the rule of law, are not often directly raised.

There is a danger in separating individual issues from their rule of law underpinnings. It is important to keep them linked because protecting and maintaining the rule of law requires constant vigilance across a wide range of issues. It can be weakened or even destroyed by incremental actions, perhaps taken in good faith, often unnoticed. Express reference to the rule of law mitigates such risks. Direct references to the 'rule of law' when issues that concern the rule of law are discussed is a reminder that these are not purely political and policy matters with limited impact in their own particular sphere but are part of the network of policies and laws that together secure a just society in the UK - necessarily underpinned by the rule of law.

So, the study on which this Briefing is based considers only express references to the rule of law in Parliament: it is concerned with the use of the term 'rule of law' itself.

Thinking and talking about issues from a rule of law perspective is important in every part of government but Parliament has a special role in upholding the rule of law because ultimately it is Parliament that must protect the fundamental constitutional values of the United Kingdom.

Key findings

- Few parliamentarians regularly use the term 'the rule of law' in parliamentary proceedings.
- References to 'the rule of law' are often in foreign affairs matters, rather than in domestic matters.
- Members of the Executive refer to 'the rule of law' more frequently than other parliamentarians and use it to defend Government policies.
- Direct references to 'the rule of law' are not made by lawyers only. Whether parliamentarians have a legal background is largely irrelevant to their references to the rule of law.

What is the rule of law?

The rule of law is a core constitutional value in the UK. It both encompasses and illuminates vital aspects of good law-making, accountable government and individual liberty.

Magna Carta and the rule of law – 2015 Lord Lang: ‘In this of all years, when we celebrate the 800th anniversary of the sealing of the Great Charter, it seems timely to reassert the primacy of the rule of law in our democratic heritage, which is still central today to the workings of our constitution and our courts.’ [House of Lords, 7 July 2015, Col 105]

Although the rule of law is a single value, it includes many different principles, each of which contributes to the rule of law overall. These principles cover a range of matters that have practical implications for all of us, every day, like access to justice, independent and impartial courts, legal aid, transparency in executive decision-making, fair and rational decision-making, and government accountability. The rule of law is not an abstract value to be used for rhetorical effect only.

As Lord Bingham wrote in his book, *The Rule of Law*, at the core of the rule of law is the notion ‘that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts’.

The principles that make up the rule of law have been stated in many different ways. Most famous in the UK is the statement of eight specific principles by Lord Bingham, the preeminent UK judge of his generation and a passionate advocate of the rule of law. While Lord Bingham’s eight principles touch on a variety of different issues, each principle should not be viewed in isolation. They work together to secure the rule of law.

Lord Bingham’s **eight rule of law principles:**

1. The law should be accessible and predictable
2. Legal questions should be determined according to law, not by the exercise of discretion
3. The law should apply equally to all, except where objective differences justify differentiation
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably
5. The law must afford adequate protection of fundamental human rights
6. Means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve
7. Adjudicative procedures provided by the state should be fair
8. The state must comply with its obligations in international law as in national law



Key findings of the 2015-16 study

Trends across the Commons and the House of Lords

- **Very few parliamentarians regularly use the term 'rule of law' in parliamentary proceedings.** Very few parliamentarians regularly use the term 'rule of law' in parliamentary proceedings. The 'top 10' lists of parliamentarians who referred to the rule of law most frequently in each House, each had a parliamentarian in first place with over 40 hits. However, there was quickly a sharp decline, with fewer than 10 hits for the parliamentarian in tenth place.
- **Among the MPs and peers who referred to the rule of law most frequently, most references concerned foreign affairs matters.** This unfortunately suggests that members continue to view the rule of law as an 'export' of greater relevance outside the UK than in it, and often of special relevance to the developing world.

'We have an important role to play as part of the international community. We cannot stand by and see atrocities happen; we cannot stand by and see the rule of law broken or human rights abused.' Valerie Vaz MP on the political situation in Burma [House of Commons, 23 March 2016, Col 571].

- **The overwhelming majority of parliamentarians who most frequently referred to the rule of law held positions in the Executive,** and a significant proportion of references to the rule of law by members of the Executive were made when answering questions. This suggests that the rule of law tends to be used by Government to justify Government actions, rather than as a tool to scrutinise legislation and hold the Executive accountable. But, it also means that there is significant scope for members from other parties (as well as Conservative party members who do not hold Executive positions), to use the rule of law as a tool for parliamentary scrutiny.
- **Whether parliamentarians have a legal background is largely irrelevant to their engagement with the rule of law.** Almost all MPs and peers who referred to the rule of law most frequently did not have a legal background. This demonstrates that the rule of law is not a concept accessible only to lawyers and can be utilised by all parliamentarians.

Top issues attracting rule of law discussion

Of the top issues that attracted rule of law discussion in Parliament:

- Approximately half concerned the **rule of law overseas:** the rule of law in Turkey, Hong Kong, Eritrea and China, and rule of law in UK foreign policy

'Efforts to improve economic opportunities in Eritrea must go hand in hand with improvements in human rights and the rule of law.' David Lidington MP

- Two issues concerned the **rule of law in Northern Ireland:** the rule of law in Northern Ireland generally and the Northern Ireland (Stormont Agreement and Implementation Plan) Bill

'The [Northern Ireland (Stormont Agreement and Implementation) Bill] ... amends the pledge of office for Ministers in the Northern Ireland Executive. The enhanced pledge reflects the commitments in the fresh start agreement to give unequivocal support for the rule of law and to work collectively to achieve a society free of paramilitarism.' Lord Dunlop, Parliamentary Under-Secretary of State, Scotland Office

- Four issues concerned the **rule of law in the UK generally:** the rule of law in the UK as a whole and in the context of: the Immigration Bill; the Office of the Lord Chancellor; and radicalism/extremism

'Justice also recommends that the proposal to extend the "deport first, appeal later" powers to all human rights-based immigration appeals should be a source of alarm to anyone who cares about the law and the rule of law. How can people outside the country assert their rights and appeal in the way that we think is appropriate under the rule of law? It is unimaginable.' Baroness Kennedy on the Immigration Bill

Parliamentary Committees' engagement with the rule of law

Some parliamentary committees referred to the rule of law in their reports, during discussions and in committee correspondence. Certain committees provided strong examples of how the rule of law can be used as a tool for legislative scrutiny at the committee stage. For example, the House of Lords Select Committee on the Constitution employed rule of law concepts and the term 'rule of law' in a variety of different contexts, including to criticise lengthy and vaguely worded immigration legislation, expansive executive power and in discussions about the role of the Lord Chancellor.

Case study:

The Constitution Committee's discussion of the Immigration Bill and the rule of law

The Constitution Committee's report on the Immigration Bill provides a clear example of how the rule of law can be used not just as a rhetorical device but as a practical tool to scrutinise legislation and hold the Executive accountable [House of Lords, 7th Report of Session 2015-16, HL Paper 75]. The Committee's report included a section titled 'Rule of Law', which gave detailed consideration to the following rule of law concerns:

- Length and complexity of immigration law in the UK and how the Bill would contribute further to this issue: the Committee stated that *'[t]he disparate and complex nature of [immigration law] is of real concern from a rule of law perspective'*.
- Executive intervention in judicial decision-making regarding the Executive's ability to override bail conditions set by the First-tier Tribunal: the Committee noted this proposal was 'constitutionally dubious' and recommended that the House 'ask the Government to clarify how their proposals comply with the rule of law'.
- Retrospective effect of certain bail provisions: the Committee stated that *'the rule of law requires government to act according to law, and from that perspective the retrospective provision of a legal basis for executive action is constitutionally suspect and calls for a clear justification'*.



Overall the analysis of committee materials shows that committees could refer to the 'rule of law' more often, particularly committees with domestic mandates. For example, the Joint Committee on Human Rights referred to the rule of law only in relation to the use of drones for the purposes of targeting killings to emphasise the importance of the rule of law in UK foreign policy, despite the fact that the Committee considers domestic issues that touch on many rule of law principles.

Conclusions

The Bingham Centre's study of direct references to the rule of law in parliamentary proceedings is grounded in the importance of linking issues that touch on rule of law principles with the overarching concept of the 'rule of law'. Direct reference to the rule of law in Parliament can strengthen the constitutional underpinnings of government in the UK. It can remind both politicians and citizens that decisions on what may seem to be rather small or isolated matters of bureaucratic detail – such as welfare benefits sanctions – may, in fact, touch on fundamental values. Expressly anchoring parliamentary deliberation in the rule of law can also protect the practical operation of the rule of law by clarifying its application and scope.

The report on the 2015-16 session of Parliament is therefore intended to encourage parliamentarians' increased recognition of and engagement with the rule of law in their parliamentary duties. Further, it is hoped that the study will contribute to the engagement of citizens and civil society with Parliament. Finally, the study adds to the evidence base on Parliament's role in upholding the rule of law.

In light of the study's findings, the Bingham Centre makes the following recommendations:

- 1. All parliamentarians should increasingly refer to the 'rule of law'** where appropriate in parliamentary proceedings. Such references would strengthen Parliament's important role in upholding the rule of law and enrich parliamentary debate by linking seemingly independent matters to the broader, more fundamental value of the rule of law in the UK.
- 2. Parliamentarians holding Executive and shadow portfolios** should increase engagement with the rule of law on matters within their portfolios and also engage with the rule of law in a broader range of contexts outside their portfolios (e.g. parliamentarians holding Executive positions should not only use the rule of law to advocate for or defend government action within their own portfolios). This would contribute to richer parliamentary debate and more rigorous scrutiny across a broader range of policy areas.
- 3. Parliamentary Committees** should engage more actively with the rule of law, especially those with domestic mandates.
- 4. Parliamentarians should especially increase their engagement with the rule of law on domestic issues.** Parliamentarians should not view the rule of law as a matter relevant to developing countries only and should also invoke rule of law principles and expressly refer to the 'rule of law' when considering UK matters, such as those relating to criminal justice, immigration and human rights.
- 5. The All-Party Parliamentary Group (APPG) on the Rule of Law has a role to play assisting parliamentarians to implement recommendations 1–4.** Parliamentarians are encouraged to attend the meetings of the APPG on the Rule of Law.
- 6. Parliament should ensure that Henry VIII clauses are used sparingly, and when used, are carefully drafted and only used in primary legislation that provides appropriate detail and substance for legal certainty.** Looking ahead to the major issue on Parliament's agenda, Brexit will raise a range of rule of law questions. The scale and complexity of the law reform process necessary to give effect to Brexit in UK law will likely give rise to a temptation to delegate large swathes of legislative power. Although such delegation may in some cases be appropriate, it is important that rule of law principles such as the proper exercise of legal power by the Executive are safeguarded by Parliament, as discussed in the Bingham Centre's Briefing Paper on Parliament and the Rule of Law in the Context of Brexit (www.biicl.org/documents/1284_briefing_paper_-_parl_and_rol_in_brexit.pdf?showdocument=1).
- 7. When scrutinising legislation, Parliament and its committees can apply the standards from the Code of Constitutional Standards** — derived from the work of the House of Lords Constitution Committee and produced by the UCL Constitution Unit — to promote fidelity to rule of law principles. (The code is available at www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/164). Many of the Code's standards translate broad rule of law principles into specific standards.

The Bingham Centre for the Rule of Law

The Bingham Centre was launched in 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;
- providing capacity-building on the rule of law to enhance economic development, political stability and human dignity.



The Centre helps countries, international organisations, corporations and legal bodies to build rule of law commitments, whilst improving the skills and abilities of legal practitioners and governments around the world to secure access to justice for their populations. The Centre is part of the British Institute of International and Comparative Law (BIICL), an independent research institute established in London over 50 years ago.

The Bingham Centre also acts as the secretariat for the All Party Parliamentary Group (APPG) on the Rule of Law. The purpose of the APPG on the Rule of Law is to promote parliamentary and public discussion of the rule of law as a practical concept. The APPG on the rule of law was established by a meeting of members of both Houses of Parliament on 3 June 2015 and is Chaired by The Rt Hon Dominic Grieve QC MP, the Co-Chair is The Lord Pannick QC.

The Centre is grateful to the Legal Education Foundation which provides financial support for the secretariat.

More information on the APPG for the Rule of Law can be found at:

www.binghamcentre.biicl.org/appg-rule-of-law.

www.binghamcentre.biicl.org www.biicl.org

We need your support

The Bingham Centre is a charity and is funded by donations from legal firms, individuals, charitable foundations and companies. We need to raise further funds in order to respond to the growing demand for the Centre's work by extending our global network of research fellows and expanding our portfolio of applied research projects, events and training. This will enable the Centre to enhance its impact and reach, including our influence on states, international organisations, corporations and legal bodies, whilst promoting understanding of and adherence to rule of law principles.

The development team is constantly looking for new donors, volunteers and partners. If you or your organisation would like to help, please contact: Sarah Taylor, Development Director, on 020 7862 5433 or email s.taylor@biicl.org



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