

Bingham Centre Newsletter

Spring 2014

From the Director:

I am so pleased to tell you about the very rapid growth of the Bingham Centre since our last Newsletter in the Autumn.

Our international presence continues to expand. In Burma/Myanmar we have been working with local lawyers, facilitating several hundred submissions to the Parliamentary committee leading the constitutional reform process. The Centre was invited to return to Palestine in March for continued work with their justice institutions. In November I visited Panama at the request of the British Embassy there to consider matters of judicial independence.

In Europe we are active in our work on standard setting. The Open Society European Policy Institute commissioned us to examine how the EU might develop a human rights monitoring mechanism. Last October we had the second meeting with the Italian Council of State (Consiglio di Stato) in Rome, joined by four of our Supreme Court judges. The Centre has become the first non-governmental body to be granted associate status at the Venice Commission (the Council of Europe's Commission for Democracy Through Law) and we will be assisting the Commission in its work on the rule of law.

Closer to home our major review on Streamlining Judicial Review in a Manner Consistent with the Rule of Law, headed by Fellow Michael Fordham QC, made recommendations which are receiving great attention. The Legal Education Foundation has funded a project that will develop rule of law teaching for the national citizenship curriculum in schools. The distinguished Sigrid Rausing Trust has generously provided a major grant for core funding.

New Bingham Centre Fellows include Sir Keir Starmer QC (formerly the Director of Public Prosecutions).

Among our events was a conference on the Rule of Law and Taxation, hosted by Berwin Leighton Paisner. We are delighted that at our first event in the US on 21 April we shall be joining with the New York Review of Books for an event at Georgetown Law School in Washington DC that will explore the future of human rights.

None of this could have happened without the support we are increasingly receiving, as law firms and others who helped establish the Centre are progressively agreeing to pledge their continuing assistance in different ways, and others are generously adding to that support.

Do please join us at our events and get in touch if you have ideas about issues which we might engage. Thanks to all our readers for their support.

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

Constitutional Reform in Myanmar



Guest Contributor, Alex Goodman, writes about the Centre's work on Constitutional Reform in Burma/Myanmar.

In July 2013 the Joint Committee for Reviewing the Constitution of the Republic of the Union of Myanmar was established. Its instigation included Aung San Suu Kyi, who was recently elected as an MP following her release from house arrest in 2010. The Committee announced a nationwide consultation exercise aimed at garnering advice from a broad range of political parties, organizations and individuals as to how the

Myanmar Constitution might be amended. The Bingham Centre has been running a highly successful project assisting the citizens of Myanmar in participating in the process.



This consultation process is an important, possibly even revolutionary moment in Myanmar's history. In 1990

Myanmar held elections in which the National League for Democracy won 83% of the seats. The ruling military

elite refused to accept the result and imprisoned many of the victorious candidates for the next two decades while the military assumed power and repeatedly suppressed political demonstrations and uprisings. By contrast to the participatory openness of this consultation process, Myanmar's existing Constitution was drafted in conditions of total secrecy and adopted in 2008 following a referendum, the result of which is widely doubted (the result was announced before polling had been conducted in parts of the country and it was asserted there had been a 100% turnout in some regions).

Naina Patel and I attended workshops in a dozen or so locations around the country on behalf of the Bingham Centre and met with hundreds of lawyers and other professionals as well as 20 members of Parliament, a Buddhist monk, a famous actor, and orphans from minority groups. Nearly 500 people (all living in Burma) wrote submissions to the Committee as a result of these seminars. There was unanimity amongst those we met as to a number of priorities for change including reform of the presidential qualification criteria; abolition of the appointment of military men to both houses of Parliament and of the military's de facto veto over constitutional change.

Our paper examining this unusual constitutional state of affairs was published in January 2014: *Constitutional Reform in Myanmar: Priorities and Prospects for Amendment* (Bingham Centre Working Paper 2014/01). It can be downloaded at <http://bit.ly/QdfJek>

It cannot be known whether Myanmar will manage a peaceful transition to constitutional democracy, but this moment presents the best opportunity for a generation. The very process of asking the population how they would like to be governed is a unique moment in Myanmar's history.

The Centre is continuing its work supporting this process.

The Constitutional Awareness Manual

Materials from the programme are available for download at www.biicl.org/binghamcentre/activities/

- Constitutional Awareness, Myanmar - Training Manual October 2013 (**English or Burmese**)
- Constitutional Awareness, Myanmar - Training Slides November 2013 (**English**)
- Key Provisions of the Constitution Myanmar - Handout November 2013 (**English**)

The Training Manual examines a number of issues including what is the constitution, key provisions of the current Myanmar Constitution and possible areas for reform. The document is not written for the specialist in constitutional law nor is it intended to be fully comprehensive.

Materials were translated into Burmese with the support of LexisNexis.

Teaching the Rule of Law in Schools

The Bingham Centre has been awarded a grant of £100,000 from the Legal Education Foundation for a project on Citizenship Education and the Rule of Law.

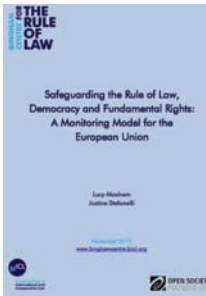
Aimed at Key Stage 3 pupils (aged 12-14 years), the project will develop a suite of resources and provide support for teachers to build rule of law issues into the national citizenship curriculum.

The flexible programme will incorporate print, audio-visual and web-based materials as well as case studies that bring rule of law concepts to life.

The scheme comprises six sessions that can be delivered over a time period of the school's choice. The project is especially timely as the 2013 government review of the citizenship curriculum resulted in a heavier focus on understanding law and democracy.

A new Research Fellow, Xiao Hui Eng, has been appointed and she will coordinate the project with the Centre's Director of Education and Training, Naina Patel, and Senior Research Fellow & Centre Deputy Director, Dr Lawrence McNamara.

Safeguarding the Rule of Law, Democracy and Fundamental Rights: A Monitoring Model for the European Union



For the past two years, the EU has been exploring how it can most effectively address member state breaches of human rights, democracy and the rule of law. In March 2013 it announced a new framework to strengthen the rule of law in the EU. In connection with that, the Bingham Centre was commissioned by the Open Society European Policy Institute (OSEPI) to

analyse a selection of existing EU, Council of Europe and UN human rights monitoring mechanisms, and to identify how the EU might best develop a monitoring mechanism.

The project was led by research fellows Lucy Moxham and Justice Stefanelli. Their report, published in November, concluded that any EU-level monitoring and

enforcement mechanism should:

- Avoid duplication by taking into account work already done by Council of Europe, EU and UN mechanisms;
- Focus on synthesising information and findings from these existing mechanisms to provide member states with a single point of reference on these issues; and
- Make use of the EU's proven influence in the member states to encourage and disseminate good practice.

OSEPI invited the Centre to present its findings at an experts' workshop in Brussels. The report was also submitted to the European Commission's consultation on the future of justice policy in the EU.

The Report is available to download here: http://www.biicl.org/files/6758_main_report_15_11_2013_commission_consultation.pdf.

The Prisoners Left Behind: Imprisonment for Public Protection After its Abolition



In 2012, Parliament legislated to abolish the sentence of Imprisonment for Public Protection (IPP), yet today some 5,500 prisoners remain under this form of indeterminate detention, with the majority being incarcerated far beyond the punitive 'tariff'

set by the sentencing judge. The European Court of Human Rights has referred to the consequences as 'arbitrary detention', which raises fundamental issues of the rule of law.

To address these issues the Bingham Centre hosted a panel discussion, chaired by Sir Sydney Kentridge QC, on 4 March 2014 in the Inner Temple. The debate was opened by Lord Lloyd of Berwick, who has regularly

raised the situation of IPP prisoners in Parliament, and contributions followed from Juliet Lyon of the Prison Reform Trust, who spoke of the impact on prisoners and their families, Sir David Calvert-Smith, who as chairman of the Parole Board described how the parole process had come under extreme pressure; and from the leading prison lawyer Pete Weatherby QC.

In an interview with BBC Newsnight the following week, David Blunkett, who as Home Secretary was responsible for the IPP sentence, admitted his regret over how it had been implemented. In late March the House of Lords debated the issues. Lord Faulks QC, Minister of State, referred to 'a recent meeting convened by the Bingham Centre, where ... those issues were thoroughly discussed', before going on to state that the Justice Secretary had so far not considered it appropriate to change the release test.

New Bingham Centre Staff



Xiao Hui Eng, Research Fellow, Citizenship Education and the Rule of Law

Xiao Hui Eng, will coordinate the Citizenship, Education and the Rule of Law project. Xiao Hui read law at the University of Cambridge and then completed a Master's degree in International Human Rights Law at the University of Oxford. She has worked at NGOs and international organisations, researching equality and non-discrimination law and practice at the Equal Rights Trust and Security Council practice and decisions at the UN Department of Political Affairs. She recently held a post at UNESCO where she was responsible for briefing on political issues and carrying out country analyses in the Asia and Pacific section. From June 2013 she worked on international projects for the Bar Council. She currently also teaches on the public international law LLM at the Open University.



Dr Julinda Beqiraj, Research Fellow in the Rule of Law

Dr. Julinda Beqiraj joined the Bingham Centre in February 2014 as Research Fellow in the Rule of Law. She holds a Master's Degree in International Affairs from the Institute for International Political Studies in Milan and a Ph.D. from the School of International Studies (Trento). Prior to joining the Bingham Centre, Julinda lectured courses on Public International law, EU law and International economic law at the University of Trento. She has been involved in a series of research projects covering subjects, such as, international migration, international economic law, regional human rights protection in Europe, European Union law, child labour issues, international humanitarian law and international criminal law.

New Bingham Centre Fellows

Sir Keir Starmer QC

After studying law at Leeds University (LLB) and Oxford University (BCL), Keir Starmer was called to the Bar in 1987 and appointed Queen's Counsel in 2002. He practised from Doughty Street Chambers since its inception in 1990 and was appointed Head of Chambers in 2007. His main areas of practice were human rights, international law, judicial review and criminal law. He has conducted cases at the highest level and all over the world in those fields. He was appointed Director of Public Prosecutions (DPP) in 2008, completing his term as DPP in November 2013.

Stephen Grosz QC (Hon)

Stephen Grosz QC is a solicitor specialising in public and administrative law and human rights cases, both before the domestic courts and in the Strasbourg and Luxembourg courts. He acts for individuals and organisations in a wide range of human rights and public law matters. He has acted or is acting in human rights cases against France, Turkey, Poland, Latvia, Romania, Croatia, Hungary and the Former Yugoslav Republic of Macedonia. He has been pursuing or advising on challenges relating to discrimination against HIV+ health professionals, reforms to legal aid eligibility and scope and the denial of a public inquiry into the 1948 massacre of Malaysian villagers by British troops.

Peter Oliver

Mr Oliver received his legal training at Cambridge, and served as a Legal Advisor in the European Commission Legal Services until 2014. He spent many years assigned to the Competition Unit in the Commission Legal Services, and has represented the Commission in cases involving air transport and other sectors before the European Court of Justice and the Court of First Instance. He was also responsible for institutional matters in the Competition Unit and in that capacity participated in the drafting of the competition provisions of the EU Constitutional Treaty. He has published more than 50 articles on a variety of topics involving the internal market, anti-trust and mergers, and rights of action before national courts for the enforcement of Community law rights. In addition, he is the author of *Free Movement of Goods in the European Union*, which is now in its fifth edition.

Judicial Review and the Rule of Law

In late 2012 the UK government embarked on a series of major reforms to judicial review, including proposing changes to legal aid funding for judicial review. These reforms raise significant rule of law issues, particularly with regard to access to justice, the exercise and scrutiny of executive power, and the resolution of questions of legal right and liability, which should be in accordance with law and not based on discretion.

The Bingham Centre engaged extensively with the reform proposals in two main ways.

- **Submissions to Government consultations:** The Centre submitted responses to each of the four Ministry of Justice consultations in 2013.
- **Evidence to Parliamentary Committees:** Evidence was given to the Joint Committee on Human Rights Inquiry into the reforms, including oral evidence given at the Committee's invitation.

The proposed reforms were modified by the Government over time, including in several ways along the lines suggested by the Centre. In addition, the Centre's analysis of the evidence-base for reforms to legal aid relating to judicial review permission work resulted in invitations to meet with the Ministry of Justice in mid-2013 and the government provided further data on these issues in subsequent consultations. The Centre's work attracted significant attention in the media, in legal commentary and in Parliament.

However, the Centre went much further than responding to proposals that were advanced by government. It set out to look at other options.

Report: Streamlining Judicial Review in a Manner Consistent with the Rule of Law

In October 2013 the Centre established an independent review into judicial review procedures.

Michael Fordham QC (Blackstone Chambers and Bingham Centre Fellow) headed the review with a team of three barristers, Martin Chamberlain QC, Iain Steele and Zahra Al-Rikabi. Their goal was to consider and report on the possible ways of improving judicial review procedures in the Administrative Court, to save and protect public funds, in a manner consistent with the rule of law.



Michael Fordham, Chair of the Bingham Centre's Streamlining Judicial Review Project

The Centre wanted to make a constructive contribution to the debate about the role of Judicial Review. There has been no systematic review of the procedures of the Administrative Court for many years.

The team invited written comments and in December 2013 published a draft list of 69 possible options for streamlining procedures. Around 50 people attended a public forum at Brick Court Chambers to discuss these options.

In February 2014 the team delivered its 43-page report, making 25 recommendations across issues relating to the allocation of courts and judges (chp 1), commercial proceedings (chp 2), pleadings and court papers (chp 3), the permission stage (chp 4), the substantive stage (chp 5) and costs (chp 6). The opening of the report explains succinctly why judicial review is so important for the rule of law:

"Judicial review is the mechanism by which the courts hold public authorities to account for the legality of their conduct. It is the reason we can be confident that Ministers and other public bodies will do what Parliament has authorised and required them to do, and act in accordance with their common law duties. It is the mechanism by which individuals

and businesses are protected from official or regulatory action that is unreasonable or unfair, arbitrary or abusive, unjustified or disproportionate. It ensures that the officials and bureaucrats who exercise public power are subject to the law, rather than being a law unto themselves. An effectively functioning system of judicial review is central to the rule of law."

The report attracted attention immediately on its release. When the House of Commons Public Bill Committee was considering the reforms shortly after the launch, the Streamlining Judicial Review report was discussed frequently by both Committee members and those giving evidence to the Committee. We hope it will continue to have an impact and our web site will provide updates on progress.

Download the report from: <http://www.biicl.org/binghamcentre/JRinquiry/>

Recent Events

Judicial Activism and the Rule of Law: Lessons from India

On 28 November 2013, Harish Salve SA, formally India's Solicitor-General, spoke on 'Judicial Activism and the Rule of Law: Lessons from India'. This was a public lecture held under the joint auspices of the Bingham Centre and the Constitutional and Administrative Law Bar Association (ALBA). The lecture was chaired by Lord Woolf of Barnes.

India's Supreme Court has handed down many notable decisions during its six decades of existence, some widely celebrated and others more controversial. Mr Salve traced the Court's jurisprudence from its cautious beginnings to the famous assertion that the basic structure of the Constitution was unalterable and through the lows of the 1970s Emergency period to the current era. In recent decades the Court has responded to the enormous scale of poverty and deprivation with important innovations such as granting 'epistolary jurisdiction' for informal petitions and developing its own jurisprudence of socio-economic rights in areas such as the right to health and to a clean environment. Overall, Mr Salve saw tremendous achievements but also potential pitfalls as the judiciary assumes more and more responsibilities which in other states are exercised by the legislature.

Burma/Myanmar: Prospects for Democracy and the Rule of Law



At this event held jointly with Chatham House, Robert Pé considered the need to promote crucial reforms of the country's 2008 Constitution, addressing the procedures and prospects for reform, the workings of the Parliament and the foreign investment landscape.

Since 2012, Robert Pé has been the advisor on legal affairs to Daw Aung Sang Suu Kyi. He is a partner of US-based international law firm, Orrick, Herrington & Sutcliffe and divides his time between Hong Kong, Naypyitaw and Yangon. Half Burmese and half English in origin, he is the grandson of the Cambridge educated Mr Justice On Pé who was one of two Burmese appeal court judges who dismissed the appeal of the mastermind behind the murder of the country's independence hero and father of Daw Aung San Suu Kyi, General Aung San.

Autonomous Weapons: Some Legal and Moral Implications



"Drones took the pilot out of the cockpit and replaced him or her with an operator in a cubicle far away from the battlefield. The next step is for human operators to be taken out of the loop altogether as far as the decision to release deadly force is concerned." In a seminar entitled 'Autonomous Weapons: Some Legal and Moral Implications', this subject was addressed by Professor Christof Heyns, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, with a response by BIICL Director, Professor Robert McCorquodale.

Professor Heyns discussed the implications of his recent report to the UN Human Rights Council on autonomous weapons, in which he calls for a worldwide moratorium on the production, testing and use of such weapons and for the UN to establish a High Level Panel on Lethal Autonomous Robotics including experts from science, ethics, law and the military. The seminar, chaired by former FCO legal advisor Sir Daniel Bethlehem QC, took place on 25th February 2014 and was jointly hosted by the Bingham Centre and the Human Rights Law Association.

Do Our Tax Systems Meet Rule of Law Standards?

Following on from our successful event on taxation in March 2013, this one-day conference discussed whether aspects of the UK tax framework comply with the rule of law standards set out in Tom Bingham's book, 'The Rule of Law'. The conference offered different perspectives on this important issue, including a comparative perspective from overseas, with a view to achieving practical outcomes. The event concluded with a debate on the GAAR between David Goldberg QC and Graham Aaronson QC. The purpose of the conference was to initiate a dialogue on tax and the rule of law with a view to developing best practice in this area. Berwin Leighton Paisner generously hosted this event.

National Security and the Courts

In April, the Centre welcomed The Hon Justice Kenneth Hayne AC from the High Court of Australia. Among the decisions for which Justice Hayne is best known is his dissenting judgment in *Thomas v Mowbray* [2007] HCA 33. In that case he took the view that where governments rely on intelligence information then, because that information can rarely be tested, there are very difficult problems for the courts because there is “little practical choice except to act upon the view proffered by the relevant agency”. The result, he said, is that “to the extent courts are left with no practical choice except to act upon a view proffered by the Executive, the appearance of institutional impartiality and the maintenance of public confidence in the courts are both damaged.” The judgment attracted attention in Australia and internationally.

At an evening event chaired by Lord Reed of the UK Supreme Court, Justice Hayne explored the difficulties that arise in these circumstances and the appropriate roles of the judiciary and the executive with regard to the public interest in protecting national security. His speech is available in full at www.biicl.org/justicehayne

Forthcoming Events

The Future of Human Rights - Washington DC, 21 April 2014

We are delighted to be presenting our first event in the United States.

This joint event between the New York Review of Books (as part of its 50th Anniversary programme) and the Bingham Centre is held in memory of Ronald Dworkin. One of the 20th century’s most eminent and influential legal scholars in rights and justice, Ronald Dworkin held prestigious chairs on both sides of the Atlantic.

In that vein, *The Future of Human Rights* will see ten leading scholars, judges and human rights workers from the US and the UK gather at Georgetown Law School to discuss the human rights challenges that will be faced by the next generation and the lessons which might be learned from the past in meeting those challenges.

Speakers include Shami Chakrabati (Director, Liberty, UK), Ken Roth (Executive Director, Human Rights Watch), Professor Pamela Karlan (Stanford Law School & US Dept of Justice), Professor Jeremy Waldron (New York University & Oxford University), Justice Stephen Breyer (US Supreme Court), Chief Justice Margaret Marshall (retired, Massachusetts Supreme Court) and the Bingham Centre’s Director, Professor Sir Jeffrey Jowell QC.

The Importance of the Rule of Law in Promoting Economic Development - Singapore, 23 May 2014

The Bingham Centre, in conjunction with Linklaters and the Singapore Academy of Law, will host a one day conference in Singapore in 2014 to examine linkages between the rule of law and economic development. The conference theme builds on the Bingham Centre’s participation in UN meetings and wider debates on finding ways to include the rule of law and good governance in the post-2015 international development framework that will replace the current UN Millennium Development Goals.

Panels will include a judicial dialogue between Chief Justice Ma of Hong Kong, Chief Justice Menon of Singapore, and Lord Phillips of Worth Matravers, the first President of the UK Supreme Court. Patricia O’Brien, the immediate past UN Legal Counsel and Under-Secretary-General for Legal Affairs, will be a keynote speaker at lunch. Other speakers will include the Singapore Minister for Law and Foreign Affairs, academics in the field of business and human rights and investment law, and the general counsel from a major development bank

Human Rights in Taiwan - London, 28 May 2014

This evening seminar will be presented by a delegation of judges, academics and lawyers from Taiwan, led by Professor Fred Chao-Chun Lin of the National Taipei University. They join us as part of a project funded by the British Academy, ‘The protection of human rights and constitutional review in the UK and Taiwan’. They will explore issues such as:

- The construction of constitutional democracy in Taiwan and how development of human rights law may have an impact on mainland China;
- The predicaments and prospects of international human rights law in Taiwan, with a particular focus on the ICCPR and the ICESCR which were incorporated into Taiwan’s domestic laws four years ago;
- How judicial review of legislation operates in constitutional courts in Taiwan.

Events Programme and Registration: www.biicl.org/events/

New Director of Development



Sarah Taylor joined BIICL in March 2014 as Development Director with responsibility for fundraising for the Institute, the Bingham Centre and the Watts Fellowship.

Sarah has been working in fundraising and marketing for nearly 30 years, in both the private and not-for-profit sectors. Sarah was deputy director at the Management Consultancies Association for ten years with responsibility for marketing, membership and sponsorship. She then moved into the charity sector managing corporate partnerships for Chatham House and Christian Aid before taking up a role as Director of Development for the child health charity, Best Beginnings. Over the last four years Sarah has raised over £4 million in grants, donations and sponsorship. Sarah can be contacted on 020 7862 5433 and s.taylor@biicl.org.

Update: The Bingham Appeal

The Second Phase of the Bingham Appeal is gathering pace, with over £500,000 raised so far towards the initial target of at least £5m. We are immensely grateful to The Sigrid Rausing Trust, Freshfields Bruckhaus Deringer, Linklaters, The David and Elaine Potter Foundation, Simmons & Simmons, the Bingham Family, and a number of other individual donors for their generous support.

The Sigrid Rausing Trust has confirmed a grant of £100,000 for general or 'core' support of the Bingham Centre over the next twelve months. The Trust is a UK grant making foundation, founded in 1995 by Sigrid Rausing, the publisher and philanthropist, to support human rights globally. Since then, the Trust has given away approximately £208.3 million to human rights organisations all over the world. This core funding will allow us to ensure that resources are available to support our priorities during the year as well the flexibility to meet urgent needs.

In addition, we are also extremely grateful to the Legal Education Foundation, Nuffield Foundation, Open Society European Policy Initiative, Ministry of Justice, Commonwealth Secretariat, British Academy, European Union (EU Coordinating Office for Palestinian Police Support), and the British Council for their generous support of the Centre's research and project activities.

Continued support from the legal community, corporations, philanthropic funders and individual donors both in the UK and internationally including the USA will be vital to ensure that there is sufficient capital to support the longer-term sustainability of the Centre. We are pleased to announce that the International Rule of Law Project Inc, a 501(c)(3) US public charity has been established, enabling us to raise and distribute funds in the US.

The Bingham Centre is delighted to announce that it has appointed two new Development Board members. Lady Hilary Browne-Wilkinson will support the Bingham Centre's development activities both in the UK and internationally and Mr Leslie Gordon Fagen will support the Centre's policy, programmes and development activities in the US.

For further information about supporting the Bingham Centre please contact the Development Office on 0207 862 5151 email: s.horsley@biicl.org. To give online, simply visit www.biicl.org/bingham_centre/ and choose from the various methods of giving.

Keep up with Bingham Centre news and events

Follow us on Twitter [@BinghamCentre](https://twitter.com/BinghamCentre) to find out the latest about our projects, events, opportunities and rule of law news from around the globe.

To sign up for event alerts or other email bulletins, contact us at binghamcentre@biicl.org and ask to be added to our email list.

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