

Joshua Rozenberg's interview with Lord Bingham on the rule of law

(VOICEOVER) Lord Bingham is widely regarded as the greatest lawyer of his generation. Master of the Rolls, Lord Chief Justice, and then Senior Law Lord, he was the first judge to have held the highest judicial offices in the land. A long-standing supporter of the British Institute of International and Comparative Law, and now its President, Lord Bingham has kindly allowed the Institute to name its new Centre for the Rule of Law in his honour. The Bingham Centre for the Rule of Law will be dedicated to the promotion of this fundamental principle in its international aspect, developing the work that has formed the foundation of Lord Bingham's judicial career. I'm Joshua Rozenberg and I'm delighted that Lord Bingham has agreed to support the fundraising campaign for the Bingham Centre by speaking to me about the rule of law.

Joshua Rozenberg

Why is the rule of law so important today?

Lord Bingham

My answer to that question is rather ambitious. We live in a world and, to some extent, in a society, in which great differences exist--of race, of nationality, of religion, of wealth etc, etc. No simple principle is going to transmute all these differences into universal harmony, but I do very strongly believe that observance of the rule of law is the best guarantee we can hope for of good governance at home and orderly and fair progress on the international level. So it seems to me that observance of the rule of law is perhaps the nearest we can get to a universal, secular religion.

Joshua Rozenberg

Everybody will say they're in favour of the rule of law but people may not be quite sure what the phrase means--how do you understand it?

Lord Bingham

I think there are a number of ingredients...the rule of law: it doesn't have a precise meaning. When it was used in an Act of Parliament two to three years ago, there was no statutory definition one can realize why not. But there are I think certain important ingredients, for example if you and I, and all of us, are expected to obey the law and to exercise our rights at law it needs to be possible with reasonable means to discover what the law is. Many Western societies it is very, very far from easy to discover what the law is. There are thousands of pages of new legislation every year, thousands of pages of ministerial regulations, and I have to admit it, albeit shamefacedly, very long judgments by the judges saying different things and very often making it hard

to know what the basis of the decision is. Again, we think that on the whole we should be governed by laws, and not discretions. We don't want our fates to be governed by whim of an official or a minister or the man in the town hall. But, we wouldn't want to squeeze all the discretion out of the system, because sometimes that works very much to the benefit of the citizen.

Again, we probably agree that powers should be exercised for the purposes for which they were conferred in the first place, and therefore a source of obvious concern and this would be multiplied worldwide, if a power enacted to counter terrorism is used to arrest a heckler at a party conference. So there are big questions here and they are not just British questions. The focus of the Centre and the Institute is on international law and comparative law. So we shall/should not be gazing at the British navel—we shall be taking a very wide international view of these as I think important questions.

Joshua Rozenberg

And, looking at some of these international aspects there are things like climate change, cyber-space, financial regulation—it's a very broad topic isn't it?

Lord Bingham

It's a very broad topic. You've named a number of the most important things one could mention. But of course the international problem of countering terrorism, the international problem of countering corruption and the whole business of how to conduct armed conflict, and the rules that should govern the conduct of occupying powers after conflict is over. Are there, for example, and this goes to conflict, not post-conflict situations, weapons that ought to be outlawed? From time to time in the history of international law various weapons have been thought to be so cruel as to be beyond the pale of human tolerance. I think cluster bombs and land mines are the most recent examples. It may be—it may be, I'm not expressing a view, that unmanned drones that fall on a house full of civilians is a weapon the international community should decide should not be used. So I think the raft of questions for consideration is endless.

Joshua Rozenberg

But how do academics in a Centre in London consider what to do with these problems? I mean these are matters for international agreement not for people sitting studying law books.

Lord Bingham

The Centre in London, although they are sitting in London, it's a very very broad academic staff. They are not all British by any manner of means, indeed I would think a minority are. And of course ultimately a lot of these questions are matters for political decision. I'm not proposing or supposing for a moment that a whole lot of lawyers are going to dictate what the nations

should decide. But I certainly am suggesting that it's highly desirable before decisions are made on these sorts of questions that they should be fully explored and the different solutions to the same problems should be compared and analysed to see which are the good solutions and which are the less good solutions. If you take for the example the question of detention of suspected terrorists, a very hot and difficult topic obviously, there is a great variation of international practice as to how you tackle this, even among nations that face the same problem.

Joshua Rozenberg

And climate change, again that doesn't seem a subject that is part of the rule of law.

Lord Bingham

I think it is very much part of the rule of law in this sense—that unless there are agreements reached which are capable of being enforced legally it would seem to be—others may disagree, that the chances of progress are greatly reduced, I mean it's all very well for aspirations to be aired and for everybody to think that other nations ought to reduce their pollution. But it would seem to me that the way forward has to be a fair and consensual settlement of what steps should be taken, by whom, and when.

Joshua Rozenberg

And the same goes for cyberspace and so on?

Lord Bingham

Yes

Joshua Rozenberg

It's all a question of international agreement.

Lord Bingham

Yes

Joshua Rozenberg

But it's much harder to get international agreements on terror and national security and so on, isn't it?

Lord Bingham

I don't know if it's harder than it is on climate change where we have a very obvious problem that the countries that cause most of the pollution are looking

for drastic measures of constraint on countries that have started polluting rather recently.

Joshua Rozenberg

And what about this question of the accessibility of legislation—you spoke about that little earlier when you were talking about these long judgments that the courts give and so on.

Lord Bingham

Yes

Joshua Rozenberg

Again—how can a study help to make the law more accessible?

Lord Bingham

Well there have been important exercises in trying to clarify and simplify legislation. The Australians for example carried out an interesting exercise by which a Bill was rewritten and reduced in length by about half, without any of the essential provisions that were in it to begin with, being omitted. And this is a serious problem. I can give you one example which was in the newspaper quite recently—a man in this country pleading guilty to smuggling...he was sentenced for that offense but he was also made subject to the confiscation of £66,000, to confiscate the proceeds of his smuggling. He appealed against the confiscation order; the Court of Appeal heard the appeal. They discussed it and decided to dismiss the appeal. They circulated, as is the practice, the day before, delivery of a draft judgment dismissing the appeal, and by chance, by pure chance, it emerged at that stage that the regulation which had been at the centre of the argument had been revoked seven years ago. And counsel for the prosecution didn't know about that, the counsel for the defendant didn't know about that, the jury at First Instance didn't know about that, the Court of Appeal didn't know about that, and there was no database from which they could apparently have discovered it.

Joshua Rozenberg

Do you know who spotted it?

Lord Bingham

Yes. The draft judgment was circulated around various official desks and it crossed the desk of one person, I think at customs and excise, who said, just a second, this regulation isn't in force.

Joshua Rozenberg

What about equality before the law? The importance of minorities having a fair hearing and so on?

Lord Bingham

Yes

Joshua Rozenberg

How can the centre help there?

Lord Bingham

I think that one needs to examine how this problem has been tackled not just here but in major developed countries like the United States, but also other countries like France with large Muslim population and other countries around the world. I don't think that probably there are any countries in the world which, hand on heart, anybody can assert that there is perfect equality before the law, sacrosanct as we would regard that principle as being.

Joshua Rozenberg

How do you balance, though, protection for minorities against protection for the majority? I mean, it's a classic question, but sometimes people feel that the rule of law is enforced by minorities at expense of the majority.

Lord Bingham

I think you're really talking about the international protection of human rights, and there are two points I'd make in response: the first is that any Charter or Convention of rights no matter what it's called, is fundamentally there for the protection of minorities because majorities are represented in Parliament, they can make their voices heard, and to a very large extent they can look after themselves. It's the oppressed, unpopular minorities that have struggled to make their voices heard. But the second point I'd make in response is a very important one, and it is that in the European Convention, which is the Convention that operates in this country and in a large number of other countries, it has been said time and time again that there needs to be a balance between the rights of the individual and the rights of the community of which the individual is part. Now there are some rights like the right not to be tortured, in which there is no balance to be struck, but for most of the rights in the Convention there certainly is and the European Court of Human Rights referred repeatedly to the search for balance which is inherent in the Convention. So I don't really accept this criticism.

Joshua Rozenberg

But if you're looking at an individual alleged terrorist and you're saying for example he can't be sent back to the country where he came from, and I appreciate that this is European human rights law, rather than specifically UK

law, then in looking after the rights of that individual you are putting in jeopardy the rights of the majority, and that majority can't protect itself against terrorism in the same way as you are talking about when you say the majority can look after itself.

Lord Bingham

Even when one is dealing with an alleged terrorist, account has to be taken of any fair legal system that he or she is an alleged terrorist and insofar as any procedure exists, as it does, in this country and in other countries, to determine whether it is appropriate to detain somebody, to keep them in prison and behind bars, the Convention requires that there should be a fair hearing. Now, fair hearing doesn't necessarily mean that all the protections of a full-blown criminal trial should be afforded to the individual but it does mean the thing should be fair in the sense that the person knows broadly what the thrust of the case against him or her is and has a reasonable opportunity to answer it. So the difficult question here is to draw the line between a hearing which is fair and a hearing which isn't. And the judges have struggled, I think on the whole successfully but some may think unsuccessfully, to draw the line in the right place and the place which Convention authority indicates.

Joshua Rozenberg

And looking more broadly at the international picture, the United States and so on, does the risk of international terrorism make it harder to persuade people of the importance of the rule of law?

Lord Bingham

I think it probably does make it harder to persuade people of its importance, but, I also think it makes it even more important to adhere to it and to accept that even in times of crisis there are some things which are not permissible in a civilised society, like resort to torture.

Joshua Rozenberg

And again, how can academics persuade the world of these important principles and how can a centre of lawyers encourage support for something that the politicians will dismiss as inconvenient, impractical or even undesirable?

Lord Bingham

I think it varies very much what country you're talking about. I, for example, have a close friend who comes from a Middle Eastern country which I won't identify, but it's a country beset by problems of a very serious nature and I put to him the question, what do you think is the most hopeful answer to the problems in your country and he said, recognition of the rule of law, and went to the lengths of having translated into Arabic a copy of a lecture I'd given on the subject. So I think that the concentration of effort does depend very much

on what country you are talking about. And there are some countries that I feel quite sure would like to get much closer to it but don't know quite how, and in this situation the Centre can be of enormous educational value.

Joshua Rozenberg

One of the principles of the rule of law that you defined in your Williams' lecture in Cambridge in 2006 was that ministers, if they are given discretion, must exercise that discretion properly and within the limits of the rules of law. How good are we at doing that at the moment?

Lord Bingham

I think it's probably an area in which practice varies enormously from one country to another. There is a body of literature that is strongly hostile to giving ministers or officials any discretion and that argues rules should be laid down by law and adhered to and there shouldn't be any question of discretion. That doesn't work out very satisfactorily in practice and I can think of cases in which somebody seeks to enter the country as an immigrant, not an asylum seeker but an immigrant and they don't fall within the immigration rules which are quite technical and specific as to the conditions to be met, but nonetheless the person presents a compassionate case and one that makes one feel that they should be allowed to enter, and on a number of occasions judges have said this applicant does not fall within the rules but it does seem to be a very strong case on the merits and I hope the minister may see his way to exercise his discretion in the applicant's favour. I remember a very experienced practitioner of the immigration Bar saying to me once that in his experience when the judges did say this, the Secretary of State or his officials took notice of it but he said, don't say it too often.

Joshua Rozenberg

How do we compare with the other countries at the moment? Do you think that we offer some sort of lead to the rest of the world in observance of the rule of law, or do you think that perhaps we've fallen behind and that other countries show rather more respect and are leading the way if not in the traditional aspects of the rule of law but in more modern aspects of it?

Lord Bingham

I don't think that any country could claim perfect compliance any more than anybody could claim perfect goodness in a sort of spiritual sense but I think our own record compares extremely well with that of most countries in the world and perhaps with all countries in the world. It is after all an expression that a British lawyer invented, the first reference to the rule of law in 1885, was Professor Dicey, and I think that we've remained a brand leader in this field.

Joshua Rozenberg

And then looking to the future, looking to the Centre, are you optimistic or pessimistic? Do you think that the Centre is going to be fighting a losing battle against all the political constraints and all the difficulties that you see ahead in maintaining this principle, or do you think that the Centre can give a lead and can actually encourage more respect for the rule of law and therefore a better world for all of us?

Lord Bingham

I am profoundly optimistic. I think everything works better if these rules are broadly observed, and the closer we get to observing them, and by we I mean all of us, all countries, the better governed people will be and the better international affairs will be managed. So, as I say I am profoundly optimistic that things are going to get better, not worse.

Joshua Rozenberg

Thank you very much indeed.

Lord Bingham

Thank you