THE RULE OF LAW by Tom Bingham, Allen Lane, 213pp., £18, January 2010, 978-1-846-14090-7

During the break-up with Kimberley Quinn that precipitated his break-up with the Home Office, David Blunkett is reported to have warned her: 'The law is on my side. I know because I made the law.' It doesn't quite have the melodramatic chill of Judge Dredd's mantra 'I am the law', but it comes close. And it's easily imaginable that it fell from Blunkett's lips, for it nicely sums up the tragically self-important view he took of himself, and of the executive branch of government, during his time in office. It was a view shared across much of the administration of the day. The law is the servant, on this view, of our duly elected political masters. It is what they say it is and what they want it to be.

This view inverts a central tenet of the ideal known as 'the Rule of Law'. Under the Rule of Law, as Plato put it, 'law is the master of the government and the government is its slave.' Where the Rule of Law prevails, nobody is above the law. The government too must answer to it in everything it does. Not only can't the government violate the law with impunity. It also can't casually change the law to exempt itself. For where the Rule of Law prevails, the law is resistant to casual change. It is stable and general and promulgated in advance of the situations to which it applies. It is tested in front of independent judges in open court. Any legal change, under these conditions, takes time and effort, and has implications, often unforeseen, for other situations apart from the one that the law-changer was trying to deal with. So as a law-changer under the Rule of Law one may turn out not to have made the legal change one was hoping to make. Which means that, thanks to the Rule of Law, it is very hard for a government to get the law out of the way *ad hoc* so as to clear a quick and easy path to its own policy objectives.

Doesn't that make the Rule of Law undemocratic, at odds with the rule of the people? Maybe. But the rule of the people is

not the the rule of the government. In Parliamentary democracy the government is not popularly elected, as the handover of Prime Ministerial office from Tony Blair to Gordon Brown reminded us. The government is a political elite, a career oligarchy, appointed from within an elected (in our case partly-elected) Parliament. Members of the government are elected, if at all, only as Members of Parliament, not as members of the government. If the distinction between the two is sometimes forgotten, that only goes to show how much control the government tends to exert these days over Parliamentary business, and how little scope there tends to be for the whole people – including those who voted for opposition MPs – to do any ruling. So let's not hear any bleating about the need for the law to be subordinate to democracy from those, like Blunkett, who turn out to be only fair-weather friends to both.

And let's not overstate the conflict either. In at least two ways democracy needs the Rule of Law. First, the ballot box is not the only mechanism of public political participation; nor is it the only mode of public political accountability. Periodic voting is neither necessary nor sufficient for democratic life. The first democracies acquired their lawmakers by lottery rather than election; politics was not a career but a periodic duty for all. That feature is still echoed in our system of jury selection, which reminds us – lest we forget - that the courtroom too is a place of public political participation. We exert our influence on public affairs by serving as jurors and lay magistrates, not to mention as litigants (when the government of the day isn't busy cutting off our legal aid). Of course in the courtroom there are also the lawyers and judges, another famous elite. But are they any more of an oligarchy than the party politicians? And are they notably less accountable? Not the judges. Uniquely among public officials, they are required to hear and decide any question that is validly brought before them and to produce fully argued public justifications for their final decisions. That makes them uniqely accessible and uniquely exposed, and plainly we wouldn't be a

democracy without it. Imagine a country with periodic re-elections of all officials, including judges, but without justice dispensed openly in publicly accessible courts. We shouldn't think of it as a democracy because, in spite of its election-mania, it lacks an essential alternative way for so-minded people to participate in public life, as well as lacking one of the most demanding modes of public accountability for officials.

And here's a second way in which the Rule of Law is needed for democracy. Democracy is the *rule* of the people, not just the implementation of the people's will (whatever that may mean). If popular influence is exerted other than through a system of authoritative public general rules complemented by authoritative independent adjudication of what counts as a breach of them, that isn't rule by the people because it isn't rule at all. Of course there is more than one way to organise the system of public general rules (the law) and more than one way to relate the other organs of the system to its organs of adjudication (the courts). But this only leaves room for marginal conflict between democracy and the Rule of Law. At the core, democrats need the Rule of Law above all else. They need government to be the slave, not the master, of the law. For they need the people to rule, and that means, above all else, to rule the government. For this they need rules (including electoral rules) by which to do so and powerful independent institutions to apply and uphold those rules.

None of this was lost on Mr Blunkett. He understood enough of it to know that he didn't like it, and regularly kicked against it. The lawyers and judges were his *bêtes noires*. Nor was he the only member of the administration to resent and rebuke their intrusions, even – in an ideological confusion worthy of Jim Hacker - intrusions called for by the same administration's own flagship manifesto legislation, the Human Rights Act 1998.

Lucky for us, then, that during the Blunkett years, and indeed throughout the age of New Labour, our judicial system was captained by a lawyer as conscientious, as judicious, as acute, and as lacking in self-importance as Tom Bingham, lately Lord

Bingham of Cornhill. Bingham's early practice at the Bar was as generalist as could be, and, although his judicial career was at first dominated by commercial work, his later judicial contributions to English Law extend to every branch and twig of that great tree. A recent *Festschrift* to mark his retirement from the bench boasts 51 chapters documenting Bingham's contributions to everything from maritime arbitration law to European competition law to the law of public inquiries.* Yet Bingham's professional legacy is not only a vast body of law. The *Festschrift* also draws attention to the decisive role that Bingham played, as Lord Chief Justice during New Labour's ambivalent human-rights honeymoon, and then as Senior Law Lord during the dark and reactionary war-on-terror years that followed, in upholding the independence of the judiciary and in standing up for the special role of the courts in protecting the Rule of Law.

Some of this work he did in court. Consider, among many other notable judgments, his successive repudiations of the 'control orders' that allowed for detention of non-British terror suspects without trial and, later, by semi-secret trial; his robust dissenting opinion on the legality of the regime for dealing with the displaced indigenous population of Diego Garcia in the Indian Ocean; and his deft handling of the decision by the Serious Fraud Office to abandon bribery proceedings against BAe under unlawful pressure from Saudi Arabia. Other work he did outside the courtroom, often as a member of Parliament in the House of Lords, or in lectures and papers of a more academic kind. He led, for example, the more constructive wing of the senior judiciary in creating what is now our Supreme Court (retiring before he could become its first president); and he cleverly used a public lecture to explain to Blunkett's successor at the Home Office, Charles Clarke, what Clarke shouldn't have

* TOM BINGHAM AND THE TRANSFORMATION OF THE LAW: A LIBER AMICORUM, edited by Mads Andenas and Duncan Fairgrieve, Oxford, 892pp., £95, 2009, 978-0-19-956618-1

needed to have explained to him, namely that judges are 'bound to take no notice' of the views of government ministers, and so shouldn't be expected to have cosy chats with them.

Bingham has also used his more academic lectures and papers to grapple in a more systematic way with ideas that he was only able to engage with in a more fragmentary and cursory way in his judicial work. His extrajudicial publications include essays on youth justice, European legal harmonisation, arbitration, and privacy. It was in a public lecture in Cambridge, published in 2007, that he started to bring together his thoughts on the Rule of Law itself. His new book *The Rule of Law* extends and deepens the themes of that lecture. It displays Bingham's erudition and patience, both rare qualities in legal practitioners, as well as his robust outlook and accessible style. He adds a slight flavour of autobiography by, as he puts it, 'referring, disproportionately ... to cases in which I have been involved', but with none of the pomposity and vanity that made Lord Denning's post-retirement *oeuvre* so cringeworthy. Although an easy and pleasant read, bringing refreshing simplicity to some issues that convolute legal theorists, Bingham's book is scrupulously academic in tone. His own views are always clearly stated and firmly maintained. Yet great trouble is taken to survey and illuminate rival views, including those that divide Bingham from his fellow judges, those that he finds in the academic literature, and even those of politicians and journalists. The words of Madeleine Albright, when in point, enjoy the same respectful attention as those of Lord Mansfield, Dr Johnson, and Aristotle. The book would a be a great tonic for anyone who believes, reading the party-political sloganeering about the Rule of Law that appear (with intended irony) on its dust-jacket, that the ideal is an empty one. Bingham shows that, on the contrary, it has much work to do, and that the opposite view is borne mainly of complacency. We underestimate the Rule of Law mainly because we cannot imagine life without it. We complain that judicial efforts to

protect it are undemocratic because we fail to see that democracy itself is made possible only by its unobtrusive presence.

Made possible, but also made inevitable? Apparently so. Bingham favours what he calls a 'thick' account of the Rule of Law (67), according to which it necessitates respect for and protection of the full range of human rights: not just those ensuring due process of law for all, but also those concerned with, for example, life, privacy, association, property, and assembly. The Rule of Law, he thinks, also requires anti-discrimination rights. It follows that Bingham's thinking on the subject does not leave logical space for regimes that respect the Rule of Law but are otherwise notably illiberal (e.g. forbid gay relationships or organised religions). Nor – a different point – does it leave logical space for regimes that respect the Rule of Law but are otherwise notably undemocratic (e.g. do not have universal suffrage, or have only one political party). In this one is reminded slightly of Albert Venn Dicey's brilliant but also infamous treatment of the Rule of Law according to which, roughly, no country has the Rule of Law unless it has the British Constitution. Bingham is, of course, nowhere near so jingoistic. He is a Diceyan for the Eurostar Generation. Roughly, no country has the Rule of Law unless it would be morally suitable to join the Council of Europe.

Why does Bingham favour this (I think too parochial) view of his subject? His two attempts at explanation are cursory and strange. The first comes early in the book. Referring to the law of torture in various jurisdictions and historical periods, he asks, as well he might: 'What has this got to do with the rule of law?' His answer: 'there are some practices so abhorrent as not to be tolerable' and which 'even the supreme power in the state should not be allowed to do, ever' (17). Clearly that is the right answer, but to a totally different question. It explains why torture ought to be banned in every country, such that (if the Rule of Law prevails in that country) there will be no torture there. But it does nothing at all to explain why the ban itself is required by the

Rule of Law. To bring it under that heading, Bingham seems to be running the following plainly invalid argument: conformity with the Rule of Law is a hallmark of civilisation; the banning of torture is a hallmark of civilisation; therefore the banning of torture is part of conformity with the Rule of Law.

Nor do things get much clearer when Bingham comes back to the same question later in the book. He says that if human-rights-violating regimes could be Rule of Law regimes, that would strip the Rule of Law 'of much of its virtue' (67). This time the argument seems to go like this: if the banning of torture (and censorship and so on) were not part of conformity with the Rule of Law, conformity with the Rule of Law would be less important than it is; conformity with the Rule of Law is not less important than it is; thus the banning of torture (and censorship and so on) is part of conformity with the Rule of Law. This argument is valid, but question-begging. How important it is to conform with the Rule of Law, in comparison with other sometimes competing ideals and principles of good government, is one of the questions we need an answer to. It is argumentative gerrymandering simply to fold those other ideals and principles of good government into our account of the Rule of Law until it reaches the level of importance we want it to have.

Moreover, even if we ignore the question-beggingness of Bingham's second argument, we may be puzzled by one of its assumptions. Why would anyone think that something is stripped of 'much of its virtue' just because it doesn't automatically bring with it various other good things? Isn't it enough, to preserve its virtue, that it is still a precondition of those other good things (as conformity to the Rule of Law is of both democracy and respect for human rights)? Compare life. Life is a precondition for the realization of any other kind of value. Of course life can be wasted, meaning that it doesn't yield much in the way of other kinds of value. It does not follow from this possibility, however, that the value of life itself is nugatory, that life is 'stripped of much of its virtue'. Nor does it follow from the fact that the

Rule of Law does not bring with it democracy and respect for human rights diminish its value in making these and many other good things possible. Bingham's assumption to the contrary goes unexplained and we are left none the wiser as to his reasons for favouring a 'thick' account of the Rule of Law.

There are some hints that Bingham has not quite worked through all the implications of his 'thick' account. In a 2005 case concerning the validity of the Hunting Act 2004, Bingham's fellow Law Lords Johan Steyn and Brenda Hale warned that there might come a day when they would hold part of an Act of Parliament legally invalid because in it Parliament attempted to do something too antithetical to the Rule of Law. Bingham was silent on the point in the case. In his book he opposes the Steyn-Hale view (166-7). It is indeed the place of judges to uphold the Rule of Law, he says, but not in *that* way, not in violation of the doctrine of Parliamentary Sovereignty. We can see why he might think this if, under the heading of the Rule of Law, he includes protection for the whole range of human rights. As he rightly says, it is Parliament that has given English judges the power to rule on the compatibility of Acts of Parliament with human rights standards, and Parliament can (as things stand in the law today) take that power away. But Steyn and Hale are not thinking of an Act of Parliament that merely violates human rights. No doubt Steyn and Hale agree that Parliament is constitutionally at liberty to do that much. As they make clear, they are thinking of an Act of Parliament that purports to oust the jurisdiction of the courts to rule on questions of law arising under that same Act. Consider, for example, an Act of Parliament that says that it is deliberately obscure and must not be clarified by the courts. I hope Bingham would agree that in spite of this provision the courts must go on applying – and thereby necessarily clarifying - the Act, for that is the very least that the doctrine of Parliamentary Sovereignty requires. It requires the courts to apply Parliamentary legislation, whatever its merits. If Bingham would accept this then he is on the side of Steyn and

Hale after all. He is committed to upholding an Act of Parliament as law even when it demands not to be so upheld.

It is only Bingham's 'thick' account of the Rule of Law, then, that makes it seem as if the Steyn and Hale view is at odds with the constitutional doctrine of Parliamentary Sovereignty. If we jettison the extra baggage with which Bingham thereby weighs down the ideal, we see that the Rule of Law and the doctrine of Parliamentary Sovereignty are as one in requiring judges to disregard, and thereby invalidate, certain imaginable provisions of an Act of Parliament. For certain imaginable provisions of an Act of Parliament prevent those Acts from entering the law, and the doctrine of Parliamentary Sovereignty says that all Acts of Parliament, however immoral, have to enter the law. The doctrine of Parliamentary Sovereignty cuts against invalidating Acts of Parliament on human rights grounds, but not against invalidating them on Rule of Law grounds.

These philosophical criticisms of Bingham's arguments are in one way unfair. He is not a philosopher and this is not, and does not pretend to be, a philosophical book. It is true that Bingham poses certain timeless philosophical questions – What is the Rule of Law? Why does it matter? – but he is by profession a judge and he sets about answering these questions in an impeccably judicial way, treating them primarily as contemporary questions of doctrine and policy calling for a brisk adjudication. Typically, then, Bingham puts before us two rival positions on each topic, much as if they were the positions of two parties appearing before him in court. Having set them out, he rapidly moves to tell us which of them he favours. Typically there is little intervening argument in favour of the chosen option, never mind against the rejected one. To mention one striking example, Bingham sets aside a well-known philosophical analysis of the Rule of Law by saying that '[w]hile ... one can recognize [its] logical force', he would 'roundly reject' it (67). He prefers a rival view which he attributes to the European Court of Human Rights and certain other institutions. Why? No argument is

given beyond the statement that those institutions endorse it and that he prefers it. As philosophy this would be high comedy. As the work of a judge it is, to repeat, quite impeccable.

I am not trying to suggest, of course, that judges do not make arguments, or that they do not make good arguments. Of course they do, and Bingham is an assured master of the art. But the art of judicial argument is different from the art of philosophical argument. The cases which call for argument in the higher courts are, by and large, those that are arguable, meaning those that could reasonably be decided either way. The arguments having been made by the able lawyers on both sides, there is normally no secret ingredient that a judge can add to either of them that will make one of them a success and the other a failure, other than a decision to run with one and not the other. Running with an argument generally means setting the argument out in its most persuasive form, and thereby (or thereafter) endorsing it. There is no requirement to show that the argument for the other side was deficient – thankfully, because usually it wasn't - let alone a requirement to dispose of any arguments that were not advanced by either party. An accomplished judge may well pretend, even pretend to herself, that the question before the court is soluble other than by decision, but by and large it is not. So there isn't much point in being a philosopher on the bench. Nothing is a philosophical problem if it is soluble only by decision. Some philosophical problems may not be soluble at all, but to the extent that they are they call for solutions that recommend themselves as true, irrespective of anyone's decision to endorse them. Most problems in the higher courts are not of this type and the undoubted skill of judging in the higher courts is therefore not readily transferable into philosophy (nor vice versa).

Should we conclude that Bingham chose an unsuitable topic for his book? Far from it. The Rule of Law is not only a moral ideal for government and law, but also a core doctrine of the United Kingdom constitution, recently reasserted by Act of Parliament. *The Rule of Law* does double service as a lively tour

of some of the contemporary and historical debates about the moral ideal and as an introduction to some problems about the constitution that have been pressingly and sometimes disturbingly live in important recent cases in the higher courts in England. In its first role, as we saw, Bingham's book goes slightly out of its depths. In its second role, however, the book is completely in its element. One could not wish for a better guide to the place of the Rule of Law in the English courts and in the United Kingdom constitution than Tom Bingham, who has done so much, in his long and distinguished period of high judicial office, to protect it. And the book shows us how: by good judgment, a peerless grasp of doctrine, and a strong moral compass, not by the highfalutin pretensions of the philosopher-judge, to which Bingham (unlike some of his colleagues in the higher judiciary) has never been much attracted.

John Gardner
Professor of Jurisprudence
University of Oxford