Lord Chancellor speaks at UCL conference on the constitution

Let me start by thanking UCL for organising this conference and Professor Russell for that introduction.

It is a huge pleasure to join you at what I hope will be one of my last fully virtual events. As the vaccination programme continues to roll out at incredible pace, we are all looking forward to life returning to some semblance of normality.

As that occurs, I have three priorities for getting the justice back on its feet and continuing to deliver our agenda for change in the justice system, which is integral to our society.

First, I want to ensure that we recover justice from the effects of the pandemic and get it firing on all cylinders again, so that it can work through the larger than usual accumulation of cases that are waiting to be heard – so that we can deliver justice that is timely.

Second, I want to rebuild the justice system – so that it is smarter in the ways it deals with reoffending, for example; so that it has stronger infrastructure to deliver a more modern service; and so that it is fairer in the way it treats victims and the professionals who keep our system working.

Third, I want to restore law and justice to their rightful place at the heart of our society. This means looking again at our human rights framework for example, and the relationship between Parliament and the Courts – to ensure that they continue to work as the public would want and expect.

It is the third of these elements – restoration – on which I will focus my remarks today.

Now as you know, the office of the Lord Chancellor has evolved and changed over many, many centuries. While it is something of a personal relief that the title 'Keeper of the King's Conscience' is no longer in the job description, the office continues to have a hugely important constitutional role – in maintaining that incredibly fine balance that exists between our institutions and the ways in which they make, shape and enforce the law.

In our 2019 manifesto, we outlined plans to look again at how our democracy operates and to restore trust in our institutions. That is a process that is taking place right across government and I am quite certain that colleagues at the conference today and tomorrow will look at themes such as the Fixed-Term Parliaments Act and how its change or repeal could affect our political landscape; and the importance of maintaining electoral integrity so that, for example, polling is protected from fraud.

Some have suggested that the Government's agenda is some sort of authoritarian Executive power grab, but I think your UCL colleague Prof Colm

O’Cinneide got it right when he said we are attempting to return to the political constitution model that was the orthodoxy for much of the 20th century(1).

For my part as Lord Chancellor, I have set up the Independent Human Rights Act Review – to look at this important piece of legislation now that it has been in place for two decades and whether or not it continues to meet in every respect the needs of our society; and of course I’ve already set up and overseen the Independent Review into Administrative Law – to examine whether judicial review continues to protect the rights of individuals against an overbearing state, and whether it is frankly being abused in order to conduct politics by other means. The latter report is of course going to result in legislation, and I hope to be able to speak more about that when the necessary changes and the response to the consultation has taken place.

Recently I spoke at a conference at Queen Mary University of London and, as I set out in my speech, I think it is also time for us to re-examine the Constitutional Reform Act 2005. It is a piece of legislation that made sweeping changes to the role of Lord Chancellor, which had always been a linchpin between the legislature, the executive, and the judiciary. That change was really forcefully brought home to me when I accepted the role two years ago and was obliged to resign as a part-time judge. The 2005 Act was, I believe, attempting to answer questions about an imagined idea of a clear separation of powers. I believe clearly that this reading of our system is an ill-informed one. What we actually have is a system based on checks and balances.

I am determined that my successors in the role should have the confidence that their powers are clear and that their relationship with the other branches of the constitution is fully understood by all.

The review is about taking a careful look at what has happened since 2005 – at whether we’ve lost anything from the role that could diminish it as it continues to evolve, and whether there is scope to clarify its responsibilities to make it more workable in the future. Now of course, I accept that governments are far from perfect, no matter their complexion. It is not difficult to find instances where mistakes with the use of power have been made in our country, but this does not mean that governments have an insatiable appetite for power. The reality is that with more power comes more responsibility and even government only has so much capacity. This I firmly believe from my own lived experience is a check on power in itself.

Judicial review is of course a vital check on unbridled power, and it is precisely for this reason that we should review how it operates – to ensure that there remains that essential balance between Parliament and our courts.

While there are those who would say that there are too few occasions when the process of judicial review goes wrong and that this exercise is somehow a waste of energy, I would say that we have a clear responsibility as custodians of our constitution to make it work as well as possible for as much of the time as possible. And when I say ‘we’ I am talking about all of us, Parliament, the executive and the judiciary – it is a collective

responsibility and the way we arrive at solutions is through dialogue, whether that plays out in Parliament, the courts or indeed in Government.

In the final analysis however, we should be crystal clear that the executive and judiciary are servants of Parliament, which derives its authority from the people – and ultimately this is the place where all the debates culminate. I think it is unhelpful frankly to be drawn into arguments about where power is derived from and anyone who would make out that I have relegated the judiciary to 'mere servants' has frankly missed the point – as a member of the executive I understand my clear role as a servant of Parliament.

In any event, our preoccupation should be with intent, not function – so for example what Parliament intended for the powers it gives to others. I believe there are two important parts to this. In a democracy as mature and complex as ours – where any gaps in legislation will naturally be filled – parliamentarians have a responsibility to ensure that laws are carefully drafted and therefore to avoid situations where judges are called upon to adjudicate on avoidable ambiguity. Now at the same time, it is incumbent upon judges to be cautious in their decision-making and to ensure that their judgments properly reflect the intent of our elected Parliament. Now in this regard, all of us have a responsibility to maintain the balance.

Like any minister of the Crown, I have a general responsibility to ensure that statutes passed through Parliament continue to be consistent with the rule of law. It is also my responsibility, along with the Leader of the House Commons, as chair of the Parliamentary Business and Legislation Committee of Cabinet, to cajole and to encourage each and every government department to consider whether the legislation they put before Parliament is properly thought through, well drafted, unlikely to export policy questions to the courts, and is consistent with the rule of law.

I will give you an example. With the mental health provisions of the Coronavirus Act it was decided ultimately that, as the measures were not used, it made abundant sense not to renew them. Now that review enshrined in the legislation was a useful process and proportional to the need at the time. It meant that renewal of the Act as a whole was not simply a rubber stamp exercise, which should never happen without proper regard to the rule of law.

Indeed, One of the core functions of the Law Officers of the Crown, and having been Solicitor General I am well familiar with its practice, is to make sure that the government acts lawfully and that it respects the rule of law. For example, if the Government wants to propose retrospective legislation this requires the consent of the Law Officers. That ensures respect for the principle of no excessive use of retrospective legislation, which is a core component of the rule of law. And that certainty which is an inherent element.

But as the minister leading the Ministry of Justice, I believe it is incumbent upon me to ensure that the rule of law itself cannot be misused to in effect weaponise the courts against political decision making. It is

worthwhile, therefore, to examine precisely what is meant by that term ‘the rule of law’.

In the modern context there is, I believe, some confusion about what the rule of law really means. Now it is true that there are a number of interpretations and potential component parts, but my worry frankly is that it has been the victim of conceptual creep, which leaves it open to hijack from politically motivated interests. The effect this is having is to set up a false dichotomy between the rule of law and parliamentary supremacy itself.

The task of the courts in interpreting legislation is to give effect to the intention of Parliament. This is done by looking at the words of the statute in context. As part of this exercise, courts will use certain general presumptions. Some of those presumptions can be said to reflect the value of the rule of law. For example, it can be seen by the presumption against retrospective legislation. As Bennion puts it, the rule is as follows:

- Unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation.
- The strength of the presumption varies from case to case, depending on the degree of unfairness that would result from giving the enactment retrospective effect.And finally,
- The greater the unfairness the clearer the language required to rebut the presumption(2).

There are a couple of points to make about this. First of all, that the presumption helps to ensure compliance with the rule of law; second that the presumption can be said to reflect Parliament’s general intentions; and thirdly that the presumption is rebuttable – and indeed where the legislation is expressly retrospective the courts will give effect to it even if they think it might be unfair. The Law Officers play an important role here through the consent process, as I mentioned, and they give impartial and invaluable legal advice as independent guardians of the rule of law within government.

A number of other presumptions and rules of interpretation can be said to give effect to the rule of law. There is also the principle of legality according to which legislation, and in particular vague and general words, will be presumed not to be contrary to certain fundamental rights and principles.

Now on a high level of generality that is perfectly proper, but as the late Sir John Laws put it, ‘The rule of law is a Protean conception. Different meanings have been variously ascribed to it. It possesses many different facets, and has generated an enormous literature.’’(3)

The rule of law itself is not a legal concept, it is a concept of political morality about the way in which we are and should be governed. Although it is a political principle, it is one which is above and must always be above party politics – a commitment to the rule of law is something which we all share. This makes it an extremely powerful concept and a failure to abide by it gives rise to criticisms which are not grounded in mere party politics.

This has given rise to the possibility of abuse in political debates. Those of both the left and the right have tried to read controversial political values into it. Hayek railed against the notion that policies such as the welfare state could be defended on the grounds that 'social justice' was a requirement of the rule of law. Dicey thought that administrative discretion was incompatible with it, which for him meant that government involvement in the running of the economy for example by issuing licences was improper.

This sort of argument suggests that the party-political view of one group are themselves incompatible with the basic principles of our legal system, therefore characterising them as illegitimate without the need to engage with them on their merits. Now, doesn't this amount to moving the goalposts such that, no matter the will of the people and no matter the will of Parliament, a political result that is deemed undesirable by one side or the other can be deemed illegitimate in the name of the rule of law, no matter how loosely connected to that concept it really is?

That is not to say that the courts must never play a role – of course they should do so where it is right and proper. There will always exist a natural tension in that possibility – the question is how we respond to it. Part 5 of the UK

Internal Markets Bill is a classic example where that tension became abundantly clear. Some of the arguments around it were political ones, but the problem was that they were framed incorrectly in a constitutional way – almost as if to suggest that they were somehow more fundamental than they really were. In all too rapid a succession of events, observations about the rule of law soon descended into allegations of 'breaking the law' which is an entirely different thing!

It is, I believe, perfectly possible to avoid that sort of wrangling by being much clearer about what the rule of law means and how it interacts with politics. Political positions are not and should not be the preoccupation of the rule of law. Anyone who attempts to characterise them as such is, in my view, overreaching.

This is an example of what Professor Tasioulas calls 'conceptual overreach'. According to him this occurs when 'a particular concept undergoes a process of expansion or inflation in which it absorbs ideas and demands that are foreign to it'. The ultimate consequence of it is that '…a single concept … is taken to offer a comprehensive political ideology.' Tasioulas points out this runs the risk of diluting those concepts and also that it makes public debate more difficult 'because it makes it difficult to find any point of common ground or shared understanding with [those we disagree with].'

Now, in the context of statutory interpretation there is another danger to guard against. If the courts end up reading too much into the rule of law, we could get into a situation where they do not give effect to Parliament's intention because they applied the presumption when it should not have been applied.

Now, when adopting a strained interpretation on the grounds that not to do so

would lead to an outcome that is contrary to legal policy, the courts are on much stronger grounds when assessing the requirements of the rule of law where it is uncontroversial that one possible outcome in a case would be an unfair one. Take, for example, R v Registrar General(4) – where a convicted murderer applied to get the name of his birth mother under the Adoption Act. Now, the terms of the statute were absolute. However, there was a real risk that he may cause serious harm or even worse to her if he got this information.

The Court of Appeal held that, notwithstanding the absolute terms of the statute, the court should presume that Parliament did not intend for such a result as it would quite clearly be against public policy. Now in the absence of any evidence that Parliament had addressed its mind to this issue, the court interpreted the statute as not requiring disclosure.

Now I think we can all recognise that disclosure would have been unjust. There is no need to appeal to contested premises for this. So, the courts are on the safe territory I believe for using this as a trigger for saying 'we won't allow this outcome unless we can be sure Parliament really intended this.'

But the situation is otherwise when it comes to other decisions where the rule of law has been invoked. In the case of Privacy International there was a disagreement between the majority and the minority on whether it could be consistent with the rule of law to allow the Investigatory Powers Tribunal to make ordinary errors of law.

And in Evans there was a disagreement between the majority and the minority on whether the rule of law was infringed by the ministerial veto provision under the Freedom of Information Act. In both cases, this led the majority to require the clearest words (which were not present) to give the effect intended by the Government. By contrast, the minority applied a more natural interpretation to those provisions.

Now, of course, with any principle there are going to be borderline cases in terms of how it's applied. But these cases were not instances of everyone agreeing on the applicable concept, realising that its application was borderline, and then coming out on different sides of the line. Rather there was a substantive disagreement about what the relevant principles were. That disagreement was obscured by the use of the term 'rule of law'. In Privacy International Lord Carnwath thought that it was important 'to ensure that the law applied by the specialist tribunal is not developed in isolation ([to coin a phrase] "a local law"), but conforms to the general law of the land.'(5) Lord Sumption did not share that view or apply that principle. Neither did Lord Wilson.

It is also noteworthy that in Privacy International and in Evans those who dissented thought that the meaning was perfectly clear but those in the majority did not. Why is this important? Because legislating is an act of communicating to the courts what the legislature intends. For such communication to be possible, it is necessary to speak the same language. Provided that there is a shared understanding of when certain interpretative

presumptions apply, and what level of clarity is required to rebut that presumption, then there is no difficulty.

For things like the presumption against retrospectivity, this is perfectly clear. But the more high-level the presumption is stated at, such as by appeal to protean concepts like the rule of law or fundamental common law rights, the more difficulty this causes. In such cases there is a great degree of scope for reasonable disagreement over whether the rule of law has been infringed. After all, when enacting the provisions at issue in Privacy International and Evans Parliament did not believe that it was infringing the rule of law (and indeed the judges in the minority in both cases agreed). It was also perfectly clear, as the minority recognised, what Parliament actually intended. Provided Parliament's assessment was not wholly unreasonable, it does not appear to me to be right to frustrate that intention by, in the absence of the clearest possible words, saying that actually this does breach the rule of law and so a presumption against the interpretation applies and it can only be rebutted by words that are even clearer to what Parliament has used.

There is, here, I think an interesting contrast with the Human Rights Act. It is true that in the vast majority of cases Parliament believes that the legislation it enacts is compatible with Convention Rights. Nonetheless, the Courts can disagree and can read-down the provision to ensure compatibility. But, importantly, they can do so because Parliament has given them that power – the power to determine whether the legislation is compatible with Convention and the power to read it down. That is what makes this legitimate. However, s. 1 of the 2005 Constitutional Reform Act cannot be said that to enact something similar with regards to the rule of law.

The case-law on all this is in a state of flux – you can see for example the careful judgments of Lord Reed and Lord Carnwath in Elgizouli(6), and there is plenty of very good academic commentary on it such as Professor Varuhas's recent article on the Principle of Legality in the Cambridge Law Journal. Now taking all of this together this gives me a high degree of confidence that the courts will indeed end up in a benign, and stable position.

I would like us to end up in a position where the courts only read down legislation in cases where there is a clear and unarguable breach of the core components of the rule of law. Now, this should not be a controversial position for a Lord Chancellor to take, but we have seen through the responses to the judicial review consultation that there are questions around it – no doubt from some who are inclined to use the noble principle of the rule of law as a means to further their political agendas.

If we are to protect the rule of law from becoming a political football then we must ensure that its focus continues to be laser sharp, rather than allowing it to become amplified as a weapon to fight battles of politics. It is a concept which is quite rightly above politics. It exists to protect the principles of justice, not to advance somebody's political agenda.

What I am really saying is that I want to restore what was at one time the very conventional thinking that parliament makes laws that give power to the

executive and are checked by the judiciary. I am not saying that I have got all the answers but, when given the opportunity to address our foremost thinkers on our constitution, I hope that it is possible to open up a debate about the rule of law and what sovereignty means today. My view is that we diminish the former by allowing it to be applied in that overtly political way, and we damage the latter by expecting the courts to adjudicate on the expressed will and intent of Parliament.

What this does is force judges to become politicians by proxy – to answer difficult political questions by applying disparate legal principles. My aim is quite simple: to protect the courts from this unsatisfactory state of affairs and to prevent them from being dragged into politics by another name. As a former part-time member of the judiciary, I think that is a noble endeavour. As member of this Government, I believe it can restore the balance that we have always managed to maintain in the past – without losing one of our most important checks on the power of the state and I am interested to hear your thoughts.

Thank you very much indeed.

1. The UK's Post-Brexit 'Constitutional Unsettlement' – Verfassungsblog
2. Feldman, Bailey, and Norbury, Bennion, Bailey, and Norbury on Statutory Interpretation, 8th Edition, 7.14
3. Cart [2009] EWHC 3052 (Admin) at [35].
4. The Rule of Law – Stanford Encyclopedia of Philosophy
5. Conceptual overreach threatens the quality of public reason – Aeon Essays
6. R v Registrar General, ex p Smith [1991] 2 QB 393.
7. R (on the application of Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22 at [139].
8. Elgizouli v Secretary of State for the Home Department [2020] UKSC 10.
9. Varuhas, "The Principle of Legality" (2020) 79 The Cambridge Law Journal 578.