Lord Chancellor's Speech: Law and politics – the nightmare and the noble dream

Introduction and the role of the Lord Chancellor

Thank you, Richard [Johnson, School of Politics and International Relations, QMUL]. It's a pleasure to join you and everyone online.

It has been claimed on various occasions, most recently by my friend and colleague the Lord President of the Council and Leader of the House of Commons that one expert on the constitution believes, and I quote, that it 'has always been puzzling and always will be.' I say quote because the expert in question is no less than Her Majesty the Queen. But I think I had better leave it there for the sake of well-known propriety. Let me start by saying how grateful I am to the School of Politics and International Relations for the invitation, and to Queen Mary University for the opportunity to speak today as we continue to puzzle over our constitution.

Now, those who are privileged to serve as Lord Chancellor have, I believe, a unique responsibility with regard to our constitutional arrangements. As part of the Executive, the Lord Chancellor naturally wants the government to be as effective as possible in delivering on its agenda – we should not apologise or be defensive about that in any way, it is what voters expect from their government frankly. But at the same time, the Lord Chancellor has an important – a vital – duty to protect the Judiciary, not just in the single jurisdiction of England and Wales, but throughout our United Kingdom.

For instance, the Lord Chancellor retains the power to determine the remuneration of specified judicial offices in Scotland and Northern Ireland, the rationale being that this goes to the unique constitutional position of the Lord Chancellor and their duty to uphold the independence of the Judiciary throughout the UK – without compromising, of course, the integrity of those three separate and historic jurisdictions. The Lord Chancellor's role is also to champion those aspects of the three different legal systems that they share in common, namely an excellent Judiciary and a top-quality legal profession; to promote the value of the UK justice system on the global stage and the values that have made it such a success. So, the Lord Chancellor is therefore very much a UK-wide role.

As our system continues to evolve to serve the needs of our citizens, as it has over many centuries, the delicate balance between our institutions and the ways in which they interact between the nations of the United Kingdom inevitably requires fine tuning. The Lord Chancellor has a vital role to play in carrying out that work and, as the current holder of the office, I am taking forward a series of reviews to examine the balance in different contexts. As you will know, last year I set up the Independent Review of Administrative Law. And I am pleased to say that the Panel has produced a

fine report, which analysed the trends seen in judicial review over the previous decades, as well as evaluating the diverse views that are held about them. And a week ago, I launched a consultation outlining my proposals for reform which emanate from the Panel's recommendations.

The ongoing Independent Review of the Human Rights Act chaired by Sir Peter Gross that was established earlier this year recently held a call for evidence, as many of you will know. Now, that review is concerned with the operation of the various aspects of the Human Rights Act and I look forward to reading the Panel's report, so that the government can consider how to respond.

Finally, I want to examine the role of the Lord Chancellor itself, in the context of the Constitutional Reform Act of 2005. Now, the Act brought in some sensible reforms, such as a greater degree of transparency in judicial appointments, but there are strands that are worth examining – to ensure that they have kept pace with the developments and continue to provide the appropriate framework for the Lord Chancellor to exercise their duties in respect of our constitutional arrangements. We are still in the early stages of that thinking and I am clear that I want to consider these matters in an open and consultative way. I look forward to talking about this in more detail in due course, but I do think there are elements that feed into the specifics of what I want to talk about today and that are worth considering first.

In the days when the Lord Chancellor was not only a Parliamentarian and a Cabinet Minister, but also sat on the bench and appointed all their judicial colleagues, the role was often described as a 'linchpin' that linked all three branches of the state and managed the relationships between them. Now Walter Bagehot was somewhat unimpressed with this arrangement, describing the role as 'a heap of anomalies'. My predecessor, Ken, now Lord Clarke, said the role was difficult to explain to people in other political systems as it 'sounded like something… made up'. The only other Lord Chancellor to have hailed from my home town of Llanelli, Lord Elwyn-Jones, described it perhaps as only he could in a more kindly way as, and I quote, 'an object of wonderment and perplexity'.

The Lord Chancellor today

As you will know, the Constitutional Reform Act of 2005 made sweeping reforms to the office of Lord Chancellor, the extent of which was brought home to me when on assuming office in 2019 I was obliged to resign my position as a Recorder of the Crown Court, a part-time judge.

The Act aimed to answer questions about separation of powers, but the reality is that we do not have a perfectly neat and defined separation of state powers – and I say amen to that. As a Tory, I accept and I embrace the imperfections of the human condition and indeed of government. Now, instead we have a system which is based on checks and balances. By changing the role of the Lord Chancellor in the ways that the previous government did – remaining as part of the Legislature and the Executive but no longer the Judiciary – we have lost the sense of the office being the linchpin between

all three that I mentioned just a few moments ago.

It is worth reminding ourselves that contrary to regular commentary Parliament today is not in my view the supine body it has been at times. It is better informed by the way outside bodies interact with it; it is a stronger scrutinising body in my view certainly since the Tony Wright reforms; and more recently since 2016 it has demonstrated an ability to flex its muscles on issues of huge national importance. It is no longer the Victorian child, someone who is seen and not heard. The fact that Parliament frankly matters a lot more today and is more assertive than it once was, is to be celebrated in a healthy democracy such as ours. While it doesn't necessarily make the day-to-day work of politics any more straightforward, I frankly very much value the effect that it has on our ability to make better law – for instance the kind of cross-party working we have seen on the Domestic Abuse Bill of late.

Since 2007 Lord Chancellors have been drawn from the House of Commons, which means that they are much more in the hurly burly of politics, with responsibilities amongst others for piloting legislation through the House – indeed just last week I made the closing arguments for the Government in the Second Reading of the Police, Crime, Sentencing, and Courts Bill. And at the same time as taking on all of these responsibilities on behalf of the Executive within the Legislature, the role of Lord Chancellor continues to demand that those who hold the office remain detached from partisan politics in their duty to defend the Judiciary.

Now, the one benefit to no longer themselves being a member of the Judiciary is that the Lord Chancellor is able to offer, shall we say, much more detached commentary in upholding their oath to defend it. This is particularly helpful in discussing the question of where power lies in our country. So, let's look then at each of these institutions. Firstly, the Executive. The role of a modern Lord Chancellor can only be understood in the light of a modern government, and it seems to me that modern government is caught between two positions: firstly, that of constant suspicion about executive power and secondly one of constant expectation about the need for Government to assume that very power to 'take swift action'. And nowhere is this more obvious than in the adoption of secondary legislative powers as a basis of lawful activity, and in the ability via secondary powers to amend primary legislation, the so-called Henry VIII power.

And indeed, the current pandemic has thrown this issue in to stark relief. Government has imposed legislative restrictions on the clear understanding that they are to be temporary only, with reviews and sunset clauses to assure every one of their intentions. Suspicion remains, however. There is an historical hangover perhaps from the Civil War struggle between Parliament and the Crown, or rather, between Parliament and a particular interpretation of prerogative power, namely the Divine Right of Kings – and we still live with tensions between different arms of the state today. I won't deny that there have been instances in ancient and indeed more modern political times where governments have overreached and have had to be checked. Governments are not perfect, but neither generally speaking do they have that insatiable appetite to ever expand their power and reach.

Now this argument has been described to me by its opponents as somewhat redolent of the way in which Frederick the Great described the attitude of Empress Maria Theresa of Austria on the partition of Poland in the 1770s – and I quote: 'She cried, when she took; the more she cried, the more she took.' I see the point, but frankly it misunderstands motive. The idea that governments of all hues are on a ceaseless mission to expand their power is, frankly, for the birds.

Government is very often all too glad to share or cede responsibility. It is constantly faced with cries of 'there ought to be a law against it', and when it acts to address those calls, often it accrues a little more authority and a little more power. And of course, this has consequences. Government has to constantly balance the need for action with its actual capacity to deliver. This is the real struggle and is the true explanation for the reluctance of Government in many instances to seek more power. Because with more power comes more responsibility, and with more responsibility comes more financial cost. This in itself is, in my view, a key check against unrestrained Government and 'elective dictatorship', so well written about by my predecessor, Lord Hailsham. And there are many other restraints, both formal and practical. Modern Government is more Prometheus bound than unbound.

Hart's Lecture

So, when it comes to the Judiciary, its role and its approach, nowhere do these issues become more pertinent than in the area of judicial review. I think it is helpful from my vantage point, uniquely connected to the Judiciary but no longer of it, to consider issues raised by none other than Professor HLA Hart, one of the foremost legal philosophers of the last century, in his 1977 Sibley lecture at the University of Georgia, and it was entitled 'American Jurisprudence through English eyes: The Nightmare and the Noble Dream'[1].

And in addressing the question of adjudication, especially higher court judges, Hart explained that there were two views on how the courts approach such a task, which he termed the Nightmare and the Noble Dream. And setting aside the purist view that, when faced with a dispute, judges simply apply existing law and do not create new law, Hart saw two extremes: firstly, the Nightmare of judges deciding dockets of moral and political questions, and then the Dream of judges threading fundamental principles through every case.

Now the Nightmare in Hart's scenario and I quote 'is that this image of the judge, distinguishing him from the legislator, is an illusion, and the expectations which it excites are doomed to disappointment – on an extreme view, always, and on a moderate view, very frequently.' [2]

Now if of course adjudication were a true form of law-making, rather than the application of existing laws, this would lead to worrying questions about how the far judges' personally held views could form the basis of their legal decision-making. An easy defence is that here in the United Kingdom not only do we do avoid selecting our judges with regard to their personal political views, but our constitution does not allow for primary legislation to be struck down by the courts. The very existence of the sovereignty of

Parliament is at odds with the idea that judges could ever act as legislators and 'create' law, but as I shall return to, the core idea of the nightmare – that judges are placed into the position of legislators or political decision makers – is not unimaginable.

Hart's Noble Dream is the belief that – even when the law appears unclear or there exists no precedent, judges can apply existing law and underlying principles and I quote 'which if consistently applied, would yield a determinate result' [3] to their cases – to do so without creating new law.

Now whether this dream can be said to apply in the UK of course is questionable, given, as I shall return to, our legal systems can contain conflicting principles, and there may be a number of legal sources which could be examined in seeking clarification. Judges are then left in the unenviable position of having to make law-making choices.

Hart concludes ultimately that the truth – as with so many things in life – is somewhere in the middle. In many cases judges simply apply the law, but in others they have a discretionary field of judgement and actually have a choice to make about what the law should be. As Hart put it and I quote: 'It is not of course a matter of indifference but of very great importance which they do and when and how they do it.' [4]

Morpheus or Epiales in Britain

Whilst Hart was speaking of the United States, quite a separate and distinct jurisdiction to ours, it is useful nearly 50 years on to consider where Britain stands on Hart's oneiric spectrum – and how the modern Lord Chancellor should react.

Before the Supreme Court heard the appeal in the first Miller case, a newspaper carried a feature analysing how supposedly 'Europhile' the 11 judges were. The rating of each was based upon their formal links to European institutions, any views they publicly expressed that seemed to be sympathetic to the EU, and their close links to individuals who themselves might be pro-EU [5]. In the end, there was no correlation whatsoever between the rating given and the way in which way the judges ruled. Lord Sumption, imagined to be the only Eurosceptic, ruled with the majority; whilst Lords Carnwath and Reed, each imagined to be a Europhile, dissented. In this case, the Nightmare proved to be just that – a nightmare and a rather ridiculous one at that, but not at all easy for the judges whose integrity was impugned and who could not defend themselves.

At the same time the Noble Dream – the view that judges do nothing more than interpret and apply the law – is frequently aired in our country. For example, the former President of the Law Society said, and I quote: 'A judge's ruling is an expression of the law – not of their personal opinion. It would be disingenuous to conflate the two.'[6]

However, I am not the first to consider that this is not always true in every case. In an interesting lecture last year Lord Sales described R (Nicklinson) v Secretary of State for Justice as and I quote 'a case literally involving

questions of life and death, which called for a decision which balanced competing fundamental moral values. It also called for a decision which balanced competing fundamental institutional values in terms of whether the court should or should not strike the balance of moral values itself or accept the balance as struck by Parliament.' [7]

Now the judges of the Supreme Court, holding the highest legal offices in the land were not of one mind on what was the first order question here and how it should be answered.

Now if the courts had to answer moral and not legal questions themselves, wholly different from the sorts of questions which even the apex courts are accustomed to considering, this raises questions of what the proper description of the judicial role should be, how the government and Parliament should relate to them and how the Lord Chancellor – me – how I should defend them.

I do not think it is controversial to say that there are questions on which a court should not be required to adjudicate. And on one famous occasion a former Chief Justice, Sir Edward Coke told James I that no level of natural reasoning abilities made the king qualified to decide a case personally. And Coke of course distinguished between natural reason and I quote 'accessible to individual rational minds' and by which 'law is measured' [8] , and artificial reason – technical, legal reasoning which requires long study of the law. On this analysis, legislators use natural reason, but judges use artificial reason and this distinction is an important one in determining what is being asked of our Judiciary and so, in turn, how the Lord Chancellor should act.

Now without wanting to get into a debate about whether everyone is equally good at natural reason, there is no objective metric by which it can be measured. And, even if there were, judges in the UK are not appointed on that basis. And as the late US Supreme Court Justice Antonin Scalia pointed out of his own bench, they would have no more, and indeed likely had less, legitimacy to decide a moral question than nine randomly selected citizens – an inference which must be true even of our great Judiciary [9].

In a jurisdiction where a body of law lay out the settled moral and philosophical view of the nation and catered for all possible scenarios then no judge would ever be asked to exercise their own discretion. Despite the work of codifiers from Hammurabi through to Justinian to Napoleon, such a jurisdiction has never existed and indeed in the increasing complexity of the modern world seems further away than ever.

The United States has pursued a solution of considering the moral, political, and philosophical dispositions of would-be judges in the appointment process. And we've all seen the results of that. As Lord Chancellor I feel that this would indeed be a nightmare for the UK, which we should seek to avoid. Imagine if the newspaper story I mentioned earlier had been about the judges' views on Assisted Suicide – here we are back to the nightmare once again. But how best can the modern Lord Chancellor use their roles in the Executive, Legislature and as advocate and defender of the Judiciary to avoid that very

nightmare?

The Intention of Parliament

In her response to the Independent Review of Administrative Law call for evidence, the Noble Lady, Baroness Hale wrote and I quote that 'in the vast majority of cases, Judicial Review is the servant of Parliament'. In this Kingdom we in Government – the Executive and the Judiciary – are all servants of Parliament, which derives its authority from the people. But how do we know what it wants – particularly how it wants the Executive and the Judiciary to treat each other?

When Parliament grants a power to the Executive it also sets limits to how it can be used – these are the familiar grounds of judicial review. Now how those limits apply in a particular case essentially comes down to a question of statutory interpretation: did Parliament intend for the decision maker to have the power to do it? The courts should not imply any limitations on a power which Parliament did not actually intend; and if Parliament intended not to put in some limitations, the of course this must be respected.

There is a cautionary tale to be found in the case of Roberts v Hopwood, where the Appellate Committee of the House of Lords held that the powers Parliament granted to Local Authorities had the implied condition that they should be exercised in accordance with a so-called fiduciary duty towards ratepayers. Using this limitation of power that they had just discovered, the courts decided that a council could not set a minimum wage for its employees. So much so, that this rule was nicknamed by some mischievous souls as 'the rule against socialism'! The powers of local government have of course changed since then, but the legal problem of a constitutional problem raised is not simply theoretical.

On the other hand, the continued failure of the courts to give full effect to ouster clauses is a cause for concern. As Lord Chancellor I have sought to ensure that Parliament's instructions are clearer to both the Executive and the Judiciary. Although I am no longer personally a law officer of the Crown, I have a duty to uphold the rule of law. The Independent Review of Administrative Law Panel said that ouster clauses, when they are used in relation to specific decisions and powers, do not contravene the rule of law, and so should be upheld. Nonetheless, we are yet to see an ouster clause where Parliament was held to have been clear enough in its language to be given full effect by the courts. Indeed, even the previous Government with a majority north of 150 at one stage ran into problems in attempting to get an ouster clause through Parliament that sought to clarify the law in the broadest terms possible. So, I believe it is now time for Parliament to clarify its instructions to the courts in this situation, and so we are consulting on proposals on how ouster clauses should be interpreted by our courts, and to ensure Parliament's intentions are observed.

Now more generally, the risk of the Nightmare arises most commonly from legislation which lacks the kind of clarity that the rule of law demands in a modern and mature democracy like ours. A legal system as complex and advanced as ours will always fills gaps in legislation – and that is in the interests

of litigants. We must be honest about the fact that rushed and poorly drafted legislation leaves those gaps and judges frankly have an unenviable task in filling them. At best it is a Parliament shirking its duty which leaves jurists uncertain of whether it did or did not intend a certain outcome, at worst it is contracting out its own decision-making function. Frankly that tendency only creates more problems for those who must interpret the law. Governments of all complexions have a clear responsibility to draft better, clearer laws that protect the Judiciary from having the responsibility to do our jobs for us.

And it must surely be an important part of the role of the modern Lord Chancellor to be the keenest advocate in government of precise and clear legislation. As a cabinet minister I have the tools to challenge my colleagues to produce only the best legislation, but as in all things I cannot guarantee perfection.

It is particularly acute when our domestic law interacts with another jurisdiction. In the EU the CJEU's supremacy was the extreme answer to this tension between the Union and member states. New case law of the CJEU is of course no longer a matter for our courts, but how to maintain clarity for the courts was amongst the most technically and politically fraught parts of legislating for our exit. In the Strasbourg Court the evolution of the convention and our domestic law has increased the complexity and decreased the clarity of the law in cases like Nicklinson. It is in this vein that I have asked Sir Peter Gross to review the operation of the Human Rights Act. Like the rest of you I am awaiting the report and do not wish to pre-judge it, but I am hoping for recommendations which will lead to greater clarity for the courts and which I can, as Lord Chancellor, ask Parliament to approve.

As I have said, achieving that clarity is a responsibility placed upon me and on the Government, but each institution of the state has a responsibility to maintain and respect balance in our system. Writing about the recent decision of the Supreme Court in the Shamima Begum case – where the Court made the determination that ministers are better equipped to make decisions relating to national security and that resolving such matters through litigation lacked democratic legitimacy – one of its former members, Lord Sumption, noted that it marked and I quote 'a return to a more cautious approach to the judicial control of ministerial decisions.' [10] You might say that I am bound, as a minister in the government that made the decision being challenged in the case, to agree with him. But his assessment – that it goes some way to restoring a balance between Parliament and the courts which understands the realities and the proper role of each institution within a democracy – has much more to say about the ongoing relationship between the Executive and the Judiciary than it does about the decisions of the current government.

Conclusion

As a modern Lord Chancellor my duties are to properly balance our constitutional arrangements, and so to protect the Judiciary. To maintain a clear delineation about where the power lies, it falls to me to propose reforms which, as far as possible, avoid drawing judges into the political

realm and forcing them to adjudicate on moral or philosophical issues. The best solution is to avoid getting into this situation in the first place by Parliament taking the lead and ensuring that the discretionary field of judgement is appropriately construed.

And I quite agree with Lord Sales that when faced with an unclear statutory provision the court should seek to construe it by, and I quote, 'looking to infer what the legislating Parliament would have decided had it addressed itself directly to the issue at hand.' [11] But in doing so the courts should not be asked to replace Parliament's reasoning with their own.

The responsibility to avoid dragging the courts into moral and political issues lies not solely with the judges. Parliament and the Executive also has a vital role in this regard. We must confront the fact that there have been instances where Parliament glossed over its own divisions by passing legislation that was vague and which had the effect (if not the intention) of exporting the determination of certain moral or political issues to judges. I want us to be clear about where power lies and why; and to strike a balance in our constitutional arrangements – on which issues the courts should adjudicate, and in doing so how they should adjudicate them.

In doing so, I am not seeking to grab power for myself or for the Executive and I reject the notion that government is something to be mistrusted fundamentally. But getting the right balance – not just in this constitutional question but right across the board – is, I believe, a fundamental duty placed upon the Lord Chancellor by virtue of their unique role. And it is one that I have begun with the work I have referenced over the last 18 months and I intend to use all the tools at my disposal. And beyond this I look forward to saying much more in the near future about how it will be possible to achieve a balance that reflects the realities of the modern justice system and the world in which we live today. The truth is that neither the Executive, nor the judges are, to borrow a regrettable and wholly wrong headline, 'Enemies of the People'. Far from it, we are both the servants of Parliament and the people. And in that common endeavour the balance of our constitution will be maintained.

Thank you.

1. Hart, H.L.A., "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream" (1977) 11 Ga L Rev 969.
2. Hart 972
3. Hart 979
4. Hart 989
5. Daily Mail https://www.dailymail.co.uk/news/article-3995754/The-judges-people-week-11-unaccountable-individuals-consider-case-help-thwart-majority-Brexit-Mail-makes-no-apology-revealing-views-links-Europe.html#comments
6. https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/response-to-supreme-court-ruling
7. Lord Sales, 'Proportionality review in appellate courts: a wrong turning?' November 2020 available at: https://www.supremecourt.uk/docs/speech-181120.pdf, p. 3.

8. Gerald J. Postema, ‘Classical Common Law Jurisprudence (Part I)’ (2002) 2 Oxford University Commonwealth Law Journal 178
9. Cruzan v Director, Missouri Department of Health (1990) 110 S. Ct. 2841, 2859 (Scalia J); cited approvingly by Ward LJ in Re A (Conjoined Twins) [2000] EWCA Civ 254.
10. https://www.thetimes.co.uk/article/supreme-court-rules-that-home-secretary-is-the-best-judge-of-national-security-risk-rfs067gw9
11. Lord Sales, ‘In defence of legislative intention’ November 2019, available at: https://www.supremecourt.uk/docs/speech-191119.pdf, p. 16.