News story: The Rule of Law and the role of the Law Officers

The Advocate General for Scotland The Rt Hon Lord Keen of Elie QC delivered this keynote address at the Scottish Public Law Group (SPLG) annual conference in Edinburgh:

ADDRESS TO SPLG Conference, 11 June 2018

I am pleased to have been invited to address this Group on its tenth anniversary. The creation of the SPLG in 2008 was a timely event, during a period of great change in public law, and the last ten years have given the Group much to continue studying and discussing. I think it is an extremely good thing that we have a cross-section of the legal profession represented here today, including from the Bar and government.

I propose to begin by providing a flavour of what I, as a government Law Officer, do.

Of course, I appreciate that as public lawyers you will all have a grasp of the role of the Law Officers. I also appreciate that this Group has been addressed by other Advocates General in its ten year history. So, although perhaps telling you that which you already know, I am hoping to demonstrate that the importance of the role is well understood.

It is essential that the Law Officers are champions of the rule of law within government, and it is equally important that you are given reassurance that we fulfil that role. Our advice, both formal and informal, is confidential – a private matter between client and lawyer, so the extent to which we are effective in our advocacy to government is not necessarily on public view. I hope today to reassure you that all such advice is given in the best traditions of maintaining the rule of law.

I am, of course, the Advocate General for Scotland, (the full title given by the legislation which created the office) and have a specific remit to advise the UK Government as principal legal adviser on matters of Scots law, and to act on behalf of the UK Government in Scottish Courts. As a Law Officer I am also able, like the Attorney General, to exercise rights of audience before the courts of England and Wales.

Within the UK Government, to government ministers and civil servants, I do frequently stress that Scots law, and the jurisdiction of the Scottish courts, is no small matter – it is the law applicable to about one third of the territory of the UK. Every decision which civil servants or Government Ministers make, every piece of legislation prepared, must be tested for its application in the context of that legal system, and may be subjected to review by those courts in Scotland.

But the essence of my role is that I am a Law Officer of the UK Government,

part of a team with the Attorney General and Solicitor General, and we should perhaps pause to consider what exactly that means.

It is obvious that a government Minister in the Ministry of Defence is concerned with defence; that the Secretary of State for Health deals with health matters, and so forth, but what are the Law Officer ministers actually for?

It is sometimes said that we are the Ministers for the rule of law, and, given that is a more abstract concept than health, defence or welfare, it requires further explanation.

The duty of the Law Officers is to ensure that the Government acts lawfully at all times – that is, that Ministers act within the law, and civil servants stay within the law. This is reflected in the Ministerial Code which states that "the Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations". The current version of the Code contains a section specifically dedicated to the role of the Law Officers, but in its introduction it also makes it clear that it "should be read against the background of the overarching duty on Ministers to comply with the law and to protect the integrity of public life."

Law, in particular statute law, is the instrument of government – it is perhaps the primary means governments have of giving effect to policy.

As a member of the Cabinet committee known as the Parliamentary Business and Legislation Committee, I as a Law Officer exercise high-level oversight over the preparation of legislation by all government departments. In seeking to uphold the rule of law, I try to ensure that all legislation the Government prepares meets the requirements of legal certainty: the law should operate in a clear and predictable manner where possible. A change in the law should be clearly understood (or at least understood with the assistance of a reasonably competent legal adviser).

A change in the law should also, ideally, take place in the future. That is why there is a strong presumption against legislation being retrospective or commencing early – and by 'early' we mean 'within two months of Royal Assent'. The consent of the Law Officers is required where either of these options is being proposed – there are occasions when the rule of law is best served by retrospective or early legislation, but we have to ensure that the limited exceptions remain exceptional.

If the rule of law is disrespected, and falls into disrepute, elected governments will not be able to govern effectively – any government is simply shooting itself in the foot if it undermines the rule of law. When faced with proposals made by my colleagues, I ask them to consider not just what they wish to achieve in the short-term, but also to reflect upon what the next government might do in their shoes and thereby place these proposals into context.

Support for the rule of law is not just a matter of following rules

obediently – it places a greater responsibility than mere observance of the law on public servants – simply following the letter of the law is not enough.

An example which affects everyone in government – officials and Ministers – is the 'duty of candour' before the courts, which arises from a respect for the rule of law and the importance of the role of courts. In court we are obliged to do more than avoid telling outright lies – rather, we have a duty to be transparent, not to withhold significant information from the courts – in short, not to dissemble in any way. The duty of candour applies to all those "who derive their authority from public law", and so includes both Ministers and their officials. The principle was explained by Lord Donaldson MR in the Huddleston case , and the relevant passage is worth quoting in full. He said that the development of the remedy of judicial review and a specialist administrative or public law court…

"…has created a new relationship between the courts and those who derive their authority from public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration…The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why…Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."

Similarly the court in Al Sweady talked of a "very high duty on central government to assist the court with full and accurate explanations of all the facts relevant to the issue that the court must decide".

Now, to many in government those dicta seem challenging – and perhaps they are challenging – but it is part of the job of lawyers within government to remind them that it is to the benefit of government that its decisions and actions can be challenged in court. Those of us in government with responsibility for promoting the rule of law must deliver this message to all of our colleagues: do not be afraid of Judicial Review. Do not fear the courts. By providing an external check on the limits of executive power, the courts are a powerful ally to those within government who restrain the zeal of our colleagues or encourage policies which promote the rule of law.

It is perhaps a useful thought-experiment to imagine a world with no Judicial Review of our public administration – where no citizen has recourse to a forum which will vindicate his rights against the full power of government.

I think from within government it is sometimes easy to forget the enormous power the state can bring to bear against individual members of the public – not just the power to imprison or wage war, but the power to take your home into public ownership to drive a new motorway or railway through it; the

power to take your children into care; the power to put an individual on a plane destined for a hostile country.

The executive arm of government wields power over the most intimate and personal aspects of the lives of every single person in the country: our homes, our families and our jobs. Faced with the fearsome responsibility of exercising the full coercive powers of government, we should actually be grateful that the courts are there to offer guidance and set boundaries.

And in order for the courts to fulfil this role, there must be parties – individuals, companies, organisations – able and indeed prepared to take their cases to court. The cases I've mentioned already required a Huddleston or Al Sweady to seek Judicial Review in the first place. The language that we use in discussing any aspect of law is coloured by the names of the litigants who brought the cases which form the basis of our legal shorthand. Without them, there would be no common law, the law would not develop, our Acts of Parliament and Statutory Instruments would not be tested in court – in short, there would be no rule of law in any meaningful sense.

And yet, to many commentators, the media and even to some involved in the administration of justice, the litigant is too easily characterised as a thrawn and difficult individual, unable to compromise his or her dispute and too single minded to explore the alternatives to a day in court. There is sometimes a tendency to see a desire to have one's dispute adjudicated by a judge in court as an expensive form of self-indulgence. This approach, I suggest, is unfair.

Court cases which establish important legal principles are of value to us all, not just the parties to the case. Even a simple action for, say, a recovery of a debt, establishes the normal practices and understandings which underpin our daily business – we can ask for a debt to be honoured because we know that right can be vindicated in court, and the fact that debts are upheld by courts on a daily basis gives us some confidence that we can enter a transaction knowing that when necessary we can recover a debt. It is not an exaggeration to say that the rule of law underpins our economy: that the rise of the mercantile countries in the last 300 years, those that are the most prosperous in human history, has been parallel to the development of the rule of law in those countries.

"The importance of the rule of law is not always understood" – so said Lord Reed, last year, giving the judgment of the Supreme Court in the UNISON case .

I would certainly commend that case to all lawyers, administrators and public servants – you will find there a very elegant explanation of the connection between the rule of law, access to courts of law and the continued existence of Parliamentary democracy. Courts exist, Lord Reed explains, to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. The role of the courts includes ensuring that the executive branch of government carries out its functions in accordance with the law, and in order for the courts to carry out their function, people must have unimpeded access to the courts. And he continued

if I may quote:

“Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.”

Now, those of us whose work involves a consideration of the level and quality of service provided by the courts (and here I suppose I declare an interest, given my role in the Ministry of Justice as well as the Office of the Advocate General) may sometimes employ the language of consumerism when talking about the courts. We might refer to “users” or talk about “value for money”. In some contexts, where our aim is to make the court process more efficient, we can find the language of business and commerce useful, but we should not forget – and indeed Lord Reed has provided us with a reminder – that the analogy with the commercial world is not always apt. There may be a business-like way of running a court system, but it does not follow that the courts are only providing a service to litigants – they perform a wider function in the public interest.

The analogy with commerce is not apt for two reasons. First, a case in which a relatively small amount of money is at stake may in fact have a great significance for the individual who brings the case to court. The litigant makes a decision balancing the cost and risk of going to court against the possible benefits (and I don’t think that Lord Reed was suggesting that there should be no cost in taking a case to a court or tribunal) and having made that choice is entitled to have his case heard. Secondly, the principle or point of law at issue in the case may have a huge significance far beyond its importance to the parties to the case. The case becomes a form of wider, public, property, guiding legal advisers, informing decisions made in the shadow of courts, or inspiring legal reforms.

In this way, individuals like Mrs Donoghue and Mrs Bourhill achieved a kind of immortality (at least to Scots lawyers); as did companies like Caparo Industries or the Carbolic Smoke Ball Company. And the same fame or notoriety can attach to the defender of the court action – the Wednesbury Corporation, for example, now a byword, perhaps unfairly, for unreasonableness.

This legal roll of honour includes James Somerset, the escaped slave who took his case to the Court of Kings Bench in 1771, which resulted in the judgment by Lord Mansfield to the effect that there was no common law basis in England for chattel slavery. Mr Somerset had been purchased by a Mr Stewart in Boston and brought to England. He escaped, was recaptured, and placed on a ship bound for Jamaica, where he was to be sold to a plantation. His backers (a group of abolitionists) applied for a writ of habeas corpus (invoking one of the most stirring remedies underpinning the rule of law).

There are many aspects of that case which sound odd to modern ears, one of which was that when Lord Mansfield first heard the parties, he suggested that they might consider reaching a compromise settlement. We might wonder, with all the arrogance of history, how such a fundamental human right could be the subject of a compromise agreement. In the historical context, the suggestion

is not so unusual – apparently such cases did settle. It could be agreed that the slave would be indentured for a fixed period, for example, giving the master time to find a replacement. Charles Stewart was not a wealthy man (a civil servant!) and could not afford to replace his slave or pay a servant, but the suggestion was that he might be better off reaching an agreement with James Somerset than defending the application any further:

"Mr Stewart" said Lord Mansfield, "may end the question, by discharging or giving freedom to" Somerset.

And there it may have ended if Somerset and Stewart had gone in for mediation sessions or some form of alternative dispute resolution. If the case was only about James Somerset's freedom, saving him from the sugar cane plantations of Jamaica, then it might have settled with Somerset spending a further six months grumpily serving out his time with Stewart. But of course it was not just about Somerset. The case had what we would now call a wider public interest. Somerset's backers wanted, and succeeded in gaining, a foothold in the law of England which resonated around the world.

The earlier Scottish case, the Tumbling Lassie of 1687 does not record the name of the slave – only that she was a performing gymnast exhausted by her efforts in a travelling show. The case citation, however, records the name of her master, Mr Reid (also known as "the Mountebank") and the benevolent couple who took the Tumbling Lassie in: Scot of Harden and His Lady.

The Scottish case which followed Somerset, Knight v Wedderburn, does record the name of the slave, Joseph Knight. We know he had the effrontery to demand wages from his owner, Mr Wedderburn, and that when freed (as a result of the court action) he married Annie Thompson, one of Wedderburn's servants. Apart from that we know nothing about his life as a free man – we can only hope perhaps he lived on happily with Annie, with knowledge that by asserting his rights in court his name would live on in Scots law, having established an important principle.

This tradition continues: more recently, Gina Miller might find her name now attached forever to some important principles of British constitutional law and the use of prerogative powers. Lists, often very long, of such names feature in the written cases prepared for court actions.

Indeed the Ministry of Justice's answers to the UNISON appeal were no exception, and Lord Reed did not waste the opportunity to point this out to us, I quote:
"The written case on behalf of the Lord Chancellor" he noted, "itself cites over 60 cases, each of which bears the name of the individual involved, and each of which is relied on as establishing a legal proposition. The Lord Chancellor's own use of these materials refutes the idea that taxpayers derive no benefit from the cases brought by other people."

It was a point made with force, although not one which the Ministry of Justice would dispute in principle. A question arises over the level of fees to be charged for access to a tribunal or court, and, set at a reasonable level, these charges can promote access to justice by ensuring a sound

funding base for the court system (as Lord Reed acknowledges elsewhere in his judgment). But there is no dispute in principle about the importance of access to the courts.

So, I hope I, and more particularly Lord Reed, have provided you with some ammunition to respond the next time you hear someone say that the courts should be avoided completely in favour of the various forms of alternative dispute resolution; or that the courts should be funded entirely by those who are determined to use them regardless of cost. Without litigation, the rule of law is undermined, and without the rule of law, democracy is undermined.

It is also important to establish, when we are considering cases in the political sphere – such as the cases I have mentioned so far today – that when a point at issue is a point of law and not a matter of policy, then we must say so in unequivocal terms.

The cases in recent years on the various devolution settlements in the United Kingdom reveal a tension between the language used in political discourse, in the newspapers and in political speeches, and the language used by lawyers in court. Fortunately, our judges have robustly supported the practice of lawyers 'telling it like it is' when litigating on the statutes which set up the devolved government in Scotland, Wales and Northern Ireland.

In the Local Government Bylaws (Wales) case the Attorney General referred a Bill passed by the National Assembly for Wales to the Supreme Court under section 112 of the Government of Wales Act 2006 (that is, the equivalent provision to section 33 of the Scotland Act 1998). In giving judgment, Lord Hope stated some principles of general application which would also guide the court when dealing with Scotland Act issues.

Incidentally, you may note that the examples given today have tended towards cases in which the Government was not, ultimately, the successful party. I make no apology for that selection – if the issue under consideration is how the courts, applying the rule of law, may hold executive action to account, then it is no surprise that many of the relevant cases are those in which the government of the day has indeed been held to account.

Now, as I was saying, in the Wales reference, Lord Hope was kind enough to explain the approach the court would take if it were the legislative competence of the Scottish Parliament which was at issue. Firstly, he explained, the question of legislative competence "…is a question of law which…the court must decide." He continued, I quote:

"It is not for the judges to say whether legislation on any particular issue is better made by the Assembly or by the Parliament of the United Kingdom at Westminster. How that issue is to be dealt with has already been addressed by the United Kingdom Parliament. It must be determined according to the particular rules that section 108 of the 2006 Act and Schedule 7 have laid down. Those rules, just like any other rules, have to be interpreted. It is for the court to say what the rules mean and how, in a case such as this, they must be applied in order to resolve the use whether the measure in question was within competence."

Lord Hope continued by explaining that the question of whether a Bill was within competence must be determined simply by examining the provision by which the scheme of devolution had been laid out. The task of the United Kingdom Parliament, he said (quoting Lord Walker in Martin v Most) was “to define the legislative competence of the Assembly, while itself continuing as the sovereign legislature of the United Kingdom”. He went on:

“Reference was made in the course of the argument in the present case to the fact that the 2006 Act was a constitutional enactment. It was, of course, an Act of great constitutional significance, and its significance has been enhanced by the coming into operation of Schedule 7. But I do not think that this description, in itself, can be taken to be a guide to its interpretation. The rules to which the court must apply in order to give effect to it are those laid down by the statute, and the statute must be interpreted like any other statute. But the purpose of the Act has informed the statutory language, and it is proper to have regard to it if help is needed as to what the words mean.”

To some of us, in 2012, this confirmed our understanding of the interpretation of the legislation which constituted the various devolution settlements. To others, the language of sovereignty, or of the devolution acts being treated as something less than holy writ, was some sort of political insensitivity.

Starting with the Inner House in Whaley, to the Supreme Court in Martin v Most, Cadder, AXA Insurance, Imperial Tobacco, and Miller, judges have interpreted the Scotland Act candidly, stating the law as they understood it, not holding back for fear of criticism in the political sphere and on occasion being subject to personal attack as a result.

In this tradition, Lord Reed stated plainly in AXA General Insurance, with reference to the Lord President’s remarks in Whaley, that I quote:

“the Scottish Parliament is not a sovereign Parliament in the sense that Westminster can be described as sovereign: its powers were conferred by an Act of Parliament, and those powers, being defined, are limited.”

Later, in that same opinion, Lord Reed was obliged, because it was necessary in the exposition of the law required in that case, to be explicit about the relationship between the Scottish Parliament and the UK Parliament, and again I quote:

“As a result of the Scotland Act, there are thus two institutions with the power to make laws for Scotland: the Scottish Parliament and, as is recognised in s.28(7), the Parliament of the United Kingdom. The Scottish Parliament is subordinate to the United Kingdom Parliament: its powers can be modified, extended or revoked by an Act of the United Kingdom Parliament. Since its powers are limited it is also subject to the jurisdiction of the courts.”

That is not the language of politics. It does not defer to popular sentiment, but deference to popularity is not the function of the courts.

I have quoted extensively from these cases (albeit selectively) because it is important to stress that by simply telling the law as it is, the judiciary does practitioners such as ourselves an enormous service. When I stand up in court, I know that I need not add any political sweetener to my submissions – I can speak candidly without looking over my shoulder. The lawyers in my office, in their duty to speak truth to power, know that they can explain the law in such terms, with the authority of the highest courts behind them.

To conclude, I hope I've given you some food for thought and further discussion. The importance of an occasion like this lies in the opportunities to meet and exchange views. Thank you for your attention.