HOUSE OF LORDS

Constitution Committee

Corrected oral evidence: The role of the Lord Chancellor and the law officers

Wednesday 22 June 2022

10.15 am

Watch the meeting

Members present: Baroness Drake (The Chair); Lord Falconer of Thoroton; Lord Faulks; Baroness Fookes; Lord Hope of Craighead; Lord Howard of Lympne; Lord Howarth of Newport; Lord Howell of Guildford; Lord Sherbourne of Didsbury; Lord Thomas of Gresford.

Evidence Session No. 7 Heard in Public Questions 80 - 101

Witnesses

I: The Rt Hon the Lord Clarke of Nottingham CH QC, former Lord Chancellor and Secretary of State for Justice (2010-12); The Rt Hon David Gauke, former Lord Chancellor and Secretary of State for Justice (2018-19).

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Lord Clarke of Nottingham and David Gauke.

Q80 **The Chair:** Welcome to this session today on our inquiry into the role of the Lord Chancellor and the law officers. We are joined by the right honourable the Lord Clarke of Nottingham QC, former Lord Chancellor and Secretary of State for Justice, 2010 to 2012, and the right honourable David Gauke, former Lord Chancellor and Secretary of State for Justice, 2018 to 2019. Welcome and thank you very much for joining us today.

We have quite a series of questions that we would like to put to you, so, if you agree, I will just launch into the questions, unless you wanted to make an opening comment.

Lord Clarke of Nottingham: It is fine by me.

David Gauke: It is fine by me too.

The Chair: The one that we usually open on, because it goes to the heart of what we are looking at, is how you define the rule of law and what you see as the role of the Lord Chancellor in protecting it within government. Lord Clarke, would you like to start?

Lord Clarke of Nottingham: I regard the rule of law as one of the centrepieces of the British constitution. We may have an unwritten constitution, but it is quite obviously based on the rule of law. Indeed, it is one of the things that we have helped transmit to those parts of the world that have also taken up liberal democracies of the kind we support. It is a key part of our democracy.

The Lord Chancellor is totally bound to protect the rule of law. Together with the law officers—the Attorney and the Solicitor—it is one of the prime duties. It is not something that takes up most of your day. Nowadays, since the reforms, it has been put in the Ministry of Justice, and so more of your time is taken up with, say, the Prison Service, which, rather illogically, was combined with the Lord Chancellor's Department when the reforms took place. Nevertheless, one of your overriding duties of which you must be conscious is your duty to make sure that you protect the rule of law.

David Gauke: I very much agree with everything that Lord Clarke has just said about the importance of the rule of law. To answer your question about the aspects that are perhaps of most significance for the Lord Chancellor, there is defending the independence of the judiciary and ensuring that the justice system works efficiently and effectively. More generally, the aspect of the rule of law I would highlight is that sense that the law applies equally to everyone, that no one is above the law and, in particular, that the Government must comply with the law. I would consider that to be an important aspect of the role of Lord Chancellor.

Lord Clarke of Nottingham: I agree with that. I hope that David Gauke and I are not going to echo each other all morning.

The Chair: Mr Gauke, you have mentioned the independence of the judiciary. One of the things that we have asked some of our witnesses is what they would do, if they wished to, to update the definition of the rule of law set by Lord Bingham. When Lord Judge approached that, he said that he would add the phrases "laws made by an assembly elected on the basis of universal suffrage and administered by the independent courts", meaning that the rule of law was inseparable from the principles of democracy and the independence of the judiciary. Do you think he was right in that?

David Gauke: I would certainly accept that. I have to say that the first book that I read, on having been appointed Lord Chancellor in January 2018, was Lord Bingham's book on the rule of law. I certainly have no objections. Who am I to question either Lord Bingham or Lord Judge in terms of that definition? I am certainly happy to stand by that definition.

Lord Clarke of Nottingham: I also agree with it. I regard Lord Bingham—Tom Bingham—as one of the great judges of my lifetime. I have heard him several times give lectures and things. That distinction between the role of Parliament and the role of the courts has tended to be emphasised rather more in recent years. The courts have certainly been more conscious of it in recent years and have followed it perfectly properly.

The making of policy and political decisions are entirely the role of Parliament, a distinct institution in our constitution. Legislation has to be made by Parliament, and the courts are bound by the legislation. Beyond that, when courts get involved in major constitutional measures, they normally intervene only when they think that basic constitutional issues are at stake.

Going to the Supreme Court and saying that some political policy is contrary to principle, or whatever it happens to be, tends to have a very low success rate nowadays. If you go to the courts and say that the Government are acting in a way that breaches the constitution and is not protected by legislation, the courts are very firm on that. They were absolutely clear about the Prorogation case and about the Article 50 case, quite rightly, where the Government were trying to exclude Parliament from its proper role in the constitution. The Government, Parliament and law are separate institutions, but they all have their role, and the Government certainly are bound by the rule of law and by an unwritten constitution, and cannot seek to exclude Parliament from its proper role.

It has got more complicated in the last few decades with the emergence of the remedy of judicial review, which means that individual decisions by Ministers and officials are constantly being challenged by people who disagree with them. They tend to invoke much wider principles of human rights, common sense and all the rest of it.

The courts have tried to be restrictive, but they have intervened, usually quite properly, in such cases. They apply a very strict test, the so-called Wednesbury test, before they will overrule an official or a Minister. I am a very out-of-date lawyer and have not practised for decades, but I think the principle is that no reasonable person, properly informed, could have come to the decision from which the person is suffering.

Q81 **Lord Howell of Guildford:** Good morning. Lord Clarke, you have particularly strong views on the concept of the rule of law extending to international law as well. I would just like to ask you to expand on this. We are talking here about not just international agreements and obligations, but international agreements and obligations that have been enshrined in a treaty, which, in turn, has been validated in the Parliament of the United Kingdom, so then it becomes a statute. Is your view that overruling that, or the Parliament passing another statute to invalidate the earlier statute, is in some way an offence against the rule of law?

Lord Clarke of Nottingham: As you say, Lord Howell, I believe that very strongly. As I have already said, the rule of law is an essential part of our constitution, and that includes international law, which we have accepted for years. I was also a very fervent supporter, when I was in office, of the emergence of the rules-based international order, particularly in the 1990s, which was the peak of my career. What I thought we were seeing was the emergence of a fully integrated world, a truly globalised economy, much more globalised interaction. We were protecting ourselves against the dangers by steadily developing a rules-based international order by which we could conduct, in a civilised way, ordinary day-to-day relationships with the Governments and citizens of other countries.

The emergence of bodies such as the World Trade Organization and the World Health Organization, all of which needed strengthening and reform, was an essential part of that. Of course, that led to an interlocking network of treaty obligations, which we willingly entered into with many other countries, and which, indeed, the Governments in which I served in the 1990s were eager participants in and were pressing.

We have done it steadily ever since the war, but it speeded up in the 1990s, and I hoped it was paving the way to a safer, more civilised and more prosperous world with the emergence of new powers. These always involve the sacrifice of sovereignty. The 19th century idea of national sovereignty can be tragic if it is applied, but it is comically irrelevant today.

We started with the United Nations post war. The biggest sacrifice of sovereignty that this and most other countries in the world have ever made involved such treaties as the United Nations treaties, the basis of the United Nations and all its agencies, as well as NATO. It was an immense sacrifice of national sovereignty and the liberty of our Government to do exactly what they want at all times with their Armed Forces. We built on that in more detailed and practical ways relevant to the modern economy.

Britain was one of the mainstays of that. When people talk about upholding the rule of law internationally, they are accustomed to looking to Britain as an arch-defender of that principle and one of the models of how a country is prepared to accept sensible treaty obligations, which its Government and Parliament have willingly entered into and are ratifying.

Lord Howell of Guildford: I agree with a large part of that; who would not? There is the narrower question that we are looking at here, which faces a Lord Chancellor, as to whether Parliament can pass a statute overruling a previous statute. Is it the later statute that then becomes the law? Lord Reed was advising us that it was the later statute, and we have had other discussions in this committee. What do you think is the narrow position? You have been so good at arguing your view in Parliament that the law should not be changed, but if it is changed by a parliamentary majority you have a new statute that overrides the earlier one.

Lord Clarke of Nottingham: Across the generality of policy, a new statute overrides an old one. We are always changing the law. Indeed, that is why we spend half our life here engaged in the consideration of legislation, quite a lot of which is repealing previous statutes now regarded as obsolete or inadequate, and either amending or changing them.

What you have in mind is a statute that has been passed in order to give effect to our obligations under a treaty and under the general principles of international law. They are binding, and I do not think that Parliament should override or contemplate overriding treaty obligations, for which Parliaments have previously legislated, with legislation that is plainly in breach of the treaty obligations or the international law.

This just goes back to the same test. If the Lord Chancellor is confronted with a statute or a Bill with which the Government in which he or she is serving intend to proceed, the Lord Chancellor should intervene, if it is clear that the Bill being proposed would breach Britain's obligations under international law, assuming that the Attorney has not already given rather severe advice to that effect to the Minister proposing it.

Q82 **Lord Falconer of Thoroton:** What do you say about prisoner voting? Both you and David Gauke presided over a period when we were in breach of our international obligations.

Lord Clarke of Nottingham: Yes, but I do not think that I legislated on it.

Lord Falconer of Thoroton: No, you did not. I am as guilty as you are in this respect. The European court said that prisoners had to vote. We said that it was quite unpopular and did not do anything about it, so we were in breach of our obligations under the European Convention on Human Rights, which we signed up to as an international obligation. Are there some occasions when it is okay?

Lord Clarke of Nottingham: No, there are not, really, but prisoner voting was a particular political issue. When we talk about the European Union and the European court, at any given time you will find that there are quite a number of member states that have not got round to trying to produce, back home, an extremely unpopular statute that they are not likely to get passed by their own supporters. Hear what David's defence is.

Lord Falconer of Thoroton: Another guilty man wants to put in his mitigation.

Lord Clarke of Nottingham: I think he would say that we postponed pressing implementation on that particular issue.

David Gauke: Just to respond to Lord Falconer's accusation, I can plead not guilty, because my predecessor, David Lidington, addressed the issue of prisoner voting, albeit in quite a limited and specific way. He did manage to address the issue for those who were on ROTL, for example, who were able to vote. The issue was no longer live by the time that I was Lord Chancellor, but I just wanted to add to Lord Clarke's remarks.

Of course, we have a dual system and it is possible for Parliament to repeal or amend previous legislation that has implemented treaty obligations. The domestic law, as Lord Reed has said, is what is in the Acts of Parliament, but I would still consider that to be a breach of the rule of law, because international law is part of the law. Fulfilling our international obligations to which we have agreed in a treaty still seems to me to have the nature of law. A deliberate breach of that would, to my mind, constitute something that is in breach of international law.

Q83 **Lord Howarth of Newport:** In that situation, if Parliament legislates to reject obligations that the United Kingdom has entered into and that have become part of international law, what then is the role of the Supreme Court? Does it have to just passively accept that this is the new statutory situation or may it have a role to remedy what you consider to be a breach of international law?

David Gauke: The Supreme Court is put in a very difficult position. I come back to the point that, when it comes to domestic law, Parliament is sovereign, but it would have acted very unwisely. The domestic law is what Parliament has passed. If we are in breach of our international obligations, that is a failing on the part of the Government, and it is a responsibility of the Lord Chancellor to express his or her objections. Personally speaking, a flagrant breach of international law of that sort would have provoked my resignation.

Lord Clarke of Nottingham: The tendency in the last few years has been for Lord Sumption and Lord Reed, for example, to rather emphasise that they feel the statute overrides everything else and they have no role to intervene. I am not sure that the courts were altogether clear about that a few years ago. It could well have happened, but we did not have

these arguments about treaty obligations in former years, probably because we did not have so many treaty obligations.

When David talks about the Lord Chancellor expressing his view, it is up to the Lord Chancellor to express his view inside the Government and, if you get a flagrant case, to even consider whether he is prepared to carry on serving. My predecessor, James Mackay, was really the epitome of what a Lord Chancellor should be. I served with him in the Major Government for some years. James Mackay would not have sat in the Cabinet, allowing the Cabinet to cheerily start proposing that we broke a treaty obligation.

Lord Howarth of Newport: In order to protect the rule of law, would he have defended the Supreme Court, had it existed in those days, or the Judicial Committee of the Privy Council, whichever was the supreme judicial authority, in reaffirming and reasserting international law?

Lord Clarke of Nottingham: I think he would, although I cannot remember an example. I think David and I would, although I have already had one omission pointed out to me in questions. I hope I did most of the time—not that it arose. No startling example arose in my two and a half years in the coalition Government.

Q84 **Lord Howell of Guildford:** It seems to me that the rule of international law is a bit different from the rule of law. It is a slightly different animal, for the very reasons revealed in the last five minutes, in our intensive discussions in this committee, and in the views of other witnesses. In a way, one is left with the feeling that ruling on international law, as to whether the other parties to a law may have broken the spirit or, indeed, the letter of a treaty, comes down to opinion rather than statute law. This is the difference, is it not? They really are different animals.

Lord Clarke of Nottingham: Both are capable of perfectly clear legal opinions. It is just that the enforcement in the face of governmental and parliamentary resistance poses problems in the case of international law, which it does not in domestic law. We very rarely have Governments that start trying to defy domestic law. The remedies are straightforward; the Supreme Court does not find any difficulty, really, in sorting that out and overruling the misuse of power by government. That is what it is there for.

There are international tribunals and there is constant argument. We have very important international courts of various kinds. I am one of those who think that one should face up to accepting the jurisdiction of those. A ruling of the international court, in The Hague or by the Court of Human Rights, should be regarded as binding on a British Government in just the same way as a ruling of the Supreme Court is. As we all know, that tends to give rise to agitated political debate when people do not agree with the decisions of the international courts.

The WTO needs a lot of improvement and reform, but it became very good at arbitrating in trade disputes. This country, and most countries, happily accepted the WTO rulings in my time.

Q85 **Lord Howard of Lympne:** I thought that Mr Gauke had cleared up the point that I wanted to raise, but it has got rather blurred in the subsequent discussion. Lord Reed was absolutely clear. Whatever ones thinks about the desirability of Parliament legislating in breach of an international treaty commitment that has been embodied in legislation and to which the Government have signed up, and I largely agree that it is very undesirable, Parliament can do it, because Parliament is sovereign. If the matter comes before the Supreme Court, the Supreme Court will give effect to the latest decision of Parliament—the legislation that Parliament has passed. There is a very clear distinction, is there not, between what Parliament should do—and I agree with what has been said—and what Parliament can do? That was a distinction recognised very clearly by Lord Reed in his evidence to us.

Lord Clarke of Nottingham: I have read the evidence. I have every respect for Lord Reed. I do not follow these things as closely as the members of the committee do, but my sense is that this has all stiffened up in the last few years. I have every respect for Lord Reed's opinion; that is obviously the opinion of the current President of the Supreme Court.

I do not think that anybody expressed it that starkly in my time in the then Supreme Court. He has given quite the clearest statement of that proposition that I am aware of. Because these problems are now piling up, that appears to be the view to which the current Supreme Court is swinging.

Lord Sumption also had strong views on these kinds of things and was very resistant to the courts being drawn into political things. Have you had Lord Sumption before you? He too gave supremacy to the role of Parliament, but he never put it quite so starkly as Lord Reed.

David Gauke: I very much agree with the analysis that Lord Howard has set out. Perhaps the distinction that is worth drawing in this context is that, as far as the courts are concerned, they implement the domestic legislation. Very often, domestic legislation is incorporating treaty obligations and subsequent Acts have to be interpreted in accordance with those treaty obligations. There is a distinction between the role of the courts and, for the purposes of this inquiry, the role of the Lord Chancellor, because, when we come back to the oath that Lord Chancellors make, which includes upholding the rule of law, for those purposes, as far as I see it, international law is part of the rule of law and part of the obligation on the Lord Chancellor to uphold the rule of law, which includes international law.

Q86 **Lord Falconer of Thoroton:** I understood both Lord Clarke and Lord Gauke to be saying that one of the roles of the Lord Chancellor was to defend international law within the Government, which means that, if the

Government were about to do something in breach of international law, your obligation as Lord Chancellor, the defender of law, involved standing up for the deal or the treaty that the Government had entered into. I was wondering how important you thought that was. Lord Howell was slightly underplaying it, saying it is all very difficult.

My own experience was that there was practically nothing more important than ensuring compliance with international law, the best example being in relation to when the Government use armed force. That is something that will never be tested by courts, unlike domestic law, where there are courts to provide vindication of people's legal rights. If you use force when you are not entitled to in international affairs, nobody is ever going to hold anybody to account, except for years and years in the future.

One of the roles of the law officers and the Lord Chancellor was to ensure that international law particularly was complied with in that area. Also, for example, in relation to the way that we left the European Union, that was another area where complying with international law and giving notice et cetera was very important.

I would be interested to hear both your views on how important defending international law is, or whether you agree with Lord Howell that it is slightly too difficult to do. That is misstating your question slightly, but only a bit.

David Gauke: Can I thank Lord Falconer for elevating me to the peerage? I am grateful.

Lord Falconer of Thoroton: You would not thank me if you were here, David.

Lord Clarke of Nottingham: You are all right where you are, David. It is a strange place.

David Gauke: It is correct to say that the role of the Lord Chancellor is upholding the rule of law in its entirety, and that includes international law. I read the evidence that Lord Keen gave to the committee, and I fully take on board his point that it is necessary for the Government to always have a respectable case. I take the point that, in terms of the use of armed force, that is never going to be tested in a court, but the wider point is that there will be times where there will be arguments over the legal interpretation.

We could look at, for example, both the Miller cases, where the Government could say that they had a respectable case to make. I do not think that losing a case constitutes necessarily a breach of the rule of law, but when there is an absolutely flagrant position taken by the Government that says, "Yes, we know what our treaty obligations are, but we're simply going to override those and pass domestic legislation that ignores or overrides international law", that is very problematic and raises very important rule of law questions. There is an obligation on the Lord Chancellor to intervene in those circumstances.

Lord Falconer of Thoroton: But you are not saying only where there are, to use your language, flagrant breaches.

David Gauke: I am saying where there are breaches. The distinction I am trying to make is that, if there is a dispute over whether something is a breach, in circumstances where there is a perfectly respectable argument that says that this is compliant with our international obligations and a respectable argument that says that it is not, the position of the Lord Chancellor is less clear cut.

Where there is no respectable case and the Government are, with full knowledge and understanding of what they are doing, breaking their international obligations, that is very problematic for a Lord Chancellor.

Q87 **Lord Hope of Craighead:** I have two points—first of all, an observation to Lord Clarke. I had the privilege of serving on the Supreme Court when you were Lord Chancellor and Lord Bingham was the President of the court. I think that he would have agreed entirely with what Lord Reed said, but the point is that we were not challenged in the same way as the Supreme Court is today by certain expressions of opinion and so forth. Perhaps Lord Clarke would agree with what I say about Lord Bingham's position, based on his reading of the book.

Lord Clarke of Nottingham: Again, when I was Lord Chancellor, no big issue of this kind appeared. There was not an occasion where I had to sit in Cabinet saying, "Up with this, we cannot put. How on earth has the Attorney allowed this to go ahead?" or anything of that kind—nothing remotely like that. In fact, the thing that troubled me when I was Lord Chancellor, which did not get to the Supreme Court, was what I thought were some of the uses of the European Convention on Human Rights.

I have to confess that, despite my extremely liberal views on these and a lot of other matters, I feel some sympathy with those who say that the army of human rights lawyers we have now, who were non-existent in my time when I practised, do sometimes, successfully, before tribunals, use things like the right to family life and so on in an extraordinary way. I do not believe in sweeping it all away and having arbitrary powers; that would be absolutely shocking, but the law in that area sometimes needs to be revisited. Judicial review is sometimes exercised in somewhat irritating ways on behalf of not terribly deserving cases. I must confess that I remember feeling some of that in my time as Lord Chancellor, but the big issues never arose.

I hate to mention the Iraq war, but that was where the big issue arose. It is not for me to interrogate a member of the committee, but I suspect that the Lord Chancellor at the time played a part in persuading the Blair Government that they had to try to get a legal basis for intervening, because, left to themselves, Bush and Blair would not have bothered with the United Nations, trying to get a resolution and all the rest of it. They were just doing good by invading a country and changing its regime, which is totally illegal.

The whole argument about the Iraq war, I suspect, with the influence of the then Lord Chancellor, was turned into an argument about whether there was a threat to the outside world and whether there was a legal basis, and an attempt to get a United Nations resolution. That was one of the starkest examples of the problem that we have had in recent years. I cannot say that any equivalent arose like that in my time. I had an easier ride on this front when I was Lord Chancellor.

Lord Hope of Craighead: Can I quickly come to you, Mr Gauke? Are treaties different, in the respect that some may, indeed, raise issues that are a matter of opinion, as Lord Howell has suggested, and others have a court built into the system that is designed to resolve the questions as to what the treaty means?

The Warsaw convention, which deals with remedies against aircraft for injuries in the course of flights and so on, is an example where there is no court that identifies exactly what the words of the convention mean. On the other hand, the European Convention on Human Rights has a key provision in it that requires all those who subscribe to the convention to give effect to the decisions of the European Court of Human Rights. Is that distinction one that we should recognise?

David Gauke: That is right. As with all these obligations, the first question that we have to ask is what precisely we have signed up to. If we have signed up to accept the rulings of the European Court of Human Rights, for example, it seems to me that our obligation is to respect those judgments and to implement them. Sometimes we implement them more fully and rapidly than on other occasions, but our obligation remains the same. In other circumstances, the mechanism lies elsewhere.

Q88 **Lord Howard of Lympne:** What Lord Clarke has said about judicial review leads neatly into the next question. Many have urged upon us the desirability of putting the Ministerial Code on a statutory basis. One of the consequences of that would be that it would be subject to judicial review, which some, I suppose, might regard as an advantage and others as a disadvantage. Do you have a view on whether the Ministerial Code should be placed on a statutory basis?

Lord Clarke of Nottingham: This is more a political than a legal question. I never contemplated it in the past, but the Ministerial Code is being challenged at the moment. If the proposition was made and it came before Parliament, I am not sure whether I would support it, but I would be extremely tempted to at the moment. What is mainly important is that we have the highest standards of public life and political behaviour by all those in public life at every level, including Ministers, and that we follow the standards of ethics, personal behaviour and so on, which are beyond question.

It is no good expecting Ministers to be saintlike. We quite often get wildly excited about matters in their private lives that do not really have anything to do with me and my fellow citizens, but perhaps have a lot to

do with the person's family, who should sort all this out, and the person's own conscience.

With straightforward things, financial and so on, Ministers should have conduct of all aspects of their daily life that are beyond question, certainly in the office and behaving towards staff, but also in implementing policy and using the power that, for the time being, is at their disposal. We expect the highest standards and that is why we have a Ministerial Code.

Once you have agreed a code, whether it is statutory or not, it should and must be followed, and it is rather outrageous if breaches are overlooked. Eventually, if standards continue to be questioned, it may be necessary to legislate and to put it in statutory form.

It would be one way of reassuring the public, because the thing that horrifies me about the current controversies is that I have never known the public to be so cynical about the political system and the Government that govern the country. Some 80% of the population do not believe that any politicians are really honest, but that they are all in it for what they can get out of it. This has a shocking effect on the type and level of political debate that we have, and the people who emerge in it.

If things continue as they are or get any worse, putting it in a statutory form would tempt me, I must say. If it was proposed, I could be persuadable to support it.

David Gauke: I share Lord Clarke's concerns over the controversies that we have seen and the apparent failure to adhere to the Ministerial Code without consequence. None the less, I am nervous about putting the Ministerial Code on a statutory footing. As Lord Howard has pointed out, this may result in judicial reviews. My concern is that this would, inevitably, draw the judiciary into very difficult political controversies and, to some extent, politicise the judiciary in a most unfortunate way.

The answer to some of the problems we have at present with the Ministerial Code is that parliamentarians should be more demanding of Ministers in terms of their adherence to the Ministerial Code, and the public should expect and demand better from Ministers, but trying to solve this by putting it on a statutory basis and by, essentially, enabling the judiciary to hold to account Ministers on broad but important matters would, I fear, cause great controversy. One could see more attacks, frankly, on the independence of the judiciary and, in a populist environment, much damage could be done to our judicial institutions.

Q89 **The Chair:** Given the reservations expressed about putting it on a statutory footing, the "quis custodiet ipsos custodes?" question still remains. What does that suggest to you could be the sort of changes that one would argue for in the Ministerial Code? Should there, for example, be more said about the role of the Lord Chancellor and the law officers in the code? Can the code be expanded or developed to address some of those issues?

David Gauke: That could be one route. Certainly, the ability of the independent ethics adviser to initiate their own investigations would be important. I would query whether the power of appointment should lie necessarily with the Prime Minister, or whether there could be a larger role for Parliament in all of this.

Whether this is something for the Lord Chancellor or the law officers, that does not necessarily provide an immediate solution, because it depends on who the Lord Chancellor and the law officers might be at any one time. One could imagine circumstances where whoever is holding that office would not provide the reassurance of the necessary element of independence that one would ideally want.

Lord Clarke of Nottingham: I do not think that the Lord Chancellor has a direct role in all this. I agree largely with what David Gauke has said. If you started drawing the Lord Chancellor into adjudicating on the Ministerial Code, it would politicise the role of the Lord Chancellor. If the courts were given jurisdiction, you would have a mass of political cases, with political opponents routinely making allegations of breaches against the Ministerial Code and against the Minister they were shadowing.

The key thing is the appointment of the independent adviser, the quality of the independent adviser, and the upholding of the independent adviser's decisions in all but the most exceptional cases when perhaps some reason can be cited why, on this occasion, the independent advice should not be followed, not just that the politicians disagree with it.

Q90 **Lord Howell of Guildford:** I just wanted to follow up and agree very strongly with what David Gauke was saying. This is, as you said, Chair, in your question, the "quis custodiet?" issue. Is it your feeling, Mr Gauke, that parliamentarians are the people who should really decide? Does that extend from saying, "We don't want judges too involved in judging the ethics and behaviour, and the following of the code, of the Government, the Cabinet and the Prime Minister"? Does that extend to saying that outside advisers should not necessarily be the deciders of the Government's fate? In the present situation, we come quite near civil servants and other appointees becoming the decisive voices of how the Government behave, whereas, surely, it should be, as you say, a matter for parliamentarians.

David Gauke: You make an interesting point and I see the logic of the position that you are taking. Very often, these matters depend on quite complex facts and it is necessary for somebody to investigate and lay out the facts. There are advantages of that person being a non-partisan figure and a non-politician.

Ultimately, the judgment of ethics and behaviour has to be with the electorate or their elected representatives. It seems to me that these are, essentially, political matters, but, for someone who can investigate and set out what has happened, a degree of independence is quite helpful here.

We will see, for example, with the Privileges Committee report into whether the Prime Minister has misled the House on partygate, whether that works as an effective and efficient mechanism, or whether it ends up splitting along partisan lines and ending with great confusion. That will be a test of that system.

Lord Clarke of Nottingham: Whether it happens with the Privileges Committee, or whether it happens over and over again with such cases, we will see. I do not agree, Lord Howell, with respect, that it can be left entirely to Parliament, because one has to accept the reality of the political atmosphere in Parliament. Nobody would defend parliamentary sovereignty more than I, a parliamentarian of 50 years, but there is no doubt that, given the whipping system, the career that politicians are making and the pressures upon them, just saying that it is entirely up to the Members of Parliament for the time being to approve or disapprove, accept or forbid policy of any kind, is a little dangerous.

There is real value in having an outsider who is not subject to any political pressure or ambitions, and who has no constituents they need to try to argue with. When it comes to ministerial standards of personal conduct, there is virtue in having a totally independent body. Retired or semi-retired hugely distinguished civil servants are perfectly able to arbitrate on whether somebody's conduct is of an acceptable standard. Perhaps it should not be binding, and there should be very exceptional cases only where that is rejected by the Government of the day.

The role of Parliament and the Commons in recent events, quite frankly, has been one of total indecision and inability to act. That is because it is all wrapped up with the daily noise, pressures and everything else of the party-political system, which is the foundation of our democratic government. I certainly do not think that you can say that it is left to the public to decide, because the public do not have the expertise.

Take the example of the occasion when improper lobbying was being done by a former Cabinet Minister who was a Back-Bencher. Paid lobbying that is not properly declared is plainly contrary to anybody's rules. You should not really need Alex Allan to tell you that. Parliament nearly succumbed to pressures to say, "Well, let's overlook it on this occasion; let's get rid of these rules and the independent adviser".

I do not think that anybody supports paid lobbying of that kind, but it was far more serious than partygate, in my view, and the sort of thing that you have to have some proper protection against. If Alex Allan had had the right to his own inquiries, and if his opinion had been regarded as binding, it would have been an improvement and a better protection of the standards of public life that we want in this country.

Lord Howell of Guildford: So you do not think the great committees of Parliament, either now or in a strengthened form, could perform a better role in this.

Lord Clarke of Nottingham: No, because Whips have a large role in selecting the Members of committees in Parliament. Let us be frank about all this. Once you have a parliamentary committee that is looking at it, everybody looks at what the political position is of the individual member. If you are a serving Member of Parliament and have been for any length of time, you can tell where each individual member of a parliamentary committee is going to come from. Some will be partisan in the extreme, some will be well above party pressures, and some will be personal supporters of one or other character involved. It is very difficult to get the truly objective, if I am being candid, parliamentary committee in a case of this kind.

Lord Howell of Guildford: Who would you have determine the penalty?

Lord Clarke of Nottingham: There is a case for independent assessment of the penalty. I do not think that it must be left to Ministers and Parliament on their own, with no outside adjudication or at least almost binding opinion on whether ministerial behaviour is up to expected standards.

Q91 **Lord Hope of Craighead:** We have reached question two on our list of questions. I am going to put this to you, Mr Gauke. Do you detect a shift in recent years in the political culture within which the Lord Chancellor operates? I am thinking particularly, of course, about treaty obligations, but it is a question that extends beyond them into a wider field.

David Gauke: There has been a change of political culture since I left office, which was not that long ago—only three years, almost. In terms of attitude towards treaty obligations, I find it difficult to believe that any of this Government's predecessors would have come forward with the original United Kingdom Internal Market Bill in the form that it was in and with an explicit acknowledgement that this was in very limited and specific breach of the law.

There is a change in atmosphere or political climate there. As I expressed earlier, I do think that this was an issue in which the Lord Chancellor should intervene. Such is the weakness of the Government's legal case on the Northern Ireland Protocol Bill, had I still been Lord Chancellor, I would have been inclined to intervene on that as well. There is a sense, if you like, that we are a sovereign nation and we can do what we want, regardless of our international obligations. That is somewhat characteristic of this Government, I fear.

Lord Clarke of Nottingham: The political culture of this country has transformed in my time. Parliament and the political culture today do not resemble very much how they were when I was first elected. They have changed, although not all for the worst. In the first Parliament that I was elected to in 1970, it was all quite different. The role of the Lord Chancellor has totally changed.

I was a Minister throughout all the years when Quintin Hailsham was Lord Chancellor, and it was altogether a different job and nobody would have

dreamed of getting remotely involved in all Quintin's dealings with the judiciary. He appointed all the judges for a start. It was a dreadful thing, really, but, fortunately, it worked, because nobody abused it. The great Lord Chancellors could have appointed all their mates to the High Court, but they did not. Quintin was objective in his appointments, as Derry Irvine was in his. All that has gone.

Parliament itself has quite changed, not always for the worse. When I was first elected, I did get the insight. I am 81, and I first joined the Government in the Whips' Office, which gives you a great insight, particularly when there are very controversial Bills going through, as there were at the time, like the European Communities Act, into the people you are working with.

There were far more crooks in Parliament when I was first elected. Some of the old knights of the shire were the most dreadful rogues. The private lives of some of my colleagues almost shocked me, and I am not normally shocked by such things, but there was a rule that all this was kept secret from the outside world. The press lobby would never report what was well known about the business affairs or the private life of any great knight of a shire, because Parliament was not like that. You did not share it with the general public.

That started coming to an end only when, at the end of the Government—I have forgotten my colleague's name who achieved unfortunate notoriety—the first great sex scandal hit the country. It has all changed completely, but I do not think that, in those days, cheerily abandoning international law would have arisen, and judicial review had not started. We have had to develop a different political culture, which, in many ways, has improved. Particularly since the Members' expenses scandal, public trust and confidence in the standards of public life have deteriorated, and the public are absurdly cynical now about the honesty and otherwise of their MPs.

I still think that the day-to-day honesty and integrity of the average Member of Parliament is far higher than that of the average member of the public. It has to be. They are exposed to public life, apart from anything else. The motives of most people going into politics are the highest. They are not the dreadful things that a huge majority of the public believe in.

Public cynicism is making the public more tolerant of low levels of political debate, believing the worst of practically anybody against whom allegations are made, and a very unfortunate and simplistic approach to what, in the modern world, needs to be a much more complicated and serious political discussion than we usually have. Sorry, I have been very long-winded in expressing myself.

Q92 **Lord Hope of Craighead:** All you say is of great value to us, but I am going to change the subject a little and focus on the relationship between the Lord Chancellor and the Lord Chief Justice, as well as the judiciary more widely. Did the political culture of your time have any bearing on

your relationship with the Lord Chief Justice?

Lord Clarke of Nottingham: It so happened, by happy chance, that I found myself alongside a Lord Chief Justice whom I had known for years and with whom I was on the most excellent terms. The relationship was regular and I saw him frequently, once a week. Lord Judge and I had, years ago, appeared in trials against each other out on the Midland Circuit, and were then and are now on quite friendly terms, so mine was a particular thing. I did not find myself dealing with a lawyer I had never previously known—a more common experience. He and I worked together very closely.

Lord Hope of Craighead: Did politics and the political culture of the time enter into it?

Lord Clarke of Nottingham: Politics did not come into it. I do not think the relationships with the Lord Chief Justice are political, as it were. I have no idea what Igor Judge's politics are. He sits on the Cross Benches here nowadays. I found his general approach to public life similar to mine, I hope. We were totally compatible. We had no difficulty working together. It helped that we knew each other. We did not know each other that well, but we had known each other over the years.

The sort of things that we were dealing with had no party-political or other content. The main thing that I annoyed him about was not raising the retirement age for judges when I was already over the judges' retirement age and serving as Lord Chancellor, but that would be going a little wide of your committee's scope, if I were to give reasons for that.

Lord Hope of Craighead: Can I raise that issue with you? Did the political culture affect, in any way, your relationship with the Lord Chief Justice in your time?

David Gauke: No, I do not think that it did. The context in which I held office was something that we would discuss from time to time in the margins of meetings. I did not know Lord Burnett before becoming Lord Chancellor, but I think we had a really good, open and constructive relationship that was very much focused on what we were both trying to achieve with the justice system, practical issues to do with how the courts were operating and so on. My time as Lord Chancellor, particularly in the later months, was somewhat tumultuous in the political context with Brexit, but the relationship was very much one of us rolling up our sleeves and focusing on the justice matters at hand.

Q93 **Lord Howard of Lympne:** Jack Straw, who we had hoped to have with us this morning, has expressed his frustration about the current judicial appointments process. He encountered difficulties, and I think I am right in saying that you encountered certain difficulties too. Jack Straw has endorsed the suggestion that it might be an improvement if a panel put a shortlist of candidates for senior judicial office to the Lord Chancellor from which he would make the final choice. Does that suggestion have any appeal for you?

Lord Clarke of Nottingham: I did not have any serious problems on this front. It would do no harm. At the moment, you get one name, and you are asked to approve or disapprove.

I would be extremely worried if any suggestion occurred that party politics, for example, was beginning to intrude in the selection of judges. The Americans are cursed with their constitution, which has needed amendment for decades now. The idea that judges are appointed entirely because of their party-political and other predilections would be a disaster if it ever obtained in this country.

The Lord Chancellor used to have total discretion, so we were protected against it by the honourable behaviour of previous Lord Chancellors. I do not think any Lord Chancellor in modern times has started making party-political appointments. Pensioned-off MPs used to be made judges when I was in practice, and one or two of them were not very good judges, but it did not lead to anything very serious.

The present system works quite well. I got lobbied from within the judiciary sometimes about appointments. I did not appoint anybody with any great reservations. I will not start naming the individual cases that arose, but I do not think anything untoward came out of it.

I got pressure to appoint a woman to the Supreme Court. It would have helped if I had had a nomination of a woman. In fact, the woman who was the obvious contender, in the opinions of those making the submissions, eventually did become a member of the Supreme Court when it was her turn, as it were. She became a very distinguished President of the Supreme Court. I was lobbied like mad by indignant High Court judges when we appointed someone who had not served in the lower judiciary to the Supreme Court; they said he should have paid his dues first. That is the nearest I will get to identifying individual problems.

It was never a problem in my time, so I have never heard what Lord Straw's indignation is really based on or what he thought the problems were. As it is Lord Straw, I am sure it was not because he thought prominent Labour lawyers should be put on the Bench. That is not remotely his scene. He would not want to do that, but future Lord Chancellors might be tempted if you started widening their discretion. In modern times, I would not go back to the old wide discretion of the Lord Chancellor, particularly as we quite frequently have Lord Chancellors appointed nowadays who are not lawyers. I find that a rather extraordinary practice, but it has now become quite accepted.

David Gauke: As with Lord Clarke, I did not have any particular issues with the appointments made during my time. It would be fair to say that I had a very limited role in those appointments. I would read the submission assiduously. It would always be a fascinating read, and I was always comfortable with the quality of the person who was being proposed.

There would be some difficulties if the Lord Chancellor in the current day were to have greater discretion. As Lord Clarke has highlighted, could there be pressure to appoint on a political basis? I would hope that most, if not all, Lord Chancellors would resist that, but there is a risk of perception. There is a risk of suspicion that judges would be appointed because they were politically sympathetic to the Government or at least that someone who was politically unsympathetic to the Government might be blocked.

The other concern, which again Lord Clarke has touched upon, is whether the Lord Chancellor is, as an individual, well placed to make a judgment on this basis. I was the first Lord Chancellor since Lord Clarke to have had a legal background; my four predecessors were not lawyers. My legal background certainly did not equip me to make great judgments as to whether one candidate was better qualified than another. I would have had to lean very heavily on the advice I was receiving from the department and the Judicial Appointments Commission, so I am not sure that it would have taken the process much further forward. I could have phoned up a mate or two who were well placed, but that does not strike me as a good process either.

In the end, I am not sure of the workability of the Lord Chancellor having a greater role. I am sceptical about it.

Q94 **Lord Faulks:** Good morning. I wondered whether I could ask you both about the role of the Lord Chancellor, which has changed very significantly since 2005, combined as it is with the role of Secretary of State for Justice. It includes responsibility for prisons as well as maintaining a functioning court system and all the other obligations a Lord Chancellor has. Should there be some separation of the roles of Lord Chancellor and Secretary of State or some reduction of his or her responsibilities?

Lord Clarke of Nottingham: I discussed this with David Cameron when I took office, because David Cameron had persuaded me to come back on the Front Bench. I said, "In exchange, I want to do a couple of years in the Opposition". He gave me a couple of years in government as a farewell thing, and I was not going to flog around in opposition. I greatly enjoy and get great job satisfaction out of being a Cabinet Minister.

I was supposed to be Secretary of State for Trade and Industry. We formed a coalition, so that all went wrong; it had to go to the Liberals. We were fishing around for something for me to do and found I was delighted to be offered the post of Lord Chancellor, because I had been a practising lawyer and all the rest of it a few years ago.

We discussed the nature of the office he was giving me, which was Lord Chancellor and Secretary of State for Justice. I expressed a view, which I do not think he disagreed with, that the reform of two years before had been a bit of a mess. I had no idea why. There was a wide theory as to why it was done; it was an attempt to remove Derry Irvine from the

Government without upsetting him. I am not sure there is any evidence to show that that was the case, and it did not work if that was the aim.

I thought that it was totally illogical. To put the Lord Chancellor in a department that now included the prisons department separately was wrong. I may be biased, because I had been Home Secretary and was accustomed to the old Home Office. I thought it was a rather random break-up that had taken place.

Having said that, my opinion, which David Cameron obviously decided was his as well, was that it was not worth trying to undo it. My experience of ministerial reorganisations, which take place far too often nowadays, is that they always produce a certain amount of chaos and the inability to do anything for the first six months while everybody argues about which desk they will have and what their title is in the new set-up. All attempts to reorganise government departments should be embarked upon only if you have the clearest reason for doing so and we might as well live with what we had inherited.

If we could unwind history, having experienced both, the old Home Secretary's role and the old Lord Chancellor's role was a much better division as a structure of government. I see Lord Howard, a former Home Secretary, is nodding in agreement with me. It was slightly irrational, but there we are.

The result is that the nature of the Lord Chancellor's role today is different from what it used to be because of the Prison Service. I was very keen on prison reform; I am sure other Lord Chancellors have been as well. A high proportion of your time is taken up not just with the justice system, but with the prisons. I devoted a good proportion of my time to the Prison Service, which we were trying to reform and strengthen rehabilitation in. In the justice system, I would have tried to tackle the sentencing system and reverse quite a few of the reforms that Lord Howard had introduced a few years before. He will be reassured to know that the Prime Minister quite firmly prevented me doing any such thing.

David Gauke: The challenge here is that there is no perfect answer as to what sits alongside the Lord Chancellor duties. There is no option of returning to the old role of Lord Chancellor as head of the judiciary and Speaker in the House of Lords, so that option is not there. You could have, if you like, a standalone Lord Chancellor position that was essentially the Minister for the courts as well as having the remnants of the traditional Lord Chancellor duties that have not been stripped away from the position. For a Cabinet position, the status would, one would hope, remain high, but the level of responsibility and the political weight that that person would have as a consequence of that particular post would, in all honesty, be limited. It would have worked very well with Lord Clarke in 2010, because he would have brought the benefits of his experience and personality to the role. For most Lord Chancellors, it would not quite work.

You are then looking at what you have alongside the Lord Chancellor position. You could go down the route of it being the Minister for Constitutional Affairs. There is a very respectable argument for that, but one should not think that that would mean they would escape from party-political controversy. If you are looking at issues of electoral reform or voter ID, these are very controversial matters, so you would still be a politician who had to be involved in quite partisan debates.

The other option is the status quo, which is having the prisons role. There is the machinery of government argument that Lord Clarke has set out: "Don't fix this unless it really is broken". There are times when there are some useful synergies. I was very focused on sentencing policy, for example, and having an understanding of the judiciary and the prison system was quite important and helpful.

I am very hesitant to get into the debate about the Home Office and prisons in the company of two very distinguished former Home Secretaries, but experience showed that it was very hard for the Home Office to cope with all its current responsibilities and the prison system. There is a debate on that.

There is no perfect answer to this. In the absence of a perfect answer, I might be inclined to leave things alone, but I understand the criticisms of the current system.

Lord Faulks: The current Lord Chancellor is also Deputy Prime Minister. When Lord Judge gave evidence to us, he thought that meant, as it were, a reduction in the status of the Lord Chancellor be reason of the fact that he was also Deputy Prime Minister. Is it a reduction, an enhancement or rather an irrelevance?

Lord Clarke of Nottingham: It is rather an irrelevance. I cannot see why that is regarded as a reduction in the status of the Lord Chancellor. It does mean that the present Lord Chancellor is involved in the political world very actively. He seems to be put up as the spokesman every morning for the Government, but that does not affect the role of the Lord Chancellor. It is just a question of the Prime Minister deciding for himself which of his colleagues he wants to give that particular title to.

We sometimes have Deputy Prime Ministers and sometimes do not. It is not always the most meaningful title. There are all kinds of reasons why people are sometimes made Deputy Prime Minister.

David Gauke: I agree with that. The answer on the Deputy Prime Minister point is that it very much depends. One could see circumstances in which a Lord Chancellor who was Deputy Prime Minister might well be able to achieve more, carry more influence and obtain more money because of their status and position within the Cabinet. One could see how that could work, but one could also see circumstances in which it became a bit of a distraction. If you had a big issue where there was a divergence between the political interests or objectives of the Government and the rule of law, being Deputy Prime Minister could put

the Lord Chancellor in a more difficult position. One would like to think that would mean that he would be better placed to steer the Government back on to the straight and narrow, but it does not necessarily follow.

It very much depends. It is perhaps a slightly awkward combination, but it does not necessarily have to be for ill.

Q95 **Lord Thomas of Gresford:** Might I take your last point, Mr Gauke? Surely a Lord Chancellor faced with a Prime Minister who wants to break international law is in an impossible position. He cannot maintain the role to which he swears when he takes the oath of office to maintain the rule of law and, as Deputy Prime Minister, support a Prime Minister bent on breaking the rule of law.

David Gauke: I agree with you. That point applies whether the Lord Chancellor is Deputy Prime Minister or not. If one takes the view that the Government are deliberately breaking international law, whether one is Deputy Prime Minister, or has responsibility for prisons or the constitution, as Lord Chancellor one's duty is to object.

Lord Thomas of Gresford: Can I ask Lord Clarke this? Nobody would suggest at the moment that the courts or the prisons are in a good state. We have a situation in which a Minister is running both those organisations and both of them are demonstrably failing. What would you say about that?

Lord Clarke of Nottingham: I would say that we are going into a much wider political field. I still have friends and so on who operate in the relevant fields. The criminal justice system is in the most appalling state. I would never have believed it. As we speak, industrial action is being taken in one section of the Bar against what they say is the near-collapsed criminal justice system and the lack of any resources going into it. The prison system is also in a crisis that has been made worse by Covid.

I am sure this committee can get into any subject it wants, but you then get into the politics of criminal justice, the Prison Service, the allocation of resources, the background of economic crisis and all the rest of it. It is not particularly relevant to the role of Lord Chancellor. The present Lord Chancellor has the misfortune of presiding over a department both the large chunks of which are in a pretty dire state—worse than I can recall for years.

Lord Thomas of Gresford: Given that, is there not a full job for a Lord Chancellor to look after the courts and concentrate on the justice system, and a full job for someone to look after the Prison Service?

Lord Clarke of Nottingham: On the other hand, the political clout of the Minister is also relevant, going back to what David Gauke was saying a minute ago. In the end, it all gets down to the Minister's clout in getting the money required in both cases. I normally reject like mad today's politics where it is simply a competition of who will offer to spend more in response to every lobby. In both these particular cases, you have a really

dire problem of trying to get resources applied to tackling the problem against a background of economic crisis when the public finances are in a dire state.

We used to have annual spending rounds in my day. It all gets down to the political clout of the Minister in order to get a sensible settlement out of the Chancellor of the Exchequer and the political clout of the Chancellor of the Exchequer and the Chief Secretary in resisting tempting but unaffordable claims. There is no point in reducing the political clout that the holder of a particular office might have.

I am afraid there are no votes in criminal justice. It is not a popular subject in the media or anything of that kind. If you went back to a Lord Chancellor who was solely responsible for the court system, in getting more money in response to political action by barristers he would have his work cut out in making the progress that being a bigger Minister in Cabinet might enable him to do.

Lord Thomas of Gresford: Mr Gauke, do you agree that the Lord Chancellor currently controlling both those departments—they are very separate—has more clout in getting resources for each of them, or do you think that a Minister focusing on only one of those problem areas would be more likely to succeed?

David Gauke: I agree with Lord Clarke. It is the point I touched on earlier. If you had a Lord Chancellor who just had responsibility for the courts and the justice system, vitally important though that is, the reality is that that would be seen most of the time as quite a junior Cabinet position. That may be wrong and unfair, and cause outrage, but that is the likely perception. There would be an absence of political clout. You need to have something alongside the Lord Chancellor post most of the time.

There is an exception I would make. Had Lord Clarke been Lord Chancellor with just those responsibilities in 2010, because of his experience and personality he would have had the necessary political clout. Without a wider brief, there would be an absence of clout. That would be disadvantageous for the justice system.

Q96 **Lord Howarth of Newport:** Just to pursue this issue as a constitutional one, you were emphatic, Mr Gauke, in what you said much earlier in this discussion: that it is a key role of the Lord Chancellor to ensure that the justice system works efficiently and effectively. Lord Clarke, you were even more emphatic. You insisted that the rule of law is a centrepiece of our constitution and the Lord Chancellor is totally bound to protect the rule of law. Yet, as you have just mentioned, the rule of law is not being very well protected. We see criminal barristers going on strike, because they say that they earn less than the minimum wage after their expenses are taken into account.

When both of you held this combined office, you were faced with the fiscal challenge of the Government's austerity policy. The Ministry of

Justice was not one of the protected departments. Should it not have been, given that the rule of law and access to justice are bedrock principles of our constitution? Should the Government not have ensured that, whatever the claims of other departments were, this centrepiece of the constitution was well protected? That did not happen. What does that tell us about the view of modern Governments of the importance of the rule of law and access to justice? Should it not have been otherwise?

Lord Clarke of Nottingham: I was an ex-Chancellor of the Exchequer and I was entirely supportive of what George Osborne did. I thought it was absolutely essential. I had been supporting it throughout. We were in the middle of a severe financial crisis. We were in danger of economic collapse. The Government we replaced were already contemplating cuts in public spending. We had to cut public spending and get back to serious finances as rapidly as possible.

That was as much part of my belief when I entered the department as anything else, so the idea that I would suddenly sit there and say, "This department's different. It's unlike every other department of government and it somehow has a rather holy position in our constitutional make-up, so it should never be subject to having to make any cuts", is wrong. I thought, as with most of the Government, that there was a great deal of fat in the system anyway and we could start making our contribution in the department, which I did.

The way we went about it was rather odd. I did a public spending round with my own excellent Permanent Secretary, who also agreed that we could make a contribution. I did not really negotiate with the Chief Secretary very much. We gave the Chief Secretary our best offer. We did have too many disused courts and a great deal of inefficiency in the system. In the early days of austerity, as in most departments in my opinion, it did not make very much difference. It was carried on for too long and things began to go wrong.

Just for my own defence, I resisted the idea of any cuts in criminal legal aid. I did institute cuts in legal aid in other areas where I thought that the profession was somewhat bloated. Too much litigation was not doing too much good in sorting out broken marriages—I tried to introduce arbitration there—or even human rights in the asylum cases. It was all done in detail between me and the Permanent Secretary, and we made the very biggest offer we could make without damage, in our opinion.

I cannot speak for later years, although I did a couple of years. Things have been carried on a devil of a long way further since then, and I do now agree—although there is a real problem for the Chancellor, as he keeps dishing out money in every other way—that criminal justice in particular, and prisons probably, are higher on the priority list for what can be afforded, although I would put skills training and social care, for example, higher than those two. You have to take a broader view than just defending your own department, except when you are Secretary of State. Secretaries of State make the kinds of arguments that you do

quite frequently: "This is different, and it's quite impossible to make any savings here".

Lord Howarth of Newport: Let me ask Mr Gauke if I may. You have the advantage of being a former Chief Secretary as well. Is it also your view that the protection of the rule of law and access to justice has to be a casualty of the imperative of fiscal austerity?

David Gauke: I agree with Lord Clarke that one could not exempt the Ministry of Justice, either on the prisons or the courts, from tough decisions in its entirety. One can argue that there are places where decisions went further than they should have done.

In my time as Lord Chancellor, for example, I sought to address the issue of judges' pensions. That is not, I suspect, a political priority for the general population, but it was clear that we were not attracting the numbers that we needed to the High Court. You come back to the earlier question of political clout. The fact that I had a lot of Treasury experience and had a good relationship with the Chancellor meant that we were able to do something about that.

Are there other areas that need to be addressed? Yes, I fully accept that there are. Big issues such as court maintenance and so on remain. Lord Clarke is also right to say that we did not need the number of courts that we had in 2010. Efficiencies could be found. There is increasing use of digital technology; once again, I apologise for using digital technology with you this morning rather than being there in person as I intended but for continued problems with the trains.

There are things that can be and were done that were right. There will always be challenges in the context of the public finances at any one time. I did a certain amount. Would I have liked to have done more as Lord Chancellor? Yes, but one has to accept that there are limits to what can be achieved.

Lord Howarth of Newport: I am also using digital technology. May I just ask you one other question? As an extension of the responsibility of the Lord Chancellor to protect the rule of law, should we also understand that he has a special responsibility to protect the constitution? We are in a slightly curious situation at the moment in which, as I understand, no Minister is currently designated as Minister for the Constitution. In that situation, does a special responsibility fall on the Lord Chancellor to safeguard the constitution? Should that indeed be seen as a significant expansion of the role as presently defined?

David Gauke: As I touched upon earlier, one model for the Lord Chancellor's role, and there is a certain amount to be said for this, is that the Lord Chancellor, as well as having the courts and the rule of law responsibilities, also being the Secretary of State for the Constitution. That is certainly a role that would have political clout and would be intellectually challenging and interesting.

We should bear in mind that such a role would, if anything, be perhaps more politicised than the Lord Chancellor would be now. Prisons policy is important, but it is not a particularly partisan issue. This is a debate in which there is a lot of cross-party support. If the Lord Chancellor were also the Minister for the Constitution, you would have issues such as devolution and electoral reform. At the moment, there are debates about voter ID and voting age. These are all big issues that very often divide pretty strongly down party lines.

It is not a killer argument against it, but I would just make the point for those advocating that model that it is not a move towards returning the Lord Chancellor to a position that is ever so slightly above party politics and at the dignified end of our constitution. It would be a pretty contentious role in some circumstances.

Lord Howarth of Newport: Lord Clarke, should there be a Secretary of State for the Constitution, and would you be willing to take it on?

Lord Clarke of Nottingham: I would get involved with the kind of issues that David mentioned. It would be quite an important role, but I am not sure it would be the best and only way of protecting the constitution, because it would be a political role that would sometimes be quite partisan in individual details.

I get worried about the present state of affairs, because we have an unwritten constitution, and an unwritten constitution depends on the good-chap rule, if I may just use a clichéd phrase that is very current at the moment in the very good media reporting of this that has gone on. We did rather rely on the fact that decent chaps would follow the practices that had always been followed in this country. That is not proving an adequate protection of our constitution now.

It comes back to the whole question of what the role of the courts is. Our unwritten constitution is valueless if the courts will never protect it. In the end, the only recourse you have to protecting some of the very basic principles of our democracy is that the Government cannot change those because it is contrary to the constitution.

Our courts get challenged because we have an unwritten constitution, but I have already cited two examples where today's cautious judges nevertheless did the right thing in stepping in and preventing the Government doing things they proposed to do. Government proposed not to put leaving the European Union to Parliament because it was a treaty obligation and a matter of reserve to the monarch acting solely on the advice of the Prime Minister, so no parliamentary approval was required. The courts overruled that; it was total nonsense.

When Parliament got difficult and the Government were slightly losing control of Parliament, their agenda and how Brexit was going, they proposed to prorogue it, proceed without a Parliament interfering in day-to-day activities and have a break from having a Parliament for a time. The Supreme Court stepped in and quite properly stopped that.

There is a danger in the present climate that this kind of thing will come up more frequently. The best protection for our liberties, our constitution and everything else is for the courts to continue to act where they properly can and not to take too restrictive a view of their role, rather than another political appointment and another Minister for Constitutional Affairs to take part in the party-political battle about all the issues that surround the constitution. He would probably increasingly claim that it is his responsibility and not the courts' to sort these things out.

A lot of western democracies have constitutional courts. It is not unusual for democratic Governments to be subject to the jurisdiction of a court that, in every other case, interprets a written constitution, even if they sometimes do so in a rather startling way.

Q97 **Baroness Fookes:** Lord Clarke, in earlier evidence to us today, I understood you to say that when you had discussions with David Cameron about the new role for the Lord Chancellor, you were not happy about combining the role then with the Ministry of Justice, but that the hassle of changing it meant that you would live with it. I now understand you to say that, in present circumstances, you think it is a good idea that this should continue. Have you in fact changed your view?

Lord Clarke of Nottingham: The present problems in both services are not the result of them being combined. That is not why they have both got into their respective states of crises. There are all kinds of other issues.

If we were in the same position today and I suddenly found myself landed with some direct involvement again, I am afraid my starting point would be to say, "Let's leave it alone, because the hassle of trying to change it will just waste a bit of time. How is it going to improve things?" It is a question of getting the resources and policies right in both cases.

I am sorry; I will give a short answer. I just do not think that changes to the structure of government and the title of the Minister have usually made a tuppence of difference in most cases where they have been embarked on in recent years.

Baroness Fookes: Can you not see a scenario perhaps where, with the addition of the role of the Deputy Prime Minister, if the Prime Minister went under the proverbial bus the deputy would presumably step into his place? That would be untenable, would it not? You would need to make rapid changes in a time of crisis.

Lord Clarke of Nottingham: The Deputy Prime Minister steps in for the Prime Minister on temporary occasions when he cannot attend Prime Minister's Questions. If the Prime Minister had a short-term illness, the Deputy Prime Minister would indeed be called upon to act in many of his functions. I do not see the Deputy Prime Minister starting to lead the Government in the absence of his sick Prime Minister, embarking on fresh policies and so on. He is just meant to step into the role.

There is no clear role of Deputy Prime Minister in our constitution or our political set-up. It is a title that has been given to particular people at particular times for particular reasons, and some have done more than others. Michael Heseltine was a very effective Deputy Prime Minister, but it was just a title. He was the second strongest member of the Government, so that was fine; it went together. We have gone for years without having a Deputy Prime Minister and, every now and again, we have one made.

The Deputy Prime Minister thing, in my opinion, is slightly irrelevant. It is a meaningless title sometimes.

Q98 **Lord Sherbourne of Didsbury:** This is a question to both Lord Clarke and Mr Gauke. One of the features of our political system is that Ministers are frequently given a department of which they have no particular experience. You might become an Education or Health Minister. I am not talking about anyone in particular; I am talking generally.

I am just wondering whether that is relevant or helpful in the case of the Lord Chancellor. You have both emphasised that the fundamental responsibility of the Lord Chancellor is to uphold the rule of law. Therefore, my question is this. Is there a problem if you appoint somebody without legal experience to the position of Lord Chancellor? Does that make it more difficult for the Lord Chancellor to really understand the fundamental role they have to uphold the rule of law? Does it perhaps make them less effective in undertaking that responsibility within government?

Lord Clarke of Nottingham: On your wider question, Ministers are frequently appointed to offices where they have had no previous experience or even taken a very close interest before. I was once told by a Prime Minister, "My dear boy, you'll soon pick it up", when I pointed out that I knew absolutely nothing about the politics of the subject to which she was allocating me. People get reshuffled too often; that is just part of life in this country.

On a more serious point, I do think that the Lord Chancellor should be a lawyer. It is an advantage if the Lord Chancellor has had a reasonably substantial legal practice. It makes a difference, apart from anything else, to the Lord Chancellor's own ability to have a proper relationship with these extremely distinguished, extremely high-powered senior judges and so on; they are probably more distinguished and high powered than the Lord Chancellor is. It helps if the Lord Chancellor has had a few years in a decent level of practice and has appeared in court a bit. I do not mind if they are a lawyer whose practice has been in some totally non-litigious specialised area.

It makes an enormous difference to the way in which the system relates to a Lord Chancellor. All lawyers prefer to have a lawyer as Lord Chancellor. You must not have it that this is a self-perpetuating, closed little world and all the rest of it, but there are good reasons for that. It is very difficult for someone who has never had anything to do with the law

in their life to suddenly take on all the roles of Lord Chancellor. Whether they give the same weight to the rule of law rather depends on political opinions as well as legal experience, but the average lawyer gets pretty steeped in the rule of law and will take seriously the duty of defending it.

David Gauke: There are real advantages for a Lord Chancellor who has a legal background. As I mentioned earlier, I was the first for a little while to have a legal background. I have to say that my background was as a City lawyer and my experience of the courts went back to my time as a trainee. Much of that experience was not directly applicable at a practical level, but it gave me the benefit of the doubt. It meant that the legal professions were perhaps more sympathetic towards me than they would otherwise be.

Should one make it a requirement? It is definitely preferable if Prime Ministers can seek to ensure that the Lord Chancellor has a legal background, but I am a little sceptical about whether you make it a requirement. A good Minister with a good attitude towards the rule of law, but without a legal background, will always be preferable to a bad Minister with a half-hearted approach to the rule of law but with legal qualifications.

I am not sure that this matter is absolute. For example, my immediate predecessor David Lidington was very widely regarded and respected. He had a very deep and strong attachment to, and belief in, the rule of law. He is an example of a good Minister with a good attitude to the rule of law, but he did not have legal qualifications, he had not been a lawyer. I am not sure I would make it a legal requirement, but it is certainly preferable. Prime Ministers should, wherever possible, find someone with a legal background to be Lord Chancellor.

Lord Sherbourne of Didsbury: When you became Lord Chancellor, apart from being told as you entered the department what issues you had to deal with, as every Minister is, was great emphasis placed on the responsibility of upholding the rule of law? Was that specifically made very clear to you?

David Gauke: It was made clear to me. I suspect that we will turn to the issue of oaths very shortly. The fact that there is this very big ceremony very early on in your time as Lord Chancellor at the Royal Courts of Justice, to which you can invite your family and in which you swear an oath to uphold the rule of law, underlined that and, certainly to my mind, emphasised its importance and how intrinsic it was to the post of Lord Chancellor. Yes, it was made very clear both in that ceremony and in the submissions I received what the role of Lord Chancellor was in respect of the rule of law.

Q99 **Lord Falconer of Thoroton:** Did you see yourself as different from other Ministers?

David Gauke: Yes, I did. I had been a Minister for seven and a half years or so. I had been a Secretary of State before, but I saw myself as

having different responsibilities and priorities. I recognised that it made me different.

Lord Falconer of Thoroton: Did it make you different in connection with collective responsibility?

David Gauke: Potentially, yes. There did not come a particular point at which that was tested, but I remember an occasion when there was something that I wanted to say about what a Member of the House of Lords had done in respect of naming somebody where there was an injunction in place. I felt that that was wrong and wanted to put that on the record. We informed No. 10 that I was going to do that and there was a relatively gentle pushback, not from the Prime Minister but from some in No. 10. They understood and I was able to explain to them, "I'm sorry; this might cause us some political difficulties", but I felt it was necessary to do because it was part of my responsibilities as Lord Chancellor.

Lord Falconer of Thoroton: There was an occasion when Lord Clarke was the Lord Chancellor, and the then Home Secretary said that a judge had refused to send an asylum seeker back because he had a close relationship with his cat. You made a statement to the effect that what the Home Secretary was saying was complete rubbish, wrong and an attack on the judges.

Lord Clarke of Nottingham: I recall that, yes.

Lord Falconer of Thoroton: Where did collective responsibility fit in on the Lord Chancellor attacking the Home Secretary?

Lord Clarke of Nottingham: I probably deviated just mildly from what I should have said, but it seemed to be the easiest way of dealing with it, because it really was a rather trivial issue. It was a phrase that had been used by the Home Secretary and rather blown out of all proportion by the media. I am afraid I made a rather media-based intervention.

It was my duty to defend the judges and stop this absurd dismissal of a judgment, but I did it, I seem to remember, in not too solemn a way. I disregarded the whole thing and just made it clear, in case someone thought this was a statement of government policy, that it was just a load of old nonsense and the decision had nothing to do with the ownership of a cat.

I am not sure that I had the doctrine of collective responsibility uppermost in my mind at the time. I just did it slightly off the cuff, but I could not have just ignored the fact that one of my colleagues had inadvertently, casually and not too seriously made a particularly silly remark about the judgment of a court.

The Chair: Mr Gauke, you were anticipating a question that is going to come now, so, Baroness Fookes, do you want to put the question?

Q100 **Baroness Fookes:** Indeed. I will put it directly to Mr Gauke first. The Prime Minister will already have taken separate oaths as an MP and a

privy counsellor. Would there be any merit if a separate oath were taken on becoming Prime Minister, perhaps in some such ceremony as you spoke about for the Lord Chancellor, that he too would abide by the rule of law or whatever else one might choose to put in an oath? I have to say, we have had various responses to this from witnesses.

David Gauke: I reiterate my point that the oath process for the Lord Chancellor is very valuable. There is certainly some merit in doing this with a Prime Minister, although the Prime Minister's responsibilities of course apply to the rule of law, as indeed they do for all Ministers. One could see that that process could become a little contentious.

A side of me also thinks that the type of Prime Minister who would take notice of such an oath is possibly the type of Prime Minister who does not need to swear such an oath. The type of Prime Minister who really does need to take note is probably the type of Prime Minister who will not. If I can do that without naming any names, that is probably all for the good.

It could make a difference. Anything that strengthens the importance of the rule of law is to be welcomed, but it would not necessarily be transformative.

Lord Clarke of Nottingham: I agree with David Gauke. It would not make any practical difference. I would like to think it would, but I do not think it would.

In the end, you are dependent on the inherent standards in government and the personal convictions and beliefs of the person who has been brought into the office. A ceremonial oath would not make a difference to the sort of people you are worried about.

Baroness Fookes: We are back to the good-chap theory of government.

Lord Clarke of Nottingham: The good-chap theory has worked quite well over the years, with some spectacular exceptions occasionally. It is a very fashionable view, which we have taken to describing in this rather odd way. The good-chap theory is seriously under threat. It is fading a bit at the moment, but that is getting into altogether more contemporary issues that I did not think the committee was going to address. We all have our views as to whether particular people at particular times are good chaps.

The Chair: There is a lot of reference to the good-chap theory. I ought to give credit to a member of our committee who could not be here today, Lord Hennessy, who owns that phrase and concept, so all credit to him. He has another famous one: "It sticks to the Velcro of memory".

Lord Clarke of Nottingham: There is a serious question. Can we any longer rely on an unwritten constitution, its conventions and the assumption that the entire political class will feel themselves bound by them? In the past, I have always respected my opponents on that front, on the basis that I may disagree with their policies, but the underlying conventions of politics and the standards in public life are as strongly

accepted by my political opponents as by my political friends. You can no longer be so sure of that.

Q101 **The Chair:** That is a very relevant question, if I may say. We have three or four minutes left, so I will put the question I missed out and ask you for a precise answer.

Should the Lord Chancellor be required to produce an annual report to be debated in Parliament? If so, what headline issues should it cover?

David Gauke: One could do it. Again, it would not necessarily be transformative. There is certainly a case for that. The risk with it is that it creates a lot of work. A lot of government reports are tedious pieces of work, frankly, and do not take the sum of human knowledge forward very much. Something that was crunchy and precise, and assessed the important issues of the rule of law, could add value, but again I would not want to overstate its use.

Lord Clarke of Nottingham: I agree with David Gauke. In practice, it would not make very much difference. The report would not be widely read outside the immediate circle of those directly affected. There would be an annual one-Whip parliamentary debate in which people would take part and make speeches about the crumbling nature of the magistrates' court in their constituency. We have to find better, more substantial ways of defending the rule of law and strengthening the department and its service

The Chair: We have come to the end, just under the wire. Thank you both for coming, participating and sharing your views. You bring a rich vein of experience to these debates, and we will reflect on some of the important comments that you have made to us. Thank you very much indeed for your contributions.