



HOUSE OF LORDS

Constitution Committee

Corrected oral evidence: The Rule of Law

Wednesday 26 March 2025

10.30 am

Watch the meeting

Members present: Lord Strathclyde (The Chair); Lord Anderson of Ipswich; Baroness Andrews; Lord Beith; Lord Bellamy; Lord Burnett of Maldon; Lord Foulkes of Cumnock; Lord Griffiths of Burry Port; Baroness Hamwee; Baroness Laing of Elderslie; Lord Murphy of Torfaen; Lord Waldegrave of North Hill.

Evidence Session No. 1

Heard in Public

Questions 1 - 17

Witnesses

[I](#): Dr Jan van Zyl Smit, Director, Bingham Institute for the Rule of Law; Professor Jeff King, Professor of Law, University College London; Professor Adam Tomkins, John Millar Professor of Public Law, University of Glasgow.

Examination of witnesses

Dr Jan van Zyl Smit, Professor Jeff King and Professor Adam Tomkins.

Q1 The Chair: I welcome you all to this meeting of the House of Lords Constitution Committee. Today we are holding the first evidence session of our inquiry into the rule of law. We have as our first witnesses Dr Jan van Zyl Smit, Professor Jeff King and Professor Adam Tomkins. You are all extremely welcome. I think some of you have given evidence before to the Constitution Committee and you know more or less what it is all about.

Since this is our first session, we will start by concentrating on the very broad themes of the issue that we want to discuss. We do not want all three of you to answer every question in exactly the same way, because I do not think that would serve any of our interests, but it would be helpful to know where you have a different nuance or view. We want to stretch out the differences that exist in this debate. We hope to take about an hour and a half. I know that some of you have other things to go on to. We have a series of questions, some of which, no doubt, are entirely obvious to you.

I will start off with the first question. Can you give us in a few sentences how you would define the rule of law? This is very useful for us in scoping the nature of the inquiry. We hope that the report we provide in the end will be very accessible to all different types of people, including academics and lawyers, but we need to try to define the rule of law and if it is a difficult thing to define, let us say that as well. Over to you. Adam, do you want to go first?

Professor Adam Tomkins: Good morning and thank you very much for inviting me. There are as many definitions of the rule of law as there are people who have written about the rule of law. That is the bad news. The good news is that this is the Constitution Committee and the Constitution Committee should be interested primarily in the British constitution. The British constitution has a single and simple definition of the rule of law and it is the idea of government according to law. The idea of the rule of law as a matter of British constitutional law is that everybody in the Government, from the Prime Minister down to a police constable via a local authority or a regulator, may do only that which they have the legal power to do. That is what the rule of law means as a matter of British constitutional law. There is a lot more that can be said about that but that is a good start.

Dr Jan van Zyl Smit: Good morning and thank you for the invitation. The rule of law is a framework of principles generating promises or at least expectations for everyone in society and these can be met only through trusted institutions. Those principles I would name as five: first, legal certainty, then access to justice, equality before the law, prevention of the misuse of powers and, finally, legality, broadly in the sense of all being subject to the law, including government and the state. Those five principles I have taken from the Council of Europe's rule of law checklist.

They are the five benchmarks. In turn, the Council of Europe, in preparing those benchmarks, looked to the work of Lord Bingham.

I suggest that the principles answer three even simpler questions that anyone in society might have. First, can I find out what the law is? Secondly, will it be applied to me fairly? Thirdly, is all power exercised, especially by government and public bodies, in accordance with the law?

Professor Jeff King: It is important to be clear that the rule of law is a political ideal. It is also a description of the United Kingdom constitution. The overarching idea—and I say this in agreement with Professor Tomkins—is that public and private power should be governed by law. That means there should be no arbitrary power of one person over another and that means legally unregulated discretionary power violates that rule.

What does it mean to be governed by law? I think this is common ground between all the major commentators. That requires that the law applies to public and private persons alike; that all persons obey valid law; that the laws are clear, open, stable and generally prospective; that there are independent and impartial courts for the resolution of legal disputes; and that people have meaningful access to those courts. Some claim that what also follows from this idea is respect for the UK's international legal commitments and the legal protection of basic rights. I am sure we will get into that later so I will not elaborate now.

Q2 The Chair: All three of you have laid out very helpfully that there are universal concepts of this rule of law. How does it differ from what people popularly call rule of lawyers or ruled by law, which is much more specific and much further away from I think what ordinary people would regard as the rule of law? Do you think there is a tension between the two?

Professor Adam Tomkins: What the committee has heard already is that the rule of law can perfectly appropriately be understood at a number of different levels. There are some very abstract overarching theories, principles or aspirations, and I promise that Jeff King and I will not agree all morning. I will make sure of that, but I do agree when Jeff says that the rule of law is a political ideal. It is an aspiration. It is an aspiration to which we should always aspire but which we should never expect that we can necessarily reach, a bit like the idea of equality or of liberty.

These are constitutional values towards which we should always aim without ever thinking that we can tick that box and say, "Job done" and move on and do something else. The rule of law is always an aspiration towards which we should strive rather than something that we should reward ourselves for having achieved, in my view. I do not know if that is what Jeff meant by "political ideal" but that is how I would interpret it.

All the things that Jeff and Jan have said are aspects of what people have said the rule of law may entail, but there is another level at which we can think about the rule of law, which is: what does it mean as a specific

doctrine of British constitutional law? What it means as a specific doctrine of British constitutional law, as I have already tried to explain, is the idea that the executive branch in particular must be governed by law, that it would be illegitimate, unlawful and unconstitutional for the Executive to claim for themselves powers that they did not in law properly have.

Who will be the guardian of all of that? Who will be the adjudicator as to whether those lines have been crossed? The answer is the courts. There is necessarily always going to be a sense in which the rule of law entails a degree of rule by people who happen to be lawyers, particularly who happen to be judges, but it would be a mistake to think from any of that that the only people interested in the rule of law should be courts, judges or lawyers. In the very first case that reached the House of Lords under the Human Rights Act, a now largely forgotten case called *Alconbury*, the great Lord Hoffmann said, "The Human Rights Act was no doubt intended to strengthen the rule of law but not to inaugurate the rule of lawyers". That is a sentence I like to give to my students with the word "Discuss" after it.

The Chair: Let me bring in Lady Andrews. Did you want to follow up on that?

Q3 Baroness Andrews: Good morning, gentlemen. Professor Tomkins, you have said already that you promise to disagree with Professor King, which opens up the question: why would there be disagreement between you? Is there disagreement between you that is disguised in some way or are you in fact happy with the common meaning that you could all offer the rule of law and what would that be? As a consequence of that—because this inquiry I think, Chair, was provoked by the contention over whether the rule of law is being upheld in a way that we would expect or has been in the past—the question then becomes: these definitions of thick and thin, are they useful? Are they inevitable? Can they be resolved? Where do they take us in fact if we are making a judgment about whether the rule of law will hold now and in the future, or should we revisit it?

Professor Jeff King: Can I make a quick comment about the rule of lawyers as a concept before I answer your question directly? I believe, as a scholar who has spent a lot of time looking at the rule of law, there is no serious academic discussion about what the rule of lawyers is. There is some danger of elevating that, which came essentially as a form of slogan in a culture war about the legal system at the present time, into a bona fide area of academic disagreement. The concept of the rule by law is widely discussed but it is the polar opposite of the rule of lawyers. The rule by law idea is that legislation can be used to violate the rule of law and scholars point to authoritarian systems where legislation is used to achieve that purpose.

To respond directly to your question about disagreement, it is important to recognise that there is widespread disagreement about a lot of values that are fundamental in the UK, about liberty, democracy, rule of law and equality. There is an excellent essay by the legal philosopher Jeremy Waldron asking the question, "Is the rule of law an essentially contested

concept?" His answer is that it is, but it is none the worse for that because we have productive discussions about what it means where we disagree, there is productive debate.

It is fair to say that everyone agrees on the elements that the three of us have stated, that public power should be governed by law and that requires clear, open, stable and prospective law, and impartial courts and tribunals. That is the thinner conception and it seems that everyone agrees on it. The area of debate is whether the concept embraces the protection of human rights as well as respect for international law. Philosophers disagree on that and so do international organisations. I can say more about that as the conversation progresses.

Dr Jan van Zyl Smit: Thick and thin conceptions—at the Bingham Centre we welcome all engagement with the rule of law and there is common ground here on at least the thin conception. If we see the thin/thick debate as a criticism of thick rule of law on the part of adherents to the thin, which is not logically necessary for the thin camp to make, that criticism, in my observation, has essentially been a slippery slope argument. The argument is that as soon as you go beyond the thin conception suddenly it collapses to embrace all public goods. I urge those who consider this debate to be wary of that type of argument. There are various aspects of the rule of law and the thick conception to consider that are necessary to sustain that rule of law we have outlined. In my view, the danger in erring over-inclusively is not so great as the danger in under-including and thereby legitimating a rule by law.

To give two examples to add to Jeff's, yes, there are debates about international law and human rights but consider also whether if we said that a society was suffering from rampant misinformation, for instance, or it had blocked the funding of NGOs in civil society, those problems, although not on the face of them relating to this rule of law principle, are in fact very serious threats to the rule of law. Our sense and our experience as a centre is that working on these issues ends up being work on the rule of law.

Professor Adam Tomkins: I do not like this thick and thin stuff at all. I do not know what it means. I confess, my Lords, I am not a legal philosopher. I do not spend very much time reading legal philosophy. I am a lawyer and a constitutional historian of sorts, and I have done a bit of politics in the past as well but that was largely by mistake. I spend a lot of time reading constitutional law, mainly of the United Kingdom but also comparatively, and I know of no UK constitutional law source that talks about thick and thin conceptions of the rule of law. That is a piece of academic jargon. I mean no disrespect to academics or jargon by calling it that, but that is what it is. It is a piece of academic jargon that has been created by commentators for commentators to write about. I do not find it very useful and the reason I do not find it very useful is that it does not shine any light on what the rule of law is as a matter of British constitutional law.

As a matter of British constitutional law, the rule of law is simple and it provides that the Executive require legal authority to act. There is no thick conception of that. There is no thin conception of that. There is just that rule of law and it has been part of our law since the middle of the 18th century. It is a common-law rule and that is really all there is to it.

Q4 Lord Bellamy: First, I declare my involvement in setting up the Bingham Centre and welcome particularly Dr Smit this morning. I was closely involved in appointing your very first predecessor, Sir Jeffrey Jowell KC.

I will follow up on the rule of lawyers question. If we accept the basic rule that no one is above the law, as I think Professor Tomkins is saying, as our starting point, below that there is a lot of debate about the content of the rule of law. There is sometimes a perception of what we can call in shorthand lawfare, that lawyers use the legal system, weaponise the legal system, to promote a particular view of whatever it is, equality or whatever. Do you have any comment on that phenomenon and whether in a way it might tend to discredit the basic rule that Professor Tomkins has explained to us and leave the public a little bit confused about what we mean by the rule of law?

Professor Jeff King: Yes, there is this perception that lawfare exists in the exploitation of certain legal instruments to achieve political ends. The issue is that there are not many good examples of that taking place, in my experience. The danger that that type of critique raises, a very serious danger for democracy, is that it is a claim that when judges accept these types of arguments they are not interpreting the law correctly. That argument leads to doubting the authority of judges to declare what the law is. We see this in public discourse and we see this on the Front Bench, sometimes of both parties. The idea that it is for the judiciary to tell us what the law is fundamental to the rule of law.

I think that we need a better example of lawfare at work. The Solicitors Regulation Authority and the Law Society have done work where lawfare seems to be at work and that tends to be SLAPP suits. That is the main area where there is extensive evidence of lawfare—SLAPP suits, silencing critics of powerful people by threatening them with lawsuits. I do not mean to downplay the possibility of this happening. I think lawfare happens in the United States but on these shores, there is not much of an evidence dossier for it.

Q5 Lord Griffiths of Burry Port: It is good to have you all here, although as a non-lawyer I will come up with questions from the point of view that I am familiar with. I declare, if it is to be declared, that I am a member of the delegation from this Parliament to the Council of Europe in Strasbourg.

Governments acting on the legal advice that they are given seem sensible enough. I sat in the Opposition until the recent election through three debates that related to immigration—the Nationality and Borders Act, the Illegal Migration Act and the Rwanda scheme—and therefore was party to several contributions to the debate where different claims were being

made about the legality of this, that or the other. What is confusing to me is the breadth of understanding that perhaps we are beginning to discover here but without for us lay people any means of testing how they stood with each other so that we as legislators make appropriate responses.

From Strasbourg I was certainly getting the idea from the European Convention on Human Rights and elsewhere that it was the view in Strasbourg that the relationship between the rule of law domestically and our international obligations was definitely under pressure there to question the legality, the existence of the rule of law as it applied to the questions we were debating. Also, one became aware, with the lawyers sitting on the Cross Benches and the legal person representing the Government of the time, that there was a breadth of understanding that led them to their respective conclusions to which I felt I had no access.

If that is the case for me sitting in Parliament, I wonder how that plays out at other levels in civil society and in communities. In my opinion, a huge obligation rests on people such as you to not only help resolve the differences and nuances that you hold respectively but to be able to communicate that to—I flatter myself and call myself—a fairly intelligent lay person but also to those whose lives are affected by which way that particular debate goes.

Professor Adam Tomkins: I entirely agree with that. There are two principal losers when too much is claimed for the rule of law and far too much was claimed for the rule of law in the debates on the legislation to which you have just referred, Lord Griffiths. The first loser is the rule of law because its meaning becomes blurred and obscure, and it does not need to have a blurred or obscure meaning. It has a very clear meaning and I have shared it with you already three times this morning. You will kick me out if I keep repeating myself without saying anything more interesting or new, so I shall not repeat it.

The second and even more important loser are the general public, who feel that they are excluded from the debate because the debate is being conducted in terms that are jargonistic and legalistic rather than in terms that are about the substance and the merits or otherwise of the policies that underscore and lead to the legislation; in this instance, on very controversial matters of immigration policy. Political matters should be debated and conducted in political terms that are accessible not just to intelligent lay people in both Houses of Parliament but to members of the public.

One of the key messages, if I can use that phrase, I can share with the committee today is: keep it simple. The rule of law is really important. None of us would want to be without it. Thinking about the alternative, thinking about a constitutional order without the rule of law, is profoundly unattractive. You have only to watch “Wolf Hall” to see what such a constitution would be like. We have not always had the rule of law in this jurisdiction. It is a creature of the 18th century, a creature of Enlightenment values. It is one of a number of Enlightenment values and

those of us who believe in them will have to fight for them, especially given what is happening elsewhere in the world at the moment, but I digress.

It is an incredibly important value but let us not claim too much for it. Precisely because it is so important we do not want to diminish its importance by spreading it too thin and overclaiming for it. There has been a lot of that on more than one side of what might loosely be called the culture war, in my view.

Lord Waldegrave of North Hill: Was there no rule of law anywhere before the Enlightenment?

Professor Adam Tomkins: The idea of the rule of law as I have tried to articulate it, the idea that the Government may do only that which they have the legal power to do, and that it is the role and responsibility, as Professor King has said, of the courts to declare when those lines have been crossed, was first clearly set out in the law of England in the 1760s. That is not to say there was no conception of the rule of law before that but the rule of law as it has come down to us, the rule of law as we understand it in the contemporary constitution, it seems to me, is a creature of 1760s jurisprudence and in particular the great case of *Entick v Carrington*.

Dr Jan van Zyl Smit: I would like to take us back if I may, Lord Griffiths, to the Nationality and Borders Bill, as it was. My suggestion is simply that the questions lead back to the Executive. The law of refugees and asylum is not a vacant field. There is a considerable body of international law to which the UK is party, largely from the post-war era. A responsible Executive, as the originator of the Bill, would have ensured that their Bill made fewer contentious claims. Quite frankly, it was a strange Bill in which many provisions were put forward as interpretations of existing obligations in international law, contrary to what the courts of this jurisdiction had already held.

I am afraid that you can really muddy the waters and you can have that kind of confusing debate in Parliament but you are less likely to end up in that situation if the Executive do not sail so close to the wind in what they choose to bring forward. I am putting out the view that those matters of legal controversy were almost stoked up in that sense, where a very different approach would have certainly led to much less contention.

Q6 **Lord Anderson of Ipswich:** Whether or not you like the phrase “thick and thin” I think it is uncontentious that of Lord Bingham’s eight principles, two of them are not purely formal and are more substantive than the other two. One is that “the law must afford adequate protection of fundamental human rights” and the other is that “the rule of law requires compliance by the state with its obligations in international law as in national law”. I would like to address two questions, one on human rights and one on international law.

My question on human rights is: I think you probably all accept that the right of access to a court is part of the core rule of law but is there any reason at all why the remainder of the human rights convention, excellent thing though it may be, is to be bracketed as part of the rule of law? I refer you to a speech, which I am sure you all know, given by Lord Sales in December last year in which he says very firmly, "Lord Bingham is making the following invalid argument: conformity with the rule of law is a hallmark of civilisation; human rights are also a hallmark of civilisation; therefore human rights are part of conformity with the rule of law". Now, we could of course take the pragmatic line that there is another committee of this Parliament that deals with human rights so we do not need to worry our heads with it, but we are being asked to write a report on what we know from the constitutional format of 2005 is a constitutional principle. If any of you think that human rights other than access to a court form part of that constitutional principle, I would like to hear why.

Professor Jeff King: The main reason why jurists such as Lord Bingham have made that claim is that there is in practice a mutually supportive connection between respect for human rights and respect for the rule of law. That connection is so close that if we look abroad—you asked about this in your questions—to Germany, for instance, it has the concept of the material Rechtsstaat. If we look to the World Justice Project's definition of the rule of law, which is by far the most widely used and the most developed, it also includes respect for human rights in that definition. The United Nations uses respect for human rights in its definition.

You asked about why I believe it exists. I believe it is not the case that simply one is required for the other and that that fact alone answers the question of whether the rule of law requires a protection of human rights. I think that what Lord Bingham said is that it requires the *legal protection* of human rights, and it follows from the idea that there should not be arbitrary power and that arbitrary power should be legally regulated. In some areas the level of legal regulation would be more intensive or closer and the area of human rights is one of those areas. That is where we want to provide a large suite of legal securities to protect against arbitrary power because the significance of arbitrary power in that area is profound. That is my basis for taking the view that the rule of law requires the legal protection of human rights.

I have indicated international organisations that take the view that it includes it. There are other organisations such as Freedom House that have a mildly thick definition. It includes a robust idea of equality before the law, which excludes refoulement, for instance; it excludes treating non-citizens differently from citizens. The Heritage Foundation and the World Bank include respect for property rights—that is contentious—and the Venice Commission has a very broad understanding of equality before the law. I think that most of the indices out there recognise something that is broader than the very thin conception that Professor Raz advocated.

Lord Anderson of Ipswich: I had another question. It might be greedy

but also the other two speakers wanted to come in.

The Chair: Ask your second question.

Q7 Lord Anderson of Ipswich: I will ask my second question and then perhaps the other two can wrap it up. The second contentious and perhaps substantive element is international law. I do not think Lord Sales had very much to say about that in his speech, but others have. It is slightly distressing to see that when lawyers in politics address this subject there seems to be relatively little common ground. We had, for example, a speech by Lord Hermer last year in which he gave the advisory opinion of the International Court of Justice on the subject of Mauritius and the United Kingdom's attempt to comply with that non-binding opinion as demonstrating our deep commitment to international law and, therefore, to the rule of law. By contrast, Lord Wolfson, whose speech I am sure you saw given yesterday, says that our breaches of international law are no more a threat to the rule of law than is someone's breach of contract a threat to the rule of law in the UK unless such breaches threaten the entire legal order. There seems to be within politics, and indeed between the Attorney-General and the shadow Attorney-General, a gulf in the importance we should accord to international law and the question of whether international law is an important component of the rule of law, which leaves us in a difficult position.

I would like to know whether any of you can offer us any guidance. As with human rights, is there perhaps a middle ground? It might seem to some of us particularly problematic to seek in an Act of Parliament to go against an agreement that you have just signed with the EU regulating the specifics of trade between Great Britain and Northern Ireland. However, perhaps there are other aspects of international law, non-binding opinions or areas of customary international law, where the obligation might have rather less force. We are struggling here, or at least I am, and we would very much appreciate any guidance.

Professor Adam Tomkins: The international law one is simple and Lord Bingham got it absolutely right. Adherence to the Crown's international treaty obligations is part of the rule of law. That is your way through the quagmire between the Attorney-General on the one hand and Lord Wolfson on the other. Not everything that is opined in an international court in an advisory opinion, for example, is an international law obligation. Lord Bingham was perfectly clear in that book. I went back to it in preparation for this, thinking that this might just come up. Lord Bingham is perfectly clear that in his view—and I of course agree with him—adherence to our international law obligations is part of the rule of law but not everything that is said in international law is part of our obligations.

On human rights, if I can come back very briefly to that I said already, I would not want to live in a society that did not adhere to the rule of law. I also would not want to live in a society that did not respect and protect not just mine but even your human rights. I do not see that there is any

value in pretending that those are two different ways of saying the same thing. Both these claims can be made at one and the same time and they both point in slightly different directions and they both make different points of substance. To pretend that the one is simply a shorthand version of saying the other does not help anybody.

There are some human rights in the 21st century that are so clear and so uncontested and so free from ambiguity and exception that you can say that they are part of the international rules-based order or they are part of the international rule of law. The rule against torture is a good example but there are lots of other human rights, the vast majority of human rights, which are, to use Waldron's phrase, "essentially contested". I have just written a book about free speech. I can plug it here or I can plug it later. Free speech, while we still have some, is deeply contested. Even the framework of Article 10 of the European convention is deeply contested. The first paragraph of the article gives you the right and the second paragraph takes it away again, or rather provides for the circumstances in which it would be lawful for a public authority to interfere proportionately with your right to free speech.

That is a profoundly political question and to say that it is all wrapped up in the rule of law and that any disagreement about freedom of speech, whether it is about online safety or the limits of hate speech or a broadcasting regulation, was a rule of law problem would be to repeat that mistake that I have already alluded to, which is that it would be spreading the idea of the rule of law so thin as to make it more or less meaningless. That is not to say that I think free speech is unimportant. I think it is so important that it is worth writing an entire book about it, but I do not think it is the same as the rule of law. I do not see what is to be gained from either the perspective of thinking about how we protect free speech or from the perspective of thinking about how we protect the rule of law by just blurring them into each other.

Dr Jan van Zyl Smit: I have some quick observations. The second question can answer the first. If the answer to the second question is international law is part of the rule of law, our standing commitments to various human rights treaties mean that those are among our international obligations and, therefore, part of what the rule of law requires us to respect. As to whether adherence to international obligations is part of the rule of law, I do not see why it should be rowed back against quite so hard, especially if those claiming it is not part of the rule of law probably do not disagree that the obligations bind. Why should they swim so hard against the tide of international opinion that says that for very good reasons—stable interactions between states, the ability to conclude future agreements, private international law, commercial dealings across borders—international obligations are to be taken very seriously? The fact that these are seen as rule of law matters, to me, allows them to sit comfortably in Lord Bingham's set of principles.

Lastly, I will make one observation on the Chagos Islands. It seems to me that again confusion is being created here. It may not be the view of

the Attorney-General that the International Court of Justice issued an order in that case. It could still very much be his view that following those proceedings and in the light of other jurists' opinions it seems that the international law position on that territory is that through decolonisation it was not for the UK to carve it out as was attempted and there may also be a geostrategic reason to close off that multi-decade controversy. To be very clear, we should not always think that the law is exhaustively contained in court proceedings. That may have been one aid to identifying where the obligations lie.

Professor Jeff King: I would like to say something brief about respect for international law. I think it follows from the idea that the state has to adhere to its valid legal obligations. When the state commits to international law and then turns around and refuses to follow it, it sends confusing signals. That is a problem for the rule of law on any view. A good example of this is where the Illegal Migration Bill and the Safety of Rwanda (Asylum and Immigration) Bill, were presented to Parliament, where Ministers were reassuring both Houses that these complied with our international obligations but the Civil Service had instructed that it could not issue a statement of compatibility to that effect. That sends a mixed signal and much of the debate in Parliament was precisely "What is the case here?"

I think that following valid binding treaty commitments follows from the rule of law. Joseph Raz was very much open to that idea and he said so in his last statement about the rule of law. He focused more on the human rights question. A speech by Victoria Prentis, Attorney-General, also committed to that idea, and it was the view of Dominic Grieve as well as Lord Hermer.

Lord Anderson of Ipswich: Nothing turns on the fact that Lord Wolfson insists on very strongly, that we are a dualist country that makes a distinction between agreements we might sign in international law and the domestic position here?

Professor Jeff King: That point applies only to the fact that the legislative supremacy of Parliament means that Parliament has the last word. It does not mean that we comply with the rule of law when it exercises that last word.

The Chair: Lord Foulkes, do you want to come in on that?

Q8

Lord Foulkes of Cumnock: I do. I do not want to go down what I think are the blind alleys of Chagos and Rwanda, but I want to get back to the principles that Dr Smit mentioned in his initial remarks about the five principles. Like Leslie Griffiths, I am a member of the Parliamentary Assembly of the Council of Europe and it is the Venice Commission of the Council of Europe that deals with this particularly. Do the 46 members of the Council of Europe and the 61 members of the Venice Commission have the same concept that we have of the rule of law?

Dr Jan van Zyl Smit: If I can answer that briefly, the checklist affirms that the rule of law is a concept of universal validity in the sense that it is worth talking about in each setting. It does not claim that what it takes to satisfy it is immutable either in time or in place. The benchmarks, the five that I mentioned, contained within them nearly 50 pages of questions to ask when assessing the state of the rule of law but they also indicate quite clearly that the scores—and the scores are not necessarily envisaged—need not be 100% on each of those. It gets nuanced, if for no other reason that the different institutional arrangements and really rather different ones are part of the legal heritage of different systems. The way France organises its courts differs from ours and in turn the United States—it is one of the 61. A nice balance is struck, in my view.

Lord Foulkes of Cumnock: But the principles have been accepted by, let us take two examples, Turkey and the United States, you are telling us, are you?

Dr Jan van Zyl Smit: The United States is an observer. I think the acceptance—

Lord Foulkes of Cumnock: It is a full member, is it not?

Dr Jan van Zyl Smit: I would have to review the records but the adoption by the Parliamentary Assembly of the Council of Europe signifies an assent through the legislatures of those member states. I am not aware of the legislatures of the observers¹ having the same oversight over what their expert members do at the commission. It is true there is a member representing the United States in the commission's deliberations, but I do not know whether she has that full authority. In turn, the outputs, such as the Checklist, will not have been affirmed by a delegation from Congress in the same way the delegation from this Parliament and the other 45 affirmed the checklist.²

Lord Foulkes of Cumnock: Is there anything we can learn from any of the other Council of Europe members or Venice Commission members or are we so unique in our systems here, our checks and balances and all other aspects, that we cannot learn anything?

Dr Jan van Zyl Smit: Certainly, each country has its areas where the rule of law is perhaps not in such good shape and really practically the levels of delay and functioning in the criminal and civil courts. Along with the Venice Commission, the Council of Europe has a commission on the efficiency of justice—CEPEJ, by the French acronym—which monitors regularly these sorts of indicators and endeavours to share good practice. There is an artificial intelligence committee attached to CEPEJ. There are

¹ Subsequent clarification from the witness: States which are not members of the Council of Europe.

² Dr van Zyl Smit provided the following information in writing, after the meeting: The Venice Commission Rule of Law Checklist was endorsed by Resolution 2187 (2017) of the Parliamentary Assembly of Europe on 11 October 2017. 51 individual members of the Assembly voted in favour and 8 against, with no UK member participating in the vote. See <https://pace.coe.int/en/files/24213>.

all kinds of initiatives. Whether in high constitutional matters the same applies, I would say it does not happen often. The UK does not have a set of Venice Commission opinions of the kind that organs of states have requested from others about their own legislation and constitutional proposals, but in principle it could.

Lord Foulkes of Cumnock: I doubt that President Trump knows about the Venice Commission.

Dr Jan van Zyl Smit: Perhaps it is best kept secret.

Q9 **Lord Murphy of Torfaen:** You have talked about the rule of law in the world, but both the rule of law and democracy globally are being threatened. My question is quite a simple one. How important is the rule of law to a functioning democracy?

Professor Jeff King: It is crucial in a grand sense and also in a mundane sense. In the grand sense, the rule of law is the canary in the coalmine of democracy. When that begins to go, the integrity of the democratic process soon follows and is eroded quite quickly afterwards. There is a lot of study about the process of democratic backsliding and these studies tend to show routinely that the erosion of checks and balances and of the rule of law tend to precede the erosion of the electoral process itself. We can see exactly this happening in the United States of America at the moment, but it has happened in many other nations as well.

On a more mundane but I would say also important level, it is crucial for democracy because political battles won in Parliament, choices made in Parliament, cannot be vindicated in practice if there is no way for citizens to go to the courts to hold those who apply the law to account and to ensure that what comes out of this institution is implemented in practice.

Professor Adam Tomkins: I do not disagree with any of that but because I promised I would not always agree with Professor King either, we have had the rule of law in this jurisdiction for a lot longer than we have had democracy. Our rule of law has not depended on democracy. It might be that the obverse is true. It might be that our democracy depends on the rule of law. Your question, Lord Murphy, gets to the core of the issue, if I may say so.

The core of the issue is not to distinguish between thick and thin conceptions. The core of the issue is not to distinguish between the rule of law and the rule of lawyers. The core of the issue is to distinguish between law and politics, and that is the distinction that is under real threat, under real challenge, in countries that have for all of my lifetime been our closest allies. The collapse of law into politics is the death knell of the rule of law. The rule of law makes sense only if and in so far as you can distinguish law, legal process, legal jurisdictions and courts from politics and political jurisdictions. It has always been that where the two come together in our constitution that this committee ever since its

founding has been most interested in, in the position of the Lord Chancellor, in the position of the Law Officers of the Crown.

When the Attorney-General makes a claim that the Chagos judgment requires this or requires that, is the Attorney-General making that claim in his capacity as a lawyer or is he making that claim in his capacity as a member of the Government? Is it a political claim? I am doing it as if you can always sever law from politics and as if you can always tell that something is either entirely legal or entirely political, and that of course would be an inaccurate and indeed misleading map of the world, but I insist that we can at least have the argument—we must be able to have the argument—as to whether something is happening in a political register or in a legal register. It is keeping those apart from one another that is critical to the success or otherwise of the rule of law.

Populism, as we call it—the idea that democratic leaders need only point to the weight of numbers behind them to be able to justify any process or any outcome or any decision—is a direct threat to the rule of law. I do not think we see it a great deal at the moment, if at all, in this country. I think, in agreement with Professor King, the allegations that we have had in this country of things such as lawfare are small beer in comparison with what is happening elsewhere, but there is a real threat to the rule of law on the continent of Europe and in the United States. Those of us who believe in it—and I think we all on this side of the table anyway, and I hope all in the Room—will have to fight for it and we will have to fight for it by being very clear about what it entails and what it requires.

What it entails and requires is that even if a Government are popularly supported it does not follow that that Government can do what they like unless and until they have clear, direct legal authority to do it. That is not a point of political philosophy. That is not something that I got from Joseph Raz or Jeremy Waldron, no disrespect to them. It is something that I got from the law. It is what the law of this jurisdiction requires.

The Chair: I will bring in Lord Beith now but in your answers you may want to come back to that.

Q10 **Lord Beith:** Professor Smit reminded us that we ask the courts what the law is and the courts tell us what the law is. What happens when Parliament decides not simply to go on and then change the law, which it is fully entitled to do, but decides to try to preclude the courts from saying what the law is by means of ouster clauses? Are ouster clauses a threat to the rule of law or are they legally incapable of threatening the rule of law?

Professor Jeff King: They are unambiguously a threat to the rule of law. I think there is conceptual confusion that has arisen on this point because statements such as “The rule of law requires the courts to follow the legislation passed by Parliament” are misguided. The reason I agree that when a court is presented with an ouster clause that is unambiguous on any legal interpretation it should give effect to it is respect for the principle of the legislative supremacy of Parliament, not respect for the

principle of the rule of law. The rule of law can be violated by legislation. If legislation requires the abolition of the judiciary or it has a deeming provision such as Section 2 of the Safety of Rwanda (Asylum and Immigration) Act, those provisions will violate the rule of law. Under this constitution we give effect to the legislative supremacy of Parliament as the supreme constitutional principle.

Lord Beith: What do you say to the judges if they are writing a judgment that says, "Unless there is an express intention of Parliament to abolish the judiciary, we are not going to interpret this piece of legislation as having that effect?"

Professor Jeff King: I think that follows from the principle of legality and there needs to be a credible case that the provision does not expressly or by necessary implication require that kind of answer. We could trust the judiciary to determine that question fairly. I think when Clause 2 of the Safety of Rwanda (Asylum and Immigration) Bill was laid out there was discussion about whether the courts would disapply it because it violates the rule of law. I think it unambiguously did violate the rule of law but in the discussion among all the people involved in that process at the Bar, judiciary, Select Committee hearings, it was crystal clear that the judges would need to apply Section 2 because it was unambiguous.

Baroness Hamwee: You may tell me that this is going down a rabbit hole, and a very shallow rabbit hole at that, but we have been talking about Parliament and we are certainly currently in a situation where Parliament will do what the Executive tell it to do. Are there any points that we should pursue around that?

Dr Jan van Zyl Smit: In its legislation? Parliament and this House does amend the Bills that come before it. I would say it is a vital part of achieving rule of law.

Baroness Hamwee: Only around the edges.

Professor Adam Tomkins: Parliament must never give up on its job. The principal job of Parliament is to hold the Executive to account. Along the way Parliament also makes some law, which is not unimportant, but the principal job of Parliament is to supply the Government and to set the terms and conditions on which that supply will continue to be granted. Parliament must never give up on that job, no matter the weight of numbers on the Government Benches in either House of Parliament.

Ministerial accountability to Parliament is another one of the aspirations that we can never say we have achieved, we have done it, let us move on and do something else. It is always an aspiration towards which we should strive, such as the rule of law, the principle of equality and, in my view, individual freedom and responsibility. They are all things that we should strive for all the time and none of us surely would want to live in a jurisdiction that did not have them, irrespective of how difficult it might temporarily appear that they will be realised in practice.

The Chair: I know that Lord Burnett has been trying to get in.

- Q11 **Lord Burnett of Maldon:** Not especially. I think I need to declare one or two interests, but I will do it briefly. I was the Lord Chief Justice so had a role in upholding the rule of law. I continue to sit occasionally in the Supreme Court, and I am a member of Blackstone Chambers, not giving legal advice but dealing in arbitrations, mediations and so forth.

In answer to the question from Lord Beith I think each of you has accepted that it is entirely possible for Parliament to act contrary to the rule of law, and we will leave aside the fine arguments about the boundaries of the rule of law. In our system over centuries there have been conventions in play that are often behavioural conventions that have usually been considered to bind all political parties and all politicians to avoid behaving in ways that are not only contrary to the rule of law but are unconstitutional in a broader sense. You have given a very extreme example of Parliament wishing to abolish the judiciary and I think were we to face legislation of that sort we would in fact face a revolution and fine arguments about the rule of law may get lost in rather louder noises.

I do not wish to enter the debate on particular legislation, and particularly I appreciate controversies at the end of the last Parliament, but what do you see as practical safeguards, not necessarily legal safeguards although perhaps some of those, to avoid these problems arising?

Professor Adam Tomkins: I think it was Sidney Low who said in 1904 in his book, *The Governance of England* that the British constitution is based on a series of “tacit understandings” that are no longer understood. That is a bit of a cliché in constitutional quarters, but I share it with you because I think the end of the last Parliament was one of those moments when a number of us were looking askance at how ill understood the tacit understandings of the constitution together had become under various pressures. To go from one cliché to another, Spider-Man said—or was it said to Spider-Man?—that with great power comes great responsibility.

The sovereignty of Parliament—the legislative supremacy of Parliament—is a great power. Most legislatures in the world do not have it. It is a great power and it needs to be exercised with great responsibility. Nobody really knows what would happen if it was not exercised with great responsibility. I think that you are right that if such extreme legislation were to be passed as to abolish judicial review, or indeed to abolish the judiciary as a whole, we would have significantly more urgent problems than: where does that leave the rule of law? We would be in unconstitutional territory. It would be a moment of revolution, not a moment that is protected by our recognised legal order at all.

The interesting examples, of course, are not those extreme ones. The interesting examples are the ones where the Executive wilfully lead Parliament to not just test the edges but to trespass over the edges of that which the tacit understandings would have said perhaps it would be

a better thing not to do this. Again, there is sometimes a lot of heat about these issues. It is not always about immigration law. In the past it has been about merchant shipping law, for example. By and large, so far, with great tact and diplomacy and no little skill, the judiciary has been able to interpret and give effect to the will of Parliament without tipping or indeed really risking the entire apple cart to be tipped. We are in the fortunate position where we do not really know what would happen if that were to occur because even in the most heated moments, even in the most extreme moments, somebody on one side or other of the argument has pulled back—and long may that continue.

Baroness Andrews: I have a very short question. According to the rule of law index, the UK has slipped from 10th in 2016 and we are now 15th. Does that reflect the perception of what you have just said about the way that the rule of law is being seen or being practised?

Professor Adam Tomkins: Perhaps. I do not know. To be honest, I do not know what the rule of law index is and I do not know how it is measured. I do not know what we have done to come to 15th rather than 10th. I suspect it may be a reflection of international perception of what we have just described, but it also might be the fact that the UK constitution has been through some stresses of late, stresses that were caused by decisions that the people took in referendums that have required us to very significantly change fundamental aspects of our constitution. I do not think anybody pretended that was easy. That is not to forgive or justify a step down in this particular league table, but I think the context of British politics in the last 10 years probably has to be borne in mind when one considers it.

Dr Jan van Zyl Smit: I receive the surveys from the World Justice Project annually. They are long. They take you through different aspects of the civil and criminal legal systems, with some questions about constitutional constraints but I do not think they are weighted towards the matters we have just discussed. It is more about the overall health of the legal system.

Can I slip in an answer to Lord Burnett's question? It leads partly back to this House, your Lordships' committee, other committees such as the Delegated Powers and Regulatory Reform Committee that do really important work. We would be delighted if their reports were available earlier in the legislative process and, best of all, if the thinking and principles laid down were taken on board systematically by the Executive. It could be set out in guidance. There are so many other impact assessments that are now made. Why should there not be an impact assessment against the standards of either of those two committees? That is feasible. It adds to the work of the Law Officers, who seem to be in the spotlight these days, but if it will pre-empt problems that are real in the way we have discussed, so much the better.

I cannot resist adding that parliaments elsewhere do absolutely terrible things. Last year Mexico did abolish its judiciary. They are now all being elected to take their place. As a South African lawyer, I will comment that

there were episodes that English constitutional scholars found very interesting about the removal of the last black voters in the first decade of apartheid exercising Westminster parliamentary sovereignty, so bad things can happen. It is well worth thinking of these safeguards.

Q12 Lord Griffiths of Burry Port: I will pick up in my question another field of application for the principle you have just spoken about. We have been talking about the interface between politics and the law but there is another interface that interests me greatly. It is enshrined in the United Nations charter, the universal declaration, the European convention, and it is access to a fair trial, access to the law.

I had a conversation at breakfast—I just wanted to throw that in; conversations at breakfast are inimical to me—with Lord Briggs of Westbourne, and his whole work has been focused on access. The situation that we find ourselves in at the moment is that it is increasingly difficult to handle that side of things because of the legal aid situation, the backlog, and so on. He produced a report in 2016; that is the point of context. His findings were widely respected and a commitment was made to implement them. Some were and then Covid came and the steam has run out of it and it needs to be looked at again.

From my own personal circumstances, I know that a lack of access to the law can have lifelong effects on the people who cannot make their case in law because they do not have the money or because of their social status or whatever it is. I feel that we need at some stage to pick up the discussion about access as a vital dimension to a discussion of the rule of law.

Dr Jan van Zyl Smit: These are some of the most serious rule of law problems facing the UK. I heard Lord Briggs speak about this last week. In the civil legal system lives are put on hold, health and employment and business activity are adversely affected by legal problems where on some estimates 80% of the population is not eligible for legal aid. In the criminal justice system, equally, we hear about the long delays. I highlight the position of prisoners, who are in the state's custody and in overcrowded prisons. Their access to justice could be much better and it is not only about money. I point out that the attacks on the legal profession, as we saw with the riots last year, are contributing to lack of legal advice in many parts of the country. Altogether, access to justice is an area of great concern.

The Chair: Dr Smit, you said a moment ago that the rule of law index is about the rule of law rating in the broader health of a legal system. In that context, what caused the drop in the score?

Dr Jan van Zyl Smit: I would have to refer back to the figures but what has been mentioned here is a descent in the ratings, which could be the better performance of others. The Nordics always sit at the top so some other countries may have done better.

Professor Jeff King: The methodology of the World Justice Project's figures is based on polling people from within the country and testing their impressions on a range of questions. It is not a foreign institution exercising judgment but collecting local views of it. On what has caused the perception of a deterioration, we saw an uptick in the use of ouster clauses and of disapplication of the Human Rights Act and we saw a discourse of critique of so-called lefty lawyers being made on the Front Bench and various other elements of critique, speeches being given at think tanks, threats to withdraw from international law, the UK Internal Market Bill, which threatened to disapply all law from the regulation-making that was contained in Part 4 of that Bill.

All these things were noticed. They were commented on constantly by the Bar Council, the Law Society and many others in submissions to Parliament. There is ample evidence that something changed, I believe, following the referendum and the type of politics that came out of that.

The Chair: That is very helpful. Lady Laing.

- Q13 **Baroness Laing of Elderslie:** We were talking about interfaces and interactions. I would like to take you to the interaction between the law and the everyday citizen. It occurs to me that we all worship Dicey—perhaps “worship” is the wrong word—we all pay attention to Dicey and take Dicey as the base for what we are discussing and considering and what we hold of great importance, but Dicey was writing 140 years ago. Is it not the case that the body of legislation that Dicey was considering was a very much smaller body of legislation than that with which the ordinary citizen deals today? Is there a danger that if we have too many rules—because we now have rules about everything in everyday life, which 140 years ago we did not—the general duty of a citizen to act decently and use one's own judgment as to what is right or wrong is supplanted by an attitude that says, “If there is no specific rule against doing this thing then I can do it”?

Let us take the very simple and what might seem trivial issue of parking your car. Never mind 140 years ago, 20 years ago there were not many yellow lines, except in city centres. Now a yellow line means you cannot park your car. If you drive through a forest there are no yellow lines so people park their cars everywhere, which is clearly ridiculous because it is stopping other people, but the attitude is, “There is no yellow line, there is no rule against this, therefore I can do it”. I suppose I am asking: is personal responsibility diluted by a subordination to state control through too many laws?

Professor Jeff King: I do not think that it is, and the experience of public compliance with government advice and rules during the Covid-19 period, which we can steer clear of for the most part, showed that when the same advice was contained in law it generated much higher levels of compliance. When it was contained in guidance it was a much lower level of compliance. I do not think it follows that because there are many rules we are somehow creating a rule of law problem because it becomes difficult to know what those rules are. We have many ways of finding out

what the rules are—Citizens Advice Bureau, legal advice, blogs, trade bodies telling their constituents what the rules are. What those rules do is provide a framework where you can expect not to be taken advantage of or you do not feel like you are being exploited in some way. Those are rule of law values.

Dr Jan van Zyl Smit: The level of mutual consideration in society goes to many different factors and I would not venture an opinion on those, except that where they meet the law there are some interesting interactions. Has the increase in legal liability led to a decline of apologies, for instance, because of the legal consequences that follow? This also points to the area of public inquiries, where we know that Parliament is shortly to consider how to legislate to address a culture of defensiveness, if one can put it that broadly. Yes, sometimes there are consequences, but I would pin it to legal liability rather than a confusion of rules making people more cautious in a certain way, but for the rest it is not only the influence of the law, it is the state of the culture.

Professor Adam Tomkins: I cannot resist the temptation to say something about Dicey. Dicey's most famous book is the one where he talks about the sovereignty of Parliament and the rule of law, but his best book is not that book. His best book is a book that studies the relationship between law and public opinion in the 19th century, which is a book based on essays he gave at Harvard in 1908, I think. The idea that you are getting at of there being a tension between requirements of legality and requirements of good citizenship is not a new one.

Q14 **Lord Waldegrave of North Hill:** I will pick away partly at that. Breaking the law is not always an attack on the rule of law, is it, because there can be bad laws, but that thought is rather complicated because there is a danger of a Whig interpretation of history about the law—"The law is always getting better", which it is not necessarily—which relates back to that last question. I am not quite sure that I know what my question is but I think I know that citizens are often accused of attacking the rule of law by breaking the law when subsequently they are judged to be heroic.

I want to pick away a little bit at attacks by the Executive on the law could be by passing law—say we abolish judges or whatever, like in Mexico—but more often, in my experience, they are when the Executive want to tell somebody to break the law. There is a good example of this—and I do not know whether it is true but nobody has contradicted it—in Tim Shipman's book about when Helen MacNamara was told by Dominic Cummings and the Prime Minister to break the law about the requirement to write a letter to Europe and when Mr Cummings said that that was going to involve her being sacked, she said, "I don't work for you, I work for the Queen". There is a little bit of complicated doctrine there because the Queen can act only on advice from the Prime Minister. Are there more defences? I believe the military is clearer. There is a right to disobey an illegal order. Should there be more defences for those in the Executive receiving a potentially illegal order?

Professor Adam Tomkins: That is a complicated question and I would want to take it away and think about it. To come back to the beginning of your question, though, Lord Waldegrave, I said at the beginning of this session that I am a constitutional lawyer and what I can offer the committee is my sense of what the constitution and its law require. Constitutional law does not govern the behaviour of citizens. It governs the behaviour of government and so what I have been talking about this morning in connection with the rule of law applies to the behaviour, the actions and decisions of government, not to the behaviour, actions and decisions of private citizens, whether they are parking their cars in forests or anything else. I thought it was worth clarifying that.

On members of the Executive, whether they are police officers or members of the security and intelligence services or civil servants or anybody else, being asked or required by their superiors to act in ways that are, in their view, contrary to the law and what remedies might be available to them is a very complicated matter. It is likely to be different depending on whether we are talking about a police officer, a member of the security or intelligence services or an ordinary civil servant. I am not sure that the rule of law gets you very far along the way to an answer to any of those questions.

What I think you would need and expect is to have a professional code of conduct. Certainly, we have that for the Civil Service. What you would need and expect is a clear statutory set of the parameters of the powers and responsibilities of the people who work in those services, whether they are police constables, spies or anything else. Within those frameworks you would have whistleblowing opportunities, perhaps not public whistleblowing opportunities but the opportunity to refer a matter to a superior who might be within the organisation or might be outside. I am not sure how much light can usefully be shone on that very difficult set of questions by thinking about it through a rule of law prism.

Q15 **Baroness Andrews:** This is a slightly unformed question, forgive me. It derives from what Baroness Laing was pursuing in the relationship between the individual and the state. Dicey was writing at a time when the Victorian nightwatchman state did the minimum. It corrected injustice, it put right abuses, industrial accidents, all that sort of legislation. It was not concerned with a body of positive law. We now have an enormous body of rights for individuals in law that constitutes a much broader platform for people to exercise their right to challenge whether the rule of law is working in their favour.

In that instance, how does the citizen then become better protected against that huge element of what defines the rule of law, the control of the abuse of power? So much of what we have seen in Parliament over the past five or six years has seemed to us to be the abuse of power, expressed through the growth of delegated legislation, for example, and disguised legislation. It is slightly conflating two issues, I know, but could you make a general comment on that and whether Dicey is still relevant?

Dr Jan van Zyl Smit: Could I make an introductory point to set the historical scene? Last year's Nobel Prize-winning economists—Acemoglu, Robinson and Johnson—paint a picture of what it takes for liberty to endure in different eras. Essentially, their account is that the capacities of the state will grow, so not only do we have more rights but the state can surveil us, it has imposed all kinds of new offences that did not exist before. To keep us within the zone of liberty, as they chart, we need ways for society to check those aspects of state capacity.

This can take many different forms, and I think there is a call for innovation. Distinct oversight bodies, ombud-type bodies, commissions of various kinds, all add to what it takes to have a balance in society, and so does allowing civil society to do its work. There is a broad sense in which historically different arrangements are needed at different times.

Professor Jeff King: Could I briefly respond first to Lord Waldegrave's questions about breaking the law and the rule of law? I think the presumption is that public and private persons do not break the law under the rule of law. The way this issue of not giving effect to bad law is dealt with theoretically is that you recognise the category of civil disobedience. If you wish to not abide by the law, you need to disagree in a way that is open and clear, non-violent, and you accept legal proceedings that might convict you of any applicable offence. Then we take account of the reasons for disobedience in the sentencing process. That is how that issue is addressed in legal and political theory.

As for executive attacks on the law, the example you gave is also narrated in *Johnson at 10* by Seldon and Newell, so I recognise the situation. I think the answer to what a civil servant does in that case is to contact their union and ask it to bring judicial review proceedings. That is something that the FDA has done a few times. That would be better than officials deciding on their own accord to just ignore what politically elected officials ask them.

As for the relevance of Dicey, his basic point that executive power should be regulated by statute still applies, and it is still very much the case today. He did not like the fact that statutes conferred a lot of administrative discretion on new bodies and agencies, but I think he would probably be quite satisfied ultimately with the extent of legal control of, for instance, delegated powers of Ministers and so on that we now have. Part of the reason that we can have such control is because of a fairly broad understanding of what the rule of law is and what it requires.

The critical thing to ensuring that in a broad regulatory state people can vindicate the rule of law is access to justice. It is that people have affordable access to the courts. I think for that reason, the exclusion of many areas from eligibility for legal services under the LASPO needs to be revisited.

Professor Adam Tomkins: Dicey was writing after the Factory Act. He was writing after the Education Act. He was writing about a state that

was unrecognisably larger than the state had been 100 years before Dicey. Of course, it is true that the state has continued to grow since. He gave us what I think is of immense value. He gave us a language with which we can talk about this. Part of that language is the language of the rule of law as a constitutional principle.

There was a part of what Dicey had to say about the rule of law that troubles me greatly in the legal landscape that we have at the moment. That is the power of regulatory agencies. I told you I was going to plug my free speech book. The last chapter of that book is about online safety and about the Online Safety Act and the powers that Ofcom has. Ofcom is now a mega regulator. It has a budget of £175 million a year and a workforce of 1,350 people. It is a huge body. It make rules, executes the rules, administers the rules and adjudicates on disputes in accordance with the rules or in accordance with its interpretation of the rules. All of this is subject to judicial review, as Jeff has just reminded us, but it is also a complete violation of the separation of powers. It is legislature, Executive, and judiciary all at once. It is not the only regulator of which that can be said.

Part of Dicey's message about the rule of law was that this is a rule of law problem, as well as a separation of powers problem, because it makes the law inaccessible. It is hard for citizens to understand what it is, because it is buried away in guidance, and that guidance may very well be on the internet but you have to be pretty skilled at using the internet always to put your finger on it quickly. It is not made transparently; it is made in an opaque way.

The rules in the Communications Act about broadcasting are made in the way that primary legislation is always made in this Parliament. What they mean is what is said in the Broadcasting Code. Nobody knows how the Broadcasting Code is made. It is made internally, secretly, by Ofcom. It will say that it is made in consultation with stakeholders and so on.

There are all sorts of rule of law problems that Dicey put his finger on 150 years ago in his lectures in Oxford, which became his book, which are still absolutely relevant to the legal landscape that we are all struggling with today.

Lord Beith: The lockdown/Covid period had some malign effects on the rule of law because of the confusion between advice and law, but there was another effect that may have been more positive, and it was a result of the No. 10 parties, which there was a wide public conception that there cannot be one law for them and one law for us. I am not aware of another period in my life when that became a talking point. Has the rule of law been helped?

Professor Jeff King: I think it has been. People recognise the importance if the principle that the Government are subject to law and required to abide by the same laws as everyone else. I think it unequivocally had a positive effect—it increased the salience of the rule of law across the board.

Dr Jan van Zyl Smit: To take just one example, Lord Wolfson's resignation shows how widely across the political spectrum this view was shared. We have heard Lord Wolfson's thin conception, but he took a stand on that. It mattered what people did in public life as well as how the citizens saw this.

The Chair: We are coming to the end, but I also would like to know who is responsible for upholding the rule of law in the UK.

Q16 **Lord Foulkes of Cumnock:** That is the question I was going to ask. Who is responsible for upholding the rule of law in the United Kingdom?

Professor Adam Tomkins: You are. We all are. Obviously, the courts are, the legal system, the legal profession. Government and Parliament have a role to play. This Parliament, unlike the one I served in 400 miles north of here, is well served by committees that are dedicated to thinking hard about the constitutional implications, not just of legislation but of government policy and of controversy. That is absolutely critical, I think. That function of Parliament, to shine light on sometimes obscure and dark corners, even sometimes Victorian corners of the constitution, is what this committee exists for, and it is critical.

Lord Foulkes of Cumnock: That is not really a proper answer because Parliament is an amorphous group of people: two Houses, Administration here, Civil Service making advice, Government. How do we as a Parliament do it? Who is principally responsible?

Professor Jeff King: I have some thoughts on that. First, in government, it is important to start with the Lord Chancellor and the Attorney-General and the Government Legal Department. They play probably the most important role at ensuring the rule of law day to day.

Within Parliament, I think it is largely down to Select Committees, such as this one, the Delegated Powers Committee, the Joint Committee on Human Rights, PACAC and the Justice Committee. I think those committees, as instructed by their legal advisers and others, their policy analysts, are the heart of vouching for the rule of law during the process of legislative scrutiny especially. I think the Government and Parliament are only two institutions for guaranteeing the rule of law.

The professional regulatory bodies are another. The Bar Council, the Law Society and the Solicitors Regulation Authority play a crucial role. They are the voice of the profession. Then there is civil society, academics, media, think tanks, and of course the courts and tribunals of the land.

I wanted to make one final observation, which is I believe that there has been a consensus between virtually all those institutions on what the rule of law requires, what a well-functioning legal order is, except for some, very few, think tanks—and I am thinking of one in particular—and some members of the Government in the last Parliaments.

On the other institutions, even though the current Supreme Court is very different from the one that we had about 10 years ago, most

commentators on the rule of law do not think that they are partisan in any way. They just possess different views of what the law requires.

- Q17 **Lord Foulkes of Cumnock:** Can I ask Professor Tomkins particularly? Like him, I was an accidental Member of the Scottish Parliament; I got in by mistake. I am worried about the rule of law in Scotland at the moment for a number of reasons. Are you concerned about it as well?

Professor Adam Tomkins: Yes, I am. There are some material differences between the institutional protections that Professor King has just outlined for the United Kingdom and the position in Scotland. There is no equivalent of the DPP in the Scottish criminal prosecution service. For example, the Lord Advocate is a member of the Scottish Government, the principal legal adviser to the Scottish Government and also the head of the Crown Office.

The Scottish Parliament is a unicameral Parliament, not a bicameral Parliament. I am absolutely not urging that it should become a bicameral Parliament. The last thing Scotland needs is even more politicians, in my view, but I think that the fact of its unicameralism is not very widely understood in the Scottish Parliament. There is no difference, there is no distance between—even the architecture of this building. When you walk up those stairs to the Committee Corridor, you feel like you are doing a different piece of work from the piece of work you might be doing downstairs in the Chamber, and that difference does not exist in the Scottish Parliament. The partisanship of the Chamber is taken into the Committee Room.

What I was talking about in response to Lord Murphy's question earlier about the all-important difference between law and politics: it is hard enough to grasp and hard enough to cling to in the United Kingdom but it is even harder in Scotland. Partly that is about the personalities of people who have been in positions of power of late, and I do not want to talk about that. More importantly, and what I would be prepared to talk about for as long as you can put up with it, is that there is no institutional framework in Scotland that replicates the institutional framework that Professor King has rightly been talking about here.

Lord Foulkes of Cumnock: What would you change to improve the position? You no longer have the chief prosecutor as a member of the Cabinet.

Professor Adam Tomkins: I certainly think that the position of the law officers in Scotland needs to be looked at afresh. I think that the committee structure in the Scottish Parliament needs to be looked at. The only people who can do that are the Members of the Scottish Parliament. That is a question for the SPCB, as you know, Lord Foulkes, in Holyrood. I think that there are too many departmental committees in Holyrood and not enough cross-cutting committees. There is no equivalent of the JCHR in Holyrood, there is no equivalent of the Constitution Committee in Holyrood. I think there is an equivalent of the Delegated Powers Committee in Holyrood, but it is not very powerful, and it is understaffed.

Lord Foulkes of Cumnock: This Parliament is ultimately responsible. The Scottish Parliament exists by legislation of this Parliament. When I ask the Government—whether Conservative or now Labour—to try to improve the position, they refuse, because they say that is the responsibility of the Scottish Parliament. That is a dereliction of duty, is it not?

Professor Adam Tomkins: There is a lot of buck passing

The Chair: Adam, it is a wonderful debate and one that I would very much like to have, and I am sure members would, but it is not directly relevant to the rule of law. Perhaps it is one we could continue at another time.

Lord Foulkes of Cumnock: I think it is. If the rule of law in Scotland, Wales, and Northern Ireland is different from the rule of law in England, it is very relevant.

The Chair: I know but we are about to start into getting into a big debate about the role of the Scottish Parliament—

Lord Foulkes of Cumnock: Only in one aspect.

The Chair: —linked to the United Kingdom. I think it is one we ought to continue, Adam, but perhaps we should do it offline.

Professor Adam Tomkins: I will resist the temptation to say anything further about the Scottish Parliament, but, if I may, I will say that when this committee is considering the rule of law in the United Kingdom, this committee should be thinking about the rule of law in all four nations of the United Kingdom.

The Chair: I think we can all agree with that.

Lord Anderson of Ipswich: We are getting towards the end of your time, in fact we are nearly there, so you must not worry about offending us. You have been kind enough to say that this committee has quite an important role in defending the rule of law. Could I ask you to take your hearts into your mouths and tell us how you think we could do that better than we do at the moment? I think, Professor van Zyl Smit, you have already suggested we might try to produce some of our reports on Bills rather earlier than we currently do.

Dr Jan van Zyl Smit: Yes. Another opportunity, which has already been taken, is to collaborate with those who study your work. I am thinking of the UCL Constitution Unit, which some years ago produced a compilation of your standards. There is precedent for this in the House of Lords.

Lord Anderson of Ipswich: There may be some movement on that.

Dr Jan van Zyl Smit: That would be useful in the way it is probably well understood, by offering general guidance that could be used on future occasions. That is my top suggestion.

Lord Anderson of Ipswich: Watch this space.

The Chair: In that case, thank you very much indeed. It has been a very full programme. We have had a lot of good discussions, a lot of areas to flag up, to look into in the future. If there is anything you want to follow up and write to us with some fuller responses or anything—I think you will be able to see your evidence, so you can correct it or change it in any way that you want. Thank you very much indeed for coming along, and I look forward to meeting you all again.