



Constitution Committee

Corrected oral evidence: The rule of law

Wednesday 23 April 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. 3

Heard in Public

Questions 35 - 54

Witnesses

[I](#): Dr Ronan Cormacain, Consultant Legislative Counsel; Dr Ruth Fox, Director, Hansard Society; Sir Stephen Laws KC, Senior Fellow, Policy Exchange and former First Parliamentary Counsel.

Examination of witnesses

Dr Ronan Cormacain, Dr Ruth Fox and Sir Stephen Laws.

Q35 **The Chair:** Welcome to this meeting of the House of Lords Constitution Committee. Today, we hear from Dr Ronan Cormacain, Dr Ruth Fox and Sir Stephen Laws KC. Thank you for coming. You all bring considerable experience and knowledge of the subject we are discussing. As you know, the Constitution Committee has decided to launch an inquiry into the rule of law, what it means, its effects and impacts. It would be true to say that the more we look at this the wider it gets and, to some extent, the more impenetrable.

Today, we have brought you together on the basis of your impressive expertise on legislation and Parliament, and on how this thing, “the rule of law”, impacts on us in this building and its effects on the people—all of us—who are governed by the law. Do you have a good understanding of the characteristics of legislation that are consistent with the rule of law? Does the UK statute book display these characteristics? In other words, can we tell when something is essentially compliant with this thing called the rule of law and what is that?

There are three of you and we do not want you all to say the same thing. If you are happy with another person having a view similar to yours, there is no need to say anything, but if you disagree, please say so. I do not mind who goes first.

Sir Stephen Laws: I will go first. I need to start with what I think the essence of the rule of law is. A lot of what I think is consistent with what Lord Wolfson said in his recent speech to Policy Exchange about the rule of law. I agree with everything he said, which we may come to talk about.

For me, a society lives under the rule of law if it has a culture of respect for the law and if that culture is shared by agents of the state. The existence of such a culture is the only thing that makes government by or under the law practicable and effective. Maintaining the rule of law means that it is necessary to protect and nurture that culture. The rule of law is not a rule; it is a description of a means of ruling. It is a fundamental error to conflate the legal obligations that the law imposes with the culture that secures adherence to the law.

The rule of law is not about what specific laws you have, how many there are or their reach. It is about whether respect for the law, including especially among the agents of the state, is enhanced and not undermined by the law you have and the way it is applied. It involves respect for the law, first and foremost, in the way you make it and, secondly, in the form in which it is applied. By “applied”, I mean not only in the courts. In some ways that is a subsidiary issue. In my view, what is more important is the way it is applied by people who use the law to arrange their affairs and conduct themselves in society.

Given that introduction, what are the characteristics of law that nurture the culture I have described? I think the best tests are the eight “tests of legality” propounded by the American jurist Lon Fuller. His tests overlap with those of other jurists but are the most comprehensive and clear. In those eight tests, the first is “generality”: legal rules should apply to a class of conduct or individuals, not specific isolated cases. They should also be “publicly promulgated”: laws should be made known so that people can understand and comply with them. There is “prospectivity”: laws should not apply retroactively, meaning they should not punish actions that were legal when they were committed. There should be “clarity”: legal rules should be understandable and avoid ambiguity to allow citizens to know what is expected of them. There is “non-contradiction”: the law should not contain conflicting provisions that would make compliance impossible. There is “possibility of obedience”: laws should not impose impossible obligations on citizens. The law should be “relatively constant”: it should not change so frequently that citizens cannot adapt their behaviour to comply with it. Then there is “congruence”: there should be a correspondence between the law as stated and created, and how it is actually applied and enforced. Of course, the last of these moves the process of creation into that of application.

That is my answer to what the characteristics are. Maybe I should let others speak before I address how the statute book operates.

Dr Ronan Cormacain: I absolutely endorse Lon Fuller’s definition of the rule of law. It complies with both Lord Bingham’s and Joseph Raz’s elements of the rule of law. Specifically on legislation, we can distinguish two different dimensions. First, there is the form of legislation: how you present it. Secondly, there is the substance of that legislation: does that substance also comply with the rule of law? In terms of form, we have principles such as whether it is clear, certain and navigable: can we find our way to the right bit of law relevant to us? Is it generally prospective and capable of being implemented? That is the form and is, in part, the function of the legislative drafter.

The second element is whether the substance of legislation conforms with the rule of law. That is more obvious whenever a Bill passes through Parliament. For example, does the legislation prevent access to the courts? Does it respect the independence of judges? Does it allow for unbridled discretion rather than the application of law? Is there compliance with international law? In answer to your follow-up question, I think the UK is pretty good really at complying with the rule of law, certainly when it comes to the form of legislation—there are obviously some problems, which we will perhaps come to. Generally, in the substance it also complies with the rule of law.

The Chair: Thank you very much. That is clear.

Dr Ruth Fox: I agree broadly with the previous speakers. On whether the law is clear and accessible, you must consider who the audience is. What is clear and accessible to Stephen and Ronan, as people with legal

backgrounds, may be less clear to someone like me without one—and even less clear to a citizen in the street who is not engaged with legislation.gov.uk. We need to think about this in that context.

Similarly, on context, I cannot remember the word Stephen used but he said essentially that legislation should be predictable—that you should not have such regular new legislation in one area that it cannot be relied on for any period by a citizen or business wanting to plan ahead. Again, that obviously depends on context, as we found during Covid. What may be possible in normal times may not be possible in abnormal ones. One must always consider the context to some degree.

Q36 Lord Griffiths of Burry Port: Picking up on some things that have been said, we have those eight principles in our briefing papers here. We also had a breakfast—it has become quite fabled—together with the Supreme Court. I felt a little at odds there because I do not have the same wealth of experience as everybody else but I picked on a rather homely example which allowed me to develop a conversational relationship with Lord Briggs. He was anxious to help me understand the work he has done on access to civil law. A report he made in 2016 was quite comprehensive on this matter. He was quite definite in putting forward his argument stating that access to the law is a desirable, indeed necessary, characteristic of the rule of law. That is miles away from what Dr Fox just said. He meant people feeling the law is accessible.

In his report, he talks about the backlog, the diminution of legal aid and that it is a paper-led process too much of the time. Now, since 2015, a lot of that has improved but he suggested ways in which people could more easily navigate the complexities. They could be helped by digital means, with another person acting as a guide and so on. What I am feeling for is that we have said the finest and noblest things about what constitutes the rule of law, but that is all as nothing if the ordinary citizen feels befuddled by it. If you, Dr Fox, feel in a category apart from the lawyers, then think what the people who I meet feel like. Too many of them are denied justice simply on the grounds of a lack of accessibility. Lord Briggs suggested that there are more efficient ways of dealing with this, certainly in mediation and things like that. Does that resonate with the three of you, from your standpoints?

Sir Stephen Laws: It is important to distinguish access to the courts from access to the law. As I said, the most important thing about the law is that it should be clear to people who do not want to litigate—most people do not want to involve themselves in litigation, or have any doubt about it. One problem we have with the law, which is partly my answer to the second bit of the Chair's question, has been through what I was going to call recent developments. I mean developments since I first joined the public service, which is over half a century ago—but let us say "recent". Those developments have involved an increase in the element of doubt in the predictability of the law, because of various things. There was the period of our membership of the European Union. There was the incorporation of the European Convention on Human Rights into the law. Devolution has complicated the law considerably. There have also been

judicial developments unconnected with those things, but which may also have been the result of the context that they set.

These things mean that, if there is to be a culture of respect for the law among the agents of the state, two things are needed. First, the state, almost all of the activities of which are governed by law, needs to be able to know what the law is. It needs to know that the option of changing the law is a safer political option than gaming or even defying it. Where law is contingent on being explained further by the courts, then it is not clear. It will not be clear to individuals who do not want to litigate, either. Yet developments have, regrettably, resulted in that happening.

On whether the statute book is clear, my answer is that it is not as much as it used to be. I am sure that the people producing it have the ambition that it should be clear, but if whatever you now enact is potentially subject to being held to be something other than what you meant, the effect of that is to make life a lot more difficult for lawyers and others.

Lord Griffiths of Burry Port: That helps me a great deal. I read Lord Sumption's book at the same time as I did the report by Lord Briggs. That did not help me at all on access to the court, to the law and so on. I come from a human rights perspective, where we have in the United Nations charter and universal declaration, and the European Convention, a common thing about access: people must feel that they have access to the law. I must swot up again on access to the court. Lord Sumption is on about that all the time. Forgive me for parading my deficient knowledge of all these things, but it really matters to me that ordinary citizens can feel confident about the law and respect it because of the way they see it working out.

Dr Ronan Cormacain: To follow up on accessibility to legislation, it is no good to simply say, "All the law is available on legislation.gov.uk. It is there for the citizen. You can look it all up". That is like telling someone, "There is a library over there but no catalogue". You would have no way of knowing which book you need to find to answer your question. It is the same with the statute book. We need a map, a guide and ways to navigate our way around the law. Now, one clear problem is the sheer volume of law. The more books you have in the library, the harder it is to find the one relevant to you. We should be able to exercise some degree of legislative restraint to cut down on the need for legislation.

I add one minor technical point on what Ruth said about accessibility. We make primary legislation and then we make secondary legislation under it. Then we also make lots of codes and guidance under that. However, if you go to legislation.gov.uk, you will not be able to track down all that contextually relevant information that would assist you in knowing what the law is. That is perhaps one concrete suggestion: that information should also be linked.

Q37 **Baroness Hamwee:** Dr Cormacain has anticipated a lot of what I wanted to raise. Going back one step from that, there is accessibility for the legislators. Do our witnesses have anything to say about the style of

our legislation, which seems to become ever more difficult? You must keep going back to what is being amended. You must find your way through a number of pieces of legislation to satisfy yourself, if you are not prepared to rely on the notes published with legislation as to what it means. This is, I suppose, a question about form.

Also on accessibility, the parliament.uk website is much more helpful than it used to be. I remember so many times complaining that it is all very well having Ministers say in debate, "I will write", but who could ever find that letter subsequently? Those things are now available. Can any more use be made of technology to help both legislators and practitioners?

Dr Ronan Cormacain: One very practical point is the Keeling schedule for use whenever we amend legislation. As a matter of course, that is not normally done. An informal Keeling schedule, setting out what the law will be after it is amended, would be very useful to parliamentarians. Whenever I draft legislation which amends other legislation, I try to give as much contextual information as possible within the draft so that the nature of the change being made is clear. Sometimes, that might be by adding extra words in parenthesis to the law in a Bill. I fully appreciate that this is difficult. One question I was going to ask Peers today was, "How can you possibly understand 300 pages of legislation that you have been asked to deal with in a very short time?" As Ruth says, if she cannot understand it and you cannot understand it, how can the citizen possibly understand it?

Q38 Lord Anderson of Ipswich: We are here mainly to talk about legislation. It is reassuring to hear your view, which for what it is worth I share, that our legislation is on the whole consistent with Fuller's eight characteristics. Yet, of course, we are also a country in which many legal rules are made by judges. We call that the common law. What is your appraisal of how the common law matches up with the requirements of the rule of law? After all, that changes often and sometimes in unpredictable ways. It is not easily obtainable from a single website. You might need to read several impenetrable judgments to work out what it is.

Looking at Fuller's rule 3, that laws should generally not be retroactive, the whole point of the common law is that when the judge declares the law, the legal fiction is that he or she is declaring the law as it has always been. There is a presumption of retroactivity. I would like you to grade the common law against the standards of the rule of law and give us any suggestions you might have for how its accessibility and comprehensibility might be improved. We heard about Lord Burrows, who has done some wonderful work on restating aspects of the common law. Is that something we need to do more of?

I will not go on much longer but we are, after all, the Constitution Committee. We are supposed to pronounce on this wonderfully amorphous thing, the British constitution. How accessible, non-contradictory, constant and non-retroactive do you think constitutional

law is in this country? Again, do you have any suggestions for improving matters from a rule of law perspective?

Sir Stephen Laws: I think Lord Anderson probably suggested the right answer to this: that the common law is not as accessible as statute law. Statute law is and should be clearer. In so far as the law made by judges qualifies the law made by Parliament, which it should not but does, that is unhelpful from a rule of law point of view.

The question of retroactivity is particularly acute and one I am sensitive about. I spent a large part of my life trying to deal with a decision of the then House of Lords to make money paid under a mistake of law recoverable, with a limitation period that begins when you discover the mistake. I remember that in 1997 I was required to draft some legislation¹ because the Government feared losing a case about VAT on company cars. I was told that it would cost the equivalent of 10p on income tax if they lost. They did not lose, fortunately, but I drafted some legislation to deal with the fact that the law had been changed by the courts retroactively with indefinite extent, which could bust the economy. Then, the legislation that I drafted was held in some respects to be contrary to human rights and European law and, therefore, did not have the effect we hoped for. However, as I said, fortunately we won that case.

The problems that Birmingham now has are attributable to a similar sort of issue. I am just emphasising what Lord Anderson already said, which is that the common law is unhelpful in so far as it is retroactive, particularly when retroactive correction of common-law things is itself regarded as a bad idea.

Lord Anderson of Ipswich: Of course, there are whole areas of law where Parliament has not impinged very much at all. I think of the laws of contract or tort. Those are prime areas of common law.

Sir Stephen Laws: It is often said that the scope for judicial creativity in the law should be confined to the matters that are within “lawyers’ law”—contract, tort and so on. The example I gave of the recovery of money paid under a mistake of law was certainly within that restraint of being about lawyers’ law but it had impacts across the public sphere that were potentially catastrophic.

Q39 **Baroness Andrews:** Good morning. I want to explore with you the notion of being ambitious in the law and some of the problems that arise because we have tried in recent years to put more rights into law. There is the subsequent challenge of a piece of legislation influencing behaviour and practice, and consequently requiring better, clearer guidance. I am thinking of the case of the Mental Capacity Act 2005 where, with the best of intentions, for the first time rights were put into law for people of variable mental capacity, particularly in relation to detention. That Act has been extremely difficult to implement. Do you think we should be more careful about putting rights into law because of the difficulty of

¹ Part 4 of the Finance Act 1997.

ensuring consistent practice or, indeed, implementation at all in some cases? Do we need to live with some uncertainties? That would make this a problem with no solution. If we are ambitious for clearer rights, how careful do we need to be that one of those eight principles, the one about not requiring the impossible, may come into play?

Dr Ronan Cormacain: There are two key factors to bear in mind whenever making legislation. First, it must be capable of being implemented. Secondly, it must be capable of being vindicated by the individual. Implementability means that the law itself sets out a structure, with a way for it to be carried out which will work in practice. That is a bit more about the policy work in making the law. On vindicability, there must be a way for the individual to say, "I have a right under this legislation". There must be an easy route for them to vindicate that right by going to a department, Minister, court or tribunal and saying, "You must prove this to me". Whenever we construct legislation, we must have those ideas in mind.

I do not know that it is a problem of ambition. It is one of thinking through the policy in advance to say, "If we are to give this right, how is it capable of being implemented in practice?" That work needs to be done at the start. If you just put a bare right into legislation without anything backing it up, the right becomes meaningless and respect for legislation is diminished. If there is some right on the statute book that is meant to happen in practice but does not, what is the point in having the law in the first place?

Sir Stephen Laws: I am in favour of specific rather than general rights. In some ways, maybe you should be more ambitious. You should try to particularise and crystallise rights that are otherwise expressed in very general terms. I am quite fond of the response made by the late Professor Griffith of LSE, who described Article 10 of the human rights convention as, to paraphrase, a description of a political conflict masquerading as the means of resolving it. Rights that need us to work out what they mean are no use at all in the law. They are a good basis for political action but the political action they should involve is finding out what, specifically, you want people to be required to do and to be able to enforce.

Baroness Andrews: Can you put that into a Bill?

Sir Stephen Laws: You can. If you work out what consequences you want from the creation of something that conforms to some general right, you can require those consequences. That may not be as comprehensive as it would be to enact the general right and let it go where it wills, but that would meet the characteristics of law that I have described.

Q40 **Lord Burnett of Maldon:** A lot of the ground on clear and accessible law that I wanted to ask you about has been covered. They are words that nobody could disagree with, but trying to work out how to provide law that is clear and accessible is sometimes very difficult.

I have two questions. The first is to explore a little more with you the

dangers of overcomplexity in the law. There are areas of our law which, speaking entirely for myself, I find completely incomprehensible: in that list I put, for example, data protection legislation. And there is another Bill going through at the moment will make that even more complex. The danger is that that legislation applies to everybody. It seems to me that a lot of employment legislation falls into the same category. It applies to every small undertaking, whether it turns over £100,000 or £5 billion a year. The truth is that it is impossible for any normal person to understand what they must do. In reality, most individuals, businesses, charities and organisations go to short summaries of the law which are readily available online and of variable quality, if I can put it that way. Sir Stephen alluded to something reflecting this happening over the course of his 50-year journey through legislative drafting. Is it a real concern? What can be done beyond asking politicians to resist the temptation to overlegislate to improve the situation?

Dr Ronan Cormacain: There are two aspects to this: complexity and comprehensiveness. With complexity, I am really talking about complexity in policy. I will give an example that is quite current. If you want to increase the rate of national insurance across the board, it would be a fairly straightforward legislative amendment to change it from, say, 4% to 5%. Yet, if we want to have a complex policy for political reasons, say, to exempt hospices, hospitals, GPs or nurses in GPs' surgeries from those one or two lines of legislation, we might need one or two pages. There is a trade-off involved in all these circumstances. It is a political decision to have a more complex policy, which might arise from political considerations, but the more exceptions we create the harder it is for the individual citizen to understand the legislation.

Secondly, on comprehensiveness, sometimes there is a desire on the part of the drafter to be exhaustive and set out all possibilities that might arise or consider every type of event and make some provision for them all. It is sometimes possible to have a simpler rather than complex way of doing things.

I will give another example. In legislation that I drafted on giving evidence in court, there was a provision that said, "A judge may make an order if they see fit in the interests of justice". That is a fairly simple provision. Alternatively, we could say, "A judge may make an order if they see fit, taking into consideration the age and vulnerability of a witness, the nature of the evidence in the case, the rights of other parties and other factors". We can turn a simple test into a more complicated one by including more and more criteria. Again, this is a trade-off. The more volume we have in the legislation, the harder it is to understand. As a drafter, I sometimes think we should have simpler tests and less complexity in the law. That also becomes partly a political question.

Lord Burnett of Maldon: Perhaps we could hear from Dr Fox on this.

Dr Ruth Fox: Let Stephen speak first. I think I will follow on neatly from what he will touch on.

Sir Stephen Laws: I entirely agree that the law is much too complex and people cannot possibly understand it, particularly the things that apply to everybody. There are three things that drive complexity. First, there is policy and the belief—I think mistaken—that the objective of regulation should be to replace judgment with compliance. Increasingly, Governments opt for compliance. That is safe because you can say someone did or did not do it, but it removes judgment, and I think the result is that we get worse outcomes.

The second thing is technical. I talked about uncertainty in the law. People draft complex provisions because they want to be absolutely sure that they achieve what they have been asked to do. If you cannot be sure that something expressed in relatively broad terms will be given the meaning you hope for, you put in more complexity and reduce the amount of discretion. The example I always think of is the extremely intricate points systems for awarding personal independence payments. It is mechanised, difficult and barely fair, but is at least so clear and detailed that it would be hard for someone to say that you got a decision wrong.

Lastly, of course, there is constitutional complexity. Once you add devolution settlements and, when we had it, European law—we still have a lot of retained European law that has not been made as accessible as UK law—that also adds complexity. More law depending on guidance, judicial decisions or things extraneous to the law also adds to the complexity of the process. Those are all things that drive complexity. They each require a different solution. It is difficult to see which of those are the most likely to succeed.

Dr Ruth Fox: On complexity, the Hansard Society has, since the start of the 2017 Session of Parliament, been tracking statutory instruments daily, which, yes, is quite a challenge. One issue is about Parliament's scrutiny of legislation. There are questions of whether we have too much legislation, the attention to detail in it, how provisions are put together, and whether policymakers, Ministers and legislators understand the legislation in front of them. Think about the amount of time spent in this place scrutinising primary legislation, compared to that spent scrutinising the regulations that emerge from it; they are directly opposite. Yet those regulations affect the daily lives of us all and there is such a large volume of them.

I was struck by this during the delegated legislation review work done by the society over several years, where we did a lot of engagement with current and former Ministers in the last Parliament. During the Brexit period, there was one Minister—I will not name them—from a department producing an awful lot of Brexit-related statutory instruments. The Minister admitted that they were not sure they understood the legislation in front of them. It was complex environmental and economic legislation. They thought that the number of people in the department who understood it could be counted on the fingers of one hand and that the

prospects of the public and affected parties understanding it were minimal. Yet, with a swipe of their pen, that was becoming law.

We want to have a debate on reform of delegated legislation, about not just the volume of statutory instruments but the way they are put together. Look at the sheer number of amended instruments that come through in some policy areas. Often, these hint that there is a policy problem and that they are having difficulties with implementation. You could highlight and concentrate on those areas, where more work is needed.

- Q41 **Lord Burnett of Maldon:** If there is time for one follow-up question, in the course of this discussion, you each gave examples of complexity. There was also the observation about the way those who draft legislation sometimes want, to paraphrase, to dot every "i" and cross every "t". Our way of drafting legislation is rather different from the way it is drafted in many other countries. For those of us who are lawyers, the obvious contrast we have had for most of our professional careers is the difference between UK and EU legislation. It might be thought that that is drafted in a way designed to articulate clearly the underlying policy objectives but often in a way which invites judicial interpretation. If one looks at the European Convention on Human Rights, these are very high-level rights but, on the face of it, many of them have no content because they are balancing exercises, which again invite and require judicial interpretation. Do any of you have a view about whether our way of doing legislation is necessarily better than the way that particularly civilian countries deal with it? How does that feed into the concern about uncertainty and the need for judicial interpretation?

Sir Stephen Laws: I agree that we do it better, in principle. However, we have allowed ourselves to be influenced by the general approach of European countries in relation to human rights and other things. We have written a lot about human rights at Policy Exchange—I am not sure I could go over it all here. Generally, there is this difference: our constitutional system works on the basis that Parliament and Government collaborate over legislation. They are not in opposition about it and the legislature does not operate separately. In my experience, that means people do not just compromise on the words, which is what tends to happen in systems where the legislature and Executive are not in conjunction or collaboration. I can think of very few examples of legislation that I drafted where people decided to reach a compromise on the words without quite knowing what they meant. That is the system in countries where the legislature is not directed by their Governments.

Here, the Government accept responsibility for the quality of legislation because all legislation is either introduced or accepted by the Government. That produces legislation that stands a better chance of being clear, if you do not allow it to be qualified by judicial decisions, than a system where a legislature operates with different views that must all be reconciled together, with no one mind directing the way the legislation comes out.

Q42 The Chair: Stephen, in your experience as a drafter, can civil servants fully understand relevant legislation when they are drafting? When we scrutinise Bills, we see lots of new consequential amendments that are just in case. Is that strictly necessary? Is it part of the problem of overlegislating?

Sir Stephen Laws: I am not sure about consequential amendments. Those are normally there to make the old law fit whatever new law you are making. Departments have a pretty clear understanding of the law that applies to them. Most legislation is actually about how government operates. The bulk of Bills are about what a Government will do. That is why it is so important for the rule of law that the agents of the state understand the law they have before them and can operate it. Departments have an interest in ensuring that the law that applies to them is law they can understand and not find themselves involved in challenging. They are not always successful at that.

Dr Ruth Fox: One of the problems with departments is not necessarily about their civil servants but the politics and nature of the legislative programme—the legislation sessions, the constraints of management of time in the House of Commons and so on. Very often, the policy is a moving target and not fixed down in all its detail before pen is put to paper for legislation. Stephen would know this better than I, but one obvious problem in respect of drafting is that, if the instructions to drafters are not sufficiently clear and detailed to be able to pin down exactly what you wish to achieve or what the remedy is, that makes the drafting process more difficult. You could point to Bills that have gone through Parliament that are effectively framework or skeleton Bills, of which this committee has great experience. You can see placeholder clauses in Bills, which have become a more regular feature of legislation than they used to be. At the endpoint of the process, you can then see something that a lot of MPs are often surprised about because it is not something they think of after Bills pass through the House and go for Royal Assent: the degree to which there is uncommenced legislation. Government departments and politicians wanted to do something and legislated for it, but for a long period sections or schedules remain uncommenced. You then have to question what the policy purpose was, what they wanted to achieve and why that has not happened.

The Chair: You have excited so many on the committee that there are many supplementary questions. I think we will get to them during the next 45 minutes or so.

Lord Foulkes of Cumnock: I am a bit confused and not clear where we are in terms of the suggested questions. The concern I had when we agreed to this topic is coming to fruition, with this committee becoming a dialogue of lawyers rather than parliamentarians. So far, we have heard from all the lawyers and none of the parliamentarians, except one or two.

The Chair: We had Lord Griffiths and Baroness Andrews.

Lord Foulkes of Cumnock: Also, I want to make it clear that when Lord

Burnett said that employment legislation should not apply to small employers—

Lord Burnett of Maldon: I did not say that.

Lord Foulkes of Cumnock: That was the implication.

Lord Burnett of Maldon: It was not.

Q43 **Lord Foulkes of Cumnock:** Anyway, my question is: are there any areas where legislative processes can challenge the rule of law improperly and create some problems?

Sir Stephen Laws: I am not sure about “challenge”. In my analysis, the essence of the rule of law is that it is a culture of respect for the law. What you are perhaps asking is whether there are circumstances where legislative process can damage that culture. The answer is yes. That can happen when law is unclear, retrospective without justification or incomprehensible. All those things diminish the culture of respect for the law.

Lord Foulkes of Cumnock: At a later stage, we will look at international comparisons, but it might help my thinking at this stage about this to know which countries you think do not have a rule of law.

Sir Stephen Laws: The easy answer is to say I do not know enough about other countries to tell you that. We can think of cultures where the law is a thing that people think is avoidable. There are some countries in Europe where perhaps family loyalties are more important than adherence to the law, or places where officials see the law as a thing to be gamed or avoided, rather than respected. On the whole, there is a lot of evidence that the agents of the state in this country are extremely scrupulous in trying to comply with the law. That is why it is so difficult when the law is uncertain.

When I first joined the Civil Service, half a century ago, I was taught that Civil Service lawyers should secure a principled approach to compliance with the law. That is, if you thought the law said something, you did not worry whether people would challenge it or how many people it affected. You advised the Government of what the law was and the option available to them was to change that law. That has become a lot more difficult because there appear to be restrictions on when and how far you can change the law and uncertainty about what it is. That tends to engender a version of commercial compliance: “What can we get away with?” I think that is wrong. There should be a culture of principled compliance, but legal developments have made it much more difficult to have one.

Lord Foulkes of Cumnock: Lord Sumption said in his evidence to us that the rule of law existed here before we had a full democracy. If that is right, are you saying that the rule of law can exist in countries around the world where there is no democracy?

Sir Stephen Laws: You can comply with the standards I outlined without having a democracy. Having a democracy is supported by the rule of law because it means that making law is an effective tool for government. If making law is not an effective tool for government, you do not have democracy because democracy does not enable you to make laws that will have an effect.

Lord Foulkes of Cumnock: Where there is no democracy, who are the protectors who ensure the rule of law?

Sir Stephen Laws: As I say, as per my thesis that it is a culture of respect for the law, we all are. Whatever we do, we must do it in a way that furthers the fact that officials and individuals try to respect the law. I have often distinguished between a political approach to lawmaking and a lawyer's approach to it. In my experience, lawyers think about the law as something that will be decided in litigation and that needs to work for people who are disposed to break it. On the whole, politicians assume that if they make the law, most people will comply with it. They make law for people who do not want to be involved in litigation and so comply with it. That second part is the most important.

Lord Foulkes of Cumnock: Dr Fox, do you agree with everything there?

Dr Ruth Fox: I would add, as a non-lawyer, that how I would think about this in respect of other countries is that part of what distinguishes the rule of law is that the making, application and exercise of power is not arbitrary. In systems where you have or rely on arbitrary power, that is a distinguishing feature. They may claim to have the rule of law under their system but that would be distinct from our understanding of it. In our system, we would not want arbitrary exercise of power—quite the contrary.

Q44 **Lord Beith:** Our witnesses touched earlier on disguised legislation. There can be statutory guidance based on a provision in legislation, the content of which is made subsequently and perhaps shown to Parliament at the time of legislation but perhaps not. There are codes of practice and ministerial Statements as to what the law means. None of these things are the law, are they?

Dr Ronan Cormacain: There is a huge problem with distinguishing between law and guidance. Certainly during Covid, Dr Fox and I worked together on a lot of the difficulties that arose between confusing, "This is a law you must follow", and, "This is guidance which we advise you to follow". Those two things became clouded together, so people were given the impression that they must do some things. Disguised legislation exacerbates that problem.

I had a quick look at the Great British Energy Bill. It contains a provision saying that the Secretary of State may direct the Great British Energy company and that the company must comply with that direction. I was confused by what that meant in practice because it uses the word "must". When it must do something, was that as a matter of law? Is it an

instruction and does it have the character of legislation? I could not answer those questions. That gets close to government by decree. Simply by virtue of being a Minister, I could say something and the words that come out of my mouth are law. That is not really in accordance with the rule of law. If it is to be a law, it should be passed by Parliament and on the statute book as law, so disguised legislation is a problem. I do not think it has been a problem in the past, but it has increasingly become one.

Lord Beith: Yet a lot of people, including agents of the state, appear to think that it is the law. I think they conduct themselves, relatively honestly, in relation to citizens by assuming that these things are the law. Of course, there may be a use in a subsequent court case as to why guidance was not followed and whether that invalidated the action, but is this not a pretty murky area in defining the rule of law?

Dr Ronan Cormacain: On that point, I always advise departments when I work for them that "If this is important, put it in the law". They say, "Oh, we'll just put in guidance and then people will have to do it". I explain that if it is in guidance, they do not have to. It is just guidance. If it is important, put it in the law so the citizen can read it there as: "This is the law. This is what you must do". Do not take yourself a power and think, "I can do this by guidance anyway and then people will have to do it". That is a misuse of the process.

Sir Stephen Laws: We have formal procedures for imposing legal obligations and avoiding those procedures should just not be done. Guidance should not be mandatory. Sometimes, people provide for guidance to be issued and then say others must comply with it. I am not sure about an executive direction, but that should not happen.

In another way, guidance is helpful to people. The dilemma you have is that once you provide for guidance, there will be an expectation that you respect it yourself. We have an absurd situation at the moment. The law on consultation exercises is, in my view, a complete mess but the guidance given by the Cabinet Office on how consultation exercises should be conducted has become holy writ. If you do not follow that guidance to the letter, you will find that your consultation is invalidated and you have to go back to square one in your legislative processes. You have this dilemma that guidance should not impose legal obligations but it is increasingly construed as if it does. How do we solve that problem? The simple answer is to stop providing for guidance, consultations and everything else. I think that is unlikely to happen.

Lord Beith: As far as ministerial advice is concerned, the ultimate outcome in the Covid situation was that all the cases were lost anyway. It turned out that what people were penalised for doing was not against the law. It was simply contrary to the advice issued.

Sir Stephen Laws: Covid was interesting. I wrote something for Policy Exchange about how the law should have been drafted for Covid. I was quite attracted to the idea, which depends on guidance, of the situation

we have with the Highway Code, which can be taken into account when deciding whether there has been dangerous or careless driving. I thought it would have been much better with Covid to have had an offence of recklessly putting other people at risk and to have backed that up with some guidance that would have helped in deciding whether that test had been satisfied but would not be determinative. There is a place for guidance, but rarely.

Dr Ruth Fox: On rule of law issues and accessibility, there is the sheer volume of guidance and the need for citizens to find it, particularly given the extent to which legislation often now requires individuals, businesses and regulators to have regard to guidance or other forms of direction. You need to be able to locate it and that is a problem. It is not necessarily deliberately hidden away but difficult to locate online and not linked up with other aspects of the legislation to which it applies. That problem is not easy to solve but it could be done.

Q45 **Lord Bellamy:** Perhaps we could move on to another topic, which is the relationship in general between statutory provisions and the rule of law. Can they conceptually be in conflict? Can we have a conflict between a statutory provision and the rule of law? Are there any examples of a statute that violates the rule of law? Can legislation challenge the rule of law? To give a concrete example, a Government driven mad by planning delays decide to cut back on judicial review of new roadbuilding, on environmental grounds. To what extent would that raise a rule of law issue and how would we approach this conceptual problem?

Sir Stephen Laws: I come back to what I said: if I am right about the law being a culture of respect, you can have law that will diminish that culture. The rule of law is not a rule that you can violate. It is something that you can damage. All those questions are matters of degree. Some decisions are better taken in ways other than by courts. The approach adopted to planning issues—more than 10 years ago, I suppose—was to have national infrastructure statements, or something, approved by Parliament. That is an alternative to judicial consideration of the issues.

It seems to me that some issues are particularly appropriate for decision outside courts. There was a recent case about whether the court should decide which foreign countries we should trust to keep their word to us.² Represented as a question of fact, that is a risk assessment and I do not think that should be for the courts. European jurisprudence says the courts must decide on this, not as a review of a Government's decision—which I also would not support—but as a question whereby they second-guess the Government. I do not think the courts are equipped to conduct our foreign policy.

There is another example. I worried a bit that *Miller* (No. 2) is a case that has its own version of Godwin's law—that the first person to mention it loses. On *Miller* (No. 2), it seems to me that the constitutionally appropriate regulator for the exercise of the royal prerogative in relation

² A reference to *R (on the Application of AAA(Syria)) v Home Secretary* [2023] UKSC 42

to Parliament is the monarch and not the courts. I also think that the courts, if they intervene, should not seek to ignore legislation passed a month before that sets out the limits on Prorogation; but that is a different question.

There are questions that it is appropriate to decide outside courts. Indeed, there are questions where, historically, we have had all sorts of tribunals for different things. What is important is that the respect that there is for the law should be maintained by ensuring that people are confident that decisions about disputes on that law are fairly determined. That is the test. Demarcation disputes between courts and tribunals, independent executive commissioners and so on seem to be irrelevant to that test.

Q46 Baroness Andrews: Earlier in your evidence, Sir Stephen, you said, intriguingly, that you thought that we should look to judgment rather than legislation. With older legislation, in fact, we could be better off using judgment. Could you elaborate now, not just in the context of the previous question, by giving an example of where you think the law would have been better served if it had been left to the judgment presumably of whoever was responsible for implementing whatever change was anticipated?

Sir Stephen Laws: I am not sure if this is quite the answer to your question but Robert Peston wrote a book about the financial crisis in which he described how banks, because of the Basel rules, began to decide whether loans were safe or not according to those rules. The rules said that an investment backed by security on real property was safe, so they lent lots of money to people because the rules said that was safe, whereas before there were rules they would have looked carefully at the people involved to see whether they were likely to get their money back. That is a case where compliance has been substituted for judgment.

Baroness Andrews: Is it a binary choice? Would they not have had to use their judgment anyway?

Sir Stephen Laws: Well, the more rules you have, the more people think that they have covered themselves if they have complied with the rules. What they should be doing is making personal decisions for which they take responsibility.

Baroness Andrews: What do you ascribe that change in culture to?

Sir Stephen Laws: I do not really know. I think I can say that it exists; I am not sure that I can say why, but it is a sort of defensiveness or risk aversion.

Q47 Lord Griffiths of Burry Port: You use the word "respect" quite a lot. Are we not living at a time when that is quite a hard commodity to find much of, in respect of institutional life across the board? Why should the law be any different? Archbishops are not respected; the teaching profession has to deal with all kinds of infractions and behaviour and so on. The law really has to work a little harder, in my view, to find a way to engage

with the aspirations of people and to help them see how reasonable law is in achieving objectives which they subscribe to.

Sir Stephen Laws: This is all to do with how I think our political constitution works. I think it works because people adhere to its rules and conventions, because there is a political imperative to do so.

Lord Griffiths of Burry Port: Except when they do not.

Sir Stephen Laws: Except when they do not. But it seems to me that the reason the Government, on the whole, still continue to respect the law is because it is politically easier and less damaging to change the law, if it does not say what you want it to do, than it is to either game it—compliance ahead of judgment—or to defy it. As long as it is politically damaging to game the law or to defy it, Governments will resort to changing it. That is true of all these objectives. I know that Lord Peter Hennessy goes on about “good chaps”. I do not think there has ever been an overabundance of good chaps but—

Lord Griffiths of Burry Port: They are all in this committee.

Sir Stephen Laws: Of course. But people have been incentivised to behave like good chaps because it is politically damaging not to. That is how I think it works, how the rule of law works and how respect for the law develops. As long as it is politically damaging not to respect the law, people will respect it.

Q48 **Lord Murphy of Torfaen:** Is parliamentary scrutiny of legislation effective at identifying and resolving the rule of law concerns? Do we do it well enough in this place?

Sir Stephen Laws: I think we do it quite well. I wrote a chapter for somebody or other on parliamentary scrutiny³ and what it is for, and it is Parliament’s choice what it does. If, in relation to the rule of law, we are talking about Fuller’s characteristics, those sorts of things are central to the scrutiny of delegated legislation. They do not so often appear in the scrutiny of primary legislation, which concentrates on the political issues.

Those values are complied with because Parliament, for primary legislation, is involved in a sort of random sampling exercise. If you are drafting legislation, you know that you could say things that probably nobody would notice—you could split an infinitive or something. I use that as a frivolous example, but you could do things that are technically wrong that you would get away with most of the time, but there will be that one occasion when the committee attacks the Minister for this failure. You do not want to be the person who drafted the piece of legislation that is subjected to random sampling, so that is the incentive.

Could Parliament do more to scrutinise the technical aspects of primary legislation? Probably it could but it needs to want to. As it does not have the time or space to give priority to everything, it gives priority to the

³ Chapter 2 of “Parliament: Legislation and Accountability” (Hart 2006) e

things that, if it scrutinises them, will confer the most democratic legitimacy on the outcome. It is desirable to look at everything but will not be possible. Does the system produce something that is largely compliant, as Ronan said? Yes, it does.

- Q49 **Baroness Laing of Elderslie:** There are some themes emerging from the very useful answers that you are giving us this morning, particularly about consistency and certainty—too many rules, risk aversion, et cetera. If I could pick up a couple of those points, first, when legislation challenges the rule of law, how should the conflict between parliamentary sovereignty and the rule of law be resolved?

The Chair: Dr Fox, is this something that you feel confident in answering?

Dr Ruth Fox: There are examples. In recent legislation, you could point to something like the legislation addressing the overturning of the Post Office convictions, for example, where there were big rule of law questions debated at that time, including by the Select Committee in the House of Commons and so on, on whether it was an appropriate approach as a rule of law measure. As a practical point, there were arguments in both directions and it was deemed in the national interest to do it as the quickest, most efficient and effective way of resolving the problem that had been created. That was arguably a rule of law breach, depending upon how broadly you construe the rule of law concept but the roof has not fallen in. Parliament can legislate contrary to the rule of law if, as Stephen asserted, there is the political will and support to do so. Ultimately, it comes down to the views of the Commons and the Lords.

On the prior question about parliamentary scrutiny, I want to point out that it is not a set picture. The degree and quality of scrutiny changes from Bill to Bill, from House to House and across a Parliament. One issue in whether the House of Commons will, at the moment, be able to sufficiently focus on rule of law questions is whether enough new MPs do so. They are 52% of the House of Commons and there is a lack of institutional knowledge about basic procedures and the legislative process in the Commons at the moment, so they are on a steep learning curve. This is about whether the concept of the rule of law is clear enough in their minds, particularly given that there are fewer lawyers in the House than in past decades to inform some of those debates, for example. That is a potential challenge on the horizon: I think these issues in the Commons are going to be more difficult.

Lord Murphy of Torfaen: Would that not then be a matter for this House? If half the House of Commons are inexperienced in institutional things, which they are, and they get things wrong, is it not the role of the House of Lords to put that right?

Dr Ruth Fox: It is a revising Chamber, so, yes, but that should not absolve us from needing to focus on—

Lord Murphy of Torfaen: I did not mean in terms of a revising

Chamber—rather a Chamber which protects the constitution.

Dr Ruth Fox: Yes, to some degree, but within the democratically elected House there needs to be a regard for those issues and a need to support increasing knowledge.

Baroness Laing of Elderslie: On exactly that point, Dr Fox, you probably know more about this than anyone because you looked at statutory instruments and secondary legislation, whereas most people just say, "Oh yes, well...". You raised the issue of the culture of the House of Commons. Am I right in thinking that there is a culture which says that, when a member of the House of Commons is nominated to serve on a statutory instruments committee, they will actually want to do something else at that point? Ninety minutes is usually allocated for the examination of a statutory instrument, which would probably, in most cases, be enough if the committee actually sat for 90 minutes. But it often sits for 15 minutes and I can think of times when one has considered that one has achieved something by saying, "Goodness, we got through that in seven and a half minutes. Isn't that brilliant?" Am I exaggerating or is there a problem there?

Dr Ruth Fox: No, there is a problem. In our research, I think that the shortest Delegated Legislation Committee that I found sat, from memory, for 14 seconds.

Baroness Laing of Elderslie: I believe that.

Dr Ruth Fox: The average in recent Sessions has been about 26 minutes, but they are often shorter. There were 12 or 14 in the first quarter of the 2023-24 Session, I think, which lasted for less than 10 minutes. I can provide you with the data but they were very short. The culture is, "This is something I've just got to get through as a punishment", but it is also because legislative scrutiny is under-resourced, for example, compared to Select Committee scrutiny or financial scrutiny.

You do not have a secretariat for a Delegated Legislation Committee and it is not a standing committee on a permanent basis. It is set up solely for the purpose of that meeting and you do not get the full range of papers, essentially, from your Whips. You might ask the House of Commons Library for a briefing and there will no doubt sometimes be briefings from lobby groups, but it is not resourced in the same way as, for example, attendance at a Select Committee meeting. It is regarded as a punishment and because, compared to Select Committees, they are not elected but appointed, it is used by the Whips as a means of putting people on who do not know anything about the subject matter under discussion.

Baroness Laing of Elderslie: There is no doubt that that is indeed the case, because of course the Government want to get their business through, so the easiest way is to put people on the committee who do not actually want to be there. They do not want to ask any questions so you

just get on with it. It is often the case also that the detail being examined is not very interesting.

Dr Ruth Fox: Yes.

Sir Stephen Laws: That is an important consideration. I am not defending this at all, but, in my experience, when a statutory instrument does something really important that people care about, it will get plenty of scrutiny and not only in the committees that are set up at the moment.

Again, I have written for Policy Exchange a criticism of a decision called the UNISON decision, which is where the Supreme Court invalidated some regulations, the effect of which was to impose fees on taking an employment tribunal case to a hearing. The Supreme Court said these were invalid not because the Government should have realised that they would affect access to justice but, bizarrely, because in the event it turned out that they had—at least, according to the Supreme Court’s analysis (which drew a rather strange distinction between deterring people from taking their case to a hearing, which was objectionable, and encouraging them to reach a settlement before the hearing, which would have been okay). In that case, the regulations had gone through two sessions of the Justice Select Committee and a lot of the evidence heard by the court had been put before that committee, I think, so they were being closely scrutinised but then the parliamentary scrutiny was aborted by the Supreme Court decision.

The Chair: Do you want to ask another supplementary question?

Q50 **Baroness Laing of Elderslie:** If I could, please, because there are two things that other members of the panel have said that would be interesting to explore.

Sir Stephen, on that issue of conflict, you—or it might have been Lord Anderson—raised the issue of retroactivity. It transpires, of course, that whenever Parliament is presented with legislation which would have a retrospective effect, there is outcry: “We cannot pass this because it is not fair to be retrospective”. Yet, as Lord Anderson said, if a judge makes a judgment it is deemed to be from the beginning and therefore intrinsically retrospective. Is there a way that we should address that conflict?

Sir Stephen Laws: It is important to recognise that it exists. The thing preoccupying me at the moment, or until recently, is the correction of the error made by the Supreme Court in the Adams case—that is, the case about Gerry Adams—where it held that he was unlawfully detained because the order in preparation for his detention had been signed, or made, by a Minister of State rather than the Secretary of State. That was corrected in the legacy Bill, retrospectively, and was a justified use of retrospection, because the matter had been understood for the best part of 50 years to have been lawful and was now held later not to be lawful. So it was justifiable to put things right and then a court in Northern

Ireland said that putting it right retrospectively was, in the case in question, a breach of and incompatible with convention rights—

Baroness Laing of Elderslie: Yet it may well have been a drafting error in the first place if it actually said “the Secretary of State” rather than a Minister.

Sir Stephen Laws: No, it was not a drafting error. It was drafted on the basis that, if you said who signed it, you were providing who should make it because, at least in the 1970s, nobody thought that you could give evidence of who had actually decided it, since what happened in a Minister’s private office was subject to public interest immunity. The legislation provided that it needed to be signed by the Secretary of State, a Minister of State or an Under-Secretary of State; that was intended to confine the people who would make the decision to those three categories. The Supreme Court said that, although it said that those people could sign it, signing it did not mean that they had to make it—and there was no evidence that the Secretary of State had decided that the order should be made in Mr Adams’s case.

Q51 **Lord Waldegrave of North Hill:** Can I go back a little to how this place—Parliament—is doing in terms of its job? Interestingly, Sir Stephen, you said at one point that legislation is a compromise: a negotiation between the Government and Parliament. It certainly felt like that all the time that I, Lord Foulkes, Baroness Laing and others were Members of the House of Commons. Even though the Government who I served had a large majority throughout the period, the Back Benches and the Opposition had very considerable power to make life difficult for the Government. If you crossed the then Mr George Foulkes, Mr Robin Maxwell-Hyslop or Mr Tam Dalyell, there was hell to pay and all sorts of things could happen.

It seems to me that a very major change, which has not really been noticed by the outside world—because why should it be?—took place when, for good and understandable reasons, family-friendly hours came in. Everything is now effectively timetabled and the negotiation has rather disappeared because a Government with a majority can take things through. We see therefore that one of the pragmatic checks, which was the difficulty of getting legislative time if you were going to do something that would be really complicated in negotiating with that House, has gone. I think this is one thing that has made legislation worse. It has also tempted Governments of all colours to produce more legislation which, by their own choice, they do not have time to debate, so the growth of delegated legislation follows. Do you think I am right in that?

Sir Stephen Laws: I think it is certainly an aspect. Programming was an unfortunate innovation, in 1997 I think, because it removed the opportunity to obstruct something in debate that you objected to. I would like to believe that the Government are still subject to parliamentary influence and that they respond to it. The most recent evidence of that is probably in the whole Brexit saga, where the Government were forced by

circumstances to do something that, in my experience, Governments do not do: to try to force through things for which there is not support in Parliament. The mess that resulted was the consequence of that.

What that proved to me was that, as I think Professor Meg Russell of UCL has proved, the influence of Parliament is all demonstrated by what Government do not do rather than by what they do. That probably still exists, but there have been factors that have weakened the tools for exercising that influence.

Lord Waldegrave of North Hill: Brexit was special in that none of the party structures really had any relevance to it. I suspect that in normal times that change, though understandable, was quite a shift of power to the Executive.

Dr Ruth Fox: In respect of programming, in part because my predecessors in the Hansard Society many years ago recommended it—they were not the only ones but were certainly at the forefront of that—what is often forgotten about is that, as originally conceived, the family-friendly hours issue was not the heart of the problem. I think whatever times that Parliament would sit, programming would be there. This is about how it divides the time. It was meant to be linked to pre-legislative scrutiny, so that programming would pull out and ensure that there was a concentration of time on those areas where there were real and significant differences. Where there was consensus about clauses and schedules, those would pass more straightforwardly. It was about trying to take the parliamentary scrutiny time available and ordering it in a more efficient way to focus where political and parliamentary attention wanted to be focused.

The reality, however, is that in practice programming has become completely divorced from pre-legislative scrutiny because there is so very little of it from Session to Session, and because programming is increasingly less consensual than was envisaged. That is why there are often calls for a business committee for the House, so that you could take it out of the Whips' hands and give it to a cross-party committee. I am not entirely convinced that that would solve some of the problems.

Then there are other aspects of the legislative process in the Commons where it is not just about programming. For example, my personal experience of Public Bill Committees as an evidence-giver is that, unlike Select Committees, public evidence is supposed to inform the committees' work but there is very little time for them to consider what has been said, because they meet almost immediately to get into the clause-by-clause examination of a Bill after the evidence sessions. There is no time for them to reflect. As somebody who has given evidence to them, I have said publicly before that it feels like you are going into a party-political bear-pit, because they are not really interested in my opinions or views, or my evidence. Each side wants you to say what will serve its particular argument. Particularly for organisations like ours, it is quite an uncomfortable environment to be in compared to a Select Committee.

We have also seen other developments in terms of how Report is managed and the selection of amendments at that stage. How that time is managed affects the scrutiny process. An awful lot of changes have come together, but programming is fundamentally divorced from the scenario that was envisaged for it and, on that basis, it is not functioning as it should.

The Chair: Okay. Obviously, this committee cannot make recommendations on procedures in the House of Commons, so unless you want to talk about that and make a wider point—

Dr Ronan Cormacain: If I could just go briefly to some of the points that have been raised, first, to Lord Murphy, yes, the House of Lords should vote down some provisions if they undermine constitutional values. I think that is an appropriate role.

Secondly, to Baroness Laing, on the conflict between the rule of law and the sovereignty of Parliament, the focus should be on avoiding that conflict in the first place. Parliament, the Executive and the courts should regard themselves as all co-guarantors of the rule of law, rather than seeing it as a power struggle: "The sovereignty of Parliament beats rule of law". Lord Griffiths talked earlier about the respect for law and how we can engender that. I think one thing which is damaging to the rule of law is if a politician, on the Floor of the House, introduces a law which calls for specific and limited breaches of international law. That undermines respect for the law.

Finally, on retrospectivity, it should not be automatic—that should never happen—but there are lots of occasions where retrospective criminal law might be appropriate. Curative retrospective law is appropriate and has been done a number of times. For me, and I will disagree with Sir Stephen here, retrospectively overturning a case that the Government are a party to and have lost seriously undermines the right to a fair trial.

Q52 **Baroness Hamwee:** The committees at this end are often extremely thorough: there is the Delegated Powers and Regulatory Reform Committee and, on secondary legislation, the Statutory Instruments Committee. First, it has been suggested that they should be available earlier in the process—obviously, given their size you have to wait until they are made. Is it overoptimistic to think that that might grab the attention of the relevant Commons committees? Secondly, and this is a bit left field, should we ask Ministers to give certificates of compliance with the rule of law, in rather the same way that they have to on the Human Rights Act?

Dr Ronan Cormacain: Sir Stephen mentioned Lon Fuller earlier. Fuller talked about the morality of duty and the morality of aspiration: the duty is the minimum level that you must attain and aspiration is what you must aspire to. A lot of the rule of law is about that aspiration, so it would be quite difficult to say, "This complies with the rule of law". It is more of a sliding scale, I am afraid.

Sir Stephen Laws: I am now against certification under Section 19. It was initially a very valuable thing that led to the establishment of procedures that are now much better, namely the provision of a memorandum to the Joint Committee. I do not think that needs to be backed up by a yes or no answer, traditionally done on a sort of 50% basis under Section 19. The Government would just say yes every time because they will find ways of doing so. That is not a bad thing; it is what Governments will do. They will not proceed with something where they are going to say no.

Lord Anderson of Ipswich: That did not happen with the Rwanda Bill, did it, or the Communications Bill?

Sir Stephen Laws: Or the Communications Bill, which I drafted. There was a time when I was the only person to have drafted a Bill that did not get a Section 19(1)(a) statement.

Lord Anderson of Ipswich: It turned out to be valid anyway.

Sir Stephen Laws: It turned out to be valid anyway.

Baroness Hamwee: You might say that it focuses attention on the issue, or maybe not.

Sir Stephen Laws: There are alternative procedures that would do the job better.

Dr Ruth Fox: On the question of whether Select Committees should produce their reports earlier, yes, I recommended this many years ago in a book that I wrote about the parliamentary scrutiny of delegated legislation. One problem the House of Commons and its MPs has is that they do not have access to that kind of resource, other than through the House of Commons Library. I think it was during Brexit—what became the European Union (Withdrawal) Act may have been the first one—where the Delegated Powers Committee reported on publication of a Bill when it was in the Commons, prior to coming to the Lords. That was regarded as quite a big constitutional breakthrough in terms of the relationship between the two Houses.

You might be surprised at the degree to which MPs now look to the Delegated Powers Committee's reports, and indeed sometimes the Secondary Legislation Scrutiny Committee's reports, if they are available in time for Delegated Legislation Committees. Certainly, the Delegated Powers Committee's reports have been cited in debates. That may have been aided by organisations such as ourselves and the Bingham Centre producing Bill briefings for MPs, which we have done precisely because there is that gap in the Commons and they do not have that access to the resource. We use the Delegated Powers Committee's reports. We produced a compendium of its legislative standards, which we use to help inform MPs' consideration of Bills.

In our recommendations for reforming delegated legislation, we propose a parliamentary office of statutory instruments that would bring together

the resources for both Houses and make them available on a bicameral basis. We think that would be a more efficient and effective way of resourcing the process, beefing it up in terms of the legal and policy support available for consideration of research and briefing material for Members on statutory instruments.

Sir Stephen Laws: Ruth's mention of Brexit regulations reminds me that there was, I think, a system of triaging for regulations, which has not been extended to other regulations. A more complex system of triaging, backed up by Parliament asking for information to enable it to be done, seems to me something that would be an improvement.

Dr Ruth Fox: That is also a core recommendation of our delegated legislation review. It was extended to the EFRA—the European Union (Future Relationship) Act. The Secondary Legislation Scrutiny Committee did it in this House and the European Statutory Instruments Committee did it in the Commons. That has now been abolished, or not revisited in this Parliament. It should now go to departmental Select Committees, but there are very few of them at the moment, so we do not know. But yes, sifting and triaging is core to improving the scrutiny of statutory instruments.

Q53 **Baroness Andrews:** I just want to reflect on that, because in a very perverse way all of that came to light in spades on the retained European law Bill. The whole weight of that legislation—the Government's proposition—was basically that there was no time to deal with it, so the original Bill had the sunset clause, whereby everything would have disappeared over the cliff edge if it had not been put in one bucket or another. That was an interesting outcome where there had been no process; it was certainly, shall we say, an inappropriate process.

Dr Ronan Cormacain: I have just one point on that. The earlier in the process that Parliament is involved in scrutiny, the better the chances of actually changing things. Once a Bill gets into Parliament, it is very hard to change its text because it becomes a matter of political will. You know better than me about earlier engagement; the reports that this committee does are very effective at highlighting rule of law problems and perhaps not as good at changing them. But if it was involved at an earlier stage, it would have a better chance of making that change.

Sir Stephen Laws: I am not sure that I agree with that. I think Parliament has real influence once the Bill is in front of it.

Dr Ruth Fox: On the retained EU law Bill, that identified a rule of law issue. The Government could not be certain—they said that they were, but many other people outside government thought they could not be certain—that they had captured the full list of all the legislation that would be affected. Indeed, I gave evidence to various committees about that. In the times since the Government's dashboard, which they set up to list all the regulations, it has increased the number since the Act was given Royal Assent. Since the deadline passed that was originally set in the initial version of the Bill, more regulations have come to light. That

would have revealed a significant rule of law problem had it been allowed to pass, but it was indicative of the way in which the political argument in the House of Commons developed that the pressure on the Government to change their approach grew. Consequently, they arrived at a much better position.

Sir Stephen Laws: I am afraid the evidence I gave was that, if the legislation was so unknown that people had not already noticed that it was important, then it probably could be dispensed with.

Baroness Andrews: That was an argument we took up with some force in this House, of course. One issue which we have not talked about this morning is that much of what was left off the dashboard was the delegated legislation. That had as many implications for the devolved Administrations as previous legislation had for England. That was a huge issue, in the end, and this House did a lot of heavy lifting on that Bill, for all the reasons which you have already explained.

Q54 **Baroness Laing of Elderslie:** Dr Cormacain, can I briefly take you back to something you said earlier? It was a very evocative description of legislation itself as being a library without a catalogue. I remember feeling that when I was a first-year law student: "Where on earth do you find that?" In that respect, you said that what might be necessary is legislative restraint, but would you recommend consolidation as a way of improving this? I can see that Sir Stephen is horrified by that, but we keep coming back to the general theme of accessibility of the law. As you rightly said at the beginning of our discourse today, if it is difficult for parliamentarians and experienced lawyers to work out what the law is, the man in the street has no chance whatever. Does consolidation play a part? Maybe Sir Stephen will give us his opinion on that, too.

Dr Ronan Cormacain: Consolidation is certainly very helpful. The Companies Act 2006 consolidated lots of legislation. It also codified the common law, which we could not find everywhere, and put it into one or two sections in that Act, so that is very helpful. The difficulty is that, if the law constantly changes after that consolidation, then the consolidation becomes a bit null and void, because you are amending it. Even one day or one month afterwards, you are making new legislation. So, yes, consolidation is very helpful, certainly in putting together the common-law principles and in codification. The work of the Law Commissions in doing that is equally helpful, but if we do not exercise legislative restraint and think that we must keep on changing the law regularly—such as immigration or welfare law—then it reduces the benefit of consolidation.

Baroness Laing of Elderslie: How can that be tackled when we have a change of Government every so often?

Dr Ronan Cormacain: That is a difficult political question, I would suggest, but even within the same Government they will continually change immigration law. You have a 300-page criminal justice Bill and

next year I am sure there will be another one. Do we need to legislate all the time on all these points in all this detail?

The Chair: Sir Stephen, you have a different view.

Sir Stephen Laws: I am not horrified by the idea of consolidation, but it has become much less necessary as a result of online availability and amendment than it was. I am not sure that it always justifies the resources that it requires. There is also the issue of codification, which Ronan just mentioned in relation to the Companies Act. Codification is a good idea, but it is not possible without always involving some sort of change of the law, because once you change the form of the law you change its parameters. In my experience, it is almost impossible to codify common law rules in a way that produces exactly the same result, because the change of source changes the law.

I remember when you used to have to try and pull all the different Acts together to work out what the sections were. That was very difficult, but, fortunately, legislation.gov.uk does it for you now. That makes it much easier, and if people proceed by textual amendment then codification becomes unnecessary. When I joined the Office of the Parliamentary Counsel, there was a big controversy about whether you did textual or non-textual amendment, but it is more or less always textual amendment these days.

Dr Ruth Fox: On consolidation, you mentioned resourcing and it is resource intensive, but it depends on whose resource it is. One interesting development of recent years has been the extent to which successive Governments have not taken up Law Commission recommendations to consolidate. I am particularly thinking of electoral law and the need for consolidation there. Yet the process of consultation for the development and drafting of the legislation, and then for the parliamentary scrutiny process of it, is quite low level in terms of the resource commitment needed, particularly as far as Parliament is concerned. I do not know the answer to the question of why successive Governments have not taken up consolidation opportunities, other than possibly the pressures of time.

The Chair: It is nearly 12.15 pm and we have covered the subject pretty well. We have not been able to put entirely all our questions, but we will follow them up. I am not sure that the committee's members are entirely satisfied that they have asked all the questions that they wanted to ask, but I am very grateful to you for taking the time and trouble to come along today and answer our questions so fully. Thank you very much, and if there is anything else that we can think of with the secretariat, we will follow up individually. But, on our behalf, thank you very much.