

James Milton, PhD Candidate and Graduate Lecturer, UCL Faculty of Laws – Written Evidence (ROL0009)

Background

- 1) I am James Milton, a final year PhD Candidate and Graduate Lecturer in the Faculty of Laws at University College London. My research focuses on, amongst other things, how the rule of law operates in practice. All views expressed are my own.
- 2) My submission will be limited in focus to the operation of the rule of law; primarily as a means of understanding what the culture of the rule of law looks like in practice. As such, I will primarily focus in and around questions 1(ii), 3, and 7.
- 3) I would like to begin by positioning my submission against the conventional thin-thick framework within which constitutional lawyers and legal theorists often find themselves. I do not find this distinction particularly useful outside of academic circles. As I hope will become evident from my submission, even the 'thinnest' conception of the rule of law will eventually draw on principles that people consider to be typical of 'thicker' conceptions of the rule of law in order to satisfy key virtues associated with the concept.

Question 1 (ii): Which factors can be used to assess the health of the rule of law?

- 4) 'Thinner' conceptions of the rule of law typically consider the rule of law to include constraints upon the *form* of rules, and often the procedural processes that exist within that legal system.¹ These formal constraints typically require rules to be promulgated, applied prospectively, generally applied to all people, and administered in line with how the rules are written. There are some constraints upon the content of rules insofar that rules must be intelligible, broadly constant, non-contradictory and possible to follow, for instance.² However, these constraints supposedly say nothing about the *moral* substance of rules.³ 'Thicker' conceptions of the rule of law typically do make such constraints, on top of accepting the formal constraints listed above. Advocates for thicker conceptions of the

¹ Some academics distinguish formal and procedural elements, primarily Jeremy Waldron. See Waldron, "The Concept and the Rule of Law", *Georgia Law Review* (43) 2008, 1 - 61, and Waldron, "The Rule of Law and the Importance of Procedure", *Nomos*, Vol. 50 (2011), pp. 3-31. Aside from this caveat, I will consider them to be together in this brief overview, as those who typically subscribe to 'formal' conceptions of the rule of law will often be happy to accommodate these procedural elements; see Joseph Raz, *The Authority of Law* (OUP, 1979) 216-7.

² Lon Fuller, *The Morality of Law* (Yale University Press, 1969)

³ John Gardner, *Law as a Leap of Faith* (OUP, 2012) 195-220.

rule of law will often argue that the content of rules must abide by human rights,⁴ international law,⁵ or broader principles of equality and justice.⁶

- 5) These principles are oriented around providing some form of virtues; benefits that legal communities will experience in jurisdictions where the rule of law is practised. These virtues are mainly (a) that citizens can plan their lives around clear, generally stable rules, and (b) citizens are afforded respect as political citizens, whereby public officials recognise that citizens are responsible agents and must be treated as such with regards to their legal obligations. As such, a political citizen is someone who is made aware of their legal options and obligations, and thus takes responsibility for choosing to engage with or disobey any legal rights or obligation.
- 6) These virtues derive from a broader aim of the rule of law, which is to prevent or limit arbitrary governance. Legal systems that practice the rule of law prevent arbitrary governance by affording citizens the stability to plan their lives and the respect as political citizens to be legally responsible agents. The rule of law contributes to this stability by requiring rules to be formed in a particular way, and establishing a justice system which citizens can access if their legal rights are infringed by those who exercise public power.
- 7) The starting point for my submission is the claim that in order for the rule of law to be successfully practised in a jurisdiction, it must be *felt* by the citizens in this jurisdiction. The perspective of the citizen is too often absent in academic and parliamentary discussions on the rule of law, which often prioritise discussions around whether public officials (those who exercise public power) have ticked certain boxes. There may be - and often are - cases in which public officials may succeed in doing everything contained in the formal or substantive desiderata outlined in paragraph 4, yet citizens do not *feel* as if the rule of law will be practised in their future interactions with public officials. Even though limitations have been placed on executive power, the rule of law has not been properly exercised in these communities, as it frustrates the virtues of the rule of law outlined in paragraph 5.
- 8) Put short, instead of assessing whether the rule of law has been achieved in a legal system by measuring whether public officials have followed formal or substantive criteria outlined in paragraph 4, we should instead assess whether the rule of law has been achieved in a legal system based

⁴ Lord Bingham, *The Rule of Law* (Penguin Books, 2010) Chapter 7.

⁵ *ibid* Chapter 10.

⁶ TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, 2003); Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985); Paul Gowder, *The Rule of Law in the Real World* (CUP, 2016).

on whether a culture has been established where citizens have *just reason to trust* that public officials will practice these rule of law criteria in the future.

Question 3: What threatens the effective operation of the rule of law in the UK?

- 9) If citizens are to believe that public officials will practice the rule of law in the future, it may demand more from public officials than simply practising those rule of law principles. It requires a culture to be established, in which public officials do not undermine any belief that the rule of law will be practised in the future. I will identify three key actions that may threaten the effective operation of the rule of law under the terms set out in paragraph 8, each of which can be created and remedied by public officials. These are anti-constitutional discourse, cases where legal institutions have a reputation for being ineffective, and a failure to make amends for past instances of wrongdoing by public officials.
- 10) Firstly, anti-constitutional language threatens the effective operation of the rule of law. Legal systems can always practice rule of law principles on the one hand, ensuring that laws are generally written and properly promulgated and so on, while undercutting those actions through their words and conduct with the other hand. Consider a legal system in which these rule of law principles are generally abided by in regards to how rules are created, yet a Minister announces that the Government is *prepared* to break international law in a “specific and limited way”.⁷ Regardless of whether this threat is carried out or not, it communicates an impression to citizens that this is a Government who are prepared to break the law to achieve their policy goals. This frustrates the virtues of the rule of law outlined in paragraph 5, as citizens now have reason to believe that officials may breach the rule of law in the future to achieve these goals, possibly to the detriment of their legal stability and position as political citizens. Note here that this does not require the officials to actually go through with the breach of the law, the threat alone is enough.⁸
- 11) Secondly, a perception of ineffective legal institutions undermines the operation of the rule of law. As the rule of law is operationalised by legal institutions, citizens ultimately depend upon them to ensure that the virtues of the rule of law are realised. When a perception is generated that bodies such as Parliament, the courts, and law enforcement do not have the capacity to exercise principles of the rule of law, then these virtues are undermined. These perceptions can be generated in a number of

⁷ HC Deb 8 September 2020, vol 679, col 509.

⁸ A similar argument was suggested by this Committee previously, in Constitution Committee, United Kingdom Internal Market Bill (17th Report, Session 2019–21, HL Paper 151), para 181.

ways, through experience of court and police backlogs, reports of underfunding and stretched resources, or just a general sense that 'these institutions are not here to protect people like me'. It is not just important that citizens have access to justice in cases where they believe a public official has abused their power, citizens also need to have just reason to believe that justice will actually be done. If someone's court case is delayed by a number of years,⁹ or have a poor experience with law enforcement,¹⁰ then citizens have reason to believe those institutions could be ineffective in implementing the rule of law in the future.

12) Thirdly, a failure to make amends for past wrongdoings undermines the effective operation of the rule of law. As stated in paragraph 8, the rule of law only satisfies its virtues if citizens have *just reason to trust* that the rule of law will be practised in the future. Trust may not be felt homogeneously. Different demographics of citizens may feel less assurance about whether the rule of law will be practised than citizens of other demographics.¹¹ This may be grounded in historical concerns about past practices of public officials, or a hostile culture established through discriminatory rhetoric. The role of memory plays a vital role in how the rule of law is practised and recognised. So when, for example, Baroness Casey's Review into the Metropolitan Police Service found "institutional racism, misogyny and homophobia in the Met", this not only reflected a lived experience for many BAME, female, and/or LGBTQ+ citizens, but also suggested that rule of law principles may not be applied equally to these citizens in the future, because the institution at the heart of historic misconduct has not cleaned up their act.¹²

13) It is important that the virtues of the rule of law are felt across the whole community. This includes demographics, such as gender, age, race, religion and sexuality, as well as geographical location. In order for the rule of law to be effectively practised in a community, it must be felt in all four corners of the United Kingdom. National and local Government thus have a role to play in working together to ensure that the rule of law is felt across all communities, accommodating for the different organisation of each devolved legislative body, as well as funding for regional police forces and courts, to name but a few.

⁹ As of 30 September 2024, the Crown Court backlog amounted 73,105 cases, see Committee of Public Accounts, "Crown Court backlogs" Twelfth Report of Session 2024–25 HC 348.

¹⁰ 34% of respondents to the Victims' Experience Annual Survey 2022 said that they would not report a crime to the police again. See Victims' Commissioner '2022 Victims' Crime Survey', and His Majesty's Chief Inspector of Constabulary, "State of Policing: The Annual Assessment of Policing in England and Wales 2023" 24-26, 27-29.

¹¹ This was hinted at by the Attorney General, the Rt Hon Richard Hermer KC, during his swearing-in speech, available at <https://www.gov.uk/government/speeches/attorney-general-swearing-in-speech-rt-hon-richard-hermer-kc> (accessed 6 April 2025).

¹² Baroness Casey Review. Final Report: An independent review into the standards of behaviour and internal culture of the Metropolitan Police Service (March 2023) 17.

7) Is there a role for the public in upholding the rule of law?

i. Is there a greater role for education, the media and civic society in promoting the rule of law?

- 14) The role of the public is therefore vital in assessing the successful operation of the rule of law. It is important to recognise that most members of the public do not discover their legal obligations in a vacuum; their position as a political citizen is often filtered through a number of mediums. These include both social media and legacy media, and the role of education in society. For the remainder of my submission, I will focus on the role that public officials, especially members of the executive, play in the media. While it should be noted that anti-constitutional language regularly generates wide reporting and patently goes some way to undermine the virtues of the rule of law, as discussed in paragraph 10, I will instead focus on how public officials use the media to promulgate legal rules.
- 15) Promulgation is possibly the most fundamental aspect of the rule of law. It provides citizens with the means through which they can be made aware of their legal obligations. Only through promulgating the legal rules of a society can citizens have the stability of knowing what their legal obligations and privileges are, and can be genuine political citizens. However, in many cases, merely publishing legal rules on the government website is not enough to make people aware of their legal obligations; a majority of people are not in the habit of regularly consulting Hansard or reading *The London Gazette*. Oftentimes, people will be guided by what they have always known the law to be, or their own moral instincts when they think no law is guiding them.¹³ When their legal obligations change in these areas, public officials need to engage in more informal forms of promulgation through media and advertising, what I have called elsewhere “full-bodied promulgation”.¹⁴
- 16) There have been many examples where public officials in the United Kingdom *have* engaged in “full-bodied promulgation” to inform citizens of the new legal rules, as well as cases where they have not done so. An example of each is in the area of rules around voting. The Election Act 2022 now required citizens to present an approved form of valid identification in order to cast their vote in some elections across the United Kingdom. Anticipating that a proportion of citizens may not be

¹³ James Milton, “The Rule of Law and Full-Bodied Promulgation” (2025) 88 Modern Law Review 502, 516-21.

¹⁴ *ibid.*

aware of the new requirement and thus be turned away from the voting booth, public officials engaged in a series of advertising and media rounds in order to get across the message about the law change. The Electoral Commission paid for a series of advertisements, members of the executive would discuss the law change in media interviews, and local authorities were told to update their communication plan in line with an expected increase of enquiries from voters.¹⁵ The result was broadly successful, where at the 2024 general election, 87% of people in Great Britain were aware that they needed to bring voter identification to the polling station.¹⁶ This was a requirement of the rule of law in pursuit of the virtues outlined in paragraph 5.

- 17) In contrast, consider the topic of prisoner voting rights. Since 1969, all convicted prisoners have been prevented from voting.¹⁷ This meant that those held on remand, or civil prisoners remained eligible to vote. However, research suggests that very few eligible prisoners are registered to vote.¹⁸ The fact that these prisoners had the right to vote tends to not be promoted to them.¹⁹ A majority of remand prisoners surveyed by HM Inspectorate of Prisons were not aware of their right to vote, with some indicating that they would have voted had it been facilitated by the prison.²⁰ A distinct but equally significant example was the confusion guidance and legal rules during the coronavirus pandemic, where public officials did very little to clarify citizens' legal obligations. These failures to inform citizens of their legal rights represents a rule of law failure under the terms outlined in paragraph 5. Citizens did not have any real means of being able to plan around their legal obligations, nor are they genuinely being treated as political citizens. Moreover, this type of rule of law failure reflects how easily officials can suppress the ability of citizens to exercise their legal rights. Certain types of legal rights, or the legal rights of particular demographics of citizens can very easily be undermined by a failure of public officials to make an active effort to inform people of their legal rights and obligations. Ensuring that public officials do not discriminate on these terms is a fundamental part of practising the rule of law.

Conclusion

¹⁵ The Electoral Commission, 'Planning for the Elections Act changes: early preparations', 5, 10-11 [<https://perma.cc/CN8L-35YG>].

¹⁶ The Electoral Commission, "Voter ID at the 2024 UK general election" [<https://perma.cc/JS7U-E953>]

¹⁷ Representation of the People Act 1983 s3.

¹⁸ Robert Jones and Gregory Davies, 'Prisoner Voting in the United Kingdom: An Empirical Study of a Contested Prisoner Right' (2023) 86 Modern Law Review 900, 908.

¹⁹ HM Inspectorate of Prisons, Remand Prisoners: A Thematic Review (London: HM Inspectorate of Prisons, 2012) 63.

²⁰ *ibid.*

- 18) To conclude, I urge the Committee to consider that the rule of law effectively operates in a society when citizens have reason to believe that the rule of law will be practised in the future. The virtues of the rule of law (stability of legal rights around which citizens can plan their lives, and respect for our position as political citizens) can be undermined in a number of ways. Public officials must avoid undermining these virtues to oversee the successful operation of the rule of law.

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