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Attorney General

LSE Law Department and Clifford Chance
Lecture series on Rule of Law
Organised in conjunction with Justice

GOVERNMENT AND THE RULE OF LAW IN THE MODERN AGE

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GOVERNMENT AND THE RULE OF LAW IN THE MODERN AGE:

THE RT HON THE LORD GOLDSMITH QC,

HM ATTORNEY GENERAL

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When last year Parliament passed the Constitutional Reform Act much time had been spent debating and finally agreeing its first clause. The Act itself is of course very important in terms of the establishment of a Supreme Court distinct from Parliament and in attenuating, if not completely abolishing, the traditional role of the Lord Chancellor in key areas especially the selection of judges.

However, I propose to concentrate this evening on the significance of the very first provision of the Act, and indeed the only provision within Part 1. It provides that the Act "*does not adversely affect: (a) the existing constitutional principle of the rule of law or (b) the Lord Chancellor's existing constitutional role in relation to that principle*".

This certainly illustrates the importance attached to the rule of law in the modern age – even if it does not much elucidate what the rule of law is, how it works and who is supposed to police it.

I want to take the opportunity this evening to focus on three themes.

First, why is the rule of law so important that it needed its existence to be underlined in the course of other constitutional change?

Second, who polices the rule of law? Is it only the judges and the courts? What is the role of Parliament?

Thirdly, does the rule of law mean the rule of lawyers? And if it does not, how we do avoid the impression that this is what is actually happening?

I approach these topics from the experience of nearly 5 years as Attorney General, the most senior law officer responsible for the most sensitive legal advice to Government and for the public prosecution authorities.

I start with the question of what is the rule of law.

If you rely on the press, I think you would pick up two messages about the rule of law. The first is that it is some sort fight-to-the-death battle between the judiciary and executive. So, in 2004, the Guardian reported "*the rule of law is under threat to an extent*

unprecedented in recent times, the judges believe"[1]. Not much has changed since then. Marcel Berlins, writing at the beginning of this year, commented: "*who would have thought, only a few years ago, that our much maligned conservative, allegedly out-of-touch, government lackey judiciary would be the main defenders of our liberties and the rule of law against an executive (Labour, what's more) hell-bent on destroying them?*"[2].

But the rule of law also crops up in the press as being something which defines our society. We cling to the rule of law in the face of the terrorist threat – thus the Queen speaking after the bombings of July 7th said: "*atrocities such as these simply reinforce our sense of community, our humanity, our trust in the rule of law*"[3]. And regimes which engage in abhorrent practices such as torture are condemned for their failure to respect the rule of law.

Many judges and academics have grappled with the nature of the rule of law and why it matters. I do not intend to attempt this evening some learned analysis of my own as to what it means in theory. I do not embark on that for two reasons. First, my own attempts at a philosophical and historical analysis would be poor compared to the excellent existing academic work and would add little, if anything.

[1] Clare Dyer, 5 March 2004.
[2] 2 January 2006.
[3] As reported in Daily Mail, 8 July 2005.

Second, I want to concentrate today on what I – as Attorney General – see as the practical implications: the rule of law in practice.

It is sufficient therefore if I emphasise three perhaps obvious but nonetheless important points about the rule of law.

The first is that the rule of law applies to Government. "*Be you never so high, the law is above you*" said Lord Denning memorably in *Gouriet v Union of Post Office Workers*[4]. That was of course said in relation to the refusal by my predecessor Sam Silkin to grant consent to a relator action. The action was one which Mr Gouriet wanted to bring to obtain an injunction against the Union of Post Office Workers to stop them calling a boycott of all post between the UK and South Africa in a protest against apartheid. Silkin had argued that his decision was not subject to review by the courts.

I cannot resist pointing out in fairness to Sam Silkin that, despite the resonance of Lord Denning's remark – which he used to justify his conclusion that the Attorney's decision was justiciable – the House of Lords in fact agreed with Silkin, noting that in this case the Attorney General was accountable to the public for the exercise of his public interest powers through Parliament and not through the courts.

[4] [1977] 1 All ER 696

Let me be clear. Some of these issues are difficult. The great challenge for free and democratic states is how to balance the need to protect individual rights with the imperative of protecting the lives of the rest of the community. This balance is not easy and it would be foolish to pretend that in all cases everyone agrees with the balance which the Government has struck. Of course there is controversy but it is not through Government failing to consider its legal obligations.

But, whilst emphasising that Government must be subject to the rule of law, we need to recall that so too is everybody else. A key part of Government is, therefore, to enforce the law with vigour and rigour. As Attorney General, I have responsibility for how public prosecutions occur. I will return to that issue.

The second point to make about the rule of law is that it is not simply about rule by law. Such a proposition would be satisfied whatever the law and however unfair, unjust or contrary to fundamental principles, provided only that it was applied to all. Instead it seems to me clear that the rule of law comprehends some statement of values which are universal and ought to be respected as the basis of a free society.

This is why I have previously expressed the view that even when emergency or time of war permit some modification to, or even derogation from, certain rights, there are some rights so fundamental that there can be no compromise on them. Certain rights – for

example the right to life, the prohibition on torture, on slavery – are simply non-negotiable.

As regards the prohibition on torture, the Government has been accused in some quarters of seeking to undermine this fundamental right. This is in the context of seeking to deport foreign nationals who pose a risk to national security to countries where they may face torture. But it is precisely because the Government cares about the rights of these individuals that it has sought to negotiate Memoranda of Understanding with the countries concerned to guard against risks such as torture. I do not accept the charge that such Memoranda will never be worth the paper that they are written on. As the Liberal Democrat peer and QC, Lord Carlile of Berriew, said in a recent report: "*It really is a counsel of despair to suggest that no verifiable or satisfactory agreement can ever be reached with apparently recalcitrant countries*[5]."

There are other rights such as the presumption of innocence or the right to a fair trial by an independent and impartial tribunal established by law, where we cannot compromise on long-standing principles of justice and liberty, even if we may recognise that there may sometimes be a need to guarantee these principles in new or different ways. These principles are not just short-term objectives – they are the permanent foundations of a free society.

[5] Paragraph 25 of report on Prevention of Terrorism Act 2005, 2 February 2006.

The third point is that the rule of law has universal application. There should be in modern society no outlaws; no people to whom the law does not apply who can ignore its constraints and to whom therefore anything can be done. They should be bound by the law and held rigorously to account in accordance with the law when they do not uphold it – but the law should not treat them as non-persons either. Some would not accept this. It is a bitter pill to swallow for those who have seen and experienced the devastation that results from terrorist outrages to see systems established to protect the legal rights of those they believe responsible for them. And those who are responsible, let it be admitted, do not have a single shred of concern for the legal or human rights of those they would kill, maim and terrorise. So why should we care, some would say, about theirs? There is much attraction in this line of attack. But the response to it is one of principle and pragmatism.

First, in confronting terrorism we are fighting for the safety of our citizens but also for the preservation of our democratic way of life, our right to freedom of thought and expression and our commitment to the rule of law; for the liberties which have been hard won over the centuries and which we hold dear. These are the very liberties and values which the terrorists seek to destroy, not only through mass murder and destruction of property but also through the climate of

fear that their actions create, and are intended to create, and which threaten those values and our way of life.

This is why it is important, as Defence Secretary John Reid made clear the other day, not to allow respect, sympathy and understanding for the position in which our soldiers find themselves – which we all naturally share - to be treated as a call for British forces to operate outside the law. As he rightly said, bending the rules or avoiding them altogether is not an option because these are the very principles we are fighting to defend[6]. It is right therefore that where there are credible accusations of criminal behaviour involving our armed forces or anyone else, they should be properly investigated and, where there is sufficient evidence to prosecute and the public interest so requires, there should be prosecutions. And any such prosecutions will be brought under British law in a British court. It is precisely because our servicemen and women are subject to British law in this way that they need have no fear of being brought before the International Criminal Court in the Hague, which has jurisdiction only when states are "unable or unwilling" genuinely to carry out an investigation or prosecution[7].

Second, determining if a particular person is or is not a terrorist requires more than mere assertion on the part of an authority,

[6] Speech at King's College on 20 February 2006.
[7] Article 17 of the Rome Statute of the ICC.

however genuine and well-intentioned that authority may be. Our tradition requires such an assertion to be subject to testing by an independent and competent tribunal.

So the rule of law is essential, it is fundamental and it is, or should be, of universal application. Who then enforces it? And what indeed is the role of the Attorney General in this field?

For many the assumption is that this is the role of the courts. That was Lord Denning's assumption in Gouriet. Many other judges have seen it the same way. Lord Justice Laws, for example, in an important judgement expounding the limits of judicial intervention in the *International Transport Roth* case[8], sees the maintenance of the rule of law as something that lies particularly within the constitutional responsibility of the courts.

No-one would take issue with the idea that the courts are responsible for upholding the rule of law. But from my experience as Attorney General I would disagree with anyone who suggested that the courts have a monopoly on seeing that the rule of law is observed, that the courts <u>alone</u> are responsible for upholding it.

[8] *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, paras 83 to 87.

This is surely not the case. Who would want to live in a society where the executive could act in defiance of the rule of law safe in the knowledge that the courts would right all wrongs in the end? A society where an individual could be detained at will by the executive on the reassurance that once his case was heard by the court, he would be freed?

In my view all the organs of state – the executive, legislature and judiciary – have a shared responsibility for upholding the rule of law. This is not to down play the responsibility of the courts – they provide the critical long-stop guarantee – but the rule of law will only have real meaning in practical terms in a society in which all organs of the state are mindful of their obligations to respect it.

This is all the more important as there are areas where rightly the courts do not enter. Despite the astounding rate of expansion of judicial review - in 1981 there were 558 applications for judicial review; by 2001 the number had jumped to nearly 5000 applications, almost 10 times as many – there are still no-go areas for the courts, referred to by Lord Phillips as "forbidden areas"[9]. One such area relates to certain decisions taken under the prerogative, such as to whether or not to go to war. Thus in the CND challenge seeking a

[9] *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, para 106(iii).

declaration in advance of the Iraq conflict in 2003 Mr Justice Richards said :

"*In my view it is unthinkable that the national courts would entertain a challenge to a Government decision to declare war or to authorise the use of armed force against a third country. That is a classic example of a non-justiciable decision*"[10].

Although that proposition has been followed since by the Court of Appeal, some lawyers obviously do not consider it unthinkable at all. So, as I speak the House of Lords are seised with appeals by anti-war protestors seeking to establish that this is an arena into which the Courts should step. The Government remains clearly of the view that this is not a matter for the Courts. So we await the decision of the House of Lords.

But the exclusion of the courts is not limited to the exercise of certain prerogative powers. To take another example. The classic and well-established doctrine is that international treaties do not form part of English law unless and until incorporated specifically. So, subject to limited exceptions, English courts have no jurisdiction to apply them[11].

[10] *Campaign for Nuclear Disarmament v Prime Minister of the United Kingdom and others* [2002] EWHC 2759 (QB), para 50, at para 59.
[11] See, for example, *R v Lyons* [2002] 3 WLR 1562.

Even where the courts do have jurisdiction, the doctrine of deference or judicial restraint means that they will be very circumspect about overriding the decisions of the democratically elected bodies. As Lord Woolf put it in a lecture in Oxford in 2003, "*there are situations where the national legislature or the executive are better placed to make difficult choices between competing considerations than the national courts*"[12].

For all these reasons it is critical that we in Government do not abdicate our own responsibility for ensuring respect for the rule of law simply leaving it to the courts.

The Government and its machinery do recognise the importance of the rule of law. That in a sense is in part what the controversy about my legal advice relating to the Iraq conflict was about. It is well illustrated by the now well-known request by the then Chief of the Defence Staff for a clear statement – yes or no – as to whether the use of armed force would be lawful. As he has since put it, he needed "*an unambiguous black-and-white statement saying it would be legal for us to operate if we had to*"[13]. Rightly the armed services – as did the civil service - needed to know that they were covered by a clear statement of lawfulness.

[12] "The Impact of Human Rights", The Oxford Lyceum, 6 March 2003.
[13] Observer, 1 May 2005.

But in general, what are the mechanisms other than judicial supervision for ensuring the rule of law within Government? I want to refer particularly to three.

First, there are the internal mechanisms. The principal of these is the internal validation of proposals with our domestic and international legal obligations. I regard this as a critical safeguard for the rule of law and one I see first hand at work day in day out. It has been given added force by the requirement under section 19 of the Human Rights Act for the Minister in charge of a Bill to make a statement to Parliament as to ECHR compatibility. (Although not a requirement of the Act, it is now expected that a similar statement should accompany any statutory instrument which is subject to mandatory debate in Parliament or which amends primary legislation.) Before this obligation existed of course there was consideration whether the proposal breached any legal obligation. But section 19 has deepened the analysis and intensified the consideration in a very strong way. It is actually this, in my opinion, which has had the greatest impact on bringing respect for fundamental rights sweeping through Whitehall's corridors – rather than the power of the court to rule on non-compliance. It is not generally understood that proposals are modified, dropped or sometimes never even see the light of day because they would not otherwise be lawful. But any Government lawyer would confirm it.

I should add that the way that section 19 certificates are given is most certainly not to preclude good proposals just because they might arguably be non-compliant. But nor is it that a statement of compatibility can be given just because it is arguable that the provision is ECHR compliant. The practice which has been followed is that the Minister giving the certificate needs to be satisfied that it is more likely than not that the courts will uphold the proposal as compliant. The Minister's judgment is necessarily made on the basis of legal advice. That advice comes from departmental lawyers, sometimes supplemented by external advice or advice from the Law Officers. The Law Officers will normally only be called upon to advise in the most difficult or sensitive cases. But called upon, we are.

We also see the memoranda of ECHR compatibility which each Department now produces to accompany a Bill. These are produced by Departmental lawyers and explain why, in relation to every relevant provision, they consider the ECHR issues to fall on the right side of the line. Any issues of concern are brought to the attention of me or the Solicitor General. Sometimes Parliamentary Counsel too will bring matters of concern to our attention. If such concerns cannot be resolved before introduction of the Bill, the provision in question must be dropped until the Law Officers have had a chance to look at the matter in detail.

The auditing of proposals to ensure compliance with legal obligations is not limited to new legislation. It applies in every area of activity, executive and legislative, domestic and international including, of course, starting military action and the way war is waged. Targeting decisions, for example, are subject to legal clearance. There is testament to how well this is dealt with, not just by the lawyers but by military commanders too, by the rejection by the Chief Prosecutor of the International Criminal Court of complaints concerning military operations in Iraq.

So respect for the rule of law does not depend on whistleblowers; it is a part of the everyday business of Government.

Here the Law Officers play a key role as advisers on the most sensitive and difficult issues; as scrutineers of departmental analysis of ECHR compliance; and as superintending ministers for the legal services provided in Government. I superintend, for example, the Treasury Solicitor the largest provider of legal advice to Government outside prosecutions. So I regard one of my responsibilities as Attorney General to uphold the rule of law.

It was interesting therefore to note that when it came to the debates on the Constitutional Reform Act little attention was given by many to this aspect. Given that it is no part of the Lord Chancellor's role to advise Government, the role of the Law Officers – who are regarded as

the final authorities on legal issues in Government – deserved perhaps greater note.

But my role in protecting the rule of law is not limited to the provision of legal advice. The greatest threat we currently face is terrorism. The aim of the terrorists is to destroy our way of life and everything we hold sacred, including the rule of law. As superintending minister for the prosecuting bodies, I regard it as one of my key tasks to ensure that the criminal law is used as effectively as possible to combat terrorism, thus safeguarding the rule of law. Obviously, we need to focus on terrorists who bomb and kill. But it is critical we also target those who are one degree removed, those who use words to incite the men of action. The recent conviction of Abu Hamza was a welcome result, but in my view we need to do more to target this group, building on the very effective work of the CPS and police in using the criminal law to target another group who once saw themselves as beyond the law, the animal rights extremists. We need too to continue to ensure the tools of prosecution do not lag behind an ability to identify threats. That is why I am pleased Charles Clarke made clear recently that there is serious work in train to determine whether we can use intercept evidence in court without compromising our vital interests.

The second extra-judicial mechanism is the growing use of independent commissioners and reviewers to ensure that the law is upheld.

I will cite two examples:

The Regulation of Investigatory Powers Act 2000 created both an Intelligence Services Commissioner and an Interception of Communications Commissioner. In an area rife with secrecy for essential reasons of national security and in which there is little judicial involvement, these Commissioners play a vital role in ensuring that the law is being applied and reassuring the public of this fact.

The other example relates to the field of terrorism where there has long been use of an independent reviewer of terrorism legislation. The present reviewer is of course Lord Carlile of Berriew to whom I have already referred. He is responsible for reviewing the working of the Terrorism Act 2000 and the Prevention of Terrorism Act 2005. While it was in force, he was also responsible for reviewing Part 4 of the Anti-terrorism, Crime and Security Act 2001. His latest report was highly significant in the recent carrying forward of the provisions of the Prevention of Terrorism Act 2005. He looked at the control orders made, praised the quality of decision making by the Home Secretary and the preparation by officials and other authorities involved and

concluded that he would have reached the same conclusion as the Home Secretary in every case before him.

The third element of protection for the rule of law is the one that actually is the most important because it oversees all that the others are doing. That is Parliament itself.

Parliament provides a high degree of scrutiny of the effectiveness of legislation and Government action but also of its lawfulness. It is Parliament to whom the declarations of compatibility under the Human Rights Act are made. It is Parliament who debate the legality of provisions proposed. It is Parliament who receive reports of independent reviewers such as Lord Carlile. It is to Parliament that Sam Silkin and the House of Lords said the Attorney General was accountable – not to the courts.

Parliamentarians are well-informed on these issues. They are assisted too in many ways: by the briefing of NGO's such as Justice, the Law Society and Bar Council; by the work of the Joint Committee on Human Rights which, although still only a baby in terms of the life of the Mother of Parliaments, is proving a vital force in these areas of debate; by the work of other Select Committees which examine these issues – I would single out the Home Affairs Select Committee of the House of Commons in domestic affairs, and the European scrutiny committees of both Houses.

I should mention too the work of the Joint Committee on Statutory Instruments. This sounds a dull old body but Government lawyers who draft such instruments shake with fear at the prospect of having their instrument publicly criticised by the Committee. It is highly unlikely that the courts will strike down any one statutory instrument out of the myriad created every year. The possibility of being criticised by the Joint Committee is, on the other hand, a very real one. In the case of statutory instruments, therefore, I would suggest that Parliament plays a more important role in keeping the Government on the straight and narrow than do the courts.

I have left mention of Parliament till last not because it is the least important of these safeguards for the rule of law. But for quite the opposite reason – that its role is of fundamental importance. It is something that lawyers would do well to remember – that democracy and the liberties which we now take for granted were fashioned by parliamentarians far more than by the courts.

That leads me to my final issue: is the rule of law the same as rule by lawyers?

In Alconbury[14], Lord Hoffman said that: "*The Human Rights*

[14] *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, para 129.

Act 1998 was no doubt intended to strengthen the rule of law but not to inaugurate the rule of lawyers."

There are many who think that, however, it is exactly the rule by lawyers which has been inaugurated. Melanie Phillips described it[15] as now *"an industry which threatens to usurp the democratic process itself"* and where law had become a "*kind of secular religion, with lawyers the new priesthood."*

Whilst I do not agree that this is an accurate picture of our present position, I believe there are serious points here which deserve consideration.

There is a risk that some lawyers express themselves with an arrogance which suggests that law is the only morality. This is a dangerous proposition. It is dangerous because the law can be uncertain and dependent on a final adjudication which does not make those who took a different view of the law immoral. Take for example the decision in relation to Part IV of the Anti-Terrorism Crime and Security Act. The outcome of that case was not certain. Quite the contrary. Although the decision of the House of Lords was strong, at least one member took a different view as had the whole of the Court of Appeal, presided over by Lord Woolf. This did not mean, in my view, that the Government and Parliament had been acting immorally

[15] Daily Mail February 28, 2005

in settling on the policy which ultimately the House of Lords struck down.

That case also illustrates that the Government, even when disappointed with the result, acts to comply with the law. It moved swiftly to remove the legislation, even though it was not obliged to under the structure of the Human Rights Act. I know that the solution sought has been controversial but it has been a solution attempting to comply with the law and balance the rights of the individual against the rights of the many.

But the proposition that the law is the only morality is also dangerous because it risks playing down or even ignoring the importance of other reasons why it might be wrong to do something. A course of action needs to be right as well as lawful. Being lawful is a necessary but not a sufficient condition to taking that course of action. And whilst lawyers may have the final say on whether something is lawful, it is for others to decide whether it is right to do it. The recent cartoon furore is a case in point: it was right that the debate centred principally on whether the newspapers who carried the cartoons did so responsibly or wisely, whether they should have realised the offence – and perhaps more - that their actions would bring, rather than whether they had the legal right to print the cartoons. Lawyers have no greater wisdom on the former question though they have something to say on the latter. Even there the role of the lawyer is

more limited than some would acknowledge – because the right of freedom of expression can, like many other rights, be curtailed where the interests of a democratic state requires it. Why should lawyers have some monopoly of determining what the interests of a democratic state require? On the contrary, their views are likely to be less informed and valuable than that of others – especially democratically elected politicians. This is why courts recognise that in their appreciation of these areas they must pay great respect to the views of Parliament and Government.

Lawyers must therefore be wary of losing sight of this important fact. Indeed, otherwise there is a real risk that law becomes a weapon of choice in what are in reality political debates.

As I have been arguing this evening it is not lawyers alone who are responsible for maintaining the rule of law. Nor does good government depend on the rule of law alone. Good government requires a much wider debate and all of us, but perhaps especially lawyers, must remember that, even while we celebrate the newly elevated status of the law in public life.

E N D S