Talk to Norfolk Community Law Service.

21st September 2023

You can’t pick cherries from the Rule of Law

1. It is great pleasure to have been invited here tonight to give this talk. An opportunity for me to come back to Norfolk and make it a long weekend, looking at some of your medieval churches of which you have many of the finest. An opportunity too to help celebrate your work which I have heard from many different sources, since accepting your invitation, is regarded as one of the foremost community law services in the country, striving to help provide access to justice and equality before the law for all.

2. The fact however that your organisation needs to exist, highlights a gap between the theory of what the Rule of Law is intended to provide for the enforcement of legal rights and the reality for many seeking to do so. That is an issue to which I want to return briefly later in this talk. But, perhaps more troublingly, this shortfall between theory and reality has of late become wrapped up in a wider debate on of what the Rule of Law consists, or should consist. It is a subject which has taken up a large bit of my political life. It was nine years ago in 2014 that I fell out with the then Prime Minister, David Cameron over the issue. He wanted the Conservative Party Manifesto of 2015 to contain a commitment to “scrapping” the Human Rights Act and replacing it with a so called “British Bill of Rights” that sought to limit the scope of how the European Convention on Human Rights was interpreted in our domestic courts. As I disagreed with this policy he dispensed with my services. I am pleased to see that the present government has for the present decided, following the resignation of the last Lord Chancellor Dominic Raab, to drop its proposed Bill of Rights-in practice virtually the same proposal that Cameron wanted to implement. But that is nine years, a sacked Attorney General and much time, effort, energy and money

wasted on a poorly reasoned and incoherent idea, described a year ago by an anonymous and clearly honest government source as a "complete mess". It is also clear that the underlying debate which brought these proposals into being has not gone away.

3. So, the issue I want to explore for this evening, is why the Rule of Law matters and the dangers of this cherry picking. But to do that we also need to have some understanding about how the concept of the Rule of Law has evolved over time and why some people now seem to view it as having drawbacks in its current form.

4. When I started practice at the Bar in 1980, the concept of living under the Rule of Law was not much talked about outside academic circles. As lawyers, we just took it for granted and prided ourselves that our Common Law based system of justice, coupled with laws enacted through the checks and balances of parliamentary democracy delivered outcomes which for the fairness and reasonableness of the Law were likely to be better than in most other countries, including those with written constitutions. It was only in 2010 that Lord Bingham set out the eight principles that are now widely accepted as encapsulating it. These are in brief:

    i) That all Law should be accessible;
    ii) That questions of legal right should be resolved by law and not by executive discretion;
    iii) That the Law should apply equally to all;
    iv) That Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding those powers or unreasonably;
    v) That the Law must offer protection for human rights;
    vi) That means must be provided to resolve civil disputes without prohibitive cost or inordinate delay;
    vii) That the system of law must be fair;

viii) That compliance by the state with its international obligations is part of the rule of law as much as national law.

5. But it's important to emphasise that although Lord Bingham produced a definition that is now very widely accepted as identifying the requirements for a country to be considered a "rule of law state", he certainly did not invent the principles he identified and which I have just read out. They have been developed over time and they can be seen in the work of the great constitutional lawyer Professor AV Dicey in the late 19th century, who was himself influenced by much older sources.

6. It's a remarkable feature of the historical continuity that is the hallmark of our country that we could watch this in early May of this year, when some aspects of it were played out in the coronation service of our new King. Some, at the time, got worked up that the ceremony was about feudal subservience to royal authority in an age where we should all be much more egalitarian. But what seemed much more important to me was that far from it being an occasion for deference it was the moment when the person set apart to embody our constitutional values, swears oaths of loyalty to us all. "I come here not to be served but to serve," said the King. He then promised in a form that comes from the Saxon coronation service that he would 'To his power cause Law and Justice in mercy to be executed in all his acts" and to govern all "according to their laws and customs". What that meant in practice in the 11th, 12th and 13th centuries is rather unclear. But it was at issue in the conflict between King John and his Barons in 1215 that led to Magna Carta. From 1217 to the end of the Middle Ages, each accession of a new King was also accompanied by a reissuing of the Charter which included clauses 39 and 40 which still survive in our law today. "No free man shall be seized, imprisoned, dispossessed, outlawed, exiled or ruined in any way, nor in any way proceeded against except by the lawful judgment of his peers and the law of the land". "We will not sell or deny or delay right or justice to anyone". Writing in 1453, Chief Justice Fortescue in his book "De laudibus legum Angliae"

(In praise of the Laws of England) identified England as different from its neighbours. It was a place where Kings could not govern of their mere will but only with the consent of the council of the realm (parliament) to make laws. He noted that the Common Law prohibited torture and extolled the benefits of trial by jury. He said that he would rather see twenty guilty men go free than for an innocent man to be unjustly condemned.

7. Of course, much of this theory did not operate in practice at all. The use of torture by the state continued into the 17th c, authorised under royal sign manual-the same bypass of the law that was practised by President Bush when he effectively authorised torture as an adjunct of interrogation under an executive order made by him after 9/11. But it was finally banned here after 1650 and was followed by Habeas Corpus in 1672 restricting unlawful detention and the Bill of Rights of 1689, the foundation of our modern constitution. All of these were landmarks in the prevention of the abuse of royal and now state power. They required the Law to be observed by all, protected liberties and helped create government only with the consent of Parliament, laying the foundations of modern parliamentary democracy and with it the ability to make political change without violence.

8. Today with a constitutional and parliamentary monarchy it is now the Executive answerable to Parliament and not the King directly, who must uphold the Rule of Law on his behalf. But it is not for nothing that Cabinet ministers are sworn of the Privy Council on appointment and go through a ceremony that requires them to kneel and kiss the King's hand. Along with judges and police officers and many others, they are all the King's servants for the discharge of his coronation oaths. In some cases these oaths are very specific when it comes to the Rule of Law. The Constitutional Reform Act of 2005 requires the Lord Chancellor to uphold the rule of law and to provide the means by which justice can be delivered. My own 16th century oath of office as

Attorney General, taken in front of the Lord Chief Justice and assembled judges reflects this as well. It required me to say-"I do declare that well and truly I will serve the Queen as her AG in all her courts of record within Great Britain and truly counsel the Queen in her matters when I shall be called and duly and truly minister the Queen's matters and sue the Queen's process after the course of the law and after my cunning. For any matter against the Queen where the Queen is a party, I will take no wages or fee from any man. I will duly in convenient time speed such matters as any person shall have to do against the Queen, as I may lawfully do, without long delay, tracking or tarrying the Party of his lawful process in that that to me belongeth, and I will be attendant the Queen's matters when I shall be called thereto". Thus, even at the peak of Tudor despotism the Attorney's oath referenced the duty to uphold the Rule of Law in Clause 40 of the Charter, even in cases brought against the Crown.

9. In the course of twenty two years in the House of Commons I can't recall any politician or indeed law abiding member of the public who did not say they believed in the Rule of Law and the principal of judicial independence as an abstract concept. Our judiciary is usually held in high esteem for its integrity and lack of corruption. There is pride in the existence of a legal system that has a global reputation for fairness and high standards of professionalism. The presence of retired UK judges on the benches of international commercial courts is viewed favourably, as are the contribution to U.K. GDP from the earnings of our legal system. Successive governments have used the reputation of our legal system to promote U.K. soft power through helping others build their legal systems. As Attorney General I travelled to the Gulf and the Occupied Palestinian Territories as part of such capacity building programmes, in which former judges also helped. In 2015 the then government supported financially the Global Law Conference in London, that both promoted the Rule of Law and showcased our contribution to it. An emphasis on the Rule of Law goes well with making the U.K. an attractive place

to do business. It underpins growth by providing fair and legitimate routes for dispute resolution, reducing corruption and creating certainty that contracts will be enforced and that investment and trade can flourish. It is the essence of "quiet government" which some of us pray for on a Sunday and most Prime Ministers want and seek to deliver. Even when carrying out difficult and controversial reforms, Margaret Thatcher placed it at the heart of her administration, stating that "the institution of democracy alone is not enough. Liberty can only flourish under a rule of law". Trained as a lawyer she was a stickler for its observance.

10. The Rule of Law has also been part of our approach to international relations. The U.K. has even at the height of its imperial power sought to make the world a safer and more predictable place by participating in the creation of international agreements governing the behaviour of states. When I was Attorney General, I enquired as to how many treaties we were adherent. The Foreign Office was unwilling to go back beyond 1834, but since then they had records of around 13200 and the figure is now over 14000 making us probably the greatest treaty making power in world history. Many hundreds of treaties contain binding dispute resolution mechanisms in the event of disagreements over interpretation. Since the end of World War II these treaties, be they the ECHR, the UN Convention on the Rights of the Child, or the treaty creating the International Criminal Court, have dealt not just with inter-state relations, but with standards of behaviour of a state towards those over whom it exercises power. In each case it is a duty on the U.K. through its Ministers and public officials to act in accordance with them and uphold their terms.

11. But these well established principles are now taking a bit of a battering. They are accused by some of acting as a fetter on the views of the electorate, parliamentary sovereignty and executive discretion. Ministers may stand at the despatch box and denounce Russia for not adhering to the "international

rules based system" by annexing Crimea and attacking the Ukraine. But they were willing to threaten that we do it ourselves by violating the terms of the Northern Ireland Protocol, that they themselves signed up to under four years ago.

12. The subject of my disagreement with David Cameron, the European Convention on Human Rights provides a good example of this phenomenon and a starting point for much that has followed.

13. The Convention was created in response to the horrors of World War II, with significant input from British lawyers, to try and prevent any return in Europe of the gross violations of rights that characterised Nazism and Fascism and were continuing in those parts under Soviet domination. Apart from Article 8 on privacy and the right to a family life, it is a classic exposition of the "liberties" which we in Britain can claim as our shared inheritance. It protects the right to life, liberty and security, fair trial, freedom of conscience, religion and expression, marriage and prohibits torture and retroactive criminalisation. It has since been amended to protect the right to free and fair elections. At the time it was signed there was concern about translating broad principles into an international legal obligation that might be interpreted by an international tribunal. But this was overcome by a sense of the benefits of promoting these principles internationally. That is why we signed and ratified it and supported its extension in 1966 so as to allow individuals to bring claims under it.

14. We have been successful in our broad aim. The promotion of human rights has, until recently, been seen internationally as a major success of U.K. soft power and influence. In the ensuing 70 years, the ECHR and the Strasbourg based European Court of Human Rights (ECtHR) that interprets it have helped transform human rights standards in many European countries and particularly in those that have most recently become

democracies where it has provided an important backstop to ensure that abuses of rights are curbed. Examples range from ending corporal punishment in schools; prohibiting interrogation techniques which constitute inhuman/degrading treatment; ending discrimination against children on the grounds of illegitimacy; requiring access to a lawyer at the earliest opportunity and requiring civil partnerships to be open to same sex couples. The benefits have even extended outside of the member states of the Convention. Our willingness, for example, to follow the ECtHR judgments scrupulously in the case of the deportation of Abu Qatada to Jordan, despite the fury of the tabloid press and the understandable frustration of the then Home Secretary, ensured permanent reforms of the Jordanian criminal justice system to prevent evidence obtained under torture being admissible in criminal proceedings, which were needed and welcomed, as well as ensuring his eventual lawful removal to stand trial there.

15. It has doubtless been challenging at times that a number of cases concerned matters where the U.K. was found wanting. But until the mid 1990s governments accepted adverse judgments against us as an irritation that was outweighed by those benefits the ECHR delivered. This changed when Michael Howard as Home Secretary, complained at the decision of the Strasbourg Court in Chahal, which prevented the deportation of a suspected Sikh terrorist to India on the grounds of there being a risk to him of being tortured, despite the assurances he had secured. He considered that the decision should have been left to the Executive. The Labour government post 1997 enacted the Human Rights Act, to "bring rights home" and provide for domestic remedies for their violation, in a way that was wholly compatible with preserving the principle of parliamentary sovereignty. But under the threat of terrorism in the post 9/11 period it started to give the impression that it regretted having done so. Its Anti-Terrorism Crime and Security Act 2001 Part IV sought to introduce indefinite detention without trial of foreign nationals

designated as terrorism suspects and thus required derogation from Article 5(1) of the Convention. This was then overturned in A v Home Secretary 2004 UKHL56 when the House of Lords declared this discriminatory and incompatible with article 14 of the ECHR. This led to some estrangement between between the executive and the judiciary. The then Home Secretary, Charles Clarke, wanted a meeting with senior judges so as to ascertain what might be acceptable to them and this suggestion was understandably rejected as compromising judicial independence. Labour back benchers were then emboldened to rebel over 90 day and 42 day pre charge detention and the government saw its policies under sustained criticism. Worse still for the Labour government, the progressive emergence of allegations of U.K. involvement in serious human rights breaches by the USA and the litigation that ensued led to a breakdown in judicial trust in government standards of propriety and integrity in relation to litigation. The decision of the Court of Appeal in Binyam Mohammed v Foreign Secretary [2010] EWCA civ65 to order the disclosure of documents that had been provided by the USA under the "Control Principle", previously upheld in our courts, marked a new low. The Labour government also sat on its hands over the decision of the Strasbourg Court in Hirst that required the U.K. to review our blanket policy of withholding the right to vote from convicted prisoners and then handed it on as a poisoned chalice to the Cameron government in 2010.

16. David Cameron's approach to these tensions, was that by replacing the HRA with a "British Bill of Rights" it would be possible to somehow "clarify" Convention rights, particularly those prohibiting torture and giving a right to a family life, so as to prevent their abuse in deportation cases by changing the tests to be applied. We would legislate to no longer require our courts to take account of decisions on similar cases at the Strasbourg Court. We would effectively demand a special status, where judgments from the ECtHR were merely

advisory, with the underlying threat, if that didn't happen, of leaving the Convention entirely, thus removing all the Executive's irritation.

17. The process of trying to do this took up a Government Commission under Sir Leigh Lewis that was unable to come to any conclusion and a set of proposals published in 2014 that was so factually flawed that it was widely criticised and indeed ridiculed. But it still featured in the Conservative Party manifesto of 2015 but was not pursued because Theresa May was wise enough to see it was unworkable. But it was revived by Boris Johnson. In response the then Justice Secretary Robert Buckland set up another independent commission under a former Lord of Appeal, Sir Peter Gross to do an analysis of options as to how the HRA might be changed compatibly with staying in the Convention and he came up, not surprisingly, with some sensible but modest ideas, because very little change was either possible or desirable. Yet the Justice Ministry under Dominic Raab ploughed on with legislation for a so called "Bill of Rights" until it was recently abandoned after his resignation. As was pointed out by a retired Supreme Court Judge, Lord Mance, the Bill if enacted would have solved nothing. It was just a recipe for further conflicts between the Executive and both domestic and international courts. More cases would end up in Strasbourg and there would be likely to be more findings against the U.K.

18. Some level of tension between the Executive and the judiciary is inevitable and can be seen as healthy, particularly if it reinforces public confidence in judicial independence and the open debate on law that underpins parliamentary democracy. It is also the case that international legal obligations are not eternal. It is open to any member state adherent to the ECHR to give notice and leave if it wishes and this threat has been repeated recently by the Home Secretary as her plans for dealing with asylum seekers runs into difficulties. But not only does the threat on its own make it harder to persuade any court

domestic or international, that we will have sought to legislate compatibly with the ECHR in any changes we make to our immigration laws. The threat also looks like angry and reckless Trump style politics. If we were to leave the consequences would be profound. We would have to leave the Council of Europe and join Belarus and Russia as the only non-European member nations. Furthermore, shared adherence to the ECHR is a key component in our Trade and Co-operation agreement with the EU. Leaving the ECHR would make parts of it unworkable, including security co-operation and data sharing which is essential not just for security but also business and participation in joint projects such as Horizon. The existence in Northern Ireland of the rights under the Convention and adherence to it by the UK, also underpins the Belfast/Good Friday Agreement. No cogent arguments have ever been advanced from within government as to how these consequences would be addressed.

19. As worryingly, it is hard to escape the conclusion that the strident rhetoric and attempted cherry picking over the ECHR has not had corrosive consequences elsewhere particularly when governments are faced with political difficulties.

20. The first example came after the 2016 referendum with the first Miller case. The question as to whether a parliamentary statute was needed to trigger Article 50 to leave the EU or whether the Executive could do this under prerogative powers was in reality a rather esoteric point of law. The final decision of the Supreme Court that it needed a statute made no difference to the progress of Brexit. But the first instance decision of the judges of the Divisional Court was followed by the vilification of the judges as "enemies of the people" in two national newspapers. The response of the then Lord Chancellor Liz Truss who had taken a specific oath of office a few weeks earlier to *"respect the rule of law (and) defend the independence of the judiciary",* was to say nothing for twenty four hours and then come out with a totally equivocal

statement about the freedom of the press to criticise judicial decisions and this only after consulting the Prime Minister's political Special Advisers. Seeing that her oath of office was specifically created to reduce concerns about the changes to the role of Lord Chancellor in the Constitutional Reform Act 2005 undermining judicial independence, her breach of her own oath to act independently to support the judiciary in its work was very telling.

21. In September 2019, we had the second Miller case concerning the unlawful Prorogation of Parliament by Mr Johnson. Contrary to the fourth principle of Lord Bingham on the Rule of Law, the power to prorogue was plainly exercised by Johnson in bad faith and was an obvious misuse of power in a parliamentary democracy. The argument that Prorogation was a matter of high policy and therefore the courts should not interfere with it, as the issue should be left to the political arena was rejected. It was impossible for the government to find anyone able to swear an affidavit giving the government's justification for doing it as the Prime minister had earlier lied as to his reasons for prorogation and when he had first decided on it. The Supreme Court decision resulted from these facts. And far from being a novelty the use (and abuse) of prerogative powers have been reviewable in principle since the 17th century.

22. But it is hard to see that lessons were learnt at the time from this shameful episode of government misconduct. Two months later Johnson was presenting a manifesto saying his government would focus on "*the relationship between parliament, government and the courts, the functioning of the Royal Prerogative…"* He pledged to *"update the HRA and administrative law to ensure there is a proper balance between the rights of individuals, our vital national security and effective government".* He went on *"we will ensure that judicial review is available to protect the rights of the individuals (sic) against an overbearing state, while ensuring*

that this is not abused to conduct politics bey another means and to create endless delays". There was no hint of recognition whatsoever that the courts in both Miller cases were protecting the very rights referred to in his manifesto. Rather the 2019 Manifesto marks the development of a novel constitutional principle: that governments enjoying the confidence of a parliamentary majority have a popular mandate to do whatever they like and that any obstruction of this is unacceptable. As a Conservative, he appeared chillingly unaware of the the late Lord Hailsham's description of this theory as being *"elective dictatorship".*

23. This distortion of reality has since borne its fruits. We have been fortunate that there has only been a rather piecemeal review of Judicial Review, probably because of the knowledge of how difficult it would be to get through the House of Lords. But we have had the Overseas Operations (Service Personnel and Veterans) Act 2021 which was intended to end allegedly vexatious claims against UK Armed Forces personnel. Denounced by a former Chief of the General Staff as contrary to all the principles for which the Armed Forces stand, it had to be extensively amended in parliament to remove glaring incompatibilities with international legal obligations that the UK was claiming to support as global champion of human rights and in particular in being the lead nation in challenging rape in warfare. But the end result has still created a two tier limitation period for legal claims, that discriminates in favour of Armed Forces personnel and a presumption against prosecution for many lesser offences after five years have elapsed. These provisions are almost certainly incompatible with the ECHR and do nothing to create greater legal certainty for anyone.

24. This attitude to the rule of law was also present with the Internal Markets Bill in late 2020. In this first attempt to override the Northern Ireland Protocol signed as an international treaty only a year earlier, the then Secretary of

State for Northern Ireland, a barrister, admitted when promoting it that it breached international law in a "specific and limited way". The then Attorney General Suella Braverman claimed to be able to sign it off as acceptable, on the entirely specious grounds that as Parliament is sovereign it can do as it pleases. This entirely ignores the Government's separate obligations under international law to uphold a treaty to which it is a signatory. This was why the Treasury solicitor (permanent head of the Government Legal Department) and the Advocate General for Scotland resigned over the issue. And although the current PM Rishi Sunak finally resolved the Protocol with the Windsor Accord, he too toyed first with a further threat of breaching International Law with his Northern Ireland Protocol Bill.

25. These serious departures from rule of law principles have been supported by the development of novel academic legal argument well outside the mainstream. The Think Tank, Policy Exchange published a paper called "The Limits of Judicial Power" to coincide with the start of the Truss administration. It's prime academic mover, Professor Richard Ekins, demands complete withdrawal from the ECHR, the reform of domestic human rights law through the repeal of the Human Rights Act, leaving the country to rely on statute and Common Law as it was pre-1998. This proposal is intended to give us back our *"traditional constitution"*. It requires making sweeping changes to principles of judicial review-including predictably, a prohibition on the courts being able to review matters relating to the *"political constitution"* or to interpreting *"ouster clauses"* and limiting judicial review in other contexts. But perhaps most tellingly, at the end of his paper, this legal academic invites Government and Parliament to abandon the process of independent judicial appointments derived from the Constitutional Reform Act 2005. He argues that the Lord Chancellor/Justice Secretary should have discretionary powers to veto the appointment of any individual as a senior judge who might personally be minded to

"undercut settled constitutional fundamentals, including parliamentary sovereignty". In the meantime, use should be made of existing powers *"to refuse to appoint candidates who have cast doubt on Parliament's authority to make or unmake any law".*

26. I am left a bit mystified as to who Professor Ekins has in his sights. I can think of no current judge who has questioned the sovereignty of Parliament to make or repeal laws even if very occasionally courts have been inventive in circumventing them. At most there are some faint "Obiter" echoes in the past- Sir Edward Coke in Dr Bonham's Case in 1610 and Lord Steyn in Jackson v the Attorney General [2005] UKHL56 who suggested *" in exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign parliament acting at the behest of a complaisant House of Commons cannot abolish".* At the time he said this, it would have appeared as extremely unlikely to ever occur. But this should make us worried about Professor Ekins' plans. His general intent is clear; to allow the Executive to better control the judiciary by restricting one of the key roles of the courts in our modern constitution of being able to interpret statutes in line with evolving legal principles (a power which is quintessentially consistent with the way the Common Law system works) and to scrutinise the extensive powers used by ministers and public officials which affect the liberties and rights of citizens. As these executive powers have grown massively in the last century so has the importance of there being an independent check on their use. The future offered by Professor Ekins looks dystopian. Anyone feeling confident that the Executive does not need this check, need look no further than the poorly drafted and inadequately scrutinised statutory instruments made during Covid.

27. Laxity in observing and upholding basic principles of the rule of law also has a carry over into standards of behaviour in government. It was David Cameron who gratuitously took the requirement for ministers to observe international law out of the ministerial code, in irritation at its presence, whilst having to admit at the time the change had to make no difference to the obligation. But it has set the ball rolling for normalising disregarding it and did make a difference when Johnson was Prime Minister. Johnson's period in office illustrates clearly what happens when these standards slip. His administration not only was cavalier with international obligations. It quickly developed a reputation for sleaze, cronyism and dishonesty that ultimately destroyed his premiership and has left a damaging legacy of erosion of public trust in politicians. In 2020 Johnson decided to disregard the findings of his Ethics Adviser, Sir Alex Allan and kept Priti Patel in office, despite Sir Alex's findings that she had bullied staff. This led to Sir Alex's resignation. In late 2021 Johnson then sought to overturn, in the House of Commons, a finding by the Parliamentary Commissioner for Standards, that Owen Paterson had engaged in paid advocacy in breach of the rules of the House. The advocacy was linked to events around the Covid pandemic, which have since produced wider allegations that the placing of multi-million pound contracts for medical equipment did not observe procurement procedures and favoured persons with links with ministers, as donors to the Conservative Party. During this time, we now know that Johnson was allowing the draconian rules his own government had introduced to fight Covid to be ignored by himself and his Downing Street staff. The most recent example of this corrosion of standards is that Nadhim Zahawi, serving as Chancellor of the Exchequer, did not seem to understand that there might be an incompatibility between doing this role and being under investigation and found to have been involved in tax avoidance for which he had to pay a substantial penalty.

28. These developments are all taking place against a background of a justice system in crisis. I am afraid that I do not have the space in this talk to look in detail at the current state of the justice system-a key requirement for us to enjoy the protection of the Rule of Law. The subject requires a talk in itself. But a lack of understanding of the importance of sustaining the Rule of Law is evident in how it has evolved in recent decades. When I was a young barrister in the early 1980s our late Queen came to open the new criminal and civil law courts in Maidstone where I appeared frequently. She referred to the provision of Justice as the original social service of the State and the law courts at Maidstone were designed to help deliver this. A year later it was being held up as an exemplar of efficiency, professionalism and fast throughput of cases. But when I returned to visit again as Attorney General it was to a building where water leaked through the ceiling, facilities had been closed and the professional users were inevitably demoralised by the conditions. This picture can be seen today in almost every court in our country. In many cases, of course large areas of our country have now no easily accessible courts at all.

29. It is impossible to escape the fact that the gulf between the Lord Chancellor's oath to ensure the provision of adequate resources for the justice system and the reality of the provision is now very wide. In 1949 when our state funded system was set up to assist those of "small or moderate means" 80% of the population was eligible. Today, as you all know too well, with the numerous restrictions and changes which have occurred since the mid 1980s through both Labour and Conservative governments and now since the passing of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the criteria for eligibility and what type of case is eligible means that justice is all but inaccessible for many.

30. There is of course a valid argument that Legal Aid as envisaged in 1949 was an unsustainable policy. Unlike the NHS, the pool of users is limited and as a consequence it is not and has never been a vote winner. But this cannot excuse creating conditions where the system is close to collapse. The remuneration rates for practitioners paid through the Legal Aid system have remained almost static for 25 years and the most recent improvements are modest. While the quality of justice available in our highest courts may be, as politicians delight in saying- “world beating”, anyone looking elsewhere might conclude that overall, it begins to look like a whited sepulchre. This too contributes to a reduction in respect for the Rule of Law amongst both the public and their representative politicians as the system becomes slower and more dysfunctional.

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31. I would not wish this talk to be seen as just a catalogue of challenges. Furthermore, I don’t subscribe to the view that a yawning gulf of incomprehension between government and legal practitioners and between political practice and the law is rooted in divergent interests that are unbridgeable. Rather it comes across as the result of ignorance and of long term neglect of the rationale underpinning why we need the Rule of Law.

32. As public anxieties have grown in recent decades over issues such as our country’s economic performance, national security, identity politics and immigration, so the temptation grows for politicians to embrace populist policies in response. These encourage the disregard of previously accepted standards of government behaviour and claim or at least imply that the end justifies the means. This has been encouraged by an aggressive and demanding print media, now in competition with the echo chamber of social media. For some sections of the Press an important driver has been a dislike of regulation,

such as the growth of privacy law through the application of Article 8 of the ECHR by our courts, even if the same papers have been only too happy to invoke Article 10 on freedom of expression when prosecuted for Contempt of Court. This has then translated into wider hostility to legally enforceable human rights and the encouragement of the trends I have just described, without any sensible consideration of the consequences.

33. Yet, the irony is that there is no evidence whatever that those trends have helped government one bit. Legislative activity in trying to alter or get round legal obligations or fettering the work of the courts, has been to engage in activity counterproductive to good governance. In trying to circumvent sound legal principles the Executive has just created new obstacles for itself rather than remove old ones. Anyone looking at where we are today must conclude that for all the populist rhetoric, these attacks on the rule of law have delivered nothing for those who advocate them. On the contrary it has created a conflict and an uncertainty that is inimical to government achieving legitimate aims within the law.

34. So, the opportunity is there for a wise Prime Minister to abandon this approach for something better which would also be advantageous to their achieving their political goals. Restoring the traditional role of the Lord Chancellor would be a good start. Lord Chancellors in their old form were not only lawyers but the most senior member of the judiciary and were accorded a high status within government. Confined to the operation of the legal system, including the courts and the regulation of lawyers, the provision of Legal Aid and the appointment of judges, they were key to ensuring respect for the Rule of Law and the maintenance of an informal dialogue between government and judiciary that served us well. Central to their standing was that the office was not a route for the furtherance of career ambition or advancement and it had

added status by their being the Speaker of the House of Lords. Clearly the role cannot be restored to what it was before 2005. No judicial function could now be considered proper for a Cabinet Minister. But we would benefit from having a Lord Chancellor back in the Lords and able to concentrate on the operation of the courts and the law rather than being diverted by the political and financial pressures of running prisons and penal policy.

35. Similar issues arise with the Law Officers who, as Harold MacMillan rightly observed owe duties to the Crown, Parliament and the courts ahead of their duties to government. These should all be underpinned by their professional status as lawyers. They should not, as has developed under Johnson, have politically appointed special advisers. Along with the Government Legal Department they should be seen to be acting at all times with propriety even when faced with difficult and complex legal challenges.

36. Proper consideration needs to be given as to how a well functioning justice system can be restored and funded. This is not a plea for return to the past which is not possible. But it does mean re-prioritising the provision of justice as a key role of the State and making it accessible again to those who need it. This also needs a dialogue and consultation with organisations such as your own as to how this can best be developed and delivered.

37. If these things are done, then I am convinced that many of the government's current frustrations with the law would disappear or at least diminish. Frictions would of course remain. But these would be seen for what they generally are- the healthy interplay between the Law, the courts and the executive and Parliament in a mature democracy. The time, effort, energy and money being currently wasted on trying to cherry pick the Rule of Law to suit transient political agendas would cease. The atmosphere would then be much more

conducive to rational decision making and we would all be much better governed.

Dominic Grieve KC