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HOUSE OF LORDS CONSTITUTION COMMITTEE INQUIRY INTO THE RULE OF LAW

SUBMISSION BY THE CONSTITUTIONAL & ADMINISTRATIVE LAW BAR ASSOCIATION

Introduction

1. The Constitutional and Administrative Law Bar Association ("ALBA") is the professional association for barristers in England and Wales practising in public law, a field which includes administrative law, constitutional law, judicial review, and other areas of the law concerned with regulating the exercise of public power. ALBA's members are predominantly self-employed barristers, but also include employed barristers (working in organisation such as the Government Legal Department, local authorities, solicitors' firms, companies, campaigning organisations and other NGOs), solicitors, judges and academics. One of ALBA's principal objectives is to provide a forum for the exchange of knowledge and ideas about the development of constitutional law, including developments in public law jurisprudence and practice across the common law world.

2. ALBA submits this paper by way of response to the House of Lords Constitution Committee's call for evidence in relation to its inquiry into the rule of law ("the Inquiry"). This paper has been prepared by an *ad hoc* subcommittee of ALBA's Executive Committee, and it is written from the perspective of lawyers practising predominantly in the courts of England and Wales in the field of public law. ALBA recognises the breadth of the Inquiry – which includes as a focus "how the rule of law as a principle is best put into operation in the different branches of government – Parliament, the judiciary and the executive" – but it does not seek to comment on every aspect of it. Nevertheless, given the recent (and perhaps necessary) focus on the rule of law in the light of events both domestic and international, ALBA supports the work of the Inquiry in seeking better to understand the rule of law as a constitutional principle and as a practical matter, and the state of the rule of law in the UK.

The rule of law as a constitutional principle

3. ALBA notes that the rule of law has been the subject of numerous definitions (and attempted definitions) over the years. It has been given legislative expression in the Constitutional Reform Act 2005.[1] It was the subject of elucidation in Lord Bingham's 'eight principles'. These include the principles that the law must be accessible and, so far as possible, intelligible, clear and predictable (first principle), equality before the law (third principle), that the law must afford adequate protection of human rights (fifth principle), and the rule of law requires compliance by the state with its obligations in international law as in national law (eighth principle).[2] Notable in Lord Bingham's understanding of the rule of law was that it necessarily involves more than 'rule by law'.

4. ALBA does not seek to elaborate on the definitions of the rule of law. Nor does it consider it necessary or helpful to approach the questions raised in the Committee's call for evidence primarily by reference to whether the rule of law is a 'thick' or 'thin' concept.[3] ALBA understands

[1] Sections 1 ('the rule of law'), 3 (Guarantee of continued judicial independence) and 17(2) (Lord Chancellor's oath – to "defend" judicial independence, as inserted into the Promissory Oaths Act 1868).
[2] Lord Bingham of Cornhill, 'The Rule of Law' (2010).
[3] Lord Wolfson of Tredgar, 'The Rule of Law: at home, abroad – and in Westminster' 25 March 2025, Policy Exchange. Cf Lord Sales, 'What is the rule of law and why does it matter?', Robin Cooke Lecture, 12 December 2024.

that particular debate as being focused on whether adherence to human rights as well as to international law are necessary ingredients of the rule of law. Those are of course important (and in some quarters contested) questions. ALBA would place the approach to those questions in the context of a broader analysis, as follows.

(1) The rule of law as a domestic constitutional principle *is informed by* other key features of the UK constitution. As noted in the Committee's call for evidence, the rule of law was identified by the Committee as one of the five tenets of the UK Constitution (see its First Report, of 11 July 2001), these being (at the time):

- Sovereignty of the Crown in Parliament;
- The Rule of Law, encompassing the rights of the individual;
- Union State;
- Representative Government; and
- Membership of the Commonwealth, the EU and other international organisations.

(2) On the international plane, the rule of law sits alongside respect for fundamental rights and democracy as one of three core values which international institutions commit to uphold.[4]

5. The rule of law can usefully be understood, within the UK context, as a principle which governs, and regulates the relationship between, the three branches of the state. It is a concept which cannot be understood in isolation; rather, it is informed by and informs the other key features of the UK constitution – including the principle of Parliamentary sovereignty, representative government and the UK's membership of international institutions.[5] It forms part of a "network of fundamental principles" including parliamentary sovereignty and the separation of powers.[6]

6. The absence, in the UK context, of a written constitution, serves only to emphasise the important role played by the rule of law. In particular, the rule of law operates:

(1) as a self-regulating principle for each of the institutions of the State – be it through the operation of constitutional conventions[7] or through the exercise of judicial self-restraint based on respect for the separation of powers and/or Parliamentary sovereignty;[8]

(2) in appropriate instances, as a justiciable check on the exercise of executive power;[9] and

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[4] Article 3 of the Statute of the Council of Europe: "Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, […]" and the Preamble to the ECHR. See also Articles 2 and 3 of the UN Charter and Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." It is notable that the 'Venice Commission' (a body of the Council of Europe – European Commission for Democracy through Law), in a report adopted in 2011, concluded that the term 'the rule of law' was indefinable. Instead, it took an operational approach and focused on identifying the core elements of the rule of law, namely: (i) legality (ii) legal certainty, (iii) prevention of abuse/misuse of powers, (iv) equality before the law and non-discrimination, and (v) access to justice.

[5] Mark Elliott, 'Constitutional Adjudication and Constitutional Politics in the UK', European Constitutional Law Review, 16: 625-646, 2020.

[6] Ibid, at 645.

[7] Eg that the executive will not invite Parliament to legislate in breach of the UK's international obligations (cf s.19 Human Rights Act 1998); the Salisbury convention (or doctrine) in respect of 'manifesto' bills. By reference to the former convention, the fact that the Attorney General, as a Law Officer, has underlined the importance of the rule of law and the need for the government to adhere to fundamental rights and international law, from this perspective, is uncontroversial (see the Attorney General's Bingham Lecture 2024, 'The Rule of Law in an Age of Populism', 14 October 2024).

[8] As to the exercise of judicial self-restraint, see further below.

[9] Whether in defence of access to justice (*R (UNISON) v Lord Chancellor* [2017] UKSC 51) or in defence of Parliamentary sovereignty (*Miller v Prime Minister* [2019] UKSC 41, [2020] AC 373).

(3) as a principle of legality in the interpretation of primary legislation.[10]

7. In the context of the UK constitution, the rule of law ultimately acts as a vital and necessary ingredient for a healthy and balanced constitution. Moreover, it enhances the institutional checks and balances vital to guard against the risk of 'democratic backsliding' being witnessed across even some 'democratic' nations.

8. Responsibility for upholding the rule of law lies on all of the institutions of the State. The judiciary plays an important but not exclusive role in this respect. Access to justice is therefore axiomatic to the rule of law,[11] as is ensuring respect for and protection of members of the judiciary. The executive and legislative branches of the State have an important role to play in this context – both by observing the rule of law (thereby reducing the need for, at times contested, judicial intervention) and in protecting the judiciary from attack. In turn, it is incumbent on the judiciary to respect the separation of powers and to exercise self-restraint where appropriate.

9. In the UK, the rule of law has in recent years come under significant strain – in the period leading up to and following 'Brexit', during the Covid-19 pandemic, in response to the refugee and migrant crisis, and the (at times toxic) debate on the UK's membership of international treaties and on reform of the Human Rights Act 1998, with notable breaches of rule of law principles.

The courts' approach to the rule of law

10. The courts have not sought to define what is meant by the rule of law, or to attempt exhaustively to enumerate the various principles which it comprises. Accordingly, although it is not uncommon for the courts to refer to the rule of law, there is no authoritative exposition of its exact meaning or effect, or its precise contours, at common law. Rather, the courts (particularly the higher courts) have tended to deploy the rule of law as a flexible tool which has supported the development of the common law, particularly in the context of public law.

11. By way of examples (set out in chronological order), the rule of law has been relied on by the courts in the following ways.

    (1) To support a conclusion that a claimant has standing to bring a claim for judicial review in circumstances in which it is unlikely that any other person or body would, or would be able to, bring such a claim: *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386, 395 *per* Rose LJ.

    (2) As the source of a "fundamental principle" that a sentence lawfully passed should not be increased retrospectively: *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, 591 *per* Lord Steyn.

    (3) To support the imposition of exemplary damages in cases involving "arbitrary and outrageous" use of executive power: *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, [2002] 2 AC 122, para 79 *per* Lord Hutton.

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[10] *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 at 587: "Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by clear and specific provision to the contrary"; *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491.

[11] See Mark Elliot (op.cit. at n.5 above, at p 639), commenting on the courts' approach to ouster clauses: "viewed in a broader perspective, the courts' approach to ouster clauses often transcends the protection of rights, and the notably robust judicial approach often witnessed in this area can be accounted for by the fact that critical architectural features of the constitution, most obviously the separation of powers and the rule of law, are jeopardised by such statutory provisions."

(4) To support a common law right on the part of individuals to know of a decision before their rights can be adversely affected by it: *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, para 28 *per* Lord Steyn.

(5) To support a conclusion that a power to make such provision by order as appears "necessary or expedient" does not confer an unfettered power: *A v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534, para 45 *per* Lord Hope DPSC.

(6) To support a narrow interpretation of a provision of the Freedom of Information Act 2000 which empowered a Minister to override a decision of a tribunal requiring the disclosure of information: *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787, para 51 *per* Lord Neuberger of Abbotsbury PSC.

(7) To support the proposition that, where a public body adopts a policy as to how it will exercise a statutory discretion, generally the policy must be published: *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, para 34 *per* Lord Dyson JSC.

(8) As the foundation for the proposition that it is for the courts to determine the extent to which judicial review may be excluded: *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491, para 132 *per* Lord Carnwath JSC.

(9) As the source of the proposition that it is unlawful for a public body positively to authorise or approve another to act in a way which would be unlawful: *R (A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931, para 38 *per* Lord Sales JSC and Lord Burnett CJ.

12. Independent courts providing citizens with the protection of the law is a core element of the rule of law. It is the means by which the rule of law is vindicated. "The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based" (*R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para 107 *per* Lord Hope). This is achieved by means of judicial review, to bring matters before the courts, and the principles of public law. The constitutional function of the courts in the field of public law is to ensure that public authorities respect the rule of law by not misusing or exceeding their powers (*AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, para 142 *per* Lord Reed). The judicial review jurisdiction is designed to protect the public interest in the lawful use of state powers, as well as the private interests of those who may be affected by the abuse of those powers, to secure the constitutional value of the rule of law (*National Bank of Anguilla v Chief Minister* [2025] UKPC 14, para 89). Substantive public law principles, and the procedure of judicial review, are therefore vital elements in upholding the rule of law. They exist to ensure that the rule of law is respected.

13. In performing their constitutional function through judicial review, the courts must strike a balance. The rule of law requires that the judges must retain the power to insist that legislation of an extreme kind is not law which the courts will recognise. The courts will rightly treat with particular suspicion (and might even reject) attempts to subvert the rule of law by removing governmental action affecting the rights of the individual from judicial scrutiny. On a more prosaic level, the courts must develop and apply the common law to uphold the rule of law. The courts must do this whilst maintaining public confidence, since confidence in the judicial system is itself important for the rule of law.

14. The rule of law, however, is also a limit on the power of the judiciary. In *Lewis v Attorney General of Jamaica* [2001] 2 AC 50, 90 *per* Lord Hoffmann, it was said that departing from a previous decision, because the court on a given occasion has a disposition to come out differently, would damage the rule of law. It would "risk the rule of law being seen as the rule of individual judges" (*Hunte v Trinidad & Tobago* [2015] UKPC 33, para 65). The rule of law requires continuity in the law over time through a respect for precedent. This supports the rule of law in the sense that

everyone, whether a citizen or an organ of government, is bound by rules fixed in advance (see *Chandler v Trinidad & Tobago* [2022] UKPC 19, [2023] AC 285, para 64). It is also the case that, where a remedy is discretionary, it is incumbent on a court to exercise its discretion in accordance with principle and to avoid arbitrariness, as otherwise the rule of law would be undermined to an unacceptable degree (*R (Imam) v Croydon LBC* [2023] UKSC 45, [2025] AC 335, para 43 *per* Lord Sales JSC).

15. There are also limits on what the rule of law requires, putting the rule of law in its proper context. For example, it has been said that "the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court" (*AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, para 170 *per* Lord Reed).

16. Judicial review procedure is important in upholding the rule of law, including ensuring that procedures are fair (including the duty of candour) and that remedies are provided for unlawful acts. The rule of law requires that orders made by courts or tribunals have to be respected and complied with by state bodies.

17. There were proposals for reform of judicial review advanced by the then government in October 2013 and April 2021. ALBA's responses to those consultations explain how the proposals would have affected the rule of law, including via issues such as standing, costs and remedies. ALBA's October 2020 response to the Independent Review of Administrative Law discusses the importance of public law and judicial review to the rule of law (see, in particular, paras 10-23 and 66-67).

'Rule by lawyers' and misunderstanding of the rule of law

18. Although recognition of the value of the rule of law is of significant antiquity,[12] so too is concern about a suggested 'rule of (or by) lawyers'.[13] That concern has been expressed in Parliament in particular in relation to human rights laws,[14] constitutional reforms,[15] and the decisions of international courts.[16] Two particular strands of concern have been raised in recent debate: first, that the rule of law may be used as a "fig leaf to cover up contested policy decisions…as a way of avoiding political debate";[17] secondly, that excessive caution about legal risk stifles policy-making and excessively constrains political actors.[18]

19. There is of course space for debate on the extent to which political decision-making should be constrained by legally-defined rights or other principles of administrative law. It should, however,

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[12] See for a brief introduction J. Waldron, 'The Rule of Law' in *The Stanford Encyclopedia of Philosophy* (https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/), section 3.

[13] See eg D Dyzenhaus, 'Thomas Hobbes and the Rule by Law Tradition' in J. Meierhenrich and M. Loughlin, *The Cambridge Companion to the Rule of Law* (2021) 261-277, summarising Hobbes' criticism of the "rule of the views of lawyers masquerading as objective moral and legal principle."

[14] Eg *Hansard*, HC Deb 11 February 1998, vol 306, col 363-364, William Hague MP; *Hansard*, HC Deb 16 February 1998, vol 306, col 828-829, David Ruffley MP; *Hansard*, HC Deb 28 October 2002, vol 391, col 618, Beverley Hughes MP.

[15] Eg *Hansard*, HL Deb 8 March 2004, vol 658, col 1070, Baroness Goudie, speaking on the then Constitutional Reform Bill.

[16] *Hansard*, HL Deb 6 March 2024, vol 836, col 1592-1593, Lord Jackson of Peterborough, and col 1599-1600, Lord Stewart of Direlton, both speaking in relation to 'rule 39' indications made by the European Court of Human Rights to prevent removal of migrants to Rwanda.

[17] *Hansard*, HL Deb 26 November 2024, vol 841, col 627-628, Lord Wolfson of Tredegar, see also Lord Lilley at col 641.

[18] See generally Dr C Casey and Dr YY Zhu, *From the Rule of Law to the Rule of Lawyers?* (2024), criticising the Attorney-General's *Legal Risk Guidance* (6 November 2024). For a counter-argument, see G Peretz KC, 'The Policy Exchange Paper on the Attorney General's New Legal Risk Guidelines: Excited Adjectives, Unpersuasive Analysis', *UK Constitutional Law Blog* (4 December 2024).

be noted that the judiciary is fully aware of this issue and has repeatedly emphasised its own cognisance of the limits of its constitutional role, as the following examples illustrate.[19]

(1) In *R (Alconbury Developments) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, which concerned decision-making on planning applications, Lord Hoffmann made clear (at para 129) that judicial oversight "does not require that the court should be able to substitute its decision for that of the administrative authority", adding that "[t]he Human Rights Act 1998 was no doubt intended to strengthen the rule of law but not to inaugurate the rule of lawyers".

(2) In *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223, where the Supreme Court rejected a challenge to the 'two-child' benefit cap brought on human rights grounds, Lord Reed PSC emphasised (at para 162) that the ECHR principle of proportionality carried a "risk of undue interference by the courts in the sphere of political choices", which was to be avoided by the courts "apply[ing] the principle in a manner which respects the boundaries between legality and the political process".

(3) In *Re JR123* [2025] UKSC 8, [2025] 2 WLR 435, where the Supreme Court rejected a challenge to Northern Irish sentencing law brought on human rights grounds, Lord Sales JSC and Sir Declan Morgan emphasised the need to afford a "wide margin of appreciation for the legislator in the present context", having regard to the "questions of moral and political judgment" involved which were "very much the province of the legislator" (see paras 48-49).

20. Public understanding of the rule of law is undermined insofar as these nuances are ignored and it is suggested that judges and lawyers take free reign to override democratic decision-making.

21. Likewise, public understanding of the rule of law and the function of the judiciary is undermined by misrepresentation of judicial decisions. A significant example was the response of the Daily Mail to the High Court's decision in the 2016 *Miller* litigation,[20] declaring the judges involved "Enemies of the people" who had "declared war on democracy".[21] Although legitimate disagreement over the correctness of the court's decision is of course possible,[22] the reporting gave no sense of the reasons why the court had reached the decision it had. More recently, criticism of an Upper Tribunal decision allowing a family from Gaza to enter the UK has tended to mislead by suggesting that a 'loophole' enabled the family to take advantage of the Ukraine Family Scheme, rather than that the case involved the ordinary application of human rights laws.[23] Although it is not suggested that there is no room for disagreement about the Tribunal's decision in that case,[24] public understanding is significantly undermined where that disagreement is expressed by reference to mischaracterisation of what the courts or tribunals are in fact doing.

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[19] See also UNCRC Bill [2021] UKSC 42; *Re Scottish Independence Bill* [2022] UKSC 31, *Re McQuillan* [2021] UKSC 55, [2022] 2 WLR 49.
[20] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [2017] 1 All ER 158, deciding that the process of withdrawal from the European Union could not be commenced without legislative authorisation.
[21] J. Slack, 'Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis', *Daily Mail* (3 November 2016).
[22] As demonstrated by the dissenting judgments when the case reached the Supreme Court: [2017] UKSC 5, [2018] AC 61.
[23] The 'loophole' criticism was made by the Prime Minister, *Hansard*, HC Deb, 12 February 2025, vol 762, col 249. The Upper Tribunal's decision was *IA & Ors v Secretary of State for the Home Department* (UI-2024-005295 & Ors), and is discussed at N. R. Langen, 'Imagined Loopholes', *London Review of Books Blog* (15 February 2025).
[24] The Tribunal was itself reversing a decision of the First-tier Tribunal rejecting the family's claim.