# PARLIAMENT AND THE RULE OF LAW

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**The Rule of Law in Parliamentary Discourse**

1. The Rule of Law is something that we talk about a good deal in Parliament. Since Professor A.V. Dicey wrote his *Introduction to the Study of the Law of the Constitution* in 1885, Hansard tells us that the phrase has been used more than 16,500 times in debates in the Chamber, 55% of them in the Commons and 45% in the Lords. More than a third of those references were made in the past 10 years, during which we have used the phrase, on average, more than three times on every sitting day. The statistics show that especially prolific use was made of it during the period in office of a recent Prime Minister – 2019 to 2022.

2. As is well known, we speak in Parliament only about things that we profoundly understand. So what do MPs and peers mean when they talk of the Rule of Law?

    a. Do we allude to Aristotle, with his famous distinction between the rule of laws and the rule of men?

    b. Do we have in mind the formal or "thin" conception of the philosopher Joseph Raz, who insisted that "*the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged*", and cautioned against reading into it the distinct virtues of democracy, human rights and social justice?

    c. Do we take the more expansive and substantive view associated in particular with Lord Bingham, who described the rule of law as "*perhaps the nearest we are likely to approach to a secular religion*", and whose famous eight-part formulation – including the principles that the law must

afford adequate protection of fundamental human rights, and that public officials must exercise their powers in good faith, fairly and not unreasonably – was rhetorically described by his fellow-Judge, Sir John Laws, as "*a suggested list of the virtues of a decent nation*"?

d. Or do we go further still, into the territory of the World Justice Project, whose annual Rule of Law Index, used as a governance indicator by the World Bank and widely relied on by investors as an indicator of risk, ranks 142 countries against standards which include absence of corruption, civic participation, the limitation of civil conflict and the effective control of crime?

3. Well in the service of ALBA – the *Constitutional* and Administrative Law Bar Association, let us not forget – I have reviewed which of the competing academic interpretations best encapsulates the parliamentary usage of the phrase Rule of Law. There has been at least one impressive parliamentary debate on the Rule of Law, in the House of Lords last November. But 170 years of parliamentary usage are best summarised in the definition put forward by the Harvard philosopher Judith Shklar. She described the phrase as "*ruling-class chatter*", and as "*just another of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians*".

4. A kinder way of putting the point is in a sentence of Jeremy Waldron's, whose entry on the Rule of Law in the Stanford Encyclopedia of Philosophy is perhaps the best short treatment of the subject: "*The Rule of Law is supposed to lift law above politics.*" The Rule of Law is indeed a concept for which parliamentarians reach in order to claim the backing of unimpeachable principle for whatever clause or amendment we may be advancing, or resisting, at the time. Invoking the Rule of Law sounds more authoritative than asserting that something is unconstitutional, because everyone knows that we have no codified constitution, while not everyone knows that the Rule of Law is itself a highly contested concept. And though scholars often describe the Rule of Law as an aspiration, or a culture, there is something about the word *rule* – together perhaps with a dim memory of Dicey's

tripartite statement of it – that may imply, at least to the legally uninitiated, something comfortingly certain and binding.

**The Search for a Definition**

5. Neither certainty nor binding quality are realistic outcomes of any debate on the Rule of Law, at least in this jurisdiction. But this should not prevent us from seeking the widest possible consensus for a *working* definition – if only because of the reference in section 1 of the Constitutional Reform Act 2005 to the rule of law as an "*existing constitutional principle*", in respect of which the Lord Chancellor has a statutory role. As Lord Bingham wrote in his Sir David Williams lecture of 2006, this means that

> "... the judges, in their role as journeymen and judgment-makers, are not free to dismiss the rule of law as meaningless verbiage, the jurisprudential equivalent of motherhood and apple pie, even if they were inclined to do so."

Lord Bingham explained that the courts might have to construe a statute so that it does not infringe an existing constitutional principle; and that the Lord Chancellor's exercise of his functions in relation to that principle could be said to be susceptible to judicial review.

6. An uncontroversial starting-point for a definition are the eight "*principles of legality*" developed by the American academic Lon Fuller. Though he described them as the "*inner morality of law*", they are more easily recognised as the central obligation that the law must be obeyed by everyone, especially public authorities – what he called "*congruence between official action and declared rule*", often broadened into the principle of equality before the law – together with seven qualities of good law which he summarised as (1) generality, (2) promulgation, (3) non-retroactivity, (4) clarity, (5), non-contradiction among laws, (6) the possibility of compliance, and (7) consistency over time. I need not explain to this audience that most of these are incapable of perfect fulfilment. But they were, for Fuller, the characteristics that distinguish law from other forms of social control. They are

*formal* in character: concerned not with the content of the law, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be effective.

7. To Fuller's *formal* principles, it is usual, and uncontroversial, to add a list of what are sometimes called *procedura*l principles. These include access to justice, the right to a hearing by an impartial and independent tribunal, the right to reasons and so on. Few now echo Dicey's criticism of administrative tribunals as inconsistent with the rule of law, particularly when they are led by independent judges as is often now the case, though perhaps that old distinction finds an echo in the ruling of the majority of the Supreme Court in the ouster clause case, *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, that the rule of law was insufficiently vindicated by the judicial character of the Investigatory Powers Tribunal. The focus is usually on how to *challenge* administrative decisions, though perhaps there is a case for including also within the procedural branch of the rule of law some of the procedural principles – such as the duty to consult – which *precede* the taking of an administrative decision.

8. Much more controversial is the question of what, if any, *substantive* principles are encompassed by the Rule of Law. Thin, formal conceptions of the Rule of Law are unattractive to some precisely because they are compatible with the grossest injustices. So substantive elements are found to be part of the Rule of Law, either because they are seen as necessary conditions for its existence, or because it would be unconscionable to say for example of a minutely organised totalitarian State that it respects the rule of law.

9. Waldron takes as an example of this tendency John Locke, who in the second of his Two Treatises of Government in 1689, placed himself seamlessly in the tradition leading from Aristotle to Lon Fuller by emphasising the importance of governing through what he called

> "established standing Laws, promulgated and known to the People"

contrasting this with rule by "*extemporary Arbitrary Decrees*". Yet Locke, says Waldron, complicated matters by adding into the mix his theory of pre-political property rights, controversial even at the time, under which any law purporting to "*take from any Man any part of his Property without his own consent*" is of no validity.

10. Fashions change, and more recently, it has tended to be peremptory norms of international law, or fundamental human rights more generally, that are portrayed as substantive elements of the Rule of Law. The argument was eloquently put by Lord Bingham in his book of 2010:

> "A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed."

His argument is of general application and does not depend on the fact that the United Kingdom has assumed international obligations to protect the rights of those within its jurisdiction, or that Parliament has imposed similar obligations on public authorities – though such arguments have been used by others to insert respect for human rights into the Rule of Law by means of the principle that the State must obey the law, including the obligations that it has chosen to assume by Treaty.

11. Lord Sumption, in his recent collection of essays entitled "The Challenges of Democracy and the Rule of Law", deprecated the inclination to give the Rule of Law "*whatever meaning accords with the kind of laws we would like to have*", but identified a category of rights which he described as "*clearly implicit in the rule of law*". These, he said, were rights without which "*life would be nothing more than a crude contest in the deployment of force*" and "*social existence is not possible*". He listed them as:

> "freedom from coercion except by established legal authority, freedom from arbitrary detention, physical violence, injury or death, recourse to impartial and independent courts".

Lord Sumption described another category of rights – freedom of thought, expression, assembly and association and the right to equal participation in free and fair elections – as rights essential to the functioning of a democracy; but since the rule of law can exist without democracy, as our own national history demonstrates, he did not consider them to be elements of the Rule of Law.

**The English Courts**

12. What have the judgments of our own highest courts had to say about all this? As a member of the House of Lords Constitution Committee, which is currently holding an inquiry into the Rule of Law – an inquiry which, I hasten to add, has as yet reached no conclusions – I am indebted to ALBA for listing and digesting a number of these cases in its very useful written evidence to us. Though our courts have not so far as I know ever hazarded a definition, it appears to be the *formal* and *procedural* characteristics of the Rule of Law to which they refer in their judgments. To give four examples:

    (a) In *R v SSHD ex p Pierson* [1998] AC 539, 591, in advance of the entry into force of the Human Rights Act, Lord Steyn invoked the rule of law as the source of the principle that a sentence lawfully passed should not be increased *retrospectively*.

    (b) In *R (Lumba) v SSHD* [2011] UKSC 12 [34], Lord Dyson invoked the rule of law support of the proposition that where a public body adopts a policy as to how it will exercise a statutory discretion, that policy must generally be *published*.

    (c) In *R (Unison) v Lord Chancellor* [2017] UKSC 51 [66][68], Lord Reed famously spoke of the constitutional right of *access to the courts* as inherent in the rule of law – a concept at whose heart is the idea that society is governed by law.

(d) In *National Bank of Anguilla v Chief Minister* [2025] UKPC 14, Lord Reed and Lady Rose for the Privy Council grounded the duty of candour in judicial review as part of the judicial function of securing the constitutional value of the rule of law – characterised in the earlier case of *AXA General Insurance v HM Advocate* [2011] UKSC 46 as imposing a duty on public authorities not to *misuse their powers* or *exceed their limits*.

13. Recent extra-judicial commentary about the Rule of Law has also focused on the formal and procedural aspects of the Rule of Law.

a. Lord Sales, in his Robin Cooke lecture given in Wellington last December, noted that the more substantive interpretation is given to the concept, the greater the tension with the democratic principle that underpins the sovereignty of Parliament.

> "Democratic self-determination … requires contestation. … It is better to embrace contestation as part of the vibrant life of society and not as something to be suppressed or denied."

Responding to the school of thought that a thin reading of the Rule of Law renders it an empty vessel, he made a *political* case for a formal conception of the Rule of Law as a *legitimating function for the exercise of public power*, and a *moral* case for it as contributing to human dignity. He cited Neil McCormick for the proposition that "*a society that achieves legal certainty and legal security enables its citizens to live autonomous lives in circumstances of mutual trust*".

b. Lord Reed, in a written submission to the Constitution Committee's Inquiry, also embraced a largely formal and procedural conception of the rule of law. He noted the particular responsibilities of Parliament for making laws that conform to Fuller's principles, and also for making the laws which govern the courts, judicial appointments and the judiciary's

terms of service, themselves the foundation of judicial independence. He identified a number of potential threats to the rule of law, including hostility to so-called elite institutions and to the very idea of a society governed by rules; the identification of lawyers with their clients; attacks on the competence, impartiality and integrity of judges; and, echoing a constant theme in the evidence we have received,

> "a level of resourcing of the justice system that prevents the police or the courts from providing effective protection of rights, whether through the civil or the criminal law".

In oral evidence session on 4 June, he elegantly ducked an invitation to agree (at least for the purposes of the constitutional principle referred to in the Constitutional Reform Act 2005) with the long-standing position of the Constitution Committee that the rule of law implies compliance by the State with its international obligations. As to human rights, he accepted that the need for interferences with fundamental rights be "*provided for by law*" or "*in accordance with law*" was a requirement of the Rule of Law, and that the same was true of certain other principles reflected in the European Convention, such as access to justice and non-retrospectivity. But the need for interferences with fundamental rights to be necessary in a democratic society, or proportionate – desirable as it might be – was not in itself a component of the Rule of Law.

**The EU Conditionality Regulation**

14. There perhaps we might leave the subject – with an agreeable if inconclusive debate about the ill-defined and undefinable between philosophers, academic lawyers, judges and the occasional politician. But as the foundational values of democratic society come under increasing threat around the world, the subject has recently assumed a more practical and urgent aspect – including on our own continent. I refer to the judgments of the EU Court of Justice of February 2022 in *Poland and Hungary v Parliament and Council of the European Union*

ECLI:EU:C:2022:97. Cases about the EU's Conditionality Regulation of 2020 might not sound very exciting. But the purpose of that Regulation – introduced with the situation in Hungary and under the former government in Poland very much in mind – is to make the grant of EU funds conditional on respect for the rule of law, at least in matters affecting the EU budget. These direct challenges to the Regulation, brought by Poland and Hungary, were calculated to frustrate that effort by questioning the definability of the Rule of Law. Perhaps that is why the Court of Justice sat in its plenary composition, with 25 Judges on the bench.

15. The rule of law – rendered in German as *Rechtsstaatlichkeit* and in French as *L'État de Droit* – is one of the founding values of the Union, listed in Article 2 of the Treaty of European Union. The Council and Parliament *defined* the rule of law in Article 2(a) of the Conditionality Regulation, in a manner that will already appear remarkably familiar, as including:

> "the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law."

I pause to note that this is by no means a bloated definition: respect for the rule of law is said to be *linked* to respect for democracy and for fundamental rights, but remains distinct from both. Nor is any reference made, expressly at least, to compliance with international law.

16. The breaches of the rule of law with which the Regulation, and therefore the Court, were particularly concerned were:

    a. endangering the independence of the judiciary;

    b. failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, withholding the resources needed for their proper functioning, or failing to ensure the absence of conflicts of interest; and

c. limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.

Once again, the ambit was limited, and strongly focused on access to justice.

17. Where the European Commission considered on reasonable grounds that breaches of the rule of law had a bearing on the EU budget or the financial interests of the Union, the Regulation gave it the power to initiate a procedure that could culminate in measures including a suspension of payments or commitments from the Union budget.

18. Hungary argued that the concept of the rule of law referred to in Article 2 of the Treaty on European Union and developed in the Conditionality Regulation does not lend itself to a precise definition; that its values are political rather than legal in nature; that the definition in the Regulation contained expressions which are too imprecise for it to be possible to foresee the conditions on the basis of which a breach of the principles of the rule of law may be established; and that the Commission and the Council were given excessive discretion in a procedure which may lead to the imposition of penalties [222]. The definition of the rule of law was therefore contrary to legal certainty – or, a lover of paradox might say, contrary to the rule of law itself.

19. The Court disagreed: the principles were sufficiently clear and precise, and their application sufficiently foreseeable. The manner in which the discretion of the authorities was to be exercised was indicated with sufficient clarity to give adequate protection against arbitrary interference. And the principles set out in Article 2(a) of the Conditionality Regulation did not go beyond the limits of the concept of the Rule of Law. The Court noted in particular that while the Regulation made reference to the principle of fundamental rights, it did so only "*by way of*

*illustration of the requirements of the principle of effective judicial protection*", and that the same was true of the principle of non-discrimination [229]. The Court thus echoed the concern of the legislator not to confuse the rule of law with the conceptually distinct notion of compliance with a complete catalogue of human rights.

**The Council of Europe's Venice Commission**

20. Where did the EU's formulation come from? As the Regulation stated in its preamble, and the Court noted, the definition of the Rule of Law in the Conditionality Regulation reflected the characteristics identified by the European Commission for Democracy Through Law, better known as the Venice Commission of the Council of Europe, in its 2011 Report on the Rule of Law and in its Rule of Law checklist of 2016.

21. The Venice Commission is an expert body with national members drawn from the Council of Europe Member States – every country in Europe except Belarus and Russia – and a number of others. Many if not all of the British members, as you would expect, have been members of ALBA. Established in 1990 as post-communist transitions were under way in central and Eastern Europe, the principal function of the Venice Commission is to provide advice at the request of State organs on reforms to national constitutions, laws and institutions in order to strengthen the Council of Europe's three pillars of Democracy, Human Rights and the Rule of Law. Its longevity may be partly attributable to the fact that its meetings take place four times a year in what I am told is a particularly beautiful *scuola* in the city from which the Commission takes its name.

22. The Venice Commission's Report of 2011 on the Rule of Law was chaired by Sir Jeffrey Jowell, for 30 years of course the joint author of de Smith's *Judicial Review*. Its aim – which might have intimidated a lesser scholar – was to identify common features of the Rule of Law and its approximate German and French equivalents,

*Rechtsstaat* and *État de Droit*. In his written evidence to the Constitution Committee earlier this year, Sir Jeffrey described his experience as follows:

> "The Committee initially encountered strong resistance to the view that the rule of law is an accepted and universal concept among liberal democracies. In particular, there was great difficulty in gaining acceptance from the 47-country body that it was fit for countries outside of the common law world, and did not fit the different concepts of the Rechtsstaat, État de Droit and so on.
>
> The Committee sat for four years of hard examination but in the end there was unanimous agreement that the rule of law is the clear-cut, distinct and core feature of any democracy properly so-called. .... [I]n the end they were convinced that there is sufficient overlap to allow countries across Europe to sign up to its tenets. This was aided by the fact that Tom Bingham's book on the Rule of Law (first published in 2010) provided an approach that united the Committee and persuaded the Venice Commission and the Council of Europe of its force."

23. That remarkable piece of legal diplomacy was followed by a further, characteristically pragmatic British initiative – a conference on "The Rule of Law as a Practical Concept" – launched in 2012 under the United Kingdom chairmanship of the Committee of Ministers, in conjunction with the Foreign Office and the Bingham Centre for the Rule of Law. That in turn led, after a further four years of hard work, to the checklist to which the EU Council and Parliament, followed by the Court of Justice, referred. It consists of five benchmarks, followed by a large number of specific practical questions that may be used – and commonly are used, not least in the newer democracies of Europe, by anyone wishing to verify whether a particular State complies with the benchmarks.

24. The five "benchmarks" may sound familiar. They are as follows:

    a. ***Legality*** – which in distinction to anarchy on the one hand and tyranny on the other, requires everyone to comply with the law.

    b. ***Legal certainty*** – the law should be accessible, stable and predictable, respect legitimate expectations and be non-retroactive.

c. ***Safeguards against arbitrariness and abuse of power*** – in particular, a system of judicial review.

d. ***Equality before the law*** – including by avoiding the grant of special legal privileges, save where objectively justified.

e. ***Access to justice*** – the implementation of laws, and the ability of everyone to challenge decisions that affect them in a fair trial before an independent and impartial decision-maker.

25. That checklist, Sir Jeffrey told us in his evidence, has been "*widely cited and applied in the case-law of different countries*". It seems that in this country it is has until now been chiefly cited in publications of the Bingham Centre and JUSTICE – but then we have not yet experienced a serious, across-the-board challenge to rule of law values of the sort which has been seen elsewhere. Whether such challenges come here or not, we can appreciate from across the English Channel the legislative and judicial weaponisation of the Rule of Law – and the remarkable export of British values that lies at its heart.

26. An all-day conference in the Foreign Office earlier this week was an opportunity to discuss and publicise the updating of the Checklist that is currently in progress. The checklist is already rich in specific questions that expose the outworkings of the Rule of Law. But in its essentials I hope it is still, as Lord Etherton described it during last November's debate in what turned out to be almost his last speech in the House, "*a thin version of the rule of law … appropriate for an international concept of the rule of law*". No doubt there will be all sorts of pressures to thicken it in the next iteration, in response to this or that specific abuse of power. But to load too much on to the Rule of Law risks jeopardising its intellectual coherence and the case for its universality. I hope the Venice Commission will not alter too fundamentally a series of principles that seem broadly to be, like Goldilocks's porridge, neither too thick nor too thin.

**The Rule of Law and Parliament**

27. We have strayed rather a long way from my intended theme of Parliament and the Rule of Law – so I finish by coming back to it. What specifically can Parliament do to safeguard and advance the rule of law?

No rule of law issue

28. I have indicated a preference for not too thick a conception of the Rule of Law – and consistency requires me to refrain from dressing my whole stable of hobby horses in Rule of Law colours. So:

    a. The perennial frustration of skeleton Bills, excessive delegation of powers and Henry VIII clauses deserves principled attention, of the kind that the Hansard Society and our own Delegated Powers Committee, among many others, have given it for many years. But while the separation of powers between executive and *judiciary* is most certainly a rule of law issue, the division of powers between executive and *legislature*, which varies greatly as between different legal systems, is in a more ambiguous position. Where legislative authorisation is required for executive rule-making, as in the United Kingdom, Rule of Law concerns are not dominant; though of course secondary legislation may engage other aspects of the Rule of Law. The Covid-era experience of constantly changing laws, and an uncertain distinction between law and guidance, unquestionably did so. Still with Covid but on a more positive note, the fining of the Prime Minister and Chancellor of the Exchequer for partying during Covid was a universally noticed, if relatively trivial, demonstration of the principle that the law must apply to everyone.

    b. Then there is the reform of CRAG, still based on the Ponsonby Rule of 1924: the extent to which Parliament should have sight of the negotiation mandate for international treaties, now that they bear on so many more

everyday subjects than was once the case, and should have an opportunity to debate them before they are signed. There is a balance to be struck between what Blackstone described as the "*unanimity, strength and despatch*" of a powerful Executive, and the proposition embraced by Bagehot that Ministers ought to be "*obliged to explain clearly their foreign contracts before they were valid, just as they have to explain their domestic proposals before they become law*". But once again, this is not chiefly a rule of law issue.

c. The same I think is true of the notion, embraced by the Committee on Standards in Public Life and embodied in a Private Member's Bill in my name, that certain constitutional watchdogs, and the principles on which they function, should be placed in statute. Among those included in my Bill are the Independent Adviser on Ministerial Interests, the Commissioner for Public Appointments and the House of Lords Appointments Commission. This would not stop these offices being abolished by a future Prime Minister, impatient to have their own way in all things, but at least the requirement of parliamentary consent would inject some friction into the system. Let us not forget the final words of Peter Hennessy's little book "Could it Happen Here", published earlier this year: "*It <u>could</u> happen here.*"

<u>Rule of law issue for government rather than Parliament</u>

29. Other issues unquestionably *do* form part of the Rule of Law, but despite having a legislative component are in reality the responsibility of government, as the initiator of legislation, rather than Parliament. Into this category fall decisions to consolidate and codify the law; the proper funding of the justice system and the reduction of its appalling backlogs, particularly in crime; and a solution to endlessly changing immigration rules and guidance – which make a mockery of Fuller's principle of consistency over time.

30. But let me finish with two reflections on rule of law dilemmas which more directly concern Parliament. I should really have added a third – ouster clauses, a recurrent theme in recent legislation – which embody in its most pointed form the conflict between parliamentary sovereignty and the rule of law. The courts may have pragmatically accommodated the exclusion of CART judicial reviews by section 2 of the Judicial Review and Courts Act 2022, I think with good reason – but it is hard to imagine them ceding so easily in the face of so blatant and cynical an ouster clause as was found in section 2 of the Safety of Rwanda (Asylum and Immigration) Act 2024. However that is now moot, since the Act is being repealed; the subject is complex enough to need a lecture of its own; and I see that the next panel is ideally placed to deal with it from both a judicial, a political and an academic perspective. So I pass straight on to another topical issue: retrospective legislation.

Retrospective legislation

31. I have always thought it odd that while Parliament is constrained by the Rule of Law, save in exceptional circumstances, not to legislate with retrospective effect, the common law is subject to no such constraints. Indeed it is of the essence of the common law that judges purport to declare the law as it has always been, no doubt explaining why, every time I listen to commercial radio, I am encouraged to apply for the return of undisclosed commission payments on that car I bought 10 years ago.

32. Of course, there are factors which mitigate the capacity of courts to change the common law with retrospective effect. Judges will often prioritise stability over tailored justice, conscious that to do otherwise could "*risk the rule of law being seen as the rule of individual judges*", as the Privy Council put it in *Hunte and Khan v Trinidad and Tobago* [2015] UKPC 33, [64]. When change does come it generally proceeds incrementally, with warning of potentially significant changes being given in *obiter dicta* or dissenting judgments.

33. But the pressure in Parliament to legislate with retrospective effect is often at its strongest when we are seeking to change the law as it has been declared, with retrospective and often unexpected effect, by the courts. Recent examples include:

    a. the reversal of the Supreme Court's judgment on the *Carltona* principle in *R v Adams* [2020] UKSC 2019 by the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023;

    b. the Litigation Funding (Enforceability) Bill 2024, which would have reversed the effect of the Supreme Court's judgment in PACCAR [*R (Paccar) v Competition Appeal Tribunal* [2023] UKSC 28] had it not fallen at the last General Election; and

    c. the Deprivation of Citizenship Orders (Effect during Appeal) Bill 2025, currently before the Commons, which aims to reverse with retrospective effect the result of N3 (ZA) v Secretary of State for the Home Department [2025] UKSC 6.

34. Changing the law as it has been declared by the courts is a legitimate function of a sovereign Parliament. But Parliament, according to nearly all formulations of the Rule of Law, is not supposed to legislate retrospectively. I pose two questions, without suggesting answers. How strong should the inhibition be against retrospectively reversing a judgment which itself had retrospective effect? And should the inhibition be stronger if the Government was itself a losing party in the case in question?

Clarity of constitutional law

35. My final reflection concerns clarity of the law in an area where clarity is currently at its lowest, outside a charmed circle of experts, and where Parliament is particularly well placed to make a difference – that is, *constitutional* law. The executive has given us the Cabinet Manual, based on a New Zealand model –

though it has not been updated to reflect the constitutional travails of the past 14 years, and is concerned with the operation of government rather than the constitution as a whole. But given the primacy of Parliament under our constitution, surely Parliament could do more to bring clarity to our famously obscure constitutional arrangements.

36. Parliamentary bodies have recently taken some small steps in this direction. Let me recommend two recent publications:

    a. The House of Commons Library research briefing entitled "The United Kingdom constitution – a mapping exercise" – a comprehensive summary of our constitutional arrangements, regularly updated; and

    b. The House of Lords Constitution Committee's "Legislative Standards of the Constitution Committee", an informal codification of the standards that we have identified in our reports on government Bills over the constitutionally tumultuous period 2017-2024. As well as providing a form of institutional memory for the Committee itself, this clear and accessible document has the potential to increase awareness of those standards among parliamentarians who debate legislation and, as a supplement to the Cabinet Office Guide to Making Legislation, those within government who are responsible for formulating it.

37. More could be done.

    a. We could set up, as proposed by the Institute for Government, the Bennett Institute and others, what Peter Hennessy has referred to as a "*Joint Committee for Parliamentary Standards*", its work supported by an Independent Office for the Constitution. Other countries with political constitutions such as the Netherlands, Finland and Sweden have devised parliamentary or extra-parliamentary mechanisms of this kind.

b. That body would involve interested citizens in its work. It would conduct pre-legislative scrutiny of constitutional bills. It would establish a definitive list of "constitutional acts" which, by convention, could be neither impliedly repealed nor amended by Henry VIII clauses. And it would authorise the preparation of two documents which would not have legal force but which could be endorsed by Parliament as authoritative, and regularly revised: a short and accessible Summary of the Constitution, aimed at improving public understanding, and a much fuller Restatement of the Constitution, complete with explanatory notes – a sort of constitutional Dicey & Morris – not to have binding force but to offer definitive guidance to constitutional actors.

38. The aim would not be to entrench or change our existing constitutional arrangements, but to render them clear and accessible. That, surely, would conform to everybody's idea of the Rule of Law.