Why the Lord Chancellor's role is now more central than ever , and questions about International Law'.

Lord Howell, Debate in Lords on Constitutional Committee Report.
Thursday ,July 20th,2023

On defining the Rule of Law, on nature of international and on the key role of the Lord Chancellor.

My Lords, I join other noble Lords in congratulating the noble Baroness, Lady Drake, on her skilled chairmanship of the sessions of the committee that gave birth to this report. It was not an easy task at all. I also echo strongly the words of welcome to the noble Lord, Lord Hennessy. It is marvellous to see him again. Although we have both long since been rotated off the committee, we worked together on earlier reports. That was a real honour and a pleasure, and something to keep in my memory. I greatly look forward to what he has to say in a few moments.

My contribution will focus not so much on the role of the Lord Chancellor and the law officers in upholding the rule of law—on which we have already heard some wise words—as on the first section of the report, which interestingly analyses what the rule of law really means today, and to what that rule extends.

First, I add briefly my agreement with the report's finding that the Lord Chancellor must be a massively credible figure and the pillar not only in advising the Cabinet what is or is not constitutional and robustly defending the judiciary but in ensuring that no one is above the law and that it applies equally to both rulers and the ruled. That fundamental point seems to have escaped the comprehension, for instance, of the autocrats in today's world, particularly the Chinese leaders, who often assert indignantly that of course the law applies to the people—but not to the leaders of the Government or the all-powerful Chinese Communist Party. That is the big geopolitical dilemma we all face.

All this begs the key question for us, which the report bravely faces in its first few pages, of what exactly the rule of law means and, especially, what it means in an international context, where other parties outside our

national judicial space may not be playing quite the same game as we are. As one witness to the committee's inquiry put it,

"One person's legal nicety is another person's rule of law".

Other witnesses talked about the rule of law as a "protean"—presumably meaning "evolving"—concept, or, in one case, as being "somewhat nebulous". There is also the dilemma, put to us by several very senior legal figures as witnesses, that when it comes to what some deem our international legal obligations, Parliament can legislate to the contrary, and since the will of Parliament is the law of the land, it must take precedence in the enforcement of the law in the courts.

The gospel to which many legal minds seem to return in untangling this dilemma—and to which the report itself returns—is the opinion of the late Lord Bingham, whose views get a whole half-page box in the report. Tom Bingham was pretty unequivocal about the rule of law applying just as much in the international legal order as in national domestic law. Others were more doubtful about that and that identity, arguing that international law raises quite different and changing issues. Personally, I share their doubts perhaps a little more strongly than the report consensus does.

It seems obvious to me that where one side in an international agreement or treaty is a foreign power or institution which then bends or even flouts the spirit of the agreement or treaty, or interprets it in unexpected ways, the other side—meaning us—has every right to alter its stance. Where dispute machinery exists, as in Article 16 of the EU withdrawal treaty, plainly, that should be the first port of call. That is obvious. The Vienna convention on treaties—which does not get much of a mention—makes allowance for this, in Article 60 and possibly Article 62 as well, if the dispute machinery fails to get a constructive and satisfying consequence, or in some cases is simply disregarded, as, for example, the Chinese nowadays often do.

In these circumstances, it seems to me that a unilateral response, even if temporary, to a unilateral move by another party may well be justified. Frankly, I am sorry that we did not go deeper into those kinds of circumstances. Moves by the UK Government such as the famous—some claim notorious—two clauses tacked on to the internal market Act, which were deemed to be in breach of UK treaty obligations, seemed to be assumed from the start to be "legal sins" rather than moves in an unfolding and wider drama. I know that that will not have the support or agreement of many colleagues. This all requires more careful thought before rushing to judgment.

The report both begins and ends its summary by emphasising the vital link between upholding the rule of law and the whole health of our modern democracy. That means being open-eyed and honest not only about the unfolding meaning of the rule of law but about our liberal democracy and how in the digital age it is evolving rapidly in response to the revolutionary change in the way people and institutions relate—indeed in all relationships, from the humblest, the family, up to the highest level of international exchange.

Democracy is not in decline, but it is certainly under attack. We must attend to what Alexis de Tocqueville called “the errors of democracy” if our rule of law is robustly to uphold democracy’s health as a better performer than the authoritarian alternatives. That is surely better than just standing by and letting democracy’s obvious errors and weaknesses grow or complacently assuming that it all works fine and needs no defence or adaptation.

Warning against that dangerous tendency is one more major task for a truly influential Lord Chancellor at the heart of the Government and the Cabinet but also at the heart of our independent judicial system—he or she is the bedrock—but that is clearly a task for another day and, maybe, another report.