HOUSE OF LORDS

Revised transcript of evidence taken before

The Select Committee on the Constitution

ORAL EVIDENCE SESSION WITH THE RT HON. MICHAEL GOVE MP, LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE

Evidence Session No. 1 *Heard in Public* *Questions 1 - 12*

WEDNESDAY 2 DECEMBER 2015

Witness: Rt Hon. Michael Gove MP

Members present

Lord Lang of Monkton (Chairman)
Lord Brennan
Lord Cullen of Whitekirk
Baroness Dean of Thornton-le-Fylde
Lord Judge
Lord Lester of Herne Hill
Lord Maclennan of Rogart
Lord MacGregor of Pulham Market
Lord Morgan
Lord Norton of Louth
Baroness Taylor of Bolton

Examination of Witness

Rt Hon. Michael Gove MP, Lord Chancellor and Secretary of State for Justice

Q1 The Chairman: Lord Chancellor, thank you very much for coming to meet us this morning. We greatly value the regular meetings we have with the Lord Chancellor, and this is the first that we have managed to arrange since you took over. We appreciate your presence. We know that the Bill of Rights is an issue on which a lot of detail is not yet available, and we understand that that is not an issue that we should pry into today. There are a number of other things. May I just start with a general question relating to it, but more about the process of consultation? This Committee always regards it as very important that constitutional measures should have the widest possible consultation within government and then outside government. Can you indicate a general intention in that respect as regards matters like Green and White Papers, pre-legislative scrutiny and anything else you would like to indicate?

Michael Gove MP: Absolutely. Thank you very much for the invitation to appear in front of you, Lord Lang. There has already been some discussion, obviously, about whether there should be any revision of the Human Rights Act at all. In the last Parliament, the coalition Government did some broad, consultative work. The conclusion of those tasked with reviewing the human rights landscape was that there was a case for reform. While there was a spectrum of opinions, it was nevertheless the case that that review formed, in some respects, the constitutional equivalent of a Green Paper. It set out the question, "Should we change?", and it concluded that, yes, there is a case for change. Now that we have a majority Conservative Government we are, within government, seeking to develop a set of proposals that will, outside government, command as much consensus as possible, because we agree with you that, when you are thinking of significant constitutional changes, no part of the United

Kingdom should be allowed a disproportionate say or a veto, but it is absolutely vital that we consult as widely as possible. In that regard, we want to bring forward a consultation paper. At the moment, we have a consultation document that is being shared with colleagues within government so that they have an opportunity to refine it and contribute to its eventual formation. Once individual conversations with individual members of the Government, particularly the Home Secretary, the Foreign Secretary, the Defence Secretary and the Secretaries of State for territorial departments, have been concluded, we would take it through Cabinet Committee and Cabinet and then we would publish that consultation document. The consultation document will contain a series of open-ended questions, the aim being to secure the broadest possible consensus behind whatever change is considered desirable.

Q2 Lord Lester of Herne Hill: Lord Chancellor, as you know, I was a member of that constitutional commission, and I joined the Conservative majority on the basis that there was a case as long as it was not weaker than what we have already. May I thank you for having seen me and discussed this matter some months ago? My question is this. Whatever proposals you make, do you see them strengthening or weakening the rights of individuals and minorities to be protected in their human rights and freedoms?

Michael Gove MP: The aim is to strengthen. One of the points that was brought out by your work—if I may say so—and the work of your colleagues is that the good name of human rights has been tarnished. We can debate why and who is to blame, if indeed blame should be allocated, but it is nevertheless the case that human rights, which, to a very great extent, are a British or an English creation, have come to be seen as providing protection for people who are unmeritorious rather than safeguarding the essential liberties that go to make up the birthright of any resident in these islands. We want to stress, first of all, that the rights in the European convention were framed as a result of leadership by British lawyers and British politicians. These rights are, as expressed in that convention, admirable. The application of those rights by individual nations, of course, will be different because we have different legal traditions in England, France, Belgium and all the countries that are signatories to the convention. It should be the case that they should be clear and, where possible, strengthened and clarified. It is also the case that there are some specific rights and traditions in this country that are not observed in quite the same way in other countries but which it may be appropriate for our Bill of Rights to give greater force to. For example, we are, and I certainly am, particularly attached to the principle of trial by jury. It may be the case that, while there are

particular provisions in the convention on the importance of a fair trial, we could be more specific about what we mean by that in an English or a UK context. It is also the case, going right back to the 16th century and before, that free speech has been a particularly important value in the minds of Britons. Therefore, it may be the case, as indeed was the case with the original Human Rights Act, that we may want to be more explicit about the value that we place on that freedom. Our aim is to consult and the aim is to strengthen protections wherever possible.

Lord Lester of Herne Hill: Could I follow up with a tiny further point? I understand all that, and thank you for it. But we come up against parliamentary sovereignty. The rest of Europe and most of the common law world does not have a doctrine of absolute parliamentary sovereignty; they have written constitutions with fundamental rights guaranteed. Do you see it as your aim to strengthen parliamentary sovereignty against the rights of the individual or not?

Michael Gove MP: It is a matter of fact that other countries defend individual rights by having written constitutions, but I would argue, notwithstanding the fact that there have been occasions when recourse to Strasbourg has helped to advance individual rights, not least when the *Sunday Times* advanced the cause of press freedom, that nevertheless parliamentary sovereignty and our traditions have been a more effective bulwark over time for individual rights than almost any other constitutional arrangement of which I can think. I am attached to the principle of parliamentary sovereignty, and I would not wish to see parliamentary sovereignty as we understand it at the moment undermined by any of the changes that we seek to make. Again, we will consult. There will be open questions.

Q3 Lord Cullen of Whitekirk: Is it accepted that the repeal of the Human Rights Act and the creation of a Bill of Rights Act would give rise to the application of the Sewel convention?

Michael Gove MP: It is an open question, and the reason why I hesitate to pronounce definitively is that we would have to see what was in any given Bill in order to be absolutely certain as to whether a legislative consent Motion might be required in any of the devolved legislatures.

Lord Cullen of Whitekirk: Taking the matter at its most basic, is it right that legislation in regard to human rights is a matter that is not reserved?

Michael Gove MP: It is neither reserved nor devolved.

Lord Cullen of Whitekirk: So it is open to the Scottish Parliament to make its own provision for human rights, if it so chooses.

Michael Gove MP: My understanding of the constitutional and legal position is that only the United Kingdom Parliament can amend the Human Rights Act, but it is the case that the application of human rights, by definition, differs in Scotland as distinct from other parts of the United Kingdom because Scottish courts will interpret those rights consistent with Scots law and Scots legal tradition.

Lord Cullen of Whitekirk: What I am driving at is whether the creation of a new Bill of Rights Act is something that would give rise to the Sewel convention because it would enter an area where the Scottish Parliament itself could legislate.

Michael Gove MP: I do not believe, although I stand to be corrected, that the Scottish Parliament can legislate to alter fundamentally the rights architecture which the Human Rights Act has put in place. That is a matter for the United Kingdom Parliament, as I understand it.

Lord Norton of Louth: On the Sewel convention, the Government have it in the Scotland Bill, as you know, and it is in a somewhat unusual form because there are precedents for transposing conventions into statute, but what happens here is that it is not transposed into statute but just plonked into statute; it just repeats what Lord Sewel said. Presumably, the aim is to maintain flexibility.

Michael Gove MP: Yes.

Lord Norton of Louth: But the Government claim that it would be non-justiciable. Lord Dunlop on Second Reading said that it is a convention, but it is in statute. How is it non-justiciable?

Michael Gove MP: My understanding, and we sought legal advice, was that it is a convention. It is not an absolute requirement placed on the Government and it is not justiciable. It is always open to the United Kingdom Government to make the case that the Sewel convention need not apply and that a legislative consent Motion need not be given in particular circumstances. It is a convention and it is, for understandable reasons, one that this Government, like previous Governments, would prefer to honour.

Lord Norton of Louth: You have the situation where it is both convention and statute, which has not happened before.

Michael Gove MP: Absolutely.

Lord Norton of Louth: I still do not see how it could be non-justiciable if it is in statute. It could be challenged. The Government may say, "This is not a normal situation". What is to stop someone from bringing that before the courts?

Michael Gove MP: Of course someone could attempt to, but I hope the clearly expressed intention of the Government, as articulated by Lord Dunlop in Parliament, would be respected by the courts, but that would be a matter for others to decide.

Lord Norton of Louth: The courts.

The Chairman: Lord Chancellor, do you agree that the Government's own guidance about declaratory legislation is do not do it if you can avoid it? The first two clauses in the Scotland Bill, both being declaratory, raise very difficult issues of the kind that Lord Norton has just mentioned.

Michael Gove MP: That is a fair point.

The Chairman: I will not draw you any further because we are going into Committee next week, but what you have said so far is very interesting.

Q4 Lord Morgan: We have considered the Scottish Parliament and the Welsh Assembly in relation to wider British legislation. I am wondering about their role in connection particularly with their power to alter the franchise. Could that be deemed incompatible with the Convention on Human Rights? For example, could it be said that other categories of possible voters are being denied that privilege, whereas 16 and 17 year-olds are not? Is that a problem?

Michael Gove MP: I think it is the case, as a matter of law, that any legislation passed by a devolved legislature is secondary legislation and, therefore, can be struck down. It is theoretically possible, although I would think extremely unlikely, that a devolved legislature could alter the franchise and that the courts might review that and argue that it was not compatible with convention rights and strike the legislation down.

The Chairman: We are making very rapid progress.

Q5 Lord Judge: Lord Chancellor, in the past this Committee expressed the view that the Lord Chancellor has a special responsibility for the rule of law over and above that of other Ministers. I was not a Member of the Committee then but I happen to share that view. What is your view?

Michael Gove MP: The position of Lord Chancellor is by definition and tradition different from that of other Cabinet Ministers. It is a position that has of course changed as a result of the Constitutional Reform Act and the creation of the Ministry of Justice. I will do my best to try to define it in the knowledge that it is an evolving position, one that is open to debate, and that people of good will can differ on the matter. The role of the law officers is particularly important. They are the Government's legal advisers. When it comes to any decision that a member of the Executive chooses to take and they require confirmation that it is within the

law, it is to the Attorney-General, the Solicitor-General and to the law officers that they must turn. I am not a lawyer and I am not a law officer, but as Lord Chancellor I swear a particular oath. In that oath, I make it clear that I will defend the rule of law and the independence of the judiciary. I take that oath very seriously, and I also believe that beyond the straightforward words of the oath there is a responsibility on my shoulders to look, in so far as it is possible, across the responsibilities of government and to intervene not just when narrow questions that affect my department are debated, but in a spirit of seeking to ensure that the concerns that I hope we all share for an appreciation of the vital importance that the rule of law plays in securing good government are respected across government. It is a role that depends on the exercise of a mixture of what I hope are political experience and judgment and particular respect for the traditions of the office that I hold.

Lord Judge: Is there a distinction between the office that you hold when you are Secretary of State for Justice and when you are Lord Chancellor, and, if there is, how is it manifest?

Michael Gove MP: There is, and it is manifest in a number of different ways. There are, for example, conversations that I have with the Lord Chief Justice and with the Judicial Executive Board when I think of myself as Lord Chancellor, not as a party politician but as a partner of theirs in seeking to ensure that the work of the judiciary overall and of the courts can be carried on in the most effective way, and that their interests can be protected. It is also the case that, when there are specific questions that relate to matters of law or matters of the constitution, I can, I hope, step outside the specific responsibilities that I have as Secretary of State of Justice, and try—try—to take a long view. At the same time, I am conscious that as Secretary of State for Justice I am a departmental Minister. I am responsible for thousands of dedicated civil servants, not just those in the department but those who look after those who are in the care of our prisons and those who run the daily administration of our courts. I am also responsible for making the case for broader government policy when there is cut and thrust both in the arena of Parliament and on the media. I recognise that no one can ever be immune, if they are an elected politician, to the loyalties that they owe their parliamentary and political colleagues, but I try, wherever possible, sometimes to take that longer view looking at the Government's position as a whole.

Lord Judge: As a result of your conversations with the Lord Chief Justice and the Judicial Executive Board, do you think it part of the role of the Lord Chancellor to convey the views about the different matters they express to you to your Cabinet colleagues?

Michael Gove MP: Yes. If it is the case that they wish me strongly to express a particular view on any matter, I see it as my responsibility. I also see it as my responsibility to ensure that when the Lord Chief Justice feels that he needs to see a member of the Cabinet, whether that be the Chancellor of the Exchequer or anyone else, he can do so, whether with me as his wingman or in private. It is important that senior members of the judiciary should have the opportunity to talk to relevant government Ministers in private on issues that matter to them, but it is also important for me to act as a conduit between the judiciary and the Executive.

Lord Judge: I follow that. If I may say so, it is admirable, but there is still the question of how the Lord Chancellor conveys judicial feelings to the Cabinet as opposed to individual Ministers.

Michael Gove MP: I know that, on broad terms, my predecessor, Ken Clarke—I obviously have to be careful about the nature of Cabinet discussions because they are confidential—had occasion at a couple of points to remind the Cabinet of the views of the judiciary and the importance of safeguarding judicial independence as various considerations were put forward. It is also the case that, in arguing for the reform programme for Her Majesty's Courts & Tribunals Service, I have, albeit briefly, explained in full Cabinet the importance of taking account of and being aware of the views of the senior judiciary.

Lord Judge: It follows, I think, that you agree with the approach that Ken Clarke—all confidences excluded—took on occasions.

Michael Gove MP: Yes.

Lord Judge: That is part of the role of the Lord Chancellor.

Michael Gove MP: Absolutely.

Lord Judge: That is part of the reason why he exists and is not simply the Minister of Justice.

Michael Gove MP: I think so, yes.

Lord Lester of Herne Hill: I realise that you have to be a bit of a political acrobat or contortionist, but I wonder how it works, for example, with access to justice, austerity, legal aid and judicial review, when there is a conflict between access to justice and the rule of law, on the one hand, and the cuts in your department on the other. Are you given extra clout when it comes to negotiating with the Treasury, because of your double role?

Michael Gove MP: I do not know that I am given extra clout, but the one thing I can say is that as a result of the spending review settlement that we have, legal aid is almost—in this spending review—untouched. Legal aid faced significant reductions in the last Parliament. The merits of those reductions have been debated at length, but in this spending review, while there are efficiencies and cuts that I have to make, the amount available for legal aid has

remained broadly untouched. That is a good thing because, as I outlined when I made my first public speech in this role, I thought that access to justice was important, it was part of my responsibility to seek to protect it and while I could not guarantee, depending on economic circumstances, that there would not be further cuts in legal aid, it would be my aim to try to avert or to minimise those reductions.

Lord Morgan: One of the problems, I suspect, Lord Chancellor—we were talking earlier about the rule of law—is that there are in themselves different conceptual views of what that might contain and what values they might imply. I was thinking, particularly, of the area of civil liberties and such difficult matters as, for example, detention without trial. These in themselves are arguable either way—how far the defence of civil liberties should be paramount and so on. Is that an issue, or the kind of issue, where you might find your two responsibilities, as it were, arguing with each other?

Michael Gove MP: Potentially. Winston Churchill, I think, said that detention without trial was something in the highest degree odious, but that did not stop him, of course, detaining Oswald Mosley without trial. In my own case, questions of public protection and security are hugely important for the Cabinet, particularly in the aftermath of tragic events such as those that we witnessed in Paris. The principal responsibility in these areas of course rests on the shoulders of the Prime Minister and the Home Secretary. I look at any proposals that are brought forward in this area, and I try to balance two considerations. One is their responsibility, their lead responsibility, to keep the public safe, and then my allied responsibility to ensure that anything that is proposed is consistent with the rule of law and with our traditions. We all know that democratic states can generate states of emergency. We all know that there is an arguable case that some international law might need updating to deal with the evolving nature of the threats that we face, but to my mind one of my responsibilities is to ensure that anything that is put forward to keep the public safe is consistent with our legal traditions and safeguards on our liberties. Of course, history tells us that while we sometimes face significantly greater threats as a result of terrorism or other challenges to public order, legislating in an atmosphere of heightened public concern can sometimes, and has sometimes, in this country and elsewhere, led to an erosion of freedoms. The two have to be kept in balance.

Lord Morgan: You would, I imagine, have particular concern with an issue like the degree of legal support for people who are detained without trial, the extent to which they forfeit the kinds of freedoms that citizens might otherwise have. Is that a difficult area for you?

Michael Gove MP: It is certainly an area of challenge, yes. There were debates, long preceding my being in government, let alone being in this role, about how we deal with individuals, whether they are British residents or foreign citizens, their access to legal advice and whether we should detain them in particular circumstances. How can I put it? "Studied" is too pompous a word: I looked at those debates with interest and, as I hope I made clear in my previous answer, there is always a question of balance and I would look at any proposition that was put forward by anyone in the Government, trying fairly to understand that it was put forward honestly by someone who wants to keep us safer, but bearing in mind the point I made earlier that a long view sometimes needs to be taken.

Lord Morgan: I understand that, and it was very fairly put. The view of what the balance is of course has varied over time.

Michael Gove MP: Yes.

Lord Morgan: The present Government, in my view commendably so, have taken a rather different view from, let us say, the Blair Government on some aspects of civil liberties legislation, so it is a shift in viewpoint, is it not?

Michael Gove MP: Yes, and even within the Blair Government there was a variety of views on the matter. Some of the people who were Home Secretary tended to be anxious to push the envelope slightly further than other members of those Governments.

Q6 Baroness Dean of Thornton-le-Fylde: Good morning, Lord Chancellor. In your introductory remarks you talked about the impression that the oath of office of Lord Chancellor had made on you, and your commitment to ensure that it is carried out and that you uphold it. In a report that the Committee did last year, we looked at the oath that the Chancellor commits to and came to the conclusion that "respect for the rule of law" was perhaps not strong enough. It should be "respect and uphold the law". There is quite a big difference, particularly when you are talking about your relationship as between government departments. All Ministers obviously have to uphold the law, but when there are differences how far do you believe that your role as Lord Chancellor extends? You covered some of it earlier. Do you feel that there may be an issue where you had to go public? There are two questions, really. First, should your oath be strengthened and, secondly, would you feel, as Chancellor—we cannot say what they are; obviously, it is hypothetical—that there may be issues on which you would feel you would have to go public in upholding the law?

Michael Gove MP: On the first part, the report that the Committee produced and many of the subsequent speeches in the debate made a very strong case for changing the oath. I feel

that I am the wrong person to ask about the oath that I swear. In the same way as the Prime Minister has said in a different context that MPs should not fix their own salary, I think that officeholders should not design their own oaths. I am going to take myself out of that debate.

Baroness Dean of Thornton-le-Fylde: With respect, I am not asking you to design it. This Committee actually said "respect and uphold". I am asking you for your view about that.

Michael Gove MP: I quite understand. I will say that I want to remain studiously neutral on that question. On the second point about going public, it is a very difficult question because I take very seriously the principle of collective responsibility. I am a member of the Government because the Prime Minister asked me to join the Government. I have mentioned the responsibilities that I think attach to this office. If I felt that I was being asked to do something inconsistent with those responsibilities, I would, in the first instance, have to explain to the Prime Minister my concerns, and then, if necessary, I would have to resign, if I felt that there was a course of action on which the Government were set that I could not support.

The Chairman: I think the reason the word "uphold" appealed to us was that it was a slightly proactive word, and we feel that there is merit in a Lord Chancellor who is proactive and, for example, warns ministerial colleagues, when a judge makes a sentence with which they disagree, not to intervene and criticise the judges, and in other ways to be proactive with colleagues and fellow Ministers.

Michael Gove MP: It is perfectly possible for Ministers to take a different view from the view expressed by the Supreme Court, say, on a particular issue of policy. It is wrong for Ministers to criticise individual verdicts or judgments handed down by the courts. It is part of my responsibility, absolutely, to reinforce that position. That is part of defending the independence of the judiciary. You might accuse me of pusillanimity or timorousness, but I do not want to be drawn into the question of the oath itself. More properly, it is above my pay grade.

The Chairman: Thank you very much. We will move on. Lady Taylor.

Q7 Baroness Taylor of Bolton: Lord Chancellor, you said that you think that your role in respect of the rule of law is different from that of your Cabinet colleagues, and we would all agree with that. Do you think that you have an extra role, above and beyond what your Cabinet colleagues have, in terms of protecting the constitution as a whole? We have in the past had a whole series of Lord Chancellors who were very strong in upholding the constitution, such as it is. You are probably aware that in the last Parliament our report criticised the lack of clarity in terms of who was responsible. Things have moved on and Oliver Letwin now has a specific responsibility for constitutional change, or constitutional reform.

Do you feel that you still have an overview in terms of responsibility for making sure that there is cohesion within the British constitution and that the reforms that are being introduced are not so piecemeal as to undermine the whole stability of the constitution that we have?

Michael Gove MP: As other Lord Chancellors have made clear, because the principal responsibility, not just for constitutional reform but for the constitution overall, has passed to the Cabinet Office, it passed partly because of machinery of government changes when the coalition Government were formed, and it has remained the case because of the constitution unit having grown up in the Cabinet Office. It is now the Cabinet Office that plays that role. For example, when, with respect to the British Bill of Rights, I have been thinking about some of the difficult questions that relate to how reform of the Human Rights Act bears on the devolution settlements, the constitution unit within the Cabinet Office has provided me with help, support and advice, but the outstanding civil servant who leads that unit is someone who is answerable to Oliver, to the Chancellor of the Duchy of Lancaster. Of course, I will have and have had conversations with each of the territorial Secretaries of State and their Permanent Secretaries and officials as well. I see my role as having specific responsibility for human rights—an incredibly important part of our constitutional settlement—but, ultimately, the Minister for the constitution is the Chancellor of the Duchy of Lancaster. I speak regularly and at length to Oliver about these issues. I do not know, apart from the territorial Secretaries of State, if any other Cabinet Minister speaks to him more about these sorts of issues, but he is the person who acts as the Minister for the constitution.

Baroness Taylor of Bolton: As I understand it, you are not on the Cabinet committee that deals with constitutional reform. Is that not a disadvantage?

Michael Gove MP: There are two things. Almost anything that touches on constitutional matters that I am aware of will be subject to a full Cabinet write-round, to a Home Affairs Committee write-round, to a meeting of the Home Affairs Committee of the Cabinet or to a meeting of the full Cabinet. I am not aware of any constitutional issue where I have been unsighted and have not had the opportunity to contribute either through correspondence or by requesting a meeting with Oliver. As far as the internal machinery of government goes, personally speaking, I have no complaint about my capacity to feed in or to seek to influence that debate.

Baroness Taylor of Bolton: But you are talking about a write-round or a committee meeting on a specific proposal, which presumably is a proposal for a change.

Michael Gove MP: Yes.

Baroness Taylor of Bolton: One of the things that concerns us is that there is not a comprehensive view of where the British constitution is going and that we are getting too many piecemeal changes with unintended consequences that could undermine some of our very basic principles.

Michael Gove MP: That is a very fair point. There are things that change our constitution that are deliberate decisions made by the United Kingdom Government. There are requests or attempts to change our constitution that emanate from the devolved legislatures. There are also changes to our constitution that come from time to time as a result of our membership of the European Union. In that sense, yes, there are a variety of different forces that bear on our constitution. I agree that it is sensible to have a Cabinet Minister who has lead responsibility for those. It is, in this case, Oliver, in that he is both the person who is responsible for making the case for bringing forward any particular change and for looking at how each of these questions can be balanced. I have had a series of conversations with him recently about the Bill of Rights and the Human Rights Act; I am obviously thinking, when I talk to the Scottish Secretary, about how we might handle things, but it is Oliver who is holding the ring ultimately, and it will be Oliver who will advise the Prime Minister and speak up in Cabinet when he feels that there are constitutional principles at stake that need to be borne in mind. On your broader point about piecemeal constitutional change, there is an argument that our constitution benefits from evolution.

Baroness Taylor of Bolton: Absolutely.

Michael Gove MP: One man's piecemeal change is another woman's helpful evolution.

Baroness Taylor of Bolton: I think we need some overview.

Lord Lester of Herne Hill: This is a compliment to you really, but it is not flattery. Would you accept that those of us who fear about the future of the union and what we call the British constitution would be much more reassured if you were in charge rather than another Minister who is in charge because he inherited what Nick Clegg used to do? You are in a much better position, it seems to me, to be able to manage constitutional change and protect the constitution as the Lord Chancellor. I regret very much that you are not in that position.

Michael Gove MP: Taking myself entirely out of it, it is a fair argument that constitutional matters and constitutional reform should sit with the Lord Chancellor. There are two things I would say. First, machinery of government changes are a matter for the Prime Minister. I can have a view but I will defer to his. He has made his view known. I defer to it. Secondly, in thinking about individuals, I can think of few people in Parliament, in government, who have as

much knowledge of and regard for constitutional principles as Oliver, and I can think of few people who, to use your own phrase about Roy Jenkins, have the rule of law in their DNA as much as Oliver. Making comparisons between individuals is invidious, but he does the job that he has been given very well.

Lord Morgan: I wonder if we can apply this slightly differently. You talked quite correctly about the role of individuals and their expertise, but of course it is more than just individuals. There is the matter of the institutional arrangements. Our main concern in this Committee over this Session is devolution, where there seem to be a large number of fragmentary and disparate spokespeople not only for Scotland and Wales but for a variety of other groups, such as the northern powerhouse and so on. Who speaks for the union? Do you regard yourself as particularly a voice for the union giving coherence to an otherwise rather disparate situation?

Michael Gove MP: Again, the person who holds the ring on almost all constitutional matters would be Oliver. I am responsible for courts and prisons in England and Wales, but I take very seriously a responsibility to think about the impact on the United Kingdom as a whole of changes that are brought forward. Part of that is because being Scots born and educated it matters emotionally to me as well. It is difficult to disentangle my strong feelings on the matter from the office that I am privileged to hold. If one asks the question, "Who is the Minister for the constitution, who holds the ring and who takes a view in the round on behalf of the Prime Minister?", it would be Oliver.

Q8 Lord Judge: Without any attempt at the flattery that Lord Lester tried, I am a little troubled about how we identify the distinction between constitutional reform and the rule of law. How do you?

Michael Gove MP: One of the things about the rule of law is that it should, wherever possible, provide certainty. One of the virtues of the rule of law is that people are not subject to punishment for something that was not a crime at the time they acted, and that people should be able to make provision for themselves, their families and their affairs with some degree of certainty about what is and is not just, fair and legal. Related to that, therefore, when we are thinking about constitutional change, we should proceed with caution, with an awareness of the fact that the law of unintended consequences will often operate and with a desire to ensure that, when we make constitutional changes, they are intended to last for some time. While constitutions evolve, they should not be in a state of constant revision. In that sense, there are similarities between the mindset that one has if one takes the rule of law seriously, a desire

not to be legislatively hyperactive and introduce retrospective legislation as well, and the approach that you should take towards constitutions and constitutional reform, which is to proceed with care. There are distinctions between the two, in that a question such as whether it should be the case that the Scottish Parliament is responsible for regulation of fishmeal, or whether that should be a matter that Defra keeps at a UK level, does not, I think, touch particularly on the high principles of the rule of law, but it is a nitty-gritty constitutional matter that will come up at times when the Scottish Parliament asks for more power or the United Kingdom Government seek to revisit any part of the devolution settlement.

Lord Judge: You have given us an example of one extreme. What about the decision 10 years ago to abolish the office of Lord Chancellor? That is constitutional reform and rule of law.

Michael Gove MP: Absolutely.

Lord Judge: I am speaking entirely for myself. Subject to all the other responsibilities that you have, and in view of the way you have described the responsibilities that you accept you have, why is the Lord Chancellor not at least a member of the Constitutional Reform Committee, not to turn up to every meeting, necessarily, but there will be issues about which he or she will have specific responsibilities?

Michael Gove MP: It is a fair point. This is a statement of no more than bald facts. Membership of Cabinet committees is ultimately a matter for the Prime Minister. Speaking for myself, I do not feel that in practical terms there have been any decisions that have been taken or that I should have been involved in with respect to domestic constitutional matters where I have been the boy with my face pressed up against the window looking in.

Lord Judge: Forgive me, Lord Chancellor, but you have only been in office for a very short time, so we should direct our attention, if that is the view of the Committee, to the Prime Minister, should we not? Yes?

Michael Gove MP: Yes.

Q9 Lord Maclennan of Rogart: One issue that would very much concern you, Lord Chancellor, would be the role of the Supreme Court, which seems to me particularly an argument for following up what has been said about your being on all the bodies concerned with constitutional reform. For example, should the Supreme Court be a constitutional court as happens in France and other countries? Is that not something that should concern you as directly as possible in your role?

Michael Gove MP: Absolutely, and it does. I mentioned earlier the desire that we have to look at the Human Rights Act in our new British Bill of Rights. One of the other challenges,

and it is a challenge that the Prime Minister has passed directly to me, is to think hard about whether we should use the British Bill of Rights in order to create a constitutional longstop similar to the German Constitutional Court and, if so, whether the Supreme Court should be that body. This was partly a consequence, as we got into the nitty-gritty of thinking about the European Convention on Human Rights and the court, of recognising that the European Court of Justice in Luxembourg and the European Charter of Fundamental Rights, which was adopted as part of EU law in the Lisbon treaty, also have an application in domestic law here. It is the case that the German Constitutional Court can, in certain circumstances, say that rulings of the Court of Justice of the European Union may pose problems for their constitution. There are other constitutional courts that fulfil a similar function in other jurisdictions. This is an enormously complex area where we have to tread with care. Therefore, we are in the process of considering how, in our consultation document, we can ask some fair questions that do not foreclose debate. That is one of the reasons why we have taken longer than I originally envisaged to refine our consultation document; this is a very important matter and I would like to make sure that people have an opportunity to consider the challenge that the Prime Minister has set us and that any decision that the Government take can be informed by people of good faith, seeking to fill this gap in our constitutional arrangements, if indeed they agree that it exists.

Lord Maclennan of Rogart: Let me ask one final question. It was a fascinating answer. Many countries have this kind of arrangement with their constitution, and the great majority have written constitutions.

Michael Gove MP: Exactly.

Lord Maclennan of Rogart: Many of them, more specifically, are federal. You mentioned Germany, for example; they would fit in there. There are different kinds of problems in creating that kind of structure in this country.

Michael Gove MP: There absolutely are. As I say, I am not a lawyer and I am getting to grips with some of those arguments. I am certainly only on the foothills of some of the arguments, but you are absolutely right. It is only countries with written constitutions that have constitutional courts. Traditionally, the argument would be that the High Court of Parliament was the constitutional court. Even then, there is an argument, which has been put forward by Sir John Laws—Lord Justice Laws—in the "Metric Martyrs" case and in subsequent lectures on the common law constitution, that some statutes that Parliament passes are properly seen as constitutional statutes that have a different status to the ordinary run of laws that we pass.

The Human Rights Act and the European Communities Act and, indeed, the devolution settlements are constitutional statutes, which means that they are not subject to the doctrine of implied repeal. Before Sir John's judgment, which has been widely accepted, I do not think there was such a clear delineation between what a constitutional statute and a non-constitutional statute might be. He is an extremely distinguished lawyer, but there is a fair question, which is whether it should be the case that we think in a more systematic way about what constitutes a constitutional statute or not. These are huge questions. They require debate, and it is because they require some thought that, as I said, my original intention, which was to publish a consultation document before Christmas, has been put back, and I expect that any consultation document that we produce will now be produced in the new year, because the issue that the Prime Minister raises requires serious thought, consultation within government and then space afterwards in order to allow proper debate.

Q10 Lord MacGregor of Pulham Market: Good morning. The 2015 *Ministerial Code* has been amended to remove references to Ministers being bound by international law and upholding the administration of justice, words which were in the 2010 code. Why?

Michael Gove MP: There are two reasons. The first is that the *Ministerial Code* was changed to bring it into conformity with the Civil Service Code. My understanding is that the Civil Service Code was changed along similar lines preceding that change, and the *Ministerial Code* was brought into line with it. The other area was to remove potential ambiguity. Again, I am no lawyer but, as I understand it, we operate a dualist approach towards international law, and that means that, while the state is bound by international law, individuals, including Ministers, are bound by our own laws. The British state is a party to a variety of conventions, treaties and agreements. If we are in breach of those treaties and agreements, the appropriate arbitration tribunal or court can find against us as a state but, as an individual, a Minister, a parliamentarian and so on is not bound by international law in the same way as a state is or in the same way as they are bound by the law of the land.

Lord MacGregor of Pulham Market: That deals with international law, but what about upholding the administration of justice? Why was that removed?

Michael Gove MP: As far as I know—I will have to check because the decision to revise the *Ministerial Code* was, obviously, the Prime Minister's and it was conducted by the Cabinet Office—I can only imagine that it was to bring it into conformity with what the Civil Service Code said, because that was the first motivation, but I will revisit the issue with the Cabinet

Office. If I can, I will write to the Committee, Lord MacGregor, with more details on that precise change.

The Chairman: We would appreciate that. Thank you.

Q11 Lord Norton of Louth: This month marks the second anniversary of the publication of the report of the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, on which I served. We had a brief letter from the then Minister in reply, but we have not actually had a substantive response from Government. Are there any plans to produce a substantive response?

Michael Gove MP: I hope that we will be able to produce a more substantive response. My colleague, Dominic Raab, the Minister who is front and central on that issue, is in Strasbourg tomorrow to talk to other Ministers in the Council of Europe about the issue. As you will appreciate, and as everyone in this room appreciates, it is not a simple one. The point that was made by my predecessor is an important one, which is that whatever any of our individual views are about the judgment in Hirst, the last Parliament made its view very clear on the issue, and I cannot see, given the constitution of the new Parliament, that it would be likely to be dramatically different. We mentioned the European Court of Justice earlier. The European Court of Justice heard another case, as I am sure you know, about prisoner voting—the Delvigne case—and it came to a set of conclusions which, while they do not contradict the Hirst judgment, are different. Funnily enough, when I met the new President of the European Court of Justice in Luxembourg, Baron Koen Lenaerts, he was at pains to say that they had made that judgment in a different way and that they were conscious of feelings in a number of states that these sorts of questions about the franchise should be subject to a greater margin of appreciation than might have been the case in the past. It is a fluid matter. It is one that is of course subject to Parliament's will but, yes, you deserve in due course a fuller answer—absolutely.

Lord Norton of Louth: Do you have any idea of when "in due course" may be?

Michael Gove MP: I think it would be after we have published the consultation document on how we hope to revise the Human Rights Act and the Bill of Rights. It should be next year.

Lord Lester of Herne Hill: Under Article 46 of the European convention, a final judgment like Hirst is binding and we have a duty to abide by the judgment. When Dominic Raab appeared in the Committee of Ministers last time, I am told that 17 countries attacked our position and the 18th was Russia, whose delegate said, "We are very interested in the UK position and might do the same thing ourselves". Do you appreciate that the continued

reluctance of the present Government, of the coalition Government and of the Government in which Jack Straw served to abide by that judgment is staining our reputation in a way that is unworthy of the Conservative Party, which, as you pointed out, was largely responsible for getting the convention in the first place?

Michael Gove MP: I would place the emphasis slightly differently. A number of countries have argued that we should implement the judgment in order to ensure that the authority of the court and the power of the convention are upheld. There are other countries, good democracies, which have an enormous amount of sympathy for our position. The argument has been made by Dominic far better than I can make it that if one looks at the travaux préparatoires—the work that went into the creation of the convention—it is pretty clear that the original intention was not to have the court take the view on the franchise that the Hirst judgment does, but these are arguable matters. Your central point is: are we, by not implementing the judgment, somehow letting the side down? I would argue that whatever I, as a government Minister, or the whole of the Government, were to do, our Parliament would not accept a change to the law to grant prisoners the vote. In that sense, you have a clash between two principles: on the one hand, our desire to respect the judgment of the European Court of Human Rights but, on the other hand, our desire to recognise that, ultimately, as we touched on earlier, parliamentary sovereignty is the essence of our democracy. In having to choose between the two—it is always difficult and I would rather not—I err on the side of saying that we must respect the democratic principles of parliamentary sovereignty. I would argue that it is not letting the side down if Parliament decides that it does not wish to implement it in this way.

Lord Lester of Herne Hill: Will you allow Parliament to make that decision soon by introducing a Bill that can then be debated by both Houses?

Michael Gove MP: We will have to wait until we have had the conversation around the consultation document that I discussed earlier before deciding what the next step might be in this particular case.

Q12 Lord Brennan: Lord Chancellor, the Ministry that you are in charge of has an essential function in providing a courts and tribunals service to which our citizens have access. Your predecessor started a reform programme that is continuing under your ministerial charge. Please give us some reassurance that these reforms will not adversely affect access to justice for our citizens. I have a couple of examples. In the entertaining reference to Dickens and

Bleak House in your June speech, you talked about the importance of modern technology, but reassure us that we are not moving from *Bleak House* to Twitter overnight.

Michael Gove MP: That is a very good point.

Lord Brennan: I have two more points, so that you can deal with the question fully. The second point is about the court estate. Your summer consultation paper spoke of closing 91 courts and integrating 31 buildings. How are you going to ensure that local provision is made for people in that locality to go to court? Lastly, I favour changes in working practices, especially with technology, but how are you going to guard against civil servants being tempted towards systems of justice online?

Michael Gove MP: Those are three very good points. *Bleak House* is some 700 pages long, and Twitter is only 140 characters. Hopefully, somewhere between the two there is a happy medium—*Great Expectations* perhaps. I would not have gone ahead with reform of our Courts & Tribunals Service if I had not been absolutely confident that it had not just the acquiescence of the Lord Chief Justice and the Judicial Executive Board but their enthusiastic support. We are very fortunate that we have in our current Lord Chief Justice, like his predecessor, someone who is a reformer and who wants to ensure that access to justice is not just preserved but enhanced. He believes, as I do, that we will be able to speed up access to justice and deal with the delays and inefficiencies that we currently have by utilising technology in a smarter way. That does not mean that we will be doing away with basic principles, including protecting the right to trial by jury, making sure that our courts are adequately resourced for the tasks that fall on their shoulders and making sure that the quality of advocacy in our courts remains high. Indeed, some of the steps that I have taken since coming to office have been designed to ensure that we can improve the quality of advocacy in our courts, safeguard the future of the criminal Bar and make sure that people whose life and liberty is at stake get the best possible representation.

As far as reducing the number of courts is concerned, many of the courts were dramatically underused. Again, it was with the support of the Lord Chief Justice that we drew up our consultation proposals. Our aim is to ensure that people who need to travel to court can do so in a reasonable way. We have received a number of responses to the consultation. If it is the case that we have cut provision too severely in any particular area, we will revisit that.

On your final point about moving things online, there is huge potential to move lots of activity online in a way that would help people. It is already the case that the Office of the Public Guardian has moved many of its services online to help families when they are dealing with

particularly delicate and complex matters. I see that there is potential to move more online, but, ultimately, for important matters where you need a trained judge or a bench of magistrates deciding on critical matters, we absolutely need to ensure that that remains protected.

The Chairman: Thank you very much, Lord Chancellor. The clock has not yet struck 11.30—although it just did as I started speaking. I have started so I will finish. Can I just ask you a very brief supplementary on the Sewel convention? You said that you had taken legal advice, and I am sure you had. Two of the most distinguished lawyers of our generation—Lord Hope of Craighead and Lord Mackay of Clashfern—are taking a very close interest in the issues raised by Clauses 1 and 2 of the Scotland Bill. I would like to ask you, to reassure yourself, that you have taken Scottish legal advice as well as United Kingdom legal advice.

Michael Gove MP: I will talk to the Advocate-General and make sure that my department and I have the very best advice on this matter. If I may, I will write back to the Committee once I have had a chance to talk to Lord Keen.

The Chairman: I am most grateful. Can I also thank you on behalf of the Committee for coming today and giving us such very informative and interesting answers? You were admirably precise and concise. We have covered the ground we wanted to within the allotted span, and we thank you very much.

Michael Gove MP: Not at all. Thank you.