

Treasurer's Lecture, Middle Temple, Monday 3 November 2025

The rule of law, populism and the importance of institutions

Society is made up of people with different interests which we pursue, and divergent views on social mores, politics, religion or philosophy. This is not new; it has been so for centuries. We live our lives together and mutually benefit by cooperatively obeying legal or social rules, such as which side of the road we drive on, making way for others using the pavement rather than forcing them onto a busy road, or waiting our turn to be served in a shop or café.

Where law comes into the picture is in creating rules which govern our behaviour and which can be enforced against us in the courts of law or in tribunals. Governing our behaviour in accordance with those rules is the essence of the rule of law.

The rule of law underpins our commercial life: contractual commitments are enforced, debts are to be paid, property rights are upheld, insolvency is regulated, market abuse is punished, consumers are protected, compensation in the form of damages is paid for loss and damage caused by tortious behaviour. Being known and trusted as a rule of law society has huge economic benefits. The economic prosperity of London and the United Kingdom more widely is underpinned by our international reputation as a rule of law society.¹

The rule of law also is the bedrock of the long-term political stability of a liberal democracy. When I speak of “liberal democracy” I am not speaking of a position on the political spectrum but of a society in which the citizen can successfully enforce his or her rights against the state in courts of law. That is often not possible in autocratic regimes and in some so called “disciplined democracies”. But even such disciplined democracies and autocracies depend on the existence of some of the characteristics of the rule of law to maintain their stability in the medium and longer term.

In written evidence on behalf of the Supreme Court to the House of Lords Constitution Committee in their enquiry into the rule of law, Lord Reed stated:

¹ See my lectures, “The Rule of Law, the Courts and the British Economy”, (The Guildhall, 4 October 2022) available at [The Rule of Law, the Courts and the British Economy Speech](#) (accessed 3 November 2025); and “The Contribution of the Common Law and the Courts to Economic Prosperity”, (Brunei Darussalam, 25 February 2025) available at [speech_lord_hodge_250225_0cad343a9a.pdf](#) (accessed 3 November 2025); see also Sir Geoffrey Vos, Master of the Rolls, “The McNair Lecture: The future of London as a pre-eminent dispute resolution centre: opportunities and challenges”, (Lincoln’s Inn, 19 April 2023) available at: [The Master of the Rolls letterhead template](#) (accessed 3 November 2025).

“Put simply, the rule of law means the protection of everyone in our society against interferences with their rights without lawful authority. It means that no-one can interfere with a person’s home, their family, their property or their liberty without lawful authority. The rule of law exists to protect everyone in our society – especially the most vulnerable, who are at greatest risk where the exercise of power is not controlled by law.”

The independence of the judiciary as a constitutional doctrine is not a means of conferring a privilege on judges. Judicial independence exists for the benefit of our society: to enable judges to uphold the rule of law.

To help you imagine what a society is like when the rule of law breaks down I will take you on a brief journey into history. May I ask you to look round this beautiful hall and imagine that you were here 400 years ago?

Edward Hyde, who fought for the King in the civil war and became the Chancellor of the Exchequer to Charles II, would be studying law and dining here from 1626. In the same year you would see Bulstrode Whitelocke, a friend of Edward Hyde, studying and dining in this Inn. He fought for Parliament in the civil war and held high office during the Protectorate of Oliver and then Richard Cromwell. They were moderates who sought compromise for several years after the outbreak of the civil war in 1642. Also to be seen in the Inn, perhaps only occasionally, was John Pym, who had joined the Inn in 1602, was by 1626 a prominent parliamentarian, and went on to lead the opposition to Charles I and his attempt at personal rule between 1629 and 1640. It was the King’s attempt to arrest Pym and four other MPs in 1642 which was an important link in the causal chain which led to the outbreak of civil war in that year.

Back in 1626, the country was divided on religious grounds, with the King supporting a conservative, episcopal church and many of his opponents, being Puritans, wishing a more democratic form of church governance on a presbyterian model as in Scotland or a congregational model. It was an age in which religious disagreements were often expressed in uncivil, hyperbolic and offensive terms. There were serious divisions on foreign policy which were linked to the religious divide. Because of those disagreements, Parliament was reluctant to give the King the money he needed to govern the country. These matters were an important part of the background to the outbreak of civil war.

But issues relating to the rule of law also played a central role in causing the war. As I have said, Charles I attempted to rule without Parliament between 1629 and 1640; he raised taxes to fund his government that were held to be illegal. The King also sought to control the legal system by the use of prerogative courts in which he hoped that tame judges would do his bidding. When the King was forced to recall Parliament in 1640 to obtain funding for an army to oppose the Scots in the Bishops’ war, Hyde and

Whitelocke worked together to dismantle the system which had enabled the King to rule without Parliament. That involved Hyde and others preparing legislation to dismantle the prerogative courts. It was a political battle about control over the judiciary. In response to a petition by Parliament Charles I in 1640 agreed that judges would hold office not at his pleasure but during good behaviour. He thereafter honoured that commitment, but, as I will show, it was some time before that fundamental rule took hold.

In 1640 the political stakes were very high. The parliamentarians feared Thomas Wentworth, the Earl of Strafford, who had been the King's most effective and authoritarian minister – known to his enemies as “Black Tom Tyrant”. They sought to impeach him and when that prosecution failed, Parliament passed an Act of Attainder, a medieval expedient by which Parliament found him guilty of treason, a charge of which it is generally considered that he was not guilty. He was executed in May 1641. Both Edward Hyde and Bulstrode Whitelocke voted for the attainder, but both did not wish him to be executed. Nonetheless, the leading opponents of the King dared not let him live; when Edward Hyde suggested that it was sufficient to exile Strafford, the Earl of Essex famously replied, “Stone dead hath no fellow”.

A similar example of judicial murder was committed by Parliament in an attainder ordinance in 1645 which led to the execution of Archbishop Laud, who was hated by the Puritans for his authoritarian church governance, after four years in prison and a failed impeachment. Again, there was no proper legal basis for the treason charge. It was an affront to law. It was an exercise of power unconstrained by law. Those actions had consequences.

Returning to 1642, on the outbreak of civil war, which few, if any, would have wanted, Bulstrode Whitelocke wrote:

“It is strange to note, how we have insensibly slid into this beginning of a civil war, by one unexpected accident after another, as waves of the sea, which have brought us thus far.; and we scarce know how, but from paper combats, by Declarations, Remonstrances, Protestations, votes, messages, answers and replies; we have now come to the question of raising forces, and naming a general, and officers of an army.”²

Misjudgements by the King and by parliamentarians, mistrust over who should control the army needed to put down a rebellion in Ireland in 1641, riots in London, all contributed to bring about the crisis that led to the outbreak of war. But the battle over control of the courts and the breakdown of respect for legal process which resulted in the execution of the Earl of Strafford played an important causal role as political

² Minoo Dinshaw, *Friends in Youth. Choosing Sides in the English Civil War* (2025), p 21.

disagreements were no longer tempered by a rules-based system and impartial adjudication. The stakes for each side became too great for peaceful resolution.

The attempts by Hyde and Whitelock among others during the early years of the civil war to negotiate a resolution of the conflict failed. The result was the creation of the New Model Army, which gave the Parliament its victory. Continued mistrust and an inability to reach a settlement led ultimately to the coup by the leaders of the army, the trial and execution of the King in January 1649, and the republic which struggled to achieve legitimacy and lasted only until 1660.

Attempts by governments to control the judiciary did not cease with the death of Charles I. During the period of the Commonwealth after the execution of the King, the judiciary generally remained independent, but the Commonwealth set up special courts to criminalise as treason any denunciation of the government as unlawful. While Whitelock went on to obtain high office under the Protectorate, he was prepared to criticise Cromwell when he removed judges Newdigate and Thorpe from the Bench in 1655, accusing the Lord Protector of dismissing them because their judgments had displeased him.³

Before 1640, judges held office “during the King’s pleasure” and were not infrequently sacked when they displeased the ruler. That practice revived. There were then only 12 judges in the common law courts; four in each. Yet James II sacked six during his three-year reign between 1685 and 1688.

It was not until the Act of Settlement of 1701 that one of the bastions of judicial independence was put in place: senior judges from then on have held office “during good behaviour” and can be removed only on an address presented to the monarch by both Houses of Parliament.⁴

In recent times the Lord Chancellor has had the power to remove judges below the level of the High Court only after the prescribed disciplinary procedures have been completed.⁵ Disciplinary sanctions against a judicial office holder which do not involve removal from office, require the consent of the Lady Chief Justice and the Lord Chancellor. This discourages any perception that a Chief Justice is protecting her or his fellow judges.

The Act of Settlement of 1701 together with the Bill of Rights of 1689 which established the constitutional monarchy, the sovereignty of Parliament, no taxation without parliamentary consent and freedom of speech within Parliament, have been the

³ Stephen Sedley, *Lions under the Throne. Essays on the History of English Public Law* (2013), p 99.

⁴ See now the Senior Courts Act 1981, section 11(3): for Supreme Court Justices see the Constitutional Reform Act 2005, section 33.

⁵ Constitutional Reform Act 2005, sections 108, 115, 117 and 122.

underpinning of this country's relative political stability for over 300 years. They should be treasured.

Returning to the concept of the rule of law, there are debates as to its scope but there is a broad consensus as to its basic requirements:

- (i) that powers to interfere with individuals' rights must be conferred and defined by law;
- (ii) that the law is reasonably clear and accessible, so that everyone can find out what their rights are;
- (iii) that the law is applied and enforced even-handedly and with reasonable efficiency, so that everyone's rights are protected in practice and not only on paper;
- (iv) that courts of law, as the final guardians of everyone's rights under the law, are impartial and independent of political influence; and
- (v) that everyone whose rights have been threatened or infringed has reasonable access to the courts, so that unlawful behaviour can be challenged and redress can be obtained.

That list comes from Lord Reed's written evidence to the Constitution Committee, and was a response to that Committee's questions.⁶ I would add to his fourth point that impartiality – the obligation in the judicial oath to act “without fear or favour, affection or ill will” – requires a judge to make decisions without *any* form of external influence, whether from powerful commercial or other organisations, the press or anyone else, and to decide without bias.

Few would, I think, take issue with that list. But judges in this country and democracies overseas operate against a background in which there is an increasingly strident populist narrative. This narrative suggests that there is a fundamental opposition between the people on the one hand and an elite, whether political or judicial, on the other, who do not share their values or pay attention to their concerns.

In an illuminating lecture last week,⁷ the former Prime Minister, Theresa May, warned of the widespread disillusionment with, and denigration of, political and public institutions across Europe, the tendency of populists to exploit people's concerns and promote polarisation, the apparent wish of many younger citizens for the rule of a strong man, and the denial by some of the reality and threat of climate change. She suggested that the root causes of these attitudes included the shifting of global power from the West, and rapid technological change which brings with it social and economic change. Those together generate a sense of powerlessness and a fear being felt behind. She expressed a concern that populism and polarisation were allowing strong men to carve up the

⁶ Available at: committees.parliament.uk/writtenevidence/141837/pdf/ (accessed 3 November 2025).

⁷ The Lord Speaker's Lecture, “Politics, Populism and Polarisation”, House of Lords, 27 October 2025.

world in their own interest. She concluded her address with a call for a positive vision in response, which allows democracy to deliver for the people, which retains its commitment to tackle climate change, and which defends the judges and upholds the rule of law.

The financial crisis of 2008 and the Covid pandemic have created a heavy burden of public debt in many countries which has to be serviced at great cost. This has greatly curtailed the ability of responsible governments to address the aspirations of their electorates. This has created popular discontent and that discontent is articulated in a context in which many people communicate in an unconstrained way often anonymously or pseudonymously through social media.

In what was, I think, his final episode of the great radio programme “In our Time” on 3 July 2025, Melvyn Bragg discussed the concept of civility with his guests. Civility was described as the skill to discuss topics which really matter to you with someone who disagrees and yet somehow get along. More succinctly, it was called the absence of insults. The remedy which his panel proposed for the international phenomenon of uncivil demagogic politics was to bring back a sense of shame. In his book on civility,⁸ the historian Keith Thomas speaks of the function of civility as a social glue which enables a society or community to cohere. There was in the seventeenth century plenty evidence of a lack of civility and there is now.

In the United Kingdom we have witnessed the consequences of unrestrained behaviour in unacceptable threats of violence to politicians, especially women, and the tragic murder of two MPs. The judiciary has not suffered such tragedy but there are increasing concerns about threats to and harassment of first instance judges and tribunal judges by disgruntled litigants. In social media there is ample evidence of intemperate criticism of judicial decisions by people who are angry about the outcome of a dispute but who do not engage with the reasoning which has produced the result.

There are also examples internationally of significant clashes between senior politicians and the legal institutions of their country, for example in France, Brazil, and the United States of America. In the United States, the Chief Justice, John Roberts, in his End of Year Report on the Federal Judiciary in 2024⁹ warned that attempts by activist groups or public officials to intimidate judges can undermine judicial independence and that intemperate statements may prompt dangerous reactions in others.

It is not my role to express views on the merits of those disputes, I simply draw attention to their existence and to the existence of similar tensions in other countries to give context to our domestic concerns.

⁸ Keith Thomas, “In pursuit of Civility: Manners and Civilisation in Early Modern England” (Yale 2020). See in particular chapter 7: Changing Modes of Civility.

⁹ Available at: [2024year-endreport.pdf](#) (accessed 3 November 2025).

In the United Kingdom we have been fortunate in that we have not witnessed clashes of that magnitude. But we have had some serious episodes.

During the divisive debates on Brexit, the *Daily Mail* in a headline in November 2016 branded the members of the Divisional Court as “Enemies of the People” and the government’s defence of the judiciary in response was far from adequate. There were real concerns among the judiciary at the time. There were credible suggestions that the episode affected recruitment to the senior judiciary for a while, but I doubt whether the episode has caused any lasting damage.

Thereafter, in 2020 the UK Supreme Court held that the Prime Minister’s advice to Her Majesty The Queen to prorogue Parliament at a time of political crisis was unlawful, and that the suspension of the work of Parliament was a nullity. Some commentators attacked the court’s judgment as motivated by hostility to Brexit, a charge which was without foundation. It ignored the fact that the Government’s case before our court was that Brexit had nothing to do with the decision to prorogue. The court was faced with legal propositions by the government (i) that we should proceed on the basis that a Prime Minister’s advice to the Sovereign was advice which the monarch had no discretion to reject, and (ii) that the courts had no authority to address any legal challenge to a prorogation under any circumstance. In other words, Parliament only sits as and when the government pleases. I cannot speak for the thinking of my colleagues, but I recall asking myself what would happen if an authoritarian government were in a future crisis to suspend Parliament for up to 11 months? Would there be neither a political nor a legal constraint? The application of established legal principles gave the answer: there was a legal constraint based on the prerogative being a creature of the common law and on the supremacy of Parliament which is a fundamental constitutional principle.

Many of our critics did not see the bigger constitutional picture, which was wholly unrelated to Brexit. We were accused by some journalists and politicians of overreach and being politically motivated. A briefing from No 10 Downing Street suggested that the court might be radically altered or even abolished. But with the passage of time the crisis passed, our constitution operated, a general election was held, and effect was given to the democratic wishes expressed in the referendum.

In an important recent lecture entitled “Trust in the Courts in an Age of Populism”,¹⁰ which is on the Supreme Court’s website and I recommend that you read, Lord Reed acknowledges continuing concerns among some media organisations and commentators about judicial overreach and their expressed fears that some judicial decisions, particularly in the field of asylum and immigration, are based on the

¹⁰ The Peter Taylor Memorial Address 2025, 12 June 2025, available at: [Taylor Lecture](#) (accessed 3 November 2025).

application of values which are not shared by Parliament or the general public. He also speaks of the questions which some politicians pose in discussions with him about the legitimacy of unelected judges overturning the decisions of a democratically elected government and whether a Supreme Court on the American model is inconsistent with our constitutional traditions.

He rightly emphasises the importance of engaging with such politicians to explain the true position and to dispel these mistaken beliefs. The politicians' first concern is answered by explaining that there is a difference between the government and Parliament and that it is the task of the courts to uphold the laws enacted by Parliament if they are breached by the government. The second concern is answered by explaining the differences between the UK and US Supreme Courts, the fact that we perform the same judicial role as the House of Lords did before us with no enhancement of our powers, and that parliamentary sovereignty allows the elected Parliament to reverse decisions of our court if it disagrees with them.

Enough about populism. The third part of my talk tonight is about the importance of institutions. I am not despondent about the institutions of the British state, which have withstood the political divisions and controversies in the campaigns for Scottish independence and Brexit.

The institution of the judiciary, of which I have been part for almost 21 years, has a vital role in preserving the rule of law. Judicial independence enables judges to perform that role. There are many ways in which judicial independence is upheld in our society. In a lecture almost nine years ago, I suggested that there were ten pillars which upheld judicial independence.¹¹ In my view, the most important constitutional pillars are the following. First, the Constitutional Reform Act 2005 has formalised a long-standing convention by imposing a statutory duty on the Lord Chancellor and other Ministers to uphold the continued independence of the judiciary.¹² Secondly, there is the exclusion or at least the minimisation of political considerations in the appointment and promotion of judges. In accordance with what is now a widespread international norm in liberal democracies,¹³ judges are selected in open competition by independent judicial appointments commissions who recommend candidates to the Lord Chancellor. The Lord Chancellor has a limited power of veto. Thirdly, as I have already explained, since the Act of Settlement of 1701 judges have enjoyed security of tenure.

¹¹ See my Lincoln's Inn Denning Society Lecture "Upholding the rule of law: how we preserve judicial independence in the United Kingdom" (7 November 2016), available at [Lord Hodge Denning Society lecture at Lincoln's Inn](#) (accessed 3 November 2025).

¹² Sections 3(1), 3(5) and 3(6).

¹³ See the "Commonwealth (Latimer House) Principles on the Three Branches of Government". These Principles set out guidelines for the relationship between the executive, legislature and judiciary, as agreed and endorsed by Commonwealth Heads of Government in 2003. This includes guidance on preserving judicial independence. Available at: [commonwealth-latimer-principles-web-version.pdf](#) (accessed 3 November 2025).

The removal of the ability of the executive to dismiss judges because it disliked their decisions played a crucial role in stabilising our country after the political turmoil of the seventeenth century. Over the years we have heard some politicians suggest that there should be a greater role for politicians in the appointment of judges and that the executive should be able more easily to remove them. I believe that our history demonstrates that such suggestions are profoundly misguided.

There are also constitutional conventions which support judicial independence. Ministers exercise restraint in commenting on judicial decisions. In a democracy it is certainly proper for a politician, including a Minister, to disagree with a judgment, to express disappointment and to announce that the decision will be appealed or that legislation should or will be introduced into Parliament to reverse it. But it would be contrary to parliamentary custom for a Minister to attack the courts or the judiciary as a whole. Within Parliament it is a parliamentary custom, which rulings of the Speaker support, that an attack on a judge's character or motives, or charges of a personal nature or a call for his or her dismissal, should be made only on a substantive motion on which a vote will be taken, and that arguments that a judge had got a decision wrong should be made in moderate language.¹⁴ There is also the sub judice rule which prohibits parliamentary debates on matters currently before the courts. These constraints on politicians contribute to an effective separation of powers.

But there are, quite properly, also important constraints upon judges. I describe the most important constraint not as judicial deference or restraint but as role recognition. Deference and restraint imply that judges can do otherwise. I do not agree. We judges do not have the constitutional role or the institutional competence to make judgments on social and economic policy or on foreign policy. We do not have a democratic mandate to make such decisions or to make political judgments. It is the demanding role of the politician to make the trade-offs and compromises which enable our society to cohere. We are not politically accountable to the electorate as politicians are when they do so.

In the field of statutory law, it is Parliament which makes the law. The task of the judge is to ascertain the meaning of the legislation which Parliament has enacted in accordance with well-established legal rules and techniques set out in case law and in legal textbooks. Sometimes, judges may interpret a statute in a way which Parliament considers to be wrong. If so, Parliament can change the law. In our constitution, which has parliamentary sovereignty as its fundamental principle, Parliament can overrule the decision of the courts.

¹⁴ Erskine May, para 21.23.

Judges are not policy-makers except in the limited sense that it has long been our task to develop the common law incrementally and interstitially to address social, economic and technological changes. The law reports over the centuries record that work.

The twentieth century witnessed the judicial development of administrative law in response to the ever-increasing role of public authorities in the lives of our citizens. But the judges' role is limited to ruling on the lawfulness of the actions of a public body. We are not and should not be policymakers in this field.

Many countries have written constitutions which set out the rights of citizens in very broad-textured and unspecific language. Judges in countries with a domestic Bill of Rights or Charter of Rights have had to learn how to adjudicate on such rights. We do not have a written constitution, but since 2000 Parliament has given judges in the United Kingdom a similar task in interpreting the Convention rights contained in the Human Rights Act 1998. We have also found ourselves involved in constitutional adjudication as a result of legislation which since 1998 has devolved powers to Scotland, Wales and Northern Ireland.

The involvement of judges in human rights and constitutional adjudication means that we have to make decisions which can have significant political consequences. Those decisions can give rise to political controversy. In this environment it is essential that judges leave any views on politics or policy which they may have outside the door of the court and approach their task as a purely legal exercise. This may not always be an easy task at first, but it is one which a judge learns through experience and it soon becomes second nature.

There is also a well-established and salutary principle of judicial conduct that a judge does not engage in party political activity or make public comments on matters of political controversy. It is my view that a former judge should be similarly reticent after retirement.

In recent years some politicians and newspapers have accused tribunal judges working in the field of asylum and deportation law of being politically motivated or "activist".

There are admittedly some tribunal decisions which appear to take a more expansive view on the article 8 rights of claimants when balanced against the public interest than the tests laid down by the superior courts allow. The doctrine of precedent and the appeal system can rectify such decisions.

I have not encountered politically motivated tribunal judges. But a judge who brings a political or social agenda to his or her judicial work would be undermining the judicial role.

If some tribunal judges *are* politically motivated and *if* they articulate partisan views, the judicial disciplinary procedures should be used to address the problem. It is only by

respecting the limits of the role of a judge and the constraints on behaviour which judicial office entails that judges can fully perform their role.

The judiciary is only one of the institutions of the state, but it is the one that I know best. Time does not permit me to discuss the other institutions which contribute to our public life in any detail.

The executive branch of government, which is comprised of the departments of state and other public authorities, has the difficult task of governing the country and adapting our country to rapid social, economic and technological change. Our long tradition of an impartial civil service is sometimes called into question, but it commands international respect, and it is a vital means by which Ministers give effect to their electoral promises.

As I have said, Parliament is charged with making laws, authorising taxation to fund the government, and holding the government to account. It is the central institution of our constitution.

One of the roles of the judiciary is to make sure that the laws which Parliament has passed are observed. Contrary to what some commentators have asserted, parliamentary sovereignty and the rule of law are not in conflict; the rule of law is the means by which Parliament's laws are observed.

The independent media are also a vital contributor to our democracy. At their best, the media inform national debate, articulate tensions in our society which can spur public action, and expose the misuse of power. Episodes such as the notorious "Enemies of the People" headline are not a common occurrence.

Each of those institutions has a common interest in protecting and promoting the rule of law.

Without the rule of law, a government cannot address the challenges which we all face.

None of the institutions of which I have spoken should be immune to reform when change is needed, but they are by international standards remarkably robust.

The OECD in a publication in 2022 entitled "Building Trust to Reinforce Democracy" stated:

"Trust is the foundation for the legitimacy of public institutions and a functioning democratic system. It is crucial for maintaining political participation and social cohesion ..."¹⁵

¹⁵ Frey, Nguyen and Hermanutz, "Building Trust to Reinforce Democracy" (Paris 2022) quoted in an essay by Anthony Ball in "Trust in Public Life" (2023), p 40.

Those of us who are involved in the institutions of state must earn that trust through our work. We must also redouble our efforts to explain to our society, especially the young, what we do and why we do it.

In conclusion, all societies in history have had to find ways in which people with very diverse views could live together peaceably. This hall 400 years ago would have encountered very diverse views on the pressing issues of that time. Misjudgements then led to a very bad result. Today, our society faces challenges which many other countries face. Climate change, migration on an unprecedented scale, and an ageing population are problems which most developed economies must address. The high levels of public debt after the financial crisis of 2008 and the pandemic of 2020—2022 are also an international phenomenon which hamper the ability of governments to achieve prompt results. But we have the institutions which will allow us over time to address those problems. Populist attacks on those institutions are not an answer. There is plenty room for a positive vision of our future.

Thank you.