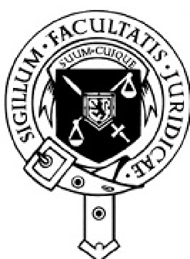

**Response from the Faculty of Advocates**

***to***

***Questions raised by the House of Lords Constitution Committee in respect of its inquiry into the Rule of Law***

EXECUTIVE SUMMARY

i. The Faculty of Advocates ("the Faculty") attaches great importance to the rule of law. The Faculty recognise that there are several views about the concept. The Faculty takes a substantive rather than merely formal view of the concept, which it considers chimes with other important concepts, such as fundamental human rights, separation of powers democracy, and even the social contract.

ii. The rule of law has practical as well as jurisprudential aspects. The Faculty notes that the rule of law is important to citizens themselves planning what to do and how to organise their affairs, and in turn autonomy. It is also linked, albeit in an attenuated form, to a citizen's expectations about how the state will regulate the conduct of others, including an expectation of some degree of enforcement of the law against those who transgress.

iii. The Faculty draws attention to some of the Scottish dimensions to the rule of law, including but not limited to the following: some old Scots usage of the term; the declaratory powers of the Scottish High Court of Justiciary; the use of the *nobile officium*; and the Scottish Parliament being one whose powers are constrained.

iv. Looking at matters broadly rather than concentrating on the Scots nuances, as far as general components of the rule of law are concerned, the Faculty has considered several different approaches, and found that articulated extrajudicially by Lord Bingham especially helpful. Whilst a difference of emphasis by the Faculty rather than a disagreement with Lord Bingham, the

Faculty considers access to independent advice and representation of great importance to the thriving of the rule of law.

v. The Faculty considers some quite modern developments, such as the European Convention on Human Rights ("ECHR") and the Human Rights Act 1998 ("HRA"), how sophisticated interpretations bear on the rule of law, and expresses concerns that even well intentioned extra statutory guidance may be a mixed blessing for the rule of law.

vi. The Faculty considers that threats to the rule of law include actions by some parts of the media to "delegitimise" judicial decision making on important constitutional matters, such as when appellate judges were branded "enemies of the people."

vii. The Faculty considers that there is scope for enhancing the public understanding of the rule of law, and has, for example, introduced youngsters to court proceedings through the medium of moots.

INTRODUCTION

1. The House of Lords Constitution Committee ("the Constitution Committee") is undertaking an inquiry into the rule of law as it seeks 'to understand the rule of law as a constitutional principle and practical matter, and what the state of the rule of law is in the UK…' The Constitution Committee is conscious that there may be '…different understandings of the rule of law, both at home and internationally…'[1].

2. The Faculty is a collegiate body of independent court practitioners, whose aim is to ensure that the people of Scotland, regardless of wealth, background or location, have access to objective, impartial legal advice of the highest quality and representation. Hence it takes a great interest in questions regarding the rule of law[2].

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[1] https://committees.parliament.uk/committee/172/constitution-committee/news/205702/rule-of-law-inquiry-launched-by-lords-constitution-committee/ (published 11 March 2025).

[2] In recent years, amongst other consultation exercises to which the Faculty has responded have been those concerned with, for example: prisoner voting (2019);

3. Accordingly, Faculty welcomes the opportunity to respond to this consultation. Faculty does not, in general, proffer views on matters that are political in nature. However, given the importance of the rule of law as a key tenet of the constitution, we will respond to those questions in the consultation where we consider Faculty's input may assist.

PART 1: DEFINING THE RULE OF LAW

**Question 1:**
**What are the components of the rule of law?**

*Overview*

4. The Faculty recognises that '[t]here is considerable diversity of opinion as to the meaning of the rule of law and the consequences that do and should follow from breach of the concept'[3].

5. The rule of law can be described as existing on a spectrum, with two principal, and competing, versions of the rule of law at either end. At one side of the spectrum sits the formal (or thinner) versions of the rule of law and on the other side sits the substantive (or thicker) versions of the rule of law[4]. As may be expected, formal versions of the rule of law contain fewer requirements than substantive versions. Functionally, then, the rule of law can operate and be applied in different ways depending on how it is defined.

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access to justice (funding of human rights related legal proceedings) (2020); Ministry of Justice Commission's second consultation on a Bill of Rights (2021); and the independent Human Rights Act review, the latter of which focused on the relationship between UK and the ECHR and certain of the Protocols thereto, especially as such law is mediated through the HRA, and whether the HRA should be amended, which were matters fundamental to the constitutional integrity of the country and to the rights of its citizens.

[3] Professor Paul Craig, "The Rule of Law", published as Appendix 5 to the House of Lords Select Committee on Constitution Sixth Report, Session 2006-07 ("Professor P Craig's Paper (2007)") and set against the background of the Constitutional Reform Act 2005 ("CRA 2005").

[4] This understanding of the rule of law, as expressed in the following two paragraphs, is credited to Brian Z Tamanaha: see B Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) chs 7 and 8.

6. At its weakest, the rule of law consists of the "rule by law", ie. law merely as an instrument of government action. Moving along the spectrum, the rule of law can be formulated as "formal legality", which consists of general, prospective, clear and certain laws. The "thicker" of the formal versions of the rule of law is a combination of formal legality plus democracy, whereby consent determines the content of law.
7. Substantive versions include commitments to individual rights (such as rights to property, contract, privacy and autonomy), dignity and justice and, at its "thickest", social welfare (ie. substantive equality, welfare and the preservation of community).

***Historical considerations***

8. In the United Kingdom, the notion of the rule of law is often associated with historic events and thinking such as the *Magna Carta Liberatum* (1215), the Glorious Revolution (1688) and the Bill of Rights (1689), the works by, for example., Locke in the late 17th Century, and Dicey in the late 19th and early 20th Century, often referred to as "British constitutionalism", despite being English in origin.

9. However, the rule of law has a long history in Scots jurisprudence. For example, writing in the mid-seventeenth century, Samuel Rutherford employed it in arguing against the divine right of kings[5]. Also, the judges of the Court of Session in Edinburgh in 1687, decided that "...we have no slaves in Scotland, and mothers cannot sell their bairns"[6], an early anticipation of the abolitionist movements which were to come. The latter point highlights both a need for sensitivity to the Scottish dimension, according to which the rule of law is inextricably linked to the idea that the ruler is subject to the laws of the land (and not the other way round), and that, therefore, there is "equality before the law". Accordingly, the rule of law is not just about the good citizen knowing how to conform to the law, or just about the "good king" regulating his or her own conduct, but also about there being some expectation

[5] *Lex, Rex: The Law and the prince* (1644), where the phrase "rule of law" or similar phrases are used several times (text available in digitalised and word searchable form from the University of Michigan's electronic library collection).
[6] *Reid v Scot of Harden and his Lady* [1687] Mor 9505, 13 January 1687.

that those disregarding the law will be brought to justice. The rule of law has resonances with the idea of a social contract.

### *Components of the rule of law*

10. The Faculty considers that core idea of the rule of law in the UK is that persons, whether natural or legal, should, in respect of legal relations, have those relations with the state and each other regulated by laws, and not the arbitrary decision of the state or the adjudicator.

11. The Faculty considers a good starting point for considering the components of the rule of law in the modern setting lies in the eight principles ("the Bingham Principles") distilled by the late Lord Bingham in his book *The Rule of Law*[7], which followed on from his seminal Sir David Williams lecture at Cambridge University in 2006, where he argued that: '[t]he core of the existing principle', was 'that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.'[8]

12. The Bingham Principles are that:

    (1) The law must be accessible and so far as possible intelligible, clear and predictable.

    (2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.

    (3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

    (4) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the

[7] Bingham, *The Rule of Law* (Penguin Group, 2010).
[8] See: https://binghamcentre.biicl.org/our-vision

powers were conferred, without exceeding the limits of such powers and not unreasonably.

(5) The law must afford adequate protection of fundamental human rights.

(6) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.

(7) The adjudicative procedures provided by the state should be fair.

(8) The rule of law requires compliance by the state with its obligations in international law as in national law.'[9]

13. The Faculty also suggests two further principles of the rule of law, which again are interlinked to some degree overlap with several others of the Bingham Principles:

(9) Independent advice and representation.

(10) Equality of arms[10].

14. There may also be scope for arguing that openness in the decision-making process of government and other public bodies is an aspect of rule of law.

15. Principles have the quality of "weight" and on occasions have, figuratively speaking, to be weighed. The Faculty is conscious that whilst the Bingham Principles are important, in some circumstances one or more components may not be of pre-emptive importance. By way of a glib and non-exhaustive example, arguably there may be societal justifications for open textured general anti-avoidance tax rules ("GAAR"), the unpredictability of their bite being

[9] See: https://binghamcentre.biicl.org/our-vision

[10] For convenience, these components are dealt with in the discussion of several of the Bingham Principles, especially the seventh principle.

justified by the need to counter "abusive" tax arrangements and deter others from such behaviour[11].

*Bingham's first principle: The law must be accessible and so far as possible intelligible, clear and predictable*

<u>Accessibility</u>

16. Here the Faculty is focused on the ease of the law being found (accessibility) rather than whether, once found, it is understandable (intelligibility) and the ease of understanding (clarity). The Faculty acknowledges an element of artificiality in such distinctions because, unless one can understand what one finds, it may be difficult to know if one has found the relevant material.

17. Modern technology and access to data bases has, in one sense, made the law more accessible than at any time in history. Many but not all legal resources are available free of charge in electronic form. This includes much legislation and much case law. It often does not include up to date textbooks. However, even if a lay person does have access to legal resources, that person may have difficulty making good sense of them. By way of non-exhaustive examples, they may have difficulty ascertaining the ratio of a case or in understanding the hierarchy of decisions (*stare decisis*). There is a danger that a lay person may overestimate their abilities in understanding the law. Independent advice and representation remain very important.

<u>Intelligibility</u>

18. Regrettably, much law, whether judge-made or legislation, is not readily intelligible. Such problems are not confined to old law.

19. This is particularly unfortunate when the law is in part aimed at protecting the vulnerable or those of modest means. In Scotland, the law surrounding crofting, including succession to crofts, is a prime example. Even solicitors

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[11] https://www.gov.uk/government/publications/compliance-checks-information-about-the-general-anti-abuse-rule-ccfs34a/information-about-the-general-anti-abuse-rule

experienced in executry work in general often shy away from this area of practice.

Clarity

20. Clarity can arise either at an almost abstract level (what do the words mean) and at the level of application (how do the law and facts mesh). In the common law, at an abstract level, the law may tend to be easily grasped but even at this level may be more complex and less static than first thought[12]. At the level of application, the "rules" are found to be open textured and less than clear in in application[13].

21. Lack of clarity may arise from numerous sources. One source which is often overlooked is the sophistication of the interpretative approaches to statutes, common law and documents. The Faculty is, for example, familiar with the so-called "Pepper v Hart rule"[14] related to statutory interpretation. In relation to statute law, the Faculty is conscious of the role of the interpretative obligation under HRA, section 3. This can on occasion result in a strained meaning being attributed to the words being used by Parliament[15].

22. Even with modern legislation, both primary and secondary, there can be occasions where a literal reading yields to a more purpose-orientated one, without the ECHR being to the fore. For a recent example, see *Faculty of Advocates and the Judicial Appointments Board for Scotland Special Case*[16]. Legislation concerned qualifying periods as a solicitor or Advocate for judicial appointment. A doubt arose as to whether a period of "devilling" (akin to pupillage) between being a solicitor and becoming an Advocate "re-set the clock" to zero[17]. The literal reading of the legislation would have the effect of wiping out the previous years of practice as a solicitor in the context of eligibility for appointment as a sheriff. The Inner House held that this gave rise

[12] See below comments on standard of care in negligence.
[13] See below comments on predictability in the context of delict/negligence.
[14] *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.
[15] See *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.
[16] 2025 SLT 171.
[17] Owing to the requirement that the person seeking appointment must be legally qualified, and to be so throughout the ten years immediately preceding appointment: Courts Reform (Scotland) Act 2014, s.14(1).

to an absurdity and rejected such a reading in favour of a reading which gave a sensible outcome, where the devilling did not nullify the pre-devilling years of practice.

23. In relation to interpretation of documents other that legislation, over the last couple of decades there have been interpretative trends backed by the highest courts bearing on interpretation and these trends have not necessarily made the meaning of document mores certain than it would have been but for these developments. In the field of interpretation of testamentary instruments, for example, well settled Scots rules of interpretation have been replaced by principles emanating from principles developed in England in respect of commercial contracts, even though in many English will cases a different approach might be adopted[18]. Thus, overarching theories of interpretation of documents, whilst intellectually impressive, make the giving of guidance on what a document means perhaps more difficult than in a less sophisticated age.

Predictability

24. In Scotland, there is the complication that, at least in theory, the High Court of Justiciary retains a controversial declaratory power, enabling it to declare actions to be criminal, even if those actions have not hitherto been defined as criminal. Under this power, the High Court of Justiciary can "competently…punish, (with the exception of life and limb), every act which is obviously of a criminal nature; though it be such which in time past has never been the subject of prosecution"[19]. The historical and jurisprudential basis of such powers is much debated[20].

[18] See, for example, *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74; [2016] 1 WLR 85; 2016 SC (UKSC) 25, especially paras 33 *et seq*. The interpretation of some English Wills falls under the Administration of Justice Act 1982, s.21, which although found in a UK Act of Parliament does not apply in Scotland.

[19] Hume, *Commentaries on the Law of Scotland Respecting the Description and Punishment of Crimes*, (Bell & Bradfute, 1797) vol 1, lii, cited by Chloë Kennedy, "Declaring Crimes", Oxford Journal of Legal Studies, vol 37, issue 4 (2017) pp 741-769 at p 742 fn 3 where she gives the declaratory power its true context and value, which, she argues, lies in its conformity with "natural justice".

[20] See Chloë Kennedy, "Declaring Crimes", Oxford Journal of Legal Studies, vol 37, issue 4 (2017) pp 741–769.

25. To modern sensitivities, the declaratory power arguably has a degree of retrospectivity about it, and seems to expose to punishment a person for a crime not in being at the time he acted.

26. In practice, little use is made of this power, not least because of the HRA and ECHR, article 7(1), which is concerned with retrospectivity.

27. Even prior to the HRA, Scots judges tended to justify their position when extending the reach of a law by giving a wide interpretation to existing law, rather than making recourse to declaratory powers, and the accused pleaded guilty. By way of non-exhaustive examples: in *Khaliq v HM Advocate*[21], the judges, faced with an accused of the wilful, culpable and reckless supply of glue-sniffing kits to children causing or procuring the inhalation of noxious vapours by these children to the danger of their health and lives, merely interpreted the existing crime of culpable and reckless injury in a broad way, rather than declare a new crime; and similarly, in *S v HM Advocate*[22] the extension of rape to married couples was achieved without recourse to declaratory powers.

28. In Scotland, the High Court of Justiciary also retains so-called *nobile officium* powers:

> 'In the High Court, the *nobile officium* has been used to address statutory omissions in the criminal sphere. It has been used to direct a sheriff to act according to law and process, as where there had not been compliance with statutory requirements. It has also been used to substitute one offence for another where a sheriff had decided in relation to an offence not included in a particular statute. The *nobile officium* has been successfully invoked to quash an excessive (though competent) sentence on the basis that it was unrealistic to expect the accused to have been able to pay a particular sum of compensation. There has also been successful challenge where an

[21] 1984 JC 23.

[22] 1989 SLT 469.

accused was denied the opportunity to make representations to a sheriff.'[23]

29. Further, in the civil law, the Court of Session is also blessed with the *nobile officium*:

> 'The *nobile officium* has been defined as an extraordinary equitable jurisdiction of the Court of Session inherent in it as a supreme court; it enables it to exercise jurisdiction in certain circumstances which would not be justified except by the necessity of intervening in the interests of justice.'[24]

30. The versatility of the *nobile officium* in a civil context can be demonstrated by some examples of when it has been successfully invoked:

> "In the Court of Session, it has been used to appoint new trustees where the underlying offices of *ex officio* trustees ceased to exist. It has been successfully invoked to confer additional powers or authority on trustees where this would facilitate the intention of the truster, such as the power to purchase, borrow, sell or grant a lease. The court has allowed for the rectification of inadvertent errors in *Gazette* notices with the aim of protecting creditors in bankruptcy process. Also in the field of bankruptcy, the *nobile officium* has been used to grant discharge in situations of procedural impasse or where the statutory machinery has not operated as envisaged.
>
> Public officers have been appointed on an interim basis in the absence of a statutory basis for interim appointment with the intention of facilitating orderly public administration. A variety of statutory omissions have been provided for by exercise of the *nobile officium*. It has also been used to authorise subscription of

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[23] Stephen Thomson article in the Journal of the Law Society of Scotland, 14 December 2015: https://www.lawscot.org.uk/members/journal/issues/vol-60-issue-12/the-nobile-officium-still-relevant-still-useful/. Stephen Thomson develops these ideas in *The Nobile Officium: The Extraordinary Equitable Jurisdiction of the Supreme Courts of Scotland* (Avizandum/Edinburgh University Press, 2015).

[24] Stephen Thomson article in the Journal of the Law Society of Scotland, 14 December 2015: https://www.lawscot.org.uk/members/journal/issues/vol-60-issue-12/the-nobile-officium-still-relevant-still-useful/

documents in substitution for the rightful signatory where his or her signature could not be obtained, and to correct errors, clerical mistakes and procedural omissions.'[25]

31. Recently, the *nobile officium* was successfully invoked by a widow endeavouring to use her late husband's sperm but where the paperwork directly related to the Human Fertilisation and Embryology Act 1990, Schedule 3 was in less than an ideal state[26].

*Bingham's second principle: Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion*

32. The phrase "application of the law" is often not a straightforward matter due to, amongst other factors: the law being unclear; or it being rendered less clear than might formerly have been thought by innovative and ever changing interpretative techniques; and/or its application to given facts, perhaps being awkward because the factual scenario or social context in which the facts have arisen was not in contemplation when the law came into being.

33. By way of a non-exhaustive example, in most delictual "negligence" cases, the concept of "reasonable care" in the context of standard of care is to the fore. The issue of what constitutes "reasonable care" in Scots law is complicated by, amongst other factors, distinctions amongst the actors and the context in which they are operating: ordinary individuals[27]; trades (where trade practice is relevant but not of pre-emptive importance to assessing what amounts to reasonable care)[28]; and professionals (where professional practice tends in the vast majority of case to determine standard of care)[29], but is subject to an override where, although, the

[25]Stephen Thomson article in the Journal of the Law Society of Scotland, 14 December 2015: https://www.lawscot.org.uk/members/journal/issues/vol-60-issue-12/the-nobile-officium-still-relevant-still-useful/

[26] *B v University of Aberdeen* [2020] CSIH 62; 2020 SLT 1124.

[27] *Bourhill v Young* 1942 SC (HL) 78; *Muir v Glasgow Corporation* 1943 SC (HL) 3 per Lord Macmillan at 11.

[28] *Cavanagh v Ulster Weaving Co.* [1960] AC 145.

[29] *Hunter v Hanley* 1955 SC 200.

defender acted consistently with a body of professional practice that professional practice lacked a logical or evidential foundation[30].

Guidance

34. For the purposes of this response, the Faculty refers to "guidance" in a very broad non-technical fashion.

35. In many civil contexts, primary and or secondary legislation is augmented by "guidance" of one kind or another.

36. In the context of a consideration of the rule of law, there are at several problems created by guidance, including but perhaps not limited to the following:

    (9) There is a danger that the primary legislation initiated by the government but passed by the UK Parliament is of a skeletal kind and left to be fleshed out by secondary legislation and/or guidance. Such secondary legislation may receive limited Parliamentary "scrutiny" and the Guidance even less. There then arise issues pertaining to the "separation of powers": the legislature is doing too little in the formulation of the law and the executive too much.

    (10) There is a danger that the legislature may be less interested in clarity if the meaning of its legislation can be explained in guidance.

    (11) In respect of guidance, there is a danger that it, rather than the statute or secondary legislation, becomes treated as if it is the law.

    (12) Guidance adds to the volume and sometimes the complexity of the materials which must be considered.

37. Often the guidance is excellent, but voluminous: HMRC's website is an example of this.

[30] *Honisz v Lothian Health Board* 2008 SC 235.

38. Sometimes, guidance is difficult to find or overlooked. On one view, adults with incapacity guidance may provide an example.

39. Very occasionally, guidance can be wrong or if not wrong, inadvertently misleading.

40. Sometimes, the guidance, although of a very high quality, is of uncertain status – a mere explanatory note. Trust law provides an example. The Scottish Government's explanatory notes to the Trusts and (Succession) Scotland Act 2024, quite properly alert the reader to the fact that the guidance has not been endorsed by the Scottish Parliament.

41. There is considerable complexity surrounding use of such guidance for interpretative purposes[31]. The picture becomes more complex when it comes to secondary legislation and Explanatory Memoranda (sometimes called "EMs"), Executive Notes/Policy Note for Scottish Statutory Instruments. It is understood that EMs aim to make the Statutory Instruments or Rules accessible to readers who are not legally qualified[32].

42. In short, whilst potentially helpful, there is a danger that "official" guidance of one sort of another may create a hinterland around law which is not widely known, or is known but its status (or lack thereof) not fully appreciated.

Police, and Prosecutorial Discretion

43. Discretion applies, amongst other matters, to the decision of whether to admit certain evidence or not. However, the discretion is regulated by principles and is not unfettered[33]. In relation to hearsay evidence and its admissibility in

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[31] https://www.legislation.gov.uk/asp/2024/2/notes/contents

[32] https://www.legislation.gov.uk/understanding-legislation

[33] *M v HM Advocate (No 2)* [2013] HCJAC 22; 2013 SLT 380. *M v HM Advocate (No 2)* is a decision of a bench of five judges, concerned with a man accused of indecent assaults on a girl when she was between six and ten years old. In advance of trial, the accused sought permission under s.275(1) of the Criminal Procedure (Scotland) Act 1995 to adduce evidence about the complainer having allegedly made false allegations about another man when she was 17. The judge at first instance refused the application. Following a further application, the trial judge did so too. The accused was convicted and lost his appeal before a bench of five judges. Whilst some of the members of the bench of five expressed their views in somewhat different language to the Lord Justice Clerk (Carloway), for

criminal cases, the position is regulated by the detailed provisions of section 259 of the Criminal Procedure (Scotland) Act 1995, and precedent bearing thereon[34]. Whilst their combination of statutory provision and precedent allow a measure of discretion in relation to admissibility, it is not unfettered. When it comes to productions and whether the jury should be allowed to see them, there is discretion but again the judge has principles guiding the exercise of that discretion[35]. When it comes to sentencing, the judge has a degree of discretion but is influenced by guidelines intended to promote consistency[36].

44. In line with the rule of law, however, such discretion is not absolute but must be put into practice in accordance with some broad general principles[37]. Similarly, and notwithstanding the fact that each judge and sheriff has a wide

present purposes, the Faculty focuses on the Lord Justice Clerk's words at paragraphs 28-29 in the following terms:

> '[28] The starting point for a decision on whether this evidence is admissible is the general principle that evidence is only admissible if it is "relevant"…Evidence is relevant when it either bears directly on a fact in issue (i.e. the libel) or does so indirectly because it relates to a fact which makes a fact in issue more or less probable…The determination of whether a fact is relevant depends very much upon its context and the degree of connection between what is sought to be proved, or disproved, and the facts libelled. It is a "matter of applying logic and experience to the circumstances of the particular case"… The question is one of degree; "the determining factor being whether the matters…are, in a reasonable sense, pertinent and relevant and whether they have a reasonably direct bearing on the subject under investigation…
>
> [29] What is sought to be admitted here is evidence that, at least on one view, has no direct or indirect connection with the facts in issue, but may conceivably affect the weight to be attached to testimony which does have direct relevance to the facts…There is no doubt that this type of evidence can be admissible in certain situations; but these situations are strictly regulated. The Scots law is reasonably clear. It differs from that under certain common law systems, which permit impeachment of the general character of a witness by the use, for example, of persons speaking to general credibility…In Scots law, evidence of either good or bad character is, in general, inadmissible…because it is collateral to the issues for decision as defined in the libel.' (Ellipses added. For expository convenience and brevity, the authorities mentioned by the Lord Justice Clerk are omitted).

It is also noted that when it comes to motion as to the place of trial, the judge has a discretion: see *Luke Mitchell v Her Majesty's Advocate* [2008] HCJAC 28; 2008 SCCR 469.

[34] See, for example *N v HM Advocate* 2003 JC 140.

[35] *Begum v HM Advocate* [2020] HCJAC 16; 2020 JC 217 especially paragraph 55 *et seq*.

[36] https://www.scottishsentencingcouncil.org.uk/media/jq3gcfx3/sentencing-in-scotland-information-pack.pdf

[37] See, for example, *Gemmell v HM Advocate* [2011] HCJAC 129; 2012 JC 223 at paras 31, 32, 112 and 145, in respect of the amount of discount which may be taken off a sentence after conviction.

discretion with regards to the manner in which trial business is conducted in his or her court, or as to the manner in which a jury is charged (or given legal directions), guidance in the form of a "Jury Manual" has been widely adopted within the jurisdiction[38].

45. Once the matter is referred to the Procurator Fiscal or Crown Office, the decision is taken regarding: (i) whether there is sufficient admissible evidence of a crime having been committed, as well as sufficient admissible evidence that the crime was committed by the accused and (ii) if so, whether prosecution is in the public interest e.g. the nature and gravity of the offence justify the prosecution. Point (i) is to some degree a judgment call, not an arithmetical matter, and as such involves an element of discretion. Point (ii) inevitably has (a) a policy dimension and (b) a discretionary dimension. Again, discretion does not amount to arbitrariness: discretion is bound by legal and evidential, as well as private and public interest, considerations[39].

*Bingham's third principle: The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation*

46. As noted above, there are mundane and relatively uncontroversial situations where different approaches are taken to different actors: in the sphere of delictual negligence a doctor (such as the one in *Hunter v Hanley*) is judged by a different standard of care to a "manageress" of a tea-room (such as the one in *Muir v Glasgow Corporation*).

47. Whilst perhaps more an issue in England than Scotland, the Faculty is aware of the controversy over sentencing guidelines for ethnic minorities.

*Bingham's fourth principle: Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably*

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[38] https://judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/jury-manual-pdf-version-2-july-2024.pdf?sfvrsn=277e489c_1

[39] *Prosecution Code*, Crown Office and Procurator Fiscal Service, published 1 May 2001; updated 14 July 2023: https://www.copfs.gov.uk/publications/prosecution-code/html/

48. Bingham's fourth principle interacts with his first principle, especially in relation to accessibility. Judicial review raises an issue to do with *locus standi* but also other matters covered by the first principle along with Faculty's suggested ninth principle (independent advice and representation).

49. The Faculty notes that Scotland has a developed system of judicial review. It came to public prominence with cases on Brexit-related matters (including the prorogation of the Westminster Parliament) and Covid 19[40].

50. Judicial review is a difficult area of law for specialist lawyers, let alone lay persons. A further Scottish complication is the ability to challenge the legislative competence of the Scottish Parliament and the legislation it enacts[41]. This is yet another area where a combination of complexity, "standing" and the need for representation raise their head.

*Bingham's fifth principle: The law must afford adequate protection of fundamental human rights*

51. The Faculty is sensitive to the importance of this principle.

52. Whilst the ECHR has tended to be to the fore in this area, not least because of the Scotland Act 1998 and the HRA, the Faculty is conscious of other legislation, treaties and, indeed, domestic common law principles raising issues to do with fundamental human rights.

53. The Faculty also observes that fundamental human rights (such as those concerned with a right to a fair trial) can surface in the lower courts as well as the superior ones and can on occasion touch on relatively modest matters, such as the way an expenses hearing is conducted[42].

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[40] https://digitalpublications.parliament.scot/ResearchBriefings/Report/2022/6/27/0ea1f532-8a16-11ea-a4bf-000d3a23af40

[41] See, for example, *AXA General Insurance Limited and others v The Lord Advocate and others* [2011] UKSC 46; [2012] 1 AC 868; 2012 SC (UKSC) 122, concerned with the Damages (Asbestos-related Conditions) (Scotland) Act 2009.

[42] See, for example, *Richardson & others v Rivers*, Sheriff Principal Iain Macphail QC, 23 August 2004, Reference A1993/02 (Edinburgh Sheriff Court); 2004 GWD 28-583.

*Bingham's sixth principle: Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve*

54. The Faculty is sensitive to the importance of this cluster of factors.

55. It prefaces its remarks by noting that it consider that what amounts to a measure which improves the system of civil justice is primarily and ultimately for the legislature to decide[43], albeit there is great scope for practitioners to liaise with the court authorities over such matters as improvements to the rules of court (on one view a form of secondary legislation) and Practice Notes.

56. A decade or so ago, the civil jurisdictions within Scotland were reviewed, which culminated in the Courts Reform (Scotland) Act 2014. This aims to have civil cases heard at an appropriate level in the court hierarchy.

57. Occasionally, a lower court arguably lacks the ideal type of procedure for a particular kind of dispute. By way of a glib example, the Sheriff Court currently lacks a procedure for giving "directions" to trustees, albeit, it does have jurisdiction to give something akin to directions in other contexts, such as issues arising under the Adults with Incapacity (Scotland) Act 2000.

58. The Faculty notes in passing that Scottish courts have developed across different types of dispute a role for lay support[44].

59. Whilst Bingham's sixth principle is focused on civil matters, the Faculty takes the opportunity of observing that in criminal matters, Scotland has a long tradition of expediting speedy resolution of criminal proceedings. Even today, with a backlog of criminal cases due to, amongst other factors, the Covid-19 pandemic, great effort is made to seek to minimise the journey time from offence to a determination[45].

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[43] See, for example, *Singh v Secretary of State for the Home Department* [2025] CSIH 4; 2025 SLT 146.

[44] See, for example, Act of Sederunt (Rules of the Court of Session 1994) 1994, Sch.2, ch.12A; and Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, Sch.1, ch.1A.

[45] See https://www.gov.scot/publications/journey-times-scottish-criminal-justice-system/pages/7/ (published June 2023).

*Bingham's seventh principle: The adjudicative procedures provided by the state should be fair*

60. The Faculty is conscious that Scottish Courts strive not only to be fair but to be seen as such.

61. From time to time, a judge will recuse themselves or declare an interest[46].

62. A more common problem than perceived judicial bias is that of the funding of litigation, especially if one side can afford to "lawyer up" and the other cannot. Such issues can even surface where the individual is far from impecunious, or even legally qualified[47].

63. The Faculty's website states the following:

> '[a]s part of a commitment to promote access to justice, the Faculty can arrange for advice and representation to be provided by advocates free of charge.
>
> This pro bono service has been a feature of the Faculty down the centuries and is now provided by volunteer advocates through the Faculty's Free Legal Services Unit. It should be understood from the outset, however, that not all requests for assistance can be met by the Unit - criteria must be met before a case is accepted. When we are able to help, the aim in every case is for the advice/representation to be of the same quality as given by advocates to paying clients.'[48]

*Bingham's eighth principle: The rule of law requires compliance by the state with its obligations in international law as in national law*

64. The Faculty is sensitive to the need for the Courts to respect international law.

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[46] See, for example, *Robbie the Pict, Petitioner (No.2)* 2003 JC 78.

[47] See, for example, see, *Halley v Scottish Ministers* [2022] CSOH 81; 2022 SLT 1273, a case concerning the Scottish Ministers' refusal to meet the legal expenses of a part-time sheriff in his petition for judicial review of a decision of a tribunal reporting on his fitness to practise.

[48] https://www.advocates.org.uk/instructing-advocates/free-legal-services-unit

65. Moreover, there may even be scope for international law to be factored into decision making. For example, through the HRA, the ECHR may bear on many domestic disputes. This can arise in certain situations even where the disputants are not public authorities. By way of a non-exhaustive example, ECHR, Article 6 and the right to a fair trial bear on the courts and in turn on even disputants who are private individuals.

66. However, the Faculty of Advocates is also conscious of the sovereignty of the UK Parliament[49], which it recognises as a core tenet of the UK constitution.

**(i) Why is the rule of law an important tenet of the UK constitution?**

67. Whilst arguably the rule of law (or "rule by law", whereby law is merely an instrument of government action) may exist under authoritarian regimes, in liberal democracies, such as the UK, individuals have agreed to place themselves under the rule of the law instead of the arbitrary will of another person. The result is that no one is above the law, which allows for a free society. That is why the rule of law is such an important tenet of the UK constitution: it enables and enhances democracy. Its importance cannot be overstated.

68. The Faculty observes that the rule of law is not just about the good citizen knowing how to regulate his or conduct to conform to the law but also that good citizen having some expectation that those disregarding the law will be brought to justice. The rule of law has some resonance with some form of social contract.

69. In addition, the Faculty considers that rule of law values are closely associated with: (i) autonomy; (ii) equality; and (iii) respect for human dignity. It is a well-established libertarian principle that whilst the individual can do whatever is *not forbidden* by the law, authorities are only permitted to do whatever is *prescribed* by the law. The rules of law aim to promote individual initiative, industry (in the wider sense of the word) and freedom. By way of a non-exhaustive example, in relation to agreements between persons, it is important for the purposes of personal autonomy and business efficacy to know in

[49] See below discussion of the potential tension between parliamentary sovereignty and the rule of law.

advance: (i) what sorts of agreement will be justiciable; (ii) that those that are justiciable, will be adjudicated upon fairly; and (iii) ideally according to interpretative criteria present at the time of contracting. Conversely, in oppressive regimes the equation is inverted, so that individuals can only do what the authorities permit them to do, whereas those authorities will do as they please, issue orders at will, without constraint, often for the benefit of the ruling classes and to the correlative detriment to the people over whom they rule. The rule of law is important because it defines the scope and extent of action to which individuals are entitled, as opposed to the limitations to which authorities are (or should be) subject.

**(ii) Which factors can be used to assess the health of the rule of law?**

70. Factors indicating that the rule of law is in good health would include lawful decision making by public institutions and, where such decisions are considered to be unlawful, the existence of effective legal processes so that such decisions can be challenged and determined by judges applying the law without fear or favour, together with the availability of effective remedies in the event that a decision is declared to be unlawful.

71. The absence, or presence, of attempts by figures in public life to try to "delegitimise" judges and lawyers by negative comment (for political purposes), and the public's response thereto, can also be regarded as a barometer for the health of the rule of law in society. In that context, the public figure tries to argue that the judge's decision is inappropriate, not only in terms of it being wrong[50] but that the legal system should never have even entertained the proceedings in the first place and that, the judges (and as the case may be, the lawyers) participating in those proceedings are somehow abusing the legal system to "take down" such figures, against the will of the people.

72. The availability, or lack thereof, of Legal Aid or other means of supporting advice and representation is also an important indicator in assessing the health of the rule of law because without adequate funding, fewer decisions can be challenged (with legal challenges only being open to the wealthy), which results in unfairness and inequality.

[50] In that event, the appeals system can be utilised to have the decision reversed.

73. The Faculty is conscious that there is growing sophistication in this area. One body, the World Justice Project, has multiple factors it takes into account when assessing the health of the rule of law. Many of these have subfactors[51].

**(iii) Is useful assistance to be gained from definitions of the rule of law used by international or supranational organisations, or in the legal systems of other countries?**

74. As alluded to above, the idea of the rule of law can differ from state to state (as well as international and supranational organisations), depending on, amongst other factors, whether formal or substantive versions of the rule of law are to be favoured. Having said that, a comparative analysis, is always of interest, even if the outcome of that exercise is to confirm that certain definitions are not suitable or appropriate for the UK.

75. The Faculty is aware of the definitions in such documents as those used by The World Justice Project, which defines the rule of law as a durable system of laws, institutions, norms, and country commitment that uphold four universal principles:

    (13) Accountability: the government and its officials and agents are accountable under the law.

    (14) Just Law: the law is clear, publicized, and stable, and is applied evenly. It ensures human rights as well as property, contract, and procedural rights.

    (15) Open Government: the processes enforced are accessible, fair, and efficient.

    (16) Accessible and Impartial Justice: justice is delivered in timely manner by competent, ethical, and independent representatives and neutrals who

[51] See https://worldjusticeproject.org/rule-of-law-index/factors/2024

are accessible, have adequate resources, and reflect the makeup of the communities they serve[52].

76. Whilst the Faculty is open to considering the usefulness of definitions used by international or supernational bodies, it has yet to be convinced that any one definitional approach is pre-emptively useful. The Faculty reiterates that it has found assistance in the Bingham Principles.

**Question 2**

**How well is the rule of law understood by politicians and the public**?

77. Regrettably, it would appear that the idea of the rule of law is at times misunderstood, or at least under appreciated. Faculty hopes that this can be addressed through education which highlights the fundamental importance of the rule of law in a democratic society.

**(i) Has the rule of law been confused with the rule of lawyers?**

78. The concept of the rule of lawyers suggests a rules-based system whereby lawyers wield excessive influence or control over the legal system. Faculty does not recognise this as being a true reflection of reality.

79. Faculty is, moreover, conscious that lawyers can be targets because of whom they represent. Advocates in Scotland are subject to the "cab rank" rule, meaning that they do not control whom they represent. As a result, the fact that they represent a particular client should not in any way be regarded as an endorsement by that advocate of their client's actions or views. As alluded to above, complex law and complex approaches to interpreting it, can make law difficult for non-lawyers to understand. This may alienate sectors of the public from the legal system and create an impression that lawyers are running things, or even making up the law as they go along. Improving the clarity of law and the ability of lawyers to explain the law in clear terms may mitigate such issues.

80. It is important in any state which believes in the rule of law that decisions of the state are capable of being challenged by individuals affected by those

[52] See https://worldjusticeproject.org/about-us/overview/what-rule-law

decisions, be they citizens or otherwise. The fact that certain individuals, or groups of individuals, may not be viewed favourably by sections of society should not bar them from being able to challenge those decisions and hold the state accountable, which should result in better decisions being taken in the future. In representing their clients, the lawyers acting in such cases are simply doing their job. They are not wielding undue influence or control over the legal system but are fulfilling an important constitutional function, which benefits the public in general.

## PART 2: THE OPERATION OF THE RULE OF LAW

### Question 3
**What threatens the effective operation of the rule of law in the UK?**

81. Threats can emanate from actors, whether they be public officials or wealthy and powerful individuals (either from within or beyond the UK), seeking to abuse the system to strengthen or consolidate their own powerbase.

82. In addition, media attacks on lawyers and judges (calling judges "enemies of the people" for example), in an attempt to "delegitimise" their function and (where appropriate) decisions, also plays its part to undermine the rule of law. The fundamental misconception there is that, in applying the law (as is their constitutional duty), the judges are somehow acting against the interests of the public. However, by applying the law, without fear or favour, affection or ill-will (as their judicial oath demands), society benefits both from the certainty of the decision making and the equality of outcomes.

83. In addition, the Faculty is dismayed by the recent actions by the US government targeting legal professionals at both the international and domestic levels, which violate international human rights law and undermine the rule of law[53].

84. At a practical level, lack of access to justice, principally due to lack of available Legal Aid and funding, is one of the principal threats to the effective operation of the rule of law since the result is to reduce the number of individuals who

[53] See https://www.advocates.org.uk/news-and-responses/news/2025/mar/recent-targeting-of-legal-professionals-by-the-us-government-joint-statement

are potentially able to bring cases against the government (with the ability to do so becoming the preserve of the wealthy).

85. Further, the Faculty is also concerned that there is a risk that some elements of the public may become disaffected with the rule of law because, in respect of "low level" crime (such as shoplifting), they see the law being flouted to their detriment and the social contract being broken.

86. In the past, the Faculty has expressed support for the current arrangements in relation to the HRA and the ECHR. The Faculty supports the continued incorporation[54] of the ECHR into domestic law. It does not favour a UK Bill of Rights. Incorporation has brought about significant advances in domestic law. Even if the ECHR were no longer incorporated into domestic law, so long as the UK remains party to it, the Convention will continue to exert an influence on domestic law, albeit more remotely via the Court in Strasbourg. It would appear to be a retrograde step to deprive domestic courts of an opportunity to shape our response to the Convention and to leave the European Court of Human Rights as the sole arbiter of the implementation of the Convention in practice in the UK. Whilst recognising that domestic UK law has its own rich vein of human rights law and rule of law values, the Faculty considers that a retreat from the ECHR might occasion some prejudice to the rule of law within the UK.

87. A further threat to the rule of law concerns so-called "SLAPP" (Strategic Lawsuits Against Public Participation) orders. They impinge not only on free speech, but also on practical access to the courts by those upon whom such orders are directed[55].

**Question 4**
**What is Parliament's role in upholding the rule of law? Is it performing this role well, and how could it be improved?**

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[54] Whilst the ECHR was not incorporated wholesale into domestic law (notably article 13, being the right to an effective remedy, was not included in the HRA) and more accurately, it was "given further effect" in the UK through HRA, for short the Faculty will use the term "incorporation".
[55] See, for example, Francesca Farrington, Justin Borg-Barthet and Erin Ferguson "Should Scotland SLAPP-back? A comment on the need for bespoke anti-SLAPP legislation in Scotland" Juridical Review (2024) vol 3, pp 159-178.

88. The Faculty notes that the Westminster Parliament is the source of legal sovereignty both in the UK constitution and almost all UK legislation. In respect of the laws it makes or repeals, the Westminster Parliament has a responsibility to have regard to rule of law considerations.

89. British constitutional orthodoxy was not suited to the express recognition of certain individual rights[56], nor any constitutional right *per se*, opting instead to regard such rights as falling within the realm of individual liberty. The theory was that instead of holding specific rights, the individual is free to act in whichever way they desire, so long as such action is not prohibited. This "formal legality" version of the rule of law meant that the state could erode civil liberties because any form of restraint on liberty, no matter how draconian, ought to be enforced if prescribed by law.

90. By contrast, the ECHR lists substantive rights that the individual possesses, which must be secured by the state. The obligation on the state to secure the Convention individual rights conflicts with traditional orthodoxy because a restriction of a Convention right must satisfy substantive criteria and not just the "prescribed by law" test. The enactment of the HRA, which gave further effect to the ECHR in the domestic courts, marked a step away from traditional reasoning, potentially affording more protection to individuals.

91. However, the HRA is, like any other statute, "ordinary legislation" and can be repealed by the Westminster Parliament by way of a simple majority. Further, owing to the doctrine of the sovereignty of the Westminster Parliament, a declaration from the courts that Westminster legislation is incompatible with the Convention rights does not lead to the legislation being set aside; rather it is for the government to amend the offending legislation. However, if there is no appetite to remedy the incompatibility which, for example, was the case for a long-time regarding voting rights for prisoners[57], the breach will subsist. Therefore, the UK perhaps sits somewhere between formal and substantive versions of the rule of law: whilst individual rights feature heavily in the UK constitution, the ultimate protection of those rights is not guaranteed to the

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[56] Dicey said 'it can hardly be said that our constitution knows of such a thing as any specific right of public meeting': A V Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th edn, (Macmillan Education, 1959) p 271. See also *Duncan v Jones* [1936] 1 KB 218 p 222 per Hewart CJ.
[57] See *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41.

same extent as it is in states where the power of the legislature is limited by an overarching written constitution.

92. The Faculty wishes the UK to maintain its current incorporation of the ECHR into domestic law. In turn, it would not wish to see legislation changing this situation.

93. Therefore, a tension exists between the rule of law and parliamentary sovereignty, two of the most important elements of the constitution, in that parliamentary sovereignty allows for the Westminster parliament to make or unmake any law it sees fit, with other institutions, such as the courts, being obliged to give effect to the will of Parliament. Parliament, then, has the legal competence to enact legislation that offends the principles of the rule of law.

94. It should be noted that the Scottish Parliament, unlike the Westminster Parliament, is limited in terms of its legal competence. Where Acts of the Scottish Parliament breach, amongst other things, the Convention rights, the legislation can be struck down, in marked contrast to the system at Westminster. Therefore, as a result of legislative devolution in 1999 and the limitations placed on the Scottish Parliament, arguably Scotland adheres to the substantive version of the rule of law. However, the position in relation to reserved matters remains as stated above.

95. The Faculty would like to see both the Westminster Parliament and the Scottish Parliament make its legislation more readily intelligible, and provide greater funding for access to independent advice and representation.

**(i) How can Parliament improve its legislating to better facilitate the rule of law?**

96. If Parliament is to uphold the rule of law, it should ensure that it passes legislation that complies with the tenets of the rule of law as identified by Lord Bingham (set out above). If a bill is introduced by the government which may result in the rule of law being weakened, parliament should effectively scrutinise the bill and apply a proper check and balance on the power of the executive.

97. In terms of promoting clarity of legislation, the Faculty considers that Parliament could consult more widely and at various stages of the legislative process run its draft legislation past legal practitioners with experience in the field being legislated upon.

98. So far as possible, transitional provisions could be included in Acts rather than secondary legislation, thus minimising the risk of their being overlooked. A good example of primary legislation helpfully including most transitional provisions is the Scottish Parliament's Trusts and Succession (Scotland) Act 2024. By contrast, many of the transitional provisions pertaining to the Succession (Scotland) Act 2016 are found in SSI 2016/210 and easily overlooked.

99. Whilst not directly a matter for Parliament, Government could give greater publicity than at present to Explanatory Notes and EMs, and their status or lack thereof made clear. Fundamentally, laws should be clearer, written in plain English and simpler.

**Question 5**
**What is the Government's role in upholding the rule of law? Is it performing this role well, and how could it be improved?**

100. In practice, most UK legislation emanates from government. If the government is to uphold the rule of law, it should ensure that it introduces legislation that complies with the tenets of the rule of law as identified by Lord Bingham (set out above).

101. In respect of the actual text of legislation, as noted above, draft legislation at its various stages should in many cases be run past those with experience of the area under consideration.

102. An example which caused recent concern in Scotland was in relation to the Regulation of Legal Services (Scotland) Bill. This would have given the Scottish Government unprecedented power to intervene in and regulate the legal profession in Scotland. In practice, individuals will typically instruct lawyers to bring their challenges against the state. The people bringing these cases against the government (on behalf of their clients) should not themselves be subject to

professional regulation by the government. That sort of system could be open to potential abuse, resulting in lawyers who bring cases against the government being sanctioned, and reducing accountability of government decision making. Therefore, an independent legal profession, including an independent referral bar, is fundamental to ensuring that the rule of law, and democracy in Scotland is upheld. Faculty welcomed the amendments made to the Bill to remove the contentious provisions.

103. In addition, the government should ensure that its decision making in administrative matters also complies with the rule of law. Where errors are made, with decisions being effectively challenged, the government should adhere to court decisions and not remain in breach of the law.

**Question 6**
**What is the role of the judiciary in upholding the rule of law? Is it performing this role well, and how could it be improved?**

104. The principal role of the judiciary is to apply the existing law without bias to ensure equality before the law. The Faculty considers that the judiciary is successful in so doing. There are limited numbers of successful appeals and very few claims of bias.

105. In some cases, part of the judiciary's role is to supply reasoned justifications for their decisions. These are important to the disputants, not only in influencing their decision on whether to take matters further by way of appeal but also in assisting in their understanding of the rights and wrongs of the matter and increasing the chances of them "feeling" that they had a fair hearing.

106. The judiciary may also have an important role in relation to court procedures. At a grand level, this may involve determining the scope of the court's existing procedure, for example, the scope of judicial review[58]. At an apparently more

[58] see *Wightman v Secretary of State for Exiting the European Union* [2018] CSIH 62; 2019 SC 111.

modest level, it may involve inputting into changes to the rules of court, and practice notes. In relation to rules of court and practice notes, there should be (and often is) consultation with "service users", including practitioners.

107. Separately, those in public life, including politicians and journalists/those in the media (both "legacy" and "new" media) have an important role to play. When such figures turn on judges and lawyers for doing their job, the rule of law risks being undermined.

**Question 7**
**Is there a role for the public in upholding the rule of law?**

108. By exercising their freedoms and demanding the protection of their fundamental rights, by denouncing corruption and holding power to account, by cooperating with the legitimately constituted authorities and through participating in the democratic process, the public bring the rule of law to life.

109. A well-informed, interested and actively engaged public can play a role in upholding the rule of law.

110. In the criminal sphere, there is an important role for the public in reporting crime, co-operating with criminal authorities and giving evidence, in addition to abiding by the law in the conduct of their own affairs.

111. In the civil sphere, by denouncing corruption, holding power to account, co-operating with legitimately constituted authorities and in participating in the democratic process, the public bring the rule of law to life. This is often done through legal challenges to public body decision making with the aim of ensuring that such bodies act within the confines of the law. In addition, there is great scope for the public to provide input into the consultation process. As noted above, there is also a role for lay support in assisting party litigants.

112. If the public's appetite for upholding the rule of law dissipates, the risk is that this is taken advantage of, with the rule of law, and by extension democracy, being weakened as a result.

**(i) Is there a greater role for education, the media and civic society in promoting the rule of law?**

113. A greater role for education, the media and civic society to promote the rule of law can produce benefits for society. Given the lack of consensus on what it means, the rule of law is susceptible to being misinterpreted, with such misinterpretation being deployed by individuals who purport to be promoters of the rule of law, but whose real interests are in fact to weaken it.

114. Faculty regrets the decline in the amount and quality of court reporting, which is vital to ensure that the public are informed as to what is happening in their courts and why. Further, the facts of the case, in particular in relation to politically sensitive matters, sometimes disappear, with the focus being on the political ramifications of the decision, rather than why, as a matter of law, it was arrived at. Faculty would welcome more detailed court reporting that focussed on the facts of the case and why the particular decision was reached.

115. Unjustified attacks by the media on judges, such as by calling them "enemies of the people" are completely unacceptable and should not form part of the public narrative.

116. The Faculty observes that it has assisted with several projects introducing the public (especially young persons) to the judicial process. Examples of this are the assistance it has provided in running "moots" and Faculty Members (Advocates) acting as judges at university moots.

**Question 8**
**How important is the rule of law for the UK's economy and international influence?**

117. It is recognised that "soft power" has its benefits when it comes to international relations. The Faculty considers that clear law, an efficient legal system and unbiased judges make the UK an attractive place in which to live, do business and to litigate and/or arbitrate.

118. In the past, the UK has been able to exercise its soft power with a view to enhancing the rule of law elsewhere. The Faculty notes that the UK's own compliance with the rule of law makes it an important player and a sought-after

ally when it comes to international affairs, for example, when negotiating legal treaties, trade agreements or holding high-level meetings or exchanges in respect of global issues (such as war, defence or pandemics). The UK (especially London) has become a place where litigation between international parties often takes place, even where none of the parties is British.

119. When engaged in negotiations with other states, the UK should take care to ensure that the rule of law at home is not diluted. The Faculty notes that the UK's respect for the ECHR may bear on international conventions and even trade agreements.

**Question 9**
**What threatens the effective operation of the rule of law globally?**

120. The spread of globalised criminal networks and trans-nationalisation of crime, the breakout of war and the growing gap between rich and poor across continents are all threats to the rule of law.

121. In addition, populist and authoritarian regimes can threaten the rule of law. Often, the deceit from the regime is that certain acts are being taken to safeguard or improve the rule of law, democracy or public safety when in fact, what is being sought is a strengthening or consolidation of the regime's power.

122. A fundamental part of the rule of law is that no one should be regarded as being above the law. Regrettably, certain powerful individuals, in facing the legal consequences of their own actions, have sought to whip up a frenzy with their power base in an attempt to "delegitimise" the proceedings against them. This has resulted in threats or attacks on the judges who have been tasked with passing judgment on their conduct. This weakens the rule of law through attempted intimidation of the judiciary. Challenging judicial decisions, through the appellate process, is legitimate; threatening the judges who make those decisions, however, is not.

**(i) Which countries do you think are leaders in adherence to the rule of law, and why is this the case?**

123. Faculty does not express a view on any particular country.

**(ii) How effective is the UK as an advocate for the rule of law on the international stage? How could this be improved?**

124. Faculty does not express a view on how effective the UK is as an advocate for the rule of law on the international stage. However, Faculty would encourage the UK not to weaken its commitment to the rule of law and to show leadership by setting an example of a state committed to the rule of law, which ultimately benefits us all. As John Locke put it "[w]herever law ends, tyranny begins'[59].

Edinburgh April 2025

[59] J Locke, *Second Treatise of Government* (1690) ch XVII, s.202.