HOUSE OF LORDS

Constitution Committee

Corrected oral evidence: Annual evidence session with the President and Deputy President of the Supreme Court

Wednesday 6 April 2022

10.15 am

Watch the meeting

Members present: Baroness Drake (The Chair); Lord Falconer of Thoroton; Lord Faulks; Baroness Fookes; Lord Hennessy of Nympsfield; Lord Hope of Craighead; Lord Howard of Lympne; Lord Howarth of Newport; Lord Howell of Guildford; Lord Robertson of Port Ellen; Lord Sherbourne of Didsbury; Baroness Suttie; Lord Thomas of Gresford.

Evidence Session No. 1 Heard in Public Questions 1 - 23

Witnesses

I: The Rt Hon the Lord Reed of Allermuir, President of the Supreme Court; The Rt Hon Lord Hodge, Deputy President of the Supreme Court.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Lord Reed of Allermuir and Lord Hodge.

Q1 **The Chair:** Good morning. This is the House of Lords Select Committee on the Constitution. We are taking evidence today from the President and the Deputy President of the Supreme Court, in our annual evidence session with them. Welcome, Lord Reed and Lord Hodge. Thank you very much for joining us today. Today provides a valuable opportunity for the committee to ask lots of questions, inevitably, that we always have, but I know, Lord Reed, that you want to start by making a statement and giving us your views on the world as you see it at the moment and I invite you to do that.

Lord Reed of Allermuir: Thank you. I will begin by saying how grateful we are to you for inviting us again to give evidence. We regard this as an important opportunity for us to engage with Parliament and to explain what the Supreme Court has been doing over the past year.

I want to mention three points in opening. The first concerns the pandemic. We returned to hearings in court in June of last year. We are very pleased, of course, that the public can once more walk into our building and watch our hearings. We have continued to allow counsel to appear remotely on screens inside the courtroom, rather like in this room, if they have tested positive or in Privy Council cases if they are unable to travel to the UK or it is more convenient for them to appear remotely. We have been able to hear all our scheduled appeals, although one or two had to be delayed because counsel were ill.

The second point concerns the court's role in relation to the economic recovery following the pandemic. International legal services and related fields such as international shipping, insurance and financial services are of course of great importance to the UK economy. They are underpinned by the courts and by the common law and so the Supreme Court, as the flagship court ultimately responsible for the development of a common law, has a significant role to play. In the past year, we have dealt with important cases concerned with a number of matters relevant to these areas, particularly international shipping, the responsibilities of multinational companies for overseas subsidiaries' conduct, the taxation of multinationals, economic duress in the law of contract and class actions.

The third point concerns diversity, which I know is a matter that the committee has asked about in the past. Last May, we published our first judicial diversity and inclusion strategy. I am strongly committed to supporting its implementation. We have, in the first place, to attract the best qualified candidates for appointment that we possibly can, whatever their background, gender or ethnicity may be. That means not only making the process for appointment a fair and accessible process but making a real effort to encourage well-qualified people from all backgrounds to see themselves as potential candidates and to put their names forward.

The court recognises that, as the highest court, it has a leadership role in increasing the diversity of the judiciary and indeed encouraging and supporting greater diversity within the legal profession at every level. For us, that means, in the first place, encouraging schoolchildren to be aware of the law and of the possibility of a legal career. We do that through our work with schools. It also means supporting the ambitions of students from all backgrounds and encouraging them to enter the legal profession, and we do that through our work with universities. It also means supporting lawyers from groups that are underrepresented in the legal profession in their ambitions to progress in the profession and encouraging them to consider applying for judicial appointment. The court has also been doing that.

There is much work to be done and we have had an active first year in implementing our strategy.

The Chair: Lord Hodge, would you like to add any contribution?

Lord Hodge: For once in my life I have nothing to add at this stage.

Q2 **The Chair:** Thank you for that and I will open up with our questions. I think that there are quite a few questions that will allow us to interrogate the three strands to your opening comments, Lord Reed, which align in some ways with the way that we are looking at our questions.

I will ask a question that develops on the second strand, the relationship between the Supreme Court and economic issues. You said in last year's evidence session, Lord Reed, that your highest priority was to maintain and strengthen the Supreme Court's reputation as an international centre of legal excellence and a global champion of the rule of law. I think you went on to say that you believed that would also contribute to the economic recovery and a new international role for the UK. So we are interested in knowing, from your perspective, what progress you feel has been made on that number one priority over the last year.

Lord Reed of Allermuir: I can say something in that regard about the judgments that we have issued and our other activities domestically, and perhaps Lord Hodge might supplement my answer by saying something about our international relations, as he has responsibility for that part of our activities.

On the judgments, we uphold the rule of law at home and in the international cases that come before us. Domestically, the most important judgments we have issued bearing on the rule of law are two judgments relating to failures by the Government to obey court orders. In one case the argument was that, if an order has been issued under an error of law, the Government do not need to comply with it. We responded that it has been well established since Victorian times that, as part of the rule of law, the Government have to comply with court orders and, if there is something wrong with them, they either go back to the court to get the error corrected, if the court can do it, or if not, they appeal against the order and a higher court will put the matter right.

The other case we had was one where the court had issued an order declaring that a Minister was behaving unlawfully and the Minister carried on. The argument was that, if a court does not order the Minister to stop but simply tells the Minister that the conduct is unlawful, the Minister can carry on. We explained that the rule of law requires Ministers to behave lawfully and, if they have been told by a court, they must comply with that. If need be, injunctions could be issued, but it should not have to come to that.

We also had a string of cases that were to do with constitutional issues arising from the Human Rights Act. We have been able to clarify aspects of that legislation in a way that I think has addressed some of the concerns that there had been about the judiciary overreaching their proper constitutional role.

On international matters, we have had, as always, a large number of cases brought before us by foreign Governments and foreign companies. Of course, they are not required to sue in the UK but they choose to. I mentioned last year the case between Russia and Ukraine and we have been continuing to deal with that case. It has obviously been put into a certain perspective by other events, but it is a major commercial dispute between the two countries, which we are addressing. We dealt finally with the case concerned with the presidency of Venezuela and who was entitled to control the gold reserves in the Bank of England. We have had other cases concerned with the Governments of Libya, Abu Dhabi and Malaysia.

A typical case in international commerce was one which had to do with international maritime law brought before us by a French company and a German company concerning a voyage that had gone amiss in Chinese waters—a case that has no connection whatsoever with the UK, but they chose to bring it in our court.

Our decision in the insurance case to do with business interruption cover and the liabilities of insurers to businesses that had to close because of the lockdowns has also been very influential. We were the first Supreme Court to have to tackle that issue and our judgment is now being considered by other courts around the world.

Perhaps I could hand over now to Lord Hodge.

Lord Hodge: As Lord Reed has said, I have the delegated task of trying to maintain strong relationships with courts and international judicial organisations, and that involves maintaining established relationships and forging new ones. Since we last appeared before you to give evidence, we have had more than 20 engagements, either in person or remotely.

In September of last year, I chaired a remote meeting of the Marshall Forum, which was a meeting with justices of the US Supreme Court and other senior American judges, where we discussed papers on various topics of mutual interest such as the effect of Covid on the courts, the

rule of law and the independence of the judiciary, the separation of powers and freedom of speech and the internet.

In October, Lord Reed and I met the chairman of the constitutional court of Kazakhstan and the Kazakhstan ambassador to the UK for an interesting discussion. In November, we resumed meetings in person with a visit by the Conseil d'État of France to London, which was continuing a relationship that has been built up over the last 30 years.

This year, in May, I will be taking a delegation of UK judges to Washington DC to conduct the Marshall Forum in person and we will also be meeting the Chief Justice of the US Supreme Court and the Chief Justice of the Canadian Supreme Court on that visit. In June, we have a bilateral meeting with the Supreme Court of the Republic of Ireland, and again we will be exchanging papers on legal matters of mutual interest. In October of this year, we have a bilateral meeting with the Strasbourg Court, the European Court of Human Rights. For the first time, we are organising a remote bilateral with the High Court of Australia in November.

Our aim is to champion the United Kingdom as a centre of legal excellence and that involves also engaging with supranational organisations. We have a presence on the Network of the Presidents of the Supreme Judicial Courts of the European Union, no longer as a member but as a guest, and also in ACA-Europe, which is an association of Councils of State and Supreme Ministers of Jurisdictions of the EU, and also the Strasbourg Court's Superior Courts Network. We continue to try to represent the United Kingdom in these fora.

We continue to be consulted by courts from quite a number of countries on an ad hoc basis about various judicial issues in which they seek our advice and guidance on matters on which they think we can give some helpful assistance.

We co-ordinate our work with the Foreign, Commonwealth and Development Office and the Ministry of Justice to maximise the benefit that we can achieve. For example, I had a recent visit from a number of senior UK diplomats who were about to be posted overseas as heads of their delegations to discuss questions about UK legal systems and the rule of law. This was part of an arrangement that the Foreign, Commonwealth and Development Office had organised with the Bar and the courts of England and Wales, and I think the diplomats found that a useful exercise. The aim is to co-operate with these departments to enhance the United Kingdom's reputation as a legal centre and as an upholder of the rule of law.

Lord Reed of Allermuir: In relation to that, I have also been very keen to make the City aware of the importance of the rule of law and of the fact that it has a stake, effectively, in the court. I have been doing that through addressing City audiences on the subject and it has had a sort of spin-off in that I am also finding myself invited to go and speak to City audiences on improving diversity. It is a sort of irony. One might have

thought that the Supreme Court would be the last place anybody would look, but obviously word has got about that we are making an effort, so another institution that has a similar history of a lack of diversity is seeking advice from us.

The Chair: That is an impressive assembly of the evidence of the maintaining and strengthening of the importance of the Supreme Court as a centre of excellence and for a lot of people who may be listening in, a greater understanding of the extent of your international reach, which I think probably is not often appreciated. That was very helpful. I know that Lord Hope wants to ask a question.

Q3 **Lord Hope of Craighead:** Yes, it is a very short point. I want to take you back to the first point you made in your opening statement about the effect on your business of the pandemic. It is not so much about what you did during the time before you came back in June but what you have retained. One of the things that you were doing during the pandemic was remote hearings, but were there any other changes in the rules or practices, and the technology you were using, which you had to develop to make that system work? If so, did you retain some of them?

Lord Hodge: We were, of course, delighted to have resumed work in person last June, but we have changed our methods of work as a result of what we learned from the Covid experience.

Particularly noticeable is the much-reduced use of documents in the courts. In the past, in a big appeal we would have great wodges of paper with all the cases that counsel would cite, or thought they might cite and often did not cite, and all that has gone. Permissions to appeal, case bundles and other papers are now filed electronically and all we have is a small, often quite thin, key documents bundle, which we have on the bench with us. We access everything else via the computer screen; all the authorities, which took up a lot of space, have gone.

We have also continued to use remote technology, including hybrid hearings, to allow hearings to take place where a justice or a counsel has Covid and must work remotely. That has been very useful because three of our colleagues have had Covid in the last month or so and we have been able to continue to sit with one of our colleagues absent and appearing on a computer screen. Similarly, counsel, if they cannot appear, can appear remotely before us.

We particularly used this system in relation to the work of the Judicial Committee of the Privy Council, which has given us much greater flexibility in what we can do. One example was an appeal from the Cook Islands where they could not come over because of Covid restrictions. This was towards the end of last year. The difficulty was that one counsel was in New Zealand and another was in the Cook Islands. New Zealand was 11 hours ahead of us and the Cook Islands were 11 hours behind us and we had to find a slot that was not unreasonable for the hearing to take place. We allowed the parties to produce much more detailed written arguments and then gave them a two-hour slot and sat between 7 pm

and 9 pm for the hearing to take place. I was relieved that that worked. I was slightly nervous that it might not, but it did; it worked well.

As Lord Reed has said, we have not adjourned any case because the court was not able to hear it. We had one case in January that had to be adjourned because counsel was significantly ill and simply could not appear even remotely, and we rescheduled that for July.

We use technology for other purposes, which I can expand on later if you wish, Lord Hope, but those are the changes that we have kept going since the Covid pandemic.

Lord Hope of Craighead: Does the change in the use of technology save time?

Lord Hodge: I think it probably does, as long as the technology is working, and on the whole it has done. Yes, I think it does save time.

Lord Hope of Craighead: You have the advantage, compared with other courts, of not having to hear evidence, so what we are dealing with is argument, which to an extent is on paper anyway and is being developed orally. I suppose that is easier to deal with than other courts having to take evidence and deal with witnesses who are not present. So that element is absent, but do you think you lose anything by having to communicate by virtual means as opposed to personal hearings, or is it just as good as it could be if everybody was present?

Lord Hodge: I think one does lose out by having purely remote hearings. I think that when we were dealing with matters remotely during the 15 months that all our cases were heard remotely, there was a lack of spontaneity in debate. It was rather like being back at school. You had to put up your hand to indicate that you wished to ask a question. The presiding justice had to spot that you were wanting this, interrupt the counsel who might have his or her nose in the papers and then allow the question to be asked. It was slightly clunkier, if I can put it that way, than an in-person hearing, and counsel often felt they had a better feel for the judges' thinking if they saw them in person. So it was a second-best but perfectly adequate way of proceeding.

Lord Hope of Craighead: And interaction between the judges, too, would be affected.

Lord Hodge: Yes, it is.

Lord Hope of Craighead: Thank you very much. I think we can leave that there just now.

The Chair: We have all got familiar with the yellow hand now—always looking out for it. Lord Howarth has a question.

Q4 **Lord Howarth of Newport:** I want to ask you about the relationship between the Supreme Court, the Executive and Parliament. Lord Reed, during last year's evidence session you identified the need to challenge

the idea that the rule of law involves a struggle for power between the courts and the Government, or between the courts and Parliament. Do you think this idea has been sufficiently challenged now?

Lord Reed of Allermuir: My feeling is that it is an idea that still has to be challenged. We have been doing a lot of work, which I may have an opportunity to say more about later, to strengthen our relationship with Parliament, and indeed with the Government. There has been a considerable measure of success so far, particularly in our relationship with the Government, but the idea is one that constantly needs to be challenged. We are, inevitably, issuing judgments from time to time that go against the Government and which may be unwelcome to the Government—and not only to the Government but to their supporters in Parliament. We have to help people to understand what our role is. That is a constant challenge for a court such as ours, but we are working at it and we are making substantial progress.

Lord Howarth of Newport: If some senior politicians have persuaded themselves that the Supreme Court has been intruding unduly into matters that should be the preserve of the legislature or the elected Government, what more can you do to persuade them that that is a mistaken view, educate them and reassure them—or is there a problem in our political culture that politicians bestriding the scene do not sufficiently respect the rule of law?

The Chair: A good question.

Lord Reed of Allermuir: That is a very good question, if I may respectfully say so. I am inclined to think that there may be a bit of both. Obviously, politically it can be very difficult for Ministers sometimes to accept a decision with good grace. That has been the position for a very long time. There is nothing new about that. However, there has been a definite change in the way we are operating in the Supreme Court in relation to government over the last couple of years, and it is to do with trying to co-operate with officials where we properly can. Also, in our judgments themselves we are taking a lot more trouble to explain what we are doing in constitutionally sensitive cases and why we are doing it. If the Government are bringing forward proposals that have operational implications for the court and that we can properly give advice about, we have shown a willingness to do that. I think that has helped to build up a degree of confidence that we are a body that knows what the constitutional boundaries are and respects them in practice.

Q5 **Lord Faulks:** On the question of the rule of law, as you may know I chaired the Independent Review of Administrative Law. One of the things that we thought was that the issue was often mischaracterised as an issue between the Executive, the Government and the judiciary and failed sufficiently to take into account Parliament's role in the role that the Supreme Court took. However, we also concluded that it was not altogether surprising that judicial review appeared to be advancing if Parliament insisted on passing very scanty Bills without making it very clear, often, what Ministers' powers were or were not. Would you like to

comment generally on the balance between the various parts of the constitution and how your role is performed?

Lord Reed of Allermuir: I see the rule of law, democracy and social stability as being intimately connected and our role is to uphold the rule of law and by doing so, we sustain democracy ultimately. Most of the cases where the Government are challenged in the courts are to do with the application of legislation and it is essentially a matter of interpretation. Sometimes governmental action is pressing against the boundary of the law and one can see why. For example, in the realm of immigration, constraints are set by the Geneva Convention on refugees, which has been implemented in our domestic law, and by the European Convention on Human Rights, which has also been implemented in our domestic law. Policies that a Government want to pursue—and it is not only the present Government or a Government of that political persuasion by any means—may be pressing against the limits of what is permissible, trying to test and take as far as they can while remaining within the law. When you are in these boundary areas, which are the cases that tend to come to us, our role ultimately is to give effect to the law enacted by Parliament, and it is unfortunate that parliamentarians themselves do not always understand that.

I was speaking at an event a few months ago where I was trying to explain what our role was and an MP put a question to me, which was to the effect that, whenever you overturn the Government, you are overturning Parliament. I had to explain how the Government and Parliament were distinct, albeit the Government are very largely within Parliament and obviously have a majority in Parliament, and that ultimately our allegiance is not to the Government—our allegiance is to Parliament ultimately. But it is vital that all three of those institutions should work together as far as they can and should see themselves as sharing common goals.

Q6 **Lord Howard of Lympne:** I want to give you the opportunity to help me understand one of the more controversial decisions of recent years in which you were both involved, which is Miller 2, the Prorogation case. I think it is quite a useful test of some of the things that you have been saying and that you said last year.

Prorogation takes place in the House of Lords, attended by Members of the House of Commons, and Article 9 of the Bill of Rights says, "Proceedings in Parliament ought not to be impeached or questioned in any court". It is quite clear—nothing scanty about that, it is quite clear. The court decided that Prorogation was not a proceeding because it did not involve any decisions. Was the court of the view that the authors of the Bill of Rights lacked sufficient command of the English language to insert a reference to decisions in Article 9 if that was really what they meant, or was there some other explanation for the court's conclusion?

Lord Reed of Allermuir: The hearing was virtually entirely concerned with the question of whether the advice given by the Prime Minister to Her Majesty was lawful or not. The Government's argument was

essentially that Parliament sat at the Government's pleasure, and that the Government could prorogue Parliament whenever they liked for as long as they liked. We rejected that argument effectively as reversing the result of our 17th century history.

The question of what one then did about the Prorogation had not been addressed by the parties. Neither of them had presented argument on the point. We raised it towards the end of the hearing, "What should we do?", and we received at the time very perfunctory submissions because nobody had really thought about it. Afterwards, we had more detailed submissions in writing. We reached the conclusion, as a matter of law, that we did, and that you find in the judgment. I appreciate that the committee includes a number of qualified lawyers, including Lord Howard, and if you disagree with it, obviously you are entitled to disagree with it, but that was our decision.

Lord Howard of Lympne: But it is the explanation that I am searching for. I have the relevant part of the judgment here.

Lord Reed of Allermuir: You have the advantage of me, I am afraid, as I don't have it front of me.

Lord Howard of Lympne: It was dealt with in two sentences by Lady Hale. She acknowledges that Prorogation itself takes place in the House of Lords and in the presence of Members of both Houses, "But it cannot sensibly be described as a 'proceeding in Parliament'. It is not a decision of either House of Parliament." That is an assertion. It is not an explanation of why it cannot sensibly be described as a proceeding in Parliament. I think that most people, on a pretty ordinary construction of the language of Article 9, would indeed have regarded it as a proceeding in Parliament.

Lord Hodge: If I might add, it was a closing down of Parliament. It was the announcement of an outcome to Parliament. I think one has to remember that the Bill of Rights was a provision designed to protect Parliament from the Executive, and in those days from the courts, which had historically been the instrument of government. In the late 17th century, I think that out of the 12 High Court judges that there were in the reign of Charles II, he dismissed 11 and James II and VII dismissed 12 in the three years that he was king. The Bill of Rights has to be seen in its historic context and its purpose, and its purpose was to protect Parliament, not to allow the Executive to remove Parliament's sitting. That is a factor in the thinking behind the interpretation of the Bill of Rights.

Lord Howard of Lympne: Article 9, in its terms, clearly protects Parliament from the courts, but there we are.

Can I put another point to you on the case? The basis of the decision was that Prorogation had the effect of preventing Parliament from carrying out its constitutional functions, but of course Parliament had ample opportunity to reverse the Prorogation—something that was not even

mentioned by the court in its judgment. As Professor Timothy Endicott has pointed out in his masterly article in the *Law Quarterly Review*, between 3 and 6 September 2019 the two Houses of Parliament suspended their ordinary timetables and approved a Bill to require the Prime Minister to request an extension of the Brexit deadline if he did not secure Commons approval in full. Parliament could very easily have provided in that legislation that the Prorogation should not take effect, as it actually had done to make Prorogation during October functionally impossible in Northern Ireland legislation. So we have a situation in which Parliament chose not to block the Prorogation, but the Supreme Court decided that it should have done.

Lord Reed of Allermuir: I do not recall that point being put to us. I think the argument was made that Parliament could have passed a vote of no confidence in the Government and brought down the Government. I remember that argument being made. However, we were faced with an argument, the sort of argument that might have appealed to Charles I or James II, that Parliament sits at the pleasure of the Crown and the Government, effectively as a successor of the monarch in exercising the powers of the Crown, can prorogue Parliament whenever it pleases for as long as it likes. That is an argument we were not prepared to accept.

I should say, if I may, that the rules of engagement of these appearances are not intended for us to be quizzed on the reasoning of our judgments.

Lord Howard of Lympne: You will appreciate that the opportunities for the Supreme Court justices to be in any way accountable are very limited.

Lord Reed of Allermuir: We are not accountable for our judgments to any institution.

The Chair: Lord Hope, is your point very quick?

Lord Hope of Craighead: I took part in the Prorogation ceremony and it was the first time I have been told by a court that what I was doing was illegal. I do wonder, and I do not know whether you would like to comment or not, whether you would have taken the same view if you had been Members of the House sitting in the Appellate Committee and being familiar with what actually happened. I do not know whether you really knew what the Prorogation amounted to and what was actually done. That is purely an observation. We cannot go back.

Lord Reed of Allermuir: It is an interesting observation. We had two members who were Peers at that time, Lady Hale and Lord Kerr.

Lord Hope of Craighead: I do not know whether they had ever seen the Prorogation.

Lord Reed of Allermuir: No, and I certainly have not.

Lord Hope of Craighead: It may be that something was lost there. Thank you.

Q7 **Lord Howell of Guildford:** I will move to a slightly less contentious area—only slightly though. During the time of lockdown and the pandemic, one of the problems for the judiciary generally, in the courts and your court in particular, was interpreting what Parliament's will really was, in particular over the difference between law and guidance. That must have been a problem.

If I can add a specific case just to strengthen this question, there was a case before the courts two years ago in which former detainees in Northern Ireland brought a case complaining that their detention orders had been signed by junior Ministers instead of by the Secretary of State. Your predecessor, Lord Kerr, ruled that they had a case and ruled in their favour. It seemed to us that something did go off the rails here, because the detention under the Detention of Terrorists (Northern Ireland) Order 1972, which I had a hand in taking through the Commons, was universally agreed with a specific clause in it that junior Ministers would be allowed to sign these interim custody orders—but Lord Kerr seemed to argue that because the Carltona principle of non-Secretaries of State signing was not specifically in the order, therefore Parliament's intention was not really to delegate these issues at all, and he ruled that only the Secretary of State could sign. That seemed to us a real puzzle, a real clash between the Supreme Court and the perfectly obvious will of Parliament. I do not ask for your specific comment now, but is that not an example of where things went wrong?

Lord Reed of Allermuir: I remember this question being asked when we appeared last year, and I think I may give a similar answer. As you say, the court was presided over by Lord Kerr. It included the Lord Chief Justice of England and Wales. The decision it came to was a unanimous decision. I did not take part in it myself. I understand that it is a controversial decision, legally as well as perhaps politically. It is always open for any party, including in this case the Government, who wants to test the correctness of a case to raise the point again. The Carltona principle is one that obviously pervades government and sooner or later there will be another case in which somebody relies on the Adams decision and there will be scope then, if anybody wishes to challenge the correctness of Adams, for us to reconsider it.

Lord Howell of Guildford: Is it something to do with the fact that the court, in these kinds of situations, does not take evidence? There were people to be called but nobody was called. Is that the way? As a layman, it is very hard to discover how that works.

Lord Reed of Allermuir: Certainly our court does not take evidence. If there is an issue about parliamentary intention, counsel place before us such materials as there are. For example, parliamentary debates, White Papers and the like are routinely referred to in court, so there is scope for us to consider that kind of evidence.

Lord Howell of Guildford: Many of us have sympathy with the point that finding out what the will of Parliament is is getting more difficult these days, so I think that we would be on the side of the judiciary in

understanding the growing difficulties.

Lord Reed of Allermuir: I am pleased to hear that. We are trying to encourage people to pay more attention to what Parliament has said and less attention to what the Government may have said in prior consultation papers and the like.

Q8 **Lord Falconer of Thoroton:** Can I just put a marker down? Listening to Michael, who is a most formidable advocate, I do think it is wrong that we should be prodding away at a decision that has been made. For better or for worse, the Supreme Court has to make these decisions and the justices are not here to be told they are wrong or asked to give reasons beyond those in the judgment. David was doing a bit of the same there. It will, I suspect, lead to problems if we allow that to go on—so I put a marker down that that is wrong.

Could I raise a broader question? There is no doubt that there has been much greater criticism of the judiciary in a political sense since Brexit—"Enemies of the People" and so on. Has that affected the Supreme Court? Does the court think it has to improve its relationship with the Executive? If so, what has it done about it?

Lord Reed of Allermuir: Yes, it does; it has affected us in two ways. One is that we are trying to explain more fully our judgments.

Lord Falconer of Thoroton: Not fully enough, as far as Lord Howell is concerned.

Lord Reed of Allermuir: We are trying to explain more fully in our judgments how the approach we are adopting is based on an understanding of our constitutional role. However, at another level we are doing an enormous amount to try to engage with Parliament and the Government to build a stronger relationship in which our role is better understood. I have a note here with a list of things I was going to say about that. I have been holding meetings with the Speaker of the House of Commons and the Lord Speaker of the House of Lords to consider how best to engage with Parliament. One of the Speaker's suggestions was—

Lord Falconer of Thoroton: My question is much more focused upon the Executive. I do not think your problem is really with Parliament. There are tensions, always, between the Executive and the judges. My feeling is that they are worse at the moment than they have ever been.

Lord Reed of Allermuir: I do not have that view. I was concerned about the relationship when I took over the presidency because it was obvious that, following Miller 2, there had been a drop in the temperature, to say the least. However, I have had a good relationship with each Lord Chancellor we have had during my presidency, and it is very clear to me that the current Lord Chancellor has no concerns about our failing to understand what our constitutional role is.

As I have explained, in the taking forward of the review of administrative law, which began with Lord Faulks's report, and also in the taking forward

of the reform of the Human Rights Act following the Sir Peter Gross report, we have been able to engage successfully with the Ministry of Justice through justices discussing operational matters with officials, continuing something that in fact had already begun, that sort of engagement. The first I was aware of it was during Brexit when we were able to engage with officials over some of the legal implications of Brexit and how they might affect the courts. That has now become an accepted way of working where there are issues on which the court could productively co-operate with the Government within our proper constitutional role.

Lord Hodge: Perhaps I may add, Lord Falconer, in addition to the work that Lord Reed describes of engaging with government departments, I have sought to address what I think is a mistaken belief that the Supreme Court has departed from principle and become more activist than its predecessor in the House of Lords. In the course of last summer, I gave a series of lectures, extrajudicially, on the judicial development of public law and the limits of the judicial role, which sought to place the developments of constitutional and public law in their historical context, identifying circumstances, including parliamentary initiatives, that have enhanced the judicial role and also identifying the necessary limitations of that role. I published an amalgam of those lectures on the court's website and in the *Journal of Judicial Review.*

So, we have sought to address this perception by the Executive and supporters of the Executive that somehow the court has become more activist. That is not something Lord Reed or I would accept as a correct characterisation.

Lord Reed of Allermuir: I should add that, in the nature of things, the government department we engage with the most is the Ministry of Justice and the Minister with whom I engage the most is the Lord Chancellor. But we have also developed a successful engagement with the Foreign, Commonwealth and Development Office on our international activities and how they can work collaboratively with activities undertaken by the Foreign, Commonwealth and Development Office. The fact that they are bringing people to us as part of their induction, effectively, before they are sent out as ambassadors is partly a reflection of that. If, for example, I am meeting the Chief Justice of Kazakhstan and the Kazakhstan ambassador, I get a briefing beforehand from the Foreign, Commonwealth and Development Office on its take on the situation and any key messages. I had a meeting with Prime Minister Modi in India immediately before the lockdown. I was given a tremendously good briefing by the Foreign, Commonwealth and Development Office beforehand and the embassy was able to make quite a bit of my visit and the engagement with the Indian Supreme Court that I was involved in.

Q9 **Lord Faulks:** I am not going to ask you about cases that I should have won. I wanted to ask you about the relationship with the Lord Chancellor. I think you have already told us about that. As you may know, this

committee is doing an inquiry into the position of the Lord Chancellor and the law officers in particular. You may or may not want to comment on that, but there is one particular thing that I would like to ask you, if I may. The Lord Chancellor has, of course, the very important function of protecting the independence of the judiciary, but the Lord Chancellor is also the Secretary of State for Justice and has a big delivery department, including prisons. Also, we see from our research that the Lord Chancellor—or rather, the Ministry of Justice—is the biggest receiver of incoming judicial review applications.

What do you think about the apparent tension there between a Lord Chancellor whose position is, among others and quite fundamentally important, to protect the independence of the judiciary and yet at the same time is the voice in Cabinet who is having to explain the fact that his department is receiving a large number of applications for judicial review? I hasten to add that I do not think these get to court all the time, but at the very least the preliminary steps are taken, I understand.

Lord Reed of Allermuir: I am afraid I do not deal with the Lord Chancellor as a departmental operational Minister, because the Supreme Court falls outside the courts for which he is responsible, and obviously I am not involved in the prisons. I think that the Lord Chief Justice will deal with the Lord Chancellor daily about operational matters in the courts. I deal with the Lord Chancellor on matters of policy. The Lord Chancellor's statutory role is not simply to defend the independence of the judiciary; it is to defend the rule of law. I think that is a very important role because we, the judges, are not at home in the fields of politics or government or the media and we would be hopelessly outgunned if we ever tried to enter those fields, so having a senior government Minister with that responsibility is very valuable.

I do not have experience of this in relation to the Lord Chancellor's departmental responsibilities, but I do see the importance of the role of defending the rule of law in relation to other Ministers, as a voice that speaks up for it in Cabinet if other Ministers are perhaps not as aware as they might be of something like judicial independence. The Lord Chancellor has an important role to play there and also may have in public debate, although frankly it is the internal debate in government that I am more concerned about.

Lord Faulks: Would you regard it as inconsistent with the Lord Chancellor's duties to, for example, promote legislation that changed the basis of judicial review? I am talking hypothetically rather than about the rather modest Bill that is before us. Would you consider that there was any conflict there?

Lord Reed of Allermuir: I think it may be more of a theoretical conflict than a real one. For example, if the Lord Chancellor were to propose measures, as a departmental Minister, on judicial review that effectively jeopardised the rule of law, I and no doubt other senior judges would try to prevail on him to do otherwise and would tell him that it was inconsistent with his responsibility to uphold the rule of law. If we cannot

persuade him, in his present role, I am not sure we would do better at persuading him if his role were distinct from the departmental role in relation to the courts.

Lord Howell of Guildford: I want to come in on the same question from a slightly different angle. I was particularly pleased by your comments last year, Lord Reed, about international law. You said that the fact that the Government may propose legislation and Parliament enact legislation that is in breach of international law is of no significance to your role in applying an Act of Parliament. You further said that in the case of the very controversial withdrawal Act and the Northern Ireland protocol, if Parliament has given effect to one statute and later disqualifies that effect, in that situation the constitutional rule is that the later statute prevails over the earlier one. I greatly appreciate that, but I do not think it is generally accepted at all, is it, that international law is sort of malleable and not quite the same as domestic law? It is a fairly important issue.

Lord Reed of Allermuir: It absolutely is and it is an issue on which we have given very clear guidance in a judgment in the past year. Some of you will be aware that child benefit is subject to a cap and limited to a maximum of two children, or at least the main element in it is limited to two children. That was challenged before us essentially as being contrary to the UN Convention on the Rights of the Child. That convention has not been given effect by Parliament, except in certain limited ways that were not relevant, and an attempt was being made effectively to import it on the back of the Human Rights Act.

We laid down in our judgment very clear guidance on how we apply Acts of Parliament. It is an aspect of parliamentary supremacy. It is the Government, of course, who enter into treaties; the Government make international law by agreeing with other Governments. According to parliamentary sovereignty, the Government cannot alter domestic rights and obligations at their own hand. The Government has to go through Parliament and get Parliament to legislate, and that is why the Act of Parliament is essential and the treaty does not, by itself, alter the law at all. When I say "at all", that is an overstatement; there are certain limited effects that a treaty can have, but it certainly cannot override an Act of Parliament.

In that case, where there was a conflict between an Act of Parliament dealing with social security and a UN convention that Parliament had not implemented, it was pretty obvious which one trumped the other. We have made that clear now in a way that it was not previously clear. It had been rather muddied by some previous judgments in our court. That has been clarified and lower courts now know where they are.

The Chair: Lord Reed, you made a very clear statement on that point at the last session, last year. I have just looked it up. What you say is unequivocal; once the statute is passed, you apply the statute.

Lord Reed of Allermuir: Yes. I feel more comfortable making unequivocal statements about the law than I do about political institutions.

The Chair: I reread that before we came here today and I think it is very clear. Lord Hope, I think you had a question on judicial appointments.

Q10 **Lord Hope of Craighead:** Yes. This is a topic that we bring up with you every time we meet, the appointments process. Just to get our bearings, Lord Reed, you are a member of the ad hoc committee when it has to sit. Am I right?

Lord Reed of Allermuir: Yes.

Lord Hope of Craighead: But you are the only member of the court who is on that body.

Lord Reed of Allermuir: That is right. It is laid down in legislation. I have to convene the commission and I chair it.

Lord Hope of Craighead: Yes but, otherwise, there are other qualified people—judges. Is the chair—

Lord Reed of Allermuir: The chair is myself. That is laid down in the legislation. I have to nominate another senior judge—the Lord Chancellor is also involved—and who I choose tends to depend on the nature of the appointment being made. Currently, for example, we have vacancies from England and Wales and I asked the Master of the Rolls to sit. The previous time, it was another English appointment and I asked the Lord Chief Justice to sit. The time before that, it was a Northern Irish appointment and I asked the Lord Chief Justice of Northern Ireland to sit. It is myself and one other senior judge, and then there are three lay members, each of whom is a member of the judicial appointments body for either England and Wales, Northern Ireland or Scotland.

The current commission dealing with the retirements we have recently had is myself, the Master of the Rolls, Lord Kakkar—a consultant surgeon and Member of this House who chairs the English commission—Liz Burnley, an occupational psychologist by background and a member of the Scottish commission, and Paul Douglas, a senior police officer by background and a member of the Northern Irish commission.

Lord Hope of Craighead: Just to understand what has happened since last year, has the ad hoc body sat since we last met?

Lord Reed of Allermuir: We sat on Monday of this week.

Lord Hope of Craighead: Is there a vacancy to be filled?

Lord Reed of Allermuir: Yes, there are two vacancies to be filled. We held back the process until we knew where we were in relation to retirement ages. As you probably know, of course, there has been a Bill dealing with that just recently, which has raised the retirement age to 75.

As part of the benefits of the remote working that we introduced during the pandemic, we have been able to hold most of our preliminary meetings virtually rather than everybody having to come from Edinburgh and Belfast—or, indeed, Kyle of Lochalsh and Belfast—to London, but obviously the interviewing was done person to person.

Q11 **Lord Hope of Craighead:** I have two particular topics to cover. One is to go back to something we discussed with you, Lord Hodge, last year, which is the possibility that the Lord Chancellor would have a closer involvement in the choice of candidates for the Supreme Court. I think you said that any arrangements of that kind would have to preserve the perception of judicial independence because of his other responsibilities. Has there been any further thought given to the possibility of the Lord Chancellor sitting as a member of the ad hoc body?

Lord Hodge: There has been no discussion of that matter in the past year, as far as I am aware. I know commentators have suggested that they would want a list of potential candidates to be submitted to the Lord Chancellor rather than he or she sitting on the body—that is, a list of appointable candidates to be presented to the Lord Chancellor, and the Lord Chancellor can choose from that. We have had no further discussions about that matter. One has to bear in mind that there will not always necessarily be a long list of appointable people for senior posts. The discussion about appointments has yet to take place.

Lord Reed of Allermuir: Perhaps I might add that it would be a mistake for members of the committee to think of the process as one that is insulated from politics. The commission is independent and we make a recommendation that is based purely on an assessment of the merit of the candidates. However, we do consult the Lord Chancellor, the First Minister of Scotland and the First Minister of Wales, and get meaningful responses from each of them.

We also have a meeting with the Lord Chancellor at which he explains to us any concerns, priorities or factors that he thinks are particularly significant. We go through the process and make our recommendation; he then has to decide whether he will accept our recommendation or not. He is entitled to ask us to think again and he is entitled to reject our recommendation. As part of his decision-making process, he also consults the heads of the devolved Administrations and obviously has his own input. Once he has made his decision, the matter then goes to Downing Street. It is not an ivory tower process at all.

Lord Hope of Craighead: The way it works is that he is presented with the choice made by the committee—he is not given a choice himself—and he can say either yes or no. Is that right?

Lord Reed of Allermuir: He is given a full report, which will tell him who applied; he knows this because he is a consultee. He is given our thinking process in deciding who to shortlist for interview, then we explain to him very fully why we have selected one candidate out of that shortlist rather than another. If he is dissatisfied, he can ask us to think again but

obviously he is confined to the people who actually applied. Part of the difficulty sometimes from a point of view of diversity is the narrowness of the group of people who applied.

Lord Hope of Craighead: I will come on to diversity. At the moment, the court has only one lady sitting in the court, whereas some years ago there were three, so it looks as though you are moving backwards. However, there are two vacancies to be filled in, and obviously the candidates who are available will be looked at and you will apply the usual test. Could you expand a little further on your efforts about diversity?

Lord Reed of Allermuir: Certainly. They are partly focused on appointments to the court but they are also very much focused on longer-term progress. The problem with appointments to the court is partly that, as a result of the raising of the retirement age, there will not be very many during my time on the court.

Lord Hope of Craighead: Could you put any figures on this? There are two vacancies just now. Is that the last opportunity for some years to come?

Lord Reed of Allermuir: Absolutely. One of the people who retired is entitled to reapply for his old job. Frankly, it has made a massive difference to diversity because, until recently, Patrick and I both had to go at 70, which is not that far off—a little bit further off for me than for Patrick. Now, we can stay until 75. If they continue to find the job interesting, then people do—as, indeed, you did. The scope for appointments from the Court of Appeal and its equivalents is very much reduced over the short term—let us say over the next five years.

At the same time, those are not notably diverse courts themselves. There is no guarantee that you will recruit a radically different set of people in appearance from the existing ones, but we are doing what we can. As far as women in particular are concerned, I can say two things I have done in the last year. First, I went to speak to Court of Appeal judges to try to encourage them to apply because there is a reluctance to apply.

Lord Hope of Craighead: Why should that be?

Lord Reed of Allermuir: I think people are reluctant to apply unless they feel they are highly likely to be appointed. They are not people who are used to failure. That is one problem. As I say, though, I went to speak to them.

Secondly, I have been inviting judges from the lower courts and, to a disproportionate extent, women, to sit with us. This is something that is new. Over the last year, I have invited 15 judges from the Court of Appeal or its equivalents to sit with us. Seven of those were women and one of those sat with us twice so women have been more than pulling their weight. As a proportion, of course, they are well below 50%. If I have been inviting 50% women, that has been favouring them. The idea

is to demolish some of the myths about the court and let them see what it is really like to work with. Hopefully, they find we are a friendly bunch and it is interesting work so they think about applying.

The third thing has been to discuss the issue with the woman judge on the Court of Appeal who is responsible for diversity and inclusion in the Royal Courts of Justice—that is, the Court of Appeal and the High Court. We discussed with her why women are reluctant to apply, because it is perfectly obvious that they are. We have explored the reasons she thinks there are; I have to say, they are not ones that are readily capable of being addressed. First, we are talking about quite a small sample of people. For some of them, there are personal reasons of an individual character.

For some, it is a reluctance to do the kind of work that the Supreme Court does. It is a very intellectual place. It is also a place where you have to do everything but some things more than others. You particularly do commercial law and the sort of work I have been describing. We do hardly any family law, which is an area where women have historically specialised. We do not do very much medical negligence or the like, which is another area where women have tended to work. We do not have very much crime in the Supreme Court, although there is crime in the Privy Council; again, that is an area where you tend to find that women have experience. These are broad generalisations, but I am talking about only a small number of women in the Court of Appeal.

There are personal reasons and reasons to do with the sort of work you like to do. There is also a feeling that it is a step up in terms of the amount of work you have to do when you come to the Supreme Court. Not everybody is keen to do even more work, perhaps especially women who are of a certain age and have family responsibilities and so on. Obviously there are more women coming through with the sort of background where they would be comfortable in the Supreme Court. Some of them have not applied in competitions because they do not feel they have sufficient seniority in the Court of Appeal.

Lord Hope of Craighead: Could I ask you about ethnicity, because of course one has to bear that in mind too?

Lord Reed of Allermuir: Yes. You only have to look at our website to find all this, I should say, so anybody who is interested in the court can find it quite easily. We have posted on YouTube a series of videos made by members of the court explaining their background and their route. One of those at least was made by one of the women judges, explaining what the court is like, what the appointments process is like and so forth.

We organised a careers webinar, which I did with the female member of our court, Lady Rose, and with Liz Burnley from the selection commission, earlier in the year. It had a very large uptake. We had 1,000 people sign up for it, about 400 attended and it has been viewed more than 1,000 times afterwards online. Our feedback shows that most of those who viewed it were women and about half of them from an ethnic

minority as well. It was aimed at early and mid-career lawyers, explaining to them how to try to prepare themselves if they wanted to get to the court at the end of their careers, what sort of career choices made sense, what type of people we were looking for, what skills were required and what the actual process was of applying for a position.

Lord Hope of Craighead: I have one final point. I am very happy to see that you have a large number of judicial assistants here. Obviously diversity has been achieved there. Is that something deliberate or is it just the way things are developing—that you are getting more people applying from diverse backgrounds for that particular appointment, which is the beginning of a career, is it not?

Lord Reed of Allermuir: That is exactly it. We go out to universities, and indeed schools for that matter, and do sessions for schoolchildren online first thing in the morning. It is usually with sixth-formers; they are often people who are thinking about studying law at university. You find very bright people from all sorts of backgrounds and ethnicities, and it is our role to encourage them, equally so at university. You sometimes get asked difficult questions; for example, "Will I face discrimination?", was a question I was asked by a young black sixth-former. We are engaging and putting out a message pretty strongly that, if you are interested in the court, look at our website and you will find all that we are doing to encourage and support diversity.

Over the past year, we introduced paid internships at the court specifically for young lawyers from underrepresented groups. Each of them was assigned to a justice and a judicial assistant, and they spent a week with us. At the end of every day, I would go and speak to them about the case we had been hearing, the law and the advocacy. It made a very obvious difference, even by the end of the week, to their self-confidence. They were saying that they were unused to being listened to in a respectful way where they felt their views were being valued. As one of them put it, "If we are treated like that in the highest court in the land then, if we are not treated like that elsewhere, it is not a problem with us".

Q12 **Lord Howard of Lympne:** Lord Reed, when you and your colleagues on the appointments commissions consider candidates for the senior judiciary, do you take into account whether their judicial history shows a tendency towards activism or a tendency towards restraint?

Lord Reed of Allermuir: I would take that into account. For example, for the exercise this week, we asked them to give a presentation on judicial activism and its impact on the relationship between the courts, the Government and Parliament. We are expecting them not only to have talked the talk but to have walked the walk, if I can put it that way. Obviously, the judges, myself and the Master of the Rolls are well aware of people's track record, and I certainly take that into account.

Lord Howard of Lympne: Would it be entirely legitimate for the Lord Chancellor to take that into account in deciding whether to accept or

reject a recommendation?

Lord Reed of Allermuir: I suppose so. If you have shown that you understand what the court's constitutional role is—or if, on the other hand, you have shown you do not understand it—that must be a material factor.

Lord Howard of Lympne: I take it you would agree that it is important that candidates should have a judicial history?

Lord Reed of Allermuir: Yes, I do. In fact, we now put in the pack that goes out to candidates that this is not an entry-level post. You are expected to have significant judicial experience.

Lord Howard of Lympne: One final thought: do you agree—I think it is an indisputable fact but you may disagree—that there is far less accountability for such appointments now than there was before 2005? I remember being struck during the coalition when listening to a Minister from the Department of Justice being attacked from all sides in the House of Lords for the lack of diversity in judicial appointments and reflecting on the irony of the fact that, under the post-2005 arrangements, neither the Minister nor any other Minister in his department—save for the residual responsibility we have touched on—had anything to do with these appointments. Before 2005, it might even have been the person responsible for making the appointments who could have been questioned and been accountable.

Lord Reed of Allermuir: I have to say that I do not take that view. I think the Minister's responsibility is a real one. As you probably know, Policy Exchange issued a paper on judicial appointments last year with a preface by a former Lord Chancellor who said that he had once received a recommendation for a senior judicial post of somebody whom he knew was temperamentally unsuitable and so forth but he had been advised that he ought to rubber-stamp it and so he had rubber-stamped it. I do not intend any disrespect to that individual—quite the reverse—but my view of the Minister's role is not that. It is a very important responsibility to sign off appointments to the highest court in the land. Personally, I would expect the Minister to take it very seriously and, if he is concerned, to raise those concerns with the selection commission and, if need be, ask them to think it over again.

The Chair: We will have the opportunity to ask him that question when we see him.

Q13 **Lord Falconer of Thoroton:** Looking at the judicial record of the judge and deciding he or she is too activist to be appointed to the Supreme Court—surely not?

Lord Reed of Allermuir: The merit criterion is obviously concerned with judicial ability but—

Lord Falconer of Thoroton: They are to be appointed on merit.

Lord Reed of Allermuir: Yes, but those criteria also include having a sound understanding of constitutional relationships. That is all I mean. I am not meaning whether somebody is more or less keen on developing the law on psychiatric injury, or vicarious liability or whatever it might be, nor for that matter whether they are more or less likely to have overturned the Home Secretary in a deportation case. That is not what I have in mind at all.

However, they do have to demonstrate—we specifically test them on this—a proper understanding of constitutional roles. If I am aware from somebody's record that they have been issuing judgments that demonstrate a lack of such an understanding, I would take that into account.

Lord Falconer of Thoroton: That is very helpful. The way Michael asked the question was: can activism be bad and conservatism be good? You are saying no—that it is a question of understanding what the implications are of what you do, whether it be conservative or activist.

Lord Reed of Allermuir: Yes. Obviously a very important part of the role of a Supreme Court Justice involves the development of the law, so another criterion is creativity. I suppose one person's creativity may be another person's activism. We are looking for individuals who have demonstrated an ability to think creatively and develop the law but who also understand what a judge's role is and understand that it is not the same as a politician's role.

Lord Falconer of Thoroton: I will go back to one thing you were saying before. I imagine that, when a committee made up of the President of the Supreme Court, the Lord Chief Justice of England and Wales, a consultant surgeon, a police officer and a psychologist is choosing the next person to be a Supreme Court Justice, but the Lord Chief Justice of England and Wales and the Supreme Court President know all the candidates and the other three do not, the judges predominate to an undue extent. Do you think that happens as a matter of practice?

Lord Reed of Allermuir: No, I do not. I do not want to talk about the contributions of individuals but the lay members play a very active part in the discussion. We are not just testing on legal ability. In that area, I would expect them in practice to defer to myself and the other senior judge. They get the same judgments and they read the judgments, but they will comment on things like how well the person communicates, how easy it is to understand the judgment—that sort of thing.

We test on personal qualities. You need someone who can work collegiately, for example—somebody who can relate well to people from different backgrounds and is willing and able to do, and suitable for, outreach work with schools, students, and the general public. For these personal qualities, such as communication skills and an ability to work as a team player, you obviously see the role of an occupational psychologist immediately being relevant. All these people use their experience of life.

The exercise is a very thorough one. They get the chance to assess the individuals in front of them, including putting questions to them and comparing one with another. In practice, we tend, with nuances, to be broadly of much the same view about how people have performed and how well equipped they seem to be for the role. It is certainly not a question of two judges making up their mind and the rest just going along with it. That is not the position.

Q14 **Baroness Fookes:** Lord Reed, in your outreach work, you were asked by a young black person, "Will I face discrimination?" What was your answer?

Lord Reed of Allermuir: I said no. They will not face any greater discrimination in the law than they would in other fields—possibly less. It is a very market-driven profession. If you are good at the job, you will get on at it. It is very important for us to be encouraging people and not putting them off. They are not going to encounter discrimination from the judges. I certainly hope that they will not encounter it from the Bar or indeed the solicitors' profession.

Frankly, that question brought me up short because I had to think about whether to give an elaborate honest answer and say, "Well, you must be familiar with the fact you face discrimination as it is in your daily life. That is the nature of our society. You are not going to find it any worse in the legal profession than you will anywhere else, and you should go for it, despite any problems that may be in your way." That is one way of answering the question. Another way is to be upbeat and say, "No, go for it. There are lots of black people coming into the profession now, there are black judges now"—which is true— "and it is getting easier all the time. You should go ahead with your plans." Faced with somebody who is 16 or 17, I gave the simple encouraging answer rather than the more nuanced one.

Baroness Fookes: I hope you will not get a comeback on it then.

Lord Reed of Allermuir: I hope so too.

The Chair: Could I just ask one quick question on this? You have a stock and flow problem: you do not have the people now and you need to make sure people are coming through for the future. Is there a strategy that identifies barriers in the flow-line for people with different characteristics and a systematic way of setting out how those barriers will be addressed? It is not only the attitude of the individual that may be the barrier. It may be processes or culture, unless the territory has been mapped and there is a strategy for dealing with the barriers in that flow-line. Has any thought been given to that, just as an exercise? I am not going in for the detail.

Lord Reed of Allermuir: We focus on the things that we can change, either directly or by setting an example. There are factors that we cannot change. For example, statistics demonstrate very clearly that women are under-instructed in front of us. It is mostly men who get instructed to

appear in the Supreme Court, and that reflects behaviour in the solicitors' profession in who they choose to instruct. I cannot control that.

There are currently seven female black QCs. That is a 40% increase on a couple of weeks ago, when there were only five. For male black QCs, it is not much better. I think there are about 20 or 22, something like that. Why are there so few? I imagine that there are reasons to do with social mobility, which we cannot do anything about. There is a host of social factors that lie behind that but there may also be factors to do with offers of pupillage by barristers' chambers. I cannot control that either.

We try to set the best example that we can and overcome barriers that may put people off applying to our court. I hope we are setting an example that other courts will follow. As I say, we do what we can. Compared with a lot of organisations, we do a great deal to engage with schoolchildren, students and young professionals to try to encourage them and support them.

We have completed year one of our strategy and we are moving in the right direction. We have built links with groups such as Bridging the Bar, a barristers' organisation that supports people from underrepresented groups, the Black Barristers' Network and equivalents to try to find out more about how we can best address these problems. It is a work in progress but I can assure you that we are taking it very seriously.

The Chair: I do not doubt that. I was not offering criticism; I was just reflecting on the fact that we focus on the judicial appointment process when the solution lies with a wider range of players.

Lord Reed of Allermuir: Absolutely. There is only a tiny number of people who are ever going to be appointable as Supreme Court Justices. In the legal profession, I think there are 350,000 people in the UK employed either as lawyers or in legal firms or chambers. It is a very large number of people, so we can influence behaviour in a way that can have much wider benefits. We are not underestimating the importance of a more diverse Supreme Court—that is a more representational issue to do with public confidence and, to some extent, with decision-making—but there is a much larger group of people out there that we can benefit.

The Chair: I think someone out there who is not just the judicial appointments bodies needs to own that broader strategy; that may be something we can raise with the Lord Chancellor. Lord Faulks, we are back to you on the reviews.

Q15 **Lord Faulks:** Since you gave evidence last year, the Judicial Review and Courts Bill has been going through Parliament. In fact, its Third Reading is this afternoon. On behalf of my committee, I want to say that we are very grateful to have contributions from the senior judiciary to that consultation; I am sure that Sir Peter Gross would say the same about his inquiry. They were helpful in terms of the constitutional proprietary of any recommendations we might or might not have made. Would you have expected to have been involved any further than in the way in

which you were involved?

Lord Reed of Allermuir: Not really, subject to the point I have already mentioned. We were very happy to provide responses to the two reviews because, at that stage, what we were offering you was information, statistics and information about developments in the law or trends in the law. I did the same for Sir Peter Gross's review. I was also able to give him some practical help by giving him introductions to foreign judges whom he wished to interview.

Beyond that, once it got to the stage of the Government's consultation papers, we pulled back because they were putting forward policy proposals and it is not our role to offer views on government policy, particularly in such controversial areas. As I mentioned earlier, there has been some engagement with MoJ officials over what you might call the "nuts and bolts implications" for the courts, but that has operated within well-understood boundaries.

Lord Faulks: I have one final question on this. The suggestion in our report, which is reflected in the review, is that it is perfectly constitutionally in order for Parliament to decide to reverse a particular decision of the Supreme Court.

Lord Reed of Allermuir: Yes.

Lord Faulks: That is parliamentary supremacy, although some people have suggested that, in some ways, this is contrary to the rule of law. Can you confirm that we did get that right?

Lord Reed of Allermuir: Yes, I think you got that right. The classic example is the War Damage Act 1965. There was a case to do with compensation for property that had been destroyed during the Second World War to halt the Japanese advance in the Far East. The Government warned the House of Lords Appellate Committee that, if they lost the case, they would immediately legislate to overturn the House of Lords' decision. The House of Lords went ahead anyway and decided the case, called Burmah Oil. The War Damage Act was promptly passed to reverse it.

The same happens every year in the Finance Act. The Inland Revenue tots up the cases it has lost over the previous year and identifies the ones that it thinks really matter. It then puts the courts right, as it were, in the Finance Bill.

Lord Faulks: Thank you.

Q16 **Baroness Fookes:** Lord Reed, you mentioned earlier this morning the work with the Speaker's Office. You also mentioned it in last year's evidence. Can I ask you to elaborate on what has taken place and how successful it has been?

Lord Reed of Allermuir: Certainly. The Speaker suggested that the first step we might take in engaging with Members of Parliament was to invite

members of the Justice Select Committee of the House of Commons to come to the Supreme Court for a visit and a discussion. We did that. It was a very successful event. I think we had timed it to be an hour and a half but, in fact, it went on for an hour longer than had been planned. That reflected the degree of interest that there was. I was very pleased to see how well attended it was because we realise that MPs are very busy people.

We are now discussing what to do next. We have identified another committee that is likely to have a particular interest in our work, so we have it in mind to invite it over for a similar visit and discussion. I have also been holding meetings with the Lord Speaker. They have resulted in his inviting me to give a lecture in his series of lectures in the early summer and speak about the rule of law and its interrelationship with democracy.

We have held two seminars with parliamentary counsel on statutory drafting. These have been very valuable for us. We get taken to a lot of material of a kind that did not used to be referred to very often, for example Explanatory Notes. I, for one, had not realised until the seminars that there are three different categories of Explanatory Note dealt with in different ways within Parliament and therefore, from our point of view, with differing degrees of significance as an aid to interpretation.

So, we have had these seminars. We have also done it the other way round. Some of our officials have come to Parliament to do seminars there with, for example, people in the Speaker's Office. In the autumn, we took part for the first time in Parliament Week to raise awareness of the court. As you might imagine, our role in that was to emphasise the importance of the rule of law in a democracy.

We focused on education. We ran tours for staff from the Department for Education so that they could see what we do with materials for children and lessons for children, because we run lessons in the court. We also organised a debate day for schools. Our communications team has also been engaging with the House of Commons communications academy, explaining how we go about trying to explain the work of the court to the wider community. There have been quite a few steps taken and I am keen to build on them.

Baroness Fookes: Have you considered engaging with the Delegated Powers Committee in this House? I confess that I was formerly its chairman and a member, so I have a vested interest, but it is a very interesting slant on the way Governments bring forward legislation.

Lord Reed of Allermuir: I should have thought of that because I used your report on the Covid legislation; it was a very useful source of material. I should have thought of inviting you but it had not occurred to me, but that is now added to our list.

Baroness Fookes: I was looking not for an invitation for me but for an

invitation to a committee of which I am no longer a member. I thought it could be a useful, different approach.

Lord Reed of Allermuir: Yes. I meant the committee. I certainly see the value of that.

The Chair: The bar was raised when you did that, Lady Fookes. Lord Hennessy, you had a question.

Lord Hennessy of Nympsfield: I have a couple of follow-ups to Baroness Fookes's questions—just a quick one first. Do you remember when Charles Clarke was Home Secretary and suggested that the senior judiciary might have dinner with him and a couple of other Ministers so that they could take each other's minds more effectively? It was a suggestion not greeted with rapture—to put it mildly—by the senior judiciary. If you had been a player in that request, would you have said, "Yes, let us have dinner"? In other words, have you changed your tone and pitch on where the boundaries are drawn in that particular instance?

Lord Reed of Allermuir: I am not sure that I would take a different view. I think one wants to avoid becoming too chummy with Ministers. There has to be a certain distance. You want to have a co-operative relationship but we are not friends. I have to say, we do invite the Lord Chancellor to an annual dinner that we hold. It is the chance to meet the Lord Chancellor and his partner socially, but I think it is probably a good idea to maintain a certain distance.

Q17 **Lord Hennessy of Nympsfield:** Thank you. This is a slightly longer question, following up Lord Howell's earlier question. I think there is a hidden river beneath many of the questions we are discussing today and, indeed, our wider inquiry into the law officers of the Lord Chancellor. It is this: the two professions—the legal profession and the political profession—are very different in all sorts of ways. They attract different people. Their use of evidence is very different and the way they express their use of evidence is very different. So the formations of the two professions over the years, as you rise up their hierarchies, are very different.

One of the things that we expect our law officers to do—and, indeed, our Lord Chancellor until recently—is to have the kind of temperament and experience that bridges those two professions. Do you think that there is something in that anthropological explanation I am offering for the difficulties and intentions that we have been skirting our way and waltzing around this morning, and in our now wider inquiry too?

Lord Reed of Allermuir: Yes, I do. In fact, in the judgment I mentioned earlier about child benefit, I wrote at some length about what I saw as the differences in approach, reasoning and the like between a parliamentary process and a judicial process. As you say, that becomes ingrained over 40 years of a career. I certainly found it helpful that the Lord Chancellors I have had to deal with as President or Deputy President all had some legal experience. Some had more than others but they all

had a legal background and some legal experience and at least they understood where we were coming from. They had internalised some of the same values as the judges hold.

Lord Hennessy of Nympsfield: Would it be helpful—I am not going to request this but I would be fascinated to see it if you could do it—to write another article describing the things that you think politicians least understand about the judges and vice versa and get it out into the open? For example, Lord Reed, what do you think you are most parodied for? What do politicians parody and what particular stuff do they hurl at you?

The Chair: How do you most see that politicians parody judges?

Lord Reed of Allermuir: One of the things I explained in the judgment was that politics is the business of compromise. It is an intensely pragmatic business, as I see it. It is about trying to get as close an outcome as you can to what you would like and, if need be, not being too squeamish about how you achieve it. You are not going through a punctilious process of reasoning but it may involve rather hard-nosed bargaining, with offers of favours and threats. Ultimately, you emerge with an outcome that will command general acceptance, or at least sufficient acceptance to get it through Parliament, whereas we are inevitably much more—

Lord Hennessy of Nympsfield: Is "fastidious" the word you are reaching for?

Lord Reed of Allermuir: Well, "principled" was the one that I came up with, but "fastidious" might be a politician's way of describing it. These are very different processes. I think you have to get your hands dirtier as a politician than we do as judges. At the same time, you are exposed to public criticism to a far greater extent than we are.

Lord Hennessy of Nympsfield: Thank you very much.

The Chair: If we could move on to the future of the Supreme Court, Lord Sherbourne has a question.

Q18 **Lord Sherbourne of Didsbury:** From time to time, there is speculation, with suggestions in the media and from politicians, about how the Supreme Court could operate or be structured differently. Without you giving me a specific answer, in general, are there various suggestions about how the court might operate or be structured in a better way? They may not be within the remit of the court itself but you may think in your private moments, "Gosh, that is a good idea."

Lord Reed of Allermuir: I have some ideas—I have been putting them into practice—about how the court might be improved but I have not had any structural ideas of that kind. The closest I have come to that is in relation to the Privy Council, which takes up about half of our time and our work. I am acutely conscious that we are 12 British people from a British culture sitting on appeals from countries that are very different from this one. Sometimes that becomes very obvious. For example, we

recently had two cases about same-sex marriage, which is an intensely controversial issue in the jurisdictions that the cases came from. I think that religion generally is of more central significance to society in some of these jurisdictions than it is in this country now.

The suggestion I have put forward is that we should be enabled to invite judges who actually have experience of sitting in these countries to sit with us. This used to happen with judges, for example, from India sitting in the Privy Council, and from Ceylon, as it then was. However, it does not happen now. In fact, it cannot happen now because there are none who are Privy Councillors and whom we could invite to sit. I have proposed a way forward on that, which would give the Privy Council a rather different look; it is currently with the Government for consideration.

I have not had any such damascene moment about reforming the Supreme Court. My feeling is that it generally works well. It is a pretty new institution that works pretty well on the whole. There are improvements that can be made; obviously I have made quite a lot of changes in our external relationships, and the Covid pandemic has encouraged us to make major internal changes to how we work. We are planning to make more changes to how we work internally but there is nothing dramatic.

Lord Sherbourne of Didsbury: Thank you, that is helpful. I have a follow-up question. Do any suggestions occur to you, again in your more private moments, about how the way in which law officers—they are the officeholders whom this inquiry is ultimately about; I am talking not about the current holders of these positions but in general—operate vis-à-vis the Supreme Court, including in terms of their status and their responsibilities, could be better?

Lord Reed of Allermuir: I see the law officers' role as primarily being to provide legal advice to government departments and, in that way, to ensure that government departments keep on the right side of the law. We engage with the law officers by having regular meetings with them. I have been particularly conscious of the importance of those in the devolved Administrations because it is up to them to keep those Administrations well informed about the limits to their powers and avoid the sort of constitutional problem that might have to come before us for decision. Also, if there are cases that devolved Administrations lose in our court, it is part of the law officers' role to explain to their colleagues in government why they lost and what the implications are—and, I hope, to make our decision accepted, perhaps reluctantly but none the less as an honest application of the law.

It can be a useful two-way process. Again, my most fruitful discussions have been with devolved law officers. I remember one of the Scottish law officers raising with me the level of awareness of devolution among the English justices, which he thought was rather low; things that had been said during a hearing of a devolution case had tended to support that assessment. I have responded to that since then by always including one

of the English justices when I have a meeting with any representative of the devolved Administrations so that they are aware of issues arising in Northern Ireland, Scotland or Wales, as it may be, and are aware of devolution as a reality. Certainly, among my English colleagues, awareness was not previously as well developed as it was among the Scots, the Welsh and the Northern Irish members of the Court.

It is an important relationship. I see our meetings as a communication of information each way and I see their primary importance, from our perspective, as being in the way they advise the Administrations that they are part of.

Q19 **Lord Howarth of Newport:** Some lawyers have suggested that the Supreme Court has inappropriately taken upon itself to be the ultimate authority on constitutional matters. Do you so consider yourselves or is it perhaps the case that, with an unwritten constitution, there cannot be such an ultimate authority, and that the determination of constitutional issues is a matter of debate, the outcome of politics and the interplay of different institutions and power centres, and not something that any one authority can opine upon?

Lord Reed of Allermuir: I take the latter view. Dicey's classic division was between constitutional law and constitutional conventions. Constitutional law is partly statutory. It is largely common law. We are the final arbiters on the common law and, indeed, on the interpretation of statutes, so inevitably we have to be the final arbiters of issues of constitutional law. However, Dicey was right: there is a great deal that is constitutionally important that depends on convention. That is a matter that is resolved within the political institutions themselves.

We have had some interesting cases recently, which rather illustrate the point. There is one that has not reached us—I do not know whether it may, so I will not express any view about it—but let me just say that there was a challenge to the Prime Minister's decision to retain the Home Secretary in the Government, notwithstanding allegations against her, and the court—not our court but the court—was effectively being invited to treat the Ministerial Code as raising justiciable issues. I dare say that you can work out where Dicey might place that issue.

Curiously, these cases are often brought by MPs. We had another one recently in which we refused an application for permission to appeal that had been brought by two MPs. Again, it raised an issue that, depending on which way you looked at it, might arguably be regarded as legal or might more accurately be regarded as a question of convention. We do not go looking for cases; they come to us. It is not unusual for the cases that might tempt a judge over the boundary to be brought by MPs.

Lord Howarth of Newport: With them trying to invoke you as political players.

Lord Reed of Allermuir: Exactly.

Q20 **Lord Robertson of Port Ellen:** Last year when we were talking about

the challenges to the court, the implications of Brexit were still being worked through at that point, and clearly there are major issues of principle and practice concerned with the application of existing European Court of Justice law. You said at that time that it was too early to say, so maybe you could give us an update on the court's thinking now.

Lord Reed of Allermuir: Yes, I can give you an update. We have still not had a case in the Supreme Court that raises any of the issues that you have in mind. We currently have some before us where permission to appeal is being requested and we have not decided yet whether to grant permission.

We had an interesting case that came to us in the Privy Council from Gibraltar, and of course EU law applied in Gibraltar. The case arose prior to Brexit; of course, Gibraltar left at the same time as the UK did. The result of Brexit was that when we had this case, which raised a rather difficult question of interpretation of an EU directive to do with electronic communications, we could no longer refer the question to Luxembourg, as we would have been required to do until Brexit. So we had to decide the question for ourselves.

It made us conscious of the fact that if it had gone to Luxembourg, the court there would have heard submissions from the European Commission, which would have been responsible for drafting the legislation and would have been familiar with the policies that it was meant to implement, and submissions from the member states. The court would then have taken a decision in the interests of the EU as a whole, designed primarily to promote the single market.

We, of course, had submissions only from the individual parties to the case, so we could not undertake the same exercise and could not be confident at all that we either could, or even should, arrive at the same answer as the Luxembourg court would. We did our best and we gave an answer. As I say, it may not be the answer that Luxembourg would have arrived at. It also struck us that, if the same point had come up in the UK, how we dealt with it would have depended on which part of the UK it arose in. If it had been an England and Wales case, or a case at least concerned with England and Wales, we would have had to deal with it in the same way as we dealt with the Gibraltar case and, similarly, if the case was concerned with retained EU law. If the case concerned Northern Ireland, we would have been required to make a reference to Luxembourg because the protocol requires that.

So we could end up in a situation where the same piece of legislation could be given two different meanings within the UK, depending on which part of the UK is relevant. It is a rather curious situation, but there it is.

Lord Robertson of Port Ellen: If it was a directive, the directive would have been put into domestic law, so a previous interpretation would have been put in place at that time, would there not?

Lord Reed of Allermuir: There would be a piece of domestic legislation. It usually simply repeats—and in this case did—what the directive said. This was a pre-Brexit case, and we would have been required to interpret the legislation in accordance with the directive, so in reality you are interpreting the directive.

The directive itself would now be a piece of retained EU law and we would be interpreting it. But in Northern Ireland it would not be retained EU law; it would still be EU law, and that different status would mean that it would be dealt with by a different court, ultimately, and a different answer might be arrived at.

Lord Robertson of Port Ellen: So you are now beginning to look at the implications in advance of cases that might come forward.

Lord Reed of Allermuir: They are beginning to dawn on us.

Lord Robertson of Port Ellen: To go back to your opening submission—I was curious at the time but did not want to interrupt you, but it might be relevant here too—you said that you had a case that had nothing to do with the United Kingdom—

Lord Reed of Allermuir: Yes, we have had lots of them.

Lord Robertson of Port Ellen: —but they chose to land the case with you. That is a bit of a mystery to me, but would that not mean that you could have cases that were also to do with interpreting ECJ rulings? If somebody decided that they were not happy with what Luxembourg was saying, would they decide to land it with you on the basis that you might give a different answer?

Lord Reed of Allermuir: That is a very interesting possibility. That is not how things work in practice. If you take the Russia-Ukraine case as an example, Russia and Ukraine entered into a commercial contract worth billions of dollars. They selected English law as the legal system that would govern the contract, and that is very common. English law is like the English language. It has become a world legal system for international commerce—it and some American systems. So they choose English law to govern the contract. They also choose English courts as a jurisdiction where any proceedings must be brought, so the case ends up with us.

That is true of most of these cases. The shipping case is the same. The French and German company entered into a charterparty, which was governed by English law and had a choice of English courts as the courts for any litigation, so the case comes to us. There is a colossal industry in the City of London, as the legal members of the committee will know, providing legal services to the rest of the world, particularly in commercial disputes. So in a sense they forum shop. They like English law. They like its predictability and the integrity and expertise of the judges, so they choose to litigate here.

If it were a case whose natural home were the EU, you might end up with some interesting problems. We have not heard it yet, but we have a case at the moment where there is a tussle, essentially, between the English courts and the European Court in Luxembourg as to which one ought to deal with a particular dispute. The English courts have granted an injunction to stop a party litigating any further in Luxembourg, and there is an issue for us as to whether we uphold that or not.

Lord Robertson of Port Ellen: It will be interesting to hear the outcome of that. In effect, the answer to the question is that you have not yet assessed any huge increase in your workload.

Lord Reed of Allermuir: No.

Lord Robertson of Port Ellen: But you are anticipating that these things might come down the road.

Lord Reed of Allermuir: Yes. Sooner or later, we will have a substantial number of cases raising these sorts of new EU questions, I am sure.

Q21 **Lord Hope of Craighead:** This question is about the effect on you, the justices, of media portrayal—public criticism—of your decisions. I got an impression of your sensitivity to the issue when, in answering a previous question, you used the phrase "reluctant acceptance" of your decisions in devolution cases. My question is perhaps rather more personal than that: how confident are you that the judiciary can cope with criticism of that kind? If it came to the bit, does the court itself provide any help to justices who feel under attack?

Lord Reed of Allermuir: There are a number of points to make. First, justices do have a degree of resilience. It was one of the criteria for my appointment, and for the appointment of Lord Hodge, but not for the other justices. Secondly, it is unusual for us to be singled out individually for criticism. The complaint tends to be that the court has taken some crazy decision.

Lord Hope of Craighead: Is that true even in Scotland where I suffered it? It was personalised a lot in my cases. Are you immune to that, in your case?

Lord Reed of Allermuir: Yes, I remember that. I was amused to read a comment in one newspaper that I had a Scottish "background", omitting the fact that I lived and worked there for the first 55 years of my life.

You have to put it into perspective. Some criticism in public life is inevitable and, frankly, I think we get off lightly compared with MPs, for example. As to support, our comms team will explain our decisions to the media in terms that the media can understand and answer the media's questions, so far as they can, which can disarm some criticism in advance. Sometimes we respond to criticism—not very often, but we occasionally do.

Beyond that, I think it is largely down to the leadership in the court to create an environment where people feel that they are supported. We all have each other's phone numbers. We all know each other very well, we are friends, so you are not going to feel isolated if you do get singled out. In reality, it is very unusual. We were hung out to dry in some sections of the media over the Prorogation judgment, but if it is aimed at all of you, you all bear the brunt together.

Lord Hope of Craighead: Are you conscious in framing your decisions that you are designing them to react to previous criticism? Do you feel the need to explain more fully what you are doing in successive cases and, if so, would you regard that as a good thing rather than an unfortunate reaction?

Lord Reed of Allermuir: As I mentioned earlier, I at least have made an effort in judgments over the last couple of years concerned with constitutional matters to spell out what the constitutional relationships are as I understand them. That has been a response to criticism, because it was evident that people did not understand our role, at least as we saw it. Criticism is not all bad, even if it is adverse criticism. You can build on it by responding to it, and we have done that to some extent.

Lord Hodge: I will add that I think we need to keep in perspective the criticisms that are levelled against justices. Cases that come to our court come to our court because they are difficult. If they involve matters that have political consequences, people will take different views about the outcome of the decision. We are acutely aware that we do not get the same level of criticism that parliamentarians are subjected to. On the whole, we are not exposed to some of the toxic things that are said in social media about Members of Parliament. Most of the criticism of our work comes from the traditional media and political commentators and tends to relate to cases that have political consequences.

No doubt we are exposed to criticism in social media, but we are encouraged to have nothing to do with social media, so if we are being criticised, I for one am not aware of what is being said. As Robert has said, if there is something that is disturbing us, we can talk to our colleagues about it. We also have a very good comms team who can advise us on an appropriate reaction.

Getting back to our earlier discussion, it is very important that we do not enter the fray in the face of political criticism, and we leave it to the Lord Chancellor, if necessary, to defend us in the context of defending the rule of law.

Lord Reed of Allermuir: You will appreciate that the public law cases on which a lot of the discussion today has focused are a very small proportion of our work. Those cases and all the rest of our work are subject to perpetual criticism in the law journals. Professor Endicott is not alone. Needless to say, "Judges get it right" is not a headline you read very often, so we are used to having our intellectual capacities, our understanding of the law and so forth severely criticised every week.

What is said about us in the newspapers from a political perspective is just another part of the overall picture.

Lord Hope of Craighead: Thank you both very much.

Lord Howell of Guildford: I will forgo my question in the interests of time, because I know we want to get to the last question.

Q22 **Lord Falconer of Thoroton:** You said that quite a lot of criticism is good. You would be the only institution in the world that would not be changed by the press environment over a period of time. I am very struck by the comparison between the Belmarsh decision, in which Lord Bingham, when he was the presiding Member of the House of Lords, essentially overturned a decision of the Government on how to deal with terrorism. It was a declaration of incompatibility, even though Parliament had completely backed the decision, and he got quite little criticism for that.

You touched on the two-child benefit case. Your court said that, Parliament having decided that there should be a two-child limit, irrespective of the law it would be inappropriate in those circumstances to make a declaration of incompatibility. You said that in that case the advocates had been campaigning outside the Supreme Court for the very same arguments that they made in the Supreme Court, just as it occurred in the Belmarsh case where, similarly, pressure groups had campaigned against the Government's proposals and then made submissions to the House of Lords judicial committee at the time.

I do not want to comment on either of the two cases, but does that not reflect the Supreme Court retreating, as they would see it, from politics? Will there never be another declaration of incompatibility, because a declaration of incompatibility involves saying no to Parliament on primary legislation?

Lord Reed of Allermuir: Quite the reverse. First, the two cases you have mentioned raised completely different issues. The issue in the child benefit case boils down to how generous social security benefits should be. That ultimately is not a justiciable issue, and that is what we said. We said how much the taxpayer should be expected to contribute to the upkeep of other people's children is not a matter for decision by courts. We pointed out that it is a matter on which views differ greatly in our society and that the place where those differences of view get resolved is not the Supreme Court; it is here in this building.

The Belmarsh case was a fairly straightforward case to decide, if I may say so. The problem with the legislation in that case was that it required the detention of foreign terrorist suspects, but it did not require the detention of domestic terrorist suspects. There was simply no rational basis for distinguishing between them. A person's nationality does not make them more or less dangerous. If somebody is a suspected terrorist, he is a suspected terrorist, whether he was born in this country and has a UK passport or not. That was a straightforward rationality decision. The child benefit case was a judgment of a different kind altogether. I am not

sure if I have answered all your question. I think I have forgotten part of it.

Lord Hodge: The idea that there will not be more declarations of incompatibility is unlikely to eventuate, because if the Government's proposals are to encourage the courts to take a less muscular reinterpretation of parliamentary language to make them comply with the European Convention on Human Rights in the interests of legal certainty, the consequence may well be that there will be more declarations of incompatibility. That may be something that Parliament would welcome, rather than having a particularly reinterpretative function in the Human Rights Act. I suspect that if that goes through there will be more declarations in the future.

Lord Hope of Craighead: Can I just interject for a moment? Belmarsh was not a declaration of incompatibility case, was it? It was an order.

Lord Falconer of Thoroton: It was a declaration. There was an application for a declaration of incompatibility. It is primary legislation that we are dealing with. It is a declaration of incompatibility case.

Lord Hope of Craighead: Not in Belmarsh, I do not think.

Lord Falconer of Thoroton: It is.

Lord Hope of Craighead: We will have to look it up again.

Lord Falconer of Thoroton: We can check that later. I do not think we can broker that one.

Lord Reed of Allermuir: Obviously the Government are still losing cases in front of us. They do not win all their cases. I gave examples over the past year of two cases where we had to remind the Home Secretary that court orders are to be obeyed and you have to behave lawfully. The idea that we have gone soft on the Government or we are reluctant to find against the Government is completely without foundation. What has been perhaps more evident in our judgments is greater respect for the separation of powers, but that is a different issue.

The Chair: Let me ask one quick question on this. Do you see a distinction between public criticism of the decisions of the judiciary and criticisms of the justices personally? If so, what implication does that have for how the Lord Chancellor discharges their duties in respect of the independence of the judiciary?

Lord Reed of Allermuir: I think that there is a difference, because it is one thing to say that you disagree with our decision; that is everybody's prerogative. It is another thing to attribute to us a lack of integrity in reaching it. This is why there was such a fuss over the Miller 1 case in particular and the "enemies of the people" issue, where the allegation being made—and we saw the same thing with Miller 2—was that the judges did not decide this as a legal question and that they were determined to stymie the will of the people that we should leave the EU,

so what was going on was the judges giving effect to their political beliefs and not their understanding of the law.

That is obviously a very serious allegation to make, in so far as people believe it. It has very serious implications, which is why the courts, the judges, looked to the then Lord Chancellor to defend them over the Miller 1 decision in a way that we would not dream of doing if all that is happening is that people are expressing dismay or disagreement with a legal decision that we have made.

Lord Hodge: May I add how strongly I agree with Lord Reed on that matter? I was invited recently to attend and respond to a lecture on judicial independence, which was given in the think tank, Policy Exchange, by a professor. He came up with the suggestion that the judges were wrong to rely on the Lord Chancellor, which he described as "the saviour Lord Chancellor theory", to speak out when judges are unfairly criticised for their judgments in the media and elsewhere. I hope I gave an adequate response to that.

Judges cannot enter the fray to respond to criticism. Therefore, because of that, it is very important that, if there are unfair criticisms as to the motivation of judges, the Lord Chancellor speaks out to maintain civility in public debate and, perhaps more importantly, to prevent the public from accepting an incorrect narrative of what has occurred, because that could damage the rule of law.

The Chair: We turn to Hong Kong. Lord Thomas has a question.

Q23 **Lord Thomas of Gresford:** I have been interested in the reaction to your resignations. Carrie Lam said that foreign judges were only asked to swear to uphold the basic law, their allegiance to Hong Kong and serve its people: "We have never said, or required them to support the executive branch, or endorse its policies and measures". The news was met with widespread dismay. The Hong Kong Bar Association and the Law Society of Hong Kong expressed deep regret. Senior counsel and executive council member Ronny Tong said that he wished you had shown more "backbone" to resist pressure from politicians. Former chief executive, CY Leung, meanwhile did not hold back, calling your departure a permanent stain on Britain's judicial independence. That is a fairly strong action. I am interested in your comments upon it.

Lord Reed of Allermuir: I will say first that it was a matter of deep regret to me as well that we felt we had to resign. In answer to the first point you raise about the scope of our responsibilities, when the national security law came into force in the summer of 2020, I discussed the way forward with the Lord Chancellor and the Foreign Secretary. All three were involved, because our participation in Hong Kong was to implement an agreement that the Government, particularly the Lord Chancellor, entered into in 1997 and which Lord Falconer renewed in 2004, under which Britain undertook to provide judges to the Court of Final Appeal in Hong Kong.

The operation of the agreement obviously depended on two things. One was the Government's continued willingness to operate it. The second was the Supreme Court's continued willingness to provide judges to serve under it. Since effectively either side, the Government or the judiciary, could pull the rug on it, I and the two Ministers thought that the best way forward was for us to jointly monitor what was going on in Hong Kong and periodically to have discussions of the implications to decide where we stood. We also agreed on criteria that we wanted to have in mind in monitoring what was developing.

It was actually I who insisted that we have a criterion that was not to do with the courts but was to do with society more generally. To take an example, the courts in South Africa continued to apply the rule of law during the apartheid era, but I would not have wanted any Supreme Court justice to have been serving on the courts there in that period because the society was one in which our judges would just bring discredit on themselves if they manned one of the major institutions of government in that society. I thought we should at least guard against that possibility in relation to Hong Kong as well.

Thereafter, we received briefings prepared by the Foreign Office on what was happening, assessed what was going on against the criteria, and formed a judgement as to whether we should carry on working there or not. As everybody knows, there has been a gradual erosion in political freedom and consequently in freedom of speech in Hong Kong, which I felt became progressively and noticeably worse in the latter part of last year and the early part of this year.

The courts themselves were continuing to operate in accordance with rule of law values, although they were under pressure. It has to be said that one cannot completely divorce what was going on in the courts from what was going on outside the courts, because essentially what was going on outside the courts had two components. One was the use of powers conferred by the national security law to close down businesses and seize property. The other was the arrest of people on charges of having violated either the national security law or laws passed during the period of British rule concerned with sedition, for example. Once they were arrested, they were then being refused bail, essentially because of the gravity of the charge. The consequence is that if, for example, you were a shopkeeper who had posted on social media your criticism of the absence of a vaccination programme in Hong Kong, you would find yourself arrested on a charge of sedition, refused bail and then liable to be detained in prison for the best part of a year perhaps before you came to trial.

In the light of the crackdown on freedoms to which we on the Supreme Court, and indeed our society, are committed, a stage was reached when we were in agreement that the time had come for us to withdraw. I was not under pressure from politicians. That is a mistaken reading. Some things were published in Hong Kong that may have encouraged that misunderstanding, but I sought the meeting at which we took a decision

because of my own concerns and found that Ministers were of the same view.

Your final point was about judicial independence. There was no compromise of our judicial independence. It would have been rich irony if there had been, but there was none. The discussions I had with Ministers arrived at a consensus and I was not being dragged out of Hong Kong. I felt that the time had come when we had to call it a day in the interests of the values that we represent. I have to say that it is a matter of great regret. I am very fond of Hong Kong. The people were unfailingly friendly and courteous. I have the highest regard for my former colleagues on the Court of Final Appeal and I am very saddened that matters ended this way, but there it is.

Lord Thomas of Gresford: You are very clear that it was your decision and not any political influence either from this Government or from the Hong Kong Government that led to your resignation?

Lord Reed of Allermuir: That is right. The Government, having reached the same view, thought that it was time for them to withdraw from the agreement. That would in any event have compelled us to resign, because we could hardly go on sitting in China on a Chinese court, with the taxpayer paying our salary, if the Government wanted to withdraw from the agreement. As I say, the continuation of the arrangement required the agreement of both the Government and me, as the head of the Supreme Court, and we both took the view that the time had come to call an end to it.

Lord Thomas of Gresford: Does the continuing presence of six former Supreme Court justices and justices from Canada and Australia cause you concern?

Lord Reed of Allermuir: No, it does not. I think it is a matter for them. They are retired. They have to make their own decision. They are not in the same position, I think, as a serving judge exercising public power in the UK.

Lord Thomas of Gresford: I take it that you are not aware of any pressure from the Hong Kong Government on them to stay.

Lord Reed of Allermuir: No, certainly not. I have in fact been in discussion with them and I am sure that would have been mentioned, so no.

Lord Robertson of Port Ellen: If you had not been paid as public servants, if you were not chairman and deputy chairman of the Supreme Court, would the situation have been different?

Lord Reed of Allermuir: Just say I had retired, for example; I would have been in the same boat as those who have retired.

Lord Robertson of Port Ellen: The break point was that you were serving on the Supreme Court at the moment, not the principle of

collaborating with the Chinese regime in Hong Kong.

Lord Reed of Allermuir: I would have felt that the time had come to leave, in any event, even if I had retired. But because I am the President of the Supreme Court, my primary concern had to be the reputation of the Supreme Court and that institution behaving as it ought to in our constitution. My own views happened to coincide, but I had formed a view that it was no longer in the interests of the Supreme Court. In fact, it was clearly damaging the interests of the Supreme Court and the respect in which it is held for us to continue.

Lord Robertson of Port Ellen: If the other six seek your advice, what would you say?

Lord Reed of Allermuir: I would say to them that it is a matter for them. We are talking about very experienced judges: two of my predecessors; the former chief justice of Canada, for whom I have the utmost respect; two former chief justices of Australia; another very senior Australian judge, for whom I also have great respect; and former colleagues on the Supreme Court. Those who were not president were members of the court and were colleagues and remain friends. I do not think they need my advice. It is their choice what to do.

Lord Hodge: I also tendered my resignation at this time, and I think it is of central importance that Robert and I were members of the UK Supreme Court with public duties in this country. There have been two sides to this debate throughout and the matter has been finely balanced for quite a long time. Clearly, the concerns about the removal of people's freedoms in Hong Kong have been weighing very heavily on Robert and me and no doubt on our colleagues who have remained.

The other side of the coin was the equally real concern that we should do what we could in difficult circumstances to support the people of Hong Kong and support the able judges who are trying to uphold the rule of law in the way that we have traditionally understood it in this country and they continue to understand it that way. I think it is a very finely balanced decision. I certainly would not treat my resignation as any implicit or explicit criticism of those who have reached a different view.

Lord Falconer of Thoroton: I have particular views on this and you know what they are. I completely accept that you, as the two officeholders, are in a different position from the ex-members of the Supreme Court and it is their decision. Lord Reed said in his statement, "I have concluded, in agreement with the Government, that the judges of the Supreme Court cannot continue to sit in Hong Kong without appearing to endorse an Administration which has departed from values of political freedom, and freedom of expression, to which the justices of the Supreme Court are deeply committed". I agree with that statement.

Presumably the six former justices of the UK Supreme Court are equally committed to those values. Without in any way being critical of them, it must be better for the UK—and it is their decision in a way that is

different from you two—that they resign on the basis that they would be sending the message that the justices of the Supreme Court, past and present, are deeply committed to those values.

Lord Reed of Allermuir: It is not for me to speak on their behalf. You should understand that they have served on the court in Hong Kong far longer than Patrick or me. Lord Hoffmann, for example, has served on it since the 1997 withdrawal—what is that? 25 years—and some of the others for not much less than that. There are very strong personal ties of friendship with the judges there.

Lord Thomas mentioned the perception in Hong Kong that our withdrawal is a betrayal and that, if we were the canaries in the coal mine, we have disappeared at the first whiff of gas, that we have not stayed there to help them out and that they may be more vulnerable as a result of our leaving. Some of that is true, and I think our colleagues' feelings of loyalty to their colleagues on the Hong Kong court and to the people of Hong Kong are probably a weighty factor in their thinking.

The Chair: We have come to the end of all our questions. We have had quite a long session today. Thank you very much for sharing your thoughts. We have very much enjoyed the discussion and you have given us a lot of food for thought. Certainly I have taken a lot of food for thought from it. Thank you very much for joining us today.

Lord Reed of Allermuir: Thank you very much for having us.