HOUSE OF LORDS

Select Committee on the Constitution

Corrected oral evidence: Constitutional implications of Covid-19

Wednesday 2 December 2020

10.15 am

Watch the meeting

Members present: Baroness Taylor of Bolton (The Chair); Lord Beith; Baroness Corston; Baroness Drake; Lord Dunlop; Lord Faulks; Baroness Fookes; Lord Hennessy of Nympsfield; Lord Howarth of Newport; Lord Howell of Guildford; Lord Pannick; Lord Sherbourne of Didsbury; Lord Wallace of Tankerness.

Evidence Session No. 16 Virtual Proceeding Questions 211 - 228

Witnesses

I: Baroness Hale of Richmond, former President of the Supreme Court of the United Kingdom; Lord Sumption, former Justice of the Supreme Court of the United Kingdom.

USE OF THE TRANSCRIPT

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

Examination of witnesses

Baroness Hale of Richmond and Lord Sumption.

Q211 **The Chair:** This is the House of Lords Select Committee on the Constitution. Today we are looking at the use and scrutiny of emergency powers during the pandemic. Our witnesses are Baroness Hale of Richmond and Lord Sumption. Good morning to both our witnesses and thank you for joining us.

I would like to start off in general terms; we will go into detail later. Overall, how do you think the Government have fared in their use of emergency powers during this pandemic? In particular, can you talk about how Parliament has been able to respond and fulfil its responsibilities in scrutinising the legislation the Government have brought forward?

Baroness Hale of Richmond: To make it clear, I express no view on the substance of the regulations that the Government have made. I do not have views on that. I do not regard myself as qualified. I have some qualification to express views on the process by which those regulations were made.

The obvious problem with the first regulations is that they were introduced when Parliament was in recess. They did not have to be introduced when Parliament was in recess, but it meant that Parliament had no opportunity to debate them for several weeks.

What has happened since then is a bewildering flurry of new regulations coming in at very short notice. Usually, Parliament has had time for a short debate, but only a short debate. The difficulty with that is partly the bewildering rapidity with which the regulations have been changed and the difficulty of studying the regulations adequately in order to debate them properly. Of course, Parliament only has the all-or-nothing, yes-or-no option in dealing with the regulations. The normal orderly process of scrutinising delegated legislation has not taken place. There are ways in which it could have taken place, but we will get on to that later.

Lord Sumption: I agree with all that. The process had an extremely rocky start. The point made by Lady Hale about the circumstances in which the first regulations were introduced without parliamentary scrutiny for seven weeks is a particular source of concern, because it is reasonably clear that that was a deliberate decision. The reason why I say that is that the regulations were announced by the Prime Minister on 23 March. They were said to be so urgent that Parliament could not be consulted. Statements were made in the House of Commons to the effect that the regulations were already in force, which they were not. In spite of the professed urgency, there was a delay of three days until 26 March, at 1 pm, when the regulations were duly made.

That may strike one as a pettifogging point from the broader political and clinical point of view. Constitutionally, it is quite a serious matter. Since then, there has been a considerable improvement, in that, as a result of

political pressure, rather than constitutional scruple, the Government have allowed a wider measure of consultation than they originally envisaged. In particular, the second lockdown was introduced on a basis that, although it was based on the Public Health Act, was consistent with the procedure that would have been followed under the Civil Contingencies Act. In other words, it lasted for less than 30 days and parliamentary approval was sought in advance and not some time in arrears. There has been some reversion to type with the latest set of regulations, which have a duration of two months, but they have been at least discussed in advance in the Chamber of both Houses.

The Chair: Do you think the failing was on the part of Parliament, or was it because of the way the Government had gone about dealing with getting the emergency powers they felt they wanted?

Lord Sumption: In the case of the March regulations, there was nothing that Parliament could do, because it was in recess. Parliament cannot recall itself, so it was, effectively, stymied. March was the height of the alarm about the virus and I doubt that the result would have been any different if it had been consulted, but it is desirable that Governments should have to explain and produce evidence in support of drastic decisions that they make. The best, and certainly the most constitutional, way of doing that is for them to face the scrutiny of not only committees but the full Chamber of both Houses. The absence of that has significantly reduced the actual quality of lawmaking.

Baroness Hale of Richmond: I agree with all that.

Q212 **Lord Pannick:** Good morning. Do you think there was any good reason for the Government not to use the powers in the Civil Contingencies Act earlier this year, or at least replicate the provisions of that Act, which require regulations to last for only 30 days? Perhaps more importantly and exceptionally, the powers under that Act allow each House of Parliament to amend regulations and not just say yes or no.

Lord Sumption: The basic problem is that, under the terms of the Civil Contingencies Act, it can be used only if no other statutory power exists. This view is not universally shared, but my own view is that the Public Health Act does not in fact authorise the restrictions that have been imposed on people who are not reasonably supposed to have the virus and are not thought to be infectious. I do not believe it was intended to justify what has been done.

The Court of Appeal, in a judgment given yesterday in the Simon Dolan judicial review, rejected that argument. I understand that an application is to be made for leave to appeal to the Supreme Court. The basic problem is that the powers in the Public Health Act, as far as concerns non-infectious people, in wholly general terms and on an ordinary constitutional principle—the so-called principle of legality—would not be treated as justifying the curtailment of fundamental rights.

I make no comment on the merits of the Court of Appeal's decision, although I have certain views about that. However, the point of principle is very clear. The framework in the Civil Contingencies Act is specifically designed to deal with cases of national emergency, where it may be thought appropriate to govern by decree, which is essentially what has been happening for the last eight or nine months. It is precisely because of the drastic nature of those rights that there is an exceptional level of parliamentary scrutiny provided for.

It seems to me absolutely clear that the nature of the powers that have been exercised is such that parliamentary scrutiny on the level provided for in the Civil Contingencies Act is extremely desirable, for all the reasons that you, Lord Pannick, have pointed out. In due course, attention should be given to modifying the legislation in order to produce that result, but it would have been constitutionally appropriate for the Government to replicate the effect of the Civil Contingencies Act, whatever the statutory origin of their powers.

Baroness Hale of Richmond: I was going to give exactly the same reason as Lord Sumption for why the Government used the Public Health Act rather than the Civil Contingencies Act. It is actually in Section 21(5) of the Civil Contingencies Act that they are not allowed to use it unless the existing legislation cannot be relied upon without risk of serious delay. I do not want to express any view on the issue that may very well be coming before the Supreme Court, as to whether the Public Health Act in fact allows the control of the activities of healthy people to the extent that the regulations have done so. I agree that the constitutional protections in the Civil Contingencies Act are more appropriate than the lack of protection in the Public Health Act.

Lord Pannick: Do you agree that there would always be some measure of doubt as to whether existing legislation confers powers speedily enough? Therefore, the Civil Contingencies Act, with that exception, becomes useless. Governments will always want to avoid uncertainty in this area. I wonder whether Baroness Hale would agree with Lord Sumption that there is a strong case for modifying the Civil Contingencies Act to ensure that it is used where there is an emergency of this nature.

Baroness Hale of Richmond: Yes, I agree with that. It would involve amending the Civil Contingencies Act, but you would also have to deal with the possibility that the Government would nevertheless choose to use other legislation that they regarded as more convenient. Subject to whether the Public Health Act operates in this area in the way it has been used, it is undoubtedly more convenient, because it involves less parliamentary scrutiny in cases of urgency.

Q213 **Lord Beith:** At the time of the debates on the Coronavirus Act, most of us would have been surprised if we had been told that it was not that Act but the Public Health Act that was going to be used. There was an argument about whether it should be the Civil Contingencies Act, even at that time. The possibility of the Public Health Act being used was, I think, not in the discussion or debate. I certainly took the view, once it was

used, that it was a strange use of it. Its powers appeared to relate particularly to situations where you could make a judgment that somebody was likely to be infectious and act according to that judgment. Do you think there was any wider awareness that the Government would get out the old statute book and use the Public Health (Control of Disease) Act 1984, as amended, as the basis? I certainly do not remember that. Does either of you remember?

Baroness Hale of Richmond: I have no recollection of there being any mention of the Public Health Act at the time. You parliamentarians will know better than I, but my guess is that you will have thought that the provisions in the Coronavirus Act were aimed at dealing with controlling individuals, events and activities.

Lord Beith: They are in Scotland and Wales.

Baroness Hale of Richmond: Yes, but the ones in the Coronavirus Act are limited to people who are infectious or potentially infectious. I suspect that, when Parliament was voting on that, it expected that it would be either those powers or the civil contingencies powers that would be used. It had no inkling that the public health powers would be used. That is only my suspicion; I do not know.

Lord Sumption: I have read the debates, which were of course extremely truncated. The Coronavirus Act went through all its stages in each House in a single day. There is, so far as I can see, no reference at all to the Public Health Act. As Baroness Hale points out, Schedules 21 and 22 of the Coronavirus Act, which are the relevant schedules, apart from the fact that they are tucked away in a part of the Act that perhaps legislators in a hurry would not turn to first, are limited powers. They are basically the classic powers that, for centuries, states, including the United Kingdom, have exercised in the case of epidemics to isolate and control the movements of people thought to be infectious. The only power that may be wider than that is the power conferred in Schedules 21 and 22 to control gatherings, an expression that is unfortunately not defined in the Act.

Lord Beith: Do you think there is a new legal basis upon which the necessary powers could or should be placed?

Lord Sumption: Do you mean under new legislation?

Lord Beith: Yes.

Lord Sumption: Yes, there is. One possibility would be to amend the Civil Contingencies Act in the way that both Baroness Hale and I have suggested. Because the Government may choose to use an Act with the minimum of parliamentary scrutiny, it is highly desirable that the Public Health Act should also be amended. That is first to remove the powers that it confers, or may be thought to confer, in relation to healthy people, so that those powers can be exercised only under the Civil Contingencies Act. Secondly, it is to introduce into the Public Health Act, in cases where powers are being exercised in relation to healthy people, procedural

safeguards comparable to those in the Coronavirus Act. Thirdly, although this third point may be more debatable, it is to require the production, in support of any regulations made under the amended Act, of a proper impact assessment of the kind that some statutes, notably in environmental legislation, require in other contexts.

Baroness Hale of Richmond: I am in sympathy with everything Lord Sumption has said on this point.

Lord Beith: I am very happy with those responses.

Q214 **Baroness Drake:** Good morning. Baroness Hale, in reply to a previous question from Baroness Taylor, you commented that there were better ways in which Parliament could have scrutinised regulations and which could have taken place. Could you share further your thinking on that point with us?

Baroness Hale of Richmond: I recall that that was in the context of the first set of lockdown regulations, which had no parliamentary scrutiny at all for several weeks. Of course, they could have been introduced in such a way as to give them at least the level of parliamentary scrutiny that there has subsequently been for the second set of lockdown regulations and for the all-tiers regulations that came into force today. That is what I was referring to.

Baroness Drake: What should Parliament's scrutiny of emergency powers look like at this stage of the pandemic?

Lord Sumption: There are time constraints, which may limit, for example, the ability of a specialist committee to look at the question. That would be the most desirable way if it were practicable, which I rather fear it may not be. Some kind of committee investigation, even if it were abbreviated, would be extremely desirable to provide a somewhat less partial view of what is involved, for the benefit of those voting on these measures in the Chamber.

Baroness Hale of Richmond: I do not know whether this is the correct time at which to make a point that has occurred to me on this whole difficult situation. We understand the huge complexities of trying to deal with the pandemic and how hard the choices are that have to be made. It strikes me that, during the first lockdown, which went on from March until July, the Government could have provided a settled framework that everybody would understand and that could then be applied from time to time, as appropriate, and even from place to place, as appropriate.

I have in mind what was done in the Republic of Ireland, where there is a five-level framework of rules and regulations as to what people can and cannot do, which everybody knows and understands, and they move between them. If such a plan had been formulated, we would not have had this constant chopping and changing between different levels of control.

I am not making a point about the substance of that. I am making a point about how difficult it is for you in Parliament to assess the wisdom of what is being done and, indeed, for the courts to assess its validity. A proper framework would have made your lives much easier.

Lord Sumption: I entirely agree with that. The problem may have arisen at a much earlier stage than the outbreak of this particular epidemic. Major pandemics have been top of the national risk register since it was first published in 2008. There has been—we know this because a number of interim reports have been produced, notably in 2011—a fair amount of Civil Service contingency planning for that exercise and what might be done about it. One problem is that there has been a distinct failure, which is at least partly down to the Civil Service, to produce contingency plans for the kinds of measures that the Government have applied.

I do not know the reason for that, but I suspect that, until March, it was thought to be unthinkable that the Government would generally lock down the population. I think that is a fair assumption from, first, the fact that the 2011 report into contingency arrangements expressed it as government policy that the object should be to maintain normal life as far as possible, and, secondly, the fact that the minutes of SAGE indicate that there was no discussion of the possibility of a general lockdown until it happened.

Whatever the historical explanation, the absence of any kind of contingency planning explains the absence of a framework at any stage of this crisis until relatively recently. It also explains why there has not been a proper impact assessment. The templates that would normally be produced before such a crisis ever broke out simply were not there.

Q215 **Lord Howell of Guildford:** Good morning. You both talked earlier about scrutiny by the full Chamber or by specialist committees. The fact of the matter is that the full Chambers have not been full during the crisis at all. There have been almost empty or very thinly populated Benches and rather a curious atmosphere developing.

Could the specialist committees have taken a much bigger role? We have had plagues and pandemics before, but this is the first one in history in a fully digitalised society, with the general populace enormously empowered and connected in a way that has never happened before. Could not the committee ambience be far better for pursuing this cascade of regulations and pressing Ministers and officials to provide answers, and answers again, in a way that the Chamber simply cannot deliver? How would these additional powers for these specialist committees be developed? Do you have thoughts on that?

Lord Sumption: The Chamber serves an important function, but obviously it is different from the committee function. The committees are the best place to consider evidence and deal with expert input into this kind of problem, but the Chamber has an essential function, especially in the House of Commons. Notwithstanding party discipline, there can be no mistaking the atmosphere that reigns behind a Minister whose decisions

are suspected or disliked. Constitutionally, that is what has enabled the Chamber, particularly of the House of Commons, to operate as a national sounding board in a way that I personally regard as profoundly healthy for democracy. For that reason, it is very unfortunate that social distancing has been applied in the Chambers of both Houses.

There is clearly a dilemma here. Does the high constitutional calling of parliamentarians prevail over their understandable concerns about their health, or not? I gave evidence recently to the Irish Parliament on broadly similar questions. One of the striking things about Ireland is that it is unconstitutional to limit access to the Chamber. There was a considerable debate among the committee before which I was giving evidence about whether this was a satisfactory state of affairs. The debate was between those who felt that the constitutional duties prevailed over everything and those who felt that it was important that Parliament should give an example of distancing to the public at large.

This is a dilemma. I personally do not think that a three-quarters empty Chamber with a mode of access to it somewhat resembling an LBC phone-in programme is a terribly satisfactory arrangement.

Baroness Hale of Richmond: I do not really have any particular comment to make. I agree with Lord Sumption that it is important to have both the detailed scrutiny in committees and the more emotional impact of what goes on in the Chamber. I have been keeping an eye on what has been going on in the House of Lords. You have hybrid proceedings in which people can participate remotely. It does not give the same feel, but it enables a lot more people to participate. I note that that has been possible and is working as well as it can.

I do not know about expecting parliamentarians to behave in ways that are considered unsafe for other members of the public. I would be reluctant to expect that of them and—dare I say it?—particularly in the House of Lords, where, I suspect, the average age puts most Members into the vulnerable category.

Lord Howell of Guildford: The Chamber is a great show, is it not? I think someone once said that the Chamber was a Parliament on show and the committees are a Parliament at work. Here we are with this sea, this enormous quantity of very detailed regulations and guidance, all jumbled up together. It feels as though even a full Chamber, let alone a half-empty one, is not the best place for doing more than immolating certain Ministers and their reputations, let alone getting at all the very complex detail.

Is there not a question about whether to place more powers in our Parliament in the hands of committees? Almost every other democracy in the world gives power over the control of the agenda to the Parliament. We do not have that control over our agenda, as Lord Sumption has observed. If one is going to say, "Parliament wants to do this" and "Parliament wants to do that", is it not time to think about what we mean by Parliament? There are many mansions in it and maybe some of the

mansions need a bit of refurbishing.

Lord Sumption: This is a very fundamental issue and a much broader one than is, I think, envisaged by the agenda of your Committee at the moment, but I entirely agree with the point that has been made. We are almost unique in the world, although I believe the same is true of the New Zealand Parliament. I am not aware of any other case where Parliament has no control over the agenda, there is no committee on the business of the House and there is no procedure by which a minimum number of parliamentarians can require a matter to be debated, if they feel strongly enough to put their name down. This was also apparent during the debates over Brexit last year.

I believe that the control of the agenda primarily by the Executive, but to some extent by the Speaker and the Lord Speaker, is a very serious constitutional anomaly. It worked fine at a time when there was much more of a shared parliamentary culture about making the system work according to the spirit of it and not just the letter than there is now. The disappearance of that culture, which will be hard to recreate, makes it extremely important that attention should be given to this.

The Chair: Baroness Hale, this is slightly outwith what we were talking about earlier, but would you like to comment?

Baroness Hale of Richmond: I have every sympathy for what both Lord Howell and Lord Sumption have been saying.

Q216 **Baroness Corston:** Continuing the discussion of Parliament’s role in scrutiny, what lessons can be learned from the Government’s preparation and Parliament’s scrutiny of the measures introduced in response to the pandemic? What should be done differently the next time there is a need for substantial emergency legislation?

The Chair: Lord Sumption, you have touched on this. Do you want to expand a little?

Lord Sumption: No, I think I have addressed that in answers to earlier questions. We need to review the statutory framework. We need to review the procedural framework in both Houses of Parliament. It would be desirable, but I fear unrealistic, to look for a more co-operative approach from government to the proper functions of Parliament than has been forthcoming from the present Government, and their immediate predecessor, going back about two years.

Baroness Hale of Richmond: I too think that we have answered those questions previously. I would like to emphasise the lack of forward planning and a structural framework in the Government’s response to the pandemic, which would have made the parliamentary role so much simpler and easier.

Q217 **Lord Howarth of Newport:** Can we move to the question of legal certainty, the distinction between law and guidance, and how citizens may have been able to understand the nature of their responsibilities

during this period of the pandemic? Sometimes what has been promulgated as guidance has been more restrictive than what has been enacted as law.

There is a letter in the *Times* today from a person who maintains that, on 30 November, the Department of Health and Social Care published instructions for how we should behave from today, on the basis that they were law, although they had not yet been enacted as law. Moreover, the author of the letter maintains—and I have not read the documents—that what would be law is actually labelled as guidance, so there is ripe scope for confusion. What are your views as to how public health guidance has been promulgated and whether it has been done in a constitutionally appropriate way by the Government during this period?

Baroness Hale of Richmond: In the early stage of the lockdown, there was huge confusion as to what was law and what was guidance. It took a lot of digging to find out which were the regulations, to begin with, for the reasons we explored earlier—that nobody had mentioned the public health regulations. Eventually, one looked at the regulations and saw what they said, and then one looked at the guidance. The guidance purported both to interpret those regulations and to give guidance as to how they should be applied, not only by the people who were trying to do their best but by the people who were enforcing them.

There is every reason to believe that some of the enforcement—remember that these regulations introduced draconian enforcement powers—will have been used in respect of things that were not actually in the regulations but only in the guidance. That is clearly inappropriate, and the Government must always make a clear distinction between what is law and what is merely advice about how people should be behaving. That is almost the clearest moral to come from this sorry state of affairs.

Lord Sumption: I agree with that. I am all in favour of the Government giving advice to people. In many ways, advice is a more desirable way of dealing with this than the criminal law. But when the Government give advice, two things are essential. One is that the advice should be objective. It should not be couched, for example, as SAGE on 22 March advised that it should be, in a way that is designed to cause fear and alarm for the purpose of inducing compliance. It should be balanced, measured and expressed in unemotional tones, as has been the case outside this country. For example, I have seen broadcasts by senior Ministers in France, Germany and Italy in terms that are altogether more measured than those we have had in some cases from spokesmen for our own Government.

The second requirement is that it should be absolutely clear what is guidance and what is law. The situation has, as Lady Hale has said, somewhat improved, in that the guidance is more clearly labelled as guidance and less tendentious now than it originally was. A big improvement was produced as a result of the publication in April by the College of Policing of a very clear and valuable statement, which was to be delivered to every constable, of exactly what the public could and

could not do. For instance, there was a huge amount of confusion about the two-metre rule, which has never had any legal force in England, although it has in Wales. The police were enforcing the two-metre rule in circumstances where, until the College of Policing produced its guidance, there was no legal basis for it.

I regret to say that, although the position has improved, it is still happening. For example, guidance on the government website currently describes a number of things in terms of "must", which I would regard as a statement that they are legal requirements, when they are clearly not. For example, the provision of personal services in the home, such as hairdressing, is not prohibited by the regulations but the guidance says it is prohibited. This is not a satisfactory state of affairs. Although it is rarer now than it was, it should disappear altogether.

Lord Howarth of Newport: Sometimes the law has been changed at an hour's notice or very little more. Is that acceptable in the circumstances of an emergency, or are there lessons to be learned in that respect as well?

Lord Sumption: It is never acceptable for regulations of this complexity, in any circumstance, to be introduced at 20 minutes' notice, which was the case with the regulations that were introduced in place of the lockdown at the beginning of July. It is a basic characteristic of law that it should be available to the public, and that they should be capable of informing themselves, if necessary, with the assistance of legal advice, as to what obligations are imposed upon them. There is no emergency that justifies the publication of regulations, which cannot be regarded as law in that sense, at that short notice.

Baroness Hale of Richmond: It is quite obvious that it could easily have been planned in advance. The Government had all those months of the first lockdown in which to decide what they were going to do afterwards. If they had had a fully worked-out framework, much closer to the one that we have now but not necessarily the same in substance, it would have been completely unnecessary to introduce things at such short notice. It is difficult to understand why it was thought necessary then, so I agree.

Q218 **Baroness Fookes:** I have found "guidance" a somewhat slippery term when you try to define it. Would you care to define what is meant? Does it have any legal force?

Lord Sumption: It has no legal force, save in so far as it coincides with what is in the regulations. The Government's view of guidance may not be quite the same as mine. Indeed, it clearly is not. Guidance is valuable when it consists of informed advice of value to citizens, particularly when the origin of that advice is specialists, such as scientists and so on. I do not think guidance is a process of urging and hectoring. It is a process that is designed to convey balanced information.

Baroness Hale of Richmond: That is correct when it is addressed to members of the public. There can be circumstances in which a particular individual, an employee or an official, is legally obliged to follow the guidance given by the employer or superior, even though it is not in general regulations that affect the whole population. That is a different situation from the one we are talking about at the moment.

It ought to be clear to everybody that this is just advice that the Government are giving to all of us. In fact, that advice covers some of the most important things. Of the mantra "hands, face, space", in England, hands and space are not the law but are just very sensible guidance. Face coverings are the law in certain circumstances and people should understand the status of that advice. It is of course very sensible advice and we should all try to follow it.

Lord Beith: Are there not examples in the regulations of instances where a business providing a service is required to have complied with the guidance?

Baroness Hale of Richmond: Yes, that is probably the case.

Lord Sumption: Yes, there are circumstances of that kind.

Q219 **Lord Dunlop:** Baroness Hale mentioned the bewildering flurry of regulations and the lack of a proper framework. Today we are back in a new tiered system of restrictions, with a promise to try to move to a more targeted approach, with less broad areas of coverage, as we go forward. Given the likelihood of an even more complicated picture nationwide, how can the Government make sure that the new requirements are clearer and more accessible to the public?

Baroness Hale of Richmond: People should be told where they can find out what they need to know, and what they are told when they find it out ought to be clear and accurate. One of the difficulties is that you need to go on the internet to find out most of this stuff. Sometimes, it is the BBC website, rather than the government website, that has the clearest information. That seems unacceptable to me. There also have to be ways in which members of the public who do not have access to the internet can find out exactly what the position is in their area.

Another thing that has changed from the previous state of affairs is that the position about travel between areas in different tiers has been made rather clearer in the most recent regulations—more draconian, in fact, but at least it is clear.

Lord Sumption: There is a dilemma here. The problem is that the simplest way of legislating, although it is also among the most unsatisfactory, is to have one-size-fits-all rules. They are easy to understand but are usually a great deal more intrusive and draconian than they need to be. The alternative approach, which is what the Prime Minister has now described as granularity, involves dealing differently with as many different situations as legislative draftsmen can provide for. If you do the latter, you may well achieve a more accurate legislative

treatment of the problem, but at the expense of complexity and comprehension.

This is one of the major problems about the use of the criminal law as a mode of policy implementation and social discipline. It may be that the differences between one place and another, and between one kind of person and another, are simply too complex to be accommodated by law, which is sometimes rather a blunt instrument.

Q220 **Lord Wallace of Tankerness:** Following on from that, as has been indicated, you have divergence between different tiers within England. I am sitting in a level 1 area in Scotland. I wonder whether you have been able to look at the legal divergence within England and between the constituent parts of the UK. Do you think there are consequences of that? Have you made any assessment of the different statutory bases for regulations in the constituent countries and whether there has been better parliamentary scrutiny in one part of the United Kingdom than another?

Baroness Hale of Richmond: I very much regret that I have not studied what has been going on in Scotland to the same extent that I have studied what has been going on in England. I mean no disrespect, but that is the nature of the facilities available to me. I would not like to comment on whether things are better.

The only comment one can make is that it is a serious difficulty that these powers are devolved, in the sense that it means there are differences between the four parts of the United Kingdom in this respect. That makes it very hard for people who live in one part of the United Kingdom but work in another, or have good reasons to go to another part of the United Kingdom. It must make their lives even more complicated than they are if they stay within their own part. That is a problem, but it is a result of devolution and I am not in any way here to criticise devolution.

Lord Sumption: The potential for differences between the parts of the United Kingdom is, as Lady Hale points out, inevitable, given that health is a devolved issue in the three non-English jurisdictions. Therefore, one is looking at a political issue; namely what measure of co-operation and agreement there should be between the devolved Governments and the Government of the United Kingdom.

The differences between these jurisdictions are not simply confusing, as Lady Hale has said. It tends to suggest to the public that the measures themselves are more arbitrary than they necessarily are. I regret to say that there is also a certain element of point scoring between the jurisdictions, which may have encouraged a desire to create differences that were unnecessary.

The jurisdictions have agreed on what to do over Christmas. It would have been perfectly possible, with maybe more good will than actually

exists, for them to agree on an altogether wider basis at a much earlier stage.

Lord Wallace of Tankerness: I intended no criticism of Lady Hale. I perfectly understand that you would not have necessarily made that assessment.

Q221 **Lord Howell of Guildford:** Thinking about what we are hearing now, as I said earlier, it is not the first time in history that we have had plagues or pandemics, but it is the first time in history that we have had a totally digitalised society. I think 94% of the population of the United Kingdom have iPhones, iPads or some kind of connectivity, and probably 94% have their own opinions. It has never been like this before and no Government in history have ever attempted to exert the control over people's movements, habits and behaviour in such a way. Are we being proportionate in our search for clearness and accessibility, when the whole system is full of questioning of everything?

The BBC was mentioned. The BBC every morning produces what it calls interview questions, but in fact they are opinions, challenging everything that has come out of government and Parliament. I listen to LBC in the morning. It is full of granular British common sense of a wonderful kind, but it questions and throws into doubt every single regulation, proposition and guidance that has come forward. Are we not demanding too much by seeking to embrace this all in some kind of orderly law?

Lord Sumption: There is no limit to the amount of debate that we should allow, because all disagreement is healthy. That even applies to the kind of disagreement that is not necessarily well informed but reflects widely held prejudices; those should be known to politicians, whether they agree with them or not. I do not think there is any problem at all with the idea that people debate this sort of thing furiously. I do not think that it has an adverse effect on decision-making. So far as it has any effect on decision-making, it is probably a desirable one.

Baroness Hale of Richmond: I agree with what Lord Sumption has just said. Debate is better if it is balanced debate, so that, if people come up with some particularly challengeable ideas, there is somebody there to challenge it. We have all learned a lot from the debate and exchange of opinions that there has been over these extraordinary times. Long may that tradition continue.

The Chair: There are some difficult and worrying areas where conspiracy theories tend to take off on social media, which causes us many problems further down the line.

Q222 **Lord Sherbourne of Didsbury:** I wonder if I can look ahead, beyond the present crisis, to possible future emergencies that may arise. I would like clarification of something that both the witnesses said when they were talking about amending the Public Health Act and the Civil Contingencies Act to allow for greater parliamentary scrutiny and a better way of Parliament overseeing the legislation. Would they like any amended legislation that they have been thinking about to have residual

emergency powers for the Government, so that the Government could move very quickly in some future, unpredictable emergency? Would they feel more comfortable with the Government having to bring in primary legislation, which would allow greater parliamentary scrutiny and capacity for amendment?

Lord Sumption: The Civil Contingencies Act in fact achieves all those objectives. It provides for cases that are too urgent for any delay but subject to parliamentary endorsement within seven days. It covers a very wide range of emergencies, not just health crises—although those are specifically included—but anything causing a general breakdown of public order or any kind of external threat. It supplies everything that the Government need. The important point is to prevent its useful provisions for scrutiny being evaded.

If I may say so, I entirely agree with the premise of the question. Even if you look only at public health issues, you will see that Europe has been extraordinarily fortunate over the last century to have escaped most, but not all, of the major pandemics of highly infectious diseases that have affected the rest of the world. There is no particular reason why Europe should have escaped them, it simply has done, and we must expect that this good fortune will not necessarily continue. Readiness for the next occasion is extremely important.

Baroness Hale of Richmond: I was going to say exactly the same: the Civil Contingencies Act does all the things one might want it to do. Therefore, to my mind, the best solution would be to remove the restriction on its application where there is other available legislation and let it cover all these sorts of situations, with the safeguards it has contained within it.

Q223 **Lord Faulks:** Good morning to both of you. You have been very clear about the inadequacy of the Government's approach, their legal analysis, and the way they got off on the wrong foot and continued on the wrong foot. Even with a satisfactory approach legally at the beginning, there were some very difficult questions of principle that had to be considered by this Government, or any Government. I would like you to help us as to how those principles should be approached, reconciling public health, economic interests and the like.

Baroness Hale, in your recent very helpful lecture at Oxford, you suggested that the matter ought to be approached through the European Convention on Human Rights. I would like to ask you about that. Lord Sumption, I would like to ask you if there were ever circumstances in which you thought that lockdown would be acceptable.

Baroness Hale of Richmond: I have suggested that the framework and hierarchy of rights contained in the European Convention is a helpful way of looking at the sorts of regulations that involve the invasion of fundamental rights to a very considerable degree. That does not stop there being very difficult judgments to be made, because most of the relevant rights that have been interfered with, although not all of them,

are qualified rights, so they can be interfered with if it is a proportionate response to meeting a legitimate aim.

Judgments about proportionality are extremely difficult to make. In the first instance, it is for politicians and Governments to make them, and only in the second instance for the courts to oversee those. They can disagree, but they mostly do not. The Court of Appeal has recently not disagreed with any of the Government's judgments on those rights. I still think it is a very useful framework for looking at it. Do we really need to do that? Is the interference with people's private and economic lives justified to the extent that it has gone on? It is a good framework of principle.

Lord Sumption: I broadly agree with that. I have concerns about aspects of the human rights convention. I think that what Baroness Hale is saying, and what I would certainly agree with, is that the conceptual framework involved, whether it is for the courts or politicians to decide, is a useful one. In other words, you look at what the rights are and whether interference with them is proportionate. It is worth pointing out that the Public Health Act has a requirement that the Secretary of State should be satisfied that it is proportionate. He has included a statement of his satisfaction on that point in every regulation. Opinions may differ about whether it is proportionate, but that is another issue.

Are there are any circumstances in which I think a lockdown would be acceptable? My answer in one word is yes. I do not believe that liberty is an absolute value, but I believe that it is a very high value. It is the basic foundation of human happiness and creativity. An extremely weighty case needs to be made before it is curtailed. It is often necessary to distinguish between different degrees of vulnerability. That may mean that it is justified in some sectors of the population but not in others. That is a position that we need to think about.

Q224 **Lord Hennessy of Nympsfield:** I was fascinated and stimulated by your lectures, Lady Hale's Romanes Lecture and Lord Sumption's Freshfields Lecture. I am sure that, when historical accounts are written of what we have been living through, they will be classic texts.

In Lord Sumption's lecture, I was very struck by his Hobbesian passage. You seem very cross, Lord Sumption, with the British people for allowing so much of their liberty to be syringed away by the Government in return for security. I was also very struck in Lady Hale's lecture by her quoting Lord Atkin in the war: "Amid the clash of arms, the laws are not silent".

Do you not think that another way of looking at the dilemmas Lord Sumption examines in his lecture is the other great Lord Atkin line from the 1932 case involving the lady with the dead snail in her bottle of ginger beer? This snail had made the bottle his mausoleum, which infected the lady concerned, who won the case. Lord Atkin produced a sentence with the phrase "the duty of care", which has ever since suffusing the mainstream legal discussion in this country.

Do you not think that that is what is going on? Individuals are sovereign,

in the sense they have their own duty of care to those around them and to their community, but also a wider sense of duty of care to the whole community and the whole country. If you are a Secretary of State, a Prime Minister, or anybody in the relevant Cabinet committees, you have a very distinct duty of care to see the thing in the round. Rather than getting cross with them, Lord Sumption, for the Hobbesian deal they have done, might you not be slightly more understanding of the impulse of the duty of care, which is quite natural to people, without the need for them to be coerced or frightened by scientists into thinking that?

Lord Sumption: I am not cross with my fellow citizens. I think that they have made a serious mistake, which is not the same thing. The problem is that we are a great deal more risk averse now than we were in earlier generations. The point that I made about a Hobbesian bargain is essentially that the more risk averse you are, the more you find yourself voluntarily conceding powers to the state that involve the use of mass coercion against your fellow citizens.

This is a serious issue. As I have said on more than one occasion, despotisms arise not because rights are trampled on by tyrants. They arise because people voluntarily surrender their liberty in the way that Hobbes said all people do. In a risk-averse society, the danger is that because there are always risks, and risks are a normal part of human existence, we will always be in the situation where the Government will be able, with substantial public support, to curtail those risks by also curtailing liberty. This is far too open-ended a structure and some curtailment by law of those powers is required.

Baroness Hale of Richmond: I am not going to make any comment on those last observations, if you will forgive me.

Lord Hennessy of Nympsfield: I am trying to tempt Lady Hale, because it is a very fundamental question.

The Chair: I do not think Baroness Hale is going to be tempted.

Lord Hennessy of Nympsfield: Never mind.

Q225 **Lord Pannick:** In answer to Lord Faulks, each of you said that emergency powers should be used only where necessary and proportionate, having regard to the importance of individual liberty. If we, as a Committee, are going to be proposing amendments to the Civil Contingencies Act, would it help to propose including such a provision in the Act, or is it so obvious that it does not need to be said?

Lord Sumption: I do not think it is so obvious that it does not need to be said. As Lord Pannick knows and has often said, proportionality, as a general legal requirement for the exercise of public powers, has become a more significant part of the law with each year that passes. We are not yet in the position that it is a general requirement of the law, as opposed to a requirement for the exercise of certain powers, notably those that arise from the Human Rights Act. It is desirable that it should be included as a statutory requirement, as indeed it already is in the case of the

Public Health Act. That applies not only to public health emergencies but to all the emergencies, and there is a very wide range of them, covered by the CCA.

Lord Howell of Guildford: We are getting into very deep areas. Here we are, on the one hand arguing that people are surrendering their powers to leviathan in exchange for security, safety and other things, but, on the other hand, all our societies are visibly developing colossal centrifugal tendencies. Localism is the rage. Separatism is the rage. Refuting the central authorities and calling them "out of touch" is almost the most common phrase in the English language. There are two completely contradictory tendencies going on here. I am wondering whether our old philosophical frameworks, which we have tried to operate since the Enlightenment, are adequate to deal with what is happening and the totally new pattern of society, in which our inner consciousness has been penetrated by technology and people are simply behaving in completely different ways.

The Chair: I am not sure whether that is a question or a comment that you would like to take up. Lord Sumption, I think it follows on from some of what you were saying.

Lord Sumption: I am not sure that I would agree with Lord Howell's diagnosis. There are some respects in which society is centrifugal, as he puts it, and some in which it is centripetal. For example, people are very much minded to criticise the Government in many ways and to rubbish things they have done, whether justifiably or not, but they also rely on central government to intervene to limit risk in a far wider range of circumstances. The far greater technical capacities that Governments have in the 21st century, by comparison with the position even half a century ago, mean it is possible to ask government for an altogether wider range of intrusive measures than was previously the case. What is new is the greater technical capacity of Governments to intervene.

I do not accept that there is anything new about the tendency of the population to criticise. The best corrective to the historical view expressed by Lord Howell is to go and look at some Rowlandson cartoons from the end of the 18th century. They are not only very fine cartoons but they express the carping character of public opinion, which has always been true of every society. If you look at the graffiti in the ruins of Pompeii, you will find that they are far ruder than anything that appears even on the internet today.

Baroness Hale of Richmond: Lord Pannick asked about the Civil Contingencies Act and proportionality. The Civil Contingencies Act already requires the Minister making the regulations to be satisfied that they are compatible with the Convention rights. The Act already contains the very framework from which I am suggesting we should be looking at these regulations. You do not need to recommend amendments to the Civil Contingencies Act for that purpose.

As far as centrifugal and centripetal questions are concerned, there are some that go one way and some that go the other way. But I would entirely agree with Lord Sumption as to the 18th century cartoonists' capacity for causing enormous offence to those in power but great delight to the rest of us. I have quite a few Gillray cartoons, and the odd Rowlandson one as well. They give me great pleasure whenever I am feeling particularly cross with something that has happened.

The Chair: You must look at them a lot of the time in present circumstances.

Lord Howarth of Newport: Prompted by Lord Howell talking about contradictory requirements that the public make of politicians, there is another contradiction, arising from the conduct of politicians over many years. On the one hand, government and political parties have promised the people health, happiness and even immortality. The public demand that these fantasies should be fulfilled and are quite happy for Governments to act in authoritarian ways where the behaviour of others is concerned. Equally, when it comes to what it is now fashionable to refer to as granularity, and their own particular situation, people reclaim their freedom and, indeed, demand the right to behave in anarchic ways. Lord Sumption has somewhat anticipated this question but I wonder what his reflections are on that.

Lord Sumption: I entirely agree. I agree with both the general statement about our tendencies, but I think they are inevitable, and about the way in which they are aggravated by the auction of promises that happens every five years.

Q226 **Lord Faulks:** Baroness Hale, in your Romanes Lecture, I think you said you were surprised that there had not been more litigation yet. We know there has been the Dolan decision, which may find its way up to the Supreme Court. I wonder whether you have any general observations about the role the courts might have in patrolling the particular amount of legislation and regulation that has followed from the pandemic.

Baroness Hale of Richmond: There are two roles. The one that was in issue in the Dolan case was in relation to the validity of the regulations. It was argued that they were ultra vires of the Public Health Act. It was also argued that they were incompatible with the Convention rights, and there were arguments about ordinary common law principles of public law validity as well. The Court of Appeal has concluded that the regulations are valid. Who knows what the Supreme Court might decide? That is one role, and it is obviously an important role for the courts to rule on the validity of delegated legislation.

There is another role, which is to adjudicate upon alleged violations of Convention rights in the case of individuals and what they have suffered. That might be, for example, incarceration in conditions that were contrary to the requirements of Article 3 of the Convention. That is what surprises me the most, in that, as far as I know, there do not seem to have been

many cases brought by individuals claiming that their Convention rights have been violated.

It does not surprise me that there have not been many claims about the regulations and their validity, because of the bewildering rapidity with which the regulations have been changed. That has meant that any challenge to them becomes academic, as indeed the Dolan challenge was academic, because the regulations that were under consideration have now been superseded.

There are two different roles. There are different reasons for thinking that they might be deployed in this situation.

Lord Sumption: Perhaps I can make two points in answer to Lord Faulks's question. First, as Lady Hale has pointed out, there is a difference between a court's function in ruling on the validity of an exercise of a statutory power and its function in ruling on what I might loosely call the propriety of that exercise. It is extremely unfortunate that the case law over the last 60 years has tended to elide these two things.

For my part, I would welcome putting them into separate compartments, because they involve completely different exercises and utterly different questions of constitutional proprietary. The power of the courts to rule on the validity of an exercise of public powers is absolutely fundamental and should not be limited in any way. The power of the courts to consider the propriety of an exercise of public powers is a much more complicated issue, which is only sometimes constitutionally appropriate.

Secondly, and maybe this is too controversial a point to be made in the current context, but I shall make it anyway and you can ignore it if you think fit, the courts are more sensitive to the political environment than they admit. Courts very frequently have what I would call their Liversidge v Anderson moments. Liversidge v Anderson was the case in 1942 when regulation 18B gave the Government power to intern anybody by ministerial order, without having to express any reason other than that the Minister was satisfied it was a good idea. I think it is now universally thought that that was a gross aberration and that the dissenting judgment of Lord Atkin was absolutely impeccable.

I have to say that the danger of a Liversidge v Anderson moment—of the courts deferring to the Executive even on questions of validity—is a serious one. I am not going to make any suggestions as to how one should deal with it, except that it is a danger to which courts should be very much alive.

The Chair: That is a really interesting point to end on. If we follow that up, we may be here for a very long time and we have already exceeded the time that was allowed for this session. I thank both of our witnesses for their contributions and for provoking a great deal of thought this morning.