HOUSE OF LORDS

Constitution Committee

Corrected oral evidence: The rule of law

Wednesday 2 April 2025

10.30 am

Watch the meeting

Members present: Lord Strathclyde (Chair); Lord Anderson of Ipswich; Baroness Andrews; Lord Beith; Lord Bellamy; Lord Burnett of Maldon; Lord Foulkes of Cumnock; Lord Griffiths of Burry Port; Baroness Hamwee; Baroness Laing of Elderslie; Lord Murphy of Torfaen; Lord Waldegrave of North Hill.

Evidence session No. 2 Heard in Public Questions 18 - 32

Witnesses

I: Baroness Hale of Richmond; Lord Sumption.

Examination of witnesses

Baroness Hale of Richmond and Lord Sumption.

Q18 **The Chair:** Good morning. Welcome to this meeting of the House of Lords Constitution Committee. Today, we are hearing from Lady Hale and Lord Sumption. As you know, this committee has recently launched an inquiry into this thing called the rule of law; we wanted some people of great authority, knowledge and experience, which is why we wanted you to come along early on in the inquiry, to start looking at some of the questions and to clear some of the undergrowth around some of the questions that we want to answer.

I will ask the first question, which is about the definition of the rule of law. The reason why the committee came to the subject is that we felt that the concept had been well understood for many years but that, more recently, within legal circles, it has become controversial and there is perhaps confusion in the public's mind as to what it meant when people talked about the rule of law; it often trips off the tongue. We want to try to find out what it means today. This will include the whole issue of international law and how it affects people, as well as the relationship between the judiciary and Parliament; that is the background.

Is it possible, in a few short sentences, to define the rule of law as a concept that we as a committee would find useful when we are writing a report? I put that first to Lady Hale.

Baroness Hale of Richmond: Well, there is a standard definition of the rule of law, with which you are probably familiar. It is that a society is governed by rules—laws—and not by the whim or individual decisions of a person or persons. Following on from that, there has to be a justice system to enforce those laws and to allow people to enforce those laws. Those are the two essential elements of it; there are others, of course.

Lord Sumption: I broadly agree with that. I would say that the rule of law is a body of principles without which we cannot exist as a society because, in their absence, human relations are nothing more than a contest in the deployment of power. In concrete terms, this means that no person or public authority has any power to coerce us other than what the law gives them. Moreover, the law must define the extent of that power and not leave it to the discretion of the person wielding it—or, indeed, to the discretion of the courts.

There is, of course, a procedural aspect of that. First, the law must be made in a form such that it can guide people's actions in advance, so it must be accessible and not retrospective. Secondly, whatever laws we have must be applied by public authorities and, ultimately, by the courts, and there must be access to them for that purpose.

The Chair: Lord Bingham came out with his definition in 2018. Is that still as relevant today as it was then? Did he get it right? Should we be looking for more? Is that in itself an area of controversy?

Baroness Hale of Richmond: I brought the book with me because, obviously, it is the text on the rule of law. He added to the two basic things that we have both said—in different words, but we have said more or less the same thing. He added some extra elements to it, in terms of the quality of that law and the fact that it should respect human rights. That does not necessarily follow from the two features, which are ascertainable rules both that are enforced and for which there are accessible means of enforcing them. It does not necessarily follow that the protection of human rights is in there; I myself would say that it should be, but that is possibly for different reasons.

The Chair: We will definitely come to human rights and international law in a moment. Is there anything you want to add to that, Lord Sumption?

Lord Sumption: There is a natural tendency, when a principle like the rule of law acquires immense prestige, for people to expand it to embrace a number of things that are rather more controversial. I think that Lord Bingham added to the rule of law many things that I would regard as desirable but different.

Q19 **Lord Bellamy:** I have a question about the role of lawyers in the rule of law. We have an adversarial system in this country in which, broadly speaking—if you agree—the judge is in the hands of the parties as to how they present and develop the case. The judge is really there to decide between the arguments and is not, as it were, a wider seeker after some abstract truth.

Two questions arise from that, if it is correct. First, to what extent do you think a judge should interfere in or question the framework of a case as presented by the parties, for example if he thinks they have gone wrong on a point of law or wrongly made a concession? Secondly, does it follow that, in our system, we are almost wholly dependent on the integrity, professionalism and competence of the legal profession; and that, if that weakens, our whole system is at risk?

Baroness Hale of Richmond: May I answer first, being the one of us who was not in practice in the courts for a very long time, other than as a judge? I was a judge for a long time, but I was not a legal advocate or a litigator for a long time. I would challenge your premise in some respects. Generally speaking, in civil litigation and criminal trials, that is correct, but a lot of the justice system is neither of those things. For example, in tribunals, the tribunal is normally expected to know the law, not to be told it by the parties. If the parties told the tribunal judge something that that judge thought was not right, or did not frame the debate correctly, the tribunal judge would tell them so. That is a large area of our justice system.

The same is true of the family justice system. The family court is not bound by the argument as it is framed by the parties before it, particularly in children cases but even in financial cases as well. So, I would challenge the premise to that extent.

Nevertheless, of course, a large part of the system depends on the way in which the debate has been framed. My understanding—Lord Sumption will correct me if I am wrong—is that, generally speaking, in an ordinary civil case between parties, including enterprises and individuals, the courts would accept the framing of the debate. They would not, of course, accept what the parties told them the law was because they have to think about that for themselves. They would not ask, "Why have not you argued this?", or, "Why have not you put this into the frame?", because there might be all sorts of private reasons that the court did not want to know about. In a public law case where the argument is between a public authority and an individual or an enterprise, the court is much more likely to say, "Ah, yes, but there is that point too", or, "Why have you not argued this?", on either side. So there is a distinction there.

Of course, any system that depends to a large extent on lawyers depends on the skill and the integrity of that profession. We do attempt to achieve that—not always successfully, but we have regulatory bodies that attempt to achieve that. A greater problem is inequality of arms, in that there are quite a few situations in which one side will have a lawyer and the other side will not. As I am sure Lord Burnett will tell you, that puts huge burdens on the judge to try to even that out without appearing unfair to the represented party.

Of course, there is also the fact that some parties can afford Lord Sumption and others cannot; he was an incredibly effective advocate. There is that sort of inequality of arms as well. I am not sure what we can do about that other than having a national legal service to which everybody must go; that would have its own problems because, of course, that would tell people things the state should not be telling them.

Lord Sumption: I would challenge your premise rather more broadly than Lady Hale. In my experience, advocates do their best to ensure that the full range of reasonable possibilities are laid before the judge. However, I also think that judges, particularly in the appellate courts, are very good at questioning the premises that have been put before them—at least, at trying to confirm that whatever issue troubles the judge has actually been thought through by counsel. So I do not think it is right that judges are, so to speak, straitjacketed by the integrity of counsel. Certainly in the Supreme Court, where you have at least five people who usually come from different areas of legal expertise, I would be very surprised to discover in any case that some legal principle had been entirely overlooked simply because counsel had not drawn attention to it.

Lord Bellamy: If I may say so, briefly, what lay behind my question was a continuing worry arising from Horizon and exactly what went wrong in those particular circumstances where, for one reason or another, nobody seemed to smell a rat over the years.

Lord Sumption: That is a particular problem because the issues that were overlooked were issues of fact. Judges have no power to call their own evidence, so to speak, or to require parties to put in particular expert evidence. It is fair to say that, in essence, what unlocked the

Horizon problem was the decision of an extremely experienced judge with considerable expertise in IT systems cutting through it.

Lord Bellamy: That is entirely right.

Baroness Hale of Richmond: This year's Hamlyn lectures explore that.

Lord Bellamy: Yes. They concentrate very much on that point.

Baroness Hale of Richmond: Yes, and they have explored the role of the lawyers in that, which is not entirely to their credit, it has to be said.

Q20 **Lord Anderson of Ipswich:** This committee wrote in 2023, "adherence to the rule of law includes compliance by the state with its international law obligations" and "the responsibility of the Government to honour the state's international obligations requires it to refrain from inviting Parliament to legislate knowingly contrary to the UK's international obligations". Were we right or were we wrong?

Lord Sumption: I would say that you were half right.

Baroness Hale of Richmond: I knew he was going to say something like that.

Lord Sumption: I do not think that you can reasonably give a yes or no answer to that question. It is possible for a state to abandon the international rule of law without compromising the rule of law internally, for example if it disregards treaties which it has signed up to. I think that there are circumstances in which a national legislature may have to do that. A particularly striking example is the way in which the British state completely rewrote the rules about blockade in both world wars, in a manner entirely inconsistent with the Hague conventions, which had essentially prescribed that only close blockades were lawful.

There is also the fact that many rules of international law are not treaty-based; they are customary rules which depend on the notion that states generally accept a proposition as binding upon them, and the practice of states in that respect can change over the years and in important respects has changed. If customary international law is what states do and they start doing something differently, then the law may change.

Baroness Hale of Richmond: Well, of course I do not disagree that, from time to time, great reasons of state may mean that a particular international obligation has to be modified in order to achieve a greater aim. I think that is what Lord Sumption was saying, and I cannot disagree. I also agree with what he said about customary international law, because that is what states do, and if states' practice changes, then customary international law changes. But when it comes to treaties, treaties are contracts and pacta sunt servanda. Basically, that is a principle of international law: you should abide by your contractual obligations, so I think you need really good reasons to depart from your treaty obligations. There may be such, but you do need them.

As Lord Sumption says, you can depart from your international obligations without departing from the importance of the rule of law at home, the rule of domestic law. I would nevertheless say that this committee was broadly right in what it said, and that should be the aspiration.

Q21 **Lord Anderson of Ipswich:** Lord Sales, who is a current member of the Supreme Court, gave a lecture last December in which he said that human rights are a hallmark of civilisation, as is, of course, the rule of law, but that does not mean that human rights are themselves part of the rule of law. Lord Sumption, I infer from an answer you have already given that that might also be your view. My question to you is: are there none the less certain human rights so fundamental to the matters that you have described that they could be considered part of the rule of law? I am thinking, for example, of access to courts. It may be that freedom of expression, freedom of conscience, might be worth thinking about as well.

I have a question for Baroness Hale. You gave us a teaser earlier by saying you had your own reasons for thinking that conformity with human rights obligations may be part of the rule of law. This may be connected with what you have just said about treaties, I do not know, but I would be grateful if you could expand on that.

Lord Sumption: Clearly, some human rights are essential if we are to meet my earlier definition of the rule of law: the right of access to a court; and the right to be free of arbitrary interference with life, liberty and property. These are things without which we are not actually a society at all, but simply a fight for the more effective deployment of force. There are further rights which I would say were not necessary to enable us to function as a society, but are necessary to enable us to function as a democracy—so free speech, right of assembly and association and so on. Indeed, I would add periodic free and fair elections. They are not fundamental in the same sense. We had the rule of law for centuries in England before we had anything like democracy, but now that we have democracy, that implies certain additional fundamental rights.

Baroness Hale of Richmond: I agree with that. Why would one not? What I said earlier was that I would not necessarily say that all human rights were an essential part of the rule of law—which is, of course, what Lord Sumption has just said—because there are some that are essential to the rule of law, and there are others that are essential to democracy. It is interesting that we have left out of that list two rights that are in the European convention. One is freedom of religion and belief, and I would add that to the political rights: people should be free to believe what they want to believe, and they should be free to manifest those beliefs whatever. I think that is probably part of democracy.

The other one, of course, is Article 8, which is the one that everybody has trouble with because it contains the right to respect for private and family life, home and correspondence, and it was initially thought to be part, in

a sense, of the security of the home, the security of your correspondence, not having the secret police knocking on the door in the middle of the night and that sort of thing, which is an essential part of the rule of law. It has, of course, expanded, and in many respects it has expanded in very good directions, but whether they are essential to the rule of law is another matter.

Lord Anderson of Ipswich: I think, if I am reading you right, that if you were advising us in the probably impossible task of arriving at a working definition of the rule of law for the purposes of our inquiry, you would not be excluding international law from it, although you would be cautioning us to concentrate, in particular, on treaty obligations, to which the consent of the state is unmistakeable. Nor would either of you entirely exclude human rights from that definition, although you would both be minded, I think, to restrict the human rights we are talking about to those with a bearing on the central definition of the rule of law. Lord Sumption spelled out what some of those rights are. Is that the sort of nuanced answer that you are giving us and that we would be safe to proceed with when we write our report?

Baroness Hale of Richmond: You would probably want to say something about the relationship between democracy and the rule of law. I think that is sitting in your question somewhere. And if you are associating democracy and the rule of law, which we could get on to, the rights that are essential to democracy come with that package too.

Lord Anderson of Ipswich: Would you agree with Lord Sumption that you can have, and indeed we have had, the rule of law without having democracy?

Baroness Hale of Richmond: For centuries—we did not have democracy until 1928.

Lord Waldegrave of North Hill: Just as a follow-up, you mentioned Lord Sales's lecture. He wrote a rather good article with Frederick Wilmot-Smith called "Justice for Foxes", which is not about country sports but about Archilochus. His essential point seems to be that these things must be contestable. Using your phrase, he would say that these things are "desirable, but different", but their boundaries are always going to be contested and contestable, and therefore a final definition is not possible or desirable, because the contest should continue. Would that be your view?

Lord Sumption: The final definition is fine, so long as it is couched at a sufficient level of abstraction.

Q22 **The Chair:** Can I ask Lady Hale one question for clarification? I may have completely misunderstood about treaties and contracts. Who is the contract between? Is it the Government representing the state? Does that bind Parliament or can Parliament take a different view?

Baroness Hale of Richmond: The technical answer is that the parties are the states. It is part of the royal prerogative to make treaties and, for

that matter, to unmake treaties. There is now a process of parliamentary scrutiny of treaties, but it does not require parliamentary approval to make or unmake a treaty. Of course, if the treaty involves a commitment to change the law, it requires Parliament to change the law—simple.

The Chair: That is very helpful. Lady Andrews is joining us remotely but can hear loud and clear, and we can hear her. Lady Andrews, you have a question?

Q23 **Baroness Andrews:** Thank you very much. Good morning; I apologise for not being with you in person.

There was a timely question from Lord Anderson, which I would like to pursue, on the notion of the abstraction of disagreement, as it were, versus the practical implications. Last week, we had a very interesting and lively conversation with distinguished academics over the way in which the debate over meaning has been somewhat simplified, I might say, by notions of "thick" and "thin". Our questions are: whose purpose is served by the sort of disagreement that has surfaced in legal circles? What are the practical effects of this? One of our witnesses was adamant that it was more or less nonsense; the others were not so sure. Lord Sumption's definition—"desirable but different"—could have been replaced by "desirable but essential" by one of our witnesses, I think, as a definition of what constituted "thick". Who does this matter to? Who needs the clarification most when these definitions perhaps get in the way of good—or, should I say, consistent—practice?

Baroness Hale of Richmond: This sounds like an academic argument. It is academics who use these words, "thick" and "thin", in my observation and reading. I do not mean that as an insult at all—I myself was an academic for 18 years and Lord Sumption was also an academic; he probably still is—but I do not find this a helpful way of thinking about things. What actually matters is what the law is. The law is what Parliament and the courts say it is. As an academic lawyer, you may say, "The court's approach to this particular problem is a very thin approach. It's not giving much in the way of substance", or you may say, "It's a very thick approach. It's giving it lots and lots of body"—I think that is what we are talking about—but, from a practical point of view, the important thing is what Parliament says, what the rules and regulations say, and what the courts say.

Lord Sumption: I think that it matters for one purpose and probably one purpose only. All of these concepts such as human rights, the rule of law and so on are attempts to grasp some notion of fundamental law—that is, some body of principle that the legislature and, certainly, the courts neither can nor should overrule. In the British constitutional settlement, it is impossible for Parliament to bind itself, so it is impossible to entrench any principle in a way that ensures that it will not subsequently be revised or abrogated. However, what you can do is create a body of principle that it would be particularly politically costly to override. Those who speak about the rule of law or human rights are trying to do that. It is a perfectly justifiable process, provided that you are reasonably

cautious about what you regard the rule of law and human rights as implying. That is, I think, why it matters.

Baroness Andrews: This may be a simplistic way of putting it but do you think it is about the distinction between a political approach and a non-political approach to the rule of law?

Lord Sumption: Yes, I do. In a country with a written constitution, where the constitution is the source of all public powers, you can have a situation in which, whatever the political interest involved, you simply cannot do whatever it is. In our system, it is a bit more subtle than that: there is nothing that you cannot do; there are a number of things that you should not do; and there is a general consensus that you should not infringe on the rule of law or human rights, properly defined. So most of the argument on the subject boils down to how you do define them.

Baroness Andrews: Forgive me if this is again rather banal but, in your submission, is your definition of the rule of law, therefore, the constitutional definition—or a constitutional definition—of the rule of law?

Lord Sumption: It is a constitutional definition of the rule of law, but it is not written in stone in the way it would be if we had a written constitution.

Q24 **Lord Griffiths of Burry Port:** I am always conscious, since joining this committee, that I am the least qualified person on it in that I have no direct experience of the law and I am not a career politician. I am a Methodist preacher with a long experience of dealing with people's needs, problems, situations and where they find themselves. I am also a member of the delegation from this Parliament to Strasbourg and the Council of Europe.

Without going into the components of the issues we struggle with—although that is an interesting discussion, too—I struggle because I am very close to the European Court of Human Rights and the Commissioner for Human Rights in Geneva and in Strasbourg. I hear heated defences of certain positions, shall we say, on the question of immigration. When I hear debates acted out in this Parliament, I hear equally impassioned claims that are quite contrary to what I hear in Strasbourg. For the lay person like me, without always understanding the details that underpin the conclusions being reached—I can see what they are aiming at—I wonder how much work we need to do from a legal perspective, your perspective, to help people who, in general, do not have the finesse, the exposure to academic discussion of nuance, the experience, the history or whatever to make a better job of that.

The other side of that, for me, is the work I do with people: burying them, baptising them, representing them and giving them whatever help I can along the way. In my perception, the opinions that people form about the rule of law are often mediated by the press. When a newspaper headline tells us that judges are whatever because they have done whatever or taken sides in a particularly difficult decision, whichever

newspaper you read is instrumental in helping you form your opinion—indeed, in almost coercing you into forming your opinion. These are all difficult, existential questions. They are about where the issues we are trying to deal with in this committee play out. It is from that point of view I wanted to make that intervention.

Baroness Hale of Richmond: May I make a comment? Thank you very much. You have just demonstrated, if I may respectfully say so, how very well qualified you are to be a member of this committee.

The Chair: Hear, hear.

Baroness Hale of Richmond: One of the things that I think would be a huge improvement is if the curriculum in schools, including primary schools, taught children the basic principles of the British constitution. This would include the structure: what Parliament does; what the Government do; the difference between the two, which people often do not understand; what the courts do; and the rule of law. They are not difficult as basic principles. They are often difficult in working out in difficult situations, but they are not difficult as principles and they could be explained to children at all levels. This is done in a lot of other countries in the world; they understand the basis of their constitution. That would be a huge improvement and counteraction to the misinformation that can come through the media, whether they are social media or legacy media. There is a lot of disinformation. For example, there is the notion that the rule of law means catching as many criminals as possible and sending them to prison for as long as possible. That is one feature, but it is not the only one and it is not how we both defined the rule of law.

So that is my reaction to your intervention. I would be absolutely delighted if this committee were to recommend something along those lines. I know that the Lord Lieutenant of London is currently doing a project—he calls it "Carpe Diem"—which is very much along those lines. You might like to talk to him about it.

Lord Sumption: I would agree with all of that. People are distressingly ignorant about the basic way in which all three branches of the state work.

As to what you said about the role of the press, I think that the role of the press has been to oversimplify and, therefore, to mislead. It is particularly unfortunate that a lot of these issues have been hijacked by the question of immigration. Immigration is a very difficult issue but it is not actually a very good illustration of the points that we have been talking about. There is a lot of suggestion that we need to withdraw from the ECHR, for example, in order to have whatever is thought to be a desirable immigration policy. I am a long-standing critic of the ECHR but I do not think that it is a good example. However, it is the one above all on which the press are fixated.

If we were to leave the ECHR tomorrow, the effect on immigration would be extremely marginal. Most of the decisions that are being complained about are decisions not of the Strasbourg court but of the Tribunals Service. Most of those are overruled by the Upper Tribunal anyway, and a lot of the descriptions of the judgments are highly selective in their discussion of the reasoning: they single out a single comment about chicken nuggets or pet cats and overlook the entirety of the rest of the drift of a judgment. So I entirely agree with you that the press have been most unhelpful about this, whichever side of the debate they stand on.

The Chair: I call Baroness Hamwee then Lord Foulkes, who has, I know, been trying to get in.

Baroness Hamwee: I have a PS to this about the media. The Lady Chief Justice has said that there is—these are the words she used—"shared responsibility" on the part of the media to uphold the rule of law. Would you put it—I mean responsibility not in a social sense but constitutionally—as high as shared responsibility?

Lord Sumption: I would not because it seems to me that the media are, by definition, a bear pit. It seems to me that doing this is the responsibility of institutions and society as a whole and not of the participants in a continual process of rather ill-mannered arguments. I also think that it is unrealistic to expect them to assume a function that they are not really capable of performing.

Q25 **Lord Foulkes of Cumnock:** I am rather confused, I must admit. Lord Sumption said that democracy is not a necessary part of the rule of law and gave us examples of where the rule of law existed in the UK before we had democracy. However, earlier on, he said that the rule of law does not exist where decisions are made on the whim of an individual person.

Lord Sumption: I think that was Lady Hale.

Lord Foulkes of Cumnock: That implies that democracy is an essential part of the rule of law because, prior to democracy, decisions here were made by the King or the Queen. Now, in Belarus, Russia, North Korea and China—perhaps in the United States as well—they are made on the whim of an individual person. Is there not a contradiction there?

Lord Sumption: I do not believe there is. You can argue about the date on which democracy came in—universal male suffrage came in in the late 19th century—but it is not true to say that, before that, Britain was governed on the whim of the King or anyone else. It was an ordered parliamentary society with a constitutional monarchy and courts that enforced the rule of law. In British colonies overseas, though none of those were democracies, the rule of law applied in them.

Lord Foulkes of Cumnock: It is a very narrow—at least relatively narrow—definition of the rule of law, though, is it not?

Lord Sumption: I would not agree that it is particularly narrow. What it illustrates is that democracy and the rule of law may both be good things but they are not the same thing.

Lord Foulkes of Cumnock: You also said that human rights are a matter for politics rather than the rule of law.

Lord Sumption: I do not think I have ever said that.

Lord Foulkes of Cumnock: Did you not say that in your Reith lecture?

Lord Sumption: What I said in my Reith lecture is very difficult to sum up briefly but, if I may respectfully say so, I would not accept that summary of it.

Lord Foulkes of Cumnock: Your definition of the rule of law seems to alter as circumstances change. Are we not going to have difficulty, in our work in this committee, in coming to some kind of conclusion in relation to what we mean by the rule of law?

Lord Sumption: I have offered only one definition, which is substantially the same as the one that Lady Hale has offered. I do not believe that I have diverted from that definition. If I have, then I owe you an apology, but I think not.

The Chair: Lady Hale, do you have anything to add to this debate?

Baroness Hale of Richmond: No.

The Chair: George, do you have anything else to ask or have you got what you wanted?

Lord Foulkes of Cumnock: I have an answer. I am not saying that I agree with it, but I have an answer.

Q26 **Lord Burnett of Maldon:** I preface my question by agreeing with what both of you, I think, have said—that there is a tendency for discussions about the rule of law, which involve only lawyers and academic lawyers at that, to become rather refined and unhelpful. I was both interested in and grateful for Lord Griffiths's intervention, which brought things back down to the practical, as it were.

I am also very keen to understand, in one or two areas, what each of you believes to be the practical impact of the rule of law, in the sense that each of you have described it, on our society. The first area is the positive impact, as would I see it, on prosperity, growth and the economy of the rule of law underpinning everything that happens. The second area concerns the extent to which a recognition that we operate in a society governed by the rule of law is important for enhancing international influence.

Baroness Hale of Richmond: And the question is?

Lord Burnett of Maldon: The question is: what impact do you think the

rule of law has on both of those areas?

Baroness Hale of Richmond: As to the first, it is very important to understand that the existence of the rule of law impacts everyday life for everybody all the time. It is not just what happens in the courts; that is really important. There is the fact that, if you go into a shop and buy something but it is defective, you can take it back; or, if you enter into an agreement to pay for something, you pay because you know that there is a justice system that will make you pay. It is all over all the time; that is a very important thing to get across. Of course, it is therefore essential for commercial life and the economy.

It also essential for keeping the peace; that is quite important. If we did not have the rule of law, we would not have even as much peace as we have now. So it is there all the time; that is my answer to the first question.

The second question is almost political, is it not? To what extent would our influence in the world be diminished if we were seen to be departing from our international obligations? That goes back to what we were saying earlier, does it not? There may be a very strong reason of state to do that, which would be understood—like the blockades, I think, are understood. But you need a very strong reason that would be understood, before it makes a lot of sense to allies why you refuse to abide by the terms of a treaty you had entered into with those other member states, whoever they are.

Lord Sumption: I agree with both those points. The opposite of the rule of law is the rule of discretion or the rule of force. Either of those things is entirely inconsistent with basic, orderly systems that are fundamental to any successful economy or society. So I endorse everything that Lady Hale has said about that.

As far as international influence is concerned, clearly the ability to enter into commitments depends on people trusting you. If you have a reputation for tearing up whatever agreements you make, whenever they become inconvenient, your ability to achieve solutions to the many problems than can only be resolved internationally is much reduced. That is one way of saying that one's reputation declines.

You can also disregard basic principles of humanity and rules of law internally to such an egregious degree that it discredits you. I do not wish to internationalise your already broad remit, but we are watching a live experiment on all this on the other side of the Atlantic.

Lord Waldegrave of North Hill: I want to explore this briefly. I think you agreed that there are occasions when the Executive, the state, may want to do something that is so important that it has to break the law or operate outside the law.

Lord Sumption: The international law?

Lord Waldegrave of North Hill: The international law, yes. I was

brought up with the "Altmark" incident, where they rescued the "Graf Spee" prisoners from neutral Norwegian waters to general applause—from the British anyway. But who is to judge? It becomes circular, if we are not careful, because who is to judge whether it is legitimate or reasonable for the state to take such an action? It comes back to a judge again, does not it?

Lord Sumption: There is no tribunal that can judge that. In essence, when a state takes this action, the relevant judgments are going to be made by its own domestic politicians and electorate. There are some things that they will accept as being sufficiently important to justify that and others that they will not. It is a classic illustration of what I was saying earlier in a slightly different context about rules which there may be a high political cost for breaking. How high that political cost is depends on how extreme the circumstances are that pushed you to do this.

Lord Waldegrave of North Hill: Is it legitimate, therefore, to have—in the horrible jargon—an ouster clause that says that this is not to be judged by courts?

Lord Sumption: That is one way of, in effect, saying that this decision will be made on political rather than legal grounds. Sometimes that may be justifiable.

Baroness Hale of Richmond: We are talking about international law here, are we not?

Lord Waldegrave of North Hill: Most cases are in the intelligence world—Lord Anderson knows a great deal more than I do—but not all of them. There might be a domestic crisis that is so urgent.

Baroness Hale of Richmond: I would be really worried about suggesting that ouster clauses were appropriate, if it is a genuinely justiciable issue in the domestic courts. Obviously Parliament can legislate in an emergency to make something lawful that otherwise would not be. I would regard that as the preferable solution to a general ouster clause, ousting the jurisdiction of the courts to determine the legality of something that the Government had done, because that is clearly inimical to the rule of law. It gives the Government the power to break the law.

Q27 **Lord Beith:** What do you think about what I would describe as the doctrine of express intent? If a matter comes before the court for which Parliament has attempted to oust the jurisdiction by an ouster clause, the argument comes into play that, if Parliament had intended to do something as outrageous as this, it would have set it out expressly in statute. That has become quite significant in several cases—Anisminic, for example. What are your views about it?

Baroness Hale of Richmond: We were both engaged in a case about the Investigatory Powers Tribunal. I was on one side and Lord Sumption was on the other, but I have a feeling that I just agreed with somebody else. I am not sure, but cannot remember whether I wrote a judgment. I

am fairly sure that Lord Sumption did. It is probably a good idea to read those judgments to see what to make of it. Of course, the view is of how you interpret what is said in a particular clause. There can be more than one view about that.

Lord Sumption: There is a perfectly legitimate principle of construction that, if Parliament is going to do something abrasive, it needs to spell it out in letters of brass. Otherwise, the danger is that the more far-fetched implications of what it is doing may have escaped some legislators during the passage of the Bill. It is normally referred to as the principle of legality and I think that it is a very wholesome principle.

Clearly ouster clauses are an example of something that has to be spelled out in letters of brass. The issue in the Privacy International case, which is the one that Lady Hale was talking about, was whether it had been. We took a different view on that question.

Q28 **Lord Anderson of Ipswich:** I will briefly take you back to the question of international law and the discussion that took place a couple of minutes ago. The shadow Attorney-General, Lord Wolfson, gave a speech about a week ago. I appreciate that you are saying that it is a matter of degree, but I wonder if you could comment on what he had to say.

He said that "Our breaches of international law are no more a threat to the rule of law than is someone's breach of contract a threat to the rule of law in the UK, unless—and this is the point—such breaches threaten the entire legal order itself. Russia's invasion of Ukraine may do so. The UK's failure to abide by a double tax treaty doesn't". Is that a good analogy—the analogy between the breach of a treaty and the breach of a contract?

Lord Sumption: No. Some breaches of treaty are more important than others, but I think Lord Wolfson intended to say something more profound than that. If he was saying that breaches of double taxation treaties do not matter, then I do not agree with him. If he was saying that they will not shake the foundations of the international legal order, then he was obviously right about that. As with so many portentous statements on this subject, the more closely you analyse them, the less the speaker appears to be saying.

Q29 **The Chair:** I am going to move on a little to the state of the rule of law. How could the rule of law be strengthened? How do you assess the state of the rule of law in the United Kingdom, if that is a fair question to ask?

Baroness Hale of Richmond: It is not an easy question to answer, because it is an empirical question, in a sense, to which anybody who has had their rights invaded without getting a remedy is going to say, "Well, the rule of law is in a very bad state". The people who have not had that experience or who have been able to assert and vindicate their rights will feel, "Yes, it's in a very good state". So it is an empirical question to which we do not have an answer.

I have spent quite a bit of time over the recent past pottering into courts and tribunals, in a random way up and down the country, just seeing what goes on there. I have spent quite a bit of time over the recent past pottering into courts and tribunals up and down the country, in a random way, just seeing what goes on there. On the whole, I have been incredibly impressed with what goes on with all the functions about the rule of law that we were talking about.

Going back to the press, the press can do enormous damage by diminishing confidence in the rule of law and the administration of justice, but, for what it is worth, my empirical observations have been pretty favourable.

Lord Sumption: I agree with that. At many levels—the Civil Service, the courts and the political level of government—by and large, we try to do the right thing. The fact that we do not always succeed does not mean that the rule of law does not thrive.

Q30 **Baroness Laing of Elderslie:** I turn to whether it is the role of the judiciary to uphold the rule of law. Should the judiciary be the primary guardian of the rule of law? If not, who else should?

I ask you to consider this in the context of what I would describe as the unjustified criticism of judges. I appreciate that some in the political sphere sometimes consider the criticism of judges to be fair game in our constitutional settlement. You are well aware of the situation not long ago when tabloid newspapers put up pictures of judges and said they are traitors to the country, which was appalling.

From the criticism of judges and the role of the judiciary, I will also throw the current situation in France into the ring. I am not asking the committee to look at the rule of law in France; it is just an example of a democratic country like ours. The decision was taken in the last few days to impose a penalty upon Marine Le Pen, which might well mean that she cannot stand for election. That will come under enormous criticism and it has the potential to have an effect on the constitutional settlement. Sorry; I have put a lot of things into the mix, but the question is on the role of the judiciary in upholding the rule of law.

Baroness Hale of Richmond: The judiciary is the front line in upholding the rule of law. It is its essential function. We are not there to do anything other than decide cases according to law. That is what we are for, and we have said that an essential part of the rule of law is a functioning justice system, which includes the judiciary.

So we are the front line, but we are not the whole story, because surely Parliament and politics must also uphold the rule of law. It is essential, as we have all agreed, to the functioning of the state, society and the economy. So everybody in positions of power has a role, but it is a different role from the front-line role that judges have. That is the easy answer to your first question.

We have talked before about the role of the press, and it can obviously be guilty of misinformation, which is unfortunate, but it can also be responsible for exposing some really important things. We had reference to Horizon earlier: if it had not been for *Computer Weekly* and *Private Eye*, that would probably never have had the exposure that it eventually did. The press is very important—essential—to democracy. We will not go back to discussing democracy and the rule of the law, and the two different things, but the press is definitely essential in one way.

But the press should not go too far, and it was frankly disgraceful for the newspaper in question to have published the photographs of three very senior judges under the headline "Enemies of the people". That headline was totally inaccurate, because all they were doing was upholding a fundamental constitutional principle that had been there for centuries.

The other unfortunate thing—I hope you will forgive me for making this comment—is that there is a member of the Government who swears an oath to uphold the independence of the judiciary and the rule of law, and that did not quite happen. It would not have been difficult to do it. The script would not have been difficult to write; it would have said, "We have a free press in this country. You are free to publish what you wish within the law, but it is my duty, as the member of the Government who has sworn to uphold the rule of law and the independence of the judiciary, to tell you that you are wrong".

Baroness Laing of Elderslie: That, if I may say so, is a very strong answer to my basic, very important question. A member of the Government with that specific responsibility, under oath, is an important balance in upholding the rule of law.

Baroness Hale of Richmond: In fact, since that incident, we have not had the same problem.

Lord Sumption: I would add only that it underlines the importance of objective sources of information and of education—going back to Lord Griffith's observations earlier. One of the most striking things about the "enemies of the people" incident was that it followed the decision of a Divisional Court. When the case went to the Supreme Court, which arrived at roughly the same conclusion—a slightly different process of reasoning, but the same answer—there was no response anything like that.

I am convinced that the main reason for that is that the proceedings of the Supreme Court are livestreamed, so that it was open to anybody to tune in and listen to what was going on, and a very large number of people did. When they did that, they found that this was not, as many of my fellow citizens supposed, an argument about the rights and wrongs of leaving the European Union. If you tuned in at a random moment, you would find people discussing cases about leaseholds in 1916 being broken by the Government and so on. The overall impression that you would have got was that this was a serious argument about legal and constitutional principle. I think there is a lesson there.

Q31 **Lord Griffiths of Burry Port:** I am emboldened by my first intervention, but I am still in the same place, really. We had breakfast with the Supreme Court—I mean, what further heights can I scale? The breakfast was not particularly good, but the conversation was marvellous. I made an intervention there, and I will not repeat the illustration I gave, but I explained how my entire life had been built on a question that is important for this discussion; namely, access to the law. An injustice was done to my dear mother when I was very young, as a result of which we became homeless and all the rest of it, with all the nastiness that ensued.

As a result of that breakfast, I struck up a rather nice conversation with Lord Briggs of Westbourne, who has done a lot of work on this. I promised him that I would read his report, which came out in 2016, about access to justice. I have already read one of his lectures to some of his pupils. It seems to me that, with our backlog and the diminution of legal aid, ordinary people in ordinary places are not given much encouragement to feel that access to law means anything at all, regardless of the fact that it is stated very clearly in the Charter of the United Nations, Article 6 of the Universal Declaration of Human Rights and the European convention. He offers some quite radical ways of approaching this, but Covid came and it all ran out of steam. I think this committee ought to look again at the results of that and revive the discussion, which rather ran dry because, without access, all the definitions in the world mean nothing at all. Is that something that you would advise us to incorporate in the findings of this committee?

Baroness Hale of Richmond: It is of course a matter for the committee how far it wants to get into questions of resources, because that is what we are talking about. I made the point earlier that access to justice is an important part of the rule of law, and that there is currently, especially in certain parts of the justice system, an inability of some people properly to assert their rights.

Lord Griffiths of Burry Port: He mentions that resources are key but, in the use of technology and so on, he also comes up with ways of doing mediatory work that does not involve necessarily appearing in court, but answers the key questions that are being asked. If people do not feel that justice is for them, I do not know what it is all about.

Baroness Hale of Richmond: I completely agree, and I think that some thought has to be given to the extent to which legal services should receive public funding to help those people who need it, in those cases where they absolutely need to have legal help. My background is in family law, and public funding for large areas of family law has been withdrawn. The effect of that has been that far more cases go to court. They would not have gone to court before, because the function of the family lawyers was to give sensible advice, calm things down, do a negotiation between often very emotionally upset people and achieve an agreement between them so they did not have to go to court. More cases go to court, they take longer and they are more fraught. So it is a false economy, because you are saving here but you are putting cost on there, and backlogs are part of that. That is just one illustration, so I am

obviously very much in agreement with the tenor of what you are saying. These are resources questions and not questions for people like me.

Q32 **Lord Beith:** I have a question about the way people view the rule of law. I know that Lord Sumption made some interesting comments during the Covid crisis, or subsequent to it, but I am going slightly beyond what he said to suggest that two things happened as far as the rule of law was concerned. The first was an intolerable confusion between advice and the law, which led to people suffering consequences which should only have been possible had they been breaking the law, which they were not. A secondary effect, and perhaps a useful one, was that the events in Downing Street led people to say, "We can't have one law for them and one for us". I felt that, at that time, suddenly the rule of law entered the popular imagination: should there be the same law for all of us? Do you agree?

Lord Sumption: I certainly agree that the law, particularly the criminal law, should apply in exactly the same way to Ministers and civil servants in Downing Street as it does to any other citizen. Obviously that was something that exercised a lot of people about so-called Partygate. In general, I think the main problem about the whole Covid business was the selection of a statute to justify the orders which minimised the role of Parliament.

Lord Beith: Well, most of the cases were taken under a previous and earlier statute, the Public Health Act.

Lord Sumption: That is what I am referring to. I take the view that the Civil Contingencies Act should have been used because that is designed to give that kind of power to the Government, but subject to a much tighter regime of parliamentary supervision. But I think that we may be getting off the agenda with which we started.

The Chair: Lord Beith, do you have a supplementary to that or are you okay with it?

Lord Beith: Well, I was interested to hear what Lady Hale thought. I actually felt that the Downing Street events and the reaction to it did have a significance for people's perception that there was a rule of law and somebody was enforcing it.

Baroness Hale of Richmond: That is probably correct. I very much agree with the comment about the confusion between what was the law and what was simply government guidance about how the law should be operated, which was very apparent during the first lockdown. People thought that things were compulsory when they were not; they were just part of government guidance.

It is also correct that the choice of the Public Health Act to bring in all of these regulations, arguably at least, broadened the scope of what the regulations could do, because the Public Health Act allowed—I say it is arguable because I think that Lord Sumption takes a different view—measures to be taken against everybody, not just those who were

suffering from the disease in question. It also allowed for a rolling programme of "This is urgent so we are going to do it and you can only check it very much after the event".

It also meant that the courts could never do it, basically. The case that Lord Burnett had challenged the validity of regulations that were already long gone, which is not very helpful.

The Chair: I think we will probably move on, but let us hear from Lord Burnett.

Q33 **Lord Burnett of Maldon:** I have a question that I think you have been given notice of, about judicial activism. It is one in which there is a good deal of public interest, at least as reflected in the media. My understanding, without having checked *Hansard*, is that the term has been used in the House of Commons quite frequently over the last few weeks. Essentially, my question is: do you believe that judicial activism is going on at the moment? It is a question that has an important preceding question, which is: what does it mean? I am bound to say that I think many people who bandy the term around do not themselves understand what they think they mean by it.

There is judicial activism, which is developing the common law: that is what judges are for. There is, no doubt, a concept, which I personally would think has no validity at all, that there are judges at various levels who are advancing their own agendas, as it were. As you will both remember, Sir John Laws gave a lecture on this topic in 2016, I think, and in essence he was talking about a perception of impermissible entry into policy areas. It is a very difficult thing given that, under the Human Rights Act, judges at all levels are expected to balance competing interests. In a sense, it inevitably requires judges to make value judgments, which our own public law would not require. It is a straightforward question: do you think there is any validity in a charge of judicial activism? I appreciate that it requires more than a simple answer.

Baroness Hale of Richmond: Do you want to go first while I suck on this lovely cough sweet that Lady Hamwee has been kind enough to donate to me?

Lord Sumption: Let me offer my own definition of judicial activism as a prelude to saying whether I think it exists. In some cases, particularly in public law, questions of policy are relevant. I think that judicial activism means the formulation by a court of its own social, economic or political policy, independent of the policy of the other two branches of the state. Have there been examples of that? I think that there have—not many—but, for the reasons that you give, human rights litigation almost inevitably requires a policy view to be taken, because in many cases the question is not whether the relevant human right is engaged but whether one of the various exceptions to it applies. That very frequently requires a decision-maker to balance two incommensurate values, such as privacy on one hand and effective criminal law enforcement on the other.

I think that, in those circumstances, judges need to be quite careful about where they derive their policy guidance from. In my view, the situation has immeasurably improved since I gave my Reith lectures in 2019. In particular, there have been two landmark decisions of the Supreme Court—one in the Shamima Begum case and one in the case brought by the Child Poverty Action Group about the two-child cap. In both cases, the Supreme Court in effect decided that in a case where policy is relevant, and it is not always, it is right for the courts to take their cue from the policy of Parliament and in some circumstances of Ministers responsible to Parliament, rather than to develop a policy of their own. I think that that is a healthy development.

Baroness Hale of Richmond: I agree with you, Lord Burnett, that talking about judicial activism depends, if it is going to be serious, on a definition of what it means. What most people mean by judicial activism is a decision they do not like—it is as simple as that—and if the court had come to a decision that they did like, it is not judicial activism, even if it had been a very active decision in legal terms.

I remember an example. You will remember a decision in the House of Lords which held that a woman who, because of medical negligence, had conceived and bore a child that she never meant to have was not able to claim the costs of bringing up that child, even though, by ordinary legal principles, if you are done that sort of wrong to your body, you are entitled to the financial consequences as well. The House of Lords held that she was not entitled: that was judicial activism. It departed from a long-established principle in order to achieve a result that was thought to make more sense. You can agree or disagree, but it was undoubtedly activism.

Another part of activism is making a decision for reasons that seem good to you but are not necessarily part of the general principles of law. I do not think that the human rights example is the only example of where it is possible for the judiciary to make decisions which require a certain amount of careful thought as to whether you think that they should be done. It is undoubtedly the case that, under the Human Rights Act, when it comes to qualified rights, deciding whether an interference with that right is justified involves looking at the reasons for the interference. I would say that what we did was look at the reasons given for the interference and ask whether they made sense. If they did not make sense, we were entitled to say so—so it very much depended on the reasons that the Government gave. If they made sense, that was absolutely fine.

The other part of it was that we all took the view that there were certain types of decision which only Government and Parliament could take. They were the ones with the competence to do that, and that was a generally held view, so we did draw back from interfering in those cases where we thought the judgment could be made only by the political branches of the state. So I disagree to some extent with what Lord Sumption said, as you might gather.

Lord Burnett of Maldon: I suppose—I do not want to invite you to comment on particular cases, I hasten to add—that one can see it in some cases where the Court of Appeal, the House of Lords or the Supreme Court were not unanimous in the outcome. There are perhaps differences of judicial, philosophical starting places about what should be put in the box of "This is not for us; this is for Parliament or the Executive" and the box of "This is definitely for us". These are often issues surrounding the administration of justice, for example, and then the grey penumbra in the middle. Is that a fair comment?

Baroness Hale of Richmond: Yes, of course it is a fair comment. I was trying to say something a bit similar, without too obviously disagreeing with my learned friend here.

Lord Burnett of Maldon: Disagreement by senior judges is what we are there to do, from time to time, so please do not change the tradition of a lifetime.

Baroness Hale of Richmond: We are, indeed.

Lord Waldegrave of North Hill: We have had a couple of parliamentary examples of direct intervention. One was quashing guilt over the Post Office. I understand why it was done, but it was very unusual. We now have a lesser but interesting case going on of an Act of Parliament to tell the Sentencing Council that it has got it all wrong. Are there issues here? This committee has to look at the constitutional implications—or not—of particular legislation. Do you think that either of these cases are of constitutional interest?

Baroness Hale of Richmond: They are certainly of interest, are they not? Lord Burnett's predecessor, Lord Thomas, gave a very interesting interview on the radio yesterday, I think. He distinguished between sentencing policy, which is a matter for Parliament, and the imposition of sentences in individual cases. Parliament is at liberty to disagree with guidance given by the Sentencing Council; whether it should do that in quite the rush it is at the moment is another matter, and a political question, but there is a distinction there. It comes back to something that we were saying earlier.

Lord Waldegrave of North Hill: What about the Horizon case?

Lord Sumption: The Horizon case was an exceptional course for Parliament to take but it was justified because the courts had already pronounced on this—in particular, on the test case involving the 79 claimants. In this particular case, everybody who had been unjustly convicted, with a tiny number of exceptions, had been unjustly convicted for exactly the same reason: the mechanism was the same. The only effect of the legislation was to enable the problem to be dealt with en bloc instead of case by case over a considerable period. That was an unusual step wholly justified by the unusual circumstances in which it was taken.

The question on the Sentencing Council is one of sentencing policy. I do not see that the Government's approach was at all illegitimate, whatever one might think about the somewhat undignified exchanges of views that have been published in the press.

Q34 **Baroness Laing of Elderslie:** We spoke earlier, at the instigation of Lord Griffiths, about education at a school level on the constitutional settlement that we are generally talking about. Do you consider that there is sufficient understanding within government and Parliament about what upholding the rule of law really means and requires? We touched on this earlier when Lady Hale spoke about the specific duty of the Lord Chancellor, but is there a deficiency there? If so, what should we be doing about it?

Baroness Hale of Richmond: It is awfully difficult to comment on that question. In both government and Parliament, there are plenty of people who thoroughly understand all the things we are talking about, and there are others who do not. Perhaps this committee could publish a very useful document that will be read by every Member of Parliament.

Baroness Laing of Elderslie: I would not put money on it.

Baroness Hale of Richmond: I know; that is why I said it is difficult to answer the question. This is pie in the sky perhaps but, nevertheless, there is an important educational role for committees—those of this House, the specialist committees in the other place, and the Joint Committee on Human Rights. They can do some really important work in educating both the public and parliamentarians about certain things.

Lord Sumption: The Civil Service also plays an important role in this. In my experience, which is inevitably partial, the Civil Service is very conscious of these issues, extremely well informed about them and very anxious to do "the right thing". As a barrister, the Government were by far my most frequent client. I spent a lot of time with senior civil servants advising on this or that aspect of what they were planning to do; I was consistently impressed by the importance that the Civil Service, particularly at the senior level, attached to exactly the kinds of issues we have been discussing over the past hour and a half.

Baroness Hale of Richmond: I agree.

The Chair: We have got to the end of our set questions. Is there anything else that either of you want to say about our inquiry, or are you happy to leave it at that?

Lord Sumption: Your questions were pretty comprehensive. I do not think I can add anything.

Baroness Hale of Richmond: I managed to force in my bee in the bonnet about education and access to justice, so thank you very much indeed.

The Chair: Thank you very much for joining us. That finishes the public

broadcast.