HOUSE OF LORDS

Select Committee on the Constitution

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

Wednesday 4 March 2020

10.25 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 Wallace of Tankerness.

Evidence Session No. 1 Heard in Public Questions 1 - 12

Witnesses

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

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Examination of witnesses

The Rt Hon Lord Reed of Allermuir and The Rt Hon Lord Hodge.

Q1 **The Chair:** Lord Reed, Lord Hodge, welcome. It is your return visit to this Committee and we follow what happens with interest. Outside we were talking about the possible implications for the courts of the virus. We may not get to that today, but at some stage people will have to take that issue into account and some of the concerns that people will have about the functioning of the courts system.

That is not precisely why we are here today. Lord Reed, you are now President of the Supreme Court and you clearly had a very close relationship with your predecessor, and you have seen the workings and the changes, so I think it would be a good idea if you could start by telling us what you see your priorities and role to be over the next few years, and then perhaps, Lord Hodge, we will come to you and see how you feel you fit into all of this as well.

Lord Reed of Allermuir: Some of the priorities are unchanged. Evidently, our main priority is to maintain the standing of the court as one of the world's leading courts: producing judgments which are regarded as being of the highest quality, providing an efficient service to the litigants, and maintaining public trust. Linked to that, as a priority, we have to maintain our independence. That is very much part of the reason why we are so respected around the world and why the public trust us. We also need to maintain our accessibility, which involves a whole bundle of practices that we follow, and we will be continuing those; for example, sitting outside London so that we can make contact with people around the country. We are going to be developing our website to improve accessibility; for example, by making some of the documentation in the cases accessible online.

In addition to those constant priorities, my own first priority is to try to improve the degree of diversity on the court, which I think is a real issue. I know there are some questions later about that, so I will perhaps say more about that later on.

A second priority is to strengthen the relationship between our court and the courts below us. We have remarkably little contact with the Courts of Appeal in England and Wales, Scotland and Northern Ireland, other than at Chief Justice level, and they have very little contact among themselves. One of the ideas that I have had, particularly as a Scot coming into the role, is that the Supreme Court could hold an annual plenary for members of each of the courts to get together, partly to discuss issues of common interest—for example, at the moment how we respond to exit from the EU, which affects us all—and to give an opportunity for dialogue and for the expression of concerns that otherwise may be bottled up or may surface in ways that are less easy for us to address than if we hear these concerns expressed face to face.

My third priority is to develop an international strategy for the court. We have quite a lot of international contacts but they have hitherto been, essentially, an ad hoc matter, with the President of the court not even being aware where judges are going and who they are seeing, let alone having any strategy. Since I took over last month I have been working with the FCO on my own visits to try to be much better informed about the places I am going to and to try to feed in messages—so far as I can—that the FCO is keen that Britain projects.

I am working also with the lead judge on international relations at the Royal Courts of Justice for England and Wales. What we have in mind is to have a coherent strategy for our role in the world outside the EU, with priorities for the use of the limited budget that we have available for this purpose, and to identify judges with responsibilities for different jurisdictions, not only when we go to them but, to a greater extent, when we receive visits from countries around the world and we want to make the most of those.

A fourth priority is to strengthen the relationship between the court and Parliament, which I think needs to be addressed. We of course have a relationship with the House of Lords through appearances before this Committee and less formal meetings, but our ties with the House of Commons are extremely limited. I was very pleased that when Lord Hodge was sworn in as Deputy President in February, the ceremony was attended by the Deputy Speaker of the House of Commons, and she and I were able to have a very useful discussion about this. I want to work in liaison with the Speaker's Office to find ways in which MPs and justices of the court can have appropriate contacts where I hope that we can answer their questions about our work and they can meet us and understand the way we operate better. I think that might be beneficial.

Finally, the remaining priority is to lead the court through the transition away from membership of the EU. At the moment it is too early to say what that is going to involve. We are monitoring closely what is going on and trying to keep up-to-date with government thinking, assessing what we think the implications might be and then seeking to feed those assessments into government thinking, through both formal consultation processes and informal meetings. Those are the priorities.

The Chair: Thank you very much. I think we will want to follow up on quite a few of those issues, including public trust and independence. I was interested in what you said about contact with the lower courts. I am slightly surprised that has not been developed and we may wish to come back to that on some other occasion. Lord Hodge, do you want to say a word about how you see your role fitting in to this, and your priorities?

Lord Hodge: I have had the opportunity to discuss with Lord Reed how we see things going forward and I agree with his priorities. I would highlight four in particular. Maintaining the quality of our work is essential if we are to contribute to preserving the reputation of the UK judiciary as a leading judiciary. It is a very valuable asset to the United Kingdom internationally to have a judiciary of that standing.

Secondly, maintaining or increasing diversity within our court is a very important priority because it affects the longer-term reputation of the judiciary as a whole, both internally and internationally. There are inevitably going to be fluctuations in the numbers represented in the court, but Lord Reed and I are agreed that we have to work together to encourage people from diverse backgrounds both to acquire the necessary experience and to put themselves forward for appointment.

Thirdly, in relation to international relations, Lord Reed has asked me to prepare a strategy paper, and that is under way as we speak. I think it will be a useful focusing of our resources, which are limited, to direct them to the main priorities.

Of course as the senior court in the United Kingdom, it remains our duty to assist the Chief Justices of the three jurisdictions to uphold and defend the rule of law because the independence of the judiciary is not a privilege for justices but is the prerequisite and the underpinning of the rule of law.

The Chair: Let us broaden this out. Lord Howell, do you want to start us off?

Q2 **Lord Howell of Guildford:** What role do you feel, Lord Reed and Lord Hodge, the Supreme Court has in protecting the constitution? In particular, what role does the court have in respect of the relationship between the Executive and the legislature? Your predecessor, Lord Reed, described the role of Parliament as "to carry out its functions as a legislature and as the body responsible for the supervision of the Executive". Some have argued that that is rather a narrow and ahistorical definition of the role of Parliament. Would you comment on that as well?

Lord Reed of Allermuir: The role of the Supreme Court in protecting the constitution is limited but crucial. It is limited because our constitution is one which is not fundamentally based on law but more based on political practices and conventions. The legal element is important, and I will come to that in a moment, but a great many aspects of the constitution are not of that nature. For example, last year when the Government wanted to put the withdrawal deal before Parliament a number of times and the Speaker was unwilling to allow that to happen, he was applying parliamentary rules and practice of a kind which the courts would never adjudicate upon, and there is no way an issue of that kind would find its way in front of us. Equally, in the first of the cases brought by Gina Miller, there was an attempt by the devolved Administrations to have the Sewel convention enforced. Our court declined to do that, on the basis that it was not justiciable, and yet it is clearly a very important aspect of our current constitutional arrangements.

On the other hand, there is a considerable part of the constitution which is legal, and the Supreme Court, because it is a final court of appeal for all legal disputes, inevitably finds itself having to deal with constitutional law. That is its responsibility.

May I give a good example of how we protect the constitution? A few years ago we had a case of a challenge to the HS2 project where local authorities applied to the courts for an injunction to prevent a Minister introducing the HS2 Bill into Parliament, on the basis that introducing it would inevitably lead to a breach of EU law because Parliament would not give the environmental issues the level of scrutiny that was required by EU law and would decide the fate of the Bill on the basis of whipped arrangements rather than on the basis of the intrinsic merits of the issue. I am bound to say that, to our surprise, the Government did not take any objection in principle to these arguments, but the court said there is no way that constitutionally this can be permitted. It said that it is a fundamental tenet of our constitution that the courts will not grant orders preventing Members of Parliament introducing Bills. It is equally fundamental that the courts do not carry out any sort of supervisory function in relation to the scrutiny of legislation carried out by Parliament. It was argued against that view that the European Communities Act had given overriding priority to EU law. We took the view that when Parliament passed the European Communities Act, it did not intend, as it were, to write a blank cheque so that even constitution fundamentals of the kind that I have discussed would be overridden. That was the court protecting the constitution.

Specifically in relation to the relationship you asked about between the Executive and the legislature, again, many aspects of that are not protected by the courts at all but by parliamentary and other conventions. What we do is ensure that the Executive behave according to the law, so that they exercise the powers that Parliament has given them within the confines of the statute and we thus protect the principle of parliamentary supremacy.

To give an illustration, we had a case not long ago to do with the fees set for employment tribunals. We quashed the statutory instrument that fixed the fees to be paid by somebody who wanted to bring a claim in an employment tribunal—of the order of £1,200—on the basis that the level of fees was so unaffordable that it would prevent rights which Parliament had conferred on individuals, such as to sue for holiday pay, from being enforced and so it would undermine the principle of parliamentary supremacy. It would be the Executive frustrating Parliament's intention in passing the legislation. That is an example of how we would ensure, so far as it is a matter of law, that the relationship between the Executive and the legislature maintains its proper balance. Of course, we also have to uphold a large number of laws that underpin the practical workings of democracy—laws about the franchise, the holding of elections, freedom of speech, freedom of assembly and so forth—so the courts have a crucial role but it is by no means the whole story. Your final question was about the function of Parliament.

Lord Howell of Guildford: It was about the view of your court, and particularly of your predecessor, about the functions and role of Parliament, which some people questioned as being rather narrow and not taking account of the historic role of Parliament in supporting the

Executive or enabling the Executive to exist and the Queen's Government to carry on, which is rather important.

Lord Reed of Allermuir: I see what you mean.

Lord Howell of Guildford: That seemed to be left out of the previous view and it surprised a number of people, including me.

Lord Reed of Allermuir: I might share your surprise. I am wondering quite what the context was. We have just been through a rather extraordinary period in our constitutional history and I do not know, but it may be that Lady Hale had in mind that particular period when the Government and Parliament were clearly not working in tandem in the way they normally would.

Lord Howell of Guildford: Did Lord Hodge want to add anything to that? It was very comprehensive.

Lord Hodge: I have very little to add. I agree that our constitution is largely a political constitution and depends in large measure on political conventions for its smooth operation, including, as you say, the support of the Executive by Parliament. Many aspects of the relationships between Government and Parliament, between Government and the judiciary and between Parliament and the judiciary are governed by political conventions. As the court said in Gina Miller 1, those matters are not justiciable. I hope people will understand that our role is confined to the legal aspects of the constitution, such as the principle of the sovereignty of Parliament, and making legal rulings on the interpretation of legislation that allocates powers within the UK to the devolved Administrations and legislatures. We had the example recently of the Scottish Parliament's legal continuity Bill on EU withdrawal where we had to rule on the relationship between the UK legislation and the Scottish legislation. We see our role very much as focusing on and confined to the adjudication of legal rules.

The Chair: Lord Howarth wanted to follow up and then Baroness Corston.

Lord Howarth of Newport: You mentioned just now the Supreme Court's intervention in the matter of fees to be charged in employment tribunals, which suggests that you may consider that equality before the law is a constitutional principle that it is part of the Supreme Court's responsibility to defend. Earlier, when you were outlining your priorities, you mentioned your priority to make the Supreme Court more accessible, and for that reason you go on tour so that people in the communities can have the opportunity to see that there is a Supreme Court, and, indeed, to see it function. Might that be a rather tantalising experience for them considering the difficulties of access to the lower courts, because it is not just tribunal fees and court fees, there has been a serious diminution of legal aid, there have been many court closures, there is a rather stumbling process of court modernisation, and I think there is a pretty considerable problem about access to justice? Should the Supreme Court

be exercised about that?

Lord Reed of Allermuir: In the case that I mentioned we identified access to justice as a legal principle and we traced it back to Magna Carta. One of the few provisions of Magna Carta that is still in force is a guarantee of access to justice and it is on the statute book. That is a legal principle and in that case there were a lot of authorities to the effect that Parliament is not to be taken to authorise obstructions to access to justice unless that is a pretty clear implication of the legislation. In this case, where Parliament had authorised Ministers to make fee orders, it had not said anything that would support such an implication, and so that was the way we reasoned the case.

Of course we are anxious that there should be access to justice in the courts. I appreciate the problems that the restrictions on legal aid have caused. The courts of England and Wales, I should say, with my responsibility as President of the Supreme Court, are a matter for the Lord Chief Justice, and, similarly, in Northern Ireland and Scotland but, obviously, access to justice at all levels is very important to any judge. Because it is not part of my responsibilities in my role, I am not party to the discussions over legal aid throughout the courts system in England and Wales. I know that the Lord Chancellor has just announced, as you probably know, a very large increase in legal aid funding, which the Bar has responded to by saying it is not enough, but I hope that will make for a substantial improvement.

Q3 **Baroness Corston:** Lord Reed, you described the Supreme Court as "effectively the constitutional court of the United Kingdom". Some common-law jurisdictions have constitutional courts. In South Africa they have held cases on the right to housing and access to antiretroviral drugs. Do you see the Supreme Court going in that kind of direction in the future?

Lord Reed of Allermuir: No, I do not, is the short answer. In the lecture that you have taken this from, I had just explained a number of functions that the court has to carry out which are of a constitutional nature. I had spoken about, for example, resolving issues to do with the powers of the EU institutions vis-à-vis UK institutions and the relationship between EU law and UK law and resolving disputes over the powers of the devolved bodies. Indeed, sometimes disputes raise issues about the powers of the UK bodies or human rights issues, and issues of the kind we have just been talking about with Lord Howarth concerning whether statutory instruments are intra vires or should be quashed. I had drawn an analogy between that aspect of the Supreme Court's work and the work done by constitutional courts. I did not have in mind so much the Constitutional Court of South Africa, which, as you say, is a court that focuses primarily on issues to do with fundamental rights, including social and economic rights, in that system. I had in mind the position in many of the continental countries—for example, Germany and Italy—where normally you have three top courts: a constitutional court, a supreme administrative court and a general court that does criminal and civil law. The point I was making was that while in a common-law system normally

you just have one top court, usually called a supreme court, as in the United States, Canada, India and the UK, part of our role resembles or effectively duplicates part of the functions of a continental constitutional court.

I am very well aware that there are important differences. I suppose there are two striking differences. One is that for us it is only a small part of our work. We do not very often have constitutional cases. Most of our work is to do with commercial law, corporate insolvency, intellectual property, personal injuries and the like, and disputes between individuals, private organisations, sometimes local authorities.

The other big difference is that because we do not have a written document which forms the highest law in our country, there is no measure against which we can hold that primary legislation—Acts of Parliament—falls short, and so there is no question of our having the function of quashing legislation, other than delegated legislation if it is ultra vires.

Do I see us taking on the role that the constitutional courts have in other countries? It is not possible because we do not have the powers and we do not want to have the powers.

The Chair: Do you think that it is more likely that you will get involved more frequently in the kind of issue that you mentioned earlier about fee payments? This Committee has been concerned for quite some time that there are too many framework Bills, skeletal Bills and too many Henry VIII clauses and lots of increasing powers being given to the Government. Do you think you may get involved more in the future in deciding what is reasonable and where that balance has to be struck in the powers the Government have taken or how they exercise them?

Lord Reed of Allermuir: In principle, my response would be no, because it is not as if we are going to be any more ready to be scrutinising legislation than we have been in the past, and the Government, if anything, are learning from what has happened to them in front of the courts. Social security legislation has been a good example of framework legislation where the meat has then gone into the delegated legislation and, because the delegated legislation is open to legal challenge, we have had cases—for example, over the benefits cap and the bedroom tax—where the delegated legislation has been challenged in front of us, and it has sometimes been upheld and sometimes not been upheld. After the first of these benefits cap cases, there was a second case and, by the time the second case came, which was challenging new legislation, the crucial parts of it had been put into the primary Act itself so the scope for a challenge to delegated legislation was much reduced.

The Government had learned from the experience, or their lawyers had learned from the experience, and in some ways it makes life easier for everybody. The issue then gets debated in Parliament in a way that it would not if it were delegated legislation and the courts then respect

what Parliament has enacted in a way in which they would not otherwise be bound. On the contrary, they would be required by the Human Rights Act, which is what was being relied on, to assess the delegated legislation against the requirements of the European Convention. What might change, and the only reason why there might be an increase, is because at the moment a great deal of the legislation that we have to enforce is made in Brussels and we cannot carry out any sort of legal assessment of it because it is the highest law, effectively.

In the future, if equivalent laws are being made in this building or in the devolved legislatures, to the extent that a framework Act approach is adopted, there will be scope for legal challenges which did not exist at the time when the law was made in Brussels.

Q4 **Lord Faulks:** Lord Chair, I should declare an interest as a practising barrister who has recently appeared before the Supreme Court. In the context of your answer, Lord Reed, may I give a quotation from Lord Sumption in his Reith Lectures? He said this, "Special areas that were once thought to be outside the purview of the courts, such as foreign policy, the conduct of overseas military operations, and other prerogative powers of the state, have all one by one yielded to the power of judges". He also said that the HRA has opened up vast new areas to judicial regulation. Do you have any comment on that?

Lord Reed of Allermuir: He puts it in a rather tendentious way, if I can say so of something written by a friend of mine, in that it is not so much the power of judges; it is, rather, the power of Parliament. If Parliament passes the Human Rights Act and it has exterritorial effect so as to apply to British forces in Iraq, for example, we have to give effect to it. It is not a power grab by us, but us giving effect to an approach to the convention which has been decided on by the Strasbourg court. Parliament has told us in relation to the European Convention on Human Rights that we have to take account of the Strasbourg jurisprudence and, similarly, a lot of the areas that we scrutinise now that would not have been scrutinised in the past in relation to, for example, the many prerogative powers, are now limited by EU law.

In immigration law, for example, when we are dealing with deportations or the processing of asylum seekers, these matters are now governed by EU law as well as our domestic legislation. For that matter, if the Immigration Rules made by the Home Secretary under the powers given by Parliament in the Immigration Act 1971 fail to comply with the UN Convention on the Rights of the Child, there is a statutory provision that they are breaching. It is Section 55 of one of the immigration statutes. I forget offhand which one it is.

We do not make it up as we go along. It is certainly true that a great many things we look at now would not have been looked at by judges 100 years ago, or even 50 years ago. To some extent, that is because government was not doing these things 50 years or 100 years ago, but it is also because Parliament has enacted a lot of laws, notably the Human Rights Act and European Communities Act, which have given the courts

the duty of enforcing laws which reflect a constitutional culture which is not the traditional British constitutional culture.

The Chair: Moving on then, Lord Pannick.

Q5 **Lord Pannick:** I too declare the same interest: a practising barrister appearing before the Supreme Court, including in the two Gina Miller cases. The Government have promised a commission on the constitution, democracy and rights. Would the court expect to be consulted by the Government on these issues and are there particular topics within that rubric on which the court will want to make representations during any consultation?

Lord Reed of Allermuir: I had discussions about both these matters with the Lord Chancellor when we had a meeting at the end of January. There is not as yet any remit drawn up and we do not know what the scope of the commission's work may be. There has also not yet been any discussion about consultation, but I would be surprised if there was no scope for consultation of the judiciary. Whether we would want to say anything about it would depend on what was being discussed. Clearly, the subjects of judicial review and human rights are much in the air at the moment and they are perfectly proper matters for the Government and Parliament to consider. If they are matters of pure policy, I would not expect this court to want to become involved in that discussion. It would be different if there were matters that had a more direct bearing on the operation of the courts themselves or the administration of justice. For example, judicial appointments are a subject in which the court would clearly have an interest and judicial review proposals might conceivably be a matter of concern to us, but it would depend on what they were.

Lord Pannick: One of the concerns that the Government appear to have is delay in judicial review. Is there anything the court is able to assist with through you as to how delays can be minimised?

Lord Reed of Allermuir: They have spoken about delays in the context of immigration. Part of the problem there is the sheer complexity of the processes under the statute and under the Immigration Rules. The more separate decisions have to be taken along the route, the more opportunities there are for legal challenges. However, in our court I do not believe delay is an issue. If we have an urgent case, we expedite it and, as the second Gina Miller case demonstrated, we can hear a case and decide it very quickly if the public interest requires that. I cannot comment on delays in courts below us.

One point I might make is in relation to judicial review. The Government have said very little so far, but one thing that has been said a number of times is, "Judicial review is not, and should not be regarded as, politics by another means". That in fact is a direct quotation word for word from a number of judgments of the Divisional Court and the Court of Appeal last year, when they were explaining why they were dismissing grounds of challenge as not being proper grounds of challenge. Judges are very well aware of the risk of challenges being brought on what are, properly

speaking, political rather than legal grounds, and they are repelling them, and are careful to avoid straying into what are genuinely political matters. If this is to be a matter that is considered, it should not start from the premise that judges are eager to pronounce on political issues. The true position is quite the opposite.

Q6 **Lord Hennessy of Nympsfield:** One way of imagining the Supreme Court is as a rather large ball bearing amidst the moving parts of the constitution. A lot rests on it, to say the least. Given your position and your last point, could I ask both of you to step aside from your immediate role and bring your distilled to the fore? What are the fragilities that a royal commission on the constitution should look at? What are the great anxieties that you carry about the condition of our constitution now and where it might be going?

Lord Reed of Allermuir: If I can begin, I do not myself see the courts as being the primary area for concern. It strikes me that we have just been through a period which put our constitutional arrangements under a great deal of pressure. There was stress testing, if you like, of our constitution. While the decision taken by the courts in the Prorogation case was obviously not greeted with universal acclaim, I do not feel that it revealed an inherent weakness in the courts. If anything, the reaction has been to suggest the opposite. A striking feature of our constitution is the extent to which it depends on conventions and even on a sort of culture of shared assumptions about how people should behave. There might be merit in having rather more written down than there currently is.

For example, the Nolan report was a very useful piece of work on standards in public life. It resulted in the enunciation of articulated principles of behaviour and then the setting up of the Committee on Standards in Public Life. It is now possible to judge people's behaviour against defined standards. There is perhaps scope for more of that than there has been in the past.

The Chair: As an alternative to a written or overwritten constitutional framework.

Lord Reed of Allermuir: I think so. I know there is discussion about whether we need to have a written constitution. I would be very surprised if politicians wanted to vote for it.

The Chair: Absolutely.

Lord Reed of Allermuir: Because, in essence, that would be a transfer of power from politics to the courts. It is not something that I, at least, would welcome. It is alien to our culture. It is not a matter on which I have anything like the expertise of a number of people sitting round this table, but I think that some of the tensions we saw between the Government and Parliament might be alleviated by having clearer standards and perhaps better mechanisms for assessing whether they have been complied with.

The Chair: Lord Hodge, did you want to add anything?

Lord Hodge: What the recent political tensions revealed is that a constitution that operates by convention depends on restraint on the part of the players in the constitution. I think it would be fair to say that in the heat of the Brexit debate, where there was the perhaps unfortunate combination of a minority Government and a major divisive political issue at the same time, which one might see politically as the perfect storm, we saw both parliamentary institutions and the Government departing from the norms of certain conventions.

As Lord Reed says, if conventions are to be maintained as a way of running our constitution, and I am very much in favour of that being the case, it may be useful if some things are written down and everyone knows where the boundaries are. I do not see a question of judicial overreach as being part of the problem in this case because neither Lord Reed nor I, and, to the best of my knowledge, none of my colleagues, see the Supreme Court as performing any role which is different from that which was performed by the House of Lords before 2009, and nor do we aspire to a different role. As Lord Reed has said, we have certain responsibilities in relation to the relationship between EU law and domestic law, in relation to the allocation of power within the United Kingdom, and, of course, the Human Rights Act.

The Human Rights Act has involved us in having to make an evaluation of what is a fair balance between public interest and an individual's fundamental rights because Parliament has chosen to give those rights to citizens and residents within the United Kingdom. I believe that I and my colleagues are well aware of the need for judicial restraint—what I have called in various lectures I have given "judicial role recognition"—which is a clear understanding of the institutional limitations of the judiciary. We do not have the democratic mandate to make policy; nor do we have the research resources or the ability to consult, like the Law Commission or a government department does. That is why in matters of socioeconomic policy the court has repeatedly adopted the test when making that evaluation of asking whether a measure taken by a public authority is "manifestly without reasonable foundation". To my mind, that adverb is an important restraint which recognises the judicial role. To be fair, I do not see what the judges have done as part of the problems that have emerged.

Q7 **Baroness Drake:** Lord Reed, last year you told us that judges in this country are "immensely fortunate that we do not face the sort of pressures that judges face in so many other parts of the world". Are you still of that opinion?

Lord Reed of Allermuir: It is a very amusing question and the answer is yes, I am, very much so. Last week I was giving the keynote address at an international conference of chief justices in New Delhi, and the list of chief justices began with Afghanistan and ended with Zimbabwe. I was hearing first-hand accounts of politicians pressurising chief justices, of Governments who simply ignore court rulings that they do not like. One

does not have to go even to perhaps those extremes. Last month in the United States we saw the President criticising the judge and the foreman of the jury at the trial of one of his aides while the proceedings were still going on. In central Europe at the moment there are Governments who are quite blatantly undermining the independence of their judiciaries. Here we have been through a difficult time, but even under those pressures the Government have accepted the legitimacy of our decisions, and there has been no attempt whatever to try to influence us or pressurise us on the part of the Government. I think we remain immensely fortunate.

Baroness Drake: Given you have set a relative context there, none the less, what impact does the media's portrayal of and its attitude towards the judiciary have on the disposition of judges, particularly when they are dealing with human rights cases?

Lord Reed of Allermuir: It does not affect our decisions but it is sometimes irresponsible. It is one thing to criticise us: in our court, in particular, cases do not reach us unless they are genuinely difficult, and we can take it for granted that there are going to be mixed reactions to our decisions, so criticism is fine. What is irresponsible is attacks on our integrity, for example, asserting that our decisions are based on political bias in favour of one side or one cause or another. While it does not affect us in our work, it can affect public trust in us, and that is a concern of ours.

Lord Hodge: That is my concern. It is not that it will affect our decision-making. But if the media portrays, or people make comments which suggest, without any proper basis, that there is a political motivation for our decision-making, it will not affect our decision-making but it may affect the public's perception of what we do, and therein lies the danger.

Lord Reed of Allermuir: I am conscious of the fact that we tend to pay a lot of attention to attacks on us in the media, but we have to have a sense of perspective and, in fact, if you look across the piece, media coverage, even of a case as controversial as the Prorogation case, is very balanced. Some voices are attacking us vehemently, even with vitriol, but there are far more voices which are adopting a balanced view, and there are some who are cheering us on. At the end of the day we also have to bear in mind that the number of people who read newspapers is not as many as used to be the case. A lot more people get their news from TV. If you compare any newspaper with the main television channels, TV has a much larger audience, and the coverage there has been very balanced.

Baroness Drake: Given your description of the robust resilience of judges, I am a bit hesitant to ask the next question, but I will ask it anyway. Do you think there are sufficient health and well-being services available to help judges and court staff? Do you think that is an issue? Do you think the services are sufficient?

Lord Reed of Allermuir: We have those services but they are not usually needed in relation to that sort of issue. Where they are needed is

for criminal judges who are on a steady diet of child abuse cases. I know from my own experience of doing those cases they can be very upsetting. In the days when I was a criminal judge, you did them every so often, but now it can be a pretty much steady diet for some judges, and for them, and for the juries, there are support mechanisms available which they are made aware of.

For judges in our position, it is more likely to be media attacks. It can sometimes be an issue if you are being doorstepped and if you have crowds of photographers outside the house, and that kind of thing, which I have had in the past. Courts nowadays have communications teams which will act as a sort of buffer between the judge and the media and can give you advice and support.

Q8 **Lord Wallace of Tankerness:** You mentioned in your previous answer that it is not so much newspapers these days, it is television, and television gave the Supreme Court quite a profile last year. Do you think the two Miller cases, in particular perhaps last year's one, have helped improve public understanding of the Supreme Court? Lord Hodge mentioned earlier the importance of the public understanding the role and perhaps the restraints of the judge. Is there more that can be done to promote that public understanding of the Supreme Court?

Lord Hodge: There was an increased interest in what the court was doing last year. In fact, at the time of both Gina Miller cases we saw increased media coverage, we noticed within the court itself an increase in the number of visitors, and our website got a larger number of hits. About 156,000 people visited the website for the delivery of the Prorogation judgment and, clearly, we got television coverage and it was livestreamed on computer sites.

To my mind, it is the court's longer-term work in promoting public awareness that is more significant. You asked me what we are doing. What we have been doing in this field, to my mind, is the major break from the past when the court left the House of Lords and set up across the way in its new building. I noticed, as someone who used to appear before the House of Lords and had to struggle to find my way round the Corridor to get to this very Chamber, that the contrast of the Supreme Court is how accessible it is to the public and the effort that is put into making it accessible and the outreach which is going on. That is what I really noticed when I joined the court six years ago. I really welcome that because I think there is a need for public institutions to explain themselves to the public if people are to understand what we are doing.

I could take a long time to describe the steps and time does not permit that, but may I just give you some examples of what we do? As you know, we have sat in Edinburgh, Belfast and Cardiff. We intend to sit outside London this year, subject to funds being available, and we are currently looking for a location for that. We operate a programme called Ask a Justice where we give school pupils in their final years an opportunity for a live question-and-answer session with a Supreme Court

Justice from their classroom. I am scheduled to face further questions from schoolchildren tomorrow from Cumnock Academy in Ayrshire.

Thirdly, we provide for structured visits for groups in full-time education, from schools, colleges and universities, from Monday to Thursday each week, and we organise visits, open days and other events to encourage members of the public to visit the court. These visits are particularly popular and, bearing in mind we have to do what we can for people with additional needs, we have tours designed for people with hearing problems using sign language, and we are investigating what we can do for people with visual impairment. For those who do not get their facts from the established media, we also use Twitter to make factual statements about what the court is doing and we use Instagram as well to provide factual information about the courts such as "a day in the life of a judicial assistant" to try to reach out to a younger audience.

Lord Reed of Allermuir: May I add a word or two? There is no doubt that the second Miller case last year raised public awareness of the court enormously. At the most trivial level, the sales of spider brooches took off and the T-shirt became very popular with young women. However, improving public understanding is more challenging. In the context of that case there was a certain amount of coverage, particularly on the BBC, which was designed to explain what the court is and how it works, and who the judges are, which I think was improving public understanding, but we are not going to transform it overnight. It is a very slow process.

People have no understanding at all of what the Appellate Committee of the House of Lords was or did. They are aware of the Supreme Court now, but whether they understand what we do and how we go about it, I am not at all sure. For example, we have a lot of members of the public who come to visit the court, and I am told that one of the most common misapprehensions that our staff will correct is they imagine at the end of a hearing we go into a room and take a vote, and that is it, rather like a jury. They have no idea that the end of hearing is the tip of the iceberg and the real work begins after that.

It is going to take a long time for understanding to develop and we just have to do what we can step by step. These sessions with schoolchildren that Patrick has just mentioned are an important step along the way because these are the citizens of tomorrow. Certainly, when I was at school I never met a judge. We have done one with Stromness Academy, for example, in your former constituency, where the children have spent half an hour talking to a judge on the country's highest court answering the questions that they had submitted to the judge in advance. That is an important step, and I would like us to do more of that kind of thing, but it is a long process.

Lord Wallace of Tankerness: The lower courts might learn from some of the things you are doing, too, but that is perhaps beyond your remit. Specifically on the Prorogation case which you mentioned earlier, when necessity called you responded very quickly. Do you feel that the court is

financially and technically equipped and resourced to be able to do that? Obviously, you are not expecting a great raft of these cases, but in that particular case how feasible was it to put everything together?

Lord Reed of Allermuir: It was perfectly feasible and it was all done without too much difficulty, but we had a budget overrun to which that made a significant contribution. We had to get a supplementary payment into our budget. The problem was understood and we were given the payment we needed.

The Chair: Lord Dunlop, did you want to follow up?

Q9 **Lord Dunlop:** Going back to the point about the meetings outside London which have already been referred to, could you say how useful you found those? I accept that the financial constraints are an issue, but do you anticipate being able to meet outside London more regularly and in a wider range of places?

Lord Reed of Allermuir: I do not think we are going to be able to do it more often. We do it once a year. In terms of departmental expenditure the amount involved is trivial and for a departmental budget is a drop in the bucket. However, we have been asked, like departments have been asked, to find 5% savings for the next financial year. Most of our budget goes on fixed costs—the building itself, rent and rates, maintenance, salaries—and the discretionary elements are our library expenditure, foreign relations and our visits outside London. That is why Patrick said "funding permitting" we are planning to maintain this tradition, but I do not see us increasing it. I would love to, but I do not think it is going to be possible.

You ask whether it is useful. Yes, it is. It works to the benefit of us and of the people in the places we visit. From their perspective they have the chance to come and see us live. We get a lot of coverage in the local media. Our communications team will work with the local media. We are in contact with a wide range of local organisations, educational, schools and universities, and local legal bodies and local civic bodies. We have a very busy programme of functions. We aim to sit for four days and have functions after court every day and usually on the Sunday evening before we start. We get to meet a lot of people and the whole thing builds up a lot of interest locally. It lets people see that we are a court for the whole of the UK and that we are not just a London body or even an English body. Also, when we went to Cardiff we were invited to have a meeting with the First Minister of Wales and the Counsel General, and that was quite useful as a getting-to-know-you exercise and having an explanation of what the Government's aspirations were, what the legislative programme was and so on.

From our perspective, we learn about the place and about the devolved arrangements. We went to Edinburgh and, as that is my home city, I was not going to learn as much as my colleagues did from that. They all knew Edinburgh, but they did not all understand as well as they now understand the practicalities of how devolution operates within Scotland,

and the extent to which when people talk about the Government they mean the Government in Holyrood or St Andrew's House. When we went to Wales, I knew north Wales through family connections, but I did not know south Wales. We went to Cardiff and I had no idea how common Welsh speaking is in that part of the world. I did not know very much about the Welsh economy. I was speaking to people who were farmers or were involved in the health service or in other bodies there. I came away with a better understanding of Wales and of how devolved government is working in Wales. We all benefit from the experience as well as it being a way of our making contact and making more accessible our work to the people there.

Lord Hodge: Briefly, I have been advocating for some time now that, resources permitting, we should sit in one of the regions of England. I am hoping that is going to come about and it might happen this year, but it does depend on resources and on finding a suitable location.

The Chair: We are going to run short of time if we are not careful. Lady Fookes.

Q10 **Baroness Fookes:** May I turn to an aspect of last year's evidence session when Lady Hale, the then President, said she would discuss with you whether there should be one woman for each panel of justices? I imagine the conversation took place. What ensued?

Lord Reed of Allermuir: We decided that we would have at least one woman on every panel so far as that was feasible.

Baroness Fookes: It has become one less now, I think.

Lord Reed of Allermuir: It has become more difficult now that we have only two women on the court and, as a matter of practicality, we cannot expect them to sit, between them, on every case that we hear. It would result in them sitting more days than anybody else and having less time to write judgments. However, we succeed almost all the time in having at least one woman on every panel. We will try to have both of them sitting on certain cases. For example, we have a case coming up about equal pay, so we want both women to sit on that case but, correspondingly, that means there will be another case where we will not have any women sitting, but we try to keep those to a minimum.

Lord Hodge: We have to be very conscious of not imposing an unfair burden on our female colleagues because we are down to two now.

Baroness Fookes: Which leads me to suggest how we might have more women at this level, so perhaps we could discuss that.

Lord Reed of Allermuir: As I mentioned at the very beginning this morning, apart from the continuing priorities that all Presidents have, my first priority is to increase the diversity of the court, particularly in relation to gender balance. I have been discussing this with Baroness Hallett, who before she came here was the judge in charge of diversity in the English courts, and with her successor, Lady Justice Simler. We have

talked about how best to go about encouraging women to put their names forward. I should make it clear, first, that it is not the court's responsibility. Appointments are not made by the court, but we have a responsibility to try to encourage women—and, indeed, other underrepresented groups—to apply. We do that by having a programme where we make it known that they are welcome to come and spend time with us and see how we work and discuss our arrangements with us, and to discuss the applications process with us.

I will have a responsibility because I will be chairing the selection commission for justices. That is why I have been speaking to Baroness Hallett and Lady Justice Simler. They have given me a number of pointers and I have arranged that I am going to have a session on diversity in the Supreme Court, which I will hold first in the English courts, and I will probably do something similar in Scotland. The whole point of this will be to encourage women to put their names forward because the problem is that we have not had very many applicants.

Baroness Fookes: Does it go much lower down, so to speak, to find a solution?

Lord Reed of Allermuir: Yes, it does.

Baroness Fookes: Because unless you have highly qualified women coming up, they are not in a position to apply, are they?

Lord Reed of Allermuir: You are absolutely right. We are at the end of the pipeline.

Baroness Fookes: We have to start at the beginning of the pipeline.

Lord Hodge: I have spoken twice in recent years at an annual conference of women lawyers to encourage women to consider applying for judicial office. After the first occasion, a very able woman responded to my challenge, as it were, and applied, and she is now a High Court judge. But, yes, we have to encourage people to come into the judiciary in the first place.

Baroness Fookes: I think a fair number of women train as lawyers at the base, so something must happen between that broad base and the very narrow apex.

Lord Reed of Allermuir: Even when I studied law, and that is more than 40 years ago, there were more women than men in my class, so one asks: what happened to them all? The answer is the legal services market operates in such a way that it has been difficult for women to plan careers and have successful careers which they can combine with raising a family. Things are changing and things have changed. The proportion of women one finds, for example, on the High Court is higher than on the Court of Appeal and on the Supreme Court, and there are more now in silk, which is the traditional recruiting ground, but by no means the only one. I think appointments boards are now learning to look beyond the more traditional places to look and to be less narrow in

their expectations of what a CV ought to look like. Obviously, a woman who has taken time out to raise a family, for example, is not going to have the same CV as a man who has not.

Baroness Fookes: And there should be sensitivity on that and allowance made.

Lord Reed of Allermuir: Exactly, yes.

Baroness Fookes: Is that happening?

Lord Reed of Allermuir: I am not personally involved in selection at the initial High Court stage and I really do not know. The problem at that level is to attract recruits at all, for a number of reasons, but an important reason is how the salaries compare with earnings otherwise available. That is a perennial problem, but there have recently been a number of very good appointments made, including of women, so I am hopeful that things are moving in the right direction.

Baroness Fookes: Hopefully this widening of interest and knowledge at the Supreme Court, which has been set out by you, Lord Hodge, might indirectly be helpful and this might be borne in mind if you are speaking to schoolchildren with an interest in that career.

Lord Reed of Allermuir: Absolutely. Lady Hale, my predecessor, was a great role model for girls and young women. She was very conscious of the need to have a public profile so as to be a visible example. I do not need to go down the same road, fortunately, but she has been an inspirational figure, and I think we may see that reflected in the numbers in future.

Lord Hodge: We will in our discussions and in our outreach make clear our commitment to diversity.

Baroness Fookes: Of course, this also applies to ethnic minorities.

Lord Hodge: Indeed so.

Baroness Fookes: We have discussed mostly women, but I think it would be equally applicable there.

Lord Reed of Allermuir: The issues there are somewhat different. All the people being appointed to our court this year were born in 1957. If you imagine what British society looked like in 1957—

Baroness Fookes: Unfortunately I do.

Lord Reed of Allermuir: The demographics were very different from today, so I think there is a timing issue there, but, again, we now have an ethnic minority judge on the Court of Appeal, we have several now on the High Court and more again in silk at the Bar. It is just a process and a question of time.

The Chair: Let us move on to Lord Faulks.

Q11 **Lord Faulks:** You described there, Lord Reed, the range of work that you do and the areas covered in the judgments. In view of that, is there an argument for greater political involvement in appointments for senior ranks of the judiciary? I am conscious of what your predecessor said in this context.

Lord Reed of Allermuir: The Government have a responsibility to ensure that suitable people are appointed to the most senior ranks of the judiciary. Currently they fulfil that in the way we know, by having an independent selection commission making recommendations to the Lord Chancellor, who then consults the First Ministers of the devolved Administrations, and he himself has a role also. There is a political involvement but it is obviously less than was the case when the Lord Chancellor would tap the candidate on the shoulder, as it were. Most people regard that as a good thing.

My only concern would be that if this is looked at and alternatives are being considered that we maintain the primary principle that appointment is on merit, because that is really the key to the prestige of the court and the, frankly, pre-eminent role that it is regarded as having, at least in the common-law world. Also, that we avoid party-political considerations playing a part. The court has to maintain the confidence of the public. It also has to maintain the confidence of the Opposition, who may be the Government in future. It is very important that we are perceived as being politically neutral. Provided we have appointment on merit and political neutrality is still guaranteed, I can see the Government may quite properly want to consider alternatives to the precise mechanisms that we have at the moment.

Lord Faulks: You mentioned the desire to avoid party-political involvement. Clearly, the confirmation hearings that take place in the United States with a different constitution would be inappropriate. Would some form of confirmation hearing or public examination of judges before their appointment be acceptable and useful?

Lord Reed of Allermuir: I would not welcome it. I am one of the few judges who has been through this. When I was still at the Bar I applied to be a judge on the Strasbourg court—unsuccessfully. One of the stages of that procedure was to be questioned by a parliamentary committee. I was asked all about the policies of the Major Government and whether I agreed with them or not. It is in the nature of the beast. They are not going to ask whether I like cats or how I like to spend the weekend. What politicians are interested in is politics. It is premised on a misunderstanding of what we do. We are lawyers, and I cannot deny that our personalities and so forth play a part, that would be unrealistic, but we agonise sometimes over trying to get the right legal answer. To give an illustration, in the first Miller case I held in favour of the Government and against Lord Pannick. In the second case I held against the Government and in favour of Lord Pannick. I had not suddenly switched from being a Brexiteer to a Remainer; it was because of my view of the legal merits of the case.

Lord Hodge: May I add a word of caution in that regard? Most, if not all, judges will have personal views and private political views, but it is very clear to us that we have no democratic mandate to bring those views into our work. It is an ingrained part of judicial culture that we leave our personal views at the door of the court. I have a concern that if we were to go down a route that appeared to be political confirmation and involved asking questions about one's personal and political views, one would risk having judges who felt that they had received some mandate to bring their personal and political views into the courtroom while at the moment they are excluded.

The Chair: Exactly. Lord Hennessy wanted a follow-up.

Lord Hennessy of Nympsfield: Would you resign over a politicised judiciary if the Government brought a proposal forward?

Lord Reed of Allermuir: I would have to see what exactly was being proposed.

Lord Hennessy of Nympsfield: Where would your line be?

Lord Reed of Allermuir: The sort of system they have in the United States would be unacceptable. I know some of the justices there who have gone through that process and it is intolerable.

Lord Hodge: There is a great danger that we damage an institution which has an international reputation if we go down that road.

The Chair: I think there would be general agreement with that. Lord Beith.

Lord Beith: Before turning to a question, may I make a comment? Throughout the time that I was chairman of it, and I think to this day, the Justice Committee in the House of Commons did not think it was appropriate to have confirmation hearings, while wanting and succeeding in having many exchanges with judges in post as to the way they carried out their work. For reasons that you have both advanced, we saw no merit in confirmation hearings for judges. When you appeared before us last year, Lord Reed, you gave us a very helpful analysis of Brexit law which featured in our published evidence.

The Chair: It is frequently used.

Q12 **Lord Beith:** We wondered if you might like to update it. You identified that the streams of law we will have to deal with are retained European law, agreement law and continuing applicable EU law, in areas such as contracts, for example. Now we have the agreement Act and we are beginning a process of negotiation, do you want to update your helpful definition?

Lord Reed of Allermuir: The recent Act has clarified some matters. For example, we now know the snapshot for retained law will be at the end of the implementation period. It has introduced a complication in relation to

which courts can review European case law and depart from it, and on what basis they will do so. We know that the Government have been given the power under the 2020 Act to deal with these matters by delegated legislation. It is a matter which I have discussed with the Lord Chancellor at our meeting in January, and he has given me a commitment that we will be consulted. Indeed, it is in the Act that we will be consulted over this, but it is clear from my discussions that we are going to have an opportunity to comment on the practicalities of options as they are being developed. I very much welcome that. Apart from that question of delegated legislation, I would repeat my view that there are going to be plenty of issues to keep us busy. One we have had recently is a question of whether, if we make a reference now to Luxembourg and the answer comes, as it almost certainly will, after the end of the year, what status does the answer then have? We asked counsel that question about a month ago in a case and they are still puzzling over the answer. It is too early to tell what effect these issues will have on the court, but I suspect we may be quite busy with these issues.

Lord Beith: On the delegated legislation point, you will know that some of us on this Committee felt that the wide power to designate any court as one which could depart from previous CJEU judgments could lead to a situation where courts which do not have the power to bind other courts were making wildly inconsistent judgments. We had indications that the Government were prepared to amend the Bill in this regard, but that fell at the final fence. Our hope is, and our understanding, is that having been through that discussion with you, the Government will seek to define that the courts should have this power in an appropriate and limited way.

Lord Reed of Allermuir: Yes, there are a number of ways in which practical problems could be avoided, and, indeed, they were reflected in a number of proposals that were made during the passage of the Bill through the House of Lords.

Lord Beith: I think you said on that previous occasion, "We will have a colossal body of law for lawyers to get their teeth into, so it will be quite a challenging time for us all to get our heads around that". Apart from the mixed metaphor, is there more that needs to be done to prepare the courts system and yourselves for that situation?

Lord Reed of Allermuir: We carried out a very large exercise in the education of judges and others before the Human Rights Act came into force because that was going to be a completely new area of law which required a different approach, and so there was recognition of the need for education. With this issue I am not so sure that there will be as much benefit in going through that process. There are going to be a lot of issues raised, but I think it is going to more difficult to predict what they are going to be in a way that could enable us to try to address them in advance. There are going to be a lot of detailed issues about the language used both in the domestic legislation and in the withdrawal agreement itself. I could usefully discuss this with the Chief Justices of

the three jurisdictions, but my immediate reaction is that we may just have to take the issues as they come.

The Chair: Thank you very much. It has been very good to hear from both of you. I am sure that many of the questions that have been raised will still be around next year when the Committee will want to follow them up, but thank you very much for your evidence.