HOUSE OF LORDS

Select Committee on the Constitution

Uncorrected oral evidence: Constitutional implications of Covid-19

Wednesday 13 May 2020

10.05 am

Watch the meeting

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

Evidence Session No. 1 Virtual Proceeding Questions 1 - 17

Witness

I: Lord Burnett of Maldon, Lord Chief Justice of England and Wales.

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Examination of witness

Lord Burnett of Maldon.

Q1 **The Chair:** Good morning, everyone, and welcome to the Constitution Committee. This is a public evidence session with Lord Burnett, the Lord Chief Justice. The Committee is conducting an inquiry into the constitutional implications of Covid-19, and we are very pleased to have Lord Burnett with us. Good morning, Lord Burnett.

Lord Burnett of Maldon: Good morning.

The Chair: May I start the questions by asking you about the current situation? You have made some public statements, but could you tell us generally how you think the courts are operating at the moment, how effective the virtual proceedings are, and, indeed, what the response has been of those who have been involved?

Lord Burnett of Maldon: I would start by saying that what has occurred in the past eight weeks has been quite remarkable. There has been an astonishing amount of innovation and hard work on the part of judges, courts service staff and those more widely involved in legal proceedings.

A week before the lockdown, it was obvious, as a result of the guidance being given by government, that we would have to adjust the way we conducted a lot of proceedings. We started quite early, even before the lockdown, in converting many hearings from ordinary in-court hearings to remote hearings of one sort or another. Then, of course, as the lockdown came along, towards the end of March, that became a more urgent need.

What was achieved is quite remarkable, and through you, if I may, I pay tribute to all those who have managed to keep the wheels of justice turning in the last eight weeks. It is quite a marked contrast with what was going on in many parts of the world, where courts essentially shut down. Judges and other participants, particularly lawyers and a lot of litigants in person in family and civil cases, needed quickly to use the technology that was then available.

Our technology, as you know, is rather antiquated, so initially an awful lot of hearings were conducted by telephone. In the past, a lot of hearings, procedural hearings, were conducted by telephone, but those were ramped up significantly. So, too, was the use of the video facilities that exist in a number of courts but only a very small number overall. Also, the use of online platforms, of the sort we are using this morning, and one or two other commercial platforms, was adopted by a large number of judges.

By many people moving quickly, imaginatively and enthusiastically, a very large proportion of the work of the courts has continued. I said even a week before the lockdown that it would not be business as usual, but it is worth making clear, and making clear publicly, that the Civil Division and the Criminal Division of the Court of Appeal have carried on with their work—not at full blast, it has to be said.

In the High Court, something like 80% of the normal work has continued to be conducted despite these difficulties. In the family and county courts, a large proportion of the work has been continued, but there the problems are a little more intense, first because, as a result of historical underinvestment in our courts system as I see it, those courts are not yet digitised; in other words, they operate largely with paper bundles, which makes it more difficult to do things remotely.

Also, of course, an enormous number of litigants in person appear in the family courts and the county courts. Dealing remotely with hearings with litigants in person can provide particular difficulties for the judges concerned, especially if they are operating in an environment where emotions are highly charged. But, overall, the response of the judiciary, the professions, and the courts service has been quite remarkable—in marked contrast, as I say, to what has been going on in many parts of the world.

We also moved very quickly to consolidate the court estate. There has inevitably been a substantial level of staff absence as a result of the emergency, so with HMCTS we worked very quickly to divide the court estate into three. One group of courts—159-odd courts—remains open in every sense; judges are there, staff are there, and they are open to the public and press. The second category, comprising 115 or 116 courts, is what we call the staffed courts; judges can go in and the staff are there. Also, for the time being, we have suspended about 78 court and tribunal centres, so that the staff can be moved into an environment where things can be kept going more smoothly. That is broadly what has been happening.

In crime, the position is obviously more complex, because it is difficult to conduct quite a lot of the work of the criminal courts using video and phones, but even in the magistrates' court and the Crown Court—we may come on to more about this later—an enormous amount of work has carried on, if not as normal then at least keeping up.

Q2 **The Chair:** Thank you very much. We will come back to some of those points in greater detail later. Have you been able to maintain the requirements for social distancing when you have been opening things, and have you been able to deal with your staff in a way that takes account of their personal circumstances?

Lord Burnett of Maldon: Yes. So far as people visiting courts is concerned, HMCTS has assiduously been following Public Health England and Public Health Wales guidance. I have conducted hearings in the Court of Appeal Criminal Division sitting in my court, with some people present, some attending via video link, and everybody carefully socially distancing.

So far as staff are concerned, the Judicial Office, for which I am directly responsible, has put a system in place whereby almost everybody can work from home. HMCTS has similarly provided large numbers of its staff with computers to enable them to work from home. That is really quite

important, because a lot of remote hearings, particularly those conducted in the county and family courts, encounter difficulties for simple logistical reasons. We have all encountered them while using these types of online platforms and even phone conferences. The logistical difficulties can include things as simple as setting up the phone conference, Skype or Teams meeting, or whatever platform is being used. One of the constraints has been the inevitable shortage of staff to provide the support, although that is getting better as time goes by.

The reality is that we have been using systems on a rather ad hoc basis. We are now rolling out better systems across the whole estate, so I think the experience will improve in the next few weeks.

The Chair: Thank you. Baroness Fookes may wish to follow up that aspect at this stage.

Q3 **Baroness Fookes:** Yes, indeed. Lord Burnett, you have already indicated that some of the IT systems in many of the courts are, shall I put it, old or even obsolete. How are court staff coping with this? It must place a great strain upon them. You mentioned that social distancing is being observed for those attending courts in person, but is that always possible with some of the layout of the courts, and what are the hygiene provisions, such as soap, hand sanitisers, paper towels and the like?

Lord Burnett of Maldon: Taking those in order, if I may, the systems that were in place were not remotely suitable for conducting these types of hearings even eight weeks ago. By way of example, one of the first things that had to be done, and HMCTS moved at lightning speed to do it, was to enable all judges to be able to have conference calls on telephones. We did not have that facility, you may be surprised to hear.

We had in our systems the ability to use a number of online platforms, and steps were taken to make that possible for judges and for staff, and to provide basic training in it. But an awful lot of people were running to catch up, which is why I pay such tribute to them, because rather than just collapsing in a heap when faced with technological problems—we have all faced them—people persevered, and it has been difficult because people have had to move at great speed and make an awful lot of ad hoc arrangements.

The system that is gently being rolled out across the estate at the moment is the cloud video platform. We had it in a number of our courts, particularly criminal courts, where it has proved to be quite successful; it is being used in the Criminal Division in the Court of Appeal, and that is my personal experience of it. It is also being used very successfully in some tribunals. By way of example, the special educational needs tribunal converted pretty well all its hearings, as I understand it, via that particular platform.

HMCTS has, again, moved at great speed to enable that to be provided across all the family and civil courts in the next week or two; one or two problems needed to be sorted out. I very much hope that, as people get

used to something that is better than the rather ad hoc arrangements that we have had to make, things will settle down.

As for social distancing, it is not possible in many courts, and where it is not possible the courts have not been used. But it is possible in some courts. Similarly, HMCTS—in consultation, it has to be said, not only with the judiciary but with the professions—has been moving to ensure that proper hygiene facilities are available.

We had a problem at the beginning with hand sanitiser, for example. One could not get it for love nor money; it just was not available. HMCTS secured quite a large stock of it, but it was then handed over to the NHS, where the needs were more pressing. Those problems, I understand, have been sorted, and conducting business in a safe environment, in accordance with the guidance of Public Health England and Public Health Wales, is absolutely at the heart of what the courts service is doing and what I, as head of the judiciary, but judges more generally, am insisting upon.

The Chair: Thank you. Baroness Fookes, did you want to come back on that? If not, we move on to Lord Wallace's question.

Baroness Fookes: There is so much to ask that I think we had better move on.

Q4 **Lord Wallace of Tankerness:** Good morning, Lord Burnett. You mentioned earlier the obvious challenges of conducting family cases in virtual proceedings. What assessment have you made more generally of the implications of virtual proceedings for access to justice and participation in proceedings, and, importantly, for transparency and media access?

Lord Burnett of Maldon: Family proceedings are a category of proceedings that present particular problems. It is perhaps obvious that one is dealing very often with people in an extremely highly charged emotional atmosphere.

We have undertaken, in both the family courts and the county courts, a sort of snapshot of the experience in the first few weeks—an experience, I emphasise, that has been based upon ad hoc arrangements rather than settled arrangements. We are reflecting on those to improve people's experience and to discover good practice and that which is less good.

By way of example, it has become quite clear that using an online platform such as the one we are using now is generally better than using the telephone, and perhaps one can see that. We also discovered very early on that conducting court hearings via phone or an online platform is very much more exhausting for both the judge and the participants—I am aware that both school teachers and students found exactly the same thing with remote lessons—and adjustments have been made to take account of that.

So far as access to justice is concerned, had we not moved to encourage remote hearings, both phone and video, very large numbers of people would simply have been denied timely access to justice, including in circumstances of urgency and distress. Moving towards virtual hearings of one sort or another has enabled access to justice to continue during this emergency, and it seems to me that it will continue to be an extremely important tool for the future, because this will not be over in a matter of weeks or months, as is becoming extremely clear.

There are difficulties that have to be recognised, particularly with regard to litigants in person, in family cases and some civil cases but in tribunals as well.

One is often dealing with people who are not very well off, so one cannot make the casual assumption that somebody has a broadband connection, still less computer or phone equipment that enables this sort of interaction to take place. Many people have very limited use of phones; one needs to remember that as well. More fundamentally, to conduct a good hearing by phone, video or online platform, the participants have to be somewhere relatively calm, quiet and undisturbed, as I suspect we all are now. Again, particularly in family cases, one cannot assume that. These are the sorts of things that have been learned extremely quickly.

So far as transparency and therefore media involvement are concerned, we have tried to ensure that the principle of open justice is maintained throughout. Of course, almost all proceedings in England and Wales are open to the public, even proceedings that are of no conceivable interest to anybody. An application to adjourn a small civil case in most instances has nobody in court other than the parties and perhaps their lawyers. But a lot of trouble has been taken to ensure that the press can become involved in remote hearings in which they have an interest. HMCTS has an arrangement with the press to enable people to get in touch so they can join video and telephone hearings if appropriate, and so too can others. So far as I know, it has been quite successful. One or two notorious cases have been heard over the past few weeks, which you can readily bring to mind, where very large numbers of journalists attended on a link not very different from this one, when the reality is, had it been in a normal courtroom only a few would have been able to get in. I cannot say that there have not been slips along the way; I am sure there will have been, because, again, everybody has been moving at great speed trying to do their best. But that has been at the heart of the thinking.

The Chair: Thank you. We will have to move on quite quickly

Q5 **Lord Howarth of Newport:** Is it fair to say that the coronavirus crisis has hit a courts system that was already in considerable difficulties in negotiating a radical transition? Over the past 10 years we have seen something like a third of court facilities close and a large move towards digitisation, with that programme running somewhat late and not without its snags. You are having to struggle to cope on top of existing difficulties. What do you feel all this means for access to justice, taking it

in that broader context? People are having to rely on public transport to get to courts that are more and more remote. We have something like 20% digital illiteracy in the population. There were already substantial difficulties with access to justice, were there not?

Lord Burnett of Maldon: I cannot off the top of my head remember the detail of the academic research that tells us how many people are, in any given circumstances, effectively outside the justice system. It has always been a very large number. Digitisation—as an example of what we have been trying to do, albeit for financial reasons it has been slow over the past few years—will make it easier for more people to access justice. One very clear example, if I may just mention it, is the online money civil claims court. This is something that has been running for a couple of years now in a pilot. We are expanding its scope; in other words, increasing the value of the claims and making it more widely available. That is an example of how moving to a digital and online system provides opportunities for people to vindicate their rights, which are simply not there if they have to fill out very long paper forms and post them in, and sometimes have to use lawyers to do it, when the online system can be used relatively easily without assistance. Similarly, in the magistrates' courts, for example, the degree of engagement from defendants in the online system has actually been a little higher than normal. I see digitisation and the move to online systems as making it easier, simpler and cheaper for people to engage with the courts and tribunals and us to vindicate their rights if they need us to.

What we are encountering at the moment are not so much problems with people being able to enter the system—that is, to bring a claim or an appeal in a tribunal—but the real practical difficulties of maintaining a service to the public in the administration of justice and the transaction of the business of the courts. Underlying your question, it seems to me, is the premise that, had we been further along with modernising what we do in the courts and tribunals, we would have been in a much better position to cope with the emergency that has engulfed the nation. That is undoubtedly true.

I have spoken time and again about the programme that is currently under way as a programme of modernisation. I regard it almost as eccentric that in our county courts everything is still done on paper. No business operates in that way, nor has done for years. Yet we all know that the reason we are only now just moving towards what, in many contexts, would be thought of as basic digitisation is because over many years—indeed, decades—resources were not made available to keep the administration of justice up to date. That has changed in that the Government have been supportive of the modernisation programme. Through you, if I may, I want to make it clear that what has happened in the last couple of months demonstrates how vital it is that the investment continues, that we do not have cheese-paring in the future, and that when, as we all hope, the time comes when things are capable of returning to something approaching normal, we will not be back in

exactly the same position of having to argue for every penny in the face of a very tight budget.

The Chair: Lord Pannick, do you want to come in to follow up on that?

Q6 **Lord Pannick:** Yes, if I may. First, I declare an interest a practising barrister who has had experience for the first time of remote courts over the past few weeks, including in the Family Division, albeit without witnesses but with members of the press watching, albeit they cannot report.

I have great admiration, Lord Chief Justice, for the lead you have given and for all the work that has been done by judges, court staff and others to ensure that justice continues. My question arises out of what you were just saying and out of a very interesting article by Professor Richard Susskind, one of your advisers, in the *Financial Times* last week. He pointed out that until a couple of months ago, most judges and lawyers would have said that remote hearings could not be conducted fairly or efficiently. My question is: do you think that, in the light of this appalling, crisis, we will in fact make progress towards more online proceedings and that there will be a permanent change in the way that we lawyers and judges do business? Do you think that is going to happen?

Lord Burnett of Maldon: I strongly suspect that it will. If I may say so, Lord Pannick, you have put your finger on something that is at the heart of what lawyers are and how they behave. An awful lot of the legal profession is actually very cautious when it comes to change. An awful lot of the legal profession, including judges, wishes to be assured that every implication has been thought through and that absolutely every last detail has been put in place and resolved before we move forward.

What we have seen over the last two months is that we have had to move forward because otherwise the system would have collapsed. I detect from practitioners, but also from judges, the sense that there will be increased demand for this from litigants and from all those who take part in our proceedings, because people have discovered that for many types of hearing—although, I emphasise, not all—conducting them as we are now effectively conducting this evidence session is just as good and much more convenient. That is certainly something that we are picking up.

I think Professor Susskind is right in his general thesis that we will have moved forward and there will be no going back to where we were. If I may put it this way, we had to deal with this from the second week of March and there will be no going back to February 2020. I suspect there will be no going back to February 2020 in any walk of life, but we will not be going back to that time in the courts; of that I am confident. This may be a slightly imprecise way of putting it, but it seems to me that by necessity we have taken three steps forward—we have done so using poor technology, really, and I hope it will improve substantially—but we will probably take one step back, because we have certainly been having to do work by phone and video that would have been better done in a

court. There will be no difficulty in people identifying some of those types of cases.

What we have effectively been doing over the last eight weeks, and I suspect we will be doing it now for some months at the very least, is engaging in the biggest pilot project that the justice system has ever seen, so it is important that we look carefully at what is going on, particularly when we get better technology, and learn from it. We must do proper evaluations. A lot of thinking is going into this already so that when we come out of this emergency we are able to settle back and take from it what is good, recognise what has been less good and try to improve things in the public interest for the future.

The Chair: Lord Dunlop, that leads into what you might want to ask about.

Q7 **Lord Dunlop:** Yes, thank you. I want to ask about the progress of cases and how they are being prioritised. What types of cases are taking place at the moment, what types are not, and what implications flow from that?

Lord Burnett of Maldon: The position is different in each of the jurisdictions, and there are differences between different tribunals. I shall start with civil and family. I have already indicated that in the High Court about 80% of the work is carrying on as before, albeit differently. In the family and civil courts, one of the first steps taken back in the second or third week of March was to identify priorities. We recognised that it would not be possible to deal with everything because we simply would not have the resources to do so, so in both jurisdictions careful priorities were drawn up to ensure, first, that all urgent work was dealt with; in both jurisdictions there is a lot of work that is urgent and time-critical and has to be dealt with. Then there was a descending order of urgency, as it were, and that informed the listing practices put in place in both those jurisdictions. That continues at the moment, and the aim is to increase the volume of work that is being done.

So far as crime is concerned, in the magistrates' courts all the normal urgent business, the overnight business, has carried on as before. It was not possible to keep trials going in the magistrates' courts after the lockdown in March, but they restarted some weeks ago and are building up slowly. Obviously, trials are a different matter; even in the magistrates' courts there need be a certain number of people physically present, although quite a few can attend remotely, so that is building up. We also tried to clear the backlog of sentencing cases in the magistrates' courts, and I believe that was successful.

In the Crown Court, the critical thing was that we were unable to carry on with jury trials, for obvious reasons—that is to say, new jury trials. A few trials continued to their conclusion after 23 March, again with immediate imaginative adjustments made by everyone concerned. What we did in the Crown Court was to increase the disposal of all the other business: outstanding sentencing cases and preliminary hearings were brought forward, cases were listed for mention to see if there were pleas

acceptable to the Crown Prosecution Service and so forth. An irony of the last few weeks is that the crude numbers of cases that have been finished in the Crown Court have actually increased, but they have all been cases that do not take a lot of time and do not need a lot of people to be present.

As you know, I have recently announced that in a few courts, with very careful choreography, jury trials are to start again from next week, and there are a couple of part-heard trials which, as again has been reported widely in the media, are expected to start again in the very near future, if they have not done so this morning.

The Chair: Baroness Corston, did you want to follow up on an aspect of that?

Q8 **Baroness Corston:** Yes, I certainly will. You will be all too well aware, Lord Burnett, that before the pandemic there was a large backlog of criminal cases. What is your assessment of the additional delay to justice that the pandemic has caused?

Lord Burnett of Maldon: Thank you for that question. Until the end of 2018 there had been a steady reduction of cases coming into the Crown Court. It had been a steady reduction for some years. As a result of that, the sitting days—that is the unit of currency by which we operate in the courts—were reduced by the Ministry of Justice. Even so, until the end of 2018 outstanding cases continued to fall in the Crown Court because they were being dealt with more efficiently. At the end of 2018 the outstanding total number of cases was about 33,000 in the Crown Court. Most are not trials, I should say; in 2018-19 the average number of trials per month was about 1,200.

During 2019, however, the outstanding number of cases crept up. That was because receipts ticked up by 1,000 or so but also, as you will remember, sitting days were substantially cut. The result is that the backlog of trials has increased, and the backlog of trials is growing as a result of the events engulfing us at the moment. We would be disposing of roughly 1,000 trials a month; that is my best estimate. We have had two months, or as near as does not matter, without trials, and for every month this carries on we will accumulate another 1,000 trials or thereabouts into the backlog.

Starting new jury trials will make a small impact on that, but I emphasise that it will be small. If this goes on for more than another handful of months, I have no doubt that there is going to have to be some imaginative policy thinking from the Government and then Parliament because it will need primary legislation to adjust the way at least temporarily, in which jury trials are conducted. That is broadly where I think we are.

The Chair: Lord Faulks has a question to follow up on this.

Q9 **Lord Faulks:** Thank you, Chair. I declare an interest as a practising barrister, and I echo what Lord Pannick said about my admiration for the

way in which the court system has responded to this pandemic.

Of course jury trials present really acute problems, and we are all well aware about the announcement about a very cautious start next Monday. In view of the inevitable backlog that you have described, do you think there might be a case for bringing in criminal trials by judge alone—for example, in fraud cases, which for a long time many people have considered appropriate for that sort of disposal?

Lord Burnett of Maldon: The question surrounding fraud trials has been around for as long as you and I have been in practice; there was a big report on it 35 years ago, and there have been others. Fraud trials are actually not the problem. It is striking to remember that the overwhelming majority of trials in the Crown Court last three days or less; the ones that get into the papers by and large are the ones that do not. Trials without judges—

The Chair: Trials without jurors.

Lord Burnett of Maldon: I am so sorry; trials without jurors is a topic raised and debated every few years. Before Parliament considers moving to that, one needs to be very sure that nothing else can solve whatever the problem appears to be in a few months' time. I put it that way because it seems to me that we are not yet in a position, after two months of this emergency, to be making radical decisions that will be so profoundly informed by whether the emergency carries on for just another handful of months or whether, as some people speculate, we may be forced to be social distancing and taking precautionary measures for nine months, a year or perhaps longer.

There are all sorts of policy proposals floating around; they have been ventilated fairly fully in the media. Your Committee will know well that in the Second World War jury numbers were reduced to seven, save for murder and treason. That would be something well worth thinking about if these difficulties were to continue. I have read proposals and suggestions. Another might be to have trials in the Crown Court with a judge and two magistrates, which of course would be much easier to manage than any jury.

Trial by judge alone has also been much mentioned lately and had the support of some very senior members of the legal profession and former judges. This last I would see as an option only in extremis. The reasons why we have juries in criminal cases in England and Wales are well known. Two important aspects of that are public confidence and engagement in the administration of justice, both very important features. I hope that Parliament would take a deep breath before authorising judge-only trials, even temporarily, until collectively it was satisfied that less radical measures that might ameliorate the situation were not good enough.

The Chair: Lord Faulks, did you want to come back on that?

Lord Faulks: No, thank you.

Q10 **Lord Howarth of Newport:** This point is of relative detail but I think important to your immediate plans to resume some trials by jury. What will be the position if someone summoned for jury service is frightened to attend for reasons of health? Will they still be obliged to turn up?

Lord Burnett of Maldon: The way in which jurors are summonsed is such that they are given weeks and weeks of notice. Opportunities are given to them before a trial starts, before they have to attend the court, to put forward reasons why they should be excused. They can also do so even after they have attended. This is something that undoubtedly will be dealt with sensitively by judges, and it will be one of the very interesting things that we will see happen in practice over the next few weeks. The numbers of jurors required for the restarts that we have in mind are relatively few, and that is necessary to avoid all the problems that we understand.

There is an interesting insight into this, if I may give it to you. Before Easter there was a long trial running in Derby Crown Court that we all thought would fall over, but it did not. The jurors were absolutely determined to facilitate the trial's finishing, and it did in the early part of April. The trials that may be restarting—the two that I do not doubt you have read about in the papers—again have jurors who are very keen to continue to discharge their public duty. It is difficult to predict precisely what is going to happen, but the sense from those, albeit few, experiences is that the people called to do jury service who do not have to be at home for the very good reasons that so many people have to be at home at the moment will be happy to serve.

I should emphasise that the arrangements that have been put in place have been devised with the help of Public Health England and Public Health Wales. The committee I established to look at the resumption of jury trials—we started thinking about it straightaway, and the committee was established formally four weeks ago—has had representatives from the Law Society and from the Bar, so everyone has been involved in satisfying themselves that what is proposed accords entirely with the medical advice that is available. I should add that again the courts service has been at the heart of all this so that the necessary arrangements for social distancing but also for all the cleaning and sanitising and so forth have been put in place.

Q11 **Baroness Drake:** Good morning, Lord Burnett. Could you share with us what lessons are being learned about the handling of cases related to the Covid-19 lockdown regulations and your views on reports of individuals being charged and convicted incorrectly?

Lord Burnett of Maldon: I am certainly aware, as I am sure anyone who has been reading the papers over the last few weeks will be, of a couple of cases where it appears—it was certainly reported—that a defendant was charged under the wrong legislative provision.

There are two quite separate seams of legislative provision that cover coronavirus offences, if I can put it that way. The first was created by the

primary legislation, the Act, and relates to people suspected of being infectious not removing themselves from circumstances in which they may infect other people. The other is the coronavirus regulations, which require people to stay at home unless they have a reasonable excuse. It appears that there was some confusion about that, at least in the cases publicly reported, and the two concerned were charged under the Act when it was inapposite.

Happily, the mistake was picked up. These are cases in the magistrates' courts; there is a provision in the Magistrates' Courts Act that enables fundamental mistakes of that sort to be put right without the need to go on appeal, and that has happened. I suspect it is inevitable in a very fast-moving situation where Parliament introduces emergency legislation and then regulations are laid very quickly that some mistakes will be made, but I understand that the Crown Prosecution Service has set up a process whereby it is reviewing all the cases charged under the Act to look out for any other errors. I can also tell the Committee that the legal advisers to the magistrates' courts, who used to be called justices clerks, have been given guidance so that they look particularly for any problems of that sort.

You will remember that the regulations operate by enabling the police to give people fixed-penalty notices if the police believe there has been a breach of the regulations—in particular, being out of your home without a reasonable excuse. The way that that works is that people can just pay the notice, but if they do not then eventually they will come before a magistrates' court. The chronology of the regulations is such that I am advised that the first date on which non-payment will trigger the possibility of being brought before a magistrates' court is not until 22 May, which is a few days away.

The Chair: Lord Sherbourne, that leads into points that you wanted to raise.

Q12 **Lord Sherbourne of Didsbury:** Good morning. That exactly raises the point that was in my mind, which is that we know that lockdown has been implemented by a combination of both law and guidance, and of course many people—not just the public but sometimes, I suspect, the police—do not understand under which rules they are being governed. Has this created any issues for the courts?

Lord Burnett of Maldon: Not yet, for the reason that I have identified. If fixed-penalty notices have been issued and are not paid and the person concerned wishes to say, "I was out and I think I had a reasonable excuse", those cases have not yet come to the court. However, it is a fair point, if I may respectfully say so. As a matter of common sense, if someone is out and about from his or her home and is following the advice being given by the Government, it would be pretty extraordinary for anyone to suggest that they were acting unreasonably. However, the contrary may not be the case because the regulations were laid before Parliament and approved by it. Parliament is what suggested that there must be a reasonable excuse, and if there were a dispute about that then

that would be a matter to be resolved in a court. The fact that a Minister may not think it a reasonable excuse in the ordinary course of statutory interpretation would not weigh very much, if at all.

The Chair: Thank you. We want to come on to wider questions now.

Q13 **Lord Hennessy of Nympsfield:** I was very struck by your description of every walk of life being changed by what has happened, and that nothing will go back to February 2020. If the pathogen had not struck our country we would no doubt be discussing with you today, at least for part of the time, the Government's proposal for a constitutional commission on rights and democracy. As Lord Chief Justice, you are in a very good position to take a panoptic view of the constitution, if I can put it that way. Could you share with us your hopes and fears for what that commission might have done—or might still do, if we ever have it—in terms of particular anxieties? Above all, which do you think are the moving parts of the constitution that need most attention?

Lord Burnett of Maldon: If I may say so, that is a very, very big question.

The Chair: Yes, it is.

Lord Burnett of Maldon: I shall try to answer it by focusing on the parts of the constitution that affect the judiciary first and foremost. By way of background observation, it is clear to everyone who has lived through the last two or three years that in many respects the ordinary functioning of the constitution—I am not thinking of the judges at the moment; I am thinking more of the way that Parliament functioned—was rather unusual. It is a little difficult even now, I suspect, for most of us to think back and try to remember all the ducking and weaving that was going on, so I wonder whether many of the problems that were identified, particularly in connection with the way in which the House of Commons was operating—about which I express no view, I hasten to add—will remain of such concern to so many people when that part of the constitution has moved back to a rather more normal position, with a Government with a working majority. Happily, that is not for me.

The part of the constitution with which I am directly concerned—namely, the judiciary and the relationship between the judiciary, the Executive and Parliament—is of great importance. At the heart of it are two fundamentals: the first is the rule of law and the second is the independence of the judiciary. In the course of the last two or three years in particular, possibly as a result of the same sort of tensions as were affecting other parts of the constitution, quite a few people became aerated about some of the things that were going on. One wants to be very careful about people who are aerated, in my view, but we need to recognise that the business of judicial review has grown substantially in the course of my professional career. It is a construct of the common law. The substantive rules of judicial review are altogether judge-made. I cannot immediately think of any instance in which Parliament has intervened legislatively to regulate the substantial rules of judicial review.

Parliament has intervened occasionally to regulate procedural matters, but not substantive ones. Judicial review today, in 2020, is a completely different beast from what it was in—I have to confess—1979, when I did my law degree, and 1980 when I was called to the Bar. I suspect that a number of the early architects of the developments of judicial review in the 1980s would be very interested, but also quite surprised, to see where it has moved in the intervening 20 or 30 years.

So measured and scholarly debate about the boundaries of judicial review is, in my view, proper when looking at constitutional arrangements, and it is not something which the judges or the lawyers, with respect, should be frightened of; it is something that we should welcome. I do not doubt that anyone who professes some interest, still less expertise, in public law and judicial review could identify one or two steps that were taken which the individual judge or lawyer might think were better not taken. It is an extremely interesting prospect that there should be a proper look at this. I do not think it should cause the judges any fear at all, so long as the two fundamentals are respected: namely, the rule of law and the independence of the judiciary.

The other aspect of it that is of considerable interest to the public and politically is the interaction of public law, administrative law, judicial review, and the application of the European Convention on Human Rights. As judges never tire of explaining, in making decisions that arise out of the convention, judges are following what Parliament told judges they must do in the Human Rights Act 1998.

One understands—I certainly do—that there are many commentators who believe that the Strasbourg court has gone too far in some respects and that it would have been better had it not done so. But the United Kingdom is a state party to the European convention and is obliged to comply with its rulings, and under the law that we apply, if there is a consistent line of decision from Strasbourg on a particular issue, the courts apply it.

Again, this debate was raging even before the Human Rights Act was enacted in 1998, and it is a debate that has never gone away for a minute ever since. Parliament, with the help of a commission if there is one, is perfectly entitled to look at that, too. Obviously, the implications for treaty obligations will be well in everybody's mind.

Coming to the heart of your question—I am sorry; I have been talking for too long—I do not see a commission, a committee of inquiry, or whatever may emerge, looking at judicial review and the Human Rights Act as anything that the judges should be frightened of. On the contrary, a calm, measured and proper debate about the boundaries of judicial review—as I say, a construct of the common law, not of Parliament—should be welcomed.

The Chair: Thank you. That raises some very interesting questions that we might want to come back to at some point. Lord Howell wants to follow up on the general area.

Q14 **Lord Howell of Guildford:** Thank you, Lord Chief Justice. Those were fascinating comments. I am afraid that I missed the last ones, because for technological reasons we were cut off. They raise a number of very, very controversial issues, and hot topics as it were. Some of them were touched on by Lord Sumption in his Reith lectures when he used the phrase "law's expanding empire" and the way in which judges were being compelled to greater activism in the UK—rather different from activism in the United States, of course—simply because the clarity of view from Parliament was not easy to embrace.

Do you have further thoughts on a situation that really cannot be left as it is and which has led the public to have considerable doubts about the capacity of Parliament to deliver and to issue clarities of view to help judges on their way?

Lord Burnett of Maldon: Again, a very big question. I pause only to reflect on how important it is that I do not enter a policy debate at this stage. Lord Sumption undoubtedly identified a serious and significant direction of travel which the judiciary had been engaged in in recent years, and his attribution in part to a void—I do not think that was his word—that needed to be filled certainly has some measure of reality about it.

One can think of one particular area of deep social controversy—namely, assisted dying—an issue which Parliament has been unable to come to a clear view on, again for as long as I can remember. I had a hand in one of the cases that went through the courts before I was Chief Justice and when I was Lord Justice of Appeal, and I made it clear that I thought it was a matter that Parliament should deal with, because the judiciary and litigation are not well equipped to deal with big policy issues.

Only last week—it may have been the week before—I handed down a judgment in a case involving a transgender parent who wished to be identified on a birth certificate differently from how the current legislation would envisage. Again, I said that I thought that was an issue, irrespective of the legal arguments, that was clearly for Parliament because it has big, social implications.

Hearing an individual case, even if one gets help from interveners, does not provide the broad view that is necessary from making what are essentially policy and social judgments. So to that extent I do think there is a seam of absolute reality in what Lord Sumption said.

More generally, the problem has been that life has become very much more complicated. Governments make many more decisions in all sorts of areas of life than they used to, so those decisions are liable to be challenged, and in an environment where we have the Human Rights Act, which is capable of being prayed in aid in so many areas of litigation and judicial review, the way the convention works—there are experts on your Committee on this—the courts are propelled into making value judgments of a sort that were alien to the ordinary judicial review process.

All these things collide. But it is right to observe that most judges really do regard getting involved in anything political, even in judgments, as deeply toxic, and most avoid it at almost all cost.

Q15 **Lord Howell of Guildford:** Would a Parliament that focused, in its scrutiny and its views, more through the actions of committees than through rumbustious plenary meetings with partisan exchanges and so on, be a rather better one for judges to survey and to draw their understanding of what the will of Parliament really was?

Lord Burnett of Maldon: Interpreting statutes can be difficult, but usually that is not the problem. In terms of good law making, it would be presumptuous of me to express a view about the mechanics of a Bill getting to the Floor of either House, but, in general terms, the deeper the thinking and the wider the taking of views in advance of these types of difficult legislation, the more likely it is that the legislation will emerge in a form that works.

The Chair: Thank you. Lord Burnett, you have been very generous with your time, but there is one point that Lord Howarth wanted to make about legal aid.

Q16 **Lord Howarth of Newport:** Getting back to the practicalities of how the court system has been working and is now working, legal aid is a huge topic, but let us consider criminal aid. I believe that the means test for criminal legal aid has not been uprated for a very long time and that criminal legal aid fees for solicitors have been held down for a very long time. Do you have some anxiety that people on low incomes who cannot afford to pay for legal representation are being denied a fair trial?

I have a more specific question still about the so-called innocence tax. Does it worry you that a defendant refused legal aid after means testing is not reimbursed for a substantial part of their legal costs when acquitted?

Lord Burnett of Maldon: On your first question, I am confident that no judge and no magistrate would conduct a hearing in a criminal case unless satisfied that the trial was a fair trial. There are relatively few unrepresented defendants in the Crown Court—there are some—and there are more in the magistrates' court. But the job of the magistrates or the district judge in the magistrates' court is to ensure that there is a fair trial.

On the more general point about the rates of criminal legal aid, my concern is that for the system to operate effectively and fairly there has to be a vibrant, independent, publicly funded criminal legal profession. It has become clear, from work done by the Law Society, that the availability and spread of solicitors in the legal aid/crime world has diminished. That really does worry me, and it worries me more at the moment, given what I am reading—I am sure you are reading the same—about the potential lack of financial viability of many high-street solicitors' firms in the current environment.

The same is true of the Bar, where there is real concern that, as a result of what is going on at the moment, quite apart from the predations on incomes over the last 10 years, fewer barristers will emerge from this crisis willing to do crime. It is all very well my saying, as I have been quite loudly, that when the time comes we must be able to use our courts estate to its maximum to make up backlogs across the system, but that will work only if the legal profession that underpins the criminal courts remains vigorous and survives in its current form through the emergency. That really does concern me. I know that the Lord Chancellor is thinking hard about this, and the Bar and the solicitor sides of the profession are in discussion with the MoJ.

As for your last point—the innocence tax, as you couch it—it does seems to me to be at least anomalous that somebody can defend him or herself in criminal proceedings, necessarily incur considerable expense, and be unable to recover what would be regarded in other environments as the reasonable portion of that. I certainly think it is anomalous.

Q17 **Lord Faulks:** The probable decimation of barristers and solicitors acting for defendants in criminal cases also seems to me to have a potentially significant knock-on effect on the appointment of judges in the future, because we need judges who have experience of the criminal process and who sit very successfully as judges in the Crown Court. Does this concern you?

Lord Burnett of Maldon: In a word, yes. At the moment, we have not had difficulty recruiting district judges, judges or recorders to sit in the Crown Court. The environment in which that difficulty has not existed has coincided in the Crown Court with the reduction in sitting days that I spoke of earlier, so there is less of a need to deploy judges, but if the specialised criminal Bar and solicitors' profession diminishes in size substantially, it certainly gives rise to the prospect of not being able to recruit the same sort of judges as we have done recently.

For all these reasons, and the reason put forward by Lord Howarth when speaking of the solicitor side of the profession, there is more to legal aid and the vibrancy of the publicly funded legal profession than just paying people enough to keep going. We are talking at the moment about crime, but the vibrancy of the family part of the profession is absolutely central to the proper administration of justice and thus the rule of law.

The Chair: Thank you very much. Lord Burnett, we have covered quite a range of topics, as we always do in these discussions, and we understand that these are extraordinary times in which you are trying to keep the show on the road as best as possible, so thank you very much indeed for giving up your time today.

Lord Burnett of Maldon: It is my pleasure, and I am very grateful to all of you for putting up with me for an hour and 20 minutes. As I said at the outset, I do hope that it will not be very long before we can all meet in rather more normal circumstances.

The Chair: I think we would all echo that sentiment. Thank you very much indeed.