Revised transcript of evidence taken before

The Select Committee on the Constitution

ANNUAL ORAL EVIDENCE FROM THE PRESIDENT AND DEPUTY PRESIDENT OF THE UK SUPREME COURT

Evidence Session No. 1

Heard in Public

Questions 1 – 16

WEDNESDAY 25 JUNE 2014

10.30 am

Witnesses: Lord Neuberger of Abbotsbury and Baroness Hale of Richmond
Members present

Lord Lang of Monkton (chairman)
Lord Brennan
Lord Crickhowell
Lord Cullen of Whitekirk
Baroness Dean of Thornton-le-Fylde
Baroness Falkner of Margravine
Lord Goldsmith
Lord Lester of Herne Hill
Lord Lexden
Lord Powell of Bayswater
Baroness Taylor of Bolton
Baroness Wheatcroft

Examination of Witnesses

Lord Neuberger of Abbotsbury, President, Supreme Court of the United Kingdom, and
Baroness Hale of Richmond, Deputy President, Supreme Court of the United Kingdom

Q1 The Chairman: Good morning and welcome, Lord Neuberger and Lady Hale. Lady Hale, this is your first visit; Lord Neuberger, you came to see us just over a year ago. I am conscious of your qualified welcome of the opportunity to deal with us. I remember that you said then that we should not make it too often, given the separation of powers made manifest by the positioning of the Supreme Court, and that constitutional considerations would affect some of your answers. We understand that. I gather that you do not wish to make an opening statement, so perhaps I could ask the first question, which is about the current balance between the separation of the executive and the Supreme Court. How is that going? I know you have views about who should appoint the chief executive, and you may have views about budgets and resources generally.

Lord Neuberger of Abbotsbury: Thank you Lord Chairman. I think that constitutionally the balance seems to work well. Each of us, I hope, understands where the boundaries lie. With changes in legislation and in society, the boundaries at times are a bit fuzzy. That can
sometimes lead to misunderstandings, but so far I really do not think they have led to misunderstandings.

As to the budget, Lady Hale and I discussed that issue specifically for the purpose of today but also generally with our chief executive, Jenny Rowe. The present position is that we are properly funded, and we have, with the ministry’s knowledge, been detaching some of our services from the Ministry of Justice by making them self-contained. Most notably from our point of view, our IT system came out of the ministry umbrella, as it were, and we had our own system installed over the new year. It was very successfully done. There have been other ways in which we have detached ourselves: catering and security being two examples. In finance, therefore, things are quite acceptable at the moment. We are, I suspect like every arm of government, concerned about the future, and it is right to mention that almost 80% of our costs pay for the building and for justices’ pay and pensions, so any cuts would have to be borne by the remaining 20% or so of expenditure. Therefore we are concerned about what might happen in the future, but I suspect that our concern is merely a more accentuated concern than that of any arm of government.

**The Chairman:** Lady Hale, would you like to add anything?

**Baroness Hale of Richmond:** I agree with everything that Lord Neuberger has said. I think there has been a distinct change from when we first went over in October 2009, when quite a few things that the public would have seen might have looked as if we were a branch of the Ministry of Justice. I could give a few anecdotes about that, including the language at the bottom of our emails—things like that. We have managed to distance ourselves in all those public-facing ways, so I do not think that any member of the public now coming into our building would think that we were a branch of the Ministry of Justice.
The Chairman: Thank you. May I ask you about staffing implications, the backlog of cases and what the normal wait is between obtaining leave to appeal and actually hearing the appeal?

Baroness Hale of Richmond: We do not have a backlog.

The Chairman: You do not?

Baroness Hale of Richmond: No. We have cases that are waiting in the list, but we are able to list cases. Our target is within nine months of permission being given. If it takes any longer it is almost invariably because the counsel who appeared in the case below, and whose clients want them to continue to appear in the case, are not yet available. We try to list according to counsel’s convenience, because these are big cases and counsel has been living with them for a long time. Unless the client wants to change, it is not a good idea to oblige them to do so. That is the main reason why cases are listed a long way in advance. Otherwise, we can them in. We can get cases in at very short notice as well, because we leave gaps to accommodate urgent work as it arises.

The Chairman: Thank you very much. We are about to undertake an inquiry into the office of Lord Chancellor, so may I bring in Lord Lexden?

Q2 Lord Lexden: May I ask about the your working relationship with the current Lord Chancellor—a non-lawyer? Lord Neuberger, you expressed yourself consciously, carefully and circumspectly when you came to see us last year. You said, “It would be wrong to say, at least as far as I can see, that I have identified any particular problems at the moment”. How are things one year on?

Lord Neuberger of Abbotsbury: That sounds very lawyerly. I would give the same answer. It is fair to say that unlike the Lord Chief Justice, who came to give evidence to this committee not long ago, our involvement as the Supreme Court with the Lord Chancellor is much less. There are many administrative matters across England and Wales that have to be
considered by the Lord Chancellor and the Lord Chief Justice. I meet the Lord Chancellor formally four times a year to keep in touch, but the amount we actually have to discuss is relatively slight. Inevitably, whatever system you have, the minister—if that is the right word to use generically—responsible for the judges is bound to have a degree of perceived, and probably actual, conflict. If he or she is a member of the Cabinet, then by definition they are a member of the executive. They are likely to be a politician, yet they have responsibility for the judges and represent them. We would be more comfortable in principle with somebody who had the court and judicial system running in their veins, as it were, but so far it is not possible from our perspective to identify any specific problem arising from the fact that the Lord Chancellor is not a lawyer, or even from the fact that he has no experience of the law. But I cannot say that my experience necessarily covers the whole ground.

Q3 Lord Lexden: Could I ask you to comment on the recent conclusion of the Joint Committee on Human Rights about the Government’s judicial review proposals? The joint committee stated, “The Government’s proposals on judicial review expose the conflict inherent in the combined roles of the Lord Chancellor and Secretary of State for Justice”.

Lord Neuberger of Abbotsbury: That must be a fair comment, because as a minister, a member of the Cabinet, a politician, his interests are different from those of a minister responsible for the courts; they necessarily impinge on his view of the role of the rule of law. I cannot quarrel with that. I think it is a very good example of the inherent conflict.

Q4 Lord Crickhowell: I was interested, listening to an address by the Lord Chancellor recently, that one thing came out clearly. He discussed issues such as human rights and judicial review in terms that I do not think would have greatly shocked or worried lawyers. What he said was interesting: he said that he had a large department. Some have argued in the past that that might be an advantage. On the contrary, clearly dominant in his consideration was the fact that he was facing a substantial cut in his department’s budget;
that forced him to look at issues such as judicial review, about which there has been some agreement that there has been a tendency among campaigning bodies and so on to use it as a weapon of delay. It was clear that one of the problems of having this arrangement is that inevitably the Secretary of State of a large department is dominated by the consideration of how to deal with the budget, particularly in times of trouble—that is bound to influence his priorities when it comes to legal matters. Would you comment on that? There are strong reasons why the human rights issue needs further tightening, perhaps to avoid it being used simply as a campaigning and delaying instrument by campaigning bodies.

**Lord Neuberger of Abbotsbury:** I start by saying that for the courts there is no more important function for upholding the rule of law than controlling the excesses of the executive, and protecting individuals against the executive. I accept that the criminal legal system is as important, but I suggest that if you do not have a healthy and accessible judicial review function for the courts, you do not have a satisfactory modern democratic society. Therefore, any interference in or restriction of judicial review has to be looked at very carefully.

On the other hand, I accept that one cannot just say that anything goes—that anybody should have a right to reply to anything from the courts provided that it can be said to be under the heading of judicial review. I can understand the Secretary of State’s concern, and I completely agree with you, as with Lord Lexden, that this is an example of the conflict in which the Lord Chancellor finds himself; but it is difficult to think of a system where there is not going to be that conflict, because somebody has to decide on the money, and there is not unlimited money. For instance, the delays which the planning system was seen to suffer from as a result of some judicial reviews—here I am treading into the Lord Chief Justice’s territory—should be sorted out, and I believe to a substantial extent are being sorted out by speeding up the process and having more dedicated judges. That is the sort of thing that
should be concentrated on: how to improve the system and how to filter out that sort of thing. Indeed, the purpose of needing permission to apply for judicial review is to shut out hopeless applications. Some hopeless applications get through, but because judicial review is so important, and because the world is imperfect, one has to accept that it is well worth while and that inevitably that there will be some applications that are unmeritorious but nonetheless get pursued and hold things up. But provided it does not get out of hand—I have no reason to think that it has got out of hand—it is a small price to pay for a healthy judicial review system. Lady Hale, I know, has views on those questions.

**Baroness Hale of Richmond**: They are no different from Lord Neuberger’s. I am not sure that this really is a question of public resources. The problem, not surprisingly, is that nobody who is running a government department or operating in one is happy when somebody comes along and says, “The decision you have just taken is not in accordance with the law”. Nobody likes that.

**Q5 Lord Lester of Herne Hill**: I should declare a couple of interests: I am a member of the Joint Committee on Human Rights and a barrister. It seems to me that there is a problem in that the Government are a judge in their own cause when they seal themselves from judicial review. One has to be careful of that. Is this a matter that needs to be dealt with by governments and Parliament, or can it be dealt with by the courts? After all, you essentially invented judicial review and are the independent guardians of the citizen and the state. I do not understand why the filters and mechanisms that you have in place are not adequate to deal with the kind of problems that Mr Grayling indicated in his talk.

**Lord Neuberger of Abbotsbury**: Part of the problem is that, if you have masses of judicial review applications and a limited number of judges, that holds things up. I have to be careful, as I am on the Lord Chief Justice’s territory, so I am talking in principle if you like, but if you say to the Lord Chancellor, “Look, if you are concerned about the speed of things, can we
appoint another seven judges to deal with it?”, that comes back to the money problem. That is how I see it: coming back to the money problem. In principle, you are right: it is judge-made and it is important that it remains within the purview of the judges and is not taken over in any way by the executive, because it is proper control of the executive that the courts are concerned with. My answer is, in principle, yes, but it will always come back to money.

Q6 Lord Goldsmith: I declare an interest as a practising lawyer, with occasional appearances before the Supreme Court and other courts here. My question is this: in examining and considering the extent of judicial review, as Mr Grayling has done, would it be appropriate to have regard to the fact that, in terms of intervention in executive action, the English and Welsh courts remain relatively timid and diffident? One looks, for example, at what the Pakistani and Indian supreme courts do in terms of almost taking over the management of government business. This is a very limited area concerned with individual rights, and not political interference.

Lord Neuberger of Abbotsbury: That is true. You can also point to countries where the judges interfere less, although that may be for reasons which, as lawyers say, do not bear examination. More seriously, we have been on a journey since 1950. Long before the Human Rights Act 1998 was passed, the extent to which judges were prepared to get involved in overturning or qualifying executive decisions had changed enormously. The development of judicial review, particularly in the 1960s, 1970s and 1980s, has been very marked. It is a domestic product unrelated to human rights, although human rights have added to it. As the power of the executive has grown, it is becoming increasingly important for judges to play their part in defending citizens’ rights.

Q7 Lord Cullen of Whitekirk: When you were here last year with Lord Hope of Craighead, he suggested that there was something to be said for the President of the
Supreme Court having the right to make written representations to Parliament in the same fashion as is provided for by section 5 of the Constitutional Reform Act 2005. What is your view about that and about whether there should be some opportunity for a right of reply? I think he had in mind a case in Scotland, where there were representations from Scotland but no opportunity for the Supreme Court to have its say by way of response.

**Lord Neuberger of Abbotsbury:** The right to make written representations to Parliament is something which Lady Hale and I feel the President of the Supreme Court should have, in the same way as the Lord Chief Justice has. We are in the process, together with Lord Hope, and with his advice and assistance in his capacity now as a serving member of the House, of seeking to put forward a form of words that we hope will find favour in due course in the chamber.

**Lord Cullen of Whitekirk:** Would that eliminate the need for any right to reply, which may arise in a situation where unknown to you—the judiciary—something arises on which you might want to comment?

**Lord Neuberger of Abbotsbury:** Yes. It would extend to a right to reply if it was framed in fairly general terms, as I think we would expect it to be. It was described by the former Lord Chief Justice as a nuclear option. I do not think it is quite that extreme, but it is obviously a right which, if the President were to have it, one would expect to be used rarely.

**Q8 Lord Cullen of Whitekirk:** I would like to ask you about the appointment of Supreme Court justices to the House of Lords on their retirement. What are your views on that? I am concerned in particular with two issues. First, what value would you place on members of the House of Lords having recent experience of the administration of justice? Secondly, how would you deal with situations in which it is uncertain whether retiring justices would in fact be working members of the House of Lords? How would you control that—through some undertaking?
**Lord Neuberger of Abbotsbury:** When, under the old pre-2009 system, members of what is now the Supreme Court were able to speak in the chamber and talk about the business of the House, they provided real value. I understand that recently retired colleagues who have peerages—you referred to Lord Hope—are still seen as contributing significantly to the business of the House, although you are much better able to assess that than we are. I would have thought it very unfortunate if the members of the Supreme Court were not offered peerages on their retirement. That would be a shame. It would, again, be for you to assess more than me, but my view is that it would be a shame if you had no recently retired judges, with all the experience they would bring of the court system and how things work, to speak from the House and instead left it, effectively, to the sort of written submission that we were talking about. That would be a far less satisfactory way of dealing with matters. I entirely see the point, particularly these days when the membership of this House is under scrutiny, internally and externally, that giving someone a peerage if they are not going to take part may be of questionable value, but one then gets into the difficult and thorny area of how you deal with it. The notion of a commitment to take part in the proceedings of the House has obvious attractions. It is a matter which Lady Hale and I have obviously discussed: she has been a member of this House longer than me.

**Baroness Hale of Richmond:** I was thinking that the problem of whether somebody is actually going to make a contribution, as opposed to saying, “Thank you very much for the title”, is not unique to retired justices of the Supreme Court. That seems to be a question that arises for many appointments to the House that have been made on the basis that people will be working peers. Obviously there are some people for whom it is purely honorific, but what you do about that is a question that you as a House will have to consider. It is not for us.
The Chairman: Your predecessor as Deputy President, Lady Hale—Lord Hope of Craighead—makes excellent contributions to the business of the House. As recently as last night, he had to wait—he was the last of 40 backbenchers to take part in the debate on Scotland and the referendum—but he made a contribution that set the debate ablaze. So there are quite good precedents there.

Baroness Hale of Richmond: Of course, he was the longest-serving member of the House. He was always a very enthusiastic member and contributed to debates before we moved across the way, so that is not surprising at all.

The Chairman: Thank you. Let us move on to diversity. We have all had the chance to read your Rainbow lecture, Lord Neuberger, which could be described as the comprehensive, possibly even definitive, ruling on the law and diversity. Lady Falkner, can you lead the questions?

Q9 Baroness Falkner of Margravine: Lady Hale, what a pleasure it is to have you here, partly because of your gender. I think it is one of the first instances, at least as I recall. It is very nice to see you represented here. Lord Neuberger, I have a couple of questions or observations on that Rainbow lecture. I noticed how you emphasised social mobility, economics, belief, underprivilege and so on. That is all extremely interesting, pertinent and relevant, and I am sure Mr Piketty would agree with your finding that the establishment captures certain roles. However, coming from an ethnic minority and as a woman, I thought that you were rather hiding behind other issues of diversity at the cost of gender and ethnic minority representation. You talked about belief. Belief, social standing and economic wealth are not immutable; they change over time. In my view, they are second-order considerations in terms of diversity, as opposed to the immutable characteristics that race and gender represent.
The other point about your lecture was in respect of something that a lot of senior people do when they talk about diversity. They tend to use statistics—you criticised statistics in your lecture—to slightly obscure the starkness of where we are and what little progress we have made. You refer, for example, to 8% in the Supreme Court, 17% in the Court of Appeal, 20% in the High Court and 40% in tribunals. Why can we not use clearer language, which says one out of 12 women or zero from an ethnic minority, and actually give the numbers rather than hiding behind statistics of that kind? They may be perfectly credible statistically, but I would argue that young people in particular do not get behind the figures until they are extremely clear.

My final point is about quotas. We said in our report on judicial appointments in 2012 that, “it would not be appropriate to set targets at the present time. However … If there has been no significant increase in the numbers of women and BAME judicial appointments in five years’ time”—i.e. in 2017—“the Government should consider setting non-mandatory targets”. I note that five judges are due to retire in 2018, and I am sure that we will hear, in the lead-up to 2017 and that five-year deadline, “Well, one more year and then we will have lots of vacancies and lots of opportunities to promote senior women”. My question is: are you going to take that five-year deadline seriously, and what steps will you take? I am extremely interested in what we talked about last year: the Chartered Institute of Legal Executives, bypassing the legal profession and bringing in young lawyers as junior judges and so on. That is all very interesting, but is there going to be tangible movement, in those areas at least? Do you think that you now need to have a statutory duty as President of the Supreme Court?

Lord Neuberger of Abbotsbury: As to the suggestion that I was hiding the problem about ethnic or gender representation by dealing with socioeconomic background, I was certainly not intending to, although one is not always the best assessor of one’s own lectures, and I
do not have a copy in front of me. But it seems to me, first, that gender and ethnic diversity are much talked about, whereas the relatively small socioeconomic group of people from whom judges are selected is not much talked about. Secondly, although I accept that progress has been very slow and not good, there has been progress in gender and ethnic representation among the judiciary over the past 20 years but not in class, to use an inappropriate but convenient word. I thought that was worth pointing out.

Using percentages raises quite an interesting point. I have been told, when I have used figures, that an audience listening to someone saying, “There are 700 this, 4,000 this, 6,000 this, 200 that”, find it difficult to deal with that through their ears. Percentages are a single figure and are easier to take on board. That is why, in lectures, I now use percentages, whereas in writing I tend more often to use figures. Taking in figures and working out what percentage this is of that, if you do not have the figures in front of you, is quite difficult. I accept that saying “8% of the Supreme Court are women” sounds a bit disingenuous, but I was giving a list of figures, as you very fairly read out, and it seemed a bit odd not to continue with percentages. It was simply because it was a lecture.

As for targets, I see nothing particularly wrong with targets as aims. Whether the judiciary is different from other jobs I would not like to say, because I do not know enough about other senior jobs. But I remain of the view that the British public are entitled to expect the best people to be judges and the very best to be in the Supreme Court. Although I accept that a degree of diversity—a serious degree of diversity—in the court is desirable and may be an arguable merit factor, I would deprecate any proposals that involved backtracking on the overriding requirement of getting the best people into the Supreme Court. I appreciate that you can say, with some justification, that referring to “the best people” is slighting eliding the issue, because views can differ as to what is “best”. All that has to be taken on board. When you are invoking the tie-break in section 159 of the Equality Act 2010, for example, I do not
think you should be too particular about whether somebody is arguably a little bit better than somebody else. As we all know, predicting the future is impossible and saying whether A is better than B is difficult. If they are roughly equal, then I would accept that you should go for the ethnic minority or the woman.

I end by saying that we are going in the right direction. It is taking more time than anybody would like, but if you look at the processes and the appointments to the High Court and the Court of Appeal in England and Wales over the past five years, they are improving, albeit slowly.

**Baroness Falkner of Margravine:** In saying that gender and ethnicity or race are more important than socioeconomic status, I should caveat that, although I appear to be part of the establishment now, I am a first-generation migrant who has worked my way up. It is very difficult to make those judgments, and I was merely suggesting that you need to go for the stuff that we all see and palpably feel rather than the other stuff. I will just make one other point. I do not think you have said whether you believe that you ought to have a statutory duty.

**Lord Neuberger of Abbotsbury:** I am content to have a statutory duty. Christopher Stephens, the chairman of the Judicial Appointments Commission, said to me a year and a half ago, when Lord Judge was still Lord Chief Justice, “David, Igor has an army, you have a cricket team.” It is true that I have a small group. I speak about diversity quite a lot, but there is a very limited amount that I can do.

You referred to the Rainbow lecture. I was conscious from the questions afterwards that a number of the people asking them thought that I had a lot of power over patronage, appointment and influence. However, my power in this connection is limited really to appointments to the Supreme Court, and appointment of the Lord Chief Justice and Heads of Division in England and Wales, where I am a member of the Selection Commission and to
otherwise encouraging people and saying the right thing. If Parliament, or the House of Lords, thought it right for the President of the Supreme Court to have a positive obligation in connection with this topic, I would certainly not oppose it. It would be wrong to do so. Lady Hale epitomises this, not just as the only woman on the Supreme Court but as a leader in this area, so I would be very embarrassed if I was the only person who spoke on this.

The Chairman: We have two more questions at least, from Lady Dean and then Lord Lester, so perhaps they will bring in Lady Hale as well.

Baroness Hale of Richmond: Could I possibly say something about diversity?

The Chairman: Of course. Those questions were to be on the subject of diversity, but by all means say it now if you would like to.

Baroness Hale of Richmond: No, I will happily listen.

Q10 Baroness Dean of Thornton-le-Fylde: I have a couple of questions in this area. You have my sympathy, Lady Hale, for the great burden that you carry, as one individual, every time this issue is raised. Looking to the future, what steps could be taken now to improve diversity within the Supreme Court, knowing that in 2018 you are going to lose five justices? The time for planning is now. What steps could be taken now? I note that there was direct entry for one member of the court in 2012. It happened to be a man, but would that be one way of working with this? What lessons can we learn from Scotland, where 20% of judges are not white males? I am interested to read that you talked about the increasing proportion of pupil barristers from a white, male, Oxbridge background. In a way, that is counterintuitive to the direction of travel that you want. What steps can you take now? There is a difference between quotas and targets—I am in favour of the latter not the former—but it would be interesting to know what your plan is in those areas.

Baroness Taylor of Bolton: Before you answer, I add that last year, when you were giving evidence, there was some discussion about flexible working and job sharing. Has further
consideration been given to that area? While I am speaking, I will ask you please not to stop talking about socioeconomic issues in relation to diversity. All the recent education reports show that there are very big problems there that will need addressing.

**Baroness Hale of Richmond:** I will say two things by way of introduction. First, I give frequent lectures on this subject, and I would like to draw attention to one I gave last year on diversity in the judiciary: the Kuttan Menon lecture. I am about to give one in honour of Fiona Woolf of the Law Society on Friday. I have a lot to say about this subject. I am not going to bore you with it now, but you can read about it if you wish. The second thing I would like to say is that the Deputy President of the Supreme Court no longer has any role to play in appointments. This was a move that was made to diminish the traditional influence on the appointments process, just as I was appointed.

**The Chairman:** We would love to see a copy of your forthcoming lecture, if that can be arranged.

**Baroness Hale of Richmond:** Subject to the fact that I do not have any role in appointments, I take your point that one of the things that is necessary is to try to increase the pool of people who are considered eligible for membership of the Supreme Court. Given the sort of court we are, dealing with a wide range of points of law of general public importance, a large amount of trial experience is not really as necessary as it is in the Court of Appeal, when you are basically hearing first-tier appeals from trial judges. It seems to me that there is scope for direct entry, not just from the Bar but from other places too. That is one thing that we could look at.

Another thing is to look at those up and coming judges from diverse backgrounds, both ethnic minorities and women, and see how we can encourage others to develop their career so that they look like credible candidates for the Supreme Court. I am as strong as anybody else that it is necessary to try to get the best people; I just do not accept that the best
people are all white, male former barristers from a limited range of educational establishments. There are other places where we can look. We ought to think about that and about who is good and who we can ensure has the right experience.

Q11 Lord Lester of Herne Hill: I wonder whether you would think about two problems that have not yet been mentioned. The first is that when I go to the gifted women in my chambers and urge them to go to the Bench, they refuse. They do so for various reasons, not entirely because of money, but they refuse. I have failed so far to persuade any of them to apply to be judges. The conditions in which judges serve seem to me to be relevant; I wonder whether you agree. The second problem I have experienced is with the quota or target system in Strasbourg, and for that matter in Luxembourg. Especially in Strasbourg, the fact that politicians insist on the need to include at least one woman among the judge candidates has, in my experience, led to bad governments putting forward bad candidates who were women. Therefore the Strasbourg court has been weakened by the equality policy that I fought for for more than 40 years, because the gender of the candidate has been used rather than the quality of the candidate. Much as I agree with everything that has been said in evidence, it seems to me that these are two problems that someone needs to think carefully about: the problem of conditions leading good women in particular, in my experience, to refuse to serve, and the problem of a target system having perverse, unintended consequences.

Lord Neuberger of Abbotsbury: On the first point, your experience mirrors mine. This applies to men too, but a surprising number of the women I have encouraged to apply have not wanted to. Some of the reasons are completely insoluble in that they are inherent in what being a judge involves. Some relate to money, which I suspect is, these days, probably inherent too. There are other miscellaneous reasons. All one can do is to keep on trying to persuade people, and I entirely agree with you and Lady Hale that that is worth doing.
Indeed, we are doing research into that, into part-time work, which Baroness Taylor of Bolton referred to, and into recruitment, getting ready for 2018 process and the one before that.

As for your second question, after all my time in the law, one piece of law that I have complete confidence in, as I have said more than once, is the law of unintended consequences. Whenever you introduce an idea that seems good, such as requiring one out of three nominations to be a woman, you have to work out what unscrupulous people will do if you introduce that rule. It is an example of where one has to be very careful of skewing the market. It does not mean that one should not do it, but that one should be very careful before one does it.

**Lord Powell of Bayswater:** There is one more thing on this subject of diversity. When we published our report in 2012, and proposed targets after five years if there was no progress, we ran up against this argument that you must not put quality at risk. Of course we do not want to put quality at risk, but on the other hand, when one looks around the world, particularly at parts of northern Europe, one sees that far greater progress has been made and that the instruments of making it have been either targets or legislative decisions. I have not noticed the Scandinavian legal system collapsing in chaos or producing second-class judgments. Would accepting non-mandatory targets not be an extraordinarily good signal even if it did not necessarily lead to rapid change? Lord Neuberger, you said you did not object to targets. It seems to me that the price of targets is extraordinarily low yet the positive political and cultural effect could be extremely beneficial.

**Lord Neuberger of Abbotsbury:** I find it quite difficult to answer that question. We should not be too proud to look at what happens in other countries, to see what they have done, how they have done it and whether we can learn from it. Equally, one has to be very careful about importing something from another country, because something that may work in one
context may be a disaster in another context. One has to be careful, but I quite accept that it is absurd and arrogant not to see what happens in other countries. Targets are fine, but it depends, first, on what the targets are, and, secondly, on what happens if you do not meet the target. It may be that having targets will influence and improve people’s mindsets, but the worry about targets is that they will be used to beat us about the head if we do not live up to them.

Alternatively, if we are so concerned about that that we persuade whoever sets the targets to set them very low, people will be critical of us for having set them low. It may also lead to the sort of problem that Lord Lester has identified. I am not particularly keen on targets, but I cannot pretend to have sufficient experience of them to oppose or support them. Lady Hale, who knows more about this area, may have views on this.

**Baroness Hale of Richmond**: Before you get to targets, in my view it would be good if we could have it made clear that it is lawful to take the need to improve the diversity of the collegiate court into account as part of the selection process, without of course compromising merit, which it does not have to. We already not only have to take having appropriate expertise from Scotland and Northern Ireland into account; we actually have to ensure it. We may well, in the future, have to do the same for Wales. That has in no way compromised the merit of the Supreme Court. I would like it to be clear that it is lawful to take that into account. It might even become a duty for the appointing commission to seek to ensure a more diverse court, but it should at least be made clear that it is lawful to take it into account. I would go there before I went to targets, because targets are no good unless they are achievable.

**Lord Powell of Bayswater**: One should do both. Take the two parts together.

Q12 **Baroness Wheatcroft**: I want to ask you about a different sort of diversity: diversity in the court system itself. I know this is not an area in which you have power, but
as you said earlier you have a lot of influence. There are some interesting experiments going on, for instance with the Liverpool community court, which starts from a different principle: dealing holistically with people who find themselves in front of the Bench time after time. As far as I can gather, these experiments are not likely to be replicated. I wondered about your views on whether it was time to look for more diversity in the court system.

Lord Neuberger of Abbotsbury: It partly depends on whether you call it part of the court system. Depending on the precise nature of the procedure, you could argue that it is not a court and is more a question for government policy than for the Lord Chief Justice or the President of the Supreme Court. It is sensible to try new systems, because whatever your views of prison, who should go to prison and how long they should go for, it is the last resort. If you can find something better, in particular if you can find something that has a greater success rate in getting people back on to the straight and narrow from where they have strayed, it must be worth trying. As matter of principle, any system, whether it has been tried abroad or in this country, should be given a go and, if it works, should be taken up. I cannot go further than that, but speaking as a judge I am certainly not against—indeed I am in favour of—trying other things that may work better for some types of criminal than the court system.

Baroness Hale of Richmond: There was a specialist court in Liverpool. In London, there is the specialist family court dealing with parents with drugs and alcohol problems, which has been enormously successful and could do with being repeated elsewhere in the country. The key to that, I believe, is two things. One is access to the services that these people need, which is also true of the Liverpool court dealing with criminal cases. The other is bringing cases back to court very frequently to keep an eye on them. That seems to have worked extremely well. I support the suggestion that you are putting forward in those two contexts.
Baroness Wheatcroft: My concern is that in the short term these are quite expensive to operate, which does not bode well at the moment for what might happen.

Q13 Lord Lester of Herne Hill: I realise that both of you have dealt with the relationship between the Supreme Court and the European Court of Human Rights in your lectures and judgments, but not here. Could you summarise, briefly, how you see the dialogue between yourselves and Strasbourg? I would then like to ask a specific question about precedent and section 2 of the Human Rights Act 1998.

Lord Neuberger of Abbotsbury: Under section 2 we have to have regard to the decisions of the Strasbourg court. The general presumption, particularly if there are a number of decisions of court sections, the smaller courts, all of which point the same way, is that we would normally follow them. If there are decisions of the Grand Chamber, we would normally follow them. Initially, the attitude of the courts in this country was that we would almost certainly follow all decisions. More recently, as we have developed and matured in our relationship with and knowledge of the Human Rights Act, we have perhaps become a bit more self-confident. We have to remind ourselves of two things. One is that in the end we are the court in the United Kingdom that decides issues and we have to decide what we think is right. Secondly, we have to bear in mind that one of the purposes of the Human Rights Act was to ensure that you did not have inconsistent decisions in this country and in Strasbourg. If we depart from Strasbourg, particularly if it is a strong decision of the Grand Chamber or a consistent line of section decisions, we should think long and hard before doing so. There is no doubt that we can and do depart from Strasbourg decisions. Lord Lester, you rightly used the word “dialogue”; sometimes it is our duty to tell Strasbourg to think again. To be fair, on a couple of occasions we have done that and Strasbourg has thought again and changed its mind. There could in principle be occasions where we tell Strasbourg to think again, they think again and stick to their view, and we then have to
decide whether we stick to our view or follow Strasbourg. I have no doubt that 10 years ago the answer from more or less any judge would have been that we follow Strasbourg. Now, I think that more judges would be prepared to contemplate not following Strasbourg, but we are in a speculative area. That is how I see things at the moment.

Lord Lester of Herne Hill: Thank you very much. I assume from what you said that you are not talking about the cases in which the United Kingdom itself has been found in breach of the convention, where there is a duty on all branches of government to abide by the judgment. Leaving aside that kind of case, Lord Pannick has argued in a Times article that it is necessary to amend section 2 in order to achieve what you have just referred to. Speaking for myself, it does not seem that he is right; it is unnecessary because what you have just said indicates that we are in exactly the position that he advocates.

Lord Neuberger of Abbotsbury: I can understand why he may suggest it. First, the attitude of our courts has become a bit more independent and self-confident over the 14 years that we have had to administer the Human Rights Act. Secondly, and this is something for the legislature not for the judiciary, it may be that an amendment would send a legislative message to the courts. However, I rather doubt whether it is strictly necessary. Again, Lady Hale may have views on this.

Baroness Hale of Richmond: I have no contrary views from those which you express. I think there is a distinction when we are talking about human rights and the Human Rights Act between cases where there may be a view that Strasbourg has gone too far—as there is in relation to one or two issues where we may want to say, “Please think again”, and where we may say in due course if we think they have done things that are contrary to fundamental principles or misunderstood our situation, “We will not follow you”—and situations in which we think Strasbourg has not yet gone far enough. Those who promoted the Human Rights Act were very much in favour of our developing a distinctive United Kingdom human
rights jurisprudence, which might involve our doing things that Strasbourg has not yet done or not yet thought about. It is in that area that we are beginning to think a little more beyond the mantra, “No more, but certainly no less. No less, but certainly no more”, which came out of two cases a few years ago.

**Q14 Lord Lexden:** Could I ask for your reaction to the Lord Chancellor’s statement that the Human Rights Act should be replaced so that our Supreme Court can be wholly supreme and our relationship with the European Convention on Human Rights altered? The Lord Chancellor’s views are almost certain to be incorporated into the next Conservative party manifesto.

**Lord Neuberger of Abbotsbury:** The last point you make indicates how very careful I, as a judge, have to be in answering that question. I cannot answer it, first, because it is a political question, and, secondly, because—I do not mean this impolitely to the Lord Chancellor—I cannot really know what he is proposing until he is more specific. I would not be in a position to answer, and if I did have a specific proposal in front of me I would want to confine myself to the legal and judicial/administrative implications rather than the political ones.

**Q15 Lord Goldsmith:** Staying in Europe, may we move from Strasbourg to Luxembourg? A similar issue to the one raised about the relationship between the Human Rights Act and English decisions may arise in relation to European Union law. The HS2 appeal gave rise in two particular ways to issues that are of interest to us, and I wonder whether you are able to comment on them—I recognise the limitations on what you can say because these matters may come before you at some future date. One was a concern that was expressed I think at least by you, Lord Neuberger, and by Lord Mance about whether there was variation from what the directives had been saying as a result of judicial interpretation. That troubled you.
Secondly, might there come a point at which the way in which European Union rules develop creates a conflict with fundamental constitutional principles that we recognise? In that case it was, in particular, article 9 of the Bill of Rights and the relationship between the courts and Parliament. Might that lead to a situation in which, notwithstanding the fact that in this case it was the European Communities Act 1972 rather than the Human Rights Act 1998, the courts might find that they should not follow what European Union law was on that particular point? Any extent to which you can comment or expand on that would be very helpful, although I recognise the limitations.

**Lord Neuberger of Abbotsbury:** I start by saying that most of the press coverage when it comes to European courts, and I think most of the political argument and heat, concentrates on Strasbourg. I recommend a lecture given by my colleague Lord Reed, one of the Scottish Supreme Court justices, who says that we should think more about Luxembourg than Strasbourg. Decisions by Luxembourg require our courts to follow them even if they are contrary to primary legislation passed by Parliament, which does not happen with human rights. Lord Mance and I expressed concerns, in a judgment which others, including Lady Hale, agreed with, about two factors. One was the European Court of Justice and Luxembourg effectively rewriting rather than interpreting directives, which, as we pointed out, undermines to some extent the judicial function. It also places us in a difficult position, because as a national court we have to refer to Luxembourg any case where we think the law is uncertain. If Luxembourg starts interpreting directives and regulations in an unexpected way, we may start to think that nothing is predictable about what Luxembourg may decide, and so refer everything. Luxembourg is already complaining about being overworked. There is therefore a principled and a practical objection to what they did in that case.
The second concern was that there was a strong indication that in order to decide whether a piece of legislation complied with European environmental requirements, the court—in this case the Supreme Court, a national court—might have to look at the debate in Parliament, consider how many MPs or peers had turned up, see what the quality of the debate was like and see what the information available was like in order to decide whether a proper decision had been made. This crosses the first line or lesson that any law student would learn about the functions of the court and Parliament. Although we have no written constitution, there comes a point where the courts may have to say to Luxembourg that they can be as clear as they like about this but we cannot go there. In Germany, where they have a written constitution, they can do that very easily, because they simply cannot go outside their constitution. We have a much more limited constitution in so far as we have one at all. We have constitutional instruments such as the Bill of Rights, including article 9, to which Lord Goldsmith referred. The difficult question for us may be whether, when Parliament has said that we have to follow Luxembourg decisions, which is the effect of the European Communities Act, it really means that we can trample over article 9. I am sorry; that is a long answer.

The Chairman: It is a very interesting one. I am conscious that we are into injury time, which you kindly indicated you could endure a certain amount of. I would like to give Lord Brennan a chance to ask about legal aid.

Q16 Lord Brennan: Having regard to the constitutional principle of the rule of law, how important is the link between legal aid and access to justice? Secondly, in particular, because of cuts, we may reach the stage where a group in society is adversely affected by an issue and wants to take it to court, and it is a point of general public importance. Is there a prospect—you have said that your minds are open to new ways of doing things—of a fast-track system in the court regime, where points of obvious public importance that otherwise
would not be tried because of cost problems could reach you? I am not suggesting that we follow this example, but that happens in India with public interest applications to the court.

Baroness Hale of Richmond: Following Lord Neuberger’s example, we have to be extremely careful how far we trespass into what are, essentially, political and budgetary questions. However, both of us have expressed concern that if people are unable, because of lack of resources, either adequately to defend themselves against civil claims or criminal charges or to pursue perfectly proper claims, that is an issue for the rule of law, access to justice and community cohesion. We both believe that a healthy, functioning legal system whereby people believe that their rights can be upheld and that they can defend themselves is an essential part of a healthy society. We think that is an extremely important principle. It is not only legal aid that causes problems; it can also be court and tribunal fees. I have heard that people with small claims for unpaid wages, for example, which they used to be able to take to employment tribunals without having to pay a fee, are no longer able to do that because they cannot afford the fee or because it is not worth their while to pay the fee. There are a range of issues here about access to justice, particularly for very disadvantaged people who have very marginal decisions to make about what it is worth spending their very limited resources on.

Another serious problem that results from taking whole areas of importance to ordinary people out of the scope of publicly funded legal services is that they are taken completely out of the scope. You cannot even get advice that might help to nip the problem in the bud. We understand that there are serious difficulties here.

The other thing that you asked about was almost at the other end of the spectrum: a big question. Experience tends to show that somehow or other people find the resources to bring these huge questions to court and then come to us. If you are suggesting that they should come directly to us rather than having first gone through at least one tier of the
justice system, I think we would all be a little nervous about that, because arguments develop such a lot in the course of being dealt with at different tiers. We always say in relation to Privy Council cases that we do not like people finding new points to raise at our level when we have not heard the views of the courts in the country from which the case comes. One likes to have the thing thoroughly thrashed out by somebody else first. That may be selfish of us. We could increase the number of cases that come via the leapfrog procedure, so that they go to the High Court first but then come to us. We could do that, which would save money. I think we are generally sympathetic to attempts to broaden that.

**Lord Neuberger of Abbotsbury:** I agree with everything that Lady Hale said on both points.

**Lord Lester of Herne Hill:** The problem about the leapfrog procedure is that you would have to change the wording of the statute. The problem that Lord Brennan raised, it seems to me, might be addressed partly by more use of protective costs orders at the beginning, so that the person concerned knows that even if they lose they will not have to bear the other side’s costs and that, in certain circumstances, if they lose they might have their own costs borne in any event. I wonder whether a more creative use of that mechanism might be thought about in the Supreme Court.

**Lord Neuberger of Abbotsbury:** We have made protective costs orders. The problem is that it is often difficult to tell whether a case is as important, or as unimportant, as it appears to be. Until you have thrashed it all out in court, you cannot tell. It has happened more than once that a case that seemed very important was not actually on analysis, and vice versa. However, I have to say that I think the protective costs order is a valuable weapon and one that should be used in the sort of cases which Lord Brennan has referred to. It could be used more than it has been.

**The Chairman:** Thank you both very much for giving us your time and being so forthcoming and interesting in your answers. We are most grateful.
Lord Neuberger of Abbotsbury: Thank you very much for listening to us and for your questions.