Select Committee on the Constitution

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

Wednesday 29 March 2017

10.30 am

Watch the meeting

Members present: Lord Lang of Monkton (The Chairman); Lord Beith; Lord Brennan; Lord Judge; Lord MacGregor of Pulham Market; Lord Maclennan of Rogart; Lord Morgan; Lord Norton of Louth; Lord Pannick; Baroness Taylor of Bolton.

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

Witnesses

I: The Rt Hon Lord Neuberger of Abbotsbury, President, Supreme Court; The Rt Hon Baroness Hale of Richmond, Deputy President, Supreme Court.

Examination of witnesses

Lord Neuberger of Abbotsbury and Baroness Hale of Richmond.

Q1 **The Chairman:** President and Deputy President, welcome to our Committee. We are very grateful to you for finding time to come and see us again, and we much value these occasions. We meet on a constitutionally important day. We have a range of questions that we would like to ask, but let me start with one or two Brexit-orientated ones. What impact do you think the UK's forthcoming departure from the European Union will have on judicial review applications, and would you, President, need increased resources to cope with such matters?

Lord Neuberger of Abbotsbury: Because we are in uncharted territory and have not even seen the shape of legislation, one is obviously in an area of speculation. First, in terms of actual EU law issues, assuming to put it simply that the current corpus of EU law is made UK law, that in itself should not increase the work of the courts.

At the moment, anyone who wants to raise an issue of EU law has to raise it in the UK courts, and if it is appropriate it comes to the Supreme Court. The only difference will be that if, under the present arrangements, the point is uncertain or unclear, we have to refer it to Luxembourg, to the Court of Justice of the European Union. Under the new regime, we will presumably decide the points ourselves. However, deciding a point as opposed to deciding whether a point is sufficiently unclear to be referred is not a great difference. That aspect, therefore, should not increase our work greatly.

The issue that may increase our work, which you allude to, is the fact that, as one gathers, much of the legislation will be in the form of statutory instruments and secondary legislation. The difference between statute or EU law and secondary legislation is of course that secondary legislation—statutory instruments—can be reviewed by the courts. There must therefore be a possibility of increased litigation relating to statutory instruments and the law as contained in secondary legislation.

My own hunch, and I cannot put it much higher than that, is that there will not be a great deal of extra litigation, because, at least initially, the secondary legislation will contain current EU law. It is hard to think that that could be challenged on classic judicial review grounds. But as Governments change the law over the next 10 or 20 years, or however long it takes, and do so by secondary legislation, there is a possibility of increased litigation.

Whether the Supreme Court, with 12 justices, can cope with that remains to be seen, but I would have thought it very likely that it would be able to. If it cannot, it may well be appropriate to draw on judges who are not members of the court but who are entitled to sit there—retired judges, provided that they are younger than 75; members of the Court of Appeal and the Inner House, and so on—in order to cope with what may be a

temporary bulge of work. I would have thought that is as high as it would get, if it gets there at all.

The Chairman: Thank you very much. Deputy President, would you like to add anything?

Baroness Hale of Richmond: No, not to that, thank you very much, Chairman. I agree with everything that Lord Neuberger has said.

Lord Pannick: The President mentioned the Court of Justice in Luxembourg. One thing we do not know is whether it will have any continuing role and what it would be after March 2019. Could you say something about the working relationship between the Supreme Court and the Court of Justice? We often hear about dialogue between the Supreme Court and Strasbourg, but we hear less about the relationship between the Supreme Court and Luxembourg.

Lord Neuberger of Abbotsbury: Yes, the dialogue between us and Luxembourg tends to be more one way, in open terms. First, when we refer a case because it raises a point of difficulty or refer an issue, we sometimes give a judgment saying what we think the answer may be, if we are all agreed or have a clear majority view. Sometimes we will just refer the issue. One thing we slightly regret vis-à-vis Luxembourg and the CJEU is that it is less likely to take on board what we have said, at least on the face of its judgments, whereas the Strasbourg court is clearly more prepared to take on what we said.

Secondly, it is more difficult to engage with Luxembourg than Strasbourg—more difficult to engage with the Court of Justice of the European Union than with the European Court of Human Rights. If we think that the European Court of Human Rights has taken a wrong turning and misunderstood our law or should reconsider its decision, we can refuse to follow it. We can explain why and then the Strasbourg court may change its mind, as it has done on more than one occasion. With the CJEU in Luxembourg, we cannot do that, although sometimes we find its decisions somewhat impenetrable and may refer back to it saying "Could you please clarify?"

However, there are also communications behind the scenes. We—the judges from the Supreme Court, the Court of Appeal and the Inner House, and from Northern Ireland—visit Luxembourg from time to time and the CJEU comes to see us. My own view is that that should continue, at least for the time being. If we have issues of EU law that will now become UK law, they will make decisions on legislation in the European Court of Justice for EU purposes, and we will make decisions in our courts on identically worded legislation in the UK. It seems sensible to maintain contact with them to discuss matters of mutual interest for the benefit of the people of this country and the people of the EU.

Q2 **Lord MacGregor of Pulham Market:** The Lord Chancellor told this Committee a few weeks ago that, "protecting legal certainty and continuity" over Brexit was extremely important. Do you have any thoughts

on how legal certainty and continuity should be provided for in the run-up to and in the aftermath of Brexit?

Baroness Hale of Richmond: That follows on very neatly from what the President has just said, because one major concern that we have in the court, and probably throughout the judiciary, is that it should be made plain in statute what authority or lack of authority, or weight or lack of weight, is to be given to the decisions of the Court of Justice of the European Union after we have left, in relation both to matters that arose before we left and, more importantly, to matters after we leave. That is not something we would like to have to make up for ourselves, obviously, because it is very much a political question, and we would like statute to tell us the answer.

The other question that will be of some importance is that quite a lot of European Union law cannot simply be taken into UK law by the proposed mechanism, because it involves what are basically multilateral treaties. I am thinking of the Brussels regulations on jurisdiction, choice of law, recognition and enforcement in civil matters, family matters and the like. Obviously, if those are to continue to be part of UK law there will have to be multilateral agreements with other member states that they agree to our remaining part of that club, should we wish so to do. If that is what happens, there will then be jurisdictional questions about how it is to be interpreted and whether it can be done. For the remaining member states, it will obviously be done by the Court of Justice of the European Union. But what about us? Would there be a new court or would it be the Supreme Court? Those are two crucial questions that we need to have resolved.

Lord MacGregor of Pulham Market: They are not much discussed yet in the context of all the Brexit negotiations.

Baroness Hale of Richmond: No.

Lord Neuberger of Abbotsbury: I think this enforcement question is important both for the rule of law and for maintaining London as one of the international legal services centres—many people might say the international legal services centre—as well as for questions involving children. With the increased internationalisation of people coming from different countries to different countries, the interests of children and concerns over criminals, such as repatriating criminals, are very important.

Lord MacGregor of Pulham Market: On a slightly wider tack, and you have slightly hinted at this, we obviously face what I think is going to be the mind-bogglingly monumental task of converting the body of EU law into UK law. Are there ways in which the Supreme Court and indeed the wider judiciary might work with the Government and Parliament to contribute to that task?

Lord Neuberger of Abbotsbury: On the one hand, judges have to be very careful not to get involved in law-making. The whole existence of the Supreme Court is attributable to the fact that it was thought that the judges should not be in Parliament. Having said that, the judges, like all other

parts of the state, want this country to be as successful as possible, so we have a duty to help as much as we can. In that connection, after conversations between the Lord Chief Justice, the Lord Chancellor and me, a group has already been set up, including three judges, to discuss this with the Attorney General[1], the Treasury Solicitor and the Permanent Secretary to the Ministry of Justice to try to ensure that we give as much help as we can on the sorts of issues that Baroness Hale was describing. We should not only be prepared to do that; we should be eager to do it. It is all very well for us to complain if the end product lands us in difficulties; if we have not helped and instead have tried to avoid those difficulties, we will not get much sympathy.

Q3 **Lord Morgan:** We had a series of very significant statements by the Supreme Court about the question of legal certainty in the case of Mrs Miller, in which my colleague Lord Pannick was involved, which in a way was fortuitous. Mrs Miller was a lone protester who won her point in the courts. It is fortunate that this was done, because we benefited from it hugely, and I hope the Government benefited from the wisdom of the Supreme Court. Would you think there was any merit in having a more formal arrangement on that? In effect, the Supreme Court, by pronouncing the eternal verities on the sovereignty of Parliament, acted as a constitutional court, as they have in France and other countries. Would you feel that a more formal structural relationship for that could be created?

Lord Neuberger of Abbotsbury: If you are talking about a formal constitution, the arguments for and against a formal constitution in this country have been much debated, and there are clearly strong arguments on both sides. Among independent sovereign countries, New Zealand, Israel and the UK are the three that do not have formal constitutions. The rest do. On the other hand, it could be said that this country—uniquely, I think, of any substantial country—has survived more than 350 years with stable government, no revolution, no tyranny and no invasion, and if it ain't broke, don't mend it.

It is quite a difficult issue, not least because with devolution and our coming out of the EU it could be said that things are in a particular state of flux—there are debates about what precisely should be done with this House in terms of membership and so on. There is obviously a powerful argument for a written constitution. I am probably no more competent to express a view than most other people, but I would be slightly wary of a written constitution. We are developing a sort of constitution through statutes, although that is not technically a constitution. It might be said that we could tidy up our devolution laws in a more structured way. Perhaps doing it in that way, bit by bit, is better than trying for an overall constitution, which is foreign to our history and would probably be a mistake.

Lord Morgan: Does it worry you that there were a number of fortuitous elements, including the ability of Lord Pannick and the fact that it came to you and the other justices, that led to us having a view on this? There was

[1] The witness later clarified that it was the Secretary of State for Exiting the European Union, and not the Attorney General, who was a member of the group

an extraordinary theoretical and philosophical void prior to the pronouncement of the Supreme Court.

Baroness Hale of Richmond: It strikes me, following on from what Lord Neuberger has been saying, that I do not know of a written constitution that would answer the question that we had to answer in the Miller case. Although they tend to say, "There shall be an Executive and it shall do what Executives do, and there will be a legislature and it shall do what legislatures do", the precise division of roles regarding what is an Executive role and what is a legislative role would probably not be answered in any written constitution. Obviously we believed that we were in a position to define that difference in the Miller case, but I am very interested in the point that you make, because it was indeed fortuitous. It was not only Mrs Miller; there were two claimants and others who would have brought the case had she not done so, so there was quite a collection of people. Nevertheless, if someone had not brought the case, we would not have been in the position to say to the Government, "You can't do it". And that is an interesting question.

Lord Neuberger of Abbotsbury: That is, if I may say so, a very good point. If one looks at the United States, its constitutional events after 1776 have mostly tended to be decisions of the Supreme Court of the United States, which inevitably depend on somebody bringing a claim. That raises a point about the happenstance of constitutional events, it might be said.

Lord Brennan: The Lord Chancellor's phrase about protecting legal certainty and continuity, as Lady Hale pointed out, has particular relevance to international commercial arrangements, the Brussels convention being an obvious one. The Lugano convention also applies outside the EU. I can imagine the world of commerce being extremely upset if Brexit allows these kinds of problems simply to be ignored. Can either of you think of any mechanism, existing or proposed, whereby this kind of issue, which is discrete but legally important, can be brought to the attention of the Government?

Lord Neuberger of Abbotsbury: In a sense, that is a political decision. I have discussed this with Lord Mance, one of our colleagues on the Supreme Court and one of the three judges that I mentioned to Lord MacGregor, who is advising the Government. This is a point that he and indeed his two other colleagues have made quite clear to the Government, so if they are not aware of it it can only be because they have not listened. To be fair, though, I am pretty confident that the Government are well aware of it.

Q4 **Lord Maclennan of Rogart:** Lady Hale, you talked in November last year in a speech about the long-standing traditional ways in which the Supreme Court and indeed all her courts have been guardians of our constitutional arrangements. Do you have views about the role of the United Kingdom Parliament and the Supreme Court if we go through the process of exiting the European Union?

Baroness Hale of Richmond: The view I have always expressed is that in large part the courts are the servants of Parliament. It is our function,

when we exercise the judicial review function in relation to the actions of the Government and other public authorities, to ensure that they stay within the bounds of the powers that Parliament has given them and exercise those powers correctly in accordance with Parliament's instructions. That is what I still think we are for. It is our role to ensure that the other organs of state do what you as Parliament have said that they can or should do. It is still the role of Parliament to make the laws and set the boundaries of what the Government can do.

Lord Pannick: I want to follow up on what Baroness Hale said earlier about the vital need for Parliament to make the role of the Court of Justice clear. Do you agree that it would be very odd indeed if your court and other courts were bound by Luxembourg after we leave, given that our citizens will have no right of access to that court? Presumably we will have no power to refer cases to it, so the idea that you are bound by it is very odd, is it not?

Baroness Hale of Richmond: Of course we must distinguish between before and after. We are currently still bound by EU law. That means that, as the final court in the land, if the answer to a question of European law is not clear we have to refer it to the Luxembourg court. In fact, we are still making references to the Luxembourg court, so we assume that if the answer comes back before Brexit, obviously we must apply it. It would be good if we knew what the situation will be if the answer comes back afterwards, given that the litigation started while we were still a member. Clearly with anything that starts afterwards we will no longer be in a position to refer the question to Luxembourg.

The issue then will be what weight if any we should give to the jurisprudence of the Luxembourg court that is relevant to the issue. If, as is so often the case, the Luxembourg jurisprudence is not clear or it is a question that has not yet been asked, we will have to try to work out the answers for ourselves. As Lord Neuberger said right at the outset, that task is no different from that of deciding that something is not clear so we must refer it. Deciding what the answer is is something that we have to do all the time.

Baroness Taylor of Bolton: Presumably the cases that you are talking about that could be started but not completed before Brexit would be judged on the rules that applied when the case started.

Baroness Hale of Richmond: Normally they should be, but not every question is. Some questions depend upon the current state of affairs, but normally they depend upon the state of affairs when they started. That is the general principle. For most of the ones that I can think of, that would be the situation.

Lord Neuberger of Abbotsbury: If I may, I will clarify what I said. When I said it would be sensible if decisions of the CJEU had the same status as decisions of the Supreme Court, as Lady Hale said, that is emphatically a reference to existing decisions of the CJEU. It would be quite inappropriate for us to be bound in any way by decisions of the CJEU after we left the

EU, for the reasons that Lord Pannick gave. On the other hand, if the UK courts had a point on the equivalent legislation here to the EU legislation on which the Court of Justice in Luxembourg had reached the conclusion, it would be silly for us not to be able to look at what they had said, but we would not be bound by it.

Baroness Hale of Richmond: But as I said, we would welcome being told.

Lord Neuberger of Abbotsbury: Quite right.

Q5 **Lord Norton of Louth:** Lord Neuberger, you said in a speech a year ago that open justice is a fundamental ingredient of the rule of law. Do you think the televising of the Miller case helped the public to understand the role of the Supreme Court? Can any lessons be learned for transparency across the wider judiciary?

Lord Neuberger of Abbotsbury: I hope and believe that the filming of the Miller case in the Supreme Court helped to inform the public about the way the courts work and therefore the rule of law. The press reaction to our decision, which was the same as the decision of the Divisional Court, may have been very much more restrained than it was to the Divisional Court's decision partly—it is important to emphasise the word "partly"—because people were able to watch it happening on the screen, which the Divisional Court did not have the facilities to do. As a result of the filming, which was viewed by getting on for half a million people, according to the number of recorded hits, we have had an increase in the number of people visiting the court. I think it has made people more aware of how we work.

I have always been quite relaxed in principle about the filming of what goes on in court. We all accept that people should be free to come into court to see what is going on, subject of course to certain exceptional cases in which secrecy is absolutely necessary. The notion that filming is the equivalent of being in court is quite a powerful one. Having said that, I can see an argument against filming particularly when witnesses or juries are involved, because it can make people embarrassed, and in cases involving serious criminals it could lead to greater problems. In general, though, it is plainly worth doing, because it makes justice more open.

Lord Norton of Louth: So would there be a case for it being open in principle as a general policy for the High Court and above but on a case-by-case basis below that?

Lord Neuberger of Abbotsbury: Undoubtedly there would be a case for that. It ought to be said that when it comes to filming the Supreme Court, we have the money and facilities for controlling the filming. If the Court of Appeal or the High Court did not have control over the filming, that could lead to problems. But in principle I find it quite hard to argue against the filming of courts, given the importance of open justice.

Baroness Hale of Richmond: I would simply express very serious reservations about filming witnesses giving evidence. For most trials it would be really difficult. Although the judge's summing-up might be

perfectly possible to film, I would be very worried about the actual giving of evidence. It is all right for us; we are in court and being filmed all the time, so we are very used to it and we can ignore the cameras. Even counsel ignore the cameras, do they not, Lord Pannick? It would be very different for most witnesses, because for most of them being in court is a one-off experience. The last thing we want is the quality of their evidence being distorted by the knowledge that they are going out on the television, which they would be if it were a notorious case.

The other point is control, as Lord Neuberger said. We are very fortunate that our cameras have been discreetly installed, so people are not aware of them and we decide what is broadcast. It would be very different if a court were not in a position to control it in exactly the same way. It has to be done very carefully.

Lord Norton of Louth: Yes, and what you are doing is very different from what happens in a trial court.

Baroness Hale of Richmond: Yes. The whole point of showing our proceedings is to enable people to realise just how dull they are.

Q6 **Lord Brennan:** The Article 50 case produced a lot of personal attacks on the media against some of the judges involved, the kind of attack that many of us cannot remember in recent times. How was it received by the Supreme Court justices and staff, and what do you think about the effect of that on the wider judiciary?

Lord Neuberger of Abbotsbury: One has to distinguish, as I mentioned, between the reception of the Divisional Court's decision in some newspapers, which to my mind was quite inappropriate, and the reception of the Supreme Court's decision. Although the decision was the same, the reception was very different. So far as the reaction to the Divisional Court's decision was concerned, there was a degree of dismay. I think the dismay felt was less in with regard to the Supreme Court, although it was very much felt, than it was lower down, as it were. I think the judiciary of England and Wales felt attacked personally, because the Lord Chief Justice and the Master of the Rolls on the Divisional Court, the two most senior judges of England and Wales, were included. There was therefore considerable dismay about it. As far as the staff were concerned, there was some surprise and dismay as well.

The Chairman: Do you want to add anything, Lady Hale?

Baroness Hale of Richmond: No.

Q7 **Lord Beith:** I would like to quote what the Lord Chief Justice said to us: "Criticism is very healthy. If you have got something wrong, fine, but there is a difference between criticism and abuse, which I do not think is understood. It is not understood either how absolutely essential it is that we are protected, because we have to act, as our oath requires us, without fear or favour". As you have pointed out, the Lord Chief Justice was inhibited from commenting at the time of the Divisional Court decision because he was one of the judges involved, and he pointed out to us that

you, Lord Neuberger, could not say anything as you were going to hear the appeal. That meant that there was nothing any senior judge could do.

The Lord Chief Justice added that "In short, it is the Lord Chancellor's duty" to do the defending to which he referred. After some careful analysis of what had happened, he said, "she has taken a position that is constitutionally absolutely wrong". I think he meant that she should not believe that criticism of the press in this matter; rather, that she should confine herself to making a positive case. Has that all helped? Does more need to be done to promote the understanding, which the Lord Chief Justice said was lacking, of the nature of the judicial role?

Lord Neuberger of Abbotsbury: Clearly the judges have the function of explaining their role and function to the public, but so too does the Lord Chancellor. Indeed, Section 1 of the Constitutional Reform Act makes clear that although that Act has made substantial changes to the role of the Lord Chancellor and indeed many judges, it was not intended, and it says so in terms, to alter the Lord Chancellor's function in relation to the rule of law. That is in the very first section of the Act, as I am sure everyone in this room knows. The Lord Chancellor has a particular duty to speak up when the Lord Chief Justice and the President of the Supreme Court are hampered by the fact that they have been or are to be involved in the case and therefore cannot speak up.

It is not an issue of freedom of expression. If, as has been said, newspapers had the right under freedom of expression to be critical of the judiciary—indeed, many would say that they were worse than critical and in fact abusive—surely freedom of expression entitles the Lord Chancellor to correct and criticise what they say, and in my view Section 1 of the Constitutional Reform Act means that she has a duty to do so. Therefore I agree with what the Lord Chief Justice said. As I said, that does not mean that we should sit back and leave it all to the Lord Chancellor. That would be quite wrong. Unlike judges 50 or 60 years ago, we have a duty to speak, but we have to be careful what we speak about. We cannot speak about our decisions, because that would just muddle what we said in our judgments if we started to explain ourselves. We cannot speak about issues that we are going to have to decide, because then people would justifiably object to us trying the cases. And we cannot go into political issues, because that is not our function. We expect government Ministers to keep off our turf, and we have to keep off theirs. There are some grey areas, such as legal aid, that are political issues but on which we also have a duty to speak. Apart from them, though, we have to be very careful about not treading on political territory.

Lord Beith: Are there different circumstances—not in the case that we have just been talking about—in which you would feel that you had to speak out because the Lord Chief Justice was prohibited by having been involved in the case, or will you always be in the position that it is at least theoretically possible that a matter would come to the Supreme Court?

Lord Neuberger of Abbotsbury: If, let us say, the Government had decided to accept the decision of the Divisional Court and not to appeal, I

would have spoken out. However, I would not have done so without discussing it privately with the Lord Chief Justice, because one of the most important hinge points of the judiciary is the relationship between the Lord Chief Justice and the President of the Supreme Court. Although I do not want to devalue my own role, the Lord Chief Justice has a peculiarly demanding and wide-ranging role, and I have to be very careful before doing anything that might make his role more difficult.

Lord Beith: You referred to this a year ago when you came before the Committee and said that the Lord Chief Justice and the President of the Supreme Court must mutually respect each other's functions. Is that really a problem?

Lord Neuberger of Abbotsbury: It is not a problem, but it is one of those things that one can too easily take for granted and forget. I have occasionally given a speech about something and, as I was speaking, thought to myself, "I should have told the Lord Chief Justice that I was going to say this". One just has to bear it in mind. It should not be a problem and indeed it is not. However, if it turns out to be one because one has taken it for granted, one is really in difficulties.

Baroness Hale of Richmond: It is not only the Lord Chief Justice, of course. There is also the Lord President in Scotland and the Lord Chief Justice of Northern Ireland. We are always very aware that we are a United Kingdom court and separate from the national courts, and they have different jobs to do.

Q8 **Lord Judge:** I would love to ask a lot of questions of Lord Neuberger about the times when he spoke when I was Lord Chief Justice. I do not remember too many occasions when I was deeply offended by anything you said. However, let me ask you a lovely simple question. You have referred to the rule of law. Are there any aspects of the rule of law and its application in this country, any diminutions or concerns, that you and the Deputy President wants to draw to our attention?

Baroness Hale of Richmond: There is one specific matter that concerns us somewhat, because it is looming on the horizon. It is our view as judges that the quality, independence, integrity and professionalism of the legal profession are essential to the proper administration of justice and the rule of law. It is not our role to speak up for the legal profession—we left that many years ago—but it is a rule of law issue. The present system of regulation for the legal profession is very complicated, but it was a very carefully worked-out balance between different types of regulation and different regulatory bodies.

There is a concern at the direction of travel at the very top of that system in relation to the Legal Services Board and a document that it produced at the end of last year. It expressed the view that one of the regulatory objectives in the Legal Services Act was problematic: the objective of encouraging an independent, strong, diverse and effective legal profession. They seemed to think it problematic because the independence of the legal profession might be seen to conflict with consumer interests. The whole

point about the independence of the legal profession is that you are independent of your clients; your duty to the court comes before your duty to your client. Obviously your duty to your client is incredibly important, but that is true whichever branch of the legal profession you are in. That is what that objective is about maintaining. So if the top regulator thinks that is a problem, it is a problem for us and for the rule of law. It is very much a straw in the wind or a cloud on the horizon, or whatever, but we thought it quite important to draw it to the attention of this Committee, so that, in a rule of law sense, you can keep an eye on it.

Lord Judge: Just the one?

Baroness Hale of Richmond: That is the one we wanted to bring up. There are no doubt many others, which we have touched on in the course of our conversation so far.

Q9 **Baroness Taylor of Bolton:** You have just touched on legal professionalism, so can we turn to judicial appointments? I have a quote from Lord Neuberger saying: "The higher echelons of the judiciary in the United Kingdom suffer from a marked lack of diversity and here I must admit the Supreme Court does not score … well." We are told that two or three appointments are likely this year, and maybe a couple more next year. I suppose the question is: what are you doing to ensure that there is greater diversity? This is also a question about the main barriers and disincentives. Why are people not coming forward? Is it because you have to have full-time sitting judges? Is it because of the retirement age, or because the pool is not great enough? What is the core of the problem, and what can actually be done about it?

Lord Neuberger of Abbotsbury: So far as the core of the problem is concerned, the traditional recruiting ground for the Supreme Court is the Court of Appeal of England and Wales, the equivalent Inner House of Scotland and the Northern Ireland Court of Appeal. If one is concentrating on gender, historically they have been very male. The Court of Appeal and the Inner House now have a much better proportion of women. They are still nothing near 50%, but they are significantly better than they were.

One thing that we have been doing is to cast the net more widely. The Supreme Court is quite limited in who it can look for. There is obviously the academic world and practising lawyers, but one has to bear in mind, particularly with practising lawyers, that there may be an effect on the recruitment of the judiciary. People will think, "If I can go straight to the Supreme Court, why should I become a High Court judge or go to the Court of Appeal?" There is a balance.

Secondly, there is the familiar problem—again, this is a gross generalisation but it has some validity—of women being less prepared to put themselves forward and less self-confident than men. That, again, is improving. In relation to that, we have a duty to go out and encourage people to apply, and we have been doing so. For instance, in relation to the recent competition, Lady Hale and I agreed that she would take steps to go out and talk to likely possible applicants, and to make herself

available to be talked to. When we launched the recent competition, we broadcast the fact that we had what we called insight visits. Anybody who thought that they might like to apply but did not really know enough about us and the job could come for a day to see what goes on and meet one of us—Lady Hale or one of my colleagues; not me, because I am on the panel that selects—to discuss what is involved and be able to answer their questions.

You mentioned being part time. Legislation that was initiated in this House, with our support, now enables us to have part-time members of the court. That is made clear in the material that we put out in relation to the competition. Indeed, we issued some guidance on part-time working in the job information pack. We are also applying the equal merit provision, so that if there are two equally good candidates we would appoint the minority applicant.

It is right to add that grouping the vacancies together, which is not that common but we have two or three this year, was wholly Lady Hale's idea. I think it is certain to be three vacancies next year. That encourages and enhances the possibility of greater diversity. I have concentrated on women, but the same applies to any minority group.

Baroness Taylor of Bolton: Can I ask about the insight visits? How many people are we talking about who came through? Maybe Lady Hale can give us some idea.

Baroness Hale of Richmond: Not many people took up the offer and came, but some people did. We have found that because we actively said, "Don't be shy. Think of applying if you think that you meet the very stringent criteria for appointment", the number of candidates has been much higher and much more diverse than in previous years.

We should not forget that every one of the justices from England and Wales will have retired, compulsorily, by May 2020. That is nine justices, and it is of course a great challenge for the court in trying to maintain continuity, quality and everything else. But it is also a great opportunity for us to attract a court that will look and be a little different from the one that we have at the moment. I hope of course that it will be of even better quality than the one we have.

Baroness Taylor of Bolton: That might be difficult. Are you saying that it does not matter if people have not come up through the courts with that experience as long as they have some academic or other experience that you think is appropriate? That might alter the balance of experience on the court to a certain extent, even though it might be relevant.

Baroness Hale of Richmond: Yes. The point is that people have to be outstanding lawyers. They have to be able to express themselves clearly, properly and accurately. They have to have the judgment to know what you can develop and what you must keep the same. It is really difficult. Clearly, some previous judicial experience is desirable, but of course there are lots of different ways in which you can get previous judicial experience.

Lord Sumption, for example, had never been a full-time judge, but he had been a part-time judge in many capacities. There are other people who similarly have been part-time judges and could become Supreme Court judges.

It is more difficult if you have never done any sort of judging, but then one would have to look at the evidence for judgment, balance and the capacity to make up your mind. That is almost the prime quality that a judge has to have. It is the biggest difference. I was an academic lawyer for a great deal of my career, and the biggest difference between that and being a judge is that not only do you have to make up your mind but the decision that you make will affect people. There are ways of proving that you can do that, but I would not expect there to be a huge influx of people from different professional backgrounds—of course not. Most people are still going to have come through the normal channels, but with 12 justices and so many vacancies there is room for a greater variety of all sorts. Diversity has many dimensions.

Baroness Taylor of Bolton: Can I ask one quick follow-up question? It is about the age profile that we might see, and what impact you think the retirement age is having.

Baroness Hale of Richmond: We have nine vacancies over the next three years because some of us have the privilege of being able to continue until we are 75 and others are having to retire at 70, even though they are still at the height of their powers, which is a great shame. One hopes that it will not have a great effect—people will still be at a certain level of maturity before they are likely to be qualified—but we might have someone who is a little younger. At the moment, it is the Scots who get appointed young. It would be quite good if we had a more youthful English or Welsh member of the court. Equally, some people who have nearly reached 70 could have two years in which they could make a huge contribution. We have recently had two justices who had only about two years to serve. They both made an outstanding contribution to the court, so we must not be rigid in the approach as to who should be appointed—just look for the best.

The Chairman: Are you actively pressing for a change in those age limits?

Lord Neuberger of Abbotsbury: I have been for some time, for two reasons. First, it is a bit quaint that the retirement age used to be 75 and has been reduced to 70 at a time when retirement ages everywhere else are generally going up, or there are no retirement ages. Secondly—we have not touched on this topic, but I think you touched on it with the Lord Chief Justice and Lord Kakkar—there is the problem of recruitment. That problem means that if you are to continue to get first-class judges, they are probably going to be rather older than in the past although there will be exceptions, obviously. To have a sensible judicial career, one would therefore be well-advised to increase the retirement age to 75. I have been in favour of that for some time.

Q10 **Lord MacGregor of Pulham Market:** Following on from that but going a bit further back in the process, as you know we have been taking evidence

on some of these difficulties from Lord Kakkar and others. I am sure you are aware of the difficulties that the Judicial Appointments Commission has been experiencing with applications for judicial roles. The evidence that we have been getting centred on a considerable number of concerns—remuneration, pensions, workplace conditions and diversity—with, latterly, a session on the lack of encouragement for solicitors seeking a career in public life. This will obviously have a knock-on effect on the number of applications coming forward to you. Do you have any views on how some of these issues might be addressed?

Lord Neuberger of Abbotsbury: Pay levels and pension can be addressed in an obvious way, but it is not coming out of my pocket so that it is easy for me to say. The solicitor problem has two dimensions. One is the fact that people on the whole do not think of solicitors—and solicitors do not think of themselves—as becoming High Court judges, even though some outstanding solicitors have done so. Indeed, one of them was Lord Collins, to whom Lady Hale has referred. He eventually got all the way to the Supreme Court but, sadly, was there for only two years because he had to retire. There is still an in-built assumption that it will tend to be a barrister, not a solicitor, who becomes a High Court judge, but that is changing.

The other problem for solicitors is this. As Lady Hale rightly says, you have to think long and hard in appointing somebody to a full-time judicial appointment if they have had no judicial experience. You therefore want people who have been recorders, deputy judges or deputy circuit judges to apply. Now for most sets of chambers and barristers, having a member of chambers who is a deputy judge or recorder is a plus. It is a mark of distinction and probably makes you more marketable as a barrister.

Many solicitors tell me from direct experience that if their partners discover they have applied to become a part-time judge, it may not always lead them to be frozen out but it can lead them to being effectively reduced in importance in the firm because of the way in which solicitors work. This is obviously a gross generalisation and does not apply to all solicitors, but it is a problem with lots of the “Magic Circle” city solicitor-type firms. While they say that they are happy for their partners to become part-time judges, the actuality is slightly different. I do not mean that critically; it is the nature of the beast. But it should be addressed, because there are an awful lot of first-class solicitors out there who would make first-class judges, and I think their working environment and position in the film makes it difficult for them to apply.

Baroness Hale of Richmond: It is the difference between practising in partnership and practising as sole practitioners. If a barrister, as a sole practitioner, takes time away from his practice to do some part-time judging, nobody else in chambers loses any money, whereas if a partner in a big firm of solicitors takes time away from his practice to do so, his partners may well lose money. It is a fact of life, so one has to think of ways in which that could be got round. I have no solution.

Lord Neuberger of Abbotsbury: As for working conditions, it is fair to say that the Lord Chancellor has instituted—at any rate in England and Wales—substantial expenditure, thanks to the Treasury, on improving the courts physically and introducing what one hopes will be a very effective IT system. That will probably have a significant effect on the working conditions of judges. But it is fair to say that, possibly as a result of the Constitutional Reform Act and possibly as a result of the way life develops, a judge's life has become more demanding over the past 20 years—and probably even more over the past 40 years—than before in terms of administrative responsibility and the pressure of work.

Q11 **Lord Morgan:** I am the stage Welshman in this gathering ,but this is an important issue. As you obviously know, there is a justice with specific knowledge on Scottish matters and Scottish law, which is obviously correct. Welsh law is expanding in both quantity and diversity. It throws up separate problems in a whole range of areas such as housing and education, and perhaps health. However, at the moment there is no supreme justice with any specific qualifications in Welsh law or in what is happening in Wales. Might it at some stage be necessary to have such a member of the Supreme Court, and if that is the case what kind of circumstances would trigger off such an appointment?

Lord Neuberger of Abbotsbury: The Constitutional Reform Act requires—I am looking at a note I made—that the justices must between them have knowledge of, and experience of practice in, the law of each part of the United Kingdom. There is no specific reference to any part. The truth is that we absolutely have to have judges with experience of the basic legal system of Northern Ireland, England and Wales, all of which have a classic common-law system, and from Scotland, which has a different system. It is not miles away from ours, but it is different. A court of 12 Scottish justices, or more likely 12 English, Welsh and Northern Irish justices, would be a severe disadvantage. But Northern Ireland, Wales and England all have the same fundamental common-law system. So it could be argued that that is the essential requirement; we have to have people from the common law and people from the Scottish system.

But in practice what has developed is that, of the 12 of us, two are Scots, one is Northern Irish and nine are English and Welsh. One can well understand that, with one Northern Irish slot, the Welsh feel that, with a population of over 50% more than that of Northern Ireland, they would want to be represented. At the moment, the argument is based on Welsh law becoming different. It is certainly true that there are statutes in Wales that do not apply in England and vice versa, and that is increasing. We in the Supreme Court spend much of our time interpreting statutes that none of us has seen before. Therefore, it can be said that the fact that we have a Welsh statute that we have not seen before is no more significant than if we have an English statute that we have not seen before.

Having said that, practices in Wales may develop differently from those in England, in the way that practices in Northern Ireland have developed differently. There is a strong argument at that point for having a separate Welsh judge. At the moment I do not think it is justified, but, first, I well

understand the Welsh feeling that there should be a Welsh judge, out of justice, and, secondly, the time could come, if there continues to be divergence, when there is separately an argument not merely on fairness and representation but on the requirements of the court that there should be a judge with Welsh experience.

Baroness Hale of Richmond: We have had three devolution cases from Wales in which a Welsh Assembly Bill has been referred to us before Royal Assent so that we can check whether it is within the powers that the UK Parliament has given to the Welsh Assembly. That is a very interesting new jurisdiction for us of a truly constitutional sort. We have been joined in those references, certainly in the two that were really sensitive, by the Lord Chief Justice, who has the great benefit of being Welsh, so that we have had a specifically Welsh perspective on those cases. That is something that we could continue to do if there were a specifically Welsh element other than that it happened to be a piece of Welsh legislation.

Lord Neuberger of Abbotsbury: The first of the three cases that Lady Hale refers to came on very shortly after I became President of the Court. There was no Welsh judge on it. The First Minister wrote to me about it and we had a conversation. I wrote him a letter and announced that on any future Welsh devolution issues I would, if it were at all possible, ensure that there was a Welsh judge. As Lady Hale says, it has been very easy in theory, because the Lord Chief Justice is Welsh and we invite him to sit on the case. I say "in theory", but it would be more difficult in practice, because he is a very busy man and finding a suitable couple of days would not be that easy, although we have always done it. It would be my intention so long as I am here, and my hope when I am gone is that we will continue to ensure that on any Welsh case there is at least one Welsh judge sitting.

Lord Morgan: One of the cases that came before you—it was very important—concerned Welsh agricultural wages. The Government appeared to be unclear as to the content of the devolution measure that they had passed. It seemed to me that a certain amount of enlightenment was required from the Supreme Court.

Lord Neuberger of Abbotsbury: That picks up very nicely the point that you made earlier about a constitution. One aspect that we could look seriously at in relation to the constitutional issue is devolution and whether we could make the law on devolution clearer and more principled, to the benefit of all parts of the UK.

Q12 **Lord Beith:** My question is about the working arrangements with the Judicial Committee of the Privy Council. You have co-location, the overlap of personnel and shared housekeeping, and of course you have taken over duties that it used to have in relation to devolution, as we have just mentioned. Is the identity of the Judicial Committee getting submerged into the Supreme Court, and would that matter in the remaining jurisdictions that have recourse to it?

Baroness Hale of Richmond: We have to try our hardest to maintain the separate nature of the institution. It is a separate institution. It has always

had a common judiciary, but we used to be in Downing Street, in that wonderful purpose-built committee room, and now we are, as you say, co-located. We try to maintain the separation to the best of our ability. We always fly the flag of the jurisdiction from which the appeal comes; it is noticeable that counsel and the other lawyers who come to the committee room see that the flag is there and it reassures them. We also cover up the symbol of the Supreme Court with the Privy Council rug, which I always draw attention to, as it shows that this is the Privy Council and not the Supreme Court. It is ironic that the Privy Council seal has the royal coat of arms on it whereas ours does not, as quite a lot of the jurisdictions that come to the Privy Council are republics. We do our best to maintain the separation, and it is important that we do, because it is a separate jurisdiction and it feels completely separate. When we are sitting there, we do not feel like the Supreme Court of the United Kingdom.

Lord Neuberger of Abbotsbury: It also benefits from the fact that we have three courtrooms in our building. Two of those are Supreme Court courtrooms, whereas the ground-floor courtroom is the Judicial Committee of the Privy Council. Occasionally, on big cases, we may go into the big courtroom to hear Privy Council cases, but almost every Privy Council case is heard in the dedicated courtroom for the Privy Council, and we do not have Supreme Court hearings there.

The Chairman: Lord Pannick knows the building well.

Lord Pannick: You also go on tour, do you not? You go to the jurisdictions. How often do you go and would you like to go more?

Lord Neuberger of Abbotsbury: Last month, five of our colleagues went to the Bahamas and had a fairly intense five days hearing appeals and meeting the judges and politicians out there. Before that, there was a trip to Mauritius. I do not know if Lady Hale went to Mauritius; I did not go.

Baroness Hale of Richmond: No. We have been to the Bahamas about four times and to Mauritius about three times, but it depends on an invitation from the jurisdiction in question, and of course it is quite pricey, not surprisingly. As far as we are concerned, though, if it can be conveniently arranged, we have no problem with it. Sometimes on such trips, there is a genuine difficulty of getting a list of cases together to occupy the whole week, so it has to be carefully planned and choreographed, but we are more than happy to do it, if that can happen.

Lord Neuberger of Abbotsbury: It was very successfully done this time in the Bahamas. The last time I went to the Bahamas, they had to scrabble together a list of cases, most of which were not Bahamas cases. It is an important thing to do, but as Lady Hale says they have to foot the bill and most of these jurisdictions, almost by definition, are not particularly rich.

The Chairman: I am glad that you have only had to cross Parliament Square to get to us and we have had no trouble at all in filling the hour that we have had with you. It has been extremely helpful, informative and useful to us and we are most grateful to you both. There will be changes

in this Committee the next time we have a chance to talk to anybody from the Supreme Court, and, Lord Neuberger, I suspect that this could be your last visit to us. I am sure that we give you our very best wishes for the future. It looks as if you ought to be there for at least another 10 years. We in this House are looking at age limits as well, but in a downward direction.

Lord Neuberger of Abbotsbury: I understand that my successor will not be appearing before you next time, Lord Chairman, so I wish you the very best of luck, too. I would like to say how much I have appreciated my visits to this Committee. You thank us for coming, but for us to have the opportunity to communicate in a relaxed but none the less demanding atmosphere is very useful for us, I hope very useful for you and, therefore, very useful for the rule of law.

The Chairman: I am sure that our successors will wish to continue it. Thank you both very much.