



Justice Committee

Oral evidence: The Lord Chief Justice's Report 2014 and related matters, HC 1018

Tuesday 27 January 2015

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Members present: Sir Alan Beith (Chair); Rehman Chishti; Nick de Bois; John Howell; Mr Elfyn Llwyd; Andy McDonald; and John McDonnell

Questions 1-38

Witness: **Rt Hon Lord Thomas of Cwmgiedd**, Lord Chief Justice of England and Wales, gave evidence.

Chair: Welcome, Lord Chief Justice. We are very glad to have you with us today. Before opening, I have to ask members whether they have any interests to declare.

Mr Llwyd: I have in the past undertaken publicly funded work, both as a solicitor and as a member of the Bar, in family law and crime. I hope following the general election to return to that to earn the odd crust.

Andy McDonald: Before my by-election, I was in practice and had some legal aid work a long time ago. I am no longer in practice.

Rehman Chishti: Before being elected to Parliament, I was a barrister, prosecuting and defending. I remain a door tenant at 18 Red Lion Court chambers.

Q1 Chair: The rest of us are not lawyers.

Since the changes were made that greatly enhanced the role of Lord Chief Justice, it has been a welcome feature of the Committee's work that we have been able to discuss with you and your predecessors your perspective on how the system is functioning. We have seen that also as a mechanism through which the judiciary can communicate with Parliament, within the terms of our understanding of each other's role; there is a very constitutionally important distinction of roles. We hope that we can continue to develop that in helpful ways.

In the foreword to your report this year, you say that it has been "a very difficult one", with increased pressures on the judiciary and on HM Court Service. Could you amplify that a bit?

Lord Thomas: The principal pressure, as on every part of the public service, has been as a result of the gradual cutback in resources available. That has been impacted in the courts by two major additional factors. One is the growth of serious crime related to sexual

matters. The second is the growth in the number of litigants in person, partly as a result of the reduction in the scope of legal aid and partly because lawyers are quite expensive for small cases. The amounts that people are prepared or able to pay lawyers proportionate to the issues has meant that we have seen many people say, “I can’t avoid a lawyer, though I am coming.” The twin factors have been an increase in the number of litigants in person and a reduction in resources, coupled with the growth in serious sexual crime. That last factor has been and will continue to be a major pressure point on the criminal courts.

Q2 Andy McDonald: Good morning. Last April, you told us that you were satisfied that you were able to make representations to the Lord Chancellor, as appropriate, on matters affecting the judiciary. How do you ensure that the views that you express in discussions with Ministers are confined to technical aspects of policy or legislation when you are talking about highly controversial matters such as changes to the system of judicial review? Is this the sort of matter that will be dealt with in the guidance on judicial engagement with the Executive that you are preparing?

Lord Thomas: I will take judicial review as an example. The Government issued their consultation papers. There were two, one with less far-ranging reforms and a second one. We responded to both of them. We were then asked various questions in relation to the impact of what we had suggested. We expressed our views on that. Since the Bill was drafted and sent to Parliament, we have remained silent because we think that, the arguments having been put by us—they are all in writing and public—ultimately, the decision must rest with you.

Q3 Andy McDonald: In your 2014 report and your speech at the Institute for Government in December, you talk about judicial evidence to parliamentary Committees remaining “exceptional”. Is that a case of the wish being father to the thought? Do you have concerns that parliamentary Committees, including this one, are too quick to invite judges to give oral evidence?

Lord Thomas: We are getting the balance about right now. It is very important that we help you, where we can, and that we come and tell you what we are doing or answer questions, where it is appropriate. However, I want to be cautious that we do not move into the sphere of supplanting, as the Treasury Solicitor will always make clear to you, the function of the Government Legal Service in providing advice—and, no doubt, that of your own counsel here in the House in providing you with advice. My experience has been that the help that we have been able to give you in relation to certain matters has been good, I hope. Whether you think it is good or not must be a matter for you, but I think that we are getting the balance about right. I am not concerned about it at the moment.

Q4 Chair: An instance of your trying to get the balance right is the exchanges that we have had in relation to the inquiry that we are currently conducting into the Criminal Cases Review Commission. You have supplied us with written answers on a number of points. You obviously have a concern that you do not want a judge to be put in the position of either propounding policy or evaluating judgments that have been made. We have not yet come to a view on this, but what is the right way forward if we want consideration to be given to the impact of the Bingham doctrine that the Court of Appeal should not go behind the jury, which limits the grounds on which the CCRC can send cases to it with any prospect of success?

Lord Thomas: About four or five of my colleagues, including myself, have quite extensive experience of dealing with the CCRC. If there is a question that you would like to ask us, I would like to take the views of my colleagues and let you have a written view on how we think the test is operating.

We are always very impressed by the work done by the CCRC, which is extremely thorough. We can see their work in two areas. One is in giving judgments on references. We also see a lot of their work on judicial reviews. They are often challenged for not referring. In every one that I have seen, I have been immensely impressed with the detail into which they have gone, the concerns that they have tried to address and the expertise that they have sought. I do not want to go into particular cases, but the work that they do on very serious crimes and people who come back repeatedly to try to persuade them to refer has been very thorough. Despite pressure on their resources, they do a wonderful job. I visited them at the end of 2013, when I was in Birmingham. The Registrar of Criminal Appeals has regular contact with them, so if we have any concerns we tend to address them directly.

If you are concerned about the test and think that there should be a different one, we would be quite happy, from a technical point of view, to let you have our views. However, it is not an easy subject. Rather than try to give oral evidence on a rather difficult issue, I would prefer to address it in writing. That is the kind of thing that we would be happy to do.

Q5 Chair: Would I be right in thinking that there would be only two different possible ways in which the test would be changed? One would be if the court came to the conclusion in a case or series of cases that there was scope for interpreting it differently. The other would be if Parliament framed the law differently.

Lord Thomas: The latter would be preferable. We have to be quite careful about overruling previous decisions. I can give you a very good example of this. There is a lot of concern at the moment about joint enterprise. If that is to be remedied, my very firm view is that it should be done by Parliament. If a decision of the court is made, because we do not have the doctrine of prospective overruling, it will affect the law right back, in circumstances where it may be very difficult to have retrials of cases; you might be going back 15 or 20 years. If we are changing the law, there is an awful lot to be said for Parliament doing it in many cases, particularly where the law has been established, as it has been on these issues, for some considerable time.

Q6 Andy McDonald: In your December speech to the institute, you said that improving the quality and accessibility of law was something on which close co-operation between judiciary, Executive and Parliament was needed. Could you explain what you have in mind?

Lord Thomas: One of the great difficulties that judges—and, therefore, necessarily, everyone else—have is making certain that the statute they are looking at is up to date. Our means of amending the law is very complicated. It would be so much better, for example, if the statute law database were kept up to date by doing things electronically. Why, for example, hasn't there been a closer examination of being able to do the thing electronically when you are amending a Bill? Maybe it is too great a shock to the system.

That is one area. Secondly, language is very important. One of the difficulties that we face at the moment is that, to draft something well, you need to understand the subject. To that end, we have asked parliamentary counsel to come down to the courts regularly so that in particular areas they can see, first, what the area of law is about, and secondly, how we set about interpreting it, because there has been a slight growing apart.

Thirdly, when we look at new legislation, there is a lot to be said for asking, “Have we expressed it in the best and simplest terms possible?” We would like to see that effort made. I know that the good law project, led by the permanent secretary to the Cabinet Office, Richard Heaton, is hugely ambitious, but we would all benefit from that. We would like to help as much as we can.

Q7 John Howell: Can I take you back to the question of the costs of legal services becoming increasingly unaffordable? Who should undertake the work of reviewing that? What should it cover?

Lord Thomas: There is a paradox that no one has seriously examined. There has been a massive expansion in the number of lawyers. I will take my own lifetime. There were 2,000 practising barristers when I started to practise and there were 20,000 solicitors. There are now nearly 170,000 solicitors and about 15,000 practising barristers, so the numbers have grown. Market theory is that, when you have a hugely greater number of providers, the price should come down, but it has not, for the most part.

There are two things one needs to look at. First, is the new market operating correctly? Have the reforms that were put forward in the Legal Services Act produced a difference? Secondly, is the profession structured—and does its fee structuring work—to produce legal services that people can afford? One area—because all of this is interlapping—is whether in litigation we have gone far enough with fixed costs. All of these interrelate, but there can be no doubt that, for most people who have a dispute, a lawyer’s advice is that litigation is not the answer. That should not be, because it denies access to justice.

Who should undertake it? Your Committee, as reconstituted after the election, may want to look at it, or the Government ought to look at it or appoint someone independent to look at it. An independent examination now of the operation of the legal services market, through one of these means—it need not be a long study—would help to see whether we have got the reforms right.

Q8 John Howell: The judiciary has submitted robust responses to the Government consultation on raising court fees. It sent a letter expressing deep concerns about the introduction of a fee of 5% of the value of specified money claims over £10,000. The Government are proceeding with that proposal, although they have dropped others in the consultation paper. What impact do you think that will have on access to the courts and, in particular, on the international competitiveness of London as a preferred venue for litigation?

Lord Thomas: We are concerned about it. There is no doubt that the advent of the new international court in Singapore provides a competitor to London. A similar point applies to the courts in Dubai and Qatar, although they are still in a more nascent phase. We are becoming concerned about competition from the Netherlands and Germany. Some people from the Netherlands visited us recently to see how we did it.

One must remember that in commercial law English is the language that everyone uses. I am concerned that, for relatively small sums of money, we do not drive away business that produces much greater sums of money by way of taxation on lawyers' fees. Therefore, one needs to proceed very cautiously on this line. Many Governments are prepared to invest heavily in providing good resources and anything else that induces people to bring this business to them because, for a court and for the legal profession, it is good business to have.

Q9 Chair: These are litigants who are spending big money on their lawyers and want to pay for the best. They want the best forum in which to have their case considered, don't they?

Lord Thomas: Yes, but we have to be very careful about complacency. I am not complacent about any of this. We have excellent judges, but one or two of my colleagues retire at an age where they can go and be judges elsewhere. The international advocates move around much more. Where we have the absolute advantage is that we keep our judges absolutely up to date in relation to the practices of the market. We look constantly—we are doing so at the moment—at whether we have our procedures right and can offer clients what they want. I think that at the moment we have the best judges at trial level. Trial-level judges are critical to this. We have to be very careful that, for relatively small sums of money, we do not upset business that is very important to the country's economy.

Q10 John Howell: It is your opinion that the state is under a duty to provide effective access to justice, irrespective of its ability to secure full cost recovery. Does that principle apply to all types of cases?

Lord Thomas: Yes. There is a debate that goes back to at least the time of Jeremy Bentham on the extent to which the state ought to provide access to justice for nothing and what contribution ought to be made. The arguments on this subject have been run for the past nearly 200 years and are no different now.

At the moment, I would be concerned about not appreciating the full context in which the legal system operates. To make current users—people who want to go to court—pay for the entire system ignores one basic fact. Somebody who litigates a case and gets a point of law decided is benefiting everyone by that, so to say that he should pay for it somewhat misunderstands the nature of the legal process.

It is a question of balance. That balance will vary according to the philosophy of the time. Judges have always taken the view—it goes right back—that the state ought to pay the greater share, if not the entire share. We realise that in the modern world that is not right, but it is about where you put the balance. We have always said that this is a matter for Parliament. Ultimately, it is a matter not for the Government but for you, in the votes that you make as to the appropriations.

Q11 John Howell: Can I take you on to your interest in the regulatory arrangements that are made for legal services? You do not have an involvement in that, but in 2013 you submitted evidence to the Government's review, through the heads of division. Would you like to outline what points you made?

Lord Thomas: We have three points. First, until 2007, the judiciary was quite heavily involved in regulation. It then ceased to be involved. We all think that that was a mistake. We have dealt with it by having very close relations with the principal regulators. I used to do it, when I was president of the Queen's bench division. Now two judges, Mr Justice Rabinder Singh and Mrs Justice Vivien Rose, see the regulators quite regularly to express our viewpoints.

The second point is that we are huge consumers of legal services. The quality of advocacy, for example, and the way in which the disciplinary system works are of great importance to us. I myself much regretted that, in trying to deal with serious problems in relation to the standards of people who practised in immigration law, we had to intervene, to tell lawyers that they had to do better and to ask what their programmes for improvement were. That was something we had to do because the system was not working properly. Therefore, I think, we ought to have a role in that. Those are two matters in relation to the judiciary.

The third is that the relationship between the Legal Services Board, the regulators and what you should regulate—whether you should regulate by activity or by profession—needs to be reconsidered. A new Government will have to look at this very carefully. The system was put in place, and it was thought that the Legal Services Board would not be needed for long. We think that probably the time has now come to look at it. Those are the three areas we outlined and expressed views on.

Q12 John Howell: Sir James Munby has been doing his consultation in relation to the family courts. I do not suppose that you would like to anticipate the results of that review.

Lord Thomas: First, I would not dream of doing so. Secondly, it would be wrong in principle of me to do so, because it would commit my own views. With respect, while he has achieved a tremendous amount in reforming the family courts, the area in relation to what should and should not be made public is a very difficult one. The benefit of doing this by practice direction is that you can look at everyone's views and see whether you can reach something that is workable. If it is not workable, you can amend a practice direction quite easily, with the assent of the Lord Chancellor.

Q13 John Howell: Let me push you on the question of the increase in work load for the Court of Protection because of *Cheshire West and Chester Council v. P* and another? Would you like to say what the increase in work load actually is?

Lord Thomas: So far, it has been very small. It was anticipated that it would be very large, but it has not been yet. I hate to try to give you the figures off the top of my head. If you would like us to send them to you, we will certainly do that. We are not quite sure why the work load has not eventuated immediately. We have taken steps to deal with it and have put measures in place, because in other areas—particularly the employment tribunal and the social entitlement tribunal—we have judges whose work load has fallen. We have been training judges there to transfer, if needed, but so far the volume of work has not come as anticipated. It may come—one can never be sure how quickly. We can certainly send you the figures, but they are very small.

Q14 Rehman Chishti: I have a few questions on HMCTS investment, followed by a few questions on criminal justice. First, on HMCTS investment, clearly you are pinning a lot of

hope on the court investment programme that has been put in place. Why are you so confident about that programme and that it will deliver the change that is needed when past efforts have failed, as you described in your speech to the Society for Computers and Law in May last year?

Lord Thomas: We have tried to learn from our past mistakes. Why am I confident? First, we have got right the view that, before we reform, we need to be certain that we have a clear idea of what we want. In criminal justice, we have gone ahead with the common platform without looking seriously at the reform of criminal procedure and the way in which we do criminal cases. That probably does not matter, because the common platform is essentially a large database. Before we go much further, I want to be sure that the reforms that Sir Brian Leveson has set out are thought through and that, if there are decisions on moving the balance of cases, we know what we are doing before we go through with them.

In civil justice, we are looking very carefully at that. In the next fortnight, three weeks or month, the Civil Justice Council will publish a paper that looks very much at online dispute resolution, which will revolutionise the way in which we deal with small cases and, in part, tackle the questions I was asked earlier about the affordability of coming to court.

Secondly, we have recruited a very good chief executive, who is in the process of thinking through everything before we embark. She is doing that in deep consultation with the judiciary. We have set up a number of groups. This is an item I deal with weekly and those judges dealing with specific activities deal with daily. We realise that if we get it wrong this time the Treasury will not come back to it within, I suspect, the lifetime of even the youngest person sitting around the table, so we have to get it right. I think that we will.

Finally, one issue is that the judiciary has felt that reform has been done to it, rather than with it. I am now reasonably confident that, both at a senior level and with the arrangements that we are putting in place across the country, people will feel that this is a joint enterprise. It is inevitable that there will be reform that people do not like. I would be unrealistic if I did not appreciate that there were changes that we needed to make that people did not like. However, I am confident that we can push forward with this and deliver a better system of justice than we have at the moment.

Q15 Rehman Chishti: I have two supplementaries on that before I move on. When and where will improvements first be noticed by litigants and their representatives?

Lord Thomas: The first improvement that has been made may seem a very elementary one. One of the biggest problems that we have had is the Central London county court. As part of the overall programme, we have put in a national call centre there. I am told—I was sceptical about this—that, because of the economics of employing people, the service has got a lot better. That is one now done.

The second thing that people will soon find much better is our ability to use internet-based video communication. We have tended to go down the programme of not using the internet; we have gone to fixed lines and contracts that control that, which has proved to be very inefficient.

Those are the two areas where I anticipate that we will see change fastest. Lord Justice Sir Brian Leveson's report contains quite a lot that should improve both the position of the victim and the position of practitioners, so I am reasonably confident. You should see some changes reasonably soon, but the big changes, such as the change to online dispute resolution and the reconfiguration of the estate, will take longer.

Q16 Rehman Chishti: Following on from that, you referred earlier to consultation with the judiciary. What consultations have there been with service users—court staff and others—who are also a key part of the process?

Lord Thomas: The court staff are brought in through HMCTS. To take one terribly minor thing—the telephones—users were consulted on that and on whether the result was right. The reforms outlined by Sir Brian were all heavily consulted upon. As soon as we publish in relation to online dispute resolution, there will be a lot of consultation, because it is a fairly radical change. There also has to be very substantial consultation on the way in which we do business in both criminal and civil courts and on where court buildings are put. That for court buildings, for example, will probably not take place until well after the election. We want to get our thinking right. We do not want to make the mistake of going into something without having absolutely thought it through.

Q17 Rehman Chishti: You have answered some of my other questions, but I will ask two further ones, if I may. If I miss out something in relation to criminal justice, no doubt the Chair can follow on from that. On page 30 of your annual report, you say that an evaluation of the broadcasting of some Court of Appeal cases is currently being carried out. What is your personal view on the initiative and whether it should be extended?

Lord Thomas: On the whole, the broadcasting of the Court of Appeal has gone well. There have been one or two hiccups, but I believe that those are of a technical nature. There is one area where I do not think it is problematic to extend it, because it is broadly the same. That is an extension to appeals heard in the divisional court from the decision on extradition cases. You may say that that is not very important, but the largest number of members of the public I have ever seen in court was for the appeal against the extradition of Mr Assange. Extradition appeals such as Dewani and McKinnon attract a lot of attention, so that is a small technical area that we can put right.

The next area people are interested in is sentencing. We are looking at this at the moment, but it is much more difficult than people think at first sight—although I am sure that the Committee does not. Can I give you an illustration? Last term—at the end of October and beginning of November—I heard an appeal in relation to two cases where people had had whole-life tariffs imposed upon them. Obviously, that is an area where we are very concerned about what the Strasbourg Court might do. We think that we have reached an accommodation, but it was necessary to show why these cases required a whole-life tariff—to set out the details of the offences.

I am immensely grateful to the press, because I asked them not to say anything more about the detail of the cases and we deliberately did not put them on to the public websites. The first involved an horrific murder, premeditated by reference to matters that were of an extreme pornographic nature. It was necessary to set all of that out in a judgment, because someone had to justify the tariff. The second case involved the mutilation of a young

child. Again, the details were horrific. Judges have to set all of this out in their judgments to justify what they do.

We need to work out the rules with which we can engage; we are giving active consideration to that at the moment. There has proved to be quite substantial local interest in cases. I am sure that you would all tell me that was unsurprising, because local cases attract publicity. We are busily at work and hope very soon to be able to say what we think should be done, but it is much more difficult than people think. I have given an illustration of the problems. At the moment in the Court of Appeal, essentially we are asked to do it, and one can organise a hearing to be quite careful. It is much more difficult in a Crown court. We want to make certain that we have thought through the problems before we move.

Q18 Chair: That is a very interesting answer. I can recall a period about 30 years ago when, in a quite notorious case—I remember talking to people at the end of it—the court relied on newspaper editors not wanting to disclose some of the more horrific details of the case, even though it could be argued that that helps to explain the sentence. There was a feeling, not just on the part of the court but among newspaper editors, that this was not a matter that should be put baldly into the public domain. Presumably, your answer implies that that situation has changed.

Lord Thomas: I think so. I am happy to send you the judgment, and you can form your own views on it, but it is immensely distressing to parents of a young child to hear that read out in open court—and, probably worse still, broadcast. The first of the two cases left me in no doubt that the peddling of pornography on the internet had had a dramatic effect on an individual. I cannot believe that someone would have thought through how to do something without having read everything. That has probably changed, too. What is available now to download and to see, as this case demonstrated, is simply horrific. As is set out in the judgment, it played a real part in the way in which this particularly horrible murder was carried out. I think that things may have changed. We are certainly much more conscious of the need to protect victims.

Q19 Nick de Bois: I have a quick follow-up on that. In your considerations of this very difficult subject, is it just legal minds looking at this or are you consulting with broadcasters, editors and any other representative groups?

Lord Thomas: When we moved to the Court of Appeal, we consulted quite a number of people. When we have formulated our proposals, almost certainly we will do a non-broadcast pilot, in consultation, to see first, whether the restrictions that we have operated, and secondly, that we have lines clear on the discretion that we will have to vest in a judge, and we think we have that. The last thing that I want is a row, with someone saying, “I want to broadcast this in the interests of this, that or the other,” and the judge saying, “No, you shouldn’t.” We need to think that through very carefully. It is a matter of immense concern to us in going forward.

Q20 Rehman Chishti: Will you be responding to the Crown Prosecution Service’s consultation on its draft guidance on speaking to witnesses at court? Do you have any initial observations on that?

Lord Thomas: I have to answer that in this way. We were shown the guidance before it was sent out and made some preliminary observations on it. We will probably not respond because, ultimately, we will have to decide as judges whether the line has been crossed. It is right that we do that as judges, not as respondents to a consultation.

Q21 Rehman Chishti: Can I ask a supplementary to that, in relation to guidance for witnesses or defendants giving evidence? There was concern at some stage about witnesses or defendants who do not want to show their face when giving evidence. Has clear guidance now been given to judges across the country on how that should be dealt with, taking into account all of the factors and the administration of justice?

Lord Thomas: No. We have not dealt with veils yet; that is still a matter pending. An awful lot of things are happening, as I hope that the annual report showed, and we have prioritised them. It has not yet proved whether that was a one-off case, but we will deal with it. It is my intention to deal with it when things get a little quieter in the next month or two, while you are all busy elsewhere.

Rehman Chishti: I am sorry—can you remind me of what is happening in the next few months?

Q22 Chair: You will know who said this: “Our conduct of criminal trials was designed in the 19th Century with many changes and reforms bolted on, especially over the last 30 years. The result is that it has become inefficient, time consuming and, as a result, very expensive.” It was Leveson, of course. Do you think that the transitional funding for the CPS and the Courts and Tribunals Service that he recommended to try to move on from the situation that he described in that rather graphic way is a realistic possibility? How much money will be needed?

Lord Thomas: On the latter, I cannot tell you. I will take immigration as an example. One of the terrible problems in dealing with asylum and immigration cases was the build-up of a backlog. If you have a backlog, you never overcome the problem. Ultimately, we threw huge resources at immigration to try to bring it under control. My predecessor as president of the Queen’s bench division, Sir Anthony May, did a huge amount of work to throw resources at trying to get the backlog down, so that we could manage it.

It seems to us that we have to do the same with this—we have to throw resources at it. With immigration, it was easier dealing with the backlog. Essentially, that was about looking and dealing with cases, which we could do internally. Criminal justice is not like that, as you have the CPS and the police, which have to be resourced.

At the moment, I cannot tell you how much money will be needed, but one of the tasks on which Sir Brian is now engaged is trying to make as accurate a forecast as possible. He is talking to the Government, the statisticians in the Ministry of Justice, the police and the CPS and is bringing our own experience to bear on what is the likely forecast for work over the next three to five years. At the moment, a huge amount of police investigation is devoted partly to domestic violence, partly to both current and historic sexual cases and partly to extreme pornography, so we think that it is probably possible to have much more accurate forecasts for the future than we have had in the past. I hope, therefore, that we will be able to look at this. Police investigations of sexual cases and extreme pornography take much longer, so you have a much clearer idea of when they will hit the courts.

Q23 Mr Llwyd: Good morning. A quiet three months—good luck with that.

Lord Thomas: I think that that is wisdom rather than life.

Mr Llwyd: Section 12 of your report refers to the international work done by the judiciary—in the European Union, on the ECHR and more widely. Are you devoting more resources to that work now?

Lord Thomas: We are devoting as much resource as we have. Let us take the various divisions of the relationship. The first is Europe. We try to maintain very good relations with corresponding judiciaries across Europe, with the two Courts and with the institutions in Brussels. Secondly, as regards the developing world, we are trying to work with DFID, in particular, and with some of the foundations. When I say the developing world, I extend that to eastern Europe. Thirdly—to go back to a subject I was dealing with earlier—we are very interested in our international competitiveness in business work. We are as active as we can be.

I turn to resources for the work. We have to operate on the basis that the most expensive part of the resource is judge time. Travelling and hotel expenses are very small—the issue is the loss of the judge from the courtroom. An awful lot of judges do a huge amount of work in their own time. We are trying to make certain that our budget is as protected as it can be in that area. We have the difficulty that sometimes we have to explain why, when someone is coming here, we need to give them lunch. To my mind, that is somewhat ridiculous, as it is the way in which quiet diplomacy works. We are using as much resource as we can. As I hope the report shows, we are very active in this area.

Q24 Mr Llwyd: Still on matters European, you told the Lords Constitution Committee in May that that you had had discussions with the Home Office on the European arrest warrant—specifically on the detail of it, rather than on the politics of whether the UK should opt in or out. Have you had discussions with the Home Office or the Ministry of Justice on the other measures in the opt-out package or on the coherence of the list of measures to which the UK is opting back in?

Lord Thomas: No; as far as I am aware, I have not. The European arrest warrant is the one that has the biggest impact upon the courts, simply because it is such a huge volume of business. Both at first instance and in the divisional court, it is now a significant area of work.

Our discussions with the Home Office have all been to do with implementation, technical drafting and some guidance that the statute directed me, in consultation with the Lord President and the Lord Chief Justice of Northern Ireland, to give in relation to the operation of proportionality in very low-level crime. We work quite closely with the Home Office on these operational aspects, because it is in everyone's interests to deal with extradition to Europe in as efficient and as just a manner as is possible. It is a very big area of work. However, we said—and have always taken the view—that this is a matter for Parliament. I know that we have never expressed a view on whether you should opt in or opt out. That is for you. We have gone nowhere near the politics of that.

Mr Llwyd: I appreciate that.

Q25 Nick de Bois: On that point, were you asked to express a view? Did you decline?

Lord Thomas: No.

Nick de Bois: So you were not asked.

Lord Thomas: No. I think that they knew that it was a question they should not ask us.

Nick de Bois: That does not stop them asking.

Lord Thomas: We were quite clear about it. There are political matters, and that is a highly political issue.

Q26 Mr Llwyd: What recent involvement, if any, has the judiciary had in the process of reform of the European Court of Human Rights?

Lord Thomas: We have not been involved in the process of reform, to the extent that it involves intergovernmental discussions. We have been told what is going on and have occasionally been asked for our views. Where we do play a part is that we have meetings with judges—as we do with the Court of the Justice of the European Union—at which we deal with particular areas and explain how we see the underlying problem and our processes, to give them a better understanding of the way in which our justice system works.

With Luxembourg, you know when you are going to get a reference, because you send a reference and can put in all of the information. Strasbourg is more difficult, because you cannot always be sure whether a case will or will not go. There are areas where the way in which our system works is not always easy to see from a shortish judgment, but we do have those discussions with them, which are very constructive.

Q27 Chair: Do they involve trying to convey an understanding of how the right to a fair trial is achieved in a fundamentally different system from that in most of the other member countries?

Lord Thomas: Yes—and, for example, of the way in which our system of inquests works. Again, that is not something that other countries have. It is about getting over a basic understanding of the way in which our system works and what questions you have. It is a very valuable exercise. We do this regularly with both courts.

Q28 Mr Llwyd: I have a question about something nearer home. In a major speech at the Cardiff business club in November and in section 9 of your report, you referred in particular to issues confronting the administration of justice in Wales. You said that arrangements would need to be made in response to the way in which, with devolution, the law applicable in Wales continues to diverge from that in England. We know that criminal law, environmental law and several other branches of the law—even family law—are diverging as we speak. Could you explain further your thinking on this?

Lord Thomas: We have seen this most clearly with the law of landlord and tenant in Wales, which next year will be different from that in England. This is the bread-and-butter work of the courts.

We are looking at three areas. The first is to make certain that, when a piece of legislation is passed in Cardiff, the necessary consultation has taken place so that the courts can deal with it—rules of court and matters of that kind. We now have and are putting in place

proper arrangements for liaison, which we have been discussing with the Ministry of Justice. I do not think that the consequences of exercising primary legislative powers were necessarily appreciated.

Secondly, we are looking at the training of judges, so that the new laws both for family justice and, next year, in relation to landlord and tenant is understood by, and taught to, the judges. That is particularly important because there are issues as to the accessibility of Welsh legislation across Wales—and across England. People do not realise, for example, that, if you live in London and own a house in Wales that you let out, the law may be different next year, so the judge needs to be absolutely on top of change.

The third area we are looking at is being sure that, when we appoint new judges in areas where it is necessary that they have a detailed understanding of the fact that the law is different, they either have that understanding or are prepared to acquire it. For the recent competition for deputy district judges, we put in place a requirement to that effect—you had to understand that things were slightly different in Wales or, alternatively, you had to be prepared to learn it. Those are the three main areas in which we are currently actively engaged. We have discussions with the Welsh Government about them.

To go back to the subject Mr Chishti asked me about—HMCTS reform—we have reached a position with the Government in Wales that we will work very closely together, because we do not want to end up with a set of Welsh tribunals in one building and a set of UK tribunals in a different building. We want to bring it all together. As far as the public are concerned, it is one system of justice.

Q29 Mr Llwyd: Would you agree with a view that I have held for some time, which is that it would be helpful to have a university department, for example, funded by the Welsh Government, produce compendiums of comparative law—English and Welsh—that could be accessed easily by practitioners and, of course, by the judiciary?

Lord Thomas: This work is being looked at closely at the moment. I would prefer not to say who should do it, but that it needs to be done is obvious. It is very important.

Q30 Mr Llwyd: You will know that currently there are some very good practitioners at the Bar in Cardiff, in all areas of law. Would you agree that the time has come to have a High Court registry and listing office in Cardiff, so that, for example, administrative cases begun in Wales remain and are heard in Wales? The practitioners and the judges are there. I believe that it is an inevitable consequence of devolution, at the end of the day.

Lord Thomas: As regards the administrative court, we have very strong controls that operate in relation both to Wales and to the administrative court out of London. People can issue anywhere, but if something has a connection with Wales or Manchester, by reason of a local authority or, in the case of Wales, a Government being there, we look at whether the case should be sent to Wales, even if it was issued in London or elsewhere.

One of the jobs of the two judges who look after the administrative court out of London is to review this every month. It is working quite well. Most cases now go back to be heard in Wales at the administrative court. We have recently taken steps to ensure that, if a difficult case has been heard there and the judge has come back to London, he will deliver his judgment over the internet so that it is done simultaneously in Wales. I was slightly

concerned to see cases decided at the High Court in London when they had been argued entirely in Wales; all that had happened in London was that someone had given the judgment. We have corrected that. If there is a problem with it, please let me know and I will look into it, but I think that the system is working quite well.

In other parts of the High Court, we try to transfer work back, but there is an attraction to bringing cases in London—for two reasons. The first is the specialisation of work. Some people will go to lawyers based in London. They prefer to keep the work here, partly because the fees in London are higher and partly because it is more convenient. That is a subject that we are also trying to address, but it is more difficult. I am reasonably confident that we have pretty good control over the administrative court. If there are problems, I would be delighted to know, because we want to address them.

Mr Llwyd: I come now to the “and finally” question.

Chair: “Finally” from Mr Llwyd.

Q31 Mr Llwyd: Well, not quite “finally” from me. You are giving the welcome address at the global law summit next month. What do you say to criticisms such as that from Peter Osborne in *The Daily Telegraph* that this event is “hypocritically” using the 800th anniversary of Magna Carta as the basis for an event for “the rich, the powerful and the well-connected”?

Lord Thomas: If it was for that, I can see criticisms that would arise. There are two points I would like to make in reply. First, it seems to me very important that we make people understand, as far as possible, the area that I addressed earlier—namely, the way in which our commercial and other specialist courts, such as the patents court, operate in London—and show the virtues of that. However, a summit directed at that would have been seen, probably rightly, as an attempt just to look at our own self-interest. What is equally important is our use of law to enforce the rule of law and to contain Government. I know that Governments generally—or some of them—find judicial review rather irritating; our earlier discussion of judicial review touched on that. It is very important that we show people that you can do this in a way that enhances good government and without judges becoming embroiled in politics, which is the fear of many.

Secondly, we need to show that the long tradition that we have had of judges being independent and making decisions without political influence has greatly benefited the functioning of our democracy and the prosperity of our country. I hope that we can get that over, as well as the point about the rule of law. The second bit is tracing back—with a lot of hiccoughs over time—the importance of the way in which our system works, to show that the core values make society better. A theme that I have at the moment is that justice is very important. It does not merely matter—it is central to our society. I hope that we can get that over at the global law summit.

You may say, “You have the Minister for this or the Minister for that, and that regime is not very good.” You can take the view that we should never talk to them. Alternatively, you can take the view that we should try to explain, “You have nothing to fear in this. It actually makes your own country better.” I can see that people’s views can differ on the latter.

Mr Llwyd: I am grateful for that full answer, which I did not expect.

Chair: It is the first draft of the speech.

Q32 John McDonnell: It sounds like a good speech is coming, anyway. Can I take you to section 5 of your report? The Crime and Courts Act 2013 placed a duty on you to encourage diversity. Can you tell us a bit more about the steps that you are taking on that? Have you discussed the co-ordination of your work with the plans by the Lord Chancellor?

Lord Thomas: Yes. This is a regular item. There are two forums, which were set up as a result of Baroness Neuberger's report. I regularly discuss it with the Lord Chancellor, but I also discuss it with the chairman of the Judicial Appointments Commission. We try to work together. We may have slightly different views as to how you get there, but that is a good thing.

At the moment, we are looking at about five areas. We have made a degree of progress. The problem exists across the judiciary, but particularly at the level of the High Court and the Court of Appeal. I cannot speak for the Supreme Court, which is not my concern, but it is reflected in what has happened below. We have made quite a lot of progress on the numbers of very able people whom we have been able to appoint to the Court of Appeal and who have been attracted to the High Court. We have got to about 20% in both areas at the moment; it is about 32% or 33% across the judiciary as a whole.

Getting to improve it, without in any way compromising on quality, is the difficulty. Until this year, there had been a marked decline in the number of women who were taking silk, which has been the traditional recruiting ground to the High Court. I was very pleased to see that this year the figure had gone up to 25%, whereas last year it was down at about 18% or 19% and had declined steadily.

We have started to see what we can do at that level. One of the steps that I very much hope we will be able to take is to run a competition, directed at the specialist areas—particularly administrative law and the commercial court—to recruit people directly as deputy High Court judges, without their having to go down the criminal route. We hope that that will make a difference in getting people to come in at a high level and in attracting them.

Secondly, we are putting in place a mentoring programme, although we have not quite got the details right yet. We think that that is critical because, in the modern appointments process, you do need help. As with any appointments process, it develops a process you have to be skilled at dealing with. Interviews, for example, require a skill. Filling in a form requires a skill, as you probably all know from UCCA forms. They are not called UCCA forms any more; that just shows my age.

We are getting along in that way. We do quite a lot of outreach work, some of it direct, involving myself, Lady Justice Hallett—who has done a tremendous amount of this work—Mrs Justice Nicola Davies and Mr Justice Hickinbottom, as well as our community judges. We do work shadowing, which we think is very important.

We are determined to extend every opportunity for people to come and to make it easier. We are determined to try and pursue any ideas that people bring to the table, but we must—and I think that we can—maintain the quality as we do that. The problem as regards female recruitment lies in women leaving the profession in their 30s. As regards

the ethnic minorities, it is partly a function of ensuring that we explain and help as much as we can. We have quite an active programme for that.

Q33 John McDonnell: What impact do you think that the equal merit test and the other reform—flexible working for judges—have had so far?

Lord Thomas: In the matters on which I have sat, which are a minute fraction, I have not seen it in operation because the competition operated in a fair way, without having to resort to it. I am afraid to pass the buck, but the Judicial Appointments Commission will have to answer that question, as it sees it more. I think that that is working.

Flexible working has had an impact. I ask when swearing in judges, and we are now seeing people who came in on flexible working as a district judge or a deputy district judge and have moved to become circuit judges, on a flexible work time. That flexibility enabled them to do very little when their families were small but then expand. At the High Court level, we hoped that we would have two people who would do it, but it has not yet worked, for various reasons. We do not see why it will not work at the High Court and Court of Appeal level, but we will have to wait and see.

Q34 John McDonnell: Turning to the magistracy, what challenges do you think there are in terms of ensuring that there is a better-trained magistracy that is more reflective of the wider community?

Lord Thomas: I am very concerned that the average age of the magistracy is now 59. Extending the retirement age for magistracy would be a disaster, because people would stay on; I am very keen that we keep it at 70. The work has gone down, so the recruitment has gone down and there has been less of an opportunity to rebalance. The principal problem is persuading employers that being a magistrate makes someone a better employee. As so many more people work these days and most employers now take a very hard-nosed attitude to time out, it is very difficult.

When I speak to magistrates, the real concern is the overall age of the magistracy and the difficulty in recruiting. As regards their ability to do cases, the training on the whole is very good and their relationship with legal advisers and district judges is good. If a political decision is made that we can transfer work down to the magistrates court, I very much hope that one thing we will look at is a district judge sitting with two magistrates, as Lord Justice Owen recommended about 10 years ago.

Q35 Rehman Chishti: I want to link the point about the age of the magistracy to that about the age of the judiciary. In relation to the High Court and above, some of those who get to that position come in much later in life and are, therefore, able and talented. What steps have been taken to ensure that the tenancies of those who come in later, at the higher end of the judiciary, are extended for longer, rather than being used, largely, for only a short period of time?

Lord Thomas: There is the question of whether you should raise the retirement age. We discuss it regularly at the Judges Council. The view at the moment is that we should not do so. The issue is whether in future, because of people's prospects of living longer, we should do it incrementally, maybe by taking it to 72. We have to balance that very

carefully with the need to diversify the judiciary. The more you extend at the end, the more difficult it is to change the balance.

We are very concerned to make certain that we employ people's talents to the full. One of the things that I find very encouraging about the way in which our judicial system works in comparison to others is that we attach enormous importance to the quality of the High Court bench to do trials. To go back to an earlier question, one of the reasons why our commercial court and the chancery division are so successful in attracting overseas business is that you have experienced people, rather than young people, trying these very big cases. As those of you who are lawyers will know, you generally tend to win the case on the facts and not the law.

Q36 Chair: Going back for a moment to recruitment, particularly to the lower rungs of the judiciary, has there been any progress in looking at the potential for using CPS-employed lawyers, who tend to include larger numbers from the categories that we need to extend in the judiciary, as recorders but in areas distant from where they are working for the CPS?

Lord Thomas: We have pursued two major recruitment campaigns. We went to the Government Legal Service, which has the same reflective spread. In one sense, the Government Legal Service is easier, because so few of them would deal with crime. The CPS is more difficult, but there are plenty of deputy district judge jobs and tribunal judge jobs available.

We have tried to persuade the CPS to go down that route, because there is now very little non-CPS crime. I do not think the view has been changed that it would be very difficult to see how someone would regard it as fair to be tried by a judge who was a full-time prosecutor. Most continental countries where there is movement between judges and prosecutors have an absolute rule that you cannot do both at the same time. You can do one and then the other—that is not a problem—but you should not do both at the same time. Lady Justice Hallett has made at least two visits to try to encourage both Government Legal Service lawyers and CPS lawyers to come into the judiciary.

Q37 Chair: Are there any matters you would have wanted to say something about this morning that we have not covered already?

Lord Thomas: I hope that I have tried to answer everything that you have asked me. I do not think that there is anything else. The only thing that I would say is that I hope you found the annual report helpful. I am sorry that it is not the traditional annual report full of pictures; we decided not to do that. I hoped that its length was such that you would read it, but if you have any suggestions as to what you would like—I have asked others this—we would be happy to look at those and at whether you think it is a useful way of doing things.

Q38 John McDonnell: Are there any areas you think that we should be looking at?

Lord Thomas: The legal services market, which must centrally be a matter for your Committee, is one very important area that we must keep under review. That is an area that I would put at the forefront. The second area that we need to keep under constant review is the area to which I spoke earlier: making certain that we keep the areas of law to which the public need to make reference, such as criminal legislation, and other areas of

legislation, under review, to modernise and consolidate them. If we are going to have a system where lawyers are used less, we need to make certain that the law is simple. Those are two things that immediately spring to mind. May I reflect, rather than just give you an off-the-cuff answer?

Chair: I am pleased to say that we have been dealing with one of them. Were it not 100 days before the election, we would probably be embarking on the other as well. Thank you very much. We are very grateful for your help this morning.

Lord Thomas: May I thank you all? Chair, I know that both you and Mr Elfyn Llwyd are going to retire, so can I thank you personally for the courtesy that you have shown me and my predecessors? It is very valuable to have this interchange with you once a year, in what I would describe, for myself and on behalf of Lord Judge, as a most courteous and extremely well-informed exchange on your part; I say nothing of mine.

Chair: It is always courteous and well informed on your side. Thank you very much.