



Joint Committee on Human Rights

Oral evidence: [Human Rights: Attitudes to enforcement](#), HC 669

Wednesday 18 April

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Members present: Ms Harriet Harman (Chair); Fiona Bruce; Ms Karen Buck; Alex Burghart; Joanna Cherry; Baroness Hamwee; Baroness O’Cathain; Lord Trimble; Lord Woolf.

Witnesses

I: Rt Hon Lord Thomas of Cwmgiedd, former Lord Chief Justice; Rt Hon Lord Hope of Craighead KT, former Deputy President of the Supreme Court; Rt Hon Lord Neuberger of Abbotsbury, former President of the Supreme Court.

Questions 43–50

Examination of witnesses

Lord Thomas of Cwmgiedd, Lord Hope of Craighead and Lord Neuberger of Abbotsbury.

Q43 Chair: Thank you very much indeed, Lord Thomas, Lord Neuberger and Lord Hope, for joining us and for being prepared to give evidence to us in this session of our inquiry, which is looking very broadly at the question of the enforcement and enforceability of human rights. As you know, we are a Joint Committee of the House of Commons and the House of Lords. We are very grateful to you.

I will start by asking quite an open question. How important is an independent judiciary to the enforcement of human rights and making a reality of the commitment to human rights?

Lord Hope of Craighead: It is absolutely crucial, of course. The essential point is that we are detached, or we were, putting it in the past tense, from politics. One can quite see when some of our judgments are announced how they are received by the Government, and that the way the Government think is really quite different from the way we think when we are concentrating on fundamental rights and the way they should be defined and enforced. People may criticise us, but they cannot do anything about us. Our position is secure and absolutely crucial.

In my experience, the Government, although sometimes critical, have never failed to give effect to a decision of the court. That says a great deal for the way the rule of law is administered in our country.

Chair: Lord Thomas? Lord Neuberger? Think about what we are going to be writing in our report. What you say will be in a little box with, underneath, "Lord Thomas". Put something in that box for us. We could all write it ourselves, but it would not have the authority that you have.

Lord Thomas of Cwmgiedd: First of all, I entirely agree with Lord Hope. It seems to me that no system that truly enforces human rights can operate without a judiciary that is completely independent, and with that independence supported by Parliament and the Executive. Having been exposed to criticism for the decision we made in relation to Article 50, one can see how important it is to have the support of both Parliament and the Executive. They can say that they disagree with it, but that is the decision and we must abide by it until we can reverse it either by going to a higher court or by legislation. It is critical that the judiciary is seen as independent and that its independence is completely supported by the other two branches of the state.

Lord Neuberger of Abbotsbury: I do not have much to add. The essence of the way our system works is that Parliament makes laws in a general sense, and the laws are applied in individual cases by the judges. There are few areas where the facts are more sensitive and more determinative, and where rights are more acute, than the area of human rights. That is where the judges, with their decision-making powers in relation to individual cases, applying the law that Parliament has made, come into their own. Unless Parliament is independent of the judiciary and the judiciary is independent of Parliament, it does not work.

Chair: There is also the issue of the judiciary holding the Executive to account for what the Executive have done, irrespective of what Parliament's role is.

Lord Neuberger of Abbotsbury: I suppose that the three most important fundamental roles of the judiciary are: first, to administer the criminal law in an effective and fair way; secondly, to resolve rights

between individuals, including companies; and, thirdly, as you rightly say, to hold the Executive to account. It is the third area, largely, where human rights come into play.

Lord Hope of Craighead: Judges do not initiate those proceedings; it takes somebody else. The judge or the courts, off their own bat, cannot simply take the Government to task. It is some individual, or possibly a group of individuals, who has an issue with the Government and needs to have it decided by an independent body. The Executive will be strongly in disagreement with an individual—perhaps an asylum seeker as an example—and the point of the Human Rights Act and the jurisdiction the judges exercise is that they can act as independent referees between the two sides and decide who is right and, furthermore, explain why they reached their decision, which sets a standard for future decisions.

Chair: Do you think that sometimes people miss that point? They think it is the judges versus the Executive rather than thinking that an individual's rights have been breached by the Executive, and the judiciary is arbitrating and deciding.

Lord Hope of Craighead: I think you are absolutely right. There is a risk of that because, of course, when the result is announced it is the judges who speak and the background to the case may disappear.

To go back to Lord Thomas's example of a time when he was criticised, perhaps people assumed that judges had taken the initiative, when that was not the case; the proceedings were brought by an individual. The judges and the courts are there to resolve disputes that otherwise would be unresolved, and one cannot allow that to happen in a country that is ruled by the rule of law and that is a democracy.

Lord Neuberger of Abbotsbury: The other reason why it may be seen in the way that you and Lord Hope describe is that if, as very often happens, the Government—the Executive—win and the individual loses a human rights case, it will get very little coverage. The cases that get the coverage are when the Government lose. The Government are sometimes criticised, not necessarily by the judge but by the press, as a result of the decision. The image of the judiciary through the press tends to be more critical of the Government than it probably is, because cases where the Government lose tend to get reported more widely.

Lord Woolf: I heard what Lord Hope said about the fine record of the Government observing the decisions of the courts. Do you think, particularly in that regard, that there is any ground for making a distinction between our domestic courts and the international courts that are given jurisdiction by Parliament to determine the matter that was decided?

Lord Hope of Craighead: I am not sure this is a precise answer to your question, but all of us know very well that the Government from

time to time have been very critical of the European Court of Human Rights. That is where they look to us for our decisions. It cannot reverse them but sometimes they are disapproved by the court in Strasbourg. The Government do not understand why that court in Strasbourg should be doing that. Joanna Cherry will recall that the same sort of tension arises between the Scottish courts and the Supreme Court in London, which seems a long way from Edinburgh. We take decisions where we reverse the Scottish court, but that is just part of the process one has signed up to.

Lord Woolf: If one deals with it as a matter of principle, assuming that the court is not a domestic court—whether it is a domestic court within one part of the United Kingdom or an international court that applies to the whole of the United Kingdom—can there be any justification when we are looking at a different point of view on human rights in distinguishing one court from another court, assuming they both have jurisdiction?

Lord Hope of Craighead: If one is talking about the convention, I do not think there can be. The whole point of the Strasbourg court is to provide a means of resolving disputes about convention rights throughout the member states—the Council of Europe states. Without that court, it would be extremely difficult to see the convention operating throughout those states. The international court is there to provide some kind of mechanism for resolving disputes, and to guide the various member states as to what they should be doing. That is part of the system. Those who wrote the convention deserve to be congratulated on adding a court, because one can think of other international conventions where there is no international court, and individual states try to find some solution to the problems that the conventions give rise to.

Lord Trimble: Correct me if I am wrong about this, Lord Hope, but I got the impression from your opening comments that, where there has been a declaration of incompatibility by the courts, on every occasion the Government have accepted and implemented the decision.

Lord Hope of Craighead: No, I was not putting it in quite that way, but you raise a rather important point. There are two ways of resolving a difficulty that has arisen. One is by interpretation of the legislation under Section 3. The other is under Section 4, which is a declaration of incompatibility. The Government are not bound to take any action if it is a declaration of incompatibility, although they usually try to do so, but they are bound by a decision that the judges make under Section 3 as to what the measure actually means. That gave rise to a good deal of dispute among judges early on as to which was the preferred route to resolve a problem. In the end, we decided that the declaration of incompatibility was a last resort and that the court should try to

construe the language in favour of the party, if there is a risk of the fundamental right being breached.

Lord Trimble: Where there has been a declaration of incompatibility, can you give us an impression of how frequently the Government accept it? How frequently do they take that into account and change legislation?

Lord Hope of Craighead: It may take some time. I can give you one example of a case that was heard in this very Committee Room of a couple who wanted to get married but their problem was that one of the couple was a transsexual. We were faced with the provision in the then Marriage Act that marriage is an arrangement between a man and a woman. We decided that we could not construe woman as if it meant man, or vice versa, so we made a declaration of incompatibility.

There was no immediate solution, because it is very difficult to decide exactly how to deal with that kind of relationship. It was solved later, but it was not immediate. That is why the mechanism that is available may require a great deal of thought before it is actually implemented. I do not criticise the Government for doing that; it is one of the problems that these cases give rise to.

Lord Trimble: Can you give us a sense of how frequently the Government accept and implement your decisions?

Lord Hope of Craighead: For decisions based on interpretation, every time. As far as declarations are concerned, I am afraid I cannot give you a precise answer. They will do so if they can; that is my response.

Q44 Joanna Cherry: I would like to ask about the specific impact on the relationship between government, Parliament and the courts of the Human Rights Act, and in Scotland and Wales the devolution Acts that incorporated the ECHR into the devolved settlement. Obviously, 20 years ago they were enormously innovative. Could you comment from your experience on the impact they have had on the relationship between government, Parliament and the courts?

Lord Thomas of Cwmgiedd: One of the factors that is quite important is the operation of the Government Legal Service, which is able to take a fairly firm line by saying, "This is the likely result", knowing that the judiciary will make a decision that is independent and right. The Government Legal Service is considerably strengthened and plays an absolutely key role.

There was a pamphlet called *The Judge over your Shoulder*. I cannot remember when it was published, but Lord Woolf would know the answer; it was probably 20 or 30 years ago. It is worth looking back at that pamphlet. It shows what a huge change there has been, if you are looking at this from a historical perspective. I think the Government take the advice of their lawyers pretty seriously because the Minister will know that their predictions are right. The Government win

something like 80% or 90% of their cases. We tend often to overlook that.

As regards the relationship with devolution, I do not think the Act has in any way impaired the relationship between the devolved legislatures, or indeed with Parliament. I think the devolved legislatures sometimes feel that the way in which the courts operate may be one where they can intervene more if it is a devolved legislature than if it is this Parliament. I think that is so. When I sat on the Supreme Court, I dissented in a case in relation to asbestosis. Lord Neuberger took a different view. It is an illustration of a case where the courts—for what may be a very good reason—would take a view that it is easier to intervene on human rights grounds with a devolved legislature because of the way the Acts are constructed than it is in relation to the Parliament at Westminster.

Maybe because I come from one of the devolved nations, I have always taken the view that, on subjects that are devolved, the devolved authorities are every bit as powerful as Westminster and ought to be respected by the courts as much as Westminster. If you legislate on health, there should be no difference in treatment between what the devolved legislatures do and what Westminster does, but I am not sure that the legislation is necessarily constructed to achieve that result.

Lord Hope of Craighead: Might I add a comment on Scotland? There is a special feature about the legislation as it applied to Scotland, in that it was possible to bring criminal cases to the Supreme Court for the review of decisions of the High Court in Edinburgh on convention rights. The tradition was always that the High Court in Edinburgh was final on all matters relating to crime, and suddenly we found that cases were coming south for decision here as to whether or not the High Court had been correct in its interpretation of convention rights in criminal cases.

The legislation was perhaps a little too loosely drafted in that respect, because it gave the court here the power to substitute its own view for the views of the High Court. It has been redesigned in a way that has released the tension so that now the role of the Supreme Court is advisory rather than that of a final court of appeal. That has reduced the tension and is very much to be welcomed.

Lord Neuberger of Abbotsbury: Looked at more broadly, there is no doubt that the past 50 or 60 years have seen a significant increase in judicial involvement in policy matters. Initially, it was for purely domestic reasons, with the Executive having more and more power, and more quangos and similar organisations. It meant that the judge's role, to which the Chair referred earlier, in holding the Executive to account grew organically domestically. More recently, as you said, around 20 years ago we had the devolution legislation that for the first

time gave courts, particularly the Supreme Court as it became, a genuinely constitutional role. Secondly, the Human Rights Act and one or two other statutes such as the Freedom of Information Act gave the judges a sort of extra public policy power, which was new.

With the exception of the first one I mentioned, which was occasioned by the increasing power of the Executive, these were not power grabs by the judiciary in any sense. The powers were given to the judges by Parliament, but they have meant that the judges have had a significantly more prominent and influential role.

Despite that, I like to believe—I do believe—that the relationship between the judiciary and the Executive, and the judiciary and Parliament, has remained one of serious mutual respect. While inevitably there have been more opportunities for disagreement, I do not think that either relationship has been harmed in any significant way.

Joanna Cherry: Thirty years ago, when I was an undergraduate law student, there was huge debate about what would happen if the United Kingdom incorporated the ECHR into the law of the domestic jurisdictions. There was much discussion of books such as *The Politics of the Judiciary* and Lord McCluskey's concerns about the further politicisation of the judiciary. We have had 20 years since that incorporation. Do you think those concerns have been realised? Do you think the judiciary has been more politicised by the incorporation of the ECHR or not? Do you think we are in the right place, or have the concerns been borne out?

Lord Neuberger of Abbotsbury: I am sorry that this is a terribly lawyerish answer, but to some extent it depends what you mean by "politicised". We have become more politicised in the sense that we have had to make more political-type, policy-related decisions, but we have been mercifully free of political commitment in the sense of party political commitment or anything of the sort that one can see in the United States Supreme Court.

I hope I am not being Pollyanna-ish, but I do not think that is a problem. Inevitably, as in any area of law, there will be differences of approach and differences of temperament between different judges about how inclined you might be to accord to the Executive particular latitude in certain areas. There may be slight differences, but they are differences of emphasis rather than principle. It is what diversity is all about. You will get some differences, but I do not think there is a fundamental problem.

Lord Hope of Craighead: You may remember that Lord McCluskey used the phrase that it would be a "field day for crackpots". The suggestion was that all sorts of ridiculous arguments would be brought before the courts and waste everybody's time. I do not think that has been our experience. There was an initial attempt, certainly in Scotland

and maybe in England, too, to anticipate all the areas that were vulnerable to attack on human rights grounds. A compliance measure was enacted very early on by the Scottish Parliament. It was quite extraordinary how it did not actually address all the issues; by no means. The issues that were opened up turned out to be very serious indeed. It opened our eyes to a breadth of fundamental rights that we had not really appreciated before.

It has done a great deal to reform the atmosphere of, for example, the conduct of criminal trials, and the emphasis on fairness of trials in various ways that, when I was prosecuting, we simply had not spotted. Once they are highlighted and opened up for argument, you realise that there is force in the point and then the law adapts to take account of it. It has not been a straightforward situation. The Government have realised that the judges are not there to take a political view. They simply accept that rights have to be examined, and perhaps revised and expanded, as people understand what we are really talking about.

Lord Thomas of Cwmgiedd: It is important to recollect the circumstances regarding England and Wales. Ten extra judges were appointed to deal with the anticipated amount of litigation that would come before the courts, but nothing like that number was needed. There was much less, so they could be usefully deployed elsewhere.

In contrast, in criminal law in England and Wales, the Human Rights Act has had much less impact. Lord Bingham always said that that was because we had moved over the centuries, and quite a lot of legislative reform was undertaken in the 1990s. I do not think it has had any politicising effect in the sense that Lord Neuberger mentioned.

It is very important that we are not complacent. One of the values of coming to speak to you is that I think the relationship between the Executive, Parliament and the judiciary is something that needs to be worked on. We need to understand each other much better. I found, having been here for a month or two, how surprisingly ignorant I was about what actually happens in Parliament. It is quite different from what one would expect sitting on the Bench. I have no doubt that, if you look at it the other way round, there is much less understanding. We need to understand each other so that, when we make decisions that either of us might think a bit odd, there is a reason for it. Providing we work at the relationship, I agree entirely with Lord Neuberger, but I would not be complacent.

Alex Burghart: You have touched on the point that the European Convention on Human Rights is a living instrument and as such it has come under fire recently from a Policy Exchange paper of which you may be aware. It says that the European Court of Human Rights "openly asserts its authority to remake the European Convention on Human Rights by way of the 'living instrument' notion. The European Court of

Human Rights' invocation of this notion in individual cases is best understood as an admission that it is departing from the ECHR's agreed terms in a way that involves brazen lawmaking". Does that reflect your experience or your view?

Lord Neuberger of Abbotsbury: It is a very difficult issue. If you have an agreement or convention entered into 60 or 70 years ago, to interpret it in the way it would have been interpreted 60 years ago is not very sensible. There are the so-called "originalists", particularly in America, who think that one should do that, but in my view it is not realistic.

On the other hand, it is a perfectly fair point that if you depart from what the original text means, as it would have been interpreted, you are, in a sense, lawmaking. To that extent you can criticise a court for doing it. There is no perfect answer. To my mind, somewhat weedily but inevitably, the right answer is to interpret it in accordance with the times. If you give undemocratically accountable judges that sort of power, they have to exercise the power with great caution and great diffidence—but they should exercise it.

That middle course has the advantage of a satisfactory compromise and the disadvantage of one. You will get criticised by both sides for not adhering to their extreme view, but you will get something that ultimately reflects what the English common law stands for, which is practicability and common sense. That is what I would aim for. Whether the Human Rights Court gets it right on every occasion I doubt—but I do not think any court ever gets it right on every occasion.

Lord Hope of Craighead: The problem is more acute for the Americans in trying to interpret their constitution. Of course, it is much older. The right to bear arms is one example where you wonder whether the US Supreme Court is really facing up to the way the old provisions and the amendments should be construed in the light of modern conditions.

I am not really conscious of a serious difficulty in cases I have had to deal with, except possibly where one asks oneself about the right to family life. The feeling, certainly of the panels I have sat on, is that you look at that provision in the light of the way families live their lives today. We have not had a real argument about going back to the time when the convention was drafted.

We are also conscious that when we talk about freedom of speech, some of those provisions were designed in the years just after the horrors of what was happening in Germany in the 1930s. They have expanded a good deal beyond that, but that is the nature of the convention. The courts I have sat in feel that we have to recognise that the convention applies in the modern setting, and if we did not do that we would not really be giving effect to the philosophy behind it.

Alex Burghart: You feel it is more a problem in theory than in practice.

Lord Hope of Craighead: I have not experienced a case where it has really been open to the argument that we are being too modernist and that we should go back and look at the convention in the light of the situation when its framers were there. That argument has never been presented to a court in which I have been sitting. On the contrary, the argument is always accepted that we are looking at modern conditions and making sense of the provision in the light of the circumstances as they are today.

Lord Thomas of Cwmgiedd: It would have been very deeply damaging to the judiciary if it had not interpreted some issues in the light of the way our society has fundamentally changed in the last 30 to 40 years. If you tried to interpret everything in the light of what was perceived in the late 1940s or early 1950s, and you look at society today, it is terribly different. If you now look at what is happening in the digital world—whatever you want to call it—with the great change that is occurring, it is inevitable that you have to confront the interpretation of the rights in that age. The judiciary would be regarded as ridiculous if it did not look at that through contemporary eyes.

I entirely agree with both Lord Hope and Lord Neuberger that, first, this is a position more theoretical than real. Secondly, as long as the judiciary is cautious and understands its role, it is moving with the times. It may move slowly, but it certainly is moving.

Lord Hope of Craighead: I have an example that may help you. A person who had been convicted of a crime was complaining that he had been photographed from the other side of the street by the police. Part of the panoply of facts before us was that everybody is photographed all the time. Wherever you go there are cameras pointing at you. Part of the way in which streets are policed is to look at images from digital cameras in the Underground or on the streets, or wherever they are.

We thought he could object if he was still on his own doorstep, but he was in a public street. Anybody could be photographed, and that is the way we live our lives today. I suppose that is a rather small example of the way things are today, rather than how they may have been long before we had cameras in position to survey what people are doing.

Chair: With freshly minted legislation, the legislation comes into law for you to interpret in the current context, but obviously with the convention, which is not modern, you have to do the job of interpreting it in the current context. Otherwise, if you alone were looking at the previous context, there would be another criticism, which would be that the judiciary is a complete load of old fogeys, that it is completely out of date and that it does not realise what is going on. That is the contrast, is it not?

Lord Hope of Craighead: Ministers are asked to give a declaration in every Bill saying that the Bill is compatible with human rights. I am assuming that when they do that they are guided by officials, looking at the circumstances as they are today, in deciding whether that compatibility statement is right or wrong. It is a condition of any Bill nowadays that it has a statement of that kind. I am assuming that that is today's view of whether it is compatible. That seems to me the right way of looking at it.

Chair: Exactly; that is what happens. The Government Legal Service gives that advice, and so do the law officers. That is the context in which they do it.

Q45 Fiona Bruce: Speaking in 2013 in a parliamentary debate, Theresa May, who was then Home Secretary, said regarding the Immigration Bill that, "some judges have ... chosen to ignore the will of Parliament and go on putting the law on the side of foreign criminals instead of the public".

Chair: It is quite a topical Bill. That Bill is one we have been discussing only today.

Fiona Bruce: We are interested in your views as to whether the Government at times overstep the mark in criticising court judgments, how courts have reacted to that, and indeed what effect it may have had on the enforceability of human rights.

Lord Neuberger of Abbotsbury: This point reflects what Lord Thomas said a minute ago about judges understanding Parliament and Parliament understanding judges. Judges have to accept that the parliamentary world, the political world, is a very different world from the judicial world. Things get tenser and can be expressed a bit more extremely in the heat of the moment than they are in court.

If we got excited and took it to heart every time a government Minister, a Back-Bencher or even a newspaper criticised us, we would not be very happy people. Nobody likes criticism, but we note when it is said. When I say "we", I mean that when I was a judge I and my colleagues noted that it was said, but I do not think that sort of comment ever caused us to recoil from making a decision we would otherwise have made.

Lord Hope of Craighead: I agree. I have an example, a different one from yours, where I was involved in a case dealing with a boy of 11 who had been convicted of rape. When he was sentenced, he was put on the sex offenders register, which in those days required him to be permanently on the register until he died. The requirements of the register are very strict. It inhibits all sorts of movements in the development of a career and so on. We took the view, and indeed we made a declaration of incompatibility, that the system should provide the opportunity for review. We did not give any time limit; we just said

that this 11 year-old was going to develop his life, and at some point it might be sensible for his position to be reviewed so that he could be released from the conditions.

The Prime Minister, David Cameron, said that having read that judgment he was physically sick. I think that was an exaggeration. We obviously read what he said, but I cannot say that it affected our judgment. We had made our judgment and it did not affect the way we dealt with cases later. We did regret that he was saying something that undermined the authority of our judgment, which we thought was carefully worded. We left it to the Government, by the declaration, to sort it out. We did not construe the measure.

Going back to Lord Trimble's point, it was a declaration and it was up to them what they did. In due course, they actually altered the system, so there is now an opportunity to review, which seems sensible, particularly in the case of very young offenders.

Lord Thomas of Cwmgiedd: It seems to me that you can generally anticipate when you are going to say something that people will not like. Therefore, it is incumbent on you to do two things. You need to make certain that you have addressed all the arguments. Very importantly these days, and the Supreme Court now does this as a matter of routine, you should provide a summary in ordinary English, which is not long and which explains it. You cannot expect people to read 100 pages; probably two is enough. Sometimes in the past we have not been good at anticipating criticism and explaining our judgments in the vernacular. We have tended to address our remarks to other lawyers. Most judges are capable of expressing the result of a decision in a page, and that is absolutely central.

Fiona Bruce: Traditionally, Parliament would speak to the courts through legislation. There are occasions when the House decides not to legislate. I am thinking of the example in September 2015 when the Assisted Dying Bill was defeated in the Commons by a vote of 330 to 118. It was a clear majority. That was a subject on which there had been some judicial comment in the run-up to the vote. How do courts take decisions not to legislate into account?

Lord Neuberger of Abbotsbury: I was involved in the Nicklinson case, which preceded the House of Commons vote. Certainly, the fact that Parliament had not fully considered it was something that a number of us, including me, felt was a reason for at least waiting to see what Parliament thought before coming to a conclusion.

On the rather drier topic of whether legal professional privilege should apply to non-lawyers—legal advice given by accountants, surveyors and so on—the majority of us took into account quite strongly, in not extending legal professional privilege in that way, the fact that the point had been considered by Parliament, although no vote had been

taken on it, and that Parliament had decided to leave the law as it was. We take notice of such decisions, but it depends very much on the circumstances of the case. It is an interesting point and the answer is yes, judges look at it.

Lord Hope of Craighead: I was in two earlier cases on assisted suicide. In one of them we were asked to take a view and we said, "No, that is a matter for Parliament". We decided that it was for Parliament and not for us. It was far too sensitive an issue. The court may possibly be going to a slightly different position now; I am not sure.

Lord Neuberger of Abbotsbury: The point may be coming up in the Supreme Court in the next year or two. I am not sure.

Lord Thomas of Cwmgiedd: It is important in these very difficult cases to realise that sometimes a democratically arrived at decision is better than a judicial decision. One obviously has only to look at the United States and see what has happened on abortion. Had it been a decision of the legislature and not of the courts, I suspect that we would not still have the controversy in the States.

Lord Neuberger of Abbotsbury: I agree, but I have to say that I think sometimes Parliament is probably quite relieved that a difficult but correct decision is made by judges who do not have to stand for re-election. There is a tension between the two points. I do not disagree with Lord Thomas. On the contrary, I entirely agree with him, but there are different issues where different factors come into play.

Lord Woolf: One way in which the court can be helped, and therefore the relationship between Parliament and the courts assisted, is for the court to be given the benefit of an amicus who indicates what the Government's view is on a particular matter. Do you think in the present state that we make use of an amicus, especially in the Supreme Court, as much as we should? In the States, they go much further and amici briefs are a regular part of the proceedings. What do you think about our position?

Lord Neuberger of Abbotsbury: The Government intervene in some cases in the Supreme Court. In the end, it is a matter for the Government. There are one or two cases I can recall—unfortunately, I cannot remember precisely which ones they were—where I was surprised that the Government had not intervened. The Government's approach, which probably is right, is to err on the side of not intervening too much rather than intervening too much.

Lord Hope of Craighead: I agree. Quite a number of the cases that come up have a law officer representing the Government anyway, so you feel that you have the advantage of the position being presented to you. The opportunity to intervene is there for the Government to use if they think that the case is one that requires intervention. The word "amicus", in effect, is more or less saying the same thing, except that in the case of the amicus, it is a court-appointed officer. Am I right?

Lord Thomas of Cwmgiedd: No. In America you can have an amicus, but they are not appointed by the court.

Lord Neuberger of Abbotsbury: I think in the UK they are appointed by the court, where one side is not represented, but in America—

Lord Thomas of Cwmgiedd: In the UK, the Attorney-General has to agree. He always says his budget is limited, which I believe.

May I add one thing? It is not necessarily for this but for future consideration by you. It is about the effect on the ability of others to intervene, not merely the Government, of the changes on costs rules. Intervention by third sector organisations is sometimes very valuable, but their liability for costs and the costs caps are something that it is probably worth your while looking at, as to whether it has had any adverse effect on interventions.

Generally speaking, the courts are quite capable of controlling those who abuse the privilege. You can make them do it in writing if you think it is too long, or you say, "You have an hour". I have never really worried about the ability to say that there are too many interventions, but it is worth looking at whether the changes to the costs rules have cut down the ability, particularly of the third sector, to intervene.

Q46 Chair: I have two related points. First, it is obviously quite right that you should determine to be robust and independent-minded, but surely in the real world, if you have an absolute hue and cry from government, Parliament, the media and the court of public opinion, it bears down on the judiciary. The question is whether or not the Government should be mindful of that. Even if you are absolutely rock solid and robust in your isolated independence, almost as though you are living in a different world and do not have the pressures of everybody else and do not worry how much hue and cry there is, surely there is an extent to which the judiciary is affected. Does that not mean that there should be a measure of self-denying ordinance proportionate to how much power the person actually has?

The man or woman in the street can rant as much as they want against the judges because it is likely to have little effect; a Back-Bencher in Parliament can do it a bit; but a Minister should be much more careful because they have the power and authority of the state. In a way, by asserting your proof against that, do you not let the Government off the hook when they are undermining your role under our unwritten constitution? Should you not be saying to us, "For us to play our role as an independent judiciary, the Government have to recognise that the higher the power they are, the more they should measure their words, tempted though they are to win popularity by slagging us off. They should be a bit more careful, because otherwise they will inevitably undermine the rule of law by creating a hue and cry"?

Oral evidence: Human rights: attitudes to enforcement

Lord Thomas of Cwmgiedd: There are two reasons. First, I think I said a little earlier that it is absolutely fundamental to the maintenance of independence and the ability of the judiciary to make robust decisions that both Parliament and Ministers defend the judiciary when it makes a decision. There is never any excuse for a government Minister to abuse the judiciary, or condone abuse by others, because that undermines the rule of law.

Secondly, it would be foolish to say that people are unaffected. The most vulnerable are always the family or friends. Many years ago, in relation to one matter, a judge told me, "I knew I was right, but I had such an attack in the popular press that people would ask questions behind my back, or ask my wife, 'Is he really all right?'" It bore down on his family. Sometimes we are not conscious enough of the effect that judges being heavily criticised or abused in the press can have on their family.

The more fundamental reason is that permitting, condoning or engaging in abuse, whether you are in Parliament or a Minister, undermines the rule of law. It should never happen. I hope it will not happen again.

Lord Hope of Craighead: The point is the undermining of the rule of law. I do not think that the ranting has an effect on the decision, because it usually follows a decision. The decision is made, so it is not as if they can change what has been decided.

Chair: But it is the next decision that is made in the same context, where people have looked at what has happened in the previous one. It cannot help but have an effect.

Lord Hope of Craighead: I hope judges are broad-minded and broad-shouldered enough to ignore all that when they make their decision.

Chair: Do you not think that, if the Government have the power to bring forward legislation to Parliament, they should take responsibility for it and say, "It is our legislation and we have legislative responsibility. We enter into these treaty obligations and that is our responsibility, not that of the judges"? Do you not think that the Executive should take more responsibility and not lay responsibility on you? If they do not like it, they can always change it, but it is easier to criticise the judges.

Lord Neuberger of Abbotsbury: First, one has to accept that politics does not always involve logic or fairness. There will be times when judges get criticised, and that is part of life. We have to be a bit careful about worrying about judges' individual feelings too much. It is more a matter of undermining the rule of law, which Lord Thomas and Lord Hope have rightly emphasised; it is also the fact that it will discourage first-class people, who are doing very nicely as barristers and solicitors, from becoming judges. As you know, that is a serious problem for other

reasons as well. We should care about the effect on judges, and even more on their families, but that comes very much third on the list.

Lord Thomas had worse treatment than Lord Hope has had—certainly than I have had—over the Article 50 business. He can talk more about that with greater authority than me. I had some assault from the press. I am afraid that the Government failed to step up to the plate on that. It was not pleasant, but what one genuinely worried about much more was the effect on the rule of law and the effect on judicial recruitment, in that order.

Chair: There is a bit of a parallel. For example, sometimes there has been abuse of younger women MPs, but quite a lot of us argue that it is an attack on democracy. If somebody is voted in to the House of Commons, they are entitled to speak in the House of Commons, to represent their constituents and to do the job they were elected to do. Anybody who threatens or abuses them is attacking their voters, because the voters have chosen that person and they should be allowed to speak without fear or favour. Therefore, the stiff upper lip, “I can put up with abuse”, lets off the hook those who are undermining democracy and the rule of law. That is the argument Lord Thomas was putting to an extent.

Lord Thomas of Cwmgiedd: I have no doubt about the position, having been subjected to abuse. I go back to the point about the rule of law. One of the things I have found most disturbing is that when there is an attack on the judiciary here, it does huge damage to the UK. Wherever I have been in the world, people have expressed absolute astonishment that in a country such as the UK judges would be described in the terms in which they were. It even happened to me in Shanghai. Right across the world, one finds horror that in this country judges would be attacked for doing their job. I do not think we should underestimate the damage it does to the perception of this country as a country that abides by the rule of law. I feel that very strongly. I do not want to repeat the criticisms I made, but it seems to me absolutely essential that government Ministers and Parliament stand behind the judges and condemn abuse in unequivocal terms.

Lord Woolf: Would you go so far as to say that we were wrong during my judicial lifetime to take the view that the law of contempt should not apply in respect of verbal abuse of the judiciary?

Lord Thomas of Cwmgiedd: It is a very interesting contrast. At the time we took the steps we did, there was legislation in Singapore that massively increased the penalties for anyone abusing judges. When Her Britannic Majesty’s ambassador criticised Singapore for doing that, the British embassy got an earful, essentially saying, “Look what happened in your country. You don’t have these strict laws and judges get abused. We’re not having that in Singapore”. I can see the argument.

On the other hand, I am not sure that in this day and age there are not better means of combatting abuse than locking people up. If one reads the studies of what judges have done in the past, I am nervous about it. I believe that encouraging Ministers and Parliament to do their job to defend the judiciary and to educate people is a much better way of doing it than exercising powers to lock people up. Lord Hope may take a very different view because things are different in Scotland.

Lord Hope of Craighead: No, I do not. The Chair will correct me if I am wrong, but the Scottish position is the same. There was an old-fashioned term.

Lord Woolf: “Murmuring” judges.

Lord Hope of Craighead: Yes. It was decided that that was an antique idea best abandoned, but the result of doing that heightens the importance of everybody else respecting the fact that the rule of law must be maintained. The press is one thing, but, as far as the Government are concerned, one of their responsibilities is indeed to maintain the rule of law. That is why great caution is required when criticising judges. The judges will never hit back at the Government by trying to use the old methods. It is a matter of each side respecting its respective position in the general public interest.

Lord Neuberger of Abbotsbury: One of the problems with contempt—“murmuring” the judges and so on—is that there is something slightly uncomfortable about judges deciding what to do with somebody who has insulted judges. It is a feeling that you are, as it were, a judge in your own cause. But I think the answer to Lord Woolf is that to some extent there was a mutual convention to be observed. If the judges were giving up the right to put people in prison or fine them for being rude about judges, the other side of the deal should be that the Government accept a solemn duty to protect the judges. Many might say that that solemn duty was, on the face of it, incorporated in the Constitutional Reform Act, which, for the first time in this country’s history, statutorily enshrined the Government’s duty to defend the rule of law and the independence of the judiciary—but, as Lord Thomas said, that duty has not always been observed.

Lord Hope of Craighead: It is a duty that the courts cannot enforce. I cannot think of a situation in which somebody would bring the Government before the court for breaching Section 2, or whatever it is, of that Act.

Lord Woolf: It is an interesting idea.

Lord Hope of Craighead: It is there as a standard that it is expected the Government will adhere to.

Q47 Chair: To follow up Fiona’s point about legislation that is not brought forward, there was a manifesto commitment by the Government

to replace the Human Rights Act that we have now. That will no longer be brought forward. Therefore, the position is that we have the Human Rights Act. Would it be your view, bearing in mind that we have that Act and it will not be changed imminently, that your job is to crack on and enforce it, and in so doing people should recognise that you are doing what the current law requires you to do, and those who might have thought about amending the law but fought shy of it should not have a proxy war by having a go at you?

Lord Thomas of Cwmgiedd: I think we might all answer yes.

Lord Neuberger of Abbotsbury: Yes. The irony is that the case that brought most abuse was the Article 50 Miller case. Although it was concerned ultimately with the European Union, it was a purely domestic constitutional issue that had nothing to do with human rights and Euro law. It was a bog standard—but rather important, some would think—domestic constitutional case.

Chair: That leads straight to Sally's point, which takes us out of the frying pan and into the fire.

Q48 Baroness Hamwee: You have said quite a lot about the Article 50 case, and certainly a lot of knees jerked at that time. I have to say mine jerked as to why the Government were not leaping to the judiciary's defence. What you have been saying about the independence of the judiciary makes me wonder—I do not have a script in front of me—whether that would have been consistent with the independence of the judiciary, particularly when the Government are a party to the case, and whether we should have been thinking more about the position of the Lord Chancellor than the Government.

Lord Thomas of Cwmgiedd: I will try to answer that in two ways. First, I think there was a difference between the position of the Government, as part of the constitution, having a duty to uphold the rule of law and being a litigant in an individual case. Those are two completely different duties. As a litigant, they can criticise; there is nothing wrong in saying, "That decision was not right. They did not take into account this and they forgot that, and we are going to appeal". That is perfectly fair, but defending it is very important.

The position of the Lord Chancellor is more difficult at the moment. We have had so many Lord Chancellors, and none has been in office long since 2012. It is important to review whether imposing the duty on the Lord Chancellor is enough and whether a more specific duty ought to be imposed on other Ministers as well. To impose such a duty on a Minister who may never have come across constitutional legal matters, or had any experience of dealing with them, is quite a burden. One knows that in any Government these days prime ministerial power has grown.

Whether in this day and age it is realistic to expect a Minister to criticise or go against the wishes of the Prime Minister when the Minister may be looking for future preferment is something that needs to be examined.

One must remember that the duty was imposed on the Lord Chancellor in a context where normally they were about to come to the end of their political career and, therefore, there would be no prospect of preferment—I was about to say that they were “old men”. We need to re-examine whether that is realistic 15 years on. I have some sympathy for someone who is in the position and is not the kind of senior Minister who was there. We need to consider the realism in this day and age of expecting someone to do it. Broadening the duty and not leaving it solely on the plate of the Lord Chancellor is something that needs to be reconsidered in due course.

Chair: Are you saying that, when the Lord Chancellor’s job was a final crowning achievement of a legal career, putting the duty there made sense, but when it is a starter job in the Cabinet, before the individual moves on to bigger things, it does not make so much sense?

Lord Thomas of Cwmgiedd: It is more difficult. One has to take into account human nature. This was legislated in a circumstance where all the Lord Chancellors—

Lord Hope of Craighead: The Lord Chancellor at the time was Lord Falconer. I do not think he would regard himself as an “old man” even today, but he followed Lord Irvine and Lord Mackay. Lord Mackay was there for 10 years and Lord Irvine was Lord Chancellor for many years. That was the situation in which that provision was drafted. Given the way in which the office is now being filled and the way that the Government find it convenient because of the greatly expanded responsibilities of the Lord Chancellor as Minister of Justice, which he was not in the older days, there is force to the point that it requires fresh thinking. It is a very important point.

Alex Burghart: What you say sounds very sensible. How would you constitute that in law and position? Would you say that the Prime Minister and First Lord of the Treasury has a legal responsibility to defend the independence of the judiciary? If that were the route, how would you make it enforceable in practice?

Lord Thomas of Cwmgiedd: Whichever Minister you place the duty on, we are all agreed there is no prospect of the judge saying, “I am issuing an injunction to require the relevant Minister to do something”. That is out of the question. At the end of the day, bearing in mind the advice that is given by the Government Legal Service and, I would hope, the Attorney-General, the more senior the Minister, the more they would appreciate the duties. In present circumstances, if a duty was imposed on, say, the Prime Minister or someone very senior in

government, because the Lord Chancellor is no longer senior in government, there would be much more political and other pressure for that person to comply.

Chair: What about putting it in the Ministerial Code, which it is not at the moment, so that it applies to all Ministers, great and small? We have all sorts of stuff in the Ministerial Code.

Lord Thomas of Cwmgiedd: That may be a very good idea. I would not like to say that I entirely agree without thinking about it. There are dangers for judges in doing that, but it is an idea that I am sure we would all like to think about.

Lord Hope of Craighead: I would like to think it could be an addition to something by way of reforming the section in the Act, possibly relying on the principle of collective responsibility so that Ministers, in the plural, have that responsibility without defining which Minister it would be.

Chair: The thing about the Ministerial Code is that it is decided by government, and legislation has to be decided by Parliament, so it is probably a bit easier to get the Ministerial Code changed than to change legislation.

Lord Woolf: There is another provision in the Constitutional Reform Act—I cannot quote it exactly—that, although a Lord Chancellor does not need to be a lawyer, he should be someone who is specially qualified by experience, or in some other way, to perform the role. The wording is to that effect; I have not quoted accurately. I think that particular requirement may not have been observed.

Chair: It is honoured more in the breach.

Lord Neuberger of Abbotsbury: One or two of us wondered whether some of the recent appointments might have been judicially reviewable on the basis Lord Woolf mentioned, but nobody brought it to court, and, as Lord Hope said, we can decide only cases that are brought to us.

Lord Woolf: This Committee is not a court of law. If we were considering making a comment, that might be an area we would want to consider.

Lord Neuberger of Abbotsbury: Having got rid of the old-style Lord Chancellor, whether one thinks that was right or wrong is irrelevant; it cannot be brought back. What we do about it is a very difficult topic. My own feeling is that giving the duty to all Ministers will devalue it in some ways, without giving it possibly as a specific duty to the Prime Minister. But I entirely agree with Lord Thomas that, rather than trying to solve it on a piecemeal basis, it should be looked at in a fairly serious holistic way.

Chair: If Ministers breach the Ministerial Code, they go. We have had some recent examples. It is very jeopardy-full. We had a very senior Minister go for breaching the Ministerial Code.

Lord Neuberger of Abbotsbury: Our position as recently retired judges is that we do not quite know all the ins and outs of the Ministerial Code. We are not disagreeing; we just do not have the competence and knowledge to comment.

Chair: You have analysed why the current situation does not afford the protection that the previous situation did, and therefore the issue is about how that is addressed.

Q49 Ms Karen Buck: We have heard quite a lot of evidence in these sessions about the ability of people to enforce their human rights in terms of their resources, in particular the implications of reductions in legal aid and LASPO legislation. Could you give us an indication of what you think the main issues have been since the introduction of LASPO? Are there ways in which you think access to resources has undermined people's ability to enforce their rights?

Lord Thomas of Cwmgiedd: A number of issues need examining. There is reasonable evidence that in certain areas, particularly rural areas and maybe post-industrial areas, there is a dearth of legal advice at an affordable price. If someone goes to a solicitor and is told, "I'll start something for you, and my charges are £100 an hour", that is totally out of the real world for those who have a problem. I chair the Commission on Justice in Wales, which has those two specific problems. I have asked for some work to be done about the number of solicitors who practise in areas where there are real difficulties in affording legal advice. That really needs to be looked at.

The Law Society may not be very happy with what I am about to say. There is a case for looking again at better integration of the advice given by lawyers, the third sector and lawyers employed by the local authority. For the foreseeable future, in the light of fiscal conditions in this country, I wonder whether it is realistic to expect solicitors, who want to earn a reasonable living, to be paid out of legal aid funds. I may be completely wrong; there may be money for it. I am rather sceptical as to whether that would ever happen. There is an urgent need, particularly in respect of post-industrial and rural areas where there is a lot of poverty of different kinds, to look for the proper provision of advice that is not necessarily through the traditional mechanisms.

Ms Karen Buck: It may be slightly unfair to put you on the spot, but can you give us an example of how you feel someone's rights could be secured within the framework you have outlined, where we integrate legal advice and the third sector more effectively?

Lord Thomas of Cwmgiedd: One of the issues that sometimes arises relates to the very unfair means by which convictions or, more seriously, cautions are registered against people and stay for a long time. There are suggestions that it has now improved, so it may not

happen in the future. Although there were good and understandable reasons for it at the time, one of the big problems with a caution that went on your record was being able to review it and persuade a lawyer to challenge a decision to impose it. That is one example. Another example that affects ordinary people's lives is their entitlement to any kind of benefit or treatment. Those are things that really matter to people.

On the whole, we have pretty good rights in this country, but the real issue is the practicalities of enforcement. It is a subject on which I have asked for some work to be done specific to Wales, but it is a really serious problem. It is not easy for a lawyer to make a living practising in a rural or post-industrial area where there is not much money.

Lord Neuberger of Abbotsbury: I agree with that. Lord Thomas can speak with greater direct experience as a former Lord Chief Justice and now in his present capacity chairing the inquiry. The nearest I got to it was when I spent three years between 2009 and 2012 as Master of the Rolls in charge of civil justice. I entirely agree that we have a problem, in that we have pretty good rights but quite a yawning gap as far as enabling people to enforce those rights is concerned. Not enough money is made available to people who could not otherwise afford legal representation.

Lawyers and some judges are very good at blaming the Government, but even now there are things that can and should be done. To be fair, particularly towards the end of Lord Thomas's time as Lord Chief Justice and continuing now, things are being done on the legal side to make litigation cheaper and quicker.

If a plumber does some work on your house and you do not pay because you say the plumber has done some damage to your house, it might involve £10,000 or £15,000 to each of you. That is a lot of money to you both, but if you go to court it may cost £100,000 or £200,000; it is completely disproportionate. You can understand why the Government are not keen on forking out hundreds of thousands of pounds to deal with a £10,000 claim.

That has to be solved by what I have called quick and dirty litigation. It may not be perfect, but at least it is enabling people to get to court. But that has to be done by appropriate legislation, rules and mechanisms. Lord Thomas can speak with greater knowledge and experience, but this is now being faced up to.

Ms Karen Buck: You talked about advice deserts and the fact that there are parts of the country where there is little provision. In your view, would that be a higher priority than, for example, looking at certain areas of legal service being out of scope of legal aid—or could you not untangle the two?

Lord Thomas of Cwmgiedd: It is partly a question of scale, but one has to be realistic as to the sums of money that are available. One of the things it would be very important to spend money on is the extent to which artificial intelligence can be employed to help people. We are now going over to using forms whereby people can make claims both in tribunals, where fortunately there are now no fees, and in court, where the fees are still far too high. I hope that can be supplemented by much more artificial intelligence guidance, because I wonder whether we can any longer afford to employ lawyers in relatively small cases. There are two ways I would go. One is the use of artificial intelligence to help people; the second is looking at third sector and local authority lawyers, but working with the Law Society and solicitors on that. It is a problem. The Law Society says we just need more money, but, quite frankly, I do not believe there is any.

Lord Hope of Craighead: It is 22 years since I last had responsibility as Lord President in Scotland for looking at the funding of litigation. My experience is really not relevant, partly because it was in Scotland and partly because it was so long ago. One of the things that strikes me as crucial is that areas that are as yet undiscovered are not being discovered because people are not able to bring forward their cases. Each case that comes before us picks up a particular issue that can then be regarded as a standard by which people with exactly the same facts can expect to be treated. All the unforeseen areas that are unexamined because they cannot be brought before a court are a matter for concern.

Ms Karen Buck: That leads me to another general question on the same point. One of the impacts of LASPO and the squeeze on legal aid funding has been the reduction in judicial review. As regards human rights enforcement, does that cause you concern, or were a number of cases being brought forward that did not merit public investment, as the Government argued?

Lord Hope of Craighead: Without a degree of research, I do not think it is possible to give an answer. There are two different problems. There is the problem that the Government were worried about, that people were bringing cases at the frontiers of human rights that were, they thought, without merit. There is also the problem of people with genuine cases, where there is no dispute about the rights but there is simply no one to help them. I suspect that is a bigger problem than the problem the Government were concerned about. What is really happening in the rural and post-industrial heartlands? Is there sufficient access to legal advice to enforce rights?

Joanna Cherry: I have a follow-up question on legal aid. The UK Government at present are holding their own review of LASPO, but some of the witnesses we have heard from suggested that an independent review might be useful. A review independent of the Scottish Government

has just reported on the legal aid system in Scotland. I take the point about resources, but it is interesting to see from that independent review in Scotland that there was a smaller spend per capita. Legal aid covers far more categories in Scotland, and there is much greater financial eligibility. Clearly, that tells us that it is not just a resource issue, although that is part of it. Do you think it might be useful to have an independent review of how legal aid is working in England and Wales, not a government-led review but an independent review chaired by somebody outwith government?

Lord Thomas of Cwmgiedd: I think the question is broader than legal aid; it is the entire provision of advice. The reason why you cannot ignore it is that one of the things the Government have done, which is laudable, is to give money to citizens advice bureaux to run advice. We look at this in pockets rather than across the board, so I think there should be a more wide-ranging review. Are we dealing with people who have genuine legal problems? Are we providing the right model of advice?

That in turn depends partly on the way in which the legal profession is changing. The sole practitioner or small firm may not be the right model. We had a meeting in Bangor in north Wales. There is one public law solicitor in north Wales. I know it is a relatively small population, but is that sensible? We need to look much more broadly for the answer to these issues.

We also have to take into account the way in which firms are changing their business model. There are larger enterprises with solicitors probably being used much more as fee-earners in large practices. The other thing we need to look at is how to bring practices together to provide the right advice. It is all very well to concentrate on legal aid, but I do not believe that is the answer. I am sorry to have given a long answer to your question.

Lord Hope of Craighead: Recruitment to the profession is another aspect, particularly of both solicitors and counsel prepared to work in criminal law, which is becoming more and more underfunded. More and more people are deserting criminal law because it does not provide them with the return they need to maintain themselves. That is a serious problem. Of course, it is related to remuneration through the legal aid schemes.

Q50 Chair: Our colleagues are just about to leave for a Division in the Lords. Can I ask a very quick question before they go? We have talked about the impact of the Government criticising, or not defending, the judiciary. The other thing that might bear down on you is the question of what criticism you get from the press and online. Do you have anything to

say about how the context in which you are upholding human rights is affected by what is written in, for example, the *Daily Mail*?

Lord Neuberger of Abbotsbury: If you are asking whether in my time I or any other judge made a decision that was influenced by what we thought the *Daily Mail* might say about it, the answer is a very big no.

Lord Hope of Craighead: Absolutely.

Chair: There is about to be a Division in the Lords. Thank you very much for your illuminating evidence. It has been an extremely useful part of our inquiry. We are grateful to you not only for all the work you have done on the Bench in the judiciary over the years, but for bringing that experience to us today. Thank you very much.