



HOUSE OF LORDS

Select Committee on the Constitution

Corrected oral evidence: Lord Chief Justice of England and Wales

Wednesday 3 April 2019

10 am

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Members present: Baroness Taylor of Bolton (Chairman) Lord Beith; Baroness Corston; Baroness Drake; Lord Dunlop; Lord Hunt of Wirral; Lord Judge; Lord MacGregor of Pulham Market; Lord Morgan; Lord Norton of Louth; Lord Pannick.

Evidence Session No. 1

Heard in Public

Questions 1 - 12

Witness

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

Examination of witness

Lord Burnett of Maldon.

Q1 **The Chairman:** Thank you for coming today. These are interesting times for everybody. May we start by going back to some of the points that we discussed on other occasions, particularly some of the judicial recruitment and retention issues? Could give us an update on how you see the situation on recruitment, particularly the people coming through? Are we getting enough high-quality candidates coming through? Are people looking to step up in that way?

Lord Burnett of Maldon: Since I last saw you, almost a year ago for a session of this nature, the High Court competition completed over the summer of last year. As you may remember, we needed 25 judges to fill the vacancies in the High Court, but we secured from the Judicial Appointments Commission the recommendation of only 10. There were only 10, because the Judicial Appointments Commission is rigorously maintaining standards, which all the judiciary applauds, but the result is that the High Court continues to run significantly below strength. There is a competition running at the moment, which is about half way through, and I hope that this year's competition will deliver more candidates than last year's.

Since we last met, there has been a competition for the Circuit Bench, which also failed to deliver the number of judges requested. That, too, was unfortunate. Once more, there is a competition running and we hope that that will make good some of the deficiency. There is also a competition running for the District Bench, and I am nervous that it will not deliver the number of judges we need.

By contrast, a number of the competitions for fee-paid judges have been very successful. We have recruited upwards of 300 new deputy district judges, which is crucial for dealing with the work in the family and civil courts, and the recorder competition that was run last year for part-time judges to sit in the Crown Court and in the county courts was successful. The picture is mixed, I am afraid. Similar pictures have emerged in the tribunals as well.

So far as quality is concerned, the position unequivocally is that the JAC, with the full support of the judiciary and the Lord Chancellor, is determined to maintain quality and would rather leave vacancies than risk undermining the general standing and reputation of the judiciary.

The Chairman: There are not enough people of sufficient quality coming forward?

Lord Burnett of Maldon: Certainly for the High Court, that has now been the position for four years. Four High Court competitions have failed to deliver the total numbers that were requested. The position appears to be developing in the same way in a number of other jurisdictions as well, which is extremely worrying.

Lord Pannick: What are the consequences of this for the judiciary and for the public in waiting times for cases to come on and the stresses imposed on judges who have to deal with the same number of cases but fewer judges to deal with them?

Lord Burnett of Maldon: There is a series of different consequences. The most high-level consequence is the difficulties that we have had in the High Court, which is a risk to the international reputation of the High Court judiciary in dealing with the very large volume of dispute resolution that comes to London out of choice.

It is a striking feature of work done in the commercial courts, the Chancery Division and business and property courts that many of those who litigate are effectively volunteers. They do not have to litigate in London. It flows from the use of English law and English jurisdiction clauses and so forth.

The international standing of the High Court in particular is critical to maintaining an extremely important aspect of the prosperity of legal London and legal UK, but also beyond that, because, as those who have been involved in litigation will know, for every lawyer involved there are lots of other people involved. That is a high-level impact that is of particular concern.

At all levels, the salaried judges are undoubtedly having to work harder. Deploying fee-paying part-time judges fills much of the gap, but, as anyone who has operated in our environment will know, including those of us who were fee-paid judges to begin with, the fee-paid judges cannot deal with some of the more important and high-profile cases, because we have to deploy salaried judges to those.

Secondly, they cannot get through quite so much work. That is not surprising, because a lot of people are fee-paid judges as they are dipping their toes into the water to see how they enjoy it, whether they like it and in due course whether they might wish to become salaried judges. There is that impact, therefore.

The next level of impact, which was at the heart of your question, is that in both the family and the civil jurisdiction, the family court across the country and the county court across the country, in the last year or so we have had difficulty in finding judges to sit in courts that are ready and available to sit, because we have not been able to make good all the deficiencies by the use of fee-paid judges.

This is why I come back to the 300 and more new deputy district judges who are in the process of being appointed. Once they have been trained in the various jurisdictions, and can be deployed to sit in the family and county court, I very much hope that that problem will gently begin to recede.

Q2 **Lord Pannick:** Could I also ask about diversity, a subject that you have addressed before? What do you say to the critics, and there are many of them, who complain that the judiciary and the Judicial Appointments

Commission are not proceeding quickly enough in order to increase the proportion of our judges, particularly at the more senior levels, who are women and who are from ethnic minorities?

Lord Burnett of Maldon: First, I make a plea. I wish the debate would proceed from a proper understanding of the position that we have reached. In other words, I would very much like people to concentrate on the statistics that are available and paint a picture that has improved very significantly in recent years.

One initiative that I hope we might be able to put in place is bringing together the relevant statistics from the Judicial Appointments Commission and the Judicial Office, where we keep statistics about the diversity of all our judges, and from the professions about diversity in the professions at the relevant level.

The position regarding the higher judiciary at the moment—the High Court, Court of Appeal and the Supreme Court, although I am not responsible for the Supreme Court in any way—is that 25% of our judges are women. That figure has increased significantly in recent years, and I hope it will increase further.

The starting point is that the judiciary remains a second career. Anyone becoming a fee-paid judge is likely to be at least in their late 30s or start in their early to mid-40s. Most of those who come to the salaried judicial career at whatever level do so in their late 40s and often a little later. We are recruiting from the legal profession at senior levels. That is the reality, and I think it is also one of the reasons why the judiciary in the United Kingdom is held in such high regard generally: because everyone understands that we recruit from the best of the legal profession. It is the Judicial Appointments Commission and not I who appoint judges, but we are, to an extent, hamstrung by the progress made in diversity in the legal profession.

As you noted, I spoke recently on this subject at some length to try to set out a stall and to nudge where the debate is going. It is striking how, at the upper reaches of both the solicitors' profession and the Bar, women are underrepresented. It is very striking that at the upper reaches of the Bar and the solicitors' profession, ethnic minorities are not well represented. My own view is that there needs to be more concentration on the pool, the pipeline of potential judges, than there has been so far.

I have a statutory duty to increase diversity among the judiciary. So, too, does the Lord Chancellor and the Judicial Appointments Commission. The judiciary, collectively, is very active in seeking to discharge my statutory duty. Large numbers of programmes are in place.

There is not time, unless you wish me to, to set them all out, but I did summarise them in the speech I made on 18 February. I can assure you and everyone that very large numbers of the judiciary, hundreds of judges, spend a lot of time, much of it their own time, pursuing the programmes that we have put in place to help improve the diversity of

the judiciary. The progress that has been made over the last few years suggests that it is having some impact.

Q3 **Baroness Corston:** On 19 February it was reported in the *Times* that sexist and bullying male judges must be “called out” and that chauvinistic attitudes were dissuading women from seeking judicial roles. To what degree do you think this deters women, and what steps are you taking to address it?

Lord Burnett of Maldon: First, I am not aware of any evidence that women are deterred from applying for judicial office as a result of the attitudes of judges. I make that clear from the outset.

The context of the report that you refer to is that in the weeks that had preceded the report there had been a good deal of comment on social media about problems that women, particularly at the criminal Bar, were facing generally with sexism at the criminal Bar. The Criminal Bar Association gave multiple examples of that and it was suggested that it was one factor that was leading to some women leaving the criminal Bar.

The essential problem that was first identified, and I do not know the extent of it or how it plays out, was a criminal Bar problem. A few anonymous examples were given of judges apparently behaving badly in court. It was in that context that I made those observations. We hunted high and low to try to identify the examples that were being referred to, and it turned out to be a handful. I fear that there was a phenomenon in play, which is all too familiar to politicians, that a few examples get repeated time and again and a false impression is created.

I would like to say absolutely clearly that of the hundreds of judges who sit in the Crown Court and the family court, if there is a problem of this nature it is a problem that affects only a small number. I have made it clear that if there are genuine concerns about the way judges are behaving in court, there are two mechanisms by which those concerns should be dealt with. Either they must be brought to the attention of the local leadership judges, who can quietly look at it and often deal with an incipient problem quickly. If it is a serious issue, however, we have a formal complaints process that is independent and which will look at these types of issues.

It is part of the foundational way in which judges should behave that they are courteous to those who appear in their courts, that they keep calm and do not display behaviour that puts unreasonable pressure on people. Of course, there are lapses. Sometimes, when one finds out more about a particular lapse, there is a backstory, and this is not unique to the judiciary. Somebody has been overworking, there is a problem in the background and so on. We are trying to ensure that, to the extent that these problems exist, they are being looked at.

Baroness Corston: Would you accept that if some, and I accept that it is probably a very small proportion, judges behave badly, they probably behave badly when they are at the Bar? I started to practise in my late

40s for a short time before being elected to the House of Commons, and I noticed that quite a few older barristers behaved in what I would call quite a sexualised way when they were changing in the robing room. It was obviously meant to be intimidatory. I knew that and it did not bother me. If I had been a 26 year-old pupil, I would have found it distressing. Would you not therefore say that this is a problem for the Bar as well as judges?

Lord Burnett of Maldon: The problem was identified by the Criminal Bar Association as one that was a problem for the Bar. I am not at all convinced that it is only the Bar. There seems to be sexism in other parts of the legal profession as well. It should not be happening. It genuinely surprises me, because in the context of the practice that I had at the Bar, which was not a criminal practice, that sort of behaviour was not apparent.

It both surprises and distresses me if able young women at the Bar are being deterred from pursuing criminal practices as a result of being exposed to behaviour that, if it was normal 50 years ago—and I cannot speak of that—is not acceptable nowadays. It pains me at a personal level for the people involved, but also because of the impact it has on the overall quality and diversity of the criminal Bar—and the quality and diversity of the criminal Bar in particular is critical for what happens when we are recruiting the JAC recorders and circuit judges for the Crown Court in particular.

Baroness Corston: May I say for the record that I never practised at the criminal Bar?

Lord Burnett of Maldon: We all have different experiences.

Q4 **Lord Dunlop:** In one of your answers you mentioned training. There were some newspaper reports last month that the senior judges are not happy about a decrease in the training courses available for junior and part-time judges. Could you tell us what training exists for those judges and whether your assessment is that the training available is adequate for the purpose?

Lord Burnett of Maldon: The reports that you refer to were wrong. They were inaccurate. It is worrying that reports of that nature should gain such a currency that they appear in the daily papers and people approach it on the basis that they might be true when they are not. This was a focus on the training given to recorders, in particular.

The reality is that the training given to recorders is being increased, not decreased. Up to now, each recorder has been provided with a two-day residential course every three years and a half to one-day seminar on a Saturday each year. Now, a two-day residential course will be given to all recorders every year, and those who sit in more than one jurisdiction will get even more.

I fear that we saw something that we are all too familiar with: namely, that because something was changing, people instinctively did not like it,

and without checking their facts they assumed that there was some sort of sinister and ulterior motive to it, and there was not.

Unequivocally, the position for the fee-paid judges is that their training is being increased, not decreased. I should say also that, in addition to the physical interaction courses, on the Judicial College website there are increasing numbers of online training course and interactions that any of us can engage in, as you would expect.

Lord Dunlop: Given that sort of misinformation, what action was taken at the time to correct it? Is there a comment that one could make about the lines of communication to the profession?

Lord Burnett of Maldon: It was corrected immediately, and the director of training at the Judicial College wrote a letter to the *Law Society Gazette*, which was published. The *Law Society Gazette* is one of the journals that ran the story quite prominently. Such action that could be taken was taken. I fear, however, that if I had to correct every piece of misinformation or misunderstanding that appears in the press I would not have time to do much else, although we thought that one was important enough to do so.

The Chairman: We understand that problem.

Q5 **Lord MacGregor of Pulham Market:** Last year, you told us that one of your priorities was to improve judicial morale. What steps have you taken to do this, and what progress has been made? What is morale like now?

Lord Burnett of Maldon: First, to make an obvious comment, causes of low morale in any organisation are complex. In the judiciary we have the advantage of the Judicial Attitude Survey from 2016, which identified a large number of them. At the top was concern about pay and pensions and remuneration, as you remember.

There was also enormous concern about the way in which judges perceived themselves to be viewed by government. The startling figure, as you may remember, was that only 2% of judges felt valued by government. There was also a perceived disconnect between the very senior judiciary and the judiciary across the country. There was worry about the state of our buildings, in particular, and increased workload. There were a large number of factors coming together.

In trying to improve morale, my personal view is that it is rarely improved by grand gestures. I cannot do the equivalent of doubling the rum ration, as it were. There is a whole series of things that we have been doing which I am told have improved morale and my perception is that they have improved morale.

The first is a determined effort by me, the Senior President of Tribunals and the other very senior judges to connect with the whole of the judiciary. That involves travelling around the country meeting hundreds of judges, talking to hundreds of judges, listening to hundreds of judges

and seeking to understand what concerns them. Within the term “judges” I include magistrates as well.

Secondly, the judiciary understands that I have been pursuing the fundamental concern in the SSRB report from last October with vigour within government. We have been keeping them broadly up to date with what has been going on. I know from what is said to me by the judicial associations that this is very reassuring for the judges.

The other big thing we did was to revise completely the way in which we communicated with judges about modernisation and reform. It is understandable in any organisation that if proposals for fundamental change are made people become nervous. That is human nature and it is not limited to judges. We engaged in a process with the judiciary of seeking views about all aspects of the reform and modernisation programme to show that the judges were engaged in shaping its development. That, too, has had a significant impact on the general sense of well-being of the judges.

On buildings, we secured some extra money last year and this year to help with maintenance, and as I think I mentioned last year, all the maintenance budget, both capital and revenue, is now being spent, because there was a time when that was not happening. The financial needs of our buildings are not going to be met by a few million here and there. In due course, when purse strings are a little looser, government has to recognise that a significant amount of money has to be deployed on the estate.

Another initiative that I was keen to propose was what are called career conversations. One of the striking things about salaried judges is that for a long time the very concept of independence was perhaps applied too rigorously and it was thought that they should be left alone to get on with it. The reality is that, in whatever walk of life one operates or whatever job we have, we should be talking to people about how we are getting on, about aspirations, about what is working and what is not working. We are introducing across the judiciary career conversations so that the leadership judges talk to the judges for whom they have responsibility. That has been a great success and is being rolled out across the country.

Another aspect that has been of real concern to me is the welfare of judges who have a diet of distressing cases, particularly those who spend all or most of their time dealing with distressing cases about children in the family courts, and the Crown Court judges who spend a disproportionate amount of their time dealing with sex cases that can have deeply distressing content.

We have introduced a welfare programme to make available to all judges the opportunity to talk to a professional about problems of that nature, and the take-up has been quite good. That development is possibly overdue, but it demonstrates how we are trying to move the way in which the judiciary operates and is managed into a place that would be recognisable to all of you who have operated in other environments.

Additionally, a programme to help judges deal with stress and resilience has been introduced, and additional training for leadership. I am sorry to bore you with a list, but it comes back to where I started, which is that there is no grand gesture. I cannot wave a wand to change morale. To the extent that the levers are within my grasp, I am trying to improve things incrementally with a view to improving morale.

Lord MacGregor of Pulham Market: Which of all the factors that you have mentioned is the most important?

Lord Burnett of Maldon: Undoubtedly the first, the SSRB issue. That is the one that has been the most telling in undermining judicial morale. I should say that the report was provided to the Prime Minister in the autumn of last year. The Lord Chancellor made a Written Ministerial Statement in October indicating that the issues were being reviewed, and in the intervening time I have been in constant discussion with the Lord Chancellor about this. Both he and his officials have worked tirelessly to develop possible solutions, as have Treasury officials. I suspect that were it not for other matters distracting Ministers we might have had a result in the sense of an announcement by now, but I hope it will not be too long in coming.

Q6 **Lord Beith:** What discussions have you had with the Lord Chancellor and the Sentencing Council about the Government's proposal to abolish sentences of six months or less?

Lord Burnett of Maldon: I have discussed this with the Lord Chancellor. It perhaps overstates it to say that there is a formulated policy yet. My understanding is that the Lord Chancellor is starting a discussion about sentencing policy. Sentencing policy is primarily for Parliament, informed in the end, of course, by any input from government and others. The judiciary will stand ready to provide, as it always does, input on the practical implications of any proposed policy changes.

This is at very early stages, as I understand it, and is part of a broader discussion about sentencing policy and how to deal with all sorts of different types of offender. In broad terms, it is desirable that there should be informed debate about sentencing policy rather than knee-jerk debate about sentencing policy, which is what I fear we get in many environments.

In the discussions that I have had with the Lord Chancellor I have made the point that we will assist and that policy in the end is for Parliament. My understanding is that it is fully accepted that there have to be exceptions to the general rule. Each of you might have your own list of those exceptions, but one or two of them are perhaps obvious—the type of offence such as taking contraband into prison. If everyone knows that they can take it in once and not get a custodial sentence, I rather suspect that the problem would get worse rather than better. There is a real problem with multiple offenders—the shoplifter who has done it 24 times and nothing has worked. Offences against justice is another example.

As you know, there are many offences for which Parliament has said that the maximum sentence should be six months' imprisonment, and there are also many offences with maxima of 12 months or two years. When one applies ordinary sentencing policy, therefore, we often get down to sentences of six months or less.

There is the whole question of suspended sentences, and there is the issue, as you rightly identify, with the Sentencing Council. Were there to be a statutory change, albeit it with a list of exceptions, that achieved the result that we have identified, almost every guideline issued by the Sentencing Council would have to be revised, and that would be quite a big job.

Lord Beith: Bearing in mind that the background to this is the known ineffectiveness for most purposes of short sentences, what would it take to increase the confidence of sentencers in the robustness of alternatives to custody?

Lord Burnett of Maldon: I am sure we talked last year, and if we did not I have talked elsewhere, about the problem that sentencers lost a lot of faith in non-custodial sentences because of the failure to monitor them properly. There was the phenomenon of multiple breaches of community orders that were simply not being reported back to the courts, and faith was lost in quite a lot of what was going on.

I need to be careful not to trespass into policy areas, but I have one mild observation. It seems to me that there are circumstances in which one needs to look subtly at what punishment will have an impact on the offender. It is perhaps a little simplistic to suppose that all offenders are affected in the same way. Looking back to when we were all late-teenagers—for some of us, a longer look than others—a curfew for an 18, 19 or 20 year-old is quite a punishment. The technology now enables that to be monitored properly. That is just an example of something that is available to the courts and is used, but I would love to see some research on the impact of these sentences on the people concerned. It may exist and, if it does, it just has not yet crossed my desk.

I hope that when there is a debate about sentencing—and no doubt it will extend a good deal beyond the question whether there should be fewer or very few sentences of custody of less than six months or a year, or whatever figure people identify—it will be informed by a deep understanding of the impact of sentences on offenders and on offending and by a proper look at what is going on around the world.

Q7 **Lord Judge:** May I refer to something you said last year when you expressed a "faint underlying concern" about the way in which "across officialdom there is not the instinctive understanding of the constitutional position" as between the judiciary and the Government? Has the situation improved, is it much the same, or has it got worse?

Lord Burnett of Maldon: I do not think it has got worse, but I can say that there are various things that we are doing to try to improve the

position. I am afraid that I do not know what basic training in the structure of the constitution is given to most new entrants to the Civil Service, for example. I do not know what materials are made available to new Peers or new Members of Parliament either. It is important, however, that each of the branches of the state—the Executive, Parliament and the judiciary—should have a clear understanding of the other's roles and responsibilities and we need to treat each other with great respect. The Civil Service is the servant of the Executive for these purposes primarily.

We are developing further programmes that, for example, enable parliamentarians to visit the Royal Courts of Justice, to sit in with judges, to talk to judges and so to learn a little more about what goes on. We are encouraging Members of Parliament to engage with and visit their local courts, all of which can help understanding at that level. In conjunction with the Ministry of Justice, we have enabled judges to talk to large numbers of civil servants to explain in short order where the constitutional boundaries lie. I have spoken about the topic at the Government Legal Department conference, which was attended by 500 or 600 people. My officials in the Judicial Office do the same regularly across Whitehall.

It seems that it is a topic worthy of some sort of dedicated training at the outset of somebody's career and perhaps refresher training from time to time. Only last week, I was talking to the director of the Judicial Office about whether we could offer senior judges to talk at the senior Civil Service gatherings that happen from time to time. It would be 15 minutes just to make the point.

Lord Morgan: I apologise to the Committee for coming late, which was due to family illness, and I was not aware of the change of time. It is my fault and I am sorry.

I was interested in your observation that at times in the past there was a clearer and instinctive understanding of the relationships between the judges and Parliament. I am interested in what you had in mind there, because it seems to me as a historian that the rise of the Labour Party, for example, was intimately connected with a misunderstanding of the relationship between the High Court and the House of Lords. The Law Lords in the House of Lords and judges in that period did not help to make things any clearer. The rise of the Labour Party, whatever you think about it, is an important historical event. I would be fascinated to hear what examples you would like to give us.

Lord Burnett of Maldon: The example you give, which I suppose centres around the Taff Vale case and others, is long in history. I do not want to talk about particular examples, if you will forgive me, but there have been instances, including quite recently, of a lack of comity being shown by individual legislators towards court decisions, which I suspect would have been unthinkable 50 years ago.

When one looks at questions such as parliamentary privilege and scans through what happened from 1689 onwards, it appears that for the thick end of 300 years it did not occur to any legislator to use the privilege to set at nought the order of the court. Since the 1970s it has happened very infrequently but sufficiently frequently to begin to cause a faint sense of unease. That is the sort of thing that one has in mind.

In terms of the way in which judges generally are viewed, it is extremely important for all concerned to remember that judges hold office under the Crown. Judges are not accountable to the Executive, or directly to Parliament, as it happens, although there is deep engagement with Parliament and parliamentary scrutiny through this sort of exercise, reports and so on.

There is a concern among many judges that there is a creeping sense, which may not be capable of being empirically demonstrated through evidence, that judges are the same as civil servants. They are not. There is a very good reason for that, which is called judicial independence. It is necessary in a complex world occasionally to remind people of that. I try to do that from time to time. I did it in a fairly heavy-duty speech last September to the Commonwealth Magistrates' and Judges' Association, where the topic of the whole conference was judicial independence, comity and so forth. I do not for a moment suggest that there is a big problem but just occasionally one gets the sense in exchanges that there is not a foundational understanding of what the position should be.

Lord Morgan: Thank you. That is an admirably lucid and helpful account of matters. I do not want to deflect the discussion, but it occurs to me that if we had a written constitution instead of relying on wisdom from you, which is very helpful, we would have something on paper that would help people. I would like to make that as a minuted observation.

Q8 Lord Norton of Louth: In a sense this is to follow it up and broaden it out because for justice to be done it has to be seen to be done. Could I put first a general question on the specific point and ask how transparent you think the justice system is at the moment?

Lord Burnett of Maldon: The default position is that everything in our courts is done in open court. There has to be a good legal reason for there to be encroachment upon the core principle of open justice. Open justice has been a core principle of how legal business is done in this country for centuries. There are some very famous statements of principle from my predecessors going back three centuries on how vital that is. It is a principle which is upheld vigorously by the judges. As you know, constantly we look at the circumstances in which there are encroachments on open justice. Obviously, the most significant encroachment would be if a hearing of significance were not held in public, but that is very rare. There are encroachments through the granting of anonymity, for example, which is most often necessary to protect the welfare of children and matters such as that. The courts are, in that sense, as transparent as they have ever been and it is a principle that, speaking personally, I will strive to uphold.

There is an issue that needs to be looked at not by the judiciary but more widely concerning the extent to which what goes on in our courts is now reported as much as it used to be. There was a time when every local newspaper would have a list of pretty well every case that ran through the local magistrates' court or the local Crown Court—for example, Fred Bloggs was convicted of careless driving and fined £120—and that was because there were sufficient reporters employed by newspapers to sit in court buildings and pick up what was going on. That is no longer the case. That needs to be looked at more broadly because it is a good discipline for courts to have reporters sitting there. I know, and Lord Judge will remember, that in the Lord Chief Justice's court there still is somebody there all the time and it is not a bad thing to have somebody who can Tweet immediately or report immediately every word one says. So I think that is a problem.

In terms more broadly of transparency, one of the things, as you may remember, that I said on a number of occasions following my appointment was that I was concerned that the public at large, those who happen to flow through our courts, do not have a very clear understanding of the rule of law, of what goes on in our courts or of the judiciary and that too much of their understanding is conditioned by reporting of high-profile cases, which inevitably concerns the senior judiciary and ignores the thousands of judges in the tribunals and courts making decisions every day that affect people's lives. A lot of it, alas, is also still informed by TV and film drama, which is for the most part a terrible caricature. It would be as if Peers were always shown wearing the robes that you wear on State Opening. It is a cause of real frustration.

We have been trying to deal with that or address it, to some extent, by having the senior judiciary be more active in talking about what goes on in our courts. That is picked up in the press quite a lot. I appreciate that the nation is not sitting agog waiting to hear what I have to say on every subject but none the less it seeps out. We are also doing things which I believe will improve transparency and public understanding. For some time, we have had the filming and availability for broadcast of proceedings in both divisions of the Court of Appeal. Again, I recognise that there is a limit to how much will be broadcast, but some of it is, which is important in letting people understand a little of what we do. We have introduced live streaming from the Court of Appeal Civil Division recently. It is only one court at the moment but it will soon be more. We do not get millions of people tuning in or coming back to look at it after the event but thousands and tens of thousands are doing so. That is one aspect.

Another aspect, which is at the heart of what I have been trying to do, is to increase and improve the engagement judges have with schools. The work done by hundreds of judges in visiting schools is inspirational. When one thinks back to one's own childhood, visits from outsiders—I can remember them all from when I was eight, nine, 10, 11 or 12—have a real impact. One of the things we are trying to do is to visit schools to demystify the law and to demystify what being a judge is. The visits are

more often than not to schools in which the pupils might not naturally be thinking about careers in the law and the purpose is to try to light a spark in bright kids who might be able to think about it for the future. That is an enormously valuable exercise.

There are many others working at it as well. Magistrates are doing it. Materials have been prepared and made available to schools so that if they wish to teach this as part of the citizenship aspect of the curriculum they can do so. I regret that I have not yet been able to engage the enthusiasm of the Department for Education in working alongside me on this, but I think it is an extremely important aspect of what the judges are doing in their own time to improve understanding.

Lord Norton of Louth: I can see the value of people understanding how the judicial system works. That is essential. Is there still a problem, however, with what it delivers in terms of making judgments accessible? I gather 80% of High Court judgments are not available online. Is that because if there is a transcript taken by shorthand writers there is an issue of copyright?

Lord Burnett of Maldon: I do not think that is an issue. The accessibility of judgments is now greater than it has ever been. The position is that all substantive judgments of the Court of Appeal Civil Division are made available online and via the British and Irish Legal Information Institute website. This is a charity that we make a significant financial contribution to annually because of the service it provides to everybody. Court of Appeal Criminal Division transcripts are too numerous all to be made available in that way because there are many routine judgments, if I can call them that. Anything of significance, however, is put on BAILII as well as decisions in the Administrative Court and all the High Court divisions. There is very much more now put online than ever was. Additionally, on the judiciary website we place immediately judgments which are thought to be of wider public interest. They are not necessarily those of most legal interest, as you will appreciate. We do the same with sentencing remarks in cases in which there is a significant public interest. We are working towards much greater accessibility than ever there was.

Lord Dunlop: The fact that it is there so people can access it is extraordinarily important. You say the material you put out there is of wider importance. Do you call attention to that fact or is it just making it available and leaving it to others to pick up on?

Lord Burnett of Maldon: We have a judicial Twitter account. I hasten to add that I do not operate it myself. That alerts to some extent. Usually, the sorts of cases that go on to our website are the sorts of cases that are immediately being reported in the press. Those who want to see the detail of why a decision was reached will have come via that mechanism.

Lord Morgan: Everything you say is very convincing. I wonder whether, however, more could be produced for the general public understanding by the legal profession. As far as I am aware, there is not a legal equivalent

of the *Times Higher Education Supplement*, which sheds a not always accurate but interesting light on higher education in this country. I have the good fortune of having a wife who is a lawyer and a son-in-law who is a solicitor, so I can study Lord Pannick in great detail every week and learn immensely from it. Do you think more light could be shed on these difficult questions by the legal profession?

Lord Burnett of Maldon: A surprisingly large number of publications produce gists of significant cases. I have already mentioned the *Law Society Gazette* and there are many others. A lot of them operate both online and in hard print. If anyone, for example, were interested to get a quick digest of a decision in the Court of Appeal last week or the week before in a case of some substance, I would wager that if you tapped it into your search engine you would find quite a few such gists. A lot of solicitors' firms produce them if they are within their particular area of legal endeavour, as do barristers' chambers. It is all there; it is a question of being able to get it via the internet.

Q9 **Lord Hunt of Wirral:** Turning to the modernisation of the courts, recently a number of us were treated to a presentation in the Jubilee Room in Westminster Hall by some highly talented people who demonstrated how we were modernising the whole system. I suppose I could be criticised for being a bit pessimistic. I said, "How on earth could you do this when your court buildings are in a terrible state?" I did not say that I was quoting the Lord Chief Justice nor did I go on to say that conditions are surely sub-optimal, but I was caught short by one very bright official who said, "Well, you seem to manage in this place". We had some masonry fall in Black Rod's entrance and there was leakage in a corner of Westminster Hall. They were saying, "Believe in what we are seeking to do because it is very exciting". Is it?

Lord Burnett of Maldon: It is exciting, but it is also absolutely vital that a lot of it is done. What is mostly in prospect is reforming the operation of process and procedure to do things that, frankly, should have been done years or decades ago. I suspect we all book our holidays online. Who fills out an insurance proposal form nowadays? Maybe a few people do rather than do it online. Who changes their driving licence save by doing it online? Yet, in many aspects of the court system, we still operate paper systems that are the same as were operated by our legal ancestors in the 1950s and 1960s. It seems extraordinary that we are still operating entirely paper-based systems in many of our courts. Providing the opportunity for professionals, but also litigants in person and those accessing the tribunals, for example, to be able to do it all online is very valuable. I say "providing the opportunity", because paper-based options will remain for those who simply cannot use the online system.

The changes that have already been achieved are striking if one goes around the courts. About three years ago, paper was phased out of almost all Crown Court trials. Everybody now—judge, advocates, everybody—has all the paperwork on an iPad or a laptop. What has happened in the buildings is that hundreds of filing cabinets groaning with files, which were wheeled around the building in trolleys and which

people had to copy, have gone. I do not have the up-to-date figure in my head, but the last time I was told, which was a month or two ago, it was something like 70 million sheets of paper that have not been copied as a result of that. You can work out what that takes in terms of time, energy and wasted resources. What was so fascinating about it was that when this system was proposed there were some long faces and people said, "Oh, it's terrible. It won't work". Now, however, I can say that I have not encountered a single Crown Court judge who does not think that it is much better. Only yesterday, I was talking to one who said how terrible it was that they still get some paper-based cases if they are not being prosecuted by the Crown Prosecution Service. They are not used to that anymore.

HMCTS is introducing paperless systems into family and civil as well. It is already available in the Business and Property Courts in London. It has been sent out across the country. In some areas, family cases are being dealt with without the great piles of paper. I am talking too much about that, but it gives an example of how what is going on is not in any way revolutionary; it is absolutely necessary.

Other aspects, which we speak of often because they have worked, include being able to file for divorce online. When it all had to be done by paper, the paper divorce form would be put before a district judge or deputy district judge, who would have to check that everything was correct. Something like 40% were rejected because people had put the wrong date of marriage in or the wrong date of this or whatever. Online can be infuriating. When you do anything online, if you do not get it right it will not let you move on. Usually, it is giving away your personal data by giving a telephone number or something. Now the failure rate is less than 1%. Just imagine the amount of time and energy that is saved. It also takes less time for people to fill them in online than it did on paper and checking those forms for district judges and deputy district judges must have been soul-destroying, to be quite honest.

With online civil money claims, if you have a dispute of up to £10,000 you can file your claim online and the defendant can file online, so there are no forms to fill in and nothing to post, and it is remarkable what is happening. Cases that are being dealt with in that way are being settled very quickly, sometimes within hours. The take-up has been much greater than anyone expected and it seems that that particular initiative is going to improve access to justice. How many people who have good but relatively small claims as individuals or as small businesses at the moment shrug their shoulders and do not bother because it is all too much trouble? Part of this is to make it easier for people and access to justice.

Lord Hunt of Wirral: On IT systems, there have been two major outages in the last year. What are you doing to stop that happening again?

Lord Burnett of Maldon: I do not have a sonic screwdriver to deal with that. The two outages in January were on MoJ systems, which applied

across the whole MoJ, and which are rather old. They did not have much resilience and the contractors perhaps did not keep up to speed on everything that was going on. It proved one thing: that lightning can strike in two places at the same time because in week one there was an unexpected problem, which was resolved by the end of the week, the Friday, and then on the Sunday another unexpected and completely unrelated problem occurred and it took another few days to restore. Those systems are nothing to do with the reform programme. The reform programme is trying to move beyond these legacy systems, which continue to cause us difficulty.

What am I doing about it? You will understand that we were very concerned, to put it mildly, about what had happened. The ingenuity of staff and judges and the professions, aided by the fact that the wi-fi, which is relatively new in our courts, carried on working meant that almost no cases were lost. It was a heroic effort by the staff at HMCTS and our judges at every level to keep the show on the road during those very difficult 10 or so days. At the heart of what the judiciary are insisting on for the reform programme is technology that works and that is resilient. There is not an organisation of any size in the world that does not occasionally have IT problems, but the extent to which they compromise your ability to deliver the services that you are concerned with depends on the contingency plans in place, back-up and resilience. HMCTS assures me that it is putting in place everything that is necessary.

Lord Hunt of Wirral: Thank you.

- Q10 **Baroness Drake:** A recent newspaper article called on the judiciary to learn and interpret the use of emojis. What challenges do the judiciary face in understanding and interpreting the complex issues arising from modern technology, including new forms of colloquial language and their meaning?

Lord Burnett of Maldon: It is a problem for us as judges just as it is a problem for all of us in life in general. Judges who try criminal cases will frequently be confronted with long extracts from texts and there is not just one text language in this country but dozens of them. It is perhaps unwise of any of us to think that we can look at a text that comes from a completely different environment from the one we are used to and be sure that we understand what it means. In that sort of environment it is necessary for those who are introducing the texts into evidence to be able to explain them. That is a broader challenge. A judge famously wrote a judgment for the benefit of very young children whose future he was determining in which he placed emojis. Personally, I am a fan of emojis when I am sending texts, but I do not think I would be brave enough yet to put one in a judgment.

The underlying issue is a very serious one simply because technology, IT, and the way people use it and the way people communicate are moving at a very fast pace. Through the Judicial College we have made training available on all these issues. It may surprise people that we have dedicated training on all these issues, but we have social media training

available for judges. We have more basic training in the use of technology and tutorials in the use of all sorts of things. In evidential terms, it is a problem if any of us encounters in evidence things that we do not understand and we have to ask people. I doubt that we can keep all judges up to speed on all the developments in text language.

Baroness Drake: How are you assessing whether the training that you are giving is proving to be effective and, if it is not 100%, how do you measure that you are keeping judges up to speed to use colloquial language?

Lord Burnett of Maldon: I do not hear that there are big problems over this and I suspect, as I said before, that these issues will principally arise in criminal cases where the exchanges between witnesses or defendants and witnesses will be important for the determination of the outcome of the case. If that is happening in the Crown Court, just as with any evidence, it is critical that those deploying it understand. It is not just the judge who has to understand it but the jury as well, although some jurors will be more up to speed on this than others. The basic starting point is that, if you are dealing with something a little unusual, you have to make sure that it is explained. I have not picked up that this is a particular problem for the judges at the moment.

Q11 **Lord Dunlop:** You recently set up a new body to guide you on artificial intelligence. What are the main opportunities and risks from the use of artificial intelligence in the justice system?

Lord Burnett of Maldon: I set up the artificial intelligence group, which comprises not only lawyers but also distinguished experts in that field, because I do not really know the answer to your question. I would not pretend for a moment to be beyond the foothills of understanding of artificial intelligence or where it might be going, but one thing I am confident of is that 10 years from now the landscape will have changed completely. The pace of change in technology is astonishing. It is important that none of us, at least in the judiciary, should be starry eyed about that change. My purpose in setting this group up was to establish a body of real expertise to think about all these issues and to think about how we might take advantage of developing artificial intelligence to improve what we do. I hasten to add that what we do is administer justice. We support the rule of law. We try to improve access to justice.

When I say we should not be starry eyed about it, I do not want what might loosely be called boys' toys. I am not interested in that. I am interested in having experts think strategically and for the future to anticipate where things might be going generally. For example, there is already artificial intelligence available in some jurisdictions, which can be used, having put in lots of information about the way different judges come to conclusions, to predict outcomes depending on the judge you get. That is fascinating. Quite where it takes us as judges I am not sure. There is AI available more generally that is used increasingly predictively in the world of legal advice. These are things that we need to be alive to. This group has only just started its work. At the moment it is looking to

identify a small number of discrete areas of inquiry that it will embark on and I hope that it will enable me to have an eye to what might be coming in the future.

Lord Dunlop: When do you expect the first product of this body to manifest itself?

Lord Burnett of Maldon: I would hope later this year.

Q12 **The Chairman:** There is another question that we have to ask. This must be the only room in the building that has gone nearly an hour and a half and not mentioned Brexit. Inevitably, we do get to that. Can you give us an assessment, if you have made one, about what the impact of Brexit will be on the judicial system and whether you expect more litigation as a result of what may be happening in the near future?

Lord Burnett of Maldon: We have been looking carefully at the potential impact of Brexit, and I should add Brexit of various different hues, on each of the jurisdictions that we operate either in the courts or in the tribunals. An enormous amount of work has been done by judges and officials on that. One of the realities of life is that legal uncertainty generates dispute. I hope that is an uncontroversial statement.

I should perhaps preface everything I say by saying that I hope nobody will analyse my every word and syntax to try to draw from it any view about the topic. That is not for me. What I can say is that there are various of our courts where we think there is likely to be a significant increase in work or a change in the nature of the work that is done. Most obviously, the Administrative Court is an environment where there may well be an increase in work in the short term. Plans have been made both in putting in additional support staff and contingently in having more deputy judges available to deal with urgent applications. Ditto in the Business and Property Courts, where, depending on what happens, there could be scope for dispute about all sorts of things.

There are also potential impacts quite swiftly in some of the tribunals. Again, it all depends on what happens, but those have been planned for as well. It has been a particularly interesting exercise to make contingency plans against contingencies that cannot be identified with clarity. I said in December, when I was asked a question at my press conference, that, whatever may flow, the judges will do their level best to ensure that the administration of justice continues as before, and we will. Whether it is a question of contingency planning or simply pressing judges to extend yet further their good will, it will happen. For example, we have a series of volunteers standing by to deal with urgent cases. There are various dates that we have had in mind and there may yet be more, but we have found the volunteers uncomplainingly and that speaks volumes to the way in which the judges approach the public duty that they perform.

The Chairman: Thank you for those reassurances. "Contingencies against contingencies" is a new phrase that goes with "unknown and

known". We were hearing from Lord Reed a couple of weeks ago about the different areas of interpretation of EU law and the changes that are going to take place, so we know every legal and judicial area will be facing quite some challenges and we wish you well.

Lord Burnett of Maldon: On that we can agree. Thank you for your time and courtesy.

The Chairman: Thank you very much for coming.