



HOUSE OF LORDS

Unrevised transcript of evidence taken before

The Select Committee on the Constitution

**ANNUAL EVIDENCE SESSION WITH
THE LORD CHIEF JUSTICE OF ENGLAND AND WALES**

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Witness: Lord Judge

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Members present

Baroness Jay of Paddington (Chairman)
Lord Goldsmith
Lord Hart of Chilton
Lord Irvine of Lairg
Lord Lang of Monkton
Lord Lexden
Lord Macdonald of River Glaven

Examination of Witness

Lord Judge, Lord Chief Justice of England and Wales, gave evidence.

Q1 The Chairman: Good morning, Lord Judge, and thank you very much for coming for another of these regular sessions, when you give us the benefit of your views on current issues and an overall perspective on where you are with various matters. I understand you do not want to make an opening statement so, if we may, we will plunge into questions, unless there is anything you particularly want to say.

Lord Judge: I had not intended to make a general opening statement but, when you ask me your first question, I may launch into what may sound like a general opening statement.

Q2 The Chairman: Very good. In that case, I shall launch into it and say that we are all aware of the changes to your office over the last decade. Do you now feel that those are settled changes?

Lord Judge: In the sense that we just have to get on with it, they are settled, but regarding the way in which the new structures are working—and I shall come to the broader constitutional issue in a moment—we will need to think again. Traditionally, the role of the Lord Chief Justice has been to sit, hear appeals, decide them, give judgments, which provide guidance to lower courts and so on, and to offer advice to the Lord Chancellor of the day on all sorts of things the Lord Chancellor wanted. Let us look at what, I have been told, you might want to ask me about today: diversity, judicial review, pensions, cameras in court, legal

aid, the budget. I have this term to help choose 10 new Court of Appeal judges as part of a selection process. That begins to touch on the new burdens of the Lord Chief Justice. I think the time may come—I am not saying it has come yet—when we need to reflect on what the role of the Lord Chief Justice in the future should be. My view is that his major responsibility is to sit in court, to hear the complex and difficult cases, and give judgments. Frankly, that is the bit of the job I like, so I would think that is the most important part, but there is an issue that will gradually come to have to be decided.

In what may seem like an opening statement, would you mind if I ask this committee to consider some of these issues that I want to raise? Ultimately, it will be for this committee to decide how we should approach a problem that I will identify. This is not a comment on Mr Grayling; I thought this when Ken Clarke was the Lord Chancellor and I would have said the same for Jack Straw. This is nothing to do with my working relationship with any of them. Let us go back to 2005, the constitutional revolution—a constitutional revolution, and it is not without its symbolism, achieved without so much as a word to the Lord Chief Justice of the day in advance—that there is going to be a new head of the judiciary. It will not be the Lord Chancellor anymore; it will be the Lord Chief Justice. I have a theory that, just because a constitution is not all written down, it does not mean it cannot be damaged. Our constitution is not all written down, but it can be damaged.

When that happened, the theory was that there should be separation of powers—brilliant—in a system in which the executive sits in the legislature and the legislature is full of members of the executive. That is not quite consistent. Nevertheless, we end up with the new system. That we could have managed, but this is where the rub comes. You, as the legislature, then turned the Lord Chancellor's role into the Minister of Justice. Ken Clarke said to you last time he was here, "I'm the Secretary of State for Justice." In addition to his responsibilities for protecting the judiciary, advising the judiciary and occasionally telling the judiciary, the

new Lord Chancellor's role included prisons, the probation service, you name it—everything to do with justice except prosecution, which is separate, and the police. We now have one minister in a large ministry. The ministry for which he is responsible in relation to prisons—that is, as the minister for prisons—may not always coincide with the departmental interest or his interest as Lord Chancellor, looking after the interests of the judiciary. So what is being lost?

What is being lost is this. The Lord Chief Justice cannot speak in the House of Lords. That was a consequence of the Constitutional Reform Act 2005. There is nobody in the Cabinet who is responsible for representing to members of the Cabinet how a particular proposal may affect the judiciary. If the Lord Chancellor of the day, in his prison capacity, wants to impose, for the sake of argument, a duty on the judiciary with which the Lord Chief Justice disagrees, we have this very strange business that the Lord Chief Justice of the day may speak to a former Lord Chancellor and say, "I am terribly concerned about this." If the former Lord Chancellor shares that view, and others who have held high office or been involved in the judicial system share that view, they may decide to talk about it, but there is no direct speech from the Lord Chief Justice to those responsible for producing the legislation: Parliament.

I am not being portentous about this, but the process of evolution has some way to go. We have to stand back and ask, "Is the judiciary the third arm of the constitution, there to represent the interests of the citizen and uphold the rule of law?" Yes, it is there to see on a judicial review basis, but on any basis, that those with power have exercised it lawfully—crucial parts of the constitution, one might have thought. Is their position being eroded by a series of accidents arising from these constitutional changes? When I get the chance after my retirement, it is an issue on which I shall spend quite a lot of time, but I would like this committee to reflect on these issues. I am not advocating it all and there may be a very

contrary view about this, but it may be that this committee should reflect on these issues. I have no fear at the moment of the possibility of any political party that we can envisage in this country, under our electoral system, turning up a process that says, “Tell Judge X that, if he does not find for us, he will lose his job or his pay will be cut.” I am not troubled about that. Everybody understands the individual system—that each individual judge is independent—but I am not sure that everybody fully grasps that there is an institutional constitutional role for the judiciary, and that changing the constitution in the way we have changed it in the last seven years may be eroding something rather important. That is an opening statement; I am sorry.

The Chairman: I think it was a very interesting and thoughtful contribution to some of the more general points that we want to raise with you. You have certainly provided a wide agenda for us to look at in subsequent sessions. Maybe after you retire you would like to come and talk to us in more detail, when you have thought about that. I suppose the simple answer to the question of whether these are settled changes is no; it is an evolutionary matter.

Q3 Lord Lang of Monkton: Good morning, Lord Chief Justice. I found your opening non-statement fascinating. I was going to say it opens a can of worms, but perhaps Pandora’s box would be better. I would like to ask about one specific aspect of it. You have gained the right to make written submissions, on behalf of the judiciary, to the Government. Presumably, because you are sensitive to the overlap between the judiciary and politics, there might be some inhibition in how you do that. Could you give us a few thoughts on that, and could you also perhaps give us some examples of the sorts of subjects you might feel inclined to make a submission on?

Lord Judge: Let me take the first question first. There is a very powerful constitutional convention, which I have adhered to throughout my time in office, that the Lord Chief

Justice and judges do not engage in debate about issues that are of political concern. The moment there is the possibility of a political party taking a different view from another political party, we have to go silent. For that reason, although there is what I describe as the nuclear option under section 5 of the Constitutional Reform Act 2005—to make written representations to Parliament—it is extremely difficult to do so. Indeed, if one were to make representations to Parliament on the basis that one was disagreeing with the Lord Chancellor of the day, you can see the headlines—“fury” and so on. The constitutional convention that judges do not speak on political issues would be undoubtedly damaged.

Should the convention continue to apply? My view is that it should. I do not think judges should be seen to be involving themselves in the political process, but if the Lord Chief Justice and the Lord Chancellor are at loggerheads about something, that means the Lord Chief Justice may be at loggerheads with the Government of the day. That gives a huge opportunity to the opposition to say, “There you are; the Lord Chief Justice says you are wrong.” Forgive me for saying so; the political shenanigans will then start, and it will have been at the behest of the Lord Chief Justice raising a concern. That is my answer to your first question. I am terribly sorry, Lord Lang; I have forgotten the second.

Q4 Lord Lang of Monkton: Could you give us your thoughts on the range of subjects and the sorts of issues on which you might feel impelled to write or constrained from writing?

Lord Judge: It could be just about anything, but let me take, for example, because it is very much in the public eye at the moment, the position in relation to arrangements for, depending on the newspaper you read, inhibiting the press or allowing the press to be free. What should the arrangement be, if there is to be any arrangement, in relation to the press? I have said before, and I know this might not appeal to members of this committee, that there is a constitutional position in relation to the press. I know that different people are

proposing different things. I even know, from reading the newspaper, that one political party said the Lord Chief Justice should do something. Nobody asked him. Somebody else said the President of the Supreme Court should be doing something. Well, nobody asked him. I asked him whether he had been asked, and he had not been. That is a very good example of something of huge importance and it is perfectly possible that the Lord Chief Justice and the Lord Chancellor of the day may take dramatically different views about it, although this is not to be taken as an indication that is the case.

Q5 Lord Lexden: Forgive me if I ask a simple, perhaps naive, question, but it is one that has occurred to me many times over some years. The simple question is: have politicians today diminished, and diminished considerably, the interest they are prepared to take in, and the time they are prepared to give to, constitutional issues? Lodged in my mind is a conversation that I had many years ago with an individual who now holds an extremely high office in this Government. I said to him, "Please never forget that, historically, the Conservative Party has taken constitutional matters extremely seriously." He looked at me with some contempt and said, "There are no votes in it." I have been extremely worried—not just then but over a longer period—that there is a diminishing interest in constitutional issues amongst politicians of all parties. Is that too simple and naive a point to raise with you?

Lord Judge: I hope nobody will be offended, but I agree with you. In each House there are people who take a very close interest in these matters, but I think it is perhaps to do with the world we live in. Constitutional matters are not a headline for tomorrow. Well, they may be a headline for tomorrow, but they are then going to disappear. There are much more exciting things to get into the headlines. I think, generally, there is not a lot of mature reflection on long-term consequences. I think I better not go any further than that. Some of you will be my colleagues in a few months' time.

The Chairman: May I bring you back to the comprehensive list of things that you said you thought we were likely to raise? One of them is judicial review. Lord Goldsmith, do you want to begin with that?

Q6 Lord Goldsmith: I will. I wondered if, before that, I may say to Lord Judge that what he said in his non-opening statement is very important. It is an invitation to us to look at this. It is not surprising, if I may say so, that the way we went about this particular constitutional reform has not produced a perfect solution. Heath Robinson did not produce a perfect solution either. The question is, and I look forward to what you will say post-retirement, are there any nudges or hints you can give us as to what we should be looking at, or what models we should perhaps be looking at, to see an alternative world?

Lord Judge: Do you mind if I say “not for now”? I think it would be wiser for me to say “not for now”.

Q7 Lord Goldsmith: Let me then go on to the question that the chairman asked me to touch on, which is judicial review. If you are able to tell us, what view has the judiciary expressed—I am not even sure whether they were consulted—about the changes that are being proposed? These particular reforms, though not the most wide-ranging reforms to judicial review there could have been—and they certainly do not match the rhetoric of some politicians—may have important practical effects. The judges, particularly those who deal with judicial review, are probably in a very good position to identify what those effects will be. I wonder if you can help us on that.

Lord Judge: We were consulted and, last week I think, a response was sent to which I was party, with the Master of the Rolls, the President of the Queen’s Bench Division and so on. It did not reflect the entire judiciary; there was not time for that. Yes, the answer is we have responded. It will be a public document, I am quite sure. It was not sent as a confidential document, nor should it have been.

Dealing with it very broadly, on examination it will be discovered that the court has got a grip, so far as it could, on judicial review, but it is of course stuck with the legislation. It will make a huge difference to the way in which the judicial review process works when, at last, what I shall describe as immigration, asylum and nationality judicial reviews are moved out of the High Court into the tribunal. They take up a vast amount of time. The real problem with them is that the overwhelming majority have absolutely no merit in them but, of course, every now and then one comes through that needs to be looked at. They can just as well be looked at by judges with particular expertise as they can by judges in the administrative court.

The other concern I have about the processes is whether we legislate in a way that invites judicial review. This is my personal view; this is not in the paper. If you legislate in a way that says that “before such-and-such, you must do this to comply with this condition”, you end up with 39 conditions that have to be complied with—i.e. the legislature micro-managing. Somewhere down the line, someone is going to have not quite complied with condition 32, and so you get a judicial review. We need to look at our legislation and be much clearer about the use of an appeals process. After all, judicial review cannot run if there is an alternative remedy and, if you introduce appeal processes, which I do not think either this Government or the previous Government were very keen on, you have then done away with judicial review. An appeal process can be dealt with as it is in civil cases. Of course, the judge can give leave to appeal if there is a point of law or general importance, and you can seek leave from the higher court if you think there is, but you cannot go on forever. The timetable is more constricted, too—there is much more limited time to appeal—so that is something that should be looked at.

Going back to the more important question, if we work on the basis that judicial review exists to make sure that the Government, the public authorities and everybody exercising

power exercises it lawfully, that is what we are here for. That is one of the most important roles that judges play, and it is of huge importance to society that those exercising power should know that, if they exercise it unlawfully, they will be held to account. It means that, on the whole, they try very hard to exercise their powers lawfully. That is a long-winded answer, Lord Goldsmith, but I hope it gives you a flavour.

Q8 Lord Goldsmith: It is very helpful. The last point is saying, in my words not yours, that a judicial review is an essential safeguard for the citizen and is not an inconvenience.

Lord Judge: It is only an inconvenience to those who have failed to do their job lawfully.

Q9 Lord Lexden: A small point: earlier in your answer you referred to the time constraint on producing a response. Do I take that to mean that you thought that this process, not called a consultation but an “engagement exercise”, was rushed and the Government should have allowed longer for it?

Lord Judge: No; I am sorry if I gave that impression. No, there really was not time to consult a vast body of judges. That was not a complaint. It is the view of the senior judges who have the greatest responsibility for these issues.

The Chairman: Perhaps we could turn to another area that you will remember this committee has been involved in, producing a report last year on judicial appointments, where we recommended new responsibilities, for example, for your office. Some of the recommendations have been adopted by the Government. Lord Hart, did you want to lead on that?

Q10 Lord Hart of Chilton: Each time, Lord Chief Justice, you have come to talk to us, we have talked about diversity and you have had very strong views about the role that you play as a leader in trying to promote diversity. Now, under pressure from the Lords, which in turn was under pressure from this committee, the Crime and Courts Bill will place a duty upon you to promote diversity. Do you think that will alter the approach you take to it? You

have taken a great number of steps in your post to promote it. Will this new statutory duty lead to an alteration of the view that you take?

Lord Judge: This was a very good example of a duty being imposed on the Lord Chief Justice without the Lord Chief Justice being able to say much about it. I had my opportunity to say it to you. I hope I will not be misunderstood. I really hope I will not be misunderstood. I have had a passionate commitment to this issue of diversity for years. I have lost count of the lectures I have given, the speeches I have made, the platforms I have sat on, the meetings I have been to, the cajoling, the encouragement, the persuasion. I do not think it is going to make any difference that I now have a statutory obligation, save that I have a statutory obligation. I cannot think of anything I will do differently, because I feel very passionately about this.

Just about the first public statement I made when I was appointed Lord Chief Justice was to organise a Lord Chief Justice's diversity conference, which took place in a distinguished firm of solicitors' offices. That was a deliberate decision. You know and I know that that is one of my most difficult areas. I have not been successful yet. I made a speech at the Law Society shortly before Christmas and I do not mind telling you what I said. I brought a copy of it, because it reflects something I feel about very personally. This is what I said to a whole lot of people who were there: "Every human being is a unique human being. And because every human being is a unique human being, we are all different in one way or another. Some of the ways are obvious. There are men and women. There are adults and children." There are skin-colour variations. There are brain-power variations. There are athleticism variations. None of that matters. None of those things is of the slightest importance. The issue is whether this individual human being is of sufficient quality to be a judge, at whatever level he or she is seeking to be a judge.

Long before that duty was imposed on me, I created a new job for two senior High Court judges, senior liaison judges for diversity. One judge was female, for the obvious reason that women in the judiciary are underrepresented, and the other a former solicitor, for the difficulties that I have referred to on previous occasions. They are working hard. The issue of what holds women back is being addressed. I am going to Wales to address a conference in Cardiff in a couple of weeks' time on what we need in the judiciary. That is going to be followed up by Mrs Justice Nicola Davies with a seminar, for all the women lawyers who wish to come, in Cardiff two weeks or so later. I am very pleased with the way that is working. Both of them are working very hard.

We have diversity and community judges; we have for some time. There are now 90 of them. These are men and women who spend a great deal of their time visiting schools, universities and in outreach activities, engaging with hundreds of students and young professionals to understand the courts. This is immensely successful. They came to the last big diversity seminar at the Law Society, and there they were—90 of them or thereabouts—just men and women, just like everybody else in the room. You can make the point it has nothing to do with anything; you are just people.

The judicial work shadowing scheme is working extremely well. We are introducing an online database for those who are interested in it. In the last three years, there have been not far short of 2,000 individuals who have come for, in effect, work shadowing at different levels—the levels they are interested in. I am very pleased with the way that is working, but we have a problem: 11% of the bar is female. That means 89% is male. For women solicitors who are partners in the top 100 firms, the figures vary but it is 22% to 25%. That means 75% to 78% are male.

One of the remarks made last time—other people take a different view—is that we are taking forever. I agree, but if you look at what the Judicial Appointments Commission has

produced in its time, it has now got appointments of women up to nearly 40%. It is still not enough and still at the lower levels of the judiciary. How am I seeing it? I am seeing this, perhaps because I am blinded by enthusiasm, optimistically.

Q11 The Chairman: Forgive me if I have got this wrong, and I think you said it twice, but when you said the duty was imposed on you, I thought it was almost as though you felt that this was an inhibition, rather than a help.

Lord Judge: No; I am so sorry. I was making the point that I made at the start: there was a piece of legislation; as it happens, I am perfectly happy with it, but what if I had been dead against it? Nobody would have asked my views. I would have had informal questions, no doubt. That was the point I was making. I have no problem with the bill as it is, none at all. I welcome it, but I do not think it makes any difference to my personal way of dealing with this issue.

If we look at this optimistically, yes, there is a wall at the end of the water, but there have been and are trickles through it. There are signs that there are holes in the wall. They are not very big ones, but my view is that, once we have persuaded people that this is a serious possibility—that there is no reason why a woman or somebody from the ethnic minorities should not be a judge—the wall will go down much faster than is currently anticipated. In other words, making a mathematical calculation of how fast it has gone in the last three years and saying, “Oh well, it is 50 years down the line,” is not the way I am seeing it. The way I am seeing it is that, once the wall has been broken, it will suddenly go much more quickly than we are anticipating, and that is what I hope.

Q12 Lord Hart of Chilton: With the new duty, there will be the possibility of your being able formally to report on progress that has been made. That might be a platform on which you can give more messages about diversity and the progress that has been made, in a more formal way, both to Parliament and to the public.

Lord Judge: My view would be that the report sent by the Lord Chief Justice to Parliament should include reference to progress or lack of progress, whatever the story happens to be in that period. I would like this committee to consider it every time the Lord Chief Justice comes to give evidence, so that the committee can be told, and in effect Parliament can be told, in open at an oral hearing.

Q13 The Chairman: One of the issues that was vigorously debated in the House of Lords—and there was no universal opinion on it—was the question about flexible and part-time working, particularly in the High Court and the Court of Appeal, which was finally adopted as the result of another amendment to the Crime and Courts Bill. That presumably is your responsibility to implement. What practical steps can you take on that?

Lord Judge: It is not my responsibility, I do not think, because the Judicial Appointments Commission has to choose the people. That is not the Lord Chief Justice's job.

The Chairman: No, I am talking about the organisation of the work. I am sorry if I have got it wrong.

Lord Judge: I think last time I gave evidence, I said I am perfectly happy with, indeed in favour of, flexible working, but we have to see what flexible working is required by the individual who is appointed. I say that seriously, because we have 56 circuit judges who are part-time; you will be disappointed to know that eight of those are female. Most of them have family commitments; that is why they need to work part-time. One of them is part-time because she wants to study for a university course. I have reservations about whether that is an appropriate way for a judge to be spending his or her time, but the vast majority are judges who are male who are retiring and quite like having a half-time job. I am not happy about that as a use of part-time working for the purposes of increasing diversity. It simply fails to do so.

We are not unfamiliar with this. We have judges who have lost their spouses—male judges who have lost their wives and have small children for whom they have to care. The system works. We know perfectly well who they are. We arrange for them to sit at times that are suitable, for them to have their breaks at suitable times, to make up, if they can. What I am really saying is: let us get the appointment on merit of these females who say, “I am very sorry, I have family commitments”—it might be their children; it might be their ageing parents—and we will adjust it. I cannot tell you in advance what adjustment we will make, but we will deal with it. There is no difficulty about it. We have had to deal with it in the past, in a different context.

Q14 Lord Hart of Chilton: From a practical point of view, you do not see any problem. In the House of Lords, there was a great deal of protest, on the basis that part-time did not work. It was not fair to the judiciary, because it meant an uneven burden between those who were full-time and those who were part-time. Although it was a minority and it was overcome, it was nevertheless a vociferous minority who spoke in that way.

Lord Judge: Children grow up. I am not anticipating that it will be a sensible idea for somebody to be a part-time judge for the whole of his or her judicial career. If somebody is appointed, for the sake of argument, at the age of 45 or 50, and has a growing family, the family will grow. I cannot think anybody worth their salt will then not want to work full-time. There is not a difficulty about it, unless what is being introduced—and I have not seen the proposal as an introduction—is a system in which we have half-time judges. What we have are full-time judges who, for the time being, while they have a commitment, are only able to work part-time. That is how I see it.

Lord Hart of Chilton: That is the difference with flexibility.

Lord Judge: Exactly, and that should not present a problem. It will mean, of course, that when it comes to consideration for promotion, there will be fewer judgments by this

particular judge at the particular time, but that is all part of the process. These are lifestyle decisions—we are talking about women, but sometimes men have to make them—and they make them. We have to make sure we can accommodate them if their lifestyle decision is, “I want to be a judge. I am of the right quality to be a High Court judge, but I must be allowed nevertheless to fulfil my obligations, as I see them, to my family.” There may be other issues of course.

The Chairman: Another issue that may be difficult to implement practically, but which is in the Crime and Courts Bill, is about cameras in courts.

Q15 Lord Macdonald of River Glaven: The Crime and Courts Bill creates a power exercisable by the Lord Chancellor with concurrence of the Lord Chief Justice to allow filming in court. The Government’s present proposal is for proceedings in the Court of Appeal and sentencing proceedings in the Crown Court.

Lord Judge: No, not sentencing. I take a very strong view about sentencing.

Q16 Lord Macdonald of River Glaven: This is what I wanted to ask you about. As I recall, there was a suggestion at one time that that might be incorporated, but you have your own views about that.

Lord Judge: I am perfectly happy for cameras to come into court, provided their presence does not increase the risk that justice will not be done. I am very troubled about the idea of having cameras swanning around the court. I think we have to see how it works in the Court of Appeal. In most cases, I suspect, John and Jane Citizen will find it ineffably dull, which of course may not be what the broadcasters want; they will want exciting television.

My concerns about filming the sentencing, at this stage, can be limited to this. You can have the camera fixed on the judge, but do you have the camera fixed on the defendant? Do you have it looking at the families of those who are bereaved or the families of the defendant? How do you avoid what has happened in New Zealand? I have looked into this, because they

have this system. I was warned very strongly by the Chief Justice there that everybody thought that, if you fixed the camera on the judge, it would be alright but, of course, people can demonstrate during the sentencing remarks, so there are cheers and boos.

We have to be very careful about how this works. I am desperately anxious, and I hope you will accordingly troop through a lobby, that any changes should be with the concurrence of the Lord Chief Justice of the day. Consultation is not enough. I hope I am not being cynical, but I can envisage a time coming—not in any situation that I can contemplate today, nor with any political party currently vying for office—when political advantage is seen in, “Well, the television companies have been awfully difficult for the last few months. It might do quite well for us to let them do a bit more television in court.” Having had a consultation that amounts to no more than a statement, so it will happen. I am very anxious about concurrence, because I think it is the judges who will have the best idea about the danger of diminishing the administration of justice in court.

Q17 Lord Macdonald of River Glaven: It does not sound as though you can contemplate a day when it would ever be appropriate for jury trials, for example, to be filmed.

Lord Judge: I cannot, but then I am getting old. Let us think about it. You, of all people, must know this: the difficulty of getting a witness to come forward to actually say, “I saw this happen.” To suddenly feel that everybody in the vicinity is anti-you, and then to be told, “Well, yes, you will have to come to court”, and then to be told when you are giving your evidence you will be on television and the friends of all the people who you are giving evidence against will see you there, I think will result in a significant diminution in the chances of justice being administered. As I say, I am very old.

Lord Macdonald of River Glaven: I think you are undoubtedly right.

Lord Judge: It is nice of you to say so, Lord Macdonald.

Q18 Lord Macdonald of River Glaven: In jurisdictions where they do this, they tend to have rules about what the cameras can be pointed at: the defence counsel declaiming in his closing speech, the judge and prosecution counsel. I suppose there is always a risk of people acting up for the cameras, which would have a distorting effect on its own.

Lord Judge: You can act up or you can just freeze up. That is why I am extremely anxious that this provision should require the concurrence of the Lord Chief Justice of the day before it goes any further.

Q19 The Chairman: It is quite a wide term though, concurrence, is it not?

Lord Judge: "Agreement" will do.

Q20 Lord Lexden: Could I ask whether it is envisaged whether this very considerable change will be undertaken on an experimental basis, with perhaps a time fixed for it, so that then consideration could be given, at the end of that period, as to how that experiment has gone, with lessons learned and suitably applied?

Lord Judge: There were experiments conducted a few years ago and we have had another look at those. I would not want to give you the impression that all my colleagues agree with me. They do not, but I have taken the view that the Court of Appeal Civil Division and Court of Appeal Criminal Division can be filmed without difficulty. It will create problems for the giving of judgments in the Court of Appeal Criminal Division, which are given largely *ex tempore*, off the cuff if you like. Judges may say, "No, if the television camera is on, I am not so happy about that." That is a perfectly reasonable point of view. We will arrange for those judges who sit in these courts to have some training in the fact that a television camera will be present. The general idea is that it will start in October in the two divisions of the Court of Appeal, in effect following what has happened in the Supreme Court.

The Chairman: Thank you. Can we go on now to legal aid, Lord Macdonald?

Q21 Lord Macdonald of River Glaven: The new provisions are coming into force at the beginning of April. Amongst other things, they remove legal aid from most family cases where there is no domestic violence and from most social welfare cases. The Bar Council, the Law Society and many practising lawyers have expressed alarm that one of the effects of these changes will be a dramatic increase in litigants in person, particularly, I suppose, in county courts. I wonder whether you share that concern and what steps the judiciary might be taking to manage what could be quite a difficult problem.

Lord Judge: I share the concern about litigants in person. I think it is inevitable we will have more. My real concern is for the district judge somewhere—let us say Carlisle—whose current list will be 20 to 25 cases, who has already a number of litigants in person, and who will have many more. You cannot expect any judge to know all the law, and dealing with litigants in person involves a much more thoughtful approach. You can say to counsel or solicitor, “Mr Macdonald, what is your answer to section 129?” You may give it or you may not, but you cannot ask that of a litigant in person. You have to take time and you have to hope they will know the answer.

The problem is going to be mainly in county courts. District judges, I think, will bear the brunt of this. They will have a much more burdensome task. Inevitably, they will have to have reduced lists. If, for the sake of argument, they have 20 cases on the list now, gradually that will become 15 or 12. We will have to see how it goes. There is nothing I can do about that. This will be a consequence of the increased number of litigants in person.

Q22 Lord Macdonald of River Glaven: This may mean that the money that the Government expect to save by reductions in legal aid simply shifts the cost to another place. If each judge is dealing with fewer cases, that in itself will cost more. We will have to have more court hearings or more judges.

Lord Judge: You can say that but I cannot possibly agree, can I? But I am not disagreeing.

Q23 Lord Macdonald of River Glaven: Can I ask about one other area? I should declare an interest as practising Queen's Counsel in criminal law. The Lord Chancellor recently raised the prospect on the "Today" programme of reducing the criminal legal aid budget by limiting the use of Queen's Counsel in murder trials. For some members of the legal community, that raises the possibility of occasionally a lower level of expertise being brought to bear in these cases than would otherwise be so. I wonder whether you, Lord Chief Justice, share that concern.

Lord Judge: I share that concern, but I must add that I share the concern that the Crown Prosecution Service is not briefing leading counsel when the CPS should be. There was a very interesting piece of legislation that appeared to say—we decided otherwise, but it certainly appeared to say—that if you came home and you found your other half, whether male or female, in bed with his or her lover, that, by definition, could not constitute provocation. It was a very tricky piece of legislation. Of the first three cases I heard in the Court of Appeal, the Crown Prosecution Service had not briefed leading counsel in any of them. This was very difficult legislation. The judge needed the best possible help, in one case she and in the other two cases he, could have.

The point of Queen's Counsel is that they offer the extra quality. They are of proven quality. They are prepared to take burdens of responsibility that junior counsel are not, like, for example, "I am not calling that evidence," or, "I am not taking that point, because leading counsel does not think it merits the attention of the court." Yes, I am concerned about it.

I am concerned about it too in a completely different way. We talked about diversity a moment ago. Diversity has many facets. This is one that causes me great anxiety. The overwhelming majority of female practitioners at the bar and people from the ethnic minorities at the bar spend their time doing publicly funded work—family work or criminal work. You have to offer them a reasonable career if you want to get them into judicial office

so that, over 15 to 20 years, they can make progress, earn more money, feel better rewarded and gradually demonstrate that they are of the requisite quality. What troubles me about the proposals and, indeed, the reality of the legal aid arrangements, quite apart from its impact on judges, is whether we will end up with a reduced number of women and people from ethnic minorities coming into the legal profession, and in particular the bar, and doing the sort of work that is the bread and butter work of most judges, most of the time. This impacts on diversity 10 or 20 years down the line. I think it is a long-term issue that needs to be considered.

Q24 Lord Lang of Monkton: I want to ask about assets, but if I could follow up the answer that you gave to Lord Macdonald, which I found very interesting: I am concerned that there is such a stand-off between politics and the Government on the one hand, and the judicial or legal profession on the other. It seems to me that the man on the Clapham omnibus would understand that there is a huge shortage of public funds for all Government services in all areas where it is spent at the moment. On the other hand, the legal profession is extremely articulate in advancing its own case. Do you not see the need for some sort of meeting in the middle ground, and could you not accept that there must be many barristers who do not take silk but who are extremely competent and could perfectly easily handle the vast majority of cases, even complex ones, even though they are not QCs? I am sorry if this sounds like I am making a partisan point, but do you not feel that there is some area where you and your colleagues could meet the aspirations of the Lord Chancellor?

Lord Judge: The fact that the country is bust is something that I have been saying for some time and which I was told off for saying about four years ago. It is obviously the reality. The point about Queen's Counsel is that the man or woman who takes silk has established that he or she is of the quality to be at the very front of the profession. There are some juniors, obviously, who would take silk and demonstrate that, indeed, they too are just as good. We

have to have a system in which we recognise the cases that are sufficiently serious and difficult to require the attention of Queen's Counsel. There should be no automaticity about this. There are cases for which the court requires the assistance of Queen's Counsel—not necessarily two counsel—but there are such cases. The case I illustrated to you about the loss of control and how that should be construed was one of them.

I am entirely aware of the current financial situation and I have not said, "No, there must be Queen's Counsel in every murder case." I am not saying that, but I am saying that somebody has to recognise that there are cases where this is a requirement, if we are going to do the job as quickly as we can. The best counsel will do the case quickly. The best counsel will tell the judge what the points are clearly and, therefore, a trial that might take 10 days may take seven, so we save money there. That is what you pay for when you have Queen's Counsel; you pay for that higher standard. My problem in relation to the diversity issue is why anybody who is a reasonably competent junior, with a reasonable practice, should ever bother to take silk. If there is going to be no work, why give up? Why take it? You will not be able to pay your mortgage.

Q25 Lord Lang of Monkton: I will try to make my questions on assets brief. Because the legal aid bill has soared so dramatically, people notice when supposedly wealthy individuals seem to be able to hide their assets and never have to contribute to the costs.

Lord Judge: It is daft, is it not?

Q26 Lord Lang of Monkton: Yes, it is daft. I read what you said in your press conference, Lord Chief Justice. Is there not a way of improving how the examination takes place to establish if funds are available or could become available before trial? Is there not a better way of constraining some of the assets that are released after a trial back to the individual, so that his or her defence costs can be paid?

Lord Judge: We are now talking about people with big money.

Lord Lang of Monkton: Yes.

Lord Judge: Where you have somebody who is perceived to have big money who is charged, there is almost certainly an application to the court to prevent him dissipating his assets—very sensible. However, one of the conditions, which is always sought and granted, includes the dissipation of assets by paying for his legal advisers. I think that is completely daft. There should be a freezing of assets, of course; we do not want the assets dissipated. But there should be an order that says, “So much of these assets can be used for the purposes of your defence.” That is the answer.

The Chairman: It sounds so simple.

Lord Judge: Forgive me for saying so: that is not very difficult.

The Chairman: Exactly. It does not sound difficult.

Q27 Lord Goldsmith: We were talking about QCs, and I should declare an interest as a practising QC, but it was not that side of the legal profession I want to ask you about. I want to take you back, if you would be so kind, to what you said about district judges—the big lists they have, the legal issues that arise and the concerns you have that they will have to be grapple with a number of those issues without legal assistance, in part at least because of legal aid changes, though it has not been the case that they have always had assistance in the past. I declare an interest—as you know, Lord Chief Justice—having been involved with pro bono and still being the president of the Bar Pro Bono Unit and chairman of the Access to Justice Foundation. Do you see that there is scope for any form of consultation between the people who are providing their services and the judiciary to try to find a method of covering some of those gaps—for example, if a district judge knows that there are a number of issues that are coming up in cases that he or she would want some help on?

Lord Judge: It is very difficult not to recognise the amazing value of the work done by the Citizens Advice Bureau, the Free Representation Unit and the huge number of members of

the profession, whether solicitors, barristers or CILEx members, who work pro bono. I think in, say, the Royal Courts of Justice, yes, the citizens advice bureau is set up. There are not so many citizens advice bureau representatives, and certainly not Free Representation Unit representatives, in the small court in, for the sake of argument, Kettering, or Carlisle to take a more remote example.

It is quite difficult for a judge to engage when he knows that there is a litigant in person by saying to somebody who is there, assuming there is somebody there, “I am really worried about this point in this case”, because he has to remember there are two parties. To go to one side in advance and say, “Look, I am very worried about this point”, could leave the other party rather aggrieved that the judge was engaging with one side’s interests, rather than the other. I think it is a very subtle problem and I do not think it can be solved simply by the judge talking to the people who are doing the free representation work.

Q28 Lord Goldsmith: That is helpful. Once upon a time, when legal assistance was not available for other reasons, judges would adjourn cases to, presumably, London at the time, so that there could be a full legal debate.

Lord Judge: That would not go down very well.

Lord Goldsmith: It would not. That is why I was not suggesting it.

Q29 Lord Macdonald of River Glaven: I have been trying for years to understand the Government’s position on forbidding the payment by extraordinarily wealthy defendants of their own legal fees. I am completely unable to understand it, I am afraid, and I have not really heard an explanation that makes sense. That is not really a question; I am sorry.

The Chairman: It is a rhetorical one.

Lord Macdonald of River Glaven: I do not know. I wonder whether you have a notion of what is behind it.

Lord Judge: There is an argument. The argument is that the prosecution says, “This man is a crook; these assets may be the proceeds of his crime. Why should he be allowed to use the possible proceeds of crime to pay for his defence?” There is the argument the other way.

Q30 Lord Hart of Chilton: I do not want to stir up trouble, but since this is the first Lord Chancellor who is not legally qualified, there must be some differences in the relationship that you would have with such a person than the hitherto relationships with those who were legally qualified. Can you describe how your relationship has had to adjust for that fact?

Lord Judge: Not a lot. You are dealing with a human being with a very important office. I have no difficulty dealing with the present Lord Chancellor. I happened to know Ken Clarke from the days when we hacked around the circuit together, so that was easy. As for Jack Straw, well I got to know him and we got on very well, but I do not think either he or Ken Clarke would say they were masters of the justice system. They were people who had qualified in the law and given it up to practise politics. I do not think that a year or two of practise at the bar makes all that much difference.

The Chairman: As is accepted by everybody who has practised in this way, I am sure. Lord Irvine has another question, I think.

Q31 Lord Irvine of Lairg: I rather want, Lord Judge, to ask you what is quite a sensitive question. What is the current state of play in the negotiations with the Ministry of Justice about judicial pension reform?

Lord Judge: The state of play is: I am expecting imminently, possibly after the statement to the House of Commons, which at the moment is anticipated next week, for the judges to receive a letter with the Government’s decisions, as they are, subject to adjustments. That is the state of play. We are very well aware that the country is broke and that everybody has to accept an element of the consequences. There are some specific features about the

judicial pension arrangements, and again it is a diversity question, that people tend to overlook. I am not saying that Mr Grayling has overlooked them, but people generally overlook them.

We are trying to get people on to the bench who are successful in their professional lives. The Lord Chancellor used to say—you certainly did, and, until recently, it was always written— when you were appointed, “These are your terms and conditions, and what is more, I expect this to be treated as an undertaking that you will not return to practice.” If you are a solicitor, you would give up your partnership and that is the end of that. If you are a barrister, you would give up your practice and your practice is dissipated, as solicitors choose to brief whomever they wish. You become a judge sometime around 50. You have done the change. You are not going to be able to take on and learn a new trade. You have done that, because you are learning the trade of being a judge, and you have done so on the basis of an express statute that says that your pay will not be reduced and a strong historic convention that it will not. If the proposal is for change, it will not be very welcome, for obvious reasons.

My real concern is the diversity one: if the transitional provisions that the Government has applied across the board, for everybody in the public service, are extended to the judiciary—and I think I am allowed to say that I have no reason to doubt that they would extend to the judiciary—the greatest impact would be on judges who are now between, say, 42—there are a few of them—and 55. It is in that area of the judiciary that we have a higher proportion of women than in any other part of the judiciary. A higher proportion of our young judges are female, who we have been encouraging to come into the judiciary. Anyway, it is a very serious, delicate and difficult issue. I am perfectly aware of the fact that the country is broke, but there are some specific features about the judicial pension arrangement that I thought it worth drawing your attention to.

Q32 The Chairman: Lord Chief Justice, you have been extraordinarily helpful. We have covered an enormous amount of ground. You, at the beginning, very kindly said that you were not going to make an opening statement and then gave us a most interesting point of view about a wide variety of subjects. Do you have something you would like to add at the end of this broad-ranging discussion?

Lord Judge: I feel as though I have just appeared in front of a judge who is telling me, “We have heard enough from you, thank you very much.”

The Chairman: Not at all. Absolutely not at all. If you do not have anything further to say—

Lord Judge: No, I do not. Thank you for the offer.

The Chairman: We are most grateful to you. I think I can say, on behalf of the whole committee, we anticipate your retirement and your further thoughts, once you are retired, with great interest, and we look forward to your telling us about that in another session, if we may.

Lord Judge: Thank you very much.

The Chairman: Thank you very much indeed for your help.