Select Committee on the Constitution

Uncorrected oral evidence: Oral evidence session with the Lord Chief Justice

Wednesday 22 March 2017

10.30 am

Watch the meeting

Members present: Lord Lang of Monkton (The Chairman); Lord Beith; Lord Brennan; Baroness Dean of Thornton-le-Fylde; Lord Hunt of Wirral; Lord MacGregor of Pulham Market; Lord Norton of Louth.

Evidence Session No. 1 Heard in Public Questions 1 - 13

Witness

I: Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales.

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Examination of witness

Lord Thomas of Cwmgiedd.

Q1 **The Chairman:** Lord Chief Justice, welcome. We are very grateful to you for finding time to pay us one of your regular visits, which we much appreciate. We have a number of questions to ask and issues to cover. Thank you for the list of items that are of particular concern to you, which anticipates my opening question, which might sound as though it has a slightly valedictory tone but is not intended to. It is simply: what major challenges do you think your successor will face over the next few years?

Lord Thomas of Cwmgiedd: I thought it would be helpful to give you a list, for two reasons. This was not in anticipation of a valediction, but it is very important to see in context what the judiciary faces.

The first issue that I wrote out was Brexit, and there are two points. The first, which is of very great importance, is maintaining the position of London as a pre-eminent centre for international dispute resolution, both court and arbitration. On that, Lord Justice Vos, Lady Justice Gloster and Lord Justice Hamblen are taking a big role. As you may have seen, the legal community has established a Brexit legal committee to try to deal with two problems. The first, obviously, is any legislative change that may be necessary, particularly in relation to the enforcement of judgments in jurisdiction, although I regret to say that there is another problem. It is hardly surprising that lawyers in other jurisdictions see this as an opportunity where, I regret to say, the truth is slightly coloured. They say, "You shouldn't really use English law any more. It's all vague and uncertain and it will be affected by Brexit. Why don't you use one of our laws?" That is untrue. The trouble in this day and age is that getting rid of untruths from a system is not easy, and there is a major task, so I am told, on this.

The second issue in Brexit is the repatriation of the law from the European Union, including, as the Lord Chancellor has said, dealing with the position of the courts when there is no recourse to Luxembourg. That is an issue that, following various discussions, we are thinking about very hard, but I do not think I should add anything about that.

On modernisation of the courts and tribunals, we have been incredibly lucky in the new chief executive, Susan Acland-Hood, who is excellent and very well supported by the chief operating officer, Kevin Sadler. The current senior presiding judge, Lord Justice Fulford and Lady Justice Macur, his deputy, are the judicial leads, and with Sir Oliver Heald we have a very good governance system. However, I want to add, and to add this throughout, that none of this is feasible without the good will and hard work of every judge at every level, whether you be a first instance judge in the tribunals, a district judge, or a High Court or a Court of Appeal judge; it is absolutely central. On the whole, however, it is going quite well.

The third thing on the list is carrying out procedural reform. A lot has been done on the criminal law, particularly under the leadership of Sir Brian Leveson and Lady Justice Rafferty, and we are now trying to create major

reforms to the civil, family and tribunals jurisdiction essentially to support online courts. We want, essentially, a uniform set of procedures across those three. The heads of division and Lord Justice Briggs are dealing with that, and we are very fortunate in the advice we get from Professor Richard Susskind and—I will not leave it out—the hard work of all the other judges, which I sometimes think is overlooked.

The major problem we have with work is twofold, and I need to say a word about this. First, the volume of work in the family court has been increasing steadily each year. There are two specific problems. The first relates to care proceedings. The work is increasing at such a rate that the courts have reached saturation point, and the only solution is to look at trying to persuade people to approach bringing these proceedings in a different manner.

The second is a problem that arises out of the restrictions in legal aid for work in settling particularly the children and financial aspects of divorce. Somewhat suddenly, in about the autumn of last year we started to discover that intractable disputes were coming back to the court and there was a decline in the use of mediation. The two are related. First, if two people who have fallen out at home do not have help externally, they are visiting what has driven them asunder. Secondly, there is no lawyer to say, "If that's what the mediator has told you, that is what the judge will do". There is much more of a tendency to say, "Let's go and see the judge". That is a particular problem.

The more serious problem up and down the system is the volume of asylum and immigration, and it is important to say something about the position of the Court of Appeal. The number of permissions to appeal in immigration cases has been steadily rising. About 60% of all permissions to appeal arise out of asylum and immigration. There are currently 618 before the Court of Appeal. This is immensely serious, because it deflects the business of the Court of Appeal and means that people know that they get longer by appealing. It is a vicious circle.

One thing that has to be tackled is the whole appellate structure in relation to asylum and immigration. There are similar problems in the tribunals. The Upper Tribunal, as at March 2016, had just over 5,000 judicial review cases before it. The outstanding caseload as at 31 March last year—I do not have the figures for this year—was about 401,000 cases, so the volume of immigration work and the procedural aspects of it are an extremely serious problem. Work is being done on that by Lord Justice Sales from the point of view of the Court of Appeal and is being led for the tribunals by Sir Ernest Ryder. Those are jurisdiction problems.

The next problem is access to justice, legal aid and the quality of advocacy. I have touched on some of the aspects of legal aid and the issues of access to justice, but I want to say a word about the quality of advocacy. It is a subject on which I have worked now for 12 years with no success. The Bar devised a panel scheme to underpin the quality of advocacy in criminal cases, and it does not seem to go anywhere. It is critical that we maintain the quality of people. In asylum and immigration, for example, we have

devised our own means of trying to improve standards essentially by getting people in and telling them that they have done a bad job, but we are doing what we can. We do a bit of that in crime, but it is much more difficult.

The next area, which I will not say anything about now because I know you want to ask me about it, is judicial recruitment. Lady Justice Sharp, Lady Justice Hallett and Sir Ian Burnett are doing a huge amount of work there. Then there is pay and pensions, which are a big topic. Then there is judicial morale and working conditions, which again I think you want to ask me about.

I also want to mention the position of the judiciary and the state. First, we have carried out an internal review of the way the judiciary is governed. That had not been done for 10 years, and we decided that it was sensible to do it at a 10-year interval. We have reached agreement and we will publish that pretty soon.

Then there are issues relating to our relationship with the media, with Parliament and the Executive, which I know you want to ask me about. Then there are quite significant issues in relation to Wales.

That is the list for my successor. However, it is also important that when you understand the burdens that fall on us in the whole of the judiciary—not just me and my colleagues in the senior judiciary—you will understand some of the issues that arise. These are all things that have to be dealt with. There is nothing which you can say would be nice to do but it has gone.

That is a long statement from me, which I know I should not make, but I wanted to put everything in context.

The Chairman: It is an extremely helpful statement and thank you very much. It is a long agenda, however, and I wish that we had the whole morning to go through it in greater detail rather than just one hour. A number of the topics, as you indicated, will crop up in the questions we would like to ask, so I will move straight on and bring in Lord Norton.

Q2 **Lord Norton of Louth:** This question picks up on your point about the judiciary and the state. You say that your relationship with government is fundamental to it, which obviously impacts on many of the other issues you have mentioned. How satisfied are you with your relationship with the Ministry of Justice? Are communications working well and are there any problems in making sure that the views of the judiciary are heard?

Lord Thomas of Cwmgiedd: First, in relation to the Bill, there is one point I want to come to which fits better in dealing with recruitment. The Bill is broadly a very good Bill. I have offered Sir Oliver any help he needs in relation to explaining any aspect of it. There are difficulties in other areas in making certain that the reforms the judiciary is trying to carry out are properly understood, but on the whole I feel that at the moment we are getting the legislation that is needed, with one exception which I would like to come back to.

Lord Norton of Louth: Generally, is the dialogue with the ministry satisfactory in getting the ministry to understand your concerns?

Lord Thomas of Cwmgiedd: One has to remember that the ministry has suffered very significant cutbacks. The first area of extreme worry for my money is Brexit. This is a massive topic and, as I said when talking to City of London Solicitors' Company in London just over 10 days ago, I believe that it is likely to come to dominate everything. I mentioned in my opening remarks my concern about how we go out and dispel the lies—to put it in the vernacular. This is a big task. It will cost money, which has to be found, because, as you have seen, the importance of the legal sector to the British economy is very considerable, and we have a fight on our hands. The MoJ, when Lord Irvine was Lord Chancellor, had a wonderful international department, which was basically run down to almost nothing, and I am afraid it is now a key issue.

There are other areas where the staff are short. I regret to say that we had to correct a serious misapprehension that had arisen as a result of what the ministry said at the end of last week about the rollout and the way we were proceeding with pre-recorded evidence. They had misunderstood the thing completely. Yesterday, I had to write to all the judges to explain that unfortunately what the ministry had said was wrong. It is very time consuming. It is fair to say that there is not sufficient depth. Richard Heaton is an absolutely excellent Permanent Secretary, but you need more resources.

To make clear what I am saying, we fought—there can be no other word for it—the ministry from 1999 right through to about 2015 to get the pre-recording of children's evidence brought into effect. It had been recommended by Judge Pigot in 1989, but we were told, "No money, no this, no that". Through the very hard work of three judges, Judge Collier at Leeds, Judge Goldstone at Liverpool and Judge Ader at Kingston, we have made the pilot work, and we want to roll it out carefully. It is quite difficult to change the culture. Instead of what we said was sensible, which was to move it to the adult victims of sexual crime and to start piloting that at the same courts, it was announced that this would be rolled out across the country. It was a complete failure to understand the impracticalities of any of this. That is the kind of thing that is very troubling.

I am sorry to give you such a long answer. The Bill is excellent, with one exception; I should mention Section 28, because it has caused such a problem over the last few days. We have put it right now, but it is not something we should have to do.

Lord Norton of Louth: But generally there is still an issue of communication, and fundamentally your point is resources.

Lord Thomas of Cwmgiedd: Yes.

Q3 **Lord MacGregor of Pulham Market:** The Lord Chancellor recently described her role to us as making sure that you as the Lord Chief Justice has "the financial resources and legislative back-up" that you need. I do

not think I need to ask you whether you are content with your financial resources, because you have made your position fairly clear on that and on legislative support. How far short are you, especially on financial resources, and can you quantify the position on resources and give us some idea of the scale?

Lord Thomas of Cwmgiedd: The problem is twofold, primarily. First, the Ministry of Justice is underresourced. It does not have enough people who understand. There was a programme, which has been happening probably since I became involved in running it, of gradually running down people with experience. They have all gone, with one or two exceptions; Kevin Sadler at HMCTS is one great exception. The problem is that the ministry simply does not have enough money to have a proper staff to do the work, and as a result the whole of the Section 28 work effectively falls on us, but I could replicate that across the system.

Secondly, a lot of the staff at HMCTS are retained on short-term contracts, and if you ask any district judge—district judges bear the brunt of the problems—there are real difficulties in their files being properly put together. This will solve itself once we get the IT, but at the moment there is a problem.

Thirdly, there is what I would call the general dilapidated state of the court estate. We will get round to that. Basically, a system cannot run without money, although I appreciate the problems with the public finances.

Lord MacGregor of Pulham Market: It sounds as though you are talking about quite a considerable scale-up.

Lord Thomas of Cwmgiedd: Yes. One very experienced professor who specialises in court administration, and there are very few of them who do, has told me that there is an endemic problem in that people do not understand the resources necessary to run a court system until it falls over. I do believe that in getting the reform programme it was understood that we needed proper investment. That has happened, and I am immensely grateful particularly to Christopher Grayling and Michael Gove for having secured that. The difficulty, understandably from the Treasury's point of view, is that you want to see savings. However, it takes time. That is how I see it from our perspective.

Q4 **Lord Brennan:** Lord Chief Justice, I want to ask you about the press coverage of the first judgment in the Article 50 proceedings, over which you presided in the High Court. Because we are being broadcast I will give a little introduction. One of the few constitutional statutes that we have, the Constitutional Reform Act 2005, specifically deals at its beginning with the independence of the judiciary. Section 1 proclaims the importance of the rule of law. Section 3(1) states that the Lord Chancellor and other Ministers must uphold the independence of the judiciary. Section 3(6)(a) imposes a specific duty on the Lord Chancellor, the very words being "the need to protect that independence". Before us a week or so ago, she said, "I might respectfully disagree with some who have asked me to condemn what the press are writing", stating that she "draws the line in saying what

is acceptable for the press to print or not", and she thought that the best way to proceed was to make the positive case. In the light of the constitutional requirements and those answers, how and by whom, in your view and that of the judiciary, should this independence be protected?

Lord Thomas of Cwmgiedd: I need to give you a relatively long answer, and I apologise, but this is an immensely important question. I intended to address this problem in a lecture. I am giving the Michael Ryle memorial lecture, following in the footsteps of Lord Norton, and I shall do that on 15 June here in Parliament because I thought it appropriate not to make a speech somewhere else but to come here and do it. I chose 15 June as it was pretty close to my then intended retirement date and it seemed to me that this was an appropriate time. However, because the Lord Chancellor has said what she said to you and because she gave an interview to the *Financial Times* on this subject on Friday, I now feel under an obligation to say what I think. It will not be the kind of detailed examination, which would take half an hour, which I would like to do in a lecture. In short, I believe that the Lord Chancellor is completely and utterly wrong in her view. I regret to have to say that, but can I explain the position I took?

First, it seemed to me inappropriate to say anything during the time of the decision. Secondly, it was inappropriate to say anything until the legislation had been passed. Thirdly, I am extremely reluctant to get into an argument that in any way compromises the position that the judiciary has taken on Brexit, which is to get on with the legal problems and leave the politics to the politicians. I do not want to be drawn into the politics at all.

It is clear, in my view, that we must maintain a free press, and I have said this in a number of cases that I have dealt with personally, most of which probably arose out of the prosecution of a number of journalists for printing stories that they knew they had acquired in breach of people's public duties. In that and a number of other cases, I have emphasised the vital importance of the freedom of the press. I say that, because it is sometimes overlooked that we believe in the freedom of the press, and I know that my predecessor, Lord Judge, had exactly the same view on the freedom of the press.

I also believe that people ought to criticise us. About three weeks ago in a speech I gave in the Cayman Islands, I said that it was very important that if the courts got commercial cases wrong, the business community should tell us. Criticism is very healthy. If you have got something wrong, fine, but there is a difference between criticism and abuse, which I do not think is understood. It is not understood either how absolutely essential it is that we are protected, because we have to act, as our oath requires us, without fear or favour, affection or ill will. It is clear in relation to the first part of the Article 50 judgment that the claimant had been subjected to quite a considerable number of threats, and it is the only time in the whole of my judicial career that I have had to ask the police to give us a measure of advice and protection in relation to the emotions that were being stirred up. It is very wrong that judges should feel it. I have done a number of cases involving al-Qaeda. I dealt with the airline bombers' plot and some other very serious cases, and I have never had that problem before. Nor

can it be right for us to have entered into a discussion at that time. How could I? I had made the judgment. Lord Neuberger could not say anything as he was going to hear the appeal, so there was nothing a judge could do. Moreover, we had fought hard, as I just said, to keep out of Brexit and I cannot see how we could have said anything without immediately plunging ourselves into a political controversy.

In short, it is the Lord Chancellor's duty, and I want to add two things. First, my private secretary tells me that I spend far too much time giving lectures. As Lord Hunt has said, I was at the Bank of England yesterday talking to a whole group of bankers about ethics but actually explaining how we do things. On Monday in the preceding week, as you may have seen, I gave a talk to solicitors, and I went to Aston University the week before to talk about the commercial court. We give a huge amount of explanation. The idea that we do not realise that the Kilmuir rules have gone is quite frankly fanciful. Of course we know that. It is a failure to understand the difference between abuse and criticism and to understand that we can talk in general terms but we cannot go into areas of controversy.

There are two other points I ought to make. The circuit judges were very concerned and wrote to the Lord Chancellor because litigants in person were coming and saying, "You're an enemy of the people". What is the most striking of all is that the Counsel General made a statement to the Welsh Assembly about the position that he would take in relation to the protection of the tiny part of the judiciary for which the Welsh Government are responsible, the Welsh tribunals. Would it be in order for me to read you two paragraphs? I will provide you with a copy.

"In the aftermath of the High Court ruling on the commencement of Article 50, the Lord Chancellor was rightly criticised for failing to defend the independence of the judiciary against the condemnation of certain sections of the media, politicians and others whose behaviour displayed a casual disregard for the rule of law. I, along with other members from across the political spectrum in the National Assembly, join that criticism. As Wales's law officer, I will ensure that the integrity of Wales's own developing judicial system is respected".

He concluded in this way: "As a government, we highly value and respect the work of the Welsh tribunals judiciary. We recognise their integrity and commitment to public service and the important role they play in Wales. As the Welsh judicial system continues to develop and grow as we move in due course to a more distinct legal jurisdiction, further reform of the administration of justice will become necessary. It will increasingly be a test of this Assembly's maturity, as the legislature and Parliament, that it recognises and understands the importance of the independence of its judicial institutions and the principles on which they are founded and operate. It is equally important that our judicial institutions know that they command the confidence of the legislature and the people of Wales and that they are defended from political interference, unwarranted and

unsubstantiated attacks and criticism in the exercise of their public responsibilities".

I apologise for reading that to you, but it seems to me a pretty clear statement of the duty of the Lord Chancellor. I regret to have to criticise her as severely as I have, but to my mind she is completely and absolutely wrong about this, as I have said, and I am very disappointed. I understand what the pressures were in November, but she has taken a position that is constitutionally absolutely wrong.

The Chairman: Thank you, Lord Chief Justice. I am very glad that the Committee has given you the opportunity to set out your position here, which you have done very clearly.

Lord Thomas of Cwmgiedd: I will do so with the whole history of this problem on 15 June here in Parliament.

The Chairman: We shall look forward to that. I am relieved to be able to say that the Committee produced a report on the office and role of the Lord Chancellor a couple of years ago that takes more or less the same view, but not in quite such clear and robust terms as you were able to.

Lord Thomas of Cwmgiedd: I am sorry, but there is no point mincing words.

The Chairman: No, indeed not.

Lord Thomas of Cwmgiedd: I am so firm about this because in the *Financial Times* article the Lord Chancellor went on to say, and I can see the force of her concern, that when the powers of the European Court are repatriated the decisions of the courts will come under greater scrutiny. It really is absolutely essential that we have a Lord Chancellor who understands her constitutional duty.

The Chairman: Thank you. I think we need to move on, however.

Lord Beith: Before we leave controversy entirely—

Lord Thomas of Cwmgiedd: I do not think I have said anything controversial, at least to lawyers.

Lord Beith: Indeed not.

Baroness Dean of Thornton-le-Fylde: Why do you not say what you mean?

Lord Beith: Without reference to the current situation and your own personal position, would it be helpful if for the future we had a bit more flexibility about the retirement age so that we did not have a situation in which some of the most senior people in the judiciary cannot be considered for appointment as Lord Chief Justice because they would not be able to serve a desirable, say, four years without hitting the retirement age?

Lord Thomas of Cwmgiedd: I should say three things. First, I have read the evidence Lord Kakkar gave you, and in my view he was absolutely right to say that he had to respect the guidance given by the Lord Chancellor.

Secondly, we were faced with a problem three or four years ago of the appointment of the Recorder of London. I sat with three former lord mayors, two lawyers and a very experienced businessman, and we saw absolutely nothing amiss in appointing someone for an 18-month period and then looking at the successor. There were good reasons for doing so, so it is right to say that there is no reason why you cannot appoint someone for a short period of time; it depends on who is available and what the circumstances are.

Thirdly, we have to be very careful about the retirement age. It is a very complicated subject. My problem at the moment is persuading people to stay, and I would prefer to tackle it from the point of view of looking at the whole issue. I say this with deference, approaching the age of 70, but my experience has been that from time to time when you cross a certain age threshold your faculties may not be as good as they were a year or two ago. The problem with the judiciary is that you cannot say to someone, "You've got to go now", so we need to be very cautious. That is why I am quite attracted by the idea, which I know is truly controversial, of fixed terms for people to do things rather than age limits.

Lord Beith: But if the term is four or five years it means that some of the most senior and most experienced members of the judiciary might be precluded from an appointment that, on your own description, has so much involved with it that two years is quite a short time in which to be expected to do it.

Lord Thomas of Cwmgiedd: It depends who that person is and what they know about the system. One of the Government's reforms is to make it very clear that the position of the Lord Chief Justice, although he has all these powers vested in him, is operated through a board. That has been done to make certain that there is continuity over a long period. You also need to have proper succession planning, as I set out in my Mansion House speech. We have never done that since 2005. The issue is complex, but it needs much more open debate about it and decisions need to be taken more openly.

Q5 **Lord Beith:** Turning to the *Transforming Our Justice System* paper, in which you were one of the three participants, where are we up to? In general terms, it talked about a just, proportionate and accessible court and tribunal system. Is this a programme which has an end date—

Lord Thomas of Cwmgiedd: Yes.

Lord Beith: —or is that just an aspiration that we continually work to?

Lord Thomas of Cwmgiedd: I cannot praise too much Susan Acland-Hood, Kevin Sadler and their team, Bob Ayling and the work that Sir Oliver is doing. We are all united in what we want to deliver. We have plans. There are two worrying factors.

The first is IT. You would be mad if you did not say that you worry about an IT program, but we are monitoring it. One thing that impressed me is that we have a critical path analysis of the programme so that we can keep an eye on it with milestones and critical dates. It is all being managed professionally, which is very comforting, and we have dates for everything. Of course, the Treasury wants a return and wants to know when the savings will come in. The judges want to know when we will get the IT that will enable us to have documents on a proper file.

The other risk now is morale. I am very concerned about the effect of morale on the reform programme. I think it can be retrieved, and I wish to express the deepest appreciation to every level of the judiciary. This will not work without them and they are working hard. We have huge numbers of groups that bring people together. With the right good will and the right backing, I believe that it can be delivered, but we need to get our morale right.

Q6 **Lord MacGregor of Pulham Market:** Last year in your evidence to us, you spoke encouragingly of progress in reducing the Courts Service's IT systems, which you have just mentioned, but said that the court estates are more difficult. In this inquiry, we have had a number of complaints about the current working conditions under which judges are having to serve. In particular, it has been put to us that this is contributing to the difficulties in recruitment. Is this is a real problem for recruitment, and can you quantify what additional expenditure you need to address the problem?

Lord Thomas of Cwmgiedd: I know, as I think I said to you last year, that this place has its problems, but the court estate is much worse; it has buckets in every area. We want to get on first with spending the money on buildings that we know we will retain. I am not talking about locations but buildings. There is obviously a court centre in Leeds, for example, and it is inconceivable that you would not. In the Leeds court, the plaster has been falling off the wall for years, so we need to get on and do that. There is nothing more demoralising than going to a building that is dilapidated. I was in Winchester to sit in the Court of Appeal there. The roof leaks, they had buckets in the corridor and the heating does not work all the time. Again, it is inconceivable that we would not have a court in Winchester. I am in agreement with Susan Acland-Hood and the Lord Chancellor that we must get on and start to put this right. It should be done and I hope it will be done quickly.

There are inevitable problems with rolling IT out and there are some that have occurred as a result of the extreme difficulty in dealing with an IT system that had not been modernised for 15 years, but that is coming, it is on track, and I believe we can do something about that and various other things. It will have an effect. Lord Hunt will know of the slightly better circumstances, compared with when I was a young man, in which solicitors now work. It was always thought fashionable to work in an office with a deed box and broken chairs, and barristers' chambers were even worse, but that is not modern life. It is a bit like going back 30 years to conditions that we thought we had got rid of.

Lord MacGregor of Pulham Market: It sounds to me as though you are talking about quite a considerable scale-up in expenditure.

Lord Thomas of Cwmgiedd: Yes, it is all planned for; it just needs getting on with. I think there is agreement here. Although I disagree fundamentally with the Lord Chancellor on her duty, we are in agreement that this needs doing and we must get on with it.

Q7 **Baroness Dean of Thornton-le-Fylde:** Good morning, Lord Thomas. The recent judicial attitude survey revealed that only 2% of judges feel valued by the Government. Of course, that also received a lot of coverage in the media. I do not think I have ever read a survey that has such a low percentage return where 2% feel valued. What is behind that? You have mentioned pay and pensions, which you may want to speak about, but are there other issues as well?

Lord Thomas of Cwmgiedd: That is why we paid such close attention to the problem of not accepting the responsibility to speak up for the judiciary and defend it when it is attacked. It is a very grave problem. Secondly, there is obviously across government, and particularly in the legal sector, an issue with pay. That is going to the SSRB, which will look at it, and I hope that will be put right. There is a problem in pensions where the circuit Bench feels that it has been unjustly treated.

Baroness Dean of Thornton-le-Fylde: Is the SSRB looking at that too?

Lord Thomas of Cwmgiedd: Yes, it is a remuneration/pay issue. There is a short-term problem, and I believe the Lord Chancellor now understands the seriousness of addressing the circuit judges' problems, which will help greatly in doing the buildings and in thanking people. That is why I have tried to go out of my way today to say, "Thank you. We appreciate what you are doing". It is very important. In the Court of Criminal Appeal, for example, one quite often gets skeleton documents that have not been put on the file but have been sent in. It is no one's fault; there just is not the staff. You therefore need to go out of your way to say the kind of thing the Counsel General in Wales was saying: "We appreciate what you are doing. It's very important and we'll back you and do all that we can".

Baroness Dean of Thornton-le-Fylde: But the Government are appealing against it.

Lord Thomas of Cwmgiedd: In relation to the pensions?

Baroness Dean of Thornton-le-Fylde: Yes.

Lord Thomas of Cwmgiedd: Yes, the Government have decided to appeal, but that is a matter on which I cannot comment. I do not think the appeal will ever come before me, but I would be very reluctant to comment on a governmental decision to appeal a case. After all, we have said that the Government should not criticise, they should appeal. I should take exactly the same view. To be fair, it is very important that we treat the Government in a way we expect they should treat us.

Baroness Dean of Thornton-le-Fylde: Will the decision to appeal impact negatively or positively on the attitude of judges and how they feel valued?

Lord Thomas of Cwmgiedd: If you win a case and the case was essentially that there was no reason to do what was done and it was unfair and discriminatory, if a judge tells you that you are right and the other side appeals, it does not take a great deal to work out that those who had felt vindicated are disappointed when they decide to do that.

Lord Brennan: Lord Chief Justice, for years we have proclaimed the value of commercial legal services in this country to the international commercial world, and millions were spent on the new commercial court building. On morale, pay, pensions and recruitment, how will this develop, especially at a time of change, such as Brexit, for the benefit of the country, unless something is done about it by government?

Lord Thomas of Cwmgiedd: I have given four speeches across the world almost about the importance of a commercial court. We are running, in early May, the first meeting of 23 or 24 international commercial courts across the world. We regard ourselves as the leaders in this, and our establishment of the financial list has been a success. At a conference that I attended yesterday, a banker, whom I did not know, told me what a wonderful thing it was. We have a product that is second to none and we have law that is second to none. I believe this is understood by Her Majesty's Treasury, by the Department for Business, Enterprise and Industrial Strategy and by the Lord Chancellor. Everyone understands this, but we have a fight on our hands. We are pretty good at fighting and I am absolutely determined that we will maintain our supremacy, but I need all the help I can get to do it. We have a good product, as somebody once said, and I want to go on making certain that we sell it in the best way.

Q8 **Lord Hunt of Wirral:** Lord Chief Justice, may we return to judicial recruitment for a moment? Last year, we discussed the process and you stated, "What we have found is the current system"—of recruitment—"advantages very, very substantially those who practise in a particular area, and it measures that rather than someone who comes from a different area who might have outstanding potential". What sort of progress have you been able to make?

Lord Thomas of Cwmgiedd: This is primarily in the remit of the Judicial Appointments Commission, but we have been trying to make certain that in all the competitions now we devise something that helps anyone with potential. I am not an expert in how you do that, but it struck me, when looking at the results of competitions, that one of the clearest indicators was that you were getting people who were being appointed who had experience in a particular field. Bearing in mind that we do not need civil recorders at the moment because there is not the demand for them—I will say something about recorder numbers in a moment—I thought that a fair way, and the JAC has agreed, would be that we look at it. We will not get it right first time, and the educationalists among you will know how difficult it is always to assess potential, but there is a problem, it is being addressed, and if I may say so as a tribute to the JAC it is doing a very

good job at setting about it, so I am optimistic. We are on the road, and I hope it is the right road, but it is not an easy road.

Q9 **Lord Beith:** Last year, you suggested that it was proving difficult to get people from different professional backgrounds to become deputy High Court judges, such as from the Government Legal Service. Have you been able to make any progress with that?

Lord Thomas of Cwmgiedd: I need to explain. Yes, we have, but I cannot give you any figures, and can I tell you why? One of the issues that we are now addressing is the comprehensive approach to the judiciary that existed when the Lord Chancellors, Lord Irvine and Lord Falconer, made the appointments. You would generally have a pretty good idea of the backgrounds of the people who are applying, that there was quite a good recruitment programme where they were coming from, and that you would manage them on.

One of the problems that occurred when the JAC was set up and the new appointments system came into place was that the integrated HR function, if I can call it that, was no longer integrated. One of the difficulties we had was that, if you are the appointing body, you are not necessarily so interested in collecting data. I can tell you how many solicitors and barristers, although I do not have the figures here, have applied. What I cannot tell you is their origins, because no one collected that information. We started to collect that last year and we will have figures that we will publish soon. So yes, we go out, but I cannot tell you the numbers that we are getting and the success rates.

We have a problem, and we need to know whether we are getting people from areas, and if so whether we are getting people from all the different parts of the government service and elsewhere. We need to analyse whether we are making progress and whether we are in a position to do more to recruit from a certain area. We do not have the proper statistical database.

Lord Beith: I understand that, but are there any barriers that you have sought to remove either to Government Legal Service lawyers getting into deputy High Court positions or to CPS lawyers, for example, who often come from a more diverse range of backgrounds than in the profession generally, becoming recorders?

Lord Thomas of Cwmgiedd: At the moment, we are recruiting 100 recorders, and I want to explain why we have a major problem in the numbers we recruit, but let me answer your question first. I have not yet come across anywhere where someone can be a full-time prosecutor and at the same time sit as a judge. They tried it once in Denmark and found that it did not work. On most of the continent, you switch between being a judge and a prosecutor, but as far as I am aware no continental system allows you do to both functions at once, and for obvious reasons.

We have said that we will try to encourage into the criminal recorderships people who have all this outstanding potential, but we must then make

certain that we take exactly the same attitude to recruitment to the district Bench and to the tribunals from the CPS. Many of them are now starting to work in the tribunals so that they can do something that is compatible with their prosecutorial function. That is one of the reasons why we have tried to move to a more level playing field in assessing potential. We have addressed it without compromising what I would regard as a fairly fundamental principle.

Can I add one thing about our problem? I have been very concerned for some time about the age profile of our recorders. At the moment, 38% of our recorders are over 60, 37% are between the ages of 50 and 59, 19% are between the ages of 40 and 49, 2% are between the ages of 30 and 39, and 5% are over the age of 70. We have a profile that is completely unbalanced. We have 1,028 recorders, and it is very difficult for us to increase the numbers, partly because we have to educate them and partly because we have to offer, across the board, the opportunities to sit. One of the great disappointments that we face is that we are not returning to what we used to have, which is the expectation that you would have a recorder for a finite period and that, at the age when they decided that they were not going to go to the Bench, unless there was a special reason for keeping them you would ask them to go or they would go. That does not happen now, and it has two impacts. One is that it we cannot have as many coming in, hence 2,500 people have applied for 100 places, and we only have 100 places because of the age profile.

Secondly, there is an adverse effect on recruitment. If you know that at the age of 60 you can still have your recordership, it is a nice comfort to know that when your advocacy skills or your litigating skills are not quite what they once were, there is this nice little part-time job you can go on with. I am told that many people therefore see an attraction in carrying on in practice, because you can have a guaranteed source of income that, as a result of the decision of the CJEU, counts as a pension.

We have raised this problem with the ministry. It is the one problem that ought to have been tackled. We have the same problem in the district Bench, although it is less serious. Some 35% of deputy district judges are over 60 and 34% are between 50 and 59, so they are not as bad as the recorderships, but you get deputy district judges who might live in Spain, come here for three weeks, earn a little money and go back again. But it is no good for recruitment. I very much hope that in the passage of the Bill through Parliament that this problem can be dealt with, because it is very serious and it affects recruitment in the two ways I have explained.

Lord Beith: Why did it change from a pattern in which people were ready to give up recorderships to one in which they were not?

Lord Thomas of Cwmgiedd: The system was very informal. We used to have assistant recorders and you were not moved on to a recorder unless you were basically okay. That was got rid of because of the decision about judicial independence from the Executive when the Lord Chancellor made the appointments. That is no longer necessary. Secondly, people were much more inclined than they are these days to say, “Look, isn’t it time

you stopped doing this?" People do not say it, but they look at their rights, which they are perfectly entitled to do, but you can tell from the figures why I am so concerned about it.

Lord Beith: What in the Bill helps to put it right?

Lord Thomas of Cwmgiedd: Nothing.

The Chairman: We are making good progress, Lord Chief Justice. We might overshoot 11.30 am. Would that be an inconvenience to you?

Lord Thomas of Cwmgiedd: No. It is probably my fault for answering your questions at too great a length. I am here to assist you. We have an awful lot that is good. Our system is still, and must remain, the best in the world, but we have a fight on our hands and we need to put certain things right.

Q10 **The Chairman:** In that context, I think I know what your answer to the next question will be, but it is still worth getting it on to the record. If the JAC continued to experience shortages at the end of the next recruitment round, what would be your reaction if a suggestion were made that the competency benchmark should be lowered in order to fill vacancies?

Lord Thomas of Cwmgiedd: I can only tell you the reaction of the entire judiciary. Lord Kakkar has been to visit virtually every level of the judiciary, and when he said, "I'm not compromising on quality", there was universal approval and universal relief, because once you compromise on it it is a downward trajectory. It would be fatal to the High Court Bench if we were to do that, but fatal also to the district Bench and to the tribunals and the circuit Bench. We simply cannot.

The Chairman: Thank you very much. That is very reassuring.

Q11 **Baroness Dean of Thornton-le-Fylde:** How successful has the judiciary been in recruiting from the Crown Prosecution Service, which is much more generally diverse than the legal profession? Have you given any thought to reducing the barriers, whatever they are, to the CPS lawyers joining the judiciary?

Lord Thomas of Cwmgiedd: We take the view that anyone who is in the Government Legal Service ought to be able to practise in an area where there is no conflict between his or her full-time job and the business they are trying. Therefore, if you are a tax lawyer for the Government, you ought not sit on the tax tribunal, because the Government will be involved in every case; I think it is still only the Government who collect taxes. The same is true with the CPS. Therefore, what you must do is give people an opportunity, which is what we are trying to do by altering the way in which we recruit. The only thing I cannot give you at the moment is the figures as to how well this is working, but that is our plan. I hope it will mean that we will recruit from all aspects of the Government Legal Service, because there are some very good lawyers in it.

Baroness Dean of Thornton-le-Fylde: Can I just press you a bit on that?

Lord Thomas of Cwmgiedd: Of course.

Baroness Dean of Thornton-le-Fylde: I can understand the conflict position entirely, but in fact if you are recruiting from the CPS and they join the judiciary, that Chinese wall, division, conflict should not be there afterwards.

Lord Thomas of Cwmgiedd: It should not after they have made the full-time appointment. If I may take the analogy of Europe, many judges on the continent may be a prosecutor for three or four years. Then they become a judge and then they become a prosecutor again. There is nothing wrong in that system, but you can only do one job at one time. If we assume that I was trying a case and one of the counsel was from the CPS, fine. But suppose you were in front of someone and he said, "I spend my time prosecuting. I am the judge in this case. My full-time employers are the Crown". There is a real problem. That is certainly the consistent advice from independent counsel that the judiciary has received over the years, and some of the people who have advised have been of very significant eminence.

Baroness Dean of Thornton-le-Fylde: That is compelling, but have you thought about how you can reduce that potential conflict?

Lord Thomas of Cwmgiedd: There are other areas; they can become deputy district judges and they can sit in the tribunals. Many of their forensic skills, for example, can be honed. They may find it a little difficult at first. In immigration, there is a huge volume of work. There are lots of opportunities. The problem in the past has been that we have tended to assess people for appointment as deputies on the basis of the skill they have in an area rather than looking for potential. They did not used to do that. No one would have appointed me. I became a recorder under the current system. I was a commercial lawyer. I had been to a criminal court probably three times. I had to learn to be a criminal lawyer. That was the idea. There were no exams or anything of that kind, or even interviews, I am so old, but we now do it properly, and you assess potential and it does not matter what your background is. That is how I believe we can address this problem, and my successor will have to come and tell you next year whether we have succeeded. I cannot give you the figures at the moment because they were never kept.

Baroness Dean of Thornton-le-Fylde: You do not have any facts you can give us?

Lord Thomas of Cwmgiedd: No, for the reasons I explained. The figures on solicitors and barristers are collected because that is quite useful, but we do not have enough information about people's different backgrounds. We now have it, I understand, from the beginning of the fiscal year 2016, so we should have it fairly soon once it has been vetted by the statisticians. I am not allowed to give you any figures that have not been vetted.

Q12 **Baroness Dean of Thornton-le-Fylde:** We are looking at legal aid and court reform; you have touched on court reform. The Legal Aid, Sentencing

and Punishment of Offenders Act will be subject to post-legislative review later this year. What are your impressions of the effect of this thus far? Do you have any formed impressions on it or is it too soon?

Lord Thomas of Cwmgiedd: On the whole, with one exception, the sentencing parts of it have been successful. There have been very few cases, which I put down to the fact that we did a huge amount of work with the ministry in making certain that the propositions are thought through. The only bit that is disappointing, which is being tackled by the excellent chairman of the Parole Board and his deputy, is getting rid of the IPP problem, but that is being tackled. On the sentencing side, I am happy.

On the legal aid side, there are problems that need review, particularly the provision of legal aid or some form of legal assistance in private law cases and in family disputes, because experience is beginning to show that in some cases you need that. Whether you do that on the traditional model or the Californian model is something you ought to look into. California has a very good system. We have had the benefit of an explanation from people in California on several occasions, and apparently it works quite well. It is the legal aid side of the Act that you will need to concentrate on. I would not spend much time on sentencing; it works pretty well. The problems with sentencing relate more to the size of the prison population, but you are not asking me about that, or about the operation of the community rehabilitation companies, which is not on your list.

The Chairman: We would like to finish with Wales, Lord Chief Justice—a subject close to your heart. Unfortunately our distinguished Welsh colleague, Lord Morgan, cannot be with us today. Lord Norton will ask the questions.

Q13 **Lord Norton of Louth:** Indeed, you are Lord Chief Justice of England and Wales, and you have spoken on the situation in Wales and touched on it in your annual report. There are two questions on that. In your report you refer to the Justice in Wales working group and mention that its principal remit is to address how the justice function in respect of Welsh law can be addressed and to ensure that the necessary underpinning mechanisms are in place to enable legislation to operate effectively. Are you able to report on that? The second point in your annual report and which you stress is that it is not just the volume of law affecting Wales but the sheer complexity of it. Is that proving to be a practical problem from the point of view of the courts?

Lord Thomas of Cwmgiedd: On the first point, yes, it was. At first sight, it does not seem very difficult to understand that if a legislature passes legislation you need to make adjustments to court procedure to deal with it, but there was no mechanism for doing that. Arrangements have been made to ensure that the Civil Procedure Rule Committee, the Family Procedure Rule Committee and the sub-committees now have a Welsh judge on them, so we hope that the lack of liaison will go.

The second problem—again, this is a political issue on which I express no view—is the training costs. There has to be agreement as to who is to pay

for it. The Whitehall model is that if you initiate legislation you pay for the training. How you apply that to devolution in a conjoined system is not a question on which I ought to express any view, because it is political.

The third area is the need to make certain that you have people who understand that Welsh law is different, and with the help of the JAC we have made a lot of progress on that. The Justice in Wales working group now means that the ministry understands that there is a problem. It has put a mechanism in place to try to deal with it, and I hope it will work.

There is another longer-term problem, although I do not know enough to express a view at the moment. There is a view that we should set up some sort of body to look at how the Welsh legal system is operating. This is quite a complicated constitutional issue. A suggestion that such a body should be chaired by a civil servant examining how the judicial system in Wales operates is constitutionally illiterate. You cannot have someone in Whitehall chairing a body and commenting on whether the judiciary is an independent branch of the state. This needs to be looked at very carefully, because as you can see from what I read to you of what the Counsel General says there is a belief that he has a tiny system on Welsh tribunals, about which we have done a bit, and the Wales Act provided for the appointment of a president of Welsh tribunals and enabled interchange between Welsh and English tribunals and English and Welsh courts. We have done some things, but there will be a lot to do, I suspect, and how this will pan out depends on issues relating to Brexit.

Secondly, as regards the law, the Law Commission has begun to do some work on trying to reduce Welsh law into a much better semblance of coherence. It is a formidable task.

Lord Norton of Louth: From what you are saying, it is a consequence of it being a conjoined system. You have law that is specific to Wales, but you would not express a view on whether it should remain conjoined.

Lord Thomas of Cwmgiedd: I have spoken on this issue before. There are three solutions. One is that you stay as is and you keep a united jurisdiction, but within it you have judges who are judges of Wales and not necessarily judges of England. There are lots of ways of doing this, and I have no doubt that this will be grappled with over the years, but it is not easy. Small jurisdictions have their advantages and disadvantages. I am always slightly loath to go into this, because it is much more for an expert and for those who come from Scotland or Northern Ireland as to the advantages of a small jurisdiction. But there is an advantage to Wales, particularly to the legal firms in Wales, in being part of a combined jurisdiction simply, because there is much better access through English law to international business.

Lord Beith: I have a quick supplementary. I say “quick” because you cannot really answer the question, but you might like to give one of your forthcoming lectures on the subject. Indeed, you challenged us on this, and it is the contribution of the judiciary to the size of the prison population. You might like to give us your views on another occasion about whether

sentencing guidelines contribute to that by causing sentence inflation, whether judges have at their disposal sufficient alternatives to custody to make alternative choices and whether society uses the length of prison sentences too much as the only index of how seriously it takes an offence.

Lord Thomas of Cwmgiedd: If you want me to talk to you about this, I would come back to you and talk about it separately. To try to answer it in a couple of minutes would be unfair to the very real problems that have built up. It is, in my view, a complex problem. We try, as best we can, to explain the effects of a prison population. I can safely say from the point of view of virtually every member of the judiciary that unless the Treasury is prepared to make available very substantial further resources for the prison side of the ministry, it is difficult to see how improving the way in which people are dealt with in prison can be achieved without a reduction in the prison population. I think I can say that that is the universal view of the judiciary, but I know that it is not a view that is accepted.

The Chairman: On that note, Lord Chief Justice, we will bring to a conclusion what has been an enormously interesting and productive session. Indeed, I thought I saw smoke rising from the pens of the third estate behind you. We are extremely grateful to you, and in case this is the last time we have you before us as Lord Chief Justice, can I thank you very much indeed for your co-operation with us? I must say in passing that you look good for at least another 10 years, but that is another subject that cannot be raised today. Nevertheless, you have our very best wishes.

Lord Thomas of Cwmgiedd: May I thank you all and say—this is an answer that I always give—that it is deeply regrettable that I cannot come and deal with these matters on the Floor of the House. It would be much easier for us to engage. If the president of the Supreme Court and I could come and talk at times on the Floor and explain some of these things, it might make us understand better the politics of things and you understand a bit better. I would like to do it openly, but that is not possible, so—this sounds so rude that I almost dare not say it—this is a wonderful alternative, so thank you very much indeed.

The Chairman: Thank you very much.