This is the first time that a lecture of mine has been sponsored by the Meteorological Office. I think it's only fair to warn the audience that over the next half an hour they may find that being lectured to by me is equivalent to being subjected to a heavy depression.

Exeter is a singularly appropriate location for a lecture on the changes that are taking place in our constitution. The Chancellor of this great University, Lord Alexander, has made it a subject of his own. I am well aware he cannot alas be here because of ill health and I am sure I speak for us all by wishing him a speedy recovery.

In addition, Exeter has splendid historic buildings, built over the centuries. They vividly illustrate the development of this country. They are historical landmarks and in a way they resemble this country's constitution, which has also been created over the centuries with its own historic landmarks. However, unlike Exeter's historic buildings, the constitution's precise form is not easily identified. The constitution is unwritten, so there is no single historic document in which its precise terms are recorded. Instead, it is to be found in ancient statutes, the common law and customs.

The absence of a single document explains our constitution's cavalier treatment in the recently published Constitutions of Europe published by the Council of Europe and the Venice Commission. Its 2 volumes contains over 2,000 pages. It devotes 30 pages to the constitution of Liechtenstein (a state with a population of 32,5000). Austria with a population of 8 million qualifies for a 100 pages. This country with a population of over 60 million has an entry of 1 .25 pages. But this does not mean that our constitution is any less important to our citizens than the written constitutions of the other members of the Council of Europe that receive more generous treatment.

Magna Carta, the Habeas Corpus Act and the Act of Settlement of 1701 are among are constitutional landmarks. However, in one respect my analogy breaks down. Exeter's historic buildings are designated an Area of Archaeological Importance [under the Ancient Monuments and Archaeological Areas Act 1979]. An Act that ensures that any development which would affect Exeter's historic buildings are subject to strict control. The same is not true of our constitution. Its preservation and developments depend upon successive generations being prepared to protect and cherish it. So here we all have responsibilities.

Vernon Bogdanor, the Professor of Government at the University of Oxford, in an article in this years' Law Quarterly Review, identified 15 significant reforms to our constitution which have taken place since 1997. He described them as unprecedented and suggested any one of these reforms constituted, by itself, a radical change. I agree with him. They include devolution, the use of referenda, conducting elections using proportional representation, the reform of the House of Lords (still unfinished) and freedom of information. While each of these reforms is interesting and certainly worthy of discussion this evening, I will focus on two other reforms to which the Professor refers; they are the changes brought about by the Human Rights Act 1998 and the reforms announced by the Prime Minister in June of last year. These involve the abolition of the historic office of Lord Chancellor, removal of the Law Lords from the House of Lords and the establishment of a new Supreme Court.

Each of these reforms have in common the fact that they effect the Rule of Law. This in itself makes them important because democratic Government is dependent upon observance of the Rule of Law. Without the observance of the Rule of Law, a democracy can become a dictatorship. Admittedly, an elected dictatorship. But nonetheless, a dictatorship which has all the dangers associated with uncontrolled power. It may be a benevolent dictatorship, it may even be an effective form of Government. But the danger is that what starts off being as benevolent can, and usually does deteriorate into being malevolent.

It will be noted that I refer to the Rule of Law not the rule of laws. About three years ago now, I gave a lecture in China. When I had finished the lecture, a Chinese female professor asked me what was the difference between the Rule of Law and the rule of laws. She, no doubt, had in mind that in China the citizens are required to observe the law and so it can be said that they are ruled by law. But there is a difference between the rule by law and the rule of law. Observing the rule of law involves observing certain fundamental values. The values which any proper functioning democracy should observe. They include the values that are protected by the European Convention of Human Rights and, importantly for present

purposes, they involve the public having access to an independent judiciary.

Many of those values are also to be found in Magna Carta and Habeas Corpus and the Act of Settlement, the monuments to which I referred earlier. They are also reflected in more contemporary legislation such as the Sex Discrimination Act 1975 and the Race Relations Act 1976.

It is these ancient great charters and subsequent Acts of Parliament that, together with the common law, have protected our liberties over the centuries. They had the effect that no one could be detained by those wielding public power in this jurisdiction without their actions being able to be scrutinised by the judges of the High Court. Judges who are in direct descent to the judges who travelled the length and breadth of this jurisdiction (including to Exeter) on behalf of the medieval kings upholding their laws. Today's High Court Judges can still make orders of Habeas Corpus and grant prerogative orders, that historically were dependent upon the powers of the Monarch. Powers that have not only been kept alive in this jurisdiction, but throughout the common law world.

It is, in situations when there are substantial threats to the internal security of this country, that the Rule of Law is of obvious importance. There then has to be a difficult balance drawn between the rights of the individual and the rights of the state. Ultimately, where to draw the line is the responsibility of the judiciary, but that is in the last resort. What is important, is that what ever the situation, those who exercise power know that they, like everyone else, are answerable to the law.

Furthermore, the public must have confidence that if and when the courts become involved, the judges will unhesitatingly apply the law and uphold the balance between individuals and the State. Both in normal times and in emergencies the Rule of Law is equally important. The public must have confidence in the impartiality, fairness and independence of the judiciary; otherwise they will be less likely to observe the law.

It is here that the first of the reforms to which I have referred is most significant. The Human Rights Act made a significant difference to the responsibilities of the judiciary. The common law places duties upon public bodies to protect the interests of the public. As a result of the Human Rights Act, the public now has rights in addition. The courts now uphold rights in the same way as they have traditionally enforced duties. The Act has been carefully drafted so as to demonstrate that Parliament still retains its Sovereignty. The courts cannot quash primary legislation. They are confined to declaring it incompatible, but the need for this only occurs in those cases where it is not possible to interpret the legislation in accordance with the convention. The Act provides a challenge to the judiciary to which the judiciary readily respond. Judges are required to interpret legislation creatively so that it accords with the HRA. Judges here need to exercise restraint and distinguish between interpreting and legislating. Interpreting is permitted, legislating is not.

Laws LJ has eloquently painted the picture. He indicates that the British system, at one time, was one of Parliamentary supremacy pure and simple. Now, the court have evolved rules of interpretation which favour the protection of certain basic freedoms. At the present state of evolution, the British system stands at an intermediate stage between Parliamentary supremacy and Constitutional supremacy. There is no statute which Parliament cannot pass, but the Human Rights Act has created a balance between respect for Parliament's legislative supremacy on the one hand and the legal protection afforded to convention rights on the other.

As to this, Jeremy Bentham observed that rights are the children of the law; from real laws come real rights; from imaginary laws come imaginary rights, "a bastard brewed of monsters." This stark contrast between "real rights" and "imaginary rights" is no longer justified. The situation is more subtle and the reach of the rights contained in the European Convention is now broader than their words literally require.

The broad effect of the Human Rights Act

Human rights now permeate the law. This has markedly increased the responsibilities of the judiciary. The responsibilities require them in the case of all the rights forming part of the ECHR, to make a judgment as to what does and does not involve an infringement of those rights. In the case of the majority of the rights, it also involves the courts coming to a judgment between the competing interests of the individual and the public body. In particular, the judiciary have to decide where there is an infringement of the right, whether

that infringement can be justified as being a proportionate response to the need for action to protect the interest of the public. Repeatedly the judiciary have to arbitrate between the State and the individual. This has resulted in the judiciary being more exposed to criticism than previously; some times immoderate criticism. It is a situation in which if the judiciary are to do their duty they have to be confident of their independence. It is also situation where we have to be sure that we have a judiciary of the highest quality that is sufficiently diverse to reflect our society.

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The Reforms

That conveniently brings me to a consideration of the constitutional reforms involving the Lord Chancellor and the Supreme Court. They are certainly capable of joining the series of constitutional landmarks that I have already identified. From my standpoint the reforms have to be judged by the extent to which they protect the judiciary's independence. The constitutional reforms were announced on the 13 June last year. It is agreed on all sides that the way they were announced (by press release and without prior consultation) was extremely unfortunate. However, this is history and only of significance because it underlines how easy it was considered that constitutional change could be brought about in the UK. The flexibility of our constitutional arrangements is undeniably desirable, but they should not be so malleable that they can be changed by Prime Ministerial announcement in the course of a Government reshuffle.

The change which was initially regarded as most significant by the media and the Government was the creation of a Supreme Court. The creation of a Supreme Court would be in accord with the doctrine of the separation of powers. This is a doctrine that has not been part of our constitutional arrangements. The theory is that if the judiciary are involved in the legislature they can readily be influenced by the legislature. They can become sucked into the political processes which play such a prominent role within the legislature. Whether or not the judiciary is in fact influenced, there can be a perceived lack of independence. A separate Supreme Court would bring out legal system more in accord with that of all other developed societies. Even if our judiciary's independence is not adversely affected, it is said we provide a bad example to the new democracies who can seek to justify their practices on the basis of ours. It would also avoid a danger of conflict between the different arms of Government.

The Supreme Court is of significance for the independence of the judiciary because it would mean that, in future, our Law Lords would no longer be able to take part in debates in the legislative chamber and even vote. However, the benefits would not be all one way. Nobody has seriously suggested the Law Lords are not fiercely independent. The same cannot be said of the judges of some other Supreme Courts. Some of the Law Lords that are opposed to the creation of a new Supreme Court contend that they are better able to deal with issues which have a political sensitivity. This is because being part of the House of Lords means they better understand the political process. There was a time when there would always be one or more Law Lords who understood the workings of Government from their own first hand experience as Ministers. This however is no longer the situation so the point has some force.

A separate point can be made as to the desirability of the Chief Justice still having the right to address the House of Lords. I know from my own experience, that being able to take part in a debate and even to indicate that you intend to take part in a debate can be a useful lever in discussions with Government. I do not, however, overstate this point because there are other avenues open to a Chief Justice, including giving lectures and seeking an audience with the Prime Minister, which is always promptly granted. Then there is the question of expense. I have not heard any suggestion that the Department of Constitutional Reform will receive any new money to fund the creation of a new Supreme Court. So the money is going to be taken away from other parts of the Justice System not yet identified.

So far as the judiciary is concerned, the proposed abolition of the Lord Chancellor is far more significant. This is because of the long history of the office. The tendrils of Lord Chancellor's authority spread throughout Government and the Justice System to an extraordinary extent. Part of his powers were of recent creation. However, others were derived from the medieval powers of the Monarch. His departmental powers for example, running the Court Service and his responsibilities for legal aid, could readily be transferred by the appropriate legislation to a Secretary of State.

The authority which flows from the fact that he was accepted as the constitutional Head of the Judiciary is a different matter. His position as the constitutional Head of the Judiciary did not appear in any Statute. Recently it is based on the provisions of the Supreme Court Act 1982, which made him President of the Supreme Court (here I mean the building in the Strand, as well as the Crown Courts up and down the country, including Exeter). But, the fact he was constitutional head of the judiciary gave him very substantial authority over the whole judiciary. He made appointments. He could remove judges other than the senior judiciary who could only be removed by Parliament, he could issue rebukes or formal reprimands.

The importance of the Lord Chancellor being Head of the Judiciary was underlined by the creation of the Court Service and the growth in the size of the legal system. This made it essential that there should be a partnership between the Lord Chancellor's senior officials and judges. No decision about the courts and the judiciary is normally taken without either the judges consulting the Lord Chancellor or his officials or the Lord Chancellor or his officials consulting the judiciary. The judiciary's increased responsibilities to which I referred earlier meant that the judiciary have increasingly come to rely upon the Lord Chancellor to protect their independence. The combination of his roles as head of the judiciary and head of a large Government department meant that he was in a good position to do this. He could use his position in cabinet to speak out on their behalf. He has a well staffed and effective press office which could assist in explaining the role of judges to the media.

Increasingly the role of judges is not confined to presiding over and giving judgments in court. Judges are members of numerous committees to do with the justice system and the senior judges, chair many of those committees. They work with the Lord Chancellor and his department to improve the effectiveness of the justice system. They have substantial commitments internationally. They represent our system abroad. They assist new democracies to set up their justice systems. They conduct numerous inquiries at the request of the government into matters of grave public concern. The list is ever growing.

Fortunately after the changes were announced both the Government and the judiciary quickly realised the substantial scale of the change that would have to take place if the constitutional reforms which were announced were to be implemented.

It is no longer in dispute that, even if the title Lord Chancellor is retained, the holder of that office cannot sit as a judge and cannot be Head of the Judiciary. Furthermore, he could no longer exercise the powers which he had previously exercised because he was Head of the Judiciary. Equally however, the judiciary realise that there were many decisions which have to be taken which affect the judiciary in relation to which the Government were entitled to be involved. It would not assist the harmonious relations which, whenever possible, should exist between the different arms of the Government if regular communications did not take place between them.

Although the initial consultation period after the announcement of the reforms was not long, in their responses, the judiciary tried to lay out clearly the steps that were needed in the proposed new situation. They considered that it was essential that changes of this scale should be the subject of open debate.

Lord Falconer who, as the new Secretary of State and Lord Chancellor, deserves to be credited with exercising considerable statesmanship, accepted in general, the thrust of the judiciary's case.

It was fortunate that within recent years the Judges' Council has been revived and remodelled so that it could represent all the judiciary. This enabled me, with the Council's authority, to present a case that had the backing of the judiciary as a whole setting out what was needed to protect our independence.

As a result of very considerable work on both sides, there is substantial agreement between the Government and the judiciary on virtually all the matters that had to be sorted out as a result of the Lord Chancellor ceasing to be head of the judiciary.

The agreement between the judiciary and the Lord Chancellor has become known as the concordat. It has been placed before Parliament and fully considered by both Houses as part of the Constitutional Reform

Bill. It is a remarkable document which deserves studying by anyone who is interested in constitutional issues. The powers which hitherto resided in the Lord Chancellor as head of the judiciary are now detailed as being ones to be exercised by the Chief Justice of the day with or without consultation with the Minister or by the Minister with or without consultation with the Chief Justice or by the Chief Justice and the Minister jointly.

But what about the contents of the concordat? What is its significance? It is the cumulative effect of the whole package which is so significant. The concordat divides the responsibility between the executive and the judiciary for the appointment, discipline and activities of the judiciary. What is more, it does this in a way which protects the independence of the judiciary while at the same time not excluding the executive from being appropriately involved. It also ensures that where appropriate there is room for lay involvement and scrutiny by Parliament.

Some of the provisions in the concordat do no more than recognise what has long been understood to be the position. They probably had become conventions. The significant difference made by the concordat is that those understandings are reduced to writing and now already have the support of the judiciary as a whole, the Government as a whole and parliamentarians as a whole. Of course, there are areas where there is still room for difference of opinion but as a package the contents have been accepted as being a constitutional settlement which deserves general support. This is a huge advance. It is good news but not deserve to be ignored because of this.

One of the most important provisions are those dealing with future appointments. It was clear prior to the reforms being announced that while our existing system of appointments has served us well it was no longer equipped to deal satisfactorily with the substantial number of appointments that have to be made to day. What is proposed is an Appointments Commission independent of government. Not only are its members to be independent of Government, but they are also to be appointed independently of Government. The chairman and 5 other members are lay. Not a majority of lay members but a substantial proportion of lay members. There is not a majority of judicial members either. What is important, is that there should be a sufficiently broad range of members to ensure that their collective contributions result in a diverse judiciary of the highest merit.

The executive is not excluded because the Commission has to recommend candidates to the Secretary of State and if the Secretary of State, for reasons given in writing, does not accept the first recommendation, he can call for it to be reconsidered or ask for another nomination. That is an end to his involvement.

This ensures that the executive has a stake in the person appointed, but cannot, in the unlikely event of this being its wish, appoint only judges sympathetic to its cause.

Two other examples of how the concordat operates are provided by the provisions as to deployment of judges and listing. Deployment of judges is clearly identified as a judicial responsibility. This is because it is known that one method of achieving a compliant judiciary is to control where they sit and what they do. It would be unacceptable for the executive to be able to say or to imply to a judge that instead of having the pleasure of sitting in Exeter, if he steps out of line, he will be relegated to some court miles from his home in some less attractive city where he or she would do less demanding work. For similar reasons, it is essential, that listing is in the hands of the judiciary. The executive should not be entitled to choose its judge or to achieve its objectives or targets by determining which cases will be given priority, when it is not in the interest of justice that this should happen.

For the concordat to be greeted by a general consensus is a remarkable achievement. It is the most important and happiest consequence of the constitutional changes we are discussing this evening. It means that if the Bill is enacted we will establish a proper framework for the relationship between the judiciary and the Government for the foreseeable future. An extraordinary feature of this process is that the concordat has been endorsed by all sides in both Houses of Parliament. Mercifully, we have managed to avoid making its contents a political issue.

However, all the constitutional reforms have not been so uncontroversial. Whether there should be a separate Supreme Court and whether a minister should exist, who is called the Lord Chancellor but is not

head of the judiciary, and, if so, whether he has to be in the Lords and a lawyer are still matters of controversy and the subject of hot debates in Parliament.

As will be known to my audience, the Constitutional Reform Bill was referred by the House of Lords to a Select Committee to examine the detail. That committee was able to perform its task in a manner which I believe all sides regarded as admirable. It endorsed the concordat and made the amendments to the Bill which were necessary to ensure it reflected the concordat. However in relation to the two fundamental issues of controversy, it could do no more than report back to the House and so we still do not know what will be the final outcome.

While I am speculating, it does seem that the Office of Lord Chancellor may well survive, though the office holder will cease to be the head of the judiciary and will be bound by the concordat. It is not clear that the creation of the new Supreme Court will be endorsed by the House of Lords. However, in any event, the creation of a Supreme Court will be delayed until an appropriate building can be found and refurbished to provide its home. How long the latter process will take is a matter of speculation.

As Chief Justice my primary concern is that the legislation should be enacted which gives effect to the concordat. In my judgment this is now a constitutional necessity. As but one example, we need the new Appointments Commission urgently. However, the imminence of the general election means that the present Bill could be lost if the politicians are unable to resolve their differences. This danger causes me real concern. It is my hope that all those engaged in the political process will accept that it would be irresponsible to allow what has been achieved so far to be lost because of the remaining differences.

The issue of the title of the Minister who now exercises the power of the Lord Chancellor and the future of Supreme Court should be capable of being resolved without delaying legislative support for the concordat. I earnestly hope that the statesmanship that has so far been displayed on all sides continues to be shown. For this not to happen for party political reasons would not reflect well on our political processes.

We must all hope for a happy outcome. I cannot over emphasise the importance, while the opportunity exists, of ensuring for the future a judiciary whose independence is secure. Our freedoms and the maintenance of the rule of law depend upon this.