A new constitutional consensus: Lord Woolf, The Lord Chief Justice of England and Wales, University of Hertfordshire

I am delighted to be giving this lecture in memory of James Kingham. James was a judge whom I admired immensely.

His Honour Eric Stockdale, who asked me to give this lecture, and James had in common that they were early examples of a new breed of judiciary that has emerged during my professional lifetime. James saw it as part of the duty of a judge to be pro-active in providing justice to those who came before their court. James cared deeply about justice. He had a broad interest in the community as well as an interest in judging. He would have no difficulty in acknowledging who Gazza was. I could never envisage him saying like a well-known 19th Century judge, "Reform, reform, do not talk to me about reform, things are bad enough already". James would not allow pre-conceptions as to the way judges should behave to inhibit his determination to serve the community. He was, for example, the only judge I knew who, at the end of his day in court, would exchange his robes for the uniform of a Scout Commissioner. Fortunately, in his numerous activities, he was strongly supported by his family. I am delighted that his wife, Vivienne, and some of their children are able to be here today.

The links between the subject of my talk this evening and James, may not be obvious. Constitutional issues are not the staple diet of a Circuit Judge. But the ability of our judiciary to perform their role as well as they do depends upon our Constitution. It is a Constitution which, unlike the Constitution of most countries, is unwritten. It is, therefore, a Constitution which can be changed very easily. It is not entrenched. Any change could affect the judiciary's ability to perform their role "without fear or favour".

Independence of the judiciary is not only important to the judiciary, it is also important to the public. In the last resort, the judiciary provide the final protection for the liberty of the public. Judges provide that protection by upholding the rule of law. They do so when two neighbours fall out over their rights over a small strip of land which divides their properties. They do so when the liberty of individual members of the public is under threat. They do so by enforcing laws which the Government provides to protect the public. They do so by ensuring that the public's access to the courts is not inappropriately impeded. They do so regardless of the background of the litigant who seeks their assistance. Justice is provided irrespective of whether the claimant is a prisoner, a powerful business tycoon or an asylum seeker. Race and gender are of no importance. These qualities of our justice system are as important today as they have ever been.

I take two rather obvious recent examples. The first concerns the detainees at Belmarsh. Whether you agree with the decision of the House of Lords or not, it is undoubtedly a decision of the greatest importance. The other example is the decision concerning the Hunting Act, as to which I say nothing about the merits because I am currently engaged in preparing my judgment. Both cases are interesting examples of the changing role of the courts.

The Belmarsh case is significant because it demonstrates clearly that, while in the past the courts would not interfere in matters that involved national security; rightly, this is not the situation today.

Similarly, the litigation over the lawfulness of the Hunting Act is of interest because, in the past it is extremely doubtful that the question of whether an Act of Parliament had properly become law would be a subject capable of being adjudicated upon by the Courts. However, it is now uncontroversial that the Courts can, at least in limited situations, do this.

A feature of both these cases is that public interest groups were given access to the courts. This is, in itself, a novel way of giving greater access to the courts. In the United States this has long been the practice. Courts receive what is known as a "Brandes Brief" [named after Louis Brandeis, who became a Supreme Court Judge, but who, in 1908, used the brief named after him to persuade the court that the minimum pay legislation for women was reasonable and not unconstitutional. (See Muller v Oregon 208 US 412 [1908])].

That the court's role has been able to evolve in this way is a clear indication that the rule of law and the independence of the judiciary has been secure in this country for a great many years.

The position has, however, changed. Not because of any Government or for that matter, anyone else deliberately wanting to interfere with the judiciary, but because of the changes in society.

Until the present time, we have had in England, a great Constitutional Officer who has a heavy responsibility to protect the rule of law, the public interest and the independence of the judiciary.

The ancient office is that of the Lord Chancellor. He is, and was, unique to this country. Most Commonwealth countries have retained large parts of their legal inheritance from this country and there is still a close affinity between the legal systems of the Commonwealth countries. However, no country has sought to establish a figure, who like the Lord Chancellor is a Senior Government Minister, Head of a large Department of State, Head of the Judiciary and Speaker of the House of Lords. Such an office could evolve, but no one would consider it appropriate to create it. As it has evolved, it has continued to make a unique contribution to the way the different arms of Government in England and Wales work together and the administration of justice.

The Lord Chancellor is a lubricant extraordinary. He lubricates relations between the judiciary and the Government and the judiciary and Parliament. He is the voice that the Government uses to communicate with the judiciary and the judiciary use to communicate with the Government and Parliament.

It is my belief that the Office has served us well for centuries. To an extent, the judiciary have been spoilt in being able to rely on his paternalistic protection. He has saved us from having to look after our own finances. He has been responsible for running the Courts. He has dealt with the media in so far as any one can deal with the media.

To an extent, the Lord Chancellor traditionally stood aside from the party political contest. As one of the highest offices of State, he should have no further political ambitions. He is therefore, in the ideal position to encourage good sense on all sides of the political debate. However, in recent years his department has grown dramatically. Inevitably, because of this, the Lord Chancellor has been drawn more closely into the party political arena. At the same time, radical changes were taking place within the institutions for which the Lord Chancellor was responsible, including the judiciary.

In a more sceptical climate, the public became more questioning as to whether it was, in truth, possible for the Lord Chancellor to play all his roles. This was particularly true in relation to his role in making judicial appointments.

Having played a significant role in judicial appointments over the years, I have been deeply impressed by the impartiality that successive Lord Chancellors have shown and the care they have exercised when making appointments. Without exception, they considered that one of the most important tasks which they had to perform was to select the best candidates to become judges. I believe that the achievements of the judges who were appointed, demonstrate the quality of the appointments that were made.

However, perceptions matter and what I know was the position was far from universally accepted by the public. Certainly, it was not accepted by the popular press that this was the position. A system which depends upon candidates being personally known to those who were recommending them for appointment lacks the necessary objectivity, and the fact that at the pinnacle of the process there was a judge who was also a politician made the position worse. In the case of choosing those who should become QC's, the efforts to make the exercise objectively defensible, in fact, made it so unwieldy as to be inoperable. Something needed to be done. The job of being Lord Chancellor was becoming too demanding for any single person to manage.

In political, academic and legal circles, there were many who were proposing change. Nonetheless, it came as an immense shock when the Prime Minister made his announcement on the 12th of June 2003 that, henceforth, the office of Lord Chancellor would be abolished and in its place there would be a Minister of Constitutional Affairs. How it came about that this announcement could have been made in the way that it

was eventually will become known. In the meantime, it is a mystery.

In any event, within a very short period it was apparent that the proposal to abolish the office, (if it was to be abolished) had complex implications. The office is central to many different aspects of our society. However, the institution that was most affected was the judiciary.

My view at the time of the announcement was, and still is, that it is impossible to have as head of the judiciary, an ordinary Government Minister who did not even purport to be a judge. The separation of powers has never been part of the framework of our unwritten Constitution. However, many aspects of our society are organised on the basis that the judiciary are independent of the other arms of Government and the Lord Chancellor was the prime protector of that independence.

The judiciary were fortunate that, shortly before the announcement of the changes, the Judges' Council, which was first set up in 1873 and for most of its life was quiescent, had become a much more effective voice for the professional and lay judiciary. It had already started to make a significant contribution to issues relating to the administration of justice. It now represents all the judiciary including Magistrates and Tribunal members. The Council was therefore in a position to point out the implications of the change and suggest what needed to be done to fill the voids that would be created if the office of the Lord Chancellor was to be abolished. This, the Judges' Council did in a paper which was met with a positive response from all quarters.

Fortunately, Lord Falconer, the new Secretary of State for Constitutional Affairs and Lord Chancellor, accepted that the whole relationship between the judiciary and the Government needed a new framework. Furthermore, he accepted that it was of prime importance that the new arrangements should be in legislation which spelt out the parameters of his responsibilities and those of the Chief Justice who was to be the new head of the judiciary.

When one of the roles of the judiciary is to act as a watchdog on behalf of the public in relation to any attempt by public bodies to abuse their power, public bodies and the Government should not be in a position to influence the decisions of the judiciary.

The independence of the judiciary takes two forms. First of all, there is the independence of the individual judge from all outside influences - including that of other judges.

Not even the Lord Chief Justice of the day can tell another judge how to decide a case. The same is true of the new Secretary of State and Lord Chancellor.

The other form of independence is the corporate independence of the judiciary. That is the independence of the judiciary as a whole.

In the immediate aftermath of the announcement of the changes, the judiciary had two principle aims. One was to ensure that there was full public debate on the scale of the changes made necessary by the Government proposals. The importance of the subject made this essential. The other objective was to identify those activities which it was essential were under the judiciary's control and then ensure that this control existed. This did not mean that members of the judiciary and civil servants should not work together in the same way as they had in the past to achieve the most effective justice system possible.

There was also the very difficult task of trying to achieve the reforms which were necessary, without losing the aspects of the Lord Chancellor's role which were uncontroversial and were helpful to the administration of justice and good governance. At a fairly early stage in the discussions between Lord Falconer and myself, a number of principles were identified. The principles established the parameters of the future relationship between the government and the judiciary. Among the most important, was that the judiciary should have the final say about how and where judges were deployed. This was necessary. First, because the Government should not be in a position to pick a judge to try a particular case. Secondly, because it should not be possible for the Government to use the power to decide where a judge sat, as a means of disciplining the judge for any decisions which they found unattractive.

Another very important principle was that the Government should not have control over who is appointed a judge, though it was perfectly proper for them to have a say. The other side of that coin is that the Government could not appoint or should not be able to discipline or remove a judge unless the Chief Justice of the day was in agreement with the need for the action to be taken.

As to appointments, there is to be established a new Appointments Commission with an independent Chairman and a careful balance of members to reflect the different interests, including non-lawyer's interests, that should be involved. The Commission itself is to be appointed by an independent body that includes the Chief Justice. The Minister is still to have a say as to appointments, but that say is to be limited to asking the Commission to either reconsider a name which they had submitted or to require the recommendation of an additional name. In support of such a request, the Minister would have to give reasons.

A structure of this sort should ensure that appointments are independent, but what about the quality of those who that are appointed. Here, the Concordat provides that the sole criteria for appointment should be merit. That it should only be merit is crucial. Increasing diversity is also important and the Commission will need to resolve how to achieve this while ensuring no diminution in standards.

The use of the word merit in the Concordat reminds me of what happened in South Africa, when Hendrik Verwoerd was Prime Minister. He decided that it was necessary to do something about the judges and so appointed judges who he thought would do his bidding. They may have done so to begin with, but within a very short time they were giving decisions against the Government, much to the annoyance of the Prime Minister. It was reported that the Prime Minister was heard grumbling "these judges, they are behaving as though they were appointed on merit".

The Concordat was in itself a unique document for this jurisdiction, and possibly any jurisdiction. However, its main provisions have now been incorporated in the Constitutional Bill. Aspects of that Bill had a rocky time in the House of Lords, but it was quite extraordinary that no one spoke against the parts of the Bill implementing the Concordat. Neither the supporters of the Government nor the Liberal Democrats nor the Tories.

It is impossible to convey the extent of the changes arising from the Concordat, without going into a considerable amount of detail. But, I assure you that they are very significant indeed. The Concordat provides a clear separation of the role of the Head of the Judiciary who will become the holder of my Office, and the Minister. It probably sets an example which many other jurisdictions will follow.

It is very important however, and this I would stress, that change on this scale should be by consensus. The Concordat is part of ordinary legislation, and its provisions are not entrenched. At any time they could be changed. However, as the Concordat was reached by consensus, this should deter an attempt in the future to amend the legislation without there being a similar consensus in favour of the amendment.

Other parts of the Bill are controversial, but their number is limited. One was whether, notwithstanding the changes in his powers, the Minister should still be called Lord Chancellor. The retention of the title is more than a courtesy to tradition. Under the Bill, all other Ministers. as well as the Lord Chancellor (as I will now call him), have a statutory responsibility for upholding the continued independence of the judiciary. The Lord Chancellor alone is also required to have regard to the other needs of the judiciary.

These responsibilities should not be the subject of litigation, but they will depend upon the clout of the Minister within cabinet and the general political scene. Here the retention of the title of the Lord Chancellor could help. In addition, the House of Lords considered that the Lord Chancellor should always be a member of the House of Lords and have a legal qualification which would make him eligible for high Judicial Office. The objective of these provisions is to ensure that the person with whom the judiciary would have to work with most closely in the Government is removed from the intensity of the political battle that exists in the Commons. The Government has given way on the title of Lord Chancellor. So the title will be preserved. However, the Commons has reversed the decision that he has to be in the Lords and a suitably qualified lawyer.
Whether this will change when the Bill goes back to the Lords, we have to see.

The other main change is whether the present Appellate Committee of the House of Lords should be transformed into a Supreme Court sitting away from the House of Lords. Personally, I thought initially that this was a change that was unnecessary. However, having heard the debate, I have come down in support of the proposals for a Supreme Court as now contained in the Bill. I have come to this conclusion because some of the Law Lords are very uncomfortable about being a part of the legislature - an arrangement which is wholly out of keeping with the separation of powers. In addition, cases can now involve issues which, as the Hunting Act case shows, there can be issues which could come before the House of Lords, and this would make it preferable for them to heard by a court entirely separate from the legislature.

Finally, there is the fact that the Chief Justice will lose the right to speak and take part in the business of the Upper House. I regret this, but at least I was able to persuade the House to allow the Chief Justice of the day and his counterparts in Scotland and Northern Ireland to place a statement before either or both Houses of Parliament in order to alert them to matters of importance relating to the judiciary or the administration of justice. So it is a case of there being no opportunity for oral advocacy, but at least there will be an opportunity for written advocacy by the senior judge in each of the jurisdictions.

While what I have described may not seem dramatic, its collective effect is extremely important. Hitherto, this jurisdiction has not been committed to the separation of powers in the same way as are most old and new democracies. Now we are committed to separation between the judiciary and the executive and the judiciary and the legislature. This is a change which contemporary circumstances has made highly desirable. This country is a model to which many countries look for the shape of their democracies and we must provide the correct precedent.

A huge investment has been made by the judiciary, and Lord Falconer and his Department into bringing us to the present position. The probabilities are now that the Bill will become law. If this happens, I would regard it as a triumph for the democratic process and the future administration of justice. Particular credit for this must go to the House of Lords. They proved to be a remarkably-effective revising chamber. The members exercised great responsibility during debates (as have the members of the Commons) and their work in the Select Committee, which was set up for the Bill, undoubtedly resulted in improvements. The creation of the Bill has been a great example of responsible law-making and so I am a much happier man than I was when that announcement was made by the Prime Minister in June 2003.

I earnestly hope that I remain happy.

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