LORD CHIEF JUSTICE
OF ENGLAND AND WALES

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"THE SUPREME COURT AND OTHER CONSTITUTIONAL CHANGES IN THE UK"

ADDRESS TO MEMBERS OF THE ROYAL COURT, THE JERSEY LAW SOCIETY, AND MEMBERS OF THE STATES OF JERSEY

THE ROYAL COURT, ST HELIER, JERSEY

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The current Labour Government has embarked on the greatest programme of constitutional reform in the U.K. in modern times. It has made the rights and freedoms enshrined in the European Convention on Human Rights and Fundamental Freedoms directly actionable by citizens. We now have devolved administrations in Scotland, Wales and Northern Ireland have been created and the role of Lord Chancellor has undergone fundamental changes. There is a new Government Ministry for Justice. There is to be a new Supreme Court. I, as Lord Chief Justice also have a new role. All of this has been the separation of powers to make quite clear and transparent the three arms of government. Collectively, these major constitutional reforms rival the Reform Acts of the 19th Century in significance

The changes to the role of the Lord Chancellor, and to my role as the Lord Chief Justice of England and Wales have been effected by the Constitutional Reform Act 2005. The Office of the Lord Chancellor is one of the oldest government positions.

Some scholars argue that Angmendus was the first Chancellor of England in the year 615. Others argue that Edward the Confessor was the first to appoint a Chancellor in the eleventh century. It is certainly true that he was the first to have a great seal, and thus to need a Chancellor to keep it.

Whichever is true, by medieval times the Lord Chancellor was one of the monarch's closest advisors. He was the Keeper of the Great Seal and the chief royal chaplain. He was the monarch's advisor on matters spiritual and temporal. So important was he that the Treason Act of 1351 made it high treason to slay the Lord Chancellor. To this day, he is outranked in order of precedence only by the Royal Family and the Archbishop of Canterbury, he is immediately followed by the Archbishop of York and also by the Prime Minister of the United Kingdom.

As one of the King's ministers the Lord Chancellor attended the *Curia Regis*, or Royal Court. The *Curia Regis* later evolved into Parliament, and the Lord Chancellor became the prolocutor of its upper house. He more recently became a member of the Privy Council and the Cabinet in more modern times. Between 1885 and 1971 he headed his own department, known as the Lord Chancellor's Office. When I started at the Bar it consisted of 3 or 4 people, and it now consists of many thousand. It was not until 2003 that the Department dropped "Lord Chancellor" from its title and became known as the Department for Constitutional Affairs.

The Lord Chancellor also gained a judicial role. In 1280 Edward I instructed his justices to examine and deal with petitions to the King. These justices formed the Court of the King's Bench, the designation that still exists today. By the start of the fourteenth century the Lord Chancellor had started to do his own thing. He would decide cases according to fairness or equity, rather than the strict principles of the common law. Thus was the High Court of Chancery created that of course also exists to this day.

More recently the Lord Chancellor also sat in the Judicial Committee of the House of Lords and the Judicial Committee of the Privy Council. He was President of the Supreme Court of England and Wales. He supervised the Court of Appeal, the High Court and the Crown Court. He was President of the Chancery Division and an *ex officio* judge of the Court of Appeal. By 2003 many considered the position of Lord Chancellor to be an historical anomaly. It offended the theory of the separation of powers which requires that the executive, legislative and judiciary be separate so that each has its own powers and responsibilities. This of course is a French concept which we have borrowed in the belief it is a central pillar of democracy.

The Lord Chancellor perpetrated the anomaly by resided in all three branches of government. He controlled the business of the House of Lords as in effect its speaker, and was a cabinet member. He was entitled to sit as a judge in the House of Lords and the Privy Council and did just that. The incoming Labour government considered this was a potential breach of the European Convention on Human Rights. A member of the Executive was regularly sitting in a judicial capacity, yet the Convention guaranteed the right to a hearing by an independent and impartial tribunal - that means independence of the executive. Independence and impartiality were required in appearance, as well as form.

I should pause here to take a moment to distinguish the roles of the Lord Chancellor and the Bailiff of Jersey, as I am aware that the Bailiff has a foot in both the judicial and legislative camps. What he does not have, however, is a foot in the executive camp, and so the situation of a member of the executive sitting regularly as a judge does not arise in this jurisdiction, and of course he has no vote in the legislature.

I would not want my comments on the desirability of the separation of powers when bringing about change to the role of the Lord Chancellor to be interpreted as comments on the role of the Bailiff. The circumstances in this

jurisdiction are very different, and any change to the Bailiff's role would, of course, be entirely a matter for the island.

In our jurisdiction the Government announced in 2003, without consultation, that the Lord Chancellor would be abolished. The Queen had not been asked for her views on the abolition of her closest advisor. No-one had consulted the then Lord Chief Justice, Lord Woolf. So concerned was he by the proposed changes that he delayed his retirement by twelve months to lead the judiciary on a long and problematic negotiation with the government over the proposed content of the Constitutional Reform Bill. This resulted in the Concordat, setting out the basic principles under which the judges and executive will relate to each other. Much of what was agreed is in the Constitutional Reform Act, and where it isn't we refer to the concordat.

It was no surprise that the abolition of the Lord Chancellor did not succeed. Some opponents resisted the abolition of an office older than democracy, older than Parliament, older than Magna Carta and older than the Norman Conquest[1].

Others thought that the Lord Chancellor was needed to speak on behalf of the judiciary in government. Others, perhaps even more practically, identified that the ancient office was enshrined in statute. Under the Regency Act of 1937, for example, the Lord Chancellor is one of five people who participate in determining the capacity of the Sovereign to discharge his or her duties. The Lord Chancellor has hundreds of other statutory obligations and these could only be changed by primary legislation.

Agreement was sought by the Lords. The Lords weren't in a cooperative mood. The Lord Chancellor survived but with radically altered powers. He is no longer the Speaker of the House of Lords. For the first time in history, the Lord Chancellor is not a member of the House of Lords. Jack Straw is a commoner. He is not President of the Courts of England and Wales. He is prevented from sitting in the Appellate Committees of the House of Lords[2] and the Privy Council. He has been stripped of all judicial functions and so of course is no longer the Head of the Judiciary.

The attempted abolition of the Lord Chancellor was not the only controversial aspect of the Constitutional Reform Bill. The government proposed the creation of a Supreme Court of the United Kingdom. To some, this was a confusing title. There has been a Supreme Court of Judicature since 1873 this includes the Court of Appeal, the High Court of Justice and the Crown Court. But these are courts of England and Wales and sit primarily in the Royal Courts of Justice on The Strand in London. The Victorian gothic building in which they operate has long been known as the Supreme Court of England and Wales.

[1] R.F.V. Heuston *"Lives of the Lord Chancellors 1940-1970"*

[2] The Appellate Jurisdiction Act 1876 was amended by the Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No 2) 2006/1016.

The words Supreme Court are misleading. The Appellate Committee of the House of Lords is in fact the highest court in the land. Like the Lord Chancellor, this offended the principle of the separation of powers. In theory, the Lords of Appeal in Ordinary were not judges at all, they were members of parliament, and therefore entitled to participate in the legislative business of the House of Lords. They don't do so by convention, but this wasn't always observed, as in the case of Lord Scott who voted on the hunting bill.

Lay peers used to be permitted to take part in a vote in an appeal before the Appellate Committee. The last time this occurred was in 1883. Lord Denman, a lay peer, gave judgement in a case concerning the recovery of penalties provided by a statute. It was a good and sensible speech and accorded with the dissenting opinion of Lord Blackburn[3].

The separation of powers had come to rest on a constitutional convention that judges would not participate in the activities of the legislature, and members of the legislature would not participate in the judicial functions of the house. Many found this was unsatisfactory. The incoming Labour Government legislated for the statutory separation of the highest court from the legislature and created the Supreme Court of the United Kingdom. One problem was where to put it. One option, which I favoured, was Summerset house. In the end it was decided to use Middlesex Guildhall. It is quite possible to walk past this building without even noticing it, but we hope it does justice to its new function.

In 2009 the United Kindom will experience a new constitutional reality, when the Supreme Court comes into being. Those who sit there will no longer be styled Lords of Appeal in Ordinary. They will become judges of the Supreme Court. Their official title will be "Justices of the Supreme Court" in the style of the United States of America. For a year I will have been the Senior Law of Appeal in Ordinary following my appointment to that post in October, and I will have the honour of becoming the President of the Supreme Court.

The court will not, of course, directly compare to the USA Supreme Court, which has the power to rule legislation as unconstitutional and is therefore sovereign. The UK Parliament will remain supreme – but of course the courts can declare particular provisions of legislation as being incompatible with the Human Rights Act, which can in effect require the Government to change the legislation.

The Government's appetite for constitutional change was not satiated by the Constitutional Reform Act in 2005. In 2007 it was announced that we were to have a new Ministry. The Ministry of Justice would subsume the responsibilities of the Department for Constitutional Affairs.

It was to deal with constitutional affairs, civil and administrative justice, the judiciary, the courts, legal aid, the judiciary and the administration of justice. But there was also to be responsibility for prisons, offender management and criminal justice policy, which had been Home Office functions.

[3] *Bradlaugh v Clarke (1883) 8 App Cas 354*

The judiciary were concerned that this was a constitutionally significant change to the machinery of government. One department was to uphold the rule of law and the independence of the judiciary and yet the same department would also have responsibility for criminal justice. That Department would have one pot of money from which to fund the court system, and the prisons. The judiciary was concerned that the Department would rob Peter to pay Paul. Peter being the judges and Paul being the prisons. Would the Department be able to prioritise the administration of justice whilst dealing with criminal justice policy?

The Constitutional Reform Act 2005 makes the Lord Chancellor the guardian of the independence of the judiciary. It was feared that this principle would be compromised by these, so called, machinery of government changes. It was intended that the role of Lord Chancellor would be performed by the Minister of Justice. Thus the Lord Chancellor would be required to lead on the government's criminal law policies.

The first I or the then Lord Chancellor, Lord Falconer, learnt of the creation of the Ministry of Justice was when we were reading our Sunday Telegraphs on the 21st of January 2007. Once again the government had not consulted on a key constitutional change. The handling of the abolition of the Lord Chancellor was brought to mind. No guarantees of the protection of the independence of the judiciary were given. There was no promise to protect the administration of justice within the new Department.

Once again we embarked on negotiations with the government. These negotiations remained on-going at the time the Ministry of Justice came into being on the 9th of May 2007. Lord Falconer and the Prime Minister refused to accept that the proposed changes were anything more than a machinery of government change.

I felt so strongly on these developments that I made a public statement highlighting my misgivings. This was unusual and came to the attention of the Constitutional Affairs Committee of the House of Commons. They concluded that the Ministry of Justice was indeed a major constitutional change. They criticised the Government for underestimating the concerns of the judiciary insofar as they related to the changes to the roles and responsibilities of the Lord Chancellor. The Committee concluded it was a unfortunate that the creation of the new ministry seemed to have been a fait accompli as early as January 2007.

The negotiations were not getting very far when Lord Falconer was replaced by the Prime Minister with Jack Straw. Things started to progress. The negotiations were finally concluded on 1 April this year, when the Lord Chancellor laid in Parliament a new Framework Document for the governance, resourcing and operation of Her Majesty's Court Service. He and I had previously settled the terms of a partnership agreement, which we announced "was founded on a firm and shared commitment to the delivery of an efficient and effective justice system, and upholding the independence of the judiciary."

The new arrangements place the leadership and broad direction of the Court Service in the hands of a new Board, with an independent non-executive chair, and ensure that the staff of the Court Service have a joint duty to myself and the Lord Chancellor. We have yet to see how this partnership will work out in practice, but the arrangements met most of our concerns about the creation of the Ministry.

This constitutional merry-go-round has raised the question of the accountability of the judiciary to the public. Responsibility for judicial matters is now split between myself and the Lord Chancellor. He is responsible to the public through Parliament for the funding and efficiency of the court system. I have responsibility for representing the views of the judiciary to parliament. I have responsibility to maintain appropriate arrangements for the welfare, training and guidance of judges, judicial deployment through the courts of England and Wales and the Lord Chancellor and I share responsibility for judicial discipline.

Together we have created the Office for Judicial Complaints. This Office supports myself and the Lord Chancellor in the exercise of our statutory powers of judicial discipline. The OJC helps us to consider and determine complaints about the personal conduct of judicial office holders in England and Wales, so here is a degree of accountability. It also deals with some judicial office holders who sit in Tribunals in Scotland and Northern Ireland. Its remit extends to complaints about the personal conduct of a judge. It cannot deal with any complaints about a judge's decision. It cannot look behind the judicial decisions. Needless to say most complaints are about judicial decisions and the complainants are told that they should look to the appeal courts. This limited remit protects judicial independence in the exercise of the adjudicative function. This supports the principle that the judicial arm of government must be, and be seen to be, independent of the Executive.

The public, and sometimes even politicians, do not always understand the importance of judicial independence. In 2006 Charles Clarke, the former Home Secretary gave evidence to the House of Lords Select Committee on the Constitution. The Prevention of Terrorism Act 2005 entitled the Home Secretary to make control orders for the restriction of the ambit of life of terrorist suspects. A series of Control Orders issued by Charles Clarke had been overturned by the court, and finally the House of Lords.

Charles Clarke vented his frustration at this was vented before the Select Committee. He said - "*The judiciary bears not the slightest responsibility for protecting the public, and sometimes seems utterly unaware of the implications of their decisions for our security. I regard it as disgraceful that no Law Lord is prepared to discuss in any forum with the Home Secretary of the day the issues of principle involved in these matters. The idea that their independence would be corrupted by such discussions is risible...I strongly believe that the attitude of the Law Lords has to change. It fuels the dangerously confused and ill informed debate which challenges Britain's adherence to the European Convention on Human Rights. It is now time for*

the judiciary to engage in a serious and considered debate about how best to legally confront terrorism in modern circumstances."[4]

Charles Clarke wanted the Law Lords to meet with him to discuss broad issues of principle. I can understand the frustration that the former Home Secretary feels on this point. But judges must not risk collusion with the executive when they are likely to be required to adjudicate on challenges to the actions of the executive.

These sentiments were echoed by the Select Committee in its Report. It agreed that a meeting between the Home Secretary and the Law Lords "*risks an unacceptable breach of the principle of judicial independence.*" The Law Lords should not even be perceived to have prejudiced an issue as a result of communication with the Executive.

I turn now to the media. The print media especially brays for "judicial accountability" for decisions. Two recent cases spring to mind. One involved the kidnap and assault of a child, the other the release of a suspect on bail.

In January 2006 Craig Sweeney kidnapped a three year old girl from her home in Cardiff. He took her to his home in Newport. He then committed serious sexual offences on her. He was apprehended by the police after a high speed car chase. Two police officers pursued him after observing him driving without lights and jumping a red light. The chase crossed the Severn Bridge and travelled along the M4 and he was eventually apprehended

The sensational nature of the apprehension of Sweeney captured the public's attention. Public sensibilities were further offended when it was revealed that Sweeney had previously been convicted of indecently assaulting a six year old girl. He had been released early from custody. The licence on which he had been released had expired just two days before he kidnapped the three year old girl.

Sweeney pleaded guilty to four offences of kidnap, three of sexual assault and one of dangerous driving. The appropriate sentence for a person who is convicted after being found guilty by a jury is set at 18 years. This is set in sentencing guidelines, issued by the Sentencing Guidelines Council, which I chair, under the authority of statute. His Honour Judge Griffith Williams, sentencing the case in Cardiff Crown Court, explained that Sweeney's guilty plea reduced the tariff by one third to 12 years. In accordance with the Sentencing Guidelines Council's guidance he would normally be considered for parole after half his sentence had expired. Taking into account the time he had spent on remand meant that he would be sentenced to a sentence which would entitle him to consideration for parole after 5 years and 108 days.

The parents of the kidnapped girl declared that the sentence was an insult to their daughter. The Home Secretary, John Reid, said that the sentence was "unduly lenient" and that the tariff did not "reflect the seriousness of the

[4] Report of the Select Committee of the House of Lords *"Relations between the executive, the judiciary and Parliament" page 26 of evidence.*

crime." He urged the Attorney General to refer it to the Court of Appeal for reassessment. Vera Baird, a junior constitutional affairs Minister publicly criticised the judge. She said that he had "got the formula wrong" and deducted too much for the early guilty plea.

Areas of the media engaged in further personal criticism of the judge. The Daily Express wrote that judges were "deluded, out-of-touch and frankly deranged" and that "our legal system has not only lost touch with public opinion but with natural justice itself...sentencing now bears no relation at all to the seriousness of the crime." The Sun Newspaper began a campaign on the day Mr. Sweeney was sentenced. The aim of the campaign was to pressurise the government to sack judges who it claimed were guilty of being soft on "killers, child sex beasts and rapists". It welcomed the comments of the Home Secretary, John Reid, as a success in its campaign to put the judges on trial.

A few voices of reason emerged from the debate. The Attorney General, Lord Goldsmith said that judges were not generally a "soft touch".

Lord Morris of Aberavon, a former Attorney General, stated that "our courts are not run by Government ministers...as far as sentencing is concerned, judges are independent. If John Reid has a concern he can amend the acts of Parliament." The Select Committee in the House of Commons underlined the importance of ministers refraining from impugning individual judges. They emphasised the importance of the Lord Chancellor being quick to reprimand those who do so.

I turn to the other case. Mr. Weddell was a former police officer who had been arrested for murdering his wife. He was initially remanded in custody. On his third court appearance His Honour Judge Bevan QC granted Mr. Weddell bail. The judge's decision was based upon a psychiatric assessment. This concluded that Mr Weddell was not a danger to himself or others. Bail was subject to 8 conditions, one of which was that Mr. Weddell was not to return to Bedfordshire. He subsequently breached this condition by meeting his mother at a pub 70 yards inside the county. Woking Magistrates found that the breach was technical and allowed him to remain on bail.

Mr. Weddell then went on to murder his mother-in-law before killing himself. Media coverage of the incident was highly critical of His Honour Judge Bevan. The Lord Chancellor, however, was supportive. He commented in a public speech that "*The decision as to whether to grant bail to a defendant is always a difficult one for judges and magistrates. These must be independent judicial decisions based on the law as it is, and they do so to a very high standard... These cases highlight the desperately difficult decisions facing judges and magistrates.*"

Judges cannot be subject to "sacrificial accountability." A Minister is expected to take the blame for errors and forfeit their job if the errors are sufficiently serious. Judges cannot be subject to such accountability. They have to apply the laws of the land and in so doing give expression to the will of parliament. They cannot be expected to sacrifice themselves when the public dislikes the

application of such laws. It is imperative for the Lord Chancellor to both support and express his support for the independent exercise of judicial discretion. Within the judiciary we are taking steps to communicate the importance of this principle clearly and openly. We have a Judicial Communications Office which is providing media training for a number of judges. It is hoped in future they will be able to respond to the media with informed comment on cases such as Sweeney and Weddell.

All of this is not a substitute for me being accountable for my part to parliament for my stewardship of the judiciary. The functions conferred upon me by the Constitutional Reform Act 2005 are novel. They are given to a senior judge for the first time. It seems to me that I should offer a degree of accountability for the administration of justice in England and Wales. The limits of this accountability are set out for me by the requirements of judicial independence. Accountability cannot jeopardise the primary function of the judiciary, which is to deliver fair and impartial resolution of disputes between citizens and between citizens and the state. But it is not incompatible with the principles of judicial independence for me to offer accountability for those statutory functions which are now incumbent upon me to fulfil. This includes the provision of an effective justice system, the judicial complaints and discipline system, the training of judges and pastoral matters effecting judges and judicial deployment.

Judicial accountability is offered in a variety of ways. The public scrutinises the work of individual judges. Hearings and decisions are generally open to the public. Errors may be rectified by higher courts hearing the case on appeal. Legislative committees in the Houses of Parliament may invite judges to give evidence on a variety of issues regarding the administration of Justice. I myself have done so on several occasions. This is a delicate exercise, and judges must be careful not to stray into areas which could prejudice their independence in future cases. As Head of the Judiciary I must ensure that judicial witnesses do not become so frequent that they are treated as merely another interest group. Judges are a distinct branch of the state. They have their own constitutional role. This must be recognised.

Today's judiciary is in a new constitutional landscape. It must recognise this, and adapt to it. We must protect the fundamental principle that judges cannot be accountable to the executive for our decisions, but none the less we must be prepared to be accountable for our administrative functions. I therefore decided to do a review and following that with a press conference. I expect an invite to attend a hearing of the constitutional select committee will follow.

In October of this year I will step down as Lord Chief Justice of England and Wales. I will become the Senior Law Lord, and in 2009, the President of the Supreme Court. The baton of constitutional reform will pass to my successor. A new Constitutional Renewal Bill has been published for public consultation. It will include provisions relating to the role of the Attorney General, the ratification of treaties, the management of the civil service and amendments to the law on judicial appointments. I am glad to say that these changes do not appear to be as profound as those instigated by the Constitutional Reform

Act of 2005. My successor will need to work with the Lord Chancellor in relation to these. Together they will remain the custodians of judicial independence. I have been privileged to participate in the development of constitutional reform during the three years in which I have served as Lord Chief Justice. I am equally pleased that I have been able to address you on the importance of these changes.
