

**TALK ON "RECENT CONSTITUTIONAL CHANGES
IN THE UNITED KINGDOM AND THEIR EFFECT
ON THE JUDICIARY"**

**SPEECH DELIVERED BY THE RIGHT HON. THE LORD WOOLF OF
BARNES ON 29 MARCH 2006 IN HONG KONG**

Good afternoon, Chief Justice, Chief Judge, Secretary for Justice, colleagues and friends, ladies and gentlemen.

It is a great privilege for me to be able to address you as a non-permanent judge. Many were the reports that I heard of the delights and challenges of being a non-permanent judge before I arrived in Hong Kong. Indeed, more than one of my colleagues in the House of Lords was careful to tell me that this was not a job I should hang on for too long because they were anxious to follow in my footsteps and I was blocking their way.

Having arrived and having been received with huge generosity by everybody and benefited from immense hospitality, I realise why my colleagues in the House of Lords are anxious to follow in my footsteps.

I'm rather surprised by the size of my audience here this evening and I can only think that it's a tribute to the speakers that have gone before me. I understand that the last speaker was a judge I admire immensely, (as I admire your Chief Justice). It was Aharon Barak, Chief Justice of Israel. Before him there was Scalia J US Supreme Court. Scalia J who is well known for his strong views apparently went to Macau during his visit and there was immediately a typhoon and he wasn't able to get back when he intended. Last weekend I went to Macau with my wife. I have to report that all I caused was some very poor drizzle; I obviously failed to make the same impact on Macau as Scalia J..

I am anxious that you will find what I have to say some interest and relevance to you. I intend to refer to what the Chief Justice mentioned in his introduction, namely, the constitutional reforms that are taking place at present in my country. Because of the very close links that exist between our two legal systems, it is my hope that there are some messages from what happened in the UK which are of relevance to you.

What I am going to try and identify during my remarks is the importance of these constitutional changes. First they are important for the independence of the Judiciary. Every judiciary needs independence so it can perform its responsibilities to the public. Secondly, and this is quite novel for the United Kingdom, the reforms are of interest because a theme of the reforms is, for the first time within our system, the separation of powers, or at least the separation of the Judiciary from the Executive and the Legislature.

At the same time, and linked to the foregoing, I want to talk to you about how the separation of powers will affect the partnership that we have between the different arms of government in the United Kingdom. This is a partnership to which I attach particular importance. In relationship to my role in the sequence of events I am going to tell you about, what was motivating me at all times was how to square the circle, so that we could ensure the independence of the Judiciary ensured but, at the same time, maintain the partnership which has existed between the Executive and the Judiciary This, I strongly believe should continue to exist. I believe the partnership is wholly consistent with an independent Judiciary. It enables the Judiciary and the Executive to work together for the benefit of the justice system and, above all, for the benefit the citizens who we are appointed to serve.

In the UK, any the statutory framework providing protection of judicial independence is quite difficult to find until the legislation, that I am going to talk about, .was passed. Legislation like the Act of Settlement provides some

protection but there was no legislation that dealt with the subject comprehensively. The independence of the Judiciary is to a large extent taken for granted. Its protection in part depended on conventions.

Everyone concerned with legal matters in the UK will say, “Of course we must have an independent Judiciary, it is part of the rule of law and we all adhere to the rule of law”. But the fact is that the independence was largely taken for granted. Recent experience has taught us we have always got to be on our guard. The independence of the Judiciary is a precious inheritance which has been handed down from generation to generation in both our jurisdictions; - of necessity, longer in the jurisdiction that I come from than yours - it is something which we have to work at to ensure it is preserved.

An example of something which you would think was hugely supportive of the independence of the Judiciary, but which could have consequences which could undermine it, was the European Convention on Human Rights becoming part of our domestic law. A similar change had occurred in Hong Kong long before it happened in the UK. Indeed, my real introduction to human rights was listening to appeals in the Privy Council from this jurisdiction, and this was actually a very good preparation for our Final Court of Appeal, the House of Lords, for what was to come.

Although he sometimes got into hot water with the Judiciary - and in particular with Lord Ackner who, alas, has just recently died, Lord MacKay, who is an extremely wise politician and wise judge, was concerned that the introduction of the Human Rights Act into our domestic law - making the European Convention of Human Rights part of our law - would have an adverse effect upon the Judiciary and, their independence. He thought there was a very substantial risk that this would politicise the Judiciary.

Well, I am glad to say that, so far, this has not happened but it is something which was beginning to have an effect. It is right and proper that there should be a tension between the Judiciary and the other arms of government. If the Judiciary are not doing their job, there won't be that tension, but if they're doing their job, there certainly will, from time to time, be that tension.

But that's not what I'm referring to. There have been statements in our Parliament, and statements by very senior ministers, that were already causing ripples of concern prior to the events that I am going to talk about. There were policy proposals which were announced in Britain which, as I saw it, were harmful to judicial independence, which were introduced, or talked about being introduced, Apparently without any appreciation of the adverse effect they could have... It became, therefore, part of the responsibility of me and, indeed, my immediate predecessors, to draw attention to these dangers...

It seemed to me, we were getting to a situation when we really should be considering, in the United Kingdom, looking at our constitutional arrangements and perhaps, for the first time, producing comprehensive legislation that codified the status and obligations of the judiciary- I'm not talking about producing an entrenched constitution - but legislation that would make the constitutional position of the judiciary clear.

Equally, and as a corollary of what I've been saying, there was undoubtedly greater responsibility being placed upon the Judiciary. Like, no doubt, your Judiciary, our Judiciary are now an extremely hard-working body...

You only need to talk to the senior silks who've taken, I'm glad to say, judicial appointments and hear what they say about the burdens they are subject as judges compared to what they were subjected to when in practice to realise that becoming a judge is certainly not a recipe for semi-retirement. This is quite contrary to the assurance I gave my wife, 27 years ago, that when I gave up the job

of being Treasury junior on becoming a judge. I told her I would be home for tea, if not for lunch. I was foolish enough to think I would be able to polish off my cases off in double-quick time. It never happened and it is not the position now.

What I think is important, and I'm sure this is equally true of the Judiciary and the profession here - though I have noticed a gap developed between when I was last here and was talking about the Woolf reforms, and the implementation of those reforms, but I pass over that quickly as dangerous ground and move on. It is extraordinary, I think, in the way in which our Judiciary and our profession have been bombarded with change, absorbed that change and done their best to ensure the changes are successful. I was very fortunate that our judiciary took that attitude.

Now, I said that the separation of powers was never part of the tradition in the United Kingdom, and in saying that, of course, you usually think of the Lord-Chancellor, who as everybody knows had a great variety of top hats which he took off and put on as the occasion demanded. Well, now, as a result of what I'm going to tell you, he's only going to have one top hat and perhaps a couple of flat caps...

His top hat will be his responsibilities as a member of the executive. That was something which caused your Chief Justice's pupil master, or one of his pupil masters, the then Vice Chancellor to get very concerned because he was filling the great office of Vice-Chancellor and he could not understand how he could be a vice-chancellor if there was not an old-fashioned lord chancellor, to whom he could he be vice ? And as a Chancery lawyer, he was deeply offended by the idea that he should still be called vice-chancellor in these circumstances.

I'm happy to say that, from 3 April, that is when these reforms come into force, just in a few days' time, he will cease to be Vice-Chancellor and he will be

Chancellor, and I hope your Chief Justice will send him a letter of congratulations on his acquiring this new and higher office.

The partnership is working very well at the moment. At every level of judicial administration, you will find that there is a civil servant of appropriate seniority and a judge or judges working together to make the system work efficiently in practice. This is something which has evolved - again, you don't find it in legislation but it's been part of what we call the presiding judge system. There is a senior presiding judge at the top, who is a Lord Justice top, less senior judges at the lower levels all working in conjunction with a civil servant of an equivalent level. It is often the case that together they manage to make what seemed unworkable work reasonably well.

We have had constitutional reform after constitutional reform. You talk about that in small letters. A little bit here and a little bit there. There are reforms for the civil justice system which I hope are now going to be followed by reforms, for the criminal justice system, changing the culture of those who are responsible for criminal justice.- but never a root and branch change.

This is a situation that is in accord with our traditional approach even in other areas, where constitutional change has happened, it has often happened by accident. An example I like to quote is Magna Carta. The fact that that great instrument, which I would see as the source of the rule of law, should happen because of a struggle between the barons and the king of the time illustrates what I mean. When you read what is in it, we all treasure what it states. We understand why it is so important to the United States. You find it is the source of what we judges believe in deeply. Due to an historical accident, this great charter was created.

So, perhaps, it is no surprise, that on 13 June of 2003, out of the blue, with really no forewarning, the Prime Minister should have announced that the

Lord-Chancellor was to be no more. Lord Irvine had lost his job; Lord Falconer had a new job, he was Secretary of State for Constitutional Affairs, a new department. And on 13 June, they took down one notice from the building which had, up to then, been the Lord-Chancellor's Department, and put up another notice saying "Department of Constitutional Affairs".

In due course, I had a telephone conversation, first of all from the Leader of the House of Lords, saying how wonderful this was going to be, it was just what all constitutional lawyers wanted and that I should be overjoyed by this, especially as we were also going to have a Supreme Court. Later, I received phone call from Lord Falconer who had no idea that this appointment was coming his way, as he told me, until a few hours earlier. He was anxious that we would co-operate as the Lord-Chancellor and the Chief Justices had done in the past.

I was in a fortunate position because the senior Judiciary were engaged on an away weekend to discuss our plans for the future - and the phone call came while we were actually conferring. All my senior colleagues were on hand so was able to tell him on behalf of the judiciary that if he was a Secretary of State, there was no possibility of his being the professional head of the Judiciary. The judiciary would not accept a Secretary of State being a judge...

On the last point, there was common ground, and Lord Falconer has not become a judge. In addition it was soon discovered you could not get rid of the Lord-Chancellor quite as easily as all that. After all, if you look at the lives of the Lord-Chancellor, they can be seen to go back to 1066, as indeed was the case with my former office of Lord Chief Justice, and they've been evolving over the centuries since that time.

There's hardly an aspect of British life upon which the Lord-Chancellor has not some direct or indirect effect. One normally sees him as the Speaker of the House of Lords, the very senior minister and head of the Judiciary... In addition

he had numerous ecclesiastical responsibilities, particularly in relation to the Queen. He had also numerous responsibilities in the educational world. We now know that there are over 350 statutes which gave responsibilities to the Lord-Chancellor. Dispensing with all of these responsibilities of State could not be dealt with by a press release...

It was first appreciated that there was a significant problem when the House of Lords, the Legislative Chamber, made it clear they still were entitled to a Lord-Chancellor, and Lord Falconer, so far as the House of Lords was concerned was expected to still be the Lord-Chancellor sits on the Woolsack until the law was changed. Lord Falconer had not, up till then, acquired any robes. He had to obtain robes very quickly and attend the House of Lords and preside regularly, as he has continued to do until today.

In addition, he had to be sworn in, and the tradition is that the Lord-Chancellor comes before the Lord Chief Justice when he's sworn in. I was equally certain that I was not going to have a Secretary of State taking the judicial oath, wearing the robes of a judge. So what was going to happen? Well, I'm glad to say English compromise worked and we found a method round this problem and most of the time there after .we usually worked well together.

There is no doubt that the Prime Minister was entitled to decide who was a minister in his government and what departments he had in his government. It became equally clear that the office of Lord Chancellor could not be abolished without legislation. Clarity had to be brought about in the new situation.

Well, I was fortunate because we had developed, over recent years, a very much stronger Judges' Council, and the Judges' Council now represents all the Judiciary from the magistrates through tribunals to the Chief Justice. So I was able to obtain authority from the Council to speak on behalf of the judiciary as a whole. In this new situation, it was clear that what we should do was to identify the

protection it was essential that the judiciary obtained to protect their independence... We decided to produce our own package of reforms that should be put in place and persuade and cajole everyone that the package was sensible and realistic package which protected what needed protecting while, at the same time, ignoring those traditions which were perhaps redundant.

We appreciated that there were certain areas where there was no unanimity. There was no unanimity as to whether the traditional form of Lord-Chancellor should be retained... There were a substantial number of judges who saw it as a vital protection for our legal system that the Lord-Chancellor should continue to perform his historic role... There was again a substantial number of the judges who did not think it was a good idea to have a Supreme Court.

There are still a substantial number of the Law Lords who would be sad to have to leave the House of Lords. They saw it, as it was put by one of my colleagues here the other day, as something which had a certain market reputation. It was a good brand name. Something, therefore, that was of value. They saw it as beneficial that the Judiciary, at the highest level, and the legislature should be working closely together. Above all, they enjoyed being members of what is undoubtedly an excellent club.

So matters such as whether there should be a Lord-Chancellor and whether there should be a Supreme Court, I personally regarded as being issues on which the judiciary as whole could take a position... However I did not consider that it would make much difference whether the new minister was called Lord-Chancellor or Secretary of State, as long as it was recognised he was now a minister and was not a judge, and that he was not head of the Judiciary, which all the Judiciary were agreed had to be the case.

Equally, I did not think that creating the Supreme Court, for the time being, was very important, because although its location was going to be changed,

its powers were going to be identical to those of the House of Lords and the Privy Council now. There were also going to be the same persons sitting in the same chairs, whatever the new body was called.

These issues which were controversial we put to one side and we worked - and we worked flat out - to produce a response ourselves which went beyond answering the consultation papers which were produced by the Department because they did not tackle the main problems. We focussed primarily on what we saw were the critical issues, and of those critical the foremost was the future responsibility for appointment of the judiciary. That could not be left in, irrespective of what he was called, this new minister's hands. Our view was he should play a very limited role – about which I will tell you about later.

Again, with regard to discipline, we thought there had to be a complete rethink in the new situation. What was agreed was because the public have a real interest in the standards and performance of the judiciary, there had to be a ministerial involvement independent of the judiciary but, equally, we felt there had to be a check on that involvement. The agreement that was reached between the Lord-Chancellor and myself was that no disciplinary action could take place against any judge, of any seniority without the agreement of the Lord Chief Justice and the Lord-Chancellor.

Now, you might say, well, that's a recipe for deadlock, to which my response is, "even if it is, it just means that if there is a deadlock, nothing happens," and that is in it self a protection for the judges. It puts a heavy responsibility on the judge to conform to proper judicial standards and of course there could be still action within the legislature which could be effective although fortunately it has never happened yet. However parliamentary action apart, no action can be taken against a judge unless there was that agreement between the Lord Chancellor. This reflected a situation which I had already negotiated with Lord Irvine and seemed to work reasonably well. By an exchange of letters, he

and I that he would not take disciplinary action against any of my judges, as they were at that time, without my agreement.

Those were two areas on which we focused and in due course we produced our response to the consultation paper which we delivered to the Lord-Chancellor. He was, in general, in agreement with the position we took. We then started the process of negotiation between the Judiciary on the one hand, represented by myself, and the Lord-Chancellor, representing the government.

Remarkably, as a consequence of this process, a document, which was a new type of document, was created which we called 'the Concordat'. This was an agreement between the two bodies as to what the form the reforms should take. The Concordat was placed in the Library of Parliament and the remarkable thing is that that document, which was lodged in January 2004, remained intact and unchallenged throughout the legislative process.

There was argument about the matters that were still in issue, in particular about the Supreme Court, about whether the Lord-Chancellor should survive, on whether the Chief Justice should have the right to address Parliament - which is something to which I attach great importance. But the actual body of the Concordat which dealt with what the judiciary regarded as being the fundamental issues, including the matters to which I have referred. An other important matter which may not seem significant unless you have been involved day to day in the running of a court, This was who should be in charge of deciding when and in which courts cases should be heard..

It seemed to us critical that there could not be pressure placed upon the judiciary to hear particular cases, out of order and give them preference at the dictate of the executive. Although we did not say that should never happen, we said it was for judges to decide who heard cases - no question of the Executive choosing their judge - and, equally, it was for the judges to decide where and

when. This happened. This is the principle which the Concordat now enshrines. So at any rate, we made good progress on that basis.

With regard to appointments, there was also agreement. There was some discussion as to what numbers of judges and what numbers of lay-people should be on the new Appointments Commission. You'll be surprised to hear that the judges thought that they should be in control – while the government thought that lay persons should have the majority of seats on the Appointments Commission. I believed then, and still do believe, that judges are often in the very best position to tell who's going to make the best judges because they know more about judging than anybody else.

But there is equally a view that you want a wider input than that, and what was wrong with our existing system, as some people saw it, was that it was too judge-dominated. There is now a 15 member Commission which is already in place. The 15 members are divided, five judges, five lay-people, a lay-chairman, one member of the Bar, one solicitor, one member of a tribunal and one magistrate.

If you add all its members together, and you treat the lay-magistrate and the lay-member of a tribunal as being in a halfway house and not, as the Lord-Chancellor thought, a judge, or not as I thought, a lay-person, you will find that it is a pretty even split between the lay and the judiciary...? It is my hope that this will work well. The appointments that have made are of undoubted quality.

But the size of the commission is not so important as the fact that, in the way it is set up, the Executive, and indeed the Legislature, can play no part in the selection process of the membership for that commission. There is a separate body, which sets up a committee of three who has the responsibility of appointing the commissioners. Once the Commission is established, it will work through a number of sub-committees because, after all, we have a very large Judiciary to handle. There's about 1,500 permanent judges. In addition, there are thousands

of tribunal members and 30,000 magistrates. So it's no small job appointing all these individuals and it's going to be very important that we don't let the process become too dominated by bureaucracy and keep it as simple and streamlined as possible.

One feature that the judiciary and the Lord Chancellor were agreed upon was that there was to be only one criterion for appointments, and that was merit. That seemed to us absolutely critical and it was always what had governed our choice of judges in the past and was where sure it should govern it in the future. However, subject to paramountcy of merit we did agree that one of the criticisms that could be made of our Judiciary is that they were perhaps not sufficiently diverse in the sense that they did not really reflect sufficiently the multicultural society which is England and Wales today.

So besides the merit, there is a requirement, which is not in the Act, which says that it should be a duty of the commission to consider how they can enlarge the pool from which judges can be selected; again, of course, on merit. It seems to me that this is the right way forward.

At any rate, the Concordat was a real step forward and when the Bill was introduced into Parliament the Concordat was uncontroversial but there was extensive argument over the matters which were in issue. I don't want to take up too much time talking about this but, again and again, it looked as though we were going to lose this Bill which I saw as really a charter for the Judiciary in the future.

But, we got over our difficulties. The House of Lords sent the Bill to a select committee which would have meant, in the ordinary way, the Bill would have been lost, but this was not a wrecking motion as some feared, including myself and the Lord-Chancellor, by opponents to the Bill. In fact it was a genuine attempt to improve it. To achieve this it was agreed that the bill should be one,

while it was in the select committee, was not killed by the ending of a session of Parliament.

However, there was another concern, and that was that the general election was approaching. We did not know what date it was going to be, but we had a fair idea that by the spring of 2005, a general election would be on us. It is fortunate, I think, greatly fortunate, that just in time, in March 2005, the Bill received the Royal assent. The Act was basically the Concordat, plus the decision that the Lord-Chancellor's name should survive, contrary to the government's wishes and there should be a Supreme Court...

So we still have a Lord-Chancellor, but he is not the head of the Judiciary. The Chief Justice will be head instead. What would happen within the Judiciary, which I strongly approved, is that there will be a clearly recognised structure with the Chief Justice at the top, you then have the heads of the Division, including the Master of the Rolls as the senior, so to speak, below the Chief Justice, and the responsibilities of the Chief Justice extend to the whole system.

I thought, and still do think, that one of the weaknesses of our system was that the Chief Justice used to be r seen - and certainly, in Lord Denning's day this was true - as having responsibility for criminal matters alone and not civil matters and not family matters. I can remember disputes as to whether Family Courts could be used for hearing criminal cases, and the President of the Family Division saying, "Over my dead body".

I can remember arguments between the Master of the Rolls and the Chief Justice of the day, which were very intense, about the fact that the Master of the Rolls, then Lord Denning, saw the Chief Justice - and the same happened with Lord Donaldson - trespassing on his patch. They saw civil justice as being a matter of no concern to the Chief Justice. This meant that there was nobody

really clearly seen as being the head of the justice system of England and Wales. Happily this problem has now been cured.

What I do think is important is this process of reform culminating in the new Act, The Constitutional Reform Act was substantially consensual. The process was one which, except for the few matters to which I have referred, was the subject of agreement. That, I think, means that this Act will have a much stronger status than it would have done otherwise, or at least that is my hope. I do believe that if you're going to have constitutional change of this order, it should be achieved by people working together.

I hope that the new start will be one where there is a continuation of the same partnership which has existed in the past. The partnership is reflected very much in the appointment system. The Lord-Chancellor is not cut out completely from the appointment system. What happens is the new Commission has to make a recommendation of one individual for the appointment. The Lord Chancellor does not have a way of initiating an appointment of a particular individual but there must then be a recommendation to him. He then has the chance of rejecting that recommendation or, alternatively, asking the commission to think again.

In either event, the commission can then put forward another name and the fact of the matter is, at best, the Lord-Chancellor will have two people to consider, and that is the extent of his power. I think that's important because it seems to me it is desirable that the Lord-Chancellor should have a sense of ownership, to some extent, still, of the Judiciary in his capacity as the government minister responsible for justice...

I am not going to take you through this rather long Act. Ninety per cent of it is schedules are dealing with all the legislative provisions that I've referred to, but I thought it, just before I sit down, worthwhile drawing attention to Part I, where it said:

“The rule of law. The Act does not adversely affect - (a) the existing constitutional principle of the rule of law; or (b) the Lord-Chancellor’s existing constitutional role in relation to that principle.”

Now, as far as I know, that’s the first time that, in any English legislation, there’s a direct reference to the rule of law. But it certainly accepts that it is a principle which is there, and that cannot be but a good thing.

One of the matters that was argued about was whether the Lord-Chancellor should continue to be a lawyer, and that was one point on which the Judiciary has views. They would have liked to have seen a lawyer. He doesn’t have to be a lawyer; he can be a lawyer. The Act says that he should be somebody who the Prime Minister considers to be qualified by experience, but having listed various different types of experience, rather lamely, the provision refers, finally to, “other experience that the Prime Minister considers relevant”. So I’m afraid that bit of legislation gives him a *carte blanche*.

But judicial independence is something that the Lord-Chancellor is required to have regard to, and not only the Lord-Chancellor but other ministers of the Crown. And the Lord-Chancellor is given a specific duty, although he’s no longer head of the Judiciary, to defend the Judiciary’s independence. That’s a good thing. His oath, which he has to take now on becoming a Lord-Chancellor, is this:

“I do swear that in the office of Lord High Chancellor of Great Britain, I will respect the rule of law, defend the independence of the Judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help me God.”

I hope that the Lord-Chancellors in the future will continue to be true to that oath. Thank you very much.
