Lionel Cohen Lecture: Jerusalem: Speech by Lord Woolf, Lord Chief Justice of England and Wales

I regard it as a great honour and a responsibility to be asked to give this Jubilee Lecture. The lecture is a symbol of the close relations between the legal systems of our countries and is named after a most distinguished judge, who was both English and a Jew. Over the years since it was established in 1953, thanks to the British Legal Friends of this University, the lecture has been given by a number of my country's most distinguished legal academics, advocates and jurists. Proof of this is that the list of lecturers contains many household names. The fact that the first lecture was given by Arthur Goodheart, later Lord Goodheart, and that I am the fourth Lord Chief Justice of England to give the lecture speaks for itself.

If actions speak louder than words, then these lectures signify that, almost from the founding of the State of Israel, the country that is appropriately described as the mother of the common law felt justified in sending its finest lawyers here. The lectures are a continuing acknowledgement by the legal system of an old democracy of its appreciation of a new legal system and a great university. There is no other country, so far as I am aware, to whom my country has paid a similar compliment.

It is my misfortune that this is the first of the lectures I have attended. Fortunately I have some insight into the quality of the earlier lectures. David Pannick provided me with a copy of his splendid lecture delivered almost precisely a year ago on *Human Rights in the Age of Terrorism*. A title which demonstrates how the lectures tend to focus on a subject which is of relevance to both our countries. In addition since I was a young barrister I have attended the dinners at Lincoln's Inn Hall at which it is the custom for the lecturer, after he has returned to the UK, to address the legal section of the Friends of the Hebrew University in London to report on their experience in Israel. Without exception, the reports have been unstinting in their praise of the hospitality they have received and the quality of the Israeli jurists and lawyers the lecturers they have met while here.

The praise that the lecturers would bestow at the dinner on the Israeli legal system gave me great satisfaction (*nachas*). I particularly appreciated the praise of the judges of the Supreme Court, so many of whom I look upon as friends. I recall with pleasure, hearing Lord Wilberforce using the word 'excellence' in his description of the members of the Court.

These comments did not surprise me because I have been involved in the British Israeli judicial exchanges and these comments merely confirmed my own experience. The exchanges tend to focus on public law and constitutional law issues since it was particularly as to these subjects that the two countries have most in common thanks to the Mandate. As with the UK, Israel has no written constitution. Your Supreme Court as a High Court and our High Court enforce public law by the use of the ancient prerogative remedies. The remedies of certiorari, mandamus and prohibition which together with declarations are ideally suited for enforcing duties that public bodies owe to the citizens on behalf of whom they should act.

Over the years what we have learnt during our judicial exchanges has been influential in moulding the developments in England. As a result of the exchanges, I have been able to detect in the judgments of my colleagues echoes of what I regard as the Israeli approach. In particular I have been conscious of the fact that whether by unconscious or deliberate decision you now find members of the English judiciary when determining public law issues recognising that there are different levels of rights culminating in basic or fundamental rights, the protection of which are at the heart of any democracy.

I would hope that we have also been able to make a contribution in return. Possibly, by doing no more than demonstrating that if the English courts are making some of the decisions which they have, perhaps the Israeli Supreme Court is not as radical as some would think. I appreciate that to some observers, the strength of the English legal system is personified by Rumpole of the Bailey or by the eighteenth century judge who famously said, "Reform, reform, don't talk to me of reform, things are bad enough already". Or again by the approach reflected in the motto of the family of the 15th Viscount Falkland:

"If it is not necessary to make a change - it is necessary not to make a change".

However, contrary to the impression, these remarks would suggest our common law system has of late been transformed. During the period of Tony Blair's Government, the picture that remarks of this sort create of the English legal system is singularly inappropriate. We are living in a period in which Lord Falkland's rule has been turned on its head. A more accurate description of the British situation today is that "it is necessary to make changes unless it can be shown that it is necessary not to do so". The assumption is that any change is for the good unless the contrary can be shown. There has been a constant torrent of change over the last 7 years. Some of the changes I strongly support and recognise that they were needed. About others I have reservations. The trick is throwing out what is no longer necessary, while ensuring that what is worth retaining is allowed to flourish.

It would be wrong to interpret what I have just said as being an indication that I am against change. On the contrary I have been responsible for more than a modest amount of change myself. However I have to admit that the recent pace of change has astonished me. This is particularly true of the changes of a constitutional nature and it is of the latest and most dramatic of these changes that I intend to talk in the hope that some lessons may be drawn from them that are of relevance to the very different situation in Israel.

In the past, the UK has been a country of constitutional evolution rather than revolution. That is why we have managed to remain, as has Israel, among the very few democracies (the only other example being New Zealand), which has managed to enter into the 21st century without a written constitution. That this has been possible in Israel, I have attributed to the decisions of your Supreme Court. A strength of your Supreme Court, as with the House of Lords appellate committee, is that it is a constitutional court, but it is not only a constitutional court. Its decisions have the pragmatism which comes from the fact that its judges are not some rarefied species of constitutional judge, but the most senior section of the ordinary judiciary that have to determine not only disputes between citizen and the State but also disputes between one citizen and another.

In a lecture which President Aharon Barak gave in Cambridge in July of this year, on "The Role of a Supreme Court in a Democracy on the Fight against Terrorism", Aharon commenced by making the following important statement;

"I see my role as a judge of a Supreme Court in a democracy as the protection of the constitution and of democracy. We cannot take the continued existence of a democracy for granted. This is certainly the case for new democracies but it also true of the old and well-established ones. The approach that "it cannot happen to us" can no longer be accepted. Anything can happen. If democracy was perverted and destroyed in the Germany of Kant, Beethoven and Goethe, it can happen anywhere. If we do not protect democracy, democracy will not protect us."

Just recently the Deputy Chief Justice and I, unusually, gave a briefing to representatives of the media during which my colleague made a similar remark. This was given extensive publicity. His remarks were taken out of context by some of the media. It is, however, significant that he felt it was appropriate to make the remarks that he did. He did so in the context of our explaining first the fundamental importance of the independence of the judiciary in a democracy and secondly that the independence was not for the benefit of the judiciary but for the benefit of the public as a whole.

At the present time it is particularly important to both our jurisdictions that we have a judiciary whose independence is solidly secure. This is because both our countries, but particularly Israel, are having to meet the terrible challenge created by a new form of terrorism, the suicide bomber. The government has the duty to defend us from this new phenomenon and the judges have on occasions the difficult and unpopular task of condemning action which government has no doubt taken to protect us in good faith because that action does not comply with the law. As we are governed by the rule of law, the judges have to have the courage to uphold the law. To do otherwise would be to betray values that are among the most important in our society.

Until recently I do not believe that, if I had been asked to say how I saw my role, I would have responded

that, like Aharon, I saw it as defending our unwritten constitution. I would have taken the view that our constitution in Britain has developed over the centuries checks and balances which meant that the judiciary could take our constitutional arrangements for granted. My confidence in the arrangements had been confirmed by the success with which we had absorbed the European Convention on Human Rights as part of English domestic law after October 2000.

What has caused me to think again was the manner in which the Government announced its latest constitutional changes on 13 June 2003. The changes that were not preceded by consultation were three fold. They were first to abolish the office of Lord Chancellor; secondly to set up a Supreme Court and thirdly to get rid of the remaining hereditary peers. From an Israeli standpoint this action may not seem significant. Hereditary peers are not a subject of burning interest in Israel. As to the Supreme Court, I am relieved that it is not to be a *constitutional court*, as has been discussed for Israel, but a Court of general jurisdiction as is your Supreme Court. I hope the architecture is equally distinguished.

It is the first change to which I will devote attention because even an English, never mind an Israeli, audience could be excused for not appreciating its significance for the independence of the judiciary.

What was most important about the announcement was not that it was not preceded by consultation with the judiciary or anyone else. It was the fact that it was apparent that the Government was of the opinion that it could treat the abolition of the office of Lord Chancellor as though it were nothing more than a Government reshuffle. Originally, it was intended to remove the existing office holder of Lord Chancellor, Lord Irvine, from office and not to replace him with another Lord Chancellor. This was to happen without the involvement of Parliament. Instead of the Lord Chancellor, it was intended that there should be a Secretary of State for Constitutional Affairs who would preside over a new Department.

It was only on the day that the announcement of the changes was due to be made that the Government woke up to the fact that there had to be a Lord Chancellor until the necessary legislation had been passed to abolish the office. So the new Secretary of State for Constitutional Affairs found that he was also required to be Lord Chancellor and had hurriedly to acquire robes and a wig so that he could sit in Parliament on the woolsack.

Like Dr Jekyl and Mr Hyde the new Lord Chancellor, Lord Falconer, has a split personality. He is, on the one hand the friendly non-political Lord Chancellor and on the other hand, the Secretary of State who freely confesses to his fondness for demonstrating that he is a front-line, highly charged politician.

Unless you are an observer of the constitutional situation in Britain, you may not appreciate the dramatic scale of the change that was announced in this casual way. The office of Lord Chancellor had evolved with the constitution of the United Kingdom. He is the Speaker of the House of Lords; a cabinet minister at the apex of Government and head of the judiciary. He is the Minister in charge of the department responsible for the legal system. He was also responsible for the Court Service that manages the court system. As it happens his responsibilities have multiplied in recent years as the office has attracted additional responsibilities for matters such as appointments to tribunals and constitutional reform.

It was not only the judiciary that was concerned as to the manner of the announcement. The House of Lords reacted with great displeasure to the proposed loss of their Speaker without their having an opportunity to express their views.

The judiciary were concerned that apparently it had not been appreciated by the Government that the new Secretary of State could not inherit all the powers of a Lord Chancellor and that the creation of a Commission for the appointment of the judiciary was not a substitute for a Lord Chancellor.

Some members of the judiciary, but by no means all or even a majority, did consider it was time that the Lord Chancellor's office should either come to an end or be modified. However, in most cases their concerns would have been largely or entirely met by the Lord Chancellor ceasing to sit as a judge. Few would want to make a decision to abolish the office of Lord Chancellor until it was known by what he would be replaced.

Many recognised advantages in retaining the Lord Chancellor as the head of the judiciary. He is able to speak up for the judiciary, particularly in relation to resources and on issues that affected the independence of the judiciary, in cabinet. The disappearance of the Lord Chancellor will, it is thought, leave the judiciary more exposed to the attacks of politicians. Lord Irvine, the former Lord Chancellor had cause to rebuke ministers by saying that, "it was not seemly for ministers to cheer when a court decided a case in their favour or boo the judges when they lose a case".

The judiciary were also concerned that the move to a new Supreme Court would result in the Law lords losing the right which they enjoy at present to take part in and address the legislative chamber of the House of Lords as to issues of importance to the justice system. I have certainly found the ability to take part in debates in the House of Lords valuable.

In due course the Government issued consultation papers on the constitutional changes. There was a paper on the new Appointments Commission; on the new Supreme Court; the constitutional changes involved in there ceasing to be a Lord Chancellor; the reform of the House of Lords and the future of the system of senior barristers being appointed Queens Counsel. However, surprisingly, the consultation did not deal explicitly with the numerous changes that would be necessary as a result of the fact that, unlike the Lord Chancellor, the Secretary of State would not and could not be the head of the judiciary. This was going to be dealt with, as it has been, by discussions between the judiciary and the transitional Lord Chancellor. This consultation is not as to whether the changes should take place, but as to what form they should take.

For the judiciary the constitutional reforms were a 'wake-up' call. Over the centuries our justice system had evolved without any anxiety as to the status of the judiciary. We have been sheltered by the existence of a Head of the Judiciary, in the form of the Lord Chancellor, who could and did speak out at cabinet meetings on our behalf as the Head of the Judiciary as well as a very senior minister. The Lord Chancellor was responsible for obtaining the resources which are needed to carry on the justice system. He had also been responsible for appointments, though the appointments were made in close consultation with the judiciary. There was also a close relationship between the judiciary and the Court Service. The Court Service was answerable to the Lord Chancellor but the Lord Chancellor and his Department accepted that they were under an obligation to support the judiciary. Most importantly over the years both the judiciary and the officials had worked closely together in harmony. There was an informal partnership designed to enhance the administration of justice. The partnership was acceptable to the judiciary because the head of the Department and the Court Service was also the Head of the Judiciary. The announcement of the changes made the future of this working relationship uncertain.

The government and the judiciary are now negotiating as to who should inherit the numerous responsibilities of the Lord Chancellor. Some of the responsibilities were clearly administrative in nature and those could, without dispute, be transferred to the new Secretary of State. Others were clearly judicial and have to be transferred to the judiciary. Although Montesquieu thought of Britain as a country which adhered to the separation of powers, he was in fact mistaken and strict separation of powers has never been part of our tradition. But as the whole of the reforms were predicated by the Government as being to enhance the separation of powers, this objective has formed a prominent part of the negotiations which are taking place.

Naturally, for the purpose of the negotiations, the judiciary and the Lord Chancellor have taken account of the practices in different jurisdictions, particularly when the other jurisdiction's systems of justice is close to our own. Among these overseas jurisdictions is Israel. Israel was well ahead of the field in having an appointments commission but today it would not be regarded as an example that we should follow because a minister and other politicians are involved in making appointments to a greater extent than we would now consider desirable.

On behalf of the Judges' Council, I submitted to the Secretary of State the view of the judiciary as to what should be the position in the future. I emphasised that it was highly desirable that there should be a new constitutional settlement. Unlike the Lord Chancellor, the Secretary of State's role would be primarily political. The Secretary of State would no longer be capable of occupying the unique constitutional role of the former Lord Chancellor. He could not bind together the three arms of the state, the legislature, the executive and the judiciary.

If the independence of the judiciary and their ability to continue to provide the quality of justice which they had hitherto was to be maintained, the Judges' Council considered that the necessary protection of the judiciary's independence had to be enshrined in statute: The protection required includes;

1. The Lord Chief Justice assuming the role of the Lord Chancellor as head of the judiciary (including the head of 30000 lay magistrates).
2. The statute should state what are the Lord Chief Justice's responsibilities, powers and duties. These should include the deployment of judges. The arrangements as to which judges hear which cases had to rest with the judiciary. The executive cannot have control over this.
3. The training of judges is to be in the hands of the judiciary.
4. Resources for the judiciary as a whole are to be sufficient to enable them to carry out their judicial duties and to maintain their independence.
5. There should be a process for the appointment and the disciplining of judges which is not under the control of the Secretary of State but is open and transparent and will ensure that we continue to be able to recruit the quality of judges we have had hitherto. Once appointed, they should not be capable of being removed or disciplined except for a cause established by a body independent of the executive.
6. The judiciary should have their own information service and no longer be dependant on the Lord Chancellor's press office. In the age of spin and public relations this is more important than might be thought. It is essential, if the judiciary are to be an independent separate arm of Government, that the judiciary's issues can be heard and explained.

By negotiating, we have already made considerable progress towards achieving the safeguards that are necessary. I accept that there are different memberships of the Appointments Commission that would be consistent with the protection of the independence of the judiciary. Equally there is room for debate as to who should appoint the members of the Commission.

The judiciary are prepared to accept that the Chairman of the Commission and an appropriate number of the members should be non-lawyers together with a balancing number of practitioners. Here I have limited concern as to the outcome of the negotiations. I expect that there will be no members of the executive on the Commission. It is also rightly accepted that appointments should be made primarily on merit. But merit is a pliable term. Like beauty, its qualities can lie in the eyes of the beholder.

The government's involvement in appointments is also likely to be limited, perhaps to requiring another name to be submitted by the Commission. A negative role of this nature could be an advantage because it will mean that the government will be involved in the appointment process without being able to choose the candidate to be appointed.

In relation to discipline, there should also be a substantial degree of common ground. The government under the Lord Chancellor accepts that the Chief Justice must have responsibility for controlling the disciplining of the judiciary when this is necessary. The process has to be transparent and there is a need for investigations to be carried out by independent members of the judiciary. Obviously, complaints can vary in significance. In respect of more serious disciplinary processes the judges need to continue to be protected by the fact that the removal or formal reprimands can only be administered by the Chief Justice if both the Secretary of State and the Chief Justice are agreed.

In addition, it is agreed that the Secretary of State should be responsible for the provision and allocation of resources for the administration of justice and the Lord Chief Justice should be primarily responsible for the wellbeing, training, guidance and role of individual judges.

It is recognised that there are differing ways in which the judiciary's independence could be undermined. One way is by being able to ensure that, if a judge does not decide cases in a manner which is to the liking of the Government, they are allocated the least favourable of postings. It would be wholly inappropriate if the executive could achieve this.

There remains a dispute as to whether the Secretary of State will have any involvement in the selection of the senior judiciary who are given the extra responsibility for judicial administration.

Each of these issues are of importance in achieving the new constitutional settlement I believe is necessary. The debate continues and I hope that we will be able to persuade the public to take part. After all what is at stake is of critical importance for the continued protection of the liberty of the public.

As to resources, fortunately independently of the present reforms, the Courts Act which has just become law provides considerable protection. It places the Lord Chancellor under a duty to ensure that there is an efficient and effective system to support the carrying on of the business of the courts and that the appropriate services are provided for those courts. If the new Secretary of State takes over this responsibility, this will undoubtedly assist.

The Secretary of State has suggested that he should be under a statutory obligation to uphold the independence of the judiciary. The judiciary would want the legislation to go further. They would like to see a statutory duty to uphold the continued independence of the judiciary imposed on all ministers not merely the new Secretary of State.

What else is needed for the protection of the judiciary? In the past, I thought that our unwritten constitution, supported by conventions and checks and balances, provided all the protection which the judiciary and therefore the citizen required to uphold the proper administration of justice. If the changes which are now necessary are enshrined in statute, that may be sufficient. This is more likely to be the case if, in accordance with the British tradition, a consensus is reached between Parliament, the executive and the judiciary as to the nature of these changes.

However, what has happened since June last does raise the issue as to whether or not the time has come when it is necessary at least to consider embarking on the difficult task of establishing a written constitution for the United Kingdom. We have the European Convention on Human Rights as part of our domestic law and that is a great protection. There have been remarks made speculating about a possible withdrawal from the Convention. I do not see any Government doing so in the foreseeable future. There are negotiations proceeding at the very moment as to a European Constitution. However, although I have up until now preferred the flexibility inherent in an unwritten constitution, I no longer see a written constitution containing entrenched provisions like the other EU States as not being on the agenda.

The fact that changes of the scale now taking place can be decided upon without legislation by the announcement of a policy decision by a Government with a very large parliamentary majority is disturbing. It does suggest additional constitutional protection may be necessary. I know this has been a subject of much debate in Israel for a number of years and this is what you would expect in a vibrant democracy.

Fortunately, in January there is to be a further Anglo-Israeli exchange and it is my hope that a consequence of the next exchange will be to help us in the task of finding the right way forward. If we find the right way forward that will benefit all democracies. If we fail to do so, the opposite result will ensue. We have a formidable but exciting challenge ahead. With good sense on all sides we have the chance of creating a constitutional settlement that is worthy of the 21st century.

Is there any message for Israel in what I have just described? My audience will know the answer better than I do. I do however suggest that what I have had to say suggests that Aharon Barak was right in saying no democracy, old or new, can afford to take for granted that the institutions that protect our freedoms are inviolate. We, the judiciary, do have to strive to protect our constitutions.