ANNUAL DENNING LECTURE

Independence – Myth or Mystery?

27 November 2007

The Rt Hon Lord Goldsmith QC
Formerly Her Majesty's Attorney General

I have termed this Annual Denning Lecture, which I am enormously honoured to have been invited to give, "Independence – Myth or Mystery?" The independence I have in mind is the independence of the law officers put under the microscope by the Government's recent consultation coming to a close as I speak on the role of the Attorney General.

It is an entirely fitting subject, in my view, for a lecture organised by BACFI because issues of independence of in-house lawyers in government as in the private sector have also been under the microscope in recent years. In the arguments about rights of audience, for example, for government lawyers, employed lawyers and the CPS. Before I went into government in June 2001 I had been a practising barrister in chambers for all of my professional career. The subsequent six or seven or so years was therefore significant in terms of my understanding from the other side, as it were, of life as an employed lawyer. I want to reflect on those insights today.

It is also highly appropriate, in my view that the topic I want to address should be the subject of a Denning Lecture.

It was of course Lord Denning who famously chastised Sam Silkin when Attorney General in the Gouriet case with having ideas above his station. "Be you never so high, the law is above you" said Denning in holding that Silkin's

decision to refuse to consent to a relator action to challenge industrial action by postal workers who were protesting South African apartheid was susceptible to challenge in the courts.

You may think, therefore that, given that dictum, there could not be a better place for a lecture on the review of the role of the Attorney General than a Denning Lecture. For my own part I am very happy to take the opportunity of the generous invitation by the Society to me to speak to take on that topic tonight. In doing so I am happy to ally myself in some small way with the long and proud tribute which this lecture series offers to the memory of one of the greatest judges. I cannot in doing so say that I can speak with much personal experience of him as a Judge. Indeed I believe that I only appeared in front of him, at least unled, on one occasion on an application for leave to appeal. I would like to tell you how my arguments and advocacy swayed even him to a triumphant conclusion. But I was not even called on. And as this was the days before skeleton arguments I cannot even pretend that my written advocacy skills were in any whit responsible for my client's success. I am honoured therefore in one sense to be at least called on today before the Society which bears his name even if on that occasion he did not need to trouble me – or as Lord Diplock is reputed once testily to have remarked to a silk in my chambers who tried to make his submissions despite being told that their Lordships did not want to trouble him that what Lord Diplock really meant was that their Lordships did not want him to trouble them.

It is also fitting in considering the role of the Attorney General to examine how and why that most quoted remark of Lord Denning did not carry the day when Attorney General Silkin appealed the judgement against him to the House of Lords. But I get ahead of myself for that is a point which comes a little later in the remarks I want to make today.

To start then at the beginning, my observations today are of course prompted by my two things: my own experiences as HM Attorney General for over 6 years; and the consultation paper on the Role of the Attorney General issued in July 2007 by the incoming government of Prime Minister Gordon Brown as part of a package of consultations entitled the Governance of Britain.

To my mind there is much that is important in the Governance of Britain consultation. I welcome for example the consideration of whether there should be a written constitution, an issue on which I became more convinced during my term in office. It is hard to see why our country virtually alone of all democratic States has no need of a written constitution. And it is an increasingly threadbare argument to protest that we have a constitution although unwritten. For an unwritten constitution means one in which the constitutional settlement is to be found in part in a series of Acts of Parliament with no special status requiring any form of super-approval when they come to be amended by one Parliament or the next so that matters which in other countries would require special procedures or debates can be effected here by ordinary parliamentary majorities or procedures or even, as with the Parliament Act 1949 by procedures which do not even require the consent of both Houses of Parliament. And an unwritten constitution also means one in which the constitution is in part to be found in unwritten conventions the true nature of which are subject to assertion and dispute: witness the fact that it was necessary to convene a special and high powered commission, the Cunningham Committee, to determine what the proper ambit of House of Lords rejection of Commons decisions should be. I believe therefore that the time has come to attempt a better codification and writing down of our constitution – even if nothing were changed – so that we can spend less time disputing the procedure for making decisions and concentrate on the substance of the decisions themselves.

I welcome too the focus on issues of citizenship and belonging and was pleased therefore to be asked by the Prime Minister to undertake a review into British citizenship which I am now engaged on. It is clear to me, for example, that though we use the concept of citizenship in many ways, even providing a legal status for it, there is little awareness of what citizenship actually means. Once it was based more on a shared history than on shared values but today a history which could once have been said to have been shared even by the Scots and the people of overseas British colonies and former colonies can no longer count as a binding constituent for immigrants from Eastern Europe and South America for whom this history is all too remote. Nor we do we have a clear view of what the rights and responsibilities of citizens are. Interestingly I have found in my discussions so far that new citizens have a stronger and clearer sense of what being a British citizen means than many settled and British born citizens.

I welcome too the consultation on war making powers; too much pain and heartache was caused over the constitutional question of the respective roles of Executive and Parliament over that issue for it not to be opened up for debate. Though having been Attorney General through two major conflicts: those in Afghanistan and Iraq, as well as more limited military engagements I do not underestimate the great difficulties of being able to have the sort of open debate and disclosure of information that a full Parliamentary debate for approval of military action is likely to require.

But I would be less than honest if I said that I said that I also wholeheartedly welcomed the fact that the role of the Attorney General was treated as a key issue at that early moment of the premiership of Gordon Brown – or rather the way it was treated as an issue. Not that I did not welcome debate on the subject of the role. I had myself discussed the role many times – one commentator said that my openness in discussing the role and its justification was unprecedented – and had myself proposed revision of the role in some

respects, and had made proposals to the Constitutional Affairs Select Committee to that effect. What to be frank I did not welcome was the apparent premise of the consultation paper that some fundamental change in the role was necessary, and moreover that this fundamental change required a downgrading of the role. As I will propose this evening, to downgrade the role would be to lessen and not to increase the protections for the public and reduce the protections for the rule of law and to keep that at the heart of government.

Nonetheless I recognise that the Consultation Paper raised legitimate questions for debate. I have not been a party to any of the seminars which I know my good friend and successor Baroness Scotland has been conducting and until very recently have not spoken publicly since the launch of the consultation paper on this topic. So this evening presents something of an opportunity.

Nor have I spoken publicly on the report of the Constitutional Affairs Committee on the Constitutional Role of the Attorney General. This document was rushed out on the 19th July 2007 just days before the Government's own consultation on the 27th of that month. I have been told that it was in the event only truly agreed by 4 of the Committee's 10 members. I find the Committee's report disappointing one-sided superficial and reaching conclusions against the weight of the evidence.

This last point is the first I want to underline. In doing so I do not refer particularly to my own evidence but to the evidence of those who could be expected, from their long actual experience of the law, to have understood the strengths and weaknesses of the role: in particular Lord Mayhew of Twysden and Lord Morris of Aberavon, both former Attornies General of note and distinction; and Lord Mackay of Clashfern, a former Lord Advocate of Scotland as well as former Lord Chancellor. Lord Mackay, for example, concluded his written evidence to the committee in this way: "I believe the principles on which

the office of Attorney General rests are sound, that it fits well into our system of government, that it has stood the test of time and should be retained." Lords Mayhew and Morris in their oral evidence made very clear why they, from their real practical experience, believed that the historic role of the Attorney General did work and that some of the perceived problems were clear misconceptions. But do not take my word for it for the evidence is printed and available and I commend its study.

Others with enormous practical experience of the role, such as Lord Woolf of Barnes who saw Attornies General in action, not only as Judge and Lord Chief Justice but also when he was Treasury Devil arguing the Crown's cases, have publicly underlined the importance of the role of Attorney General.

And in a written memorandum of evidence which he has kindly provided me Lord Lloyd of Berwick, former Lord of Appeal in Ordinary, emphatically rejects the central thesis of the Constitutional Affairs Committee report that the Attorney General should henceforth be some sort of non-political office holder. His reason, as I understand it, focuses on the need for accountability to the public through Parliament which he believes that a career lawyer appointed to the role would not have.

To my mind it is this issue of accountability which is key to the role of Attorney General and why it would be quite wrong to reduce the role of the Attorney General to that of a legally qualified non ministerial civil servant.

There is of course a degree of accountability through the Courts but not in every case by any means. So legal advice of the law officers is often tested when the dispute in which the legal advice was relevant comes to be determined in court.

But the key accountability of the law officers comes, as those whose evidence I have referred to already, made very clear comes with being a member of one of the two Houses of Parliament.

The issue of parliamentary accountability was one to which those I have referred to returned time and again making clear their view that accountability was best achieved by having Law Officers who were members of Parliament and indeed members of the Government.

So in a typical year during my term in office the Solicitor General and I answered some 400 Parliamentary questions and another 250 letters from MPs and Peers. We attended the House to answer urgent and other questions. I recall for instance answering questions on the Jubilee line prosecution, on the failed prosecution of the butler of the late Dian Princess of Wales, on prosecutions under the military system and many others. In the BAe affair for example although the actual decision to drop the prosecution was taken by the Director of the Serious Fraud Office without pressure, let alone instructions to do so, from me – a point he has repeatedly and emphatically made though some commentators find that an inconvenient truth to recall- the then Solicitor General and I went to Parliament to discuss the decision and to answer questions about it no less than 6 times, as well as answering a large number of parliamentary written questions and letters from MPs, as well as others. There are other cases of decisions in criminal investigations and proceedings where accountability for those decisions was made clear by the presence of a Law Officer in the House. I can assure those of you who have not had the experience that there is little that concentrates the mind so much on a decision making process that within hours, certainly days of the decision you may find yourself at the despatch box having to justify the decision under close questioning by MPs and Peers.

Being in Parliament brings other benefits too. As Lord Boyd of Duncansby Solicitor General for Scotland and later Lord Advocate over a period of over 9 years serving both in the United Kingdom government before devolution and then in the devolved Scottish Executive noted in his evidence to the Committee from his long practical experience:

"Accountability to Parliament is not simply about attending occasionally and answering questions. The interaction between Members of Parliament and Law Officers is also of great benefit. It allows MP's or MSP's to approach you informally and raise a constituency or other matter and it allows the Law Officer to gauge political reaction to current issues...More generally it does help inform considerations of the public interest when these matters come to be considered..."

For my own part I remain convinced that this key accountability needs to be obtained through parliamentary scrutiny and that this in turn requires the Law Officers to be members of Parliament of one House or the other able to be summoned to explain themselves and the decisions of their departments. Of course there will be matters where it will be difficult to discuss but that is always the case with matters which are subjudice for example or where an explanation requires an examination of highly confidential or secret material whose disclosure would damage the interests of the nation. But the fundamental point is that the role of the Law Officers involves decisions in what are frequently matters of high controversy where this accountability to the public through Parliament is, in my view, and that of other previous holders of this office critical.

This is why in my evidence to the Constitutional Affairs Select Committee, instead of acceding to a weakening of the accountability through agreeing to the suggestion for a legally qualified civil servant to take on the Law Officer's role, I proposed ways to increase the accountability, for instance by creating or

adapting a Select Committee to scrutinise regularly and closely the Law Officer' work and by enhancing the archaic oath of the Law Officers to emphasise the commitment to the rule of law.

It is at this point that I return to Gouriet. For although it is always Denning's rebuff to Silkin which is recalled and his "Be though ever so high" remark. It is worth recalling how he himself was overturned resoundingly by the House of Lords. The position was well explained by Lord Rawlinson, no political friend of Silkin, who in an article remarked: "the Court of Appeal in January had certainly given the Attorney-General a bloody nose" and that "the public cheered, because it is always fun to see a public officer, especially a Law Officer, swotted." But, he added, "the court had done the swotting by a foul, not of course a deliberate foul but a foul in the sense that they had got the law completely wrong … the reversal of the Court of Appeal by the House in July and the implied as well as direct criticisms of the findings of the Court of Appeal was magisterial, categoric and severe." The clear point in the House of Lords was precisely the issue of public interest which was not a matter for review by the courts.

So this key issue of accountability through Parliament lies at the heart of this debate and I personally hope that the result of the Government's deliberation and of the consultation which has taken place will be to reaffirm the importance of the Law Officers being in Parliament and accountable to it.

I hope too that the consultation will confirm that the Law Officers should remain members of the Government. A key reason for that in my view is because of the need for constant vigilance at adherence to the rule of law within government.

I have previously expressed my firm conviction that a clear part of the role of the Attorney General has been to support maintenance of the rule of law.

That role includes most obviously the role of the Law Officers as chief legal advisers to the government although it goes wider. Of course only a small proportion of the legal issues that face Government are referred to the Law Officers for their personal views and advice but by definition these tend to be the issues of greatest importance and complexity or political sensitivity or which have the widest implications. They will, I repeat, often be the issues which give rise to the greatest controversy – and often controversy whichever way they are decided. I happen to have served – and I was privileged to do so - during one of our most difficult periods for the law in recent years where the threat and actuality of terrorism led not only to actual and high level military action but also a constant reassessment of our laws in which the strain between national security and civil liberties has been at its greatest; that strain being stretched to breaking point or even, in the views of some at least, beyond.

But other Law Officers, it should be remembered, also faced decisions of difficulty and controversy. I have already referred to Silkin and Gouriet. Others had their controversies: the decision of the late Sir Peter (later Lord) Rawlinson not to prosecute Leila Khalid, member of the PLO for the attempted hijack of an Israeli airliner in 1970; the late Sir Michael (later Lord) Havers decision to prosecute Clive Ponting under the Officials Secrets Act following disclosure of information relating to the sinking of the Belgrano; indeed can anyone doubt that the very decision to sink that vessel – with all the controversy it has brought over the years – was not one taken with the benefit of legal advice; or the time of the collapse of the Matrix Churchill trial leading to the Scott report into Arms to Iraq in the time of Sir Nicholas Lyell. And there are many more.

This should not be a surprise to anyone for there are inevitably arise issues of the greatest moment which call for legal advice or decision and these are the very decisions which we call on the Law Officers to make or to approve. And

one can see taking all those cases in mind – and others including those in which I was involved – that it would be inherent in the role that from time to time the law officers would be called on to make decisions which are controversial. As one academic commentator has noted: "It would seem that where politically contentious decisions are concerned, the Attorney General is unlikely to escape criticism whatever [decision] he makes." I personally do not believe it is right for Law Officers in those circumstances to shuffle off the responsibility of difficult decision making but to bear that responsibility so long as it is done, as I always strove to do, with independence of mind and a properly and carefully following the law.

But these cases too are one of the reasons why I have long disputed that the role of the Attorney General has recently become more political because in one sense it always has been the case that these most difficult of decisions will have political implications and repercussions. Not in the sense of having a bearing on party politics and fortunes for those have always been utterly illegitimate considerations for law officers to take into account in making their public interest decisions. Sir Hartley (later Lord) Shawcross made that very clear in a statement to the House of Commons in 1951 and it has been a motto for the Law Officers ever since – emblazoned metaphorically over the portals to the Attorney General's offices. As was the legend of Sir Patrick Hasting's decision to abort the prosecution of a left wing hero in the Campbell affair allegedly at the insistence of the Cabinet in what was the first Labour Government and which very affair then led to the collapse of that government. One former incumbent of a law officer's position told me that not even 24 hours in office had passed before he was solemnly told this cautionary tale and thus the absolute importance of decisions being taken independently even if, as Shawcross always allowed, informed by an understanding of the public interest considerations from those qualified to understand it, so long as the decision and assessment itself always remained that of the prosecuting decision maker.

It is in this area of the responsibility for prosecuting decisions that the greatest debate may take place. I of course had to do the job as it was – which included a statutory responsibility and therefore accountability for certain particular prosecuting decisions – some specifically conferred by Statute, such as for offences of corruption, and some as part of the statutory duty to superintend the Directors of the prosecuting agencies and therefore the agencies themselves. I took my responsibilities in this area very seriously and where I had to make a decision or was consulted on an important decision by a prosecuting authority would be at pains to study and understand the evidence and the legal considerations. I think my staff inwardly groaned that I required to see full papers and not simply a summarising brief. I would often call in to discuss the case the lawyers who had its charge – not simply from within the CPS or Serious Fraud Office but counsel engaged in the case, and occasionally even consult Counsel myself to get a further opinion. One of the letters I got on leaving office which especially pleased me was from that extraordinary group of criminal specialists who are Treasury Counsel at the Old Bailey and who deal with the most difficult and important cases and whom therefore I often saw expressing their very positive view of the way I approached those cases which they saw as entirely proper. I have no doubt that my predecessors followed the same approach because it is a long tradition in the Law Officers' chambers.

And I want to underline one point. In my dealings with government lawyers on the civil side and in the prosecuting agencies I was at all times struck by their independence of thought and judgement. They are all, of course, employed lawyers but they were absolutely clear that their duty was to the law and not to their minister let alone senior civil servant. They knew that they always had my support in that respect. I too always recognized and acted with my duty to the law uppermost. In that respect I was no different from my predecessors whose stern faces in the photographs lining the staircase to the Attorney General's chambers testified to the importance of this independence.

But independence does not mean ignoring responsibilities or declining to take any part in decision making or expressing judgements.

The fact is that in such cases it is necessary to test the decision because you know as Attorney General you will one day likely find yourself at the despatch box defending what had been done – usually after there has been a high profile and very public failure of a case; Jubilee Line, Burrell, military cases are amongst those that come to mind. I have had to do that and one of the issues you always have to be ready for is the accusation that the failure was predictable. I would regard it as a most severe dereliction of duty to the public to have to acknowledge that the problem that had occurred was something not only that was foreseeable but was actually foreseen and you had done nothing about it but let it go on. As we have made clear for example in the BAe case I was concerned about how ever it would be possible to prove the essential elements in our corruption law of principal and agent in the special constitutional circumstances of Saudi Arabia where the royal family maintain rights over the wealth in that country unparalleled in modern times. I pressed the Serious Fraud Office over nearly a year as how they would deal with this issue and eventually in the light of further material it became apparent to me, as confirmed by independent and highly experienced leading counsel, that they would not be able to. I am quite sure it would not have been right to ignore that issue and leave myself or a successor standing at a despatch box 18 months or two years later when, let us say, untold damage had happened to the country quite apart from the costs and a case had collapsed or an investigation not led to charges saying "Yes, I could see that coming but let it happen anyway."

Having dealt with that issue it would be remiss if I did not say something about the other prosecuting issue which has given rise to controversy – the so-called cash for honours. I add parenthetically that I never thought as I contemplated this lecture that it would take place at time where there is yet another serious

issue of public concern about funding in relation to the Labour Party. I am I suspect, like all members of the party, horrified and astonished that there is yet another complaint about the way funding was obtained. The issue in relation to the so-called cash for honours case was a concern about whether I should have any involvement with any ultimate decision. I have repeatedly publicly explained why I did not believe that constitutionally I was in any position to completely stand aside. I did, I believe, put in a place a perfectly proper procedure which would have ensured that an independent decision was not only made but seen to be made in relation to that issue by agreeing both to appoint independence counsel and to publish independent counsel's opinion if there was not to be a prosecution.

I do, however, want to address one issue. There was plainly some perception that I might have been prepared to bend the law in favour of individuals who were members of my party or close to the Government of the day. Nothing could be further from the truth. My responsibility would have been solely to apply the law and the evidence as it was found. If anything, I believe that some within government were concerned that I would play the role of stiffening the sinews of the prosecuting authorities in favour of a prosecution if the matter had been doubtful. Certainly there could have been no question of relying, for example, on the public interest to say that a prosecution should not be brought. Had the evidence been there, plainly it would have been in the public interest to prosecute a significant breach of public trust in such an important area as the integrity of the parliamentary process. In the event I never saw the full evidence in the case. I had, a very preliminary briefing at the outset of the investigations and then declined to see any further briefings. The only involvement in fact I had was to take a step regarded at the time as very hostile to the Government. It will be recalled that at the request of the investigators, that is to say John Yates and his team, I sought an injunction against the BBC to prevent them from publishing a particular fact that was said to have emerged in the course of the investigation. They wanted that fact held out of

the public domain so that the questions they wanted to ask in the interrogation of a particular witness would not be affected by his pre-knowledge that they knew that piece of information. I do not need to go into the question of how it came about that the injunction properly granted was subsequently discharged. The point I make is for all the fuss about the involvement of a law officer in such a matter the only actual step that I took was one that was in favour of and supportive of the investigation and a prosecution and not in any way to damage, impede or stop it. Like so much of these events that is probably an inconvenient truth which critics of the present system would rather not recall.

There is a further reason why, in my view, it is entirely right that an Attorney General should continue to have significant responsibilities in the field of prosecuting. The point was well expressed in a lecture given by the present Lord Advocate, The Rt. Hon. Elish Angiolini, when she underlined why prosecution is a necessary function of government. As she observed "the prosecution of crime is one of the most fundamental tasks of government in the wider sense … it lies at the heart of the social contract between citizens and state." She went on: "those exercising these vital functions must be held properly to account for the manner in which they exercise their responsibilities … indeed, it is only if the prosecution function is carried out as part of government that proper accountability is secured. If the system of prosecution breaks down, it is the Lord Advocate who has to account for that to Parliament. And that is correct … it would be wrong to seek to allocate that function to some semi-detached outside body."

To my mind there is considerable force to these observations which are based on real practical experience. I worry if one detaches the responsibility for prosecuting, even in individual cases from that of a person fully responsible to Parliament in the way that only a Member of Parliament and one who is a member of a government can be held to that transparency and accountability for prosecuting decisions that will disappear in large measure to the significant

detriment of the public. In a democracy it is appropriate, within proper bounds, for elected representatives to raise issues about individual prosecuting decisions which cause them concern from the point of view of the public. I have little doubt that a fully detached independent prospecting system would find it difficult to respond to that sort of demand for accountability. It would be the public that would be the loser.

I turn though to the single most important reason why I believe that the role of Attorney General should remain that for a Minister of the Crown.

Here, it is necessary to remind ourselves of the debate at the time of the abolition of the role of the Lord Chancellor about maintenance of the rule of law. When those complicated proposals were being negotiated between Government and Opposition and between Commons and Lords, one issue that came across was the importance of maintaining the role of the Lord Chancellor in maintaining the rule of law. At least one leading and highly knowledgeable and experienced parliamentary lawyer noted that little attention was, in the context of that debate, paid to the role of the Attorney General in maintaining the rule of law. The concern here is that with the changes in the role of the Lord Chancellor less reliance could in practice be placed on a Lord Chancellor to uphold the rule of law. And so in his evidence to the Constitutional Affairs Committee Lord Goodheart QC, distinguished liberal democrat peer and chairman of the Council of Justice, said "it is important that more attention should be given to the role of the Attorney General in upholding the rule of law".

It was understandable that the question of the rule of law should be debated in the context of the possible abolition of the role of Lord Chancellor but it was odd that not more was said about the Attorney General and his role. After all it is the Attorney General and not the Lord Chancellor who advises the Government of the day on the law. The Attorney General also, for example, has

a special duty in relation to the propriety and compatibility of legislation with ECHR and other obligations. It is the Attorney General who has been called upon by Parliament and the judges to exercise functions in the interests of the rule of law and, indeed, it is in that capacity, that I have examined cases of potential miscarriages of justice, such as the nearly 300 convictions for infant homicide which I caused to be reviewed following Court of Appeal doubts about the safety of some convictions based on medical evidence of infant deaths and shaken baby syndrome.

The creation of the Ministry of Justice has significantly increased, in my view, the importance of the Attorney General in this field. It is clear that the Ministry of Justice is now a major policy department and its Secretary of State and therefore Lord Chancellor need no longer be a lawyer. I believe the department is well served by the present Lord Chancellor and Secretary of State for Justice. But one needs to plan for structures and not for individuals. I believe it critically important that there is a senior lawyer at the heart of government and in the circumstances and these changes the only candidate for that role is the Attorney General. For better of worse government operates in a world where the law, and the need for the rule of law, plays an increasingly important role. It is necessary to mention only such issues as the balancing of individual rights against collective security, measures to combat terrorism, data protection, freedom of information, devolution and other constitutional change, the growing importance of institutional law and many others. These issues bear upon every aspect of government. It is right that there should be a lawyer at the heart of government to deal with them and to ensure that the law is properly respected.

I also believe that the role of the Attorney General is important in effecting changes to the way the criminal justice system is developed. A major change has occurred, for example, in the role of the Crown Prosecution Service. These are very large changes in the role, responsibilities and resources of the Service

of which the cornerstone is the reform that makes the Prosecutor the decider at point of charge whom and with what to charge rather than the police. I do not believe these changes would have occurred without a minister as the champion of the prosecutors and a separate voice for them.

It is at this point that I have a particular criticism of the Constitutional Affairs Select committee report. I have, as I have made clear, a number of criticisms but I particularly take issue with paragraph 77 of their report. In that paragraph they say that they note my claim that it is "necessary to have a lawyer at the heart of Government but we question the merits of this claim." They go on the say "the inept handling of the beginning of the process of reform which culminated in the Constitutional Reform Act 2005 and the secretive process of establishing a Ministry of Justice, which was trailed in the newspapers before consultation, either of the Judiciary or the Lord Chancellor, were seemingly unaffected by the presence of lawyers within cabinet.

I share their dissatisfaction at the way both those events took place. But it is a false conclusion to draw that those events happened because there were lawyers within cabinet. The problem was that those lawyers were not consulted on either of those changes. The proper conclusion to draw would have been that, instead of weakening the position of the Attorney General as the committee proposed, it should be strengthened so that it became absolutely clear that major constitutional decisions of that kind should not be taken without fully consulting the Attorney General of the day. That did not happen on either occasion with the results that were seen. If the committee had chosen to put this particular point and possible conclusion to me, which so far as I recall they did not, they would have received that answer.

Let me conclude. I have termed this lecture "independence – myth or mystery". It will be apparent that my clear belief is that the independence of the law officers is not only a reality but is an essential reality for the proper governance

of this country. It may well be, however, that not enough has been done in order to unveil the mystery of that independence. Although I, as my predecessors, have attempted to explain the role we may not have done enough. That is why I hope that when the Government makes it final analysis of what steps to take it will reach the conclusion that less change is necessary than some commentators – often those with less hands on experience of what the job is – suggested. But that the changes which are made will have the aim of making the role of the Attorney General stronger and not weaker. Lord Denning would have added that the law will still be above the Attorney General. Of course that is true. It has been the law and not party politics that has been the guiding light for the law officers before me, as it was for me, and as it should be for the law officers who I hope are to come.

Lord Goldsmith is now European Chair of Litigation at Debevoise and Plimpton LLB.