THE ABOLITION OF THE OFFICE OF LORD CHANCELLOR: 10 YEARS ON

Note of Seminar held at Queen Mary, University of London

12th June 2013

1. Introduction

This is a note of a seminar held on the tenth anniversary of the dismissal of Lord Irvine as Lord Chancellor with the aim of reconstructing the events of 12

June 2003 and analysing the constitutional change that followed in the Constitutional Reform Act 2005. The seminar took place at Queen Mary, University of London on 12

June 2003. The seminar was the ninth in a series run under the auspices of a 3-year AHRC-funded project on The Politics of Judicial Independence in Britain’s Changing Constitution by the Constitution Unit at UCL, Queen Mary University of London and the University of Birmingham. Those participating had a professional interest in the issue, with contributions from senior and former politicians, judges, civil servants and others. The event was run under Chatham House rule and this short note reflects that. It is intended to give a general impression of the seminar.

2. This week ten years ago...

There were four components to the reforms announced on 12 June 2003.

1. The constitutional changes themselves: the creation of a Supreme Court, the creation of an independent system for judicial appointments and the creation of a new Lord Speaker in the House of Lords, together with the abolition of the office of Lord Chancellor itself.
2. The creation of a normal government department to replace the Lord Chancellor’s Department that was capable of delivering the government’s reform agenda.
3. Getting rid of the territorial secretaries of state for the devolved jurisdictions.
4. The politics of the reshuffle: the desire for a more united Cabinet.

There was no public consultation prior to the announcement, although Lord Irvine and the Permanent Secretary of the Lord Chancellor’s Department had known that it was proposed to abolish his role for about a week and had been engaged in behind the scenes negotiations to preserve Lord Irvine’s involvement in the changes. During these negotiations it became clear that the Prime Minister would insist on the changes. Lord Irvine and his Permanent Secretary prepared a minute explaining the difficulties and how the changes could be achieved and Irvine offered to stay on to shepherd the changes through. However, the Prime Minister felt that Lord Irvine’s support for the reforms was half-hearted and so the role was given to Lord Falconer.

Some civil servants believed that the changes would be greeted with acclamation by the judiciary, but had underestimated their innate conservatism. The lack of prior consultation was the main source of worry to the judiciary, who felt ambushed by the sudden constitutional changes. The senior judiciary were at an away day at a country house with civil servants when the changes were announced. The Lord Chief Justice received a telephone call explaining that the Lord Chancellor was to be abolished. The changes were explained to the senior judiciary while they huddled, very annoyed, around a single telephone in a pub.
The use of announcement rather than a consultation was quite deliberate and was done for tactical reasons. A proposed change in 2001 which would have placed part or all of the courts system under the management of the Home Office had been defeated by the judiciary at the early consultation stage. The Lord Chief Justice at the time, Lord Woolf, exercised his right to see the Prime Minister about the changes and made it clear that the judiciary were very strongly opposed. Some considered that the 2001 reforms were always doomed because they were poorly thought out. They would have placed control of the courts under then Home Secretary David Blunkett, not known for his sympathy for courts and the judiciary, but left the Lord Chancellor in the Cabinet as the head of the judiciary. Constitutional change on a wider scale was necessary to effect this kind of change.

The 2003 changes were announced without prior warning as a means of pre-empting an early judicial response and preventing the new package of reforms from being defeated at the consultation stage. The Department of Constitutional Affairs, when it was created in 2003, reflected much of the changes that would have been made in the abandoned 2001 reforms. Indeed, to some extent the defeat of the 2001 reforms sowed the seeds of the 2003 reforms because many of the functions that would have been transferred to the Home Office were given to the Lord Chancellor’s Department, making that department even larger and exacerbating the perception that the department was not fit for purpose.

3. Analysis

The reforms of 2003-5 were not simply about personality – about the deteriorating personal relationship between Tony Blair and Lord Irvine – or even about changes to the office of Lord Chancellor but about wider government policy. The judiciary have always seen the changes of 2003-5 as being about the courts and judicial independence but for the government they were about departmental structure and policy delivery. There was growing frustration with the Lord Chancellor’s Department as a large department with a big budget but poor management. Lord Irvine was asked at one point during the discussions prior to the announcement how often he visited Selbourne House (the home of his Department). His response was ‘never’. This would not have been unusual for past Lord Chancellors, who traditionally based themselves in the House of Lords, but it had become unacceptable. From the Prime Minister’s perspective the most important aspect of the change was that the Lord Chancellor’s Department should be replaced with a normal and fully functioning government department that could bring in the reforms that the government was looking for.

The real change to the office of Lord Chancellor has not been that the office has ceased to be held by a judge or lawyer, but that it is no longer held by a senior politician at the end of his or her career. Because the role now combines responsibility for prisons with that of the courts, new-style Lord Chancellors are increasingly likely to be ambitious mid-career politicians. However, although judges often lament the loss of the old Lord Chancellor who fought the judges’ corner in Cabinet and hark back to a ‘golden past’, several non-judicial speakers were anxious to point out that they felt that this view mythologised the old Lord Chancellor. Whilst some Lord Chancellors in recent decades have been powerful figures, this has largely been due to their own personal standing rather than the office itself. Even a respected Lord Chancellor like Lord Mackay from a judicial background still enraged the judiciary with his reforms to pensions and the legal profession, with Lord Lane comparing him at the time to Hitler.
The constitutional reforms of 2005 have not affected the quality of judicial appointments or the administration of justice. With the exception of the abolition of the Lord Chancellor’s Department itself, however, they were not done with a view to changing outcomes. The reforms were in part to make the constitution more explicable and democratic and in part to facilitate better administration by government of the relationship with the judiciary.

Despite appearances, the office of Lord Chancellor was to all intents and purposes abolished in the changes of 2003-5. There is an official that remains called the Lord Chancellor, but it is nothing like what went before and has no judicial role. The retention of the name owes much to the House of Lords which, outraged by the manner in which the change was announced without consultation, was determined to have its pound of flesh and to retain the name ‘Lord Chancellor’. Often ignored is the effect that the removal of the Lord Chancellor’s role as speaker of the House of Lords has had on that institution. The Lord Speakers who have presided over the Lords since 2005 have been diminished figures who have not commanded the same respect as the Lord Chancellors of old.

Some participants were insistent that the retention of a vestigial form of the Lord Chancellor has become a constitutional problem. It would be better now to unravel the rather odd legacy functions that the Justice Secretary exercises when he acts as Lord Chancellor, and stop pretending that the Lord Chancellor still exists, so that we have a proper separation of powers and a system that is logical.