LSE Law Department 'Officers of the Law' public lecture series

Constitutional continuity: Jack Straw speech at the London School of Economics

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London School of Economics

Jack Straw has given a speech about his role as Lord Chancellor in a modern democracy: 'Ultimately my duty is to justice, and to the taxpayer. Far from serving both ends being mutually exclusive, it is, and has to be, mutually supportive.'

[Check against delivery: this is the prepared text of the speech, and may differ from the delivered version.]

The Right Honourable Jack Straw MP, Lord Chancellor and Secretary of State for Justice:

Introduction

It is a pleasure to be here, and to contribute to the LSE's Officers of the Law series. In preparation for this speech I looked back at some of the previous lectures and I think that an important body of work is developing around the intersection between the political and the legal spheres.

The complexity of the relationship between politics and the law is no more clearly demonstrated than in the person of the Lord Chancellor. I have held this ancient office for more than 18 months now, during which time I have been able to take stock and to consider the nature of the role, its history, its future.

It is from this perspective that I would like to offer some observations, as the first of a different type of Lord Chancellor, post the 2005 Constitutional Reform Act which broke up the historic holy Trinity of roles, and following the establishment of a Ministry of Justice, which in June 2007 created one of the largest Departments of State.

The last time a Commoner - a sitting MP - was appointed Lord Chancellor Elizabeth I was on the throne, the Armada was defeated, and a young actor and playwright called Shakespeare was just beginning to make a name for himself across the London stage.

It was more than 400 years later, in June of 2007 that another Commoner assumed the post when in front of Queen Elizabeth II I took my own oaths of office.

Sir Christopher Hatton who held office from 1587 to 1591 is better remembered for his dashing good looks and for his dancing than for his place in the pantheon of Lord Chancellors, but what this 400 year gap demonstrates is the astonishing continuity of this role.

Unique constitutional role

The Lord Chancellor has always occupied a position unique to this country's constitutional arrangements. Indeed, it may only be due to the flexibility of our largely unwritten constitution that

such an anomaly has been able to develop, even to thrive. What is remarkable is that it has endured throughout the vicissitudes of our history, and remains very much a working and not titular office. The precise nature of that role, however, has waxed and waned over the course of many centuries.

The shelves in the Ministry of Justice library sag with the combined weight of Campbell's 10 volume opus, chronicling the life, times and contributions of my predecessors. I will avoid doing a disservice to that extraordinary work of scholarship by trying to summarise it in 5 minutes this afternoon. Suffice it to say that the relationship between political, legal and judicial roles has constantly evolved: from the high-water mark of the all powerful Cardinal Wolsey, to the Victorian Lord Chancellors who were pre-eminent in law, and the most well-respected and influential judges in the country but who were politically less significant, carrying little weight in either Cabinet or Parliament.

Whether as a judge or as a politician, Lord Chancellors throughout the ages have shared what the late Lord Cooke of Thorndon described as a 'special legacy'. [Official Report, 11/10/04; col. 38]

The Lord Chancellor has duties which go beyond those of a Secretary of State, they have a further responsibility other than to Cabinet, and a concern which goes beyond departmental interest. That is a duty to serve the interests of justice, to protect the rule of law and the independence of the judiciary.

But what was apparent by the end of the 20th century was that an unreconstructed office of Lord Chancellor would not be acceptable in the 21st.

Changing nature of Lord Chancellors

I do not suggest for one moment that the appointment of a Commoner represents a year zero, before which nothing. Rather, it was the culmination of a significant period of change to the role conducted by my three immediate predecessors.

When the next volume of the Lives of the Lord Chancellors is written, Lord Mackay, Lord Irvine and Lord Falconer will be recorded as three of the great reformers.

James Mackay, himself a former Lord Advocate of Scotland, transformed the civil courts through the Woolf reforms which helped move what was principally a 19th century system into the present.

Derry Irvine in turn, a very different type of Lord Chancellor, was a more political animal than his predecessor. As well as an estimable figure in the law, Derry was an active and influential Cabinet Minister, responsible for a broad programme of constitutional renewal, and furthering reform of the legal profession.

Charlie Falconer is perhaps the last of the old-style Lord Chancellors – the last to sit on the Woolsack, as Speaker, and whilst he declined to sit as a judge, he remained head of the judiciary until the Constitutional Reform Act, which he promoted and worked tirelessly to achieve, passed that responsibility to the Lord Chief Justice.

The negotiations around the Constitutional Reform Act illustrated quite how deeply ingrained the office of Lord Chancellor has become in the fabric of our constitution, and demonstrated the importance of preserving the role albeit in a new guise, more appropriate for a modern democracy.

But a further achievement for which Charlie will be rightly remembered as a moderniser is the creation of a Ministry of Justice. He fought hard to bring it about, in the selfless knowledge that it would be impossible for the Secretary of State to remain in the Upper Chamber.

Taken together the reforms of the past 25 years have changed fundamentally the character of the Lord Chancellor's role and the balance of his responsibilities.

Executive

Much of the analysis of the role of Lord Chancellor has centred around his historic constitutional position at the intersection of the three branches of state. Far less has been said about his responsibilities as a Government minister, and head of a major spending department. It is to this I want to turn next.

In part, this is because such responsibilities are relatively new:

In 1939 the Lord Chancellor's Department comprised 13 people.

In 1969, other than administrative staff, all officials were lawyers.

In 1999 it was still prescribed by law that the Permanent Secretary had to be a barrister or solicitor of at least 10 years standing.

Now, in 2009, the Ministry of Justice employs some 80,000 staff, and has a budget of more than £10 billion; the Permanent Secretary is an economist from the Treasury.

There had been a steady accrual of administrative functions since the 1971 Courts Act gave the Lord Chancellor responsibility for the administration of the High Court, Crown and County courts.

But the effect of the creation of the Ministry of Justice is far greater in both significance and magnitude - with the addition of prisons and probation, the management of a vastly increased budget, and broader policy responsibilities for the justice system as a whole.

Such is the scope and mandate of this new department, so large the budget and so 'political' the policy areas that its head had to be an MP, subject to the greater degree of scrutiny and accountability that goes with it.

When I was appointed to the Office, there was a degree of disquiet at the prospect of a 'street politician' fulfilling such a vital constitutional function. The fear, which I hope and believe is unrealised, was that the pressures associated with being an MP, of representing a constituency, of operating in the full glare of public and media scrutiny could make the Lord Chancellor more prone to act out of populism than principle. Or to rob Peter to pay Paul, by borrowing from the legal aid or courts budget, for instance, to fund prison places. Or be less inclined to act as the 'guarantor or watchdog of legality at the heart of the constitution' [Lord Cooke Official Report, 11/10/04; col. 38].

I may sit in a different place from my predecessors but that does not mean I do not hold to the same enduring values and principles, nor does it mean I take my responsibilities any less seriously.

I repeated my oath of office with the same great weight of history and reverence as any Lord Chancellor before me.

However, with increased executive responsibility and control of such a significant budget comes the need for even greater attention to providing value for money for the taxpayer. With it also comes the duty to ensure that justice itself is accessible and affordable.

Legal aid

A critical element of this duty – and one of the single biggest areas for which I am responsible – is the provision of legal aid. This is something many Lord Chancellors before me have looked at. Indeed, they have played a pivotal role in the development of legal services and the legal profession.

Legal aid now has become the subject of focus for two linked reasons.

First, the pressure on all public services to deliver more for less, due to the prevailing economic downturn and the fiscal squeeze. Indeed, there is a particular onus on the legal services during a recession, as more people need legal advice to help them with debt, redundancy or housing problems. In light of this, an extra £13million has been made available to fund these types of cases. And we have put in place a scheme to provide free advice and representation for those in danger of losing their home.

Second, the astonishing growth both in the overall legal aid budget, and the number of lawyers and law firms dependent on the State and the taxpayer.

In England and Wales we have the best funded legal aid system in the world. We spend £38 per head of population on legal aid. That amounts – in England and Wales - to a total budget of more than £2 billion per year. That is the same amount as we spend on prisons - on housing, clothing and feeding 83,000 prisoners, and employing 48,000 prisons staff to manage them and keep them secure.

I want to dwell for a moment on these figures. I know that comparisons with international jurisdictions can never be absolutely precise. Each justice system has its own vagaries. However the scale of the difference in legal aid spending between here and abroad is compelling. In Scotland and Northern Ireland the figure is around £31. In New Zealand and Canada – which have justice systems not dissimilar to our own - they spend around £10 per head. In European jurisdictions the difference is even greater: in the Irish Republic £7; in Germany £4; in France £3; in Sweden £1.

The rate of growth in the legal aid budget has also been extraordinary, up from £536 million in 1982 (in today's prices) to around £2 billion today – which amounts to a real terms increase of 5.7% per year. Through our recent reforms we have secured much greater control over legal aid expenditure. But prior to that legal aid grew faster than any other comparable public service over the past quarter-century; faster than social services, faster than education, faster than health.

So too has the number of practising lawyers increased at a considerable rate; more than doubling over the past 20 years. The amount of work available, however, has not. When I was called to the bar in the early 1970s, there were in practice just over 2,500 barristers and around 32,000 solicitors, now those figures are 15,000 and 108,000. In the UK, we have a population of nearly 61 million, meaning that there is roughly one lawyer for every 400 hundred people. India is often considered to be a highly litigious nation. But with its population of 1.2 billion they have around 800,000 lawyers; 1 in 1500.

Meanwhile, 50% of legal aid (in the Crown Court), is consumed by just 1% of cases. I suggest that unless we get a better balance in legal aid - to borrow President Carter's formulation - we are in

danger of becoming 'over-lawyered and underrepresented' [4 May 1978 – Remarks at 100th Anniversary Luncheon of the LA County Bar Association]'.

Legal services

I hope that everyone – taxpayer and lawyer alike – will accept that the growth of spending on legal aid seen in the early part of the decade and before is no longer sustainable; hence our moves to extend fixed and graduated fees as a precursor to best value tendering. For law firms to survive they will have to look to how they are structured and how they operate. The introduction of the Legal Services Act has meant that new opportunities are there for firms who are able to adapt to the changing demands of the new legal market-place. Currently, 80% of all legal aid is carried out by firms with fewer than 4 partners, and nearly a third is undertaken by sole practitioners. But no firm, large or small, will be able to stand still in the face of the innovation which new business models will be able to bring.

This may well mean lone practitioners joining together, or smaller firms growing larger. Often I hear concerns expressed that having fewer individual practices will lead to a reduction in people's access to justice. But here I think access is at risk of being confused with physical proximity. People have grown used to a far wider range of telephone and internet based services – and demand more rapid and convenient access to services, but not necessarily an office on the street corner.

A further question individual practices need to consider is whether or not all of the functions currently carried out by qualified solicitors and barristers need always to be carried out by them.

In the health service, some hospitals have reduced waiting lists by having physiotherapists run outpatient clinics for orthopaedic surgeons. The patient is still seen by a professionally qualified person, who is able either to treat them immediately or refer them swiftly in cases where genuine surgical help is needed. There is therefore more rapid treatment for both routine and urgent cases, with each receiving a proportionate intervention. As paralegals take on more responsibility, as the legal executive profession develops, there should be scope to do more, quicker and at lower cost without standards falling.

And there is scope to achieve the same thing by working in larger units with better managerial and clerical support. Look at how one goes about getting a new pair of spectacles. Few and far between are lone high street opticians, with expensive overheads and limited bargaining power when it comes to suppliers of frames or lenses.

Now opticians' services tend to be provided by larger chains, which benefit from substantial economies of scale, which in turn is passed on to the customer. We are still seen by highly skilled opticians, but the customer benefits from the savings which accrue from more efficient procurement, and better systems and processes – including for instance using sales people rather than qualified opticians to help choose our frames. The important factor here is that there has been no decline in the quality of the clinical service – the opticians we see are just as well qualified as they ever were and they see more people, more quickly because they do not spend their time manning the till. And there has been a marked increase in the level of customer service overall.

Whilst I appreciate that these are obviously very different professions, I see no reason why a similar principle should not apply to how legal services reliant on public funding are structured. I would suggest that the number of law firms is not necessarily a proxy for access to or quality of justice.

And that's not purely a question for publicly funded firms – I hope that the advent of Alternative Business Structures will generate similar innovation benefiting those above the legal aid limit who still do not find it easy to pay for the advice they need when they need it.

Legal aid is the one of the largest public services delivered by the private sector, but there is an issue as to whether the legal services industry that provides it has been through the same process of reform, or subjected to the same market pressures as other industries.

Over the course of a generation, the delivery of public services has been transformed, from bin-services, to schools, to hospitals. The twin approach – indeed from the past two governments, Conservative and Labour – has been to set measures and standards, subject to independent and proportionate regulation, but also to challenge efficiency in the public sector by allowing competition from private sector providers.

In large part, of course, standards flow from the profession itself. But totally free-standing professional self-regulation no longer carries public credibility. That's not unique to the legal profession – it is a fact of 21st century life to which the profession and Government have had to respond. That's why we have set up the Legal Services Board with its remit of improving access to justice, ensuring the highest regulatory standards, improving redress for people when things go wrong and, above all, guaranteeing proper independence in regulation.

There is a very particular problem, however, where a public service has always been delivered through private contractors, especially when those contractors have been through small firms or single operators. I'm talking here about GPs, dentists, lawyers. At best they offer fantastic care and value for money, but monitoring and maintaining of levels of service is inherently difficult. At worst, they can display a high level of ingenuity in how they make use of the system of payment, or on rare occasion, outright exploitation.

So the publicly funded legal profession needs to take an ever closer look at itself, consider the service it is providing and think about how it is viewed in the eyes of the public.

Earnings expectations

At the moment a very public and highly charged debate is taking place about the size of City salaries.

Whilst I am not drawing any equivalence in salaries or justification between publicly paid lawyers and bankers, I think that there still needs to a similar debate about how much lawyers should be able to draw from the taxpayer. I know that many legal aid lawyers, like many staff in high street banks, have earnings comparable to people in the public sector itself. The work that they do is incredibly important, and they do it out of the best traditions of both the law and public service. But for others, particularly at the top of the profession, and sometimes also in the middle ranks, the picture is very different and there is an expectation that they should receive rewards comparable to those in private practice. Two years ago, Geoffrey Vos QC, then Chairman of the Bar, said that the time had run out for the £1m a year barrister, but the forthcoming announcement of the highest paid legal aid barristers in the country will provoke just this sort of debate and will lead some to wonder how long it takes for that change to arrive.

There is certainly nothing ordained by the Almighty which says that of those paid for by the public purse, lawyers should be any higher than other professions.

Lawyers and law firms who are dependent on state funding – and I emphasise dependent, as there are many whose existence relies exclusively on the public purse – would be wise to reconsider expectations of earnings. Those in exclusively private practice will be doing so, as market disciplines and the impact of the economic slowdown hit home.

Successful legal business may be a by product of law – and the public will be increasingly better served as law firms become more business like in responding to consumer needs - but it is not the purpose of law.

The law is an honourable profession, it has an importance, an appeal and an attraction which goes far beyond the financial. There is a commitment to uphold the rule of law and improve access to justice which are among the most admirable qualities of the profession, and a code of professional ethics which binds the legal system together. These are things which need to be cherished and preserved.

There is an integrity to our legal and judicial system which I know from my time as Foreign Secretary is not by a long way a luxury afforded to every nation. By and large our lawyers are of the utmost probity, honesty and professionalism.

I think it is entirely proper that lawyers are paid decent rates; indeed it is essential to justice that high quality legal representation is preserved.

It is therefore squarely in the interests of justice that we are working to make it more affordable, not merely an exercise in cost cutting as some would characterise it. Fundamental here is to work with the profession on the wider structural changes which are required – mobility and diversity within the profession, and proper independence in its regulation as well as the structure of the legal aid system - rather than reducing the argument down to how much lawyers should be paid from legal aid on a case by case basis.

Ultimately my duty is to justice, and to the taxpayer. Far from serving both ends being mutually exclusive, it is, and has to be, mutually supportive.

Conclusion

Lord Chancellors have often been the stewards of change to the constitution and so, too, the operation of the courts and the legal profession. But as the first of a new breed of Lord Chancellors, I have a different set of immediate responsibilities to many of my predecessors. That includes an even greater duty to provide value for the taxpaying public, whether that is in determining how prison places or legal services are provided.

In many respects, I am a Secretary of State and Cabinet Minister like any other. But in other regards the Office of Lord Chancellor is unique - there is a duty to that office and to what it represents – to its history, its standing and to the expectations that come with it.

Lord Irvine, I suggest, captured this essence;

'Lord Chancellors come to the office imbued with the values that underpin our democracy: the rule of law; freedom under the law; the independence of the judiciary from any Executive interference… for any Lord Chancellor, these values would be armour against Executive mindedness or Executive pressure'.

In the actions I take and the decisions I make, I am mindful of the 'special legacy' of which I am part, well aware of the vital constitutional position of the Lord Chancellor and of my supplementary duty to uphold the rule of law, and to act in the interests of justice.

A modern Lord Chancellor needs, therefore, to combine the increased demands which come with greater executive responsibilities with the historic function of the role.

Yet it is critical to the health of a modern democracy that reverence and respect for history and traditions should not stand in the way of progress – this applies every bit as much to the legal professions as it does to Officers of the Law. This balance is something with which Lord Chancellors throughout the ages have had to grapple – from Wolsey, to Hatton, to Haldane, Irvine and Falconer. And it is something which will long continue to characterise the office and those who hold it.