

Hailsham Memorial Essay Prize 2002

This is an edited version (without footnotes) of Richard Stevens' essay, which won him the 4 Paper Buildings Hailsham Memorial Essay Prize 2002.

Lord Hailsham of St. Marylebone occupied the office of Lord Chancellor twice in the 1970s and 1980s and before then was Head of Chambers of 4 Paper Buildings, now Hailsham Chambers. This inspired the subject of the 2002 essay prize.

Theme: Should the Lord Chancellor have a political as well as a judicial rôle?

Lord Hailsham once recalled how often, as Lord Chancellor, he was confronted with the apparent conflict between the Montesquieuan mantra of the separation of powers and his 'membership of all the three so-called branches of Government'. To some, the fact that the Lord Chancellor had a finger in the executive, legislative and judicial pies compromised that office's constitutional propriety. As Austin Mitchell MP quipped: 'His three-in-one role could perhaps be performed by the Almighty, but it is something of a difficult role for a mere mortal, which I understand the Lord Chancellor is'.

Mitchell may not have known it, but Lord Hailsham had provided an analogous rationale for the office's multi-functional nature. The Lord Chancellor might resemble the Holy Trinity but this, he reasoned, concealed an advantage: 'Unlike the Holy Trinity, he is only one person, and because he is only one person discharging various functions he is the only practical guarantor of the independence of the judiciary from political interference'. The Lord Chancellor's membership of Cabinet was a way of preserving, not undermining, judicial independence. The political role of the Lord Chancellor meant that the judiciary could defend its constitutional corner without having to engage itself directly.

This is a rather defensive analysis of the Lord Chancellor's political role. Arguably, it simply describes his *constitutional* role, with the office's political status being – paradoxically perhaps – a key part of it. What of a Lord Chancellor assuming a more overtly political role? We might remember that Lord Hailsham himself is a figure as familiar to political historians as to constitutional lawyers. As Quintin Hogg, his early publications were instrumental in stoking up political debate on the desirability of the postwar consensus. He was a salient figure of twentieth-century Conservatism. Hugo Young, Margaret Thatcher's biographer, has remarked: 'Truly does Hogg go back... penetrating the life of every leading Conservative for the last fifty years.'

Yet, as his son has noted, Lord Hailsham sought to put this aside when he became Lord Chancellor. In doing so, he tried to stay true to his belief that the Lord Chancellor's political role was necessary only in so far as it enabled him to keep politics and the judiciary at a proper distance. Hence despite being a long-serving member of one of the most overtly partisan Cabinets of modern times, Lord Hailsham put his politics on the back burner. Hugo Young's contention is that it was his ultimate successor as Lord Chancellor, Lord Mackay, who administered the 'Thatcherite medicine' in his sphere of influence – although the latter is not known as a 'politician's politician'.

So why has concern about the validity of the multi-functional office of Lord Chancellor grown in the last few years? It has been stimulated not only by Lord Irvine's flamboyant occupation of the office but also by New Labour's legislative agenda. The Human Rights Act 1998, in particular, exposes an acute tension between the Lord Chancellor's political and judicial roles. Before looking more closely at that tension and its implications, the nature of those roles needs to be identified a little more precisely.

The 'political' role of the modern Lord Chancellor can be subdivided into its executive and more overtly political functions. The former is relatively uncontentious. It involves, as Lord Mackay has said, representing the vital place of the law in the affairs of government. The Lord Chancellor is at the helm of a medium-sized spending department, and must ensure that it is adequately resourced and effectively managed. On top of this are various ad hoc duties.

More contentious is the second, overtly political element of his role. It is to this element that the accusatory glances of the office's critics have been directed in recent years. Professor Woodhouse cites the present Lord Chancellor's taste for the membership of Cabinet committees as being indicative of the growing politicisation of his office. Lord Irvine's tenure has seen the Lord Chancellor assume a higher profile in government. This might be explained in part by the long personal and professional links maintained between Lord Irvine and the Prime Minister. Whatever the personal dynamic of that relationship, it is clear that Lord Irvine is seen by most commentators as possessing aspirations of an unusually political hue. This distinguishes him from predecessors who either had little interest in politics, or who, like Lord Hailsham, suppressed their strong political inclinations upon assuming the office.

Arguably, this state of affairs is not inherently problematic. The scope of the current Lord Chancellor's political role may be unconventional but it is not unconstitutional. Yet the important point is that the Blair government's legislative agenda has pitched the Lord Chancellor's political role somewhat awkwardly against his judicial role.

That judicial role is significant. The Lord Chancellor is president of the Supreme Court, a member of the Court of Appeal (ex officio) and president of Chancery. More importantly, he can sit on the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council when he so chooses. Lord Hailsham was particularly active in this sphere. In contrast to Lord Elwyn-Jones (1974-1979), who gave only one important judgment (in *R v. Majewski*), Lord Hailsham gave judgment in 60 of the 72 appeals he heard after first assuming office in 1970. The justification for the Lord Chancellor's judicial role is well known: it allows him to keep a finger on the pulses of both Bench and Bar. It has not in the past proved too controversial; but recent constitutional legislation has changed the situation.

The 1998 Human Rights Act best illustrates the point. It has proved to be an unusually divisive piece of law. For some, the incorporation into English law of the European Convention for the Protection of Human Rights and Fundamental Freedoms marks a higher form of legal protection for British citizens, surmounting the tyranny of 'democratic' majoritarianism. For others it is the new constitutional *bête noire*, at best an irrelevance and at worst a cynical piece of legislation more important for its form than substance. Whatever its merits, the Act has profound

implications for the Lord Chancellor's judicial role. Article 6 of the Convention is the crux of the problem. It provides for the right of litigants to a fair hearing before an independent and impartial tribunal. As an appointee of the Prime Minister and a member of Cabinet, this raises clear difficulties for the Lord Chancellor sitting as judge.

An indication of how this problem might manifest itself came with the judgment of the European Court of Human Rights in *McGonnell v. United Kingdom* (2000) 30 E.H.R.R. 289; [2000] 2 P.L.R. 69. The case concerned the validity of the judicial role of the Bailiff of Guernsey who, like the Lord Chancellor, also has political functions. The Court's judgment contained some classic separation of powers concerns: 'any direct involvement in the passage of legislation, or executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute'. Lord Irvine has denied the case's wider relevance. Yet the point remains that 'constitutional' legislation like the Human Rights Act exposes a tension between the Lord Chancellor's political and judicial roles that cannot easily be ignored. Denying the validity of a separate category of constitutional legislation over which different judicial rules must apply simply sweeps this tension under the carpet.

Recent developments therefore require an urgent answer to the question: should the Lord Chancellor have a political and judicial role? Lord Hailsham's view that politics should be put to one side when a Lord Chancellor assumes office no longer seems sufficient. Perhaps after the passage of the Human Rights Act it can never be so again. The office's critics have produced fresh proposals for its reform. The traditional solution has focused on the need to curtail the Lord Chancellor's political role, usually augmented by the suggestion that a Ministry of Justice be established, which in turn would mean more accountability for legal policy in the House of Commons. Professor Woodhouse argues from a different angle. With the Lord Chancellor's judicial role compromised by 'constitutional' legislation, she proposes that he should stop sitting as a judge. From this it follows that his role in the judicial appointments process should cease.

The logic of such proposals leads, of course, to a more dramatic conclusion: that the office of Lord Chancellor has no place in the modern constitution and should be abolished. Both Professor Brazier and Professor Woodhouse are explicit on this point.

The idea that the incompatibility of the Lord Chancellor's political and judicial roles undermines the *raison d'être* of the office itself is fast becoming the new orthodoxy. But, on the analysis given above, a note of caution is suggested. Lord Hailsham's argument – that defending the independence and integrity of the judiciary means having a place at the centre of the political system – is not so easy to cast aside as some of the office's critics imply. It has a solid rule of law foundation. As Lord Schuster put it in 1943, 'in England, with an unwritten Constitution and an unwritten common law, unless there is some link or buffer (whichever term may be preferred) between the two elements the situation would be perilous.' This quotation shows that Lord Hailsham was not alone in espousing the merits of a multi-functional Lord Chancellor. Lord Irvine has himself invoked it in defence of the office. But Lord Hailsham remains the most forthright advocate of the idea.

So should the Lord Chancellor have a political and judicial role? With the idea of the Lord Chancellor as constitutional 'buffer' in mind, the answer is a qualified 'yes'. The qualification is that both roles need to be more tightly defined, to prevent the ambiguous tension that has arisen

in recent years. Arguably, the Lord Chancellor's judicial role should be limited to private law cases. He should be excluded from hearing those cases where the government has an interest through legislative coincidence or design, especially those involving the Human Rights Act and devolution disputes. The necessary corollary of this is the recognition of a category of 'constitutional' cases. Furthermore, the Lord Chancellor's political role should be divested of its more overtly politicised elements, such as the intense involvement with Cabinet committees. A more radical solution would be for the incumbent to be a non-political appointee, selected perhaps by members of the judiciary rather than by the Prime Minister. But such a solution, like proposals for the abolition of the office itself, are not entirely within the realm of practical politics.

The Lord Chancellor, then, should not be a politician but should have a political role. Such a role, as Lord Hailsham argued robustly, serves the constitutional purpose of keeping executive and judiciary at a respectable distance. In considering any reforms of the office, that purpose should not be overlooked.

*Richard Stevens was at the Oxford Institute of Legal Practice and is now a trainee at Clifford
Chance LLP*