

## United Kingdom's judicial system undergoes major reform

by Sally J. Kenney

On June 12, 2003, at 5:45 p.m. Prime Minister Tony Blair fired his long-standing Lord Chancellor, Derry Irvine, Lord Irvine of Lairg, and announced that he would abolish the position of Lord Chancellor. For the months it will take to legislate the changes, Lord Falconer of Thoroton, the new Secretary of State for Constitutional Affairs, will serve as Lord Chancellor.

Reports in the U.S. media highlighted the proposal to select judges through a judicial appointments commission and establish an American-style supreme court. The reality of this momentous change is more complex. Abolishing the office of Lord Chancellor is one of the most important constitutional changes of the last 100 years, and part of the Labour government's sweeping constitutional reform consisting of passage of the Human Rights Act, devolution (transferring power and responsibility to regional assemblies in Scotland, Wales, and Northern Ireland), and reform of the House of Lords. Also significant is the removal of a major roadblock to the appointment of women judges, and particularly the first woman on England's<sup>1</sup> highest appellate court more than 20 years after women served in the U.S. and Canada. But the demise of the Lord Chancellor also dismantles a huge concentration of power in the office, creates a system of more separation of powers, and modernizes

the legal system. Moreover, the event is significant for marking the exit of a larger-than-life political personality and a realignment of power within Blair's administration.

The 800-year-old office of Lord Chancellor represented the problematic case of a fusion rather than separation of political power and was gilded with all the trappings of royalty. The Lord Chancellor sat on the woosack in the House of Lords in his full-bottomed Speaker's wig. (In his statement to the House, Prime Minister Blair emphasized the Lord Chancellor's wearing of women's tights). He exercised legislative functions as the leader of the House of Lords and a sitting member as well as being a member of the cabinet and an advisor to the Prime Minister.

The Lord Chancellor has always been a barrister and he exercised judicial functions as one able to sit as a judge, and who, with almost no democratic accountability, appointed and disciplined all sitting judges. He exercised executive functions as the head of a 12,000-person civil service department that administers the judiciary. His department also determined who among the bar would earn the government's designation of Queen's Counsel (top 10 percent of the bar), allowing them to wear a silk robe and charge higher fees, and rendering them eligible for appointment to high judicial office.

But to describe the formal powers

of the Lord Chancellor would be to miss the high drama surrounding Lord Irvine as well as to miss the importance of his political power. Lord Irvine was the barrister who hired Cherie Booth, with her high first in law from London School of Economics, as a pupil in 1976. Somewhat unusually, however, Irvine took a second pupil at the same time, the less accomplished Tony Blair. At the end of the first year, Cherie and Tony were in love and later married, but Irvine offered only Tony a tenancy in chambers.<sup>2</sup> Irvine was unsuccessful in his single attempt to stand for Parliament (as was Cherie Booth), but he assisted Labour in a series of legal actions against the left of the party that earned him a peerage in 1987. Labour leader John Smith made him shadow chancellor in 1992.

As a close personal advisor of the prime minister and an early patron and mentor of both Blair and Booth, Irvine enjoyed unrivalled political

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1. The name of the country is the United Kingdom of Great Britain and Northern Ireland, which consists of four "nations," England, Wales, Scotland, and Northern Ireland. Citizens of all parts are called British and relations among the four parts have changed considerably as the Labour government devolves more power to regional assemblies. Scotland has long had its own separate civil law system and there is the lingering legal appellate structure of the Commonwealth. I use the terms United Kingdom, Britain, and England depending on the jurisdiction.

2. Such a result is not atypical, according to a recent statistical survey from the Law Society. "Although female graduates are more likely to obtain a first or upper-second class degree than men, when it comes to finding trainee placements men are more likely to find employment in larger firms and earn a higher average salary than their female counterparts (*Equal Opportunities Review*, 84 [March 1999] 10).

power and was perhaps the most influential Lord Chancellor of the 20th Century. In 1997, for example, he served on 7 of 19 cabinet committees, while his predecessor, Lord Mackay, sat on only three and chaired none (*The Lawyer*, June 17, October 28, 1997).

Flush with success as one of the architects of Labour's electoral victory, he compared himself to Cardinal Wolsey, Henry VIII's all-powerful Lord Chancellor. Widely regarded as arrogant, Irvine nevertheless weathered several significant scandals. He redecorated his state apartments with £300 a roll wallpaper, for a total cost of £650,000, and appropriated priceless works of art to hang there.

He was charged with cronyism in judicial appointments and soliciting contributions for the Labour party from prospective nominees. Later, *The Observer* charged him with cronyism in choosing barristers from his former chambers twice as often as others for governmental work, throwing them £1 million worth of fees (November 5, 2000). More recently he came under fire for granting himself a £22,000 pay raise. (Lord Falconer will not draw the £202,736 salary of the Lord Chancellor but the £96,960 of other secretaries of state. Alas, he will still have to wear the "women's tights" at the Queen's speech and had to borrow a full-bottomed wig for his first appearance in the House of Lords.)

Lord Irvine will have to make do on his £2.6 million pension package. He was vilified in the tabloids for his drinking, his salary, and his general pompousness while earning high marks from judges for defending judicial independence in cabinet.

### Constitutional reform

Lord Irvine led efforts for constitutional reform, but he blocked a judicial appointments commission, further reform of the Lords, and reform of the criminal justice system. Historically, the labour move-

ment has been very suspicious of courts because of judges' role in suppressing the trade union movement, and also because most judges were male, from upper-middle class families, educated in public schools (i.e. private), graduates of Oxford or Cambridge, and Conservatives.<sup>3</sup> Labour favored collective bargaining to legal protection and concentrating power in Parliament rather

too, needed to strengthen the courts as a check on government. The 1992 Labour Manifesto called for reducing the powers of the Lord Chancellor and creating a judicial appointments commission. When Labour came closer to assuming power, however, that proposal disappeared from the manifesto. Judicial appointments commissions now operate in Scotland and one is



Lord Chancellor Derry Irvine Lord Irvine of Lairg.

than courts that could undermine a Labour government.

But 18 years in opposition, combined with the increasing power of courts worldwide and in the international arena, and with their experience as members of the European Union, convinced many left-wing constitutional thinkers that Britain,

planned for Northern Ireland but not in England and Wales.

Blair's proposed reforms mark the end of the fusion of legislative and executive powers for both the Lord Chancellor and the Law Lords. *The Guardian* called it "The biggest single step towards the separation of powers in Britain since the Glorious Rev-

3. Griffith THE POLITICS OF THE JUDICIARY (1977).

olution more than 300 years ago” (June 14, 2003). First, the Lord Chancellor will no longer sit and be the speaker of the upper legislative chamber, the House of Lords (no more sitting on the wool sack). Instead, the Lords, like the House of Commons, will select its own speaker. Second, members of the highest appellate court will no longer sit as legislators. Confusingly, the House of Lords is the term for both the legislative and judicial bodies. The 12 judges (supplemented by 14 others eligible to sit on panels) on the highest appellate court, Lords of Appeal in Ordinary, that the Lord Chancellor has appointed as judges, become eligible to sit as legislators (alongside bishops of the Church of England) in the House of Lords (other sitting members of the House of Lords are not eligible to serve as judges).

Lord Falconer, the new Lord Chancellor and Secretary of State for Constitutional Affairs, is a childhood friend of Blair, a former flat mate, and a Queen’s Counsel. He was the minister in charge of the ill-fated Millennium Dome, and has also served as Solicitor General, Housing Minister, and, most recently, Home Office Criminal Justice Minister. Lord Falconer will not sit as a judge, a right Lord Irvine vigorously defended but rarely utilized. Having judges evaluate the legality of laws they participated in making as legislators or members of the cabinet has increasingly been seen to violate international separation of powers norms (in particular, at the European Court of Human Rights), and it was unlikely that the Lord Chancellor could have continued to exercise his power to sit as a judge.

### Judicial selection

The proposed reforms also represent significant changes in how judges will be chosen. Previously, the Lord Chancellor, with staff support from his department, individually made the choices. Members of Parliament were not consulted, nor was confirmation required. The one or two times Prime Minister Margaret Thatcher re-ordered her Lord Chan-

cellor’s shortlists were seen as major breeches of judicial independence. The system for high judicial appointments utilized consultations, known as “secret soundings.” The Lord Chancellor and his staff would consult (“sound out”) other judges and members of the bar to see if a candidate “was a good chap.” One need not be an employment discrimination lawyer to recognize the possibilities for abuse and the likelihood of what social scientists call “homosocial reproduction”—picking people who look like us. Moreover, many criticized this system for elevating those who were leaders in one of the four Inns of Court (benchers), from elite chambers, or simply known to sitting judges, rather than being a system of true merit.

In 1996, The House of Commons Home Affairs Committee released its report, *Judicial Appointment Procedures*. The hearings occasioned a large outpouring of submissions, more than 150 pages of evidence from groups ranging from the Equal Opportunities Commission to the Association of Women Barristers, from the Judges’ Council to distinguished academics. Despite the fact that many groups urged the Conservative-dominated committee to recommend a judicial appointments commission, the committee did not call for a radical overhaul of the judicial selection system. It did not call for abandoning the use of consultation but advocated making the system more objective. The overall conclusion: Stay the course of slow reform, tinkering at the margins with the existing system.



**One of the three white papers affecting the judiciary that were released in July.**

In March, 1999, Lord Irvine launched a new program to make judicial appointments fairer, which included more resources for officials to dedicate more time to developing equal opportunities policies, arranging for lay members to be involved in the initial short listing of candidates and interviews, and allowing lawyers to spend a day shadowing members of the judiciary to get a better insight into a judge’s role. But the rhetoric and the changes in the process did not change the results. After the Peach commission recommended in December of 1999 that there be a continuing independent audit of

4. *McConnell v the United Kingdom*, BHRC, (28 September 1999, 8 February 2000), *Starrs v Ruxton*, 1999 SCCR 1052; 2000 SLT 42. The Lord Chancellor sat only nine times in the last two years, and never in a case involving the government, but he did choose who sat on the panels in the House of Lords and Privy Council on such cases (*Financial Times*, June 14, 2003).

appointment procedures for judges, tribunal chairs, and QCs, the Lord Chancellor appointed Sir Colin Campbell, vice chancellor of the University of Nottingham, to be the first Commissioner for Judicial Appointments. Heretofore, rather than overhauling the system consistent with Labour's manifesto in opposition, the Lord Chancellor had worked to make the existing system fairer, and brought in more standard

ment provided a welcome distraction for a Prime Minister increasingly under fire for supporting the United States in Iraq, mired in debates over the euro, and now facing a major public inquiry over the suicide of a Defense Department civil servant that had exposed his administration's emphasis on "spin" rather than genuine cabinet deliberation.

The timing of the cabinet reshuffle was precipitated by the unex-

intensity of the row between Blunkett and Irvine was such that one of them had to go (*Guardian*, June 13, 2003). Blunkett feared losing responsibility for crime policy to a new ministry of justice, modeled on the French system but scuttled for now. Blunkett enjoys a good working relationship with Falconer who served under him at the Home Office and is regarded as easy to get along with.

As always, the devil is in the details. The white papers released July 14 propose a range of options but favor an independent nominating commission of 15 with five lawyers, five judges, and five lay members, including its chair, which may also have power to discipline sitting judges. Lord Falconer has stated that he wants to appoint younger judges and allow them to move up the ladder rather than take only top barristers after 25 years of advocacy. He hopes to diversify the bench. Queen's Counsels will be abolished unless they can be proven to be in the public interest. The new Supreme Court of 12, drawn from sitting Law Lords, will not serve as legislators in the House of Lords and will take over hearing cases for the Privy Council. Interestingly, the white papers explicitly repudiate three components of the U.S. experience: legislative confirmation of nominees, judicial review of legislation, and sitting *en banc* rather than in panels of changing composition. Stay tuned for the proposed legislation. ☞

## The constitutional dimensions of the reform proposals should not blind us to their many political dimensions.

personnel procedures (positing positions, conducting interviews, developing assessment measures) for the lower judiciary only.

On July 14, 2003, the government issued three white papers, is now requesting comments, and plans to introduce legislation in November. Under the proposals, the Secretary of State for Constitutional Affairs will still perform executive branch functions as a member of the cabinet and as the head of a government department. That department, however, will no longer be in the business of designating Queen's Counsel, a system tarred by the same criticisms of judicial selection more generally—that it is secretive, unfair, and excludes women and minority men. (The Lord Chancellor had suspended appointments in April pending review.) These changes are applauded by the Institute for Public Policy Research, the Fabian Society, the Council of Europe, campaigning groups such as Liberty and Justice, the Law Society, the Constitution Unit, and leading legal figures that include Lord Bingham, the senior law lord (*Financial Times*, June 13, 2003).

The important constitutional dimensions of these proposals should not blind us to their many political dimensions. The announce-

pected resignation of a Blair loyalist Alan Milburn, who claimed it was impossible to be both a cabinet minister and a parent. Tying this major change to a hasty reshuffle incurred the wrath of the Queen, the Lord Chief Justice (who will now not retire in order to fight the reforms), members of the Lords, and Labour backbenchers who claimed they had not been consulted. Downing Street had to subsequently admit that it had not briefed the changes correctly. Commentators described it as "an impromptu by-product of the Cabinet merry-go-round rather than a considered recalibration of major institutions" (*The Observer*, June 15, 2003). The absence of green paper and white paper or even cabinet subcommittee (or consultation of the cabinet itself, for that matter, let alone the judiciary) preceding the announcement caused a "rumpus" in Westminster over the "ramshackle reshuffle."

Blair's removal of Lord Irvine and selection of Lord Falconer is happy news to Home Secretary David Blunkett, who wants to maintain exclusive responsibility for the reform of criminal law and is increasingly angry about being overturned by judges on tariffs (minimum time in jail) and state benefits for asylum seekers. The

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