From Private Office to Civil Service Department: Cultural change in the Lord Chancellor's Department 1970-1986

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Linda Mulcahy and Emma Rowden

Abstract

A considerable amount of literature exists on the office of the Lord Chancellor and the unique role of the holders of this office played in the British constitution for many hundreds of years. However, hardly any research has been undertaken on the civil servants that worked in the Lord Chancellor's Office and the way in which they assisted the navigation of a difficult path between matters pertaining to the legislative, executive and judicial branches of government. Drawing on an extensive review of the archives relating to the Courts Act 1971, this article draws attention to the elite band of lawyers who made up the office and the ways in which their scant knowledge of the administration of justice was exposed in the corridors of Whitehall in the years that followed this Act coming into effect. The events we describe are of particular interest because they occurred away from the public gaze, behind the scenes in Whitehall and because they represented a transformation of the role of the office from policy makers to service providers.

Introduction

This article started with a puzzle that arose in the course of the authors writing a book about the modern history of courthouse design (Mulcahy & Rowden, 2020). Our analysis of numerous court design guides, produced between 1971-2019 by an intra-departmental working party which included representatives of the Lord Chancellor's Office (LCO), left us confused.[i] Why were these documents, which had so much potential to promote the needs and interests of the laity so lacking in concern about their needs? The book had much to say about inter-professional struggles for control between engineers, architects, security experts and lawyers but much less to say about the reasons why senior lawyers overseeing the justice system seemed so disinterested in the interests of citizens who interacted with it. In this article we return to this conundrum in order to undertake a more detailed look at the people who ran this influential office. In doing so, we provide an account of a small group of elite lawyers at the heart of the establishment whose interests were closely aligned with those of the judiciary, the bar and to a lesser extent the solicitors profession. More particularly we examine their struggles to negotiate their responsibilities as the LCO began its transformation from a small private office to a large civil service department. The story that unfolds draws extensively on closed archives the authors were given access to by the Ministry of Justice, a large number of files deposited in the National Archives by the LCO and a small number of interviews with civil servants.

There is now an extensive literature on the two branches of the legal profession in England and Wales made up of solicitors and barristers, each of which have different routes to qualification, different professional bodies representing their interests and different career trajectories. It is pertinent to the account that follows to alert international readers to the fact that barristers have traditionally seen themselves as the senior branch of the profession and have much less contact with the public, receiving instructions from solicitors. Barristers also

have a much closer connection to the judiciary and continue to be the branch of the legal profession most likely to become judges, especially in the upper echelons of the legal system. While much has been written about the differences between the two branches of government much less has been said about forms of employment that see them working side by side such as in-house counsel in commercial practice or government legal service. Philip Lewis was one of the few scholars to acknowledge the paucity of material that existed about government lawyers and his own work on the subject, reported in this volume, does much to reveal important insights into this much neglected topic. In this article we hope to make an additional contribution to this field by looking in more depth at the highly influential group of lawyers in LCO who have been treated as outliers in other accounts of government lawyers provided by scholars such as Drewry (1981) and Daintith & Page (1999).

The office of the Lord Chancellor has been particular neglected in this context. There is an extensive literature on the Lord Chancellor and the unique position as a member of the Legislative, Judicial and Executive branches of government that the postholder enjoyed until the Constitution Reform Act changed that situation in 2005.[ii] A considerable amount has also been written about the role of the Lord Chancellor, those who have held the post and their particular interests (see for instance Heuston, 1987; Schuster, 1949; Stevens, 1993; Woodhouse, 2001; and Underhill, 1978).[iii] Much less has been written about the mandarins who staffed the LCO and negotiated delicate constitutional nexus the Lord Chancellor and his office occupied on a daily basis (but see Skyrme, 1983; and Polden, 1998). The nearest scholars have come to the topic is a discussion of the working life of Permanent Secretaries who served the Lord Chancellor (see for instance, Stevens, 1993; Hall & Martin, 2003; Drewry, 1983) but staff lower down the hierarchy rarely get a mention. In addition, while the shift from the judicial to political role of the Lord Chancellor in the twentieth century is regularly commented on,[iv] much less has been said about changes in the interface between the executive and judicial branches of government.

This article focuses on a case study involving an extensive modern court building programme that began in 1971 as a vehicle through which to examine how LCO lawyers negotiated their responsibilities as civil servants and upholders of judicial independence between 1971-1986 as their influence began to wane. The events we describe are of particular interest because they occurred away from the public gaze behind the scenes in Whitehall and mark the last gasp of the heyday of the office (Drewry, 1994), when officials were not distracted by operational matters. It goes on to chart the new responsibilities given to the Lord Chancellor and his officials with the passing of the Courts Act 1971. While it is common for scholars to note the extensive changes that this imposed on the Office overnight, we argue that it took much longer for organisational culture to follow suit. Our case study ends in 1986 when LCO were publicly criticized for their failure to change and outdated allegiances. In the sections which follow we provide a short history of the LCO and the changes wrought by the Courts Act 1971 before going on to describe the ways in which officials negotiated the new responsibilities for delivery of a national and outward facing service.

An Outlier in the Civil Service: The Lord Chancellor's Office

If scholarly work on government lawyers is thin, work on the LCO is even thinner. Daintith & Page (1999) leave discussion of this unit out of their magisterial review of the Executive in the Constitution, Abel (1988) does not consider it in his history of the English legal

profession and the Office has received little attention in histories of the civil service (see for instance Lowe, 2011). This seems surprising given the important role of the Lord Chancellor as a bridge between the three branches of government and the support provided by those government lawyers who served him.[v] Rather than justifying the exclusion of this unusual group of civil servants from scholarly accounts, it has been argued that neglect renders them one of the most intriguing government departments in existence (Stevens, 1988). For Claud Schuster (1949), one of the longest serving LCO Permanent Secretaries of the twentieth century, staff in the Office provided a critical link, or buffer, between judges and politicians and were key to the legitimacy of the Lord Chancellor's role. Research to date has been equally remiss in glossing over the day-to-day implications of the Courts Act 1971 which began the radical transformation of the Office to the user facing Ministry of today.

Until 1885 the Lord Chancellor had no civil servants supporting him in his role, with the result that there was no office for scholars to write about. He was 'a minister without a ministry.'[vi] Any staff he had were paid for from his own income and left office with him, destroying all records as they did so. The radical reforms of the legal system in the 1870s required a more permanent arrangement. Parliament agreed that the Lord Chancellor should be supported by a Permanent Secretary to head up an office and a team of permanent civil servants in the same way as the other great Ministries of State (Stevens, 1993; Hall, 2003). The LCO became the most influential of the various departments he was responsible for, with the others described as 'subordinate'(Skyrme, 1983, p.22).[vii] The peculiar constitutional position of the Lord Chancellor was reflected in arrangements for his staff who were 'in' the civil service but not quite 'of' it. They were paid on established civil service scales (Heuston, 1987), but enjoyed a number of privileges that other civil servants did not, including exemption from civil service regulations such as the obligatory retirement age (Stevens, 1988).[viii] Officials appointed to the Office were also not required to pass the civil service entrance exam and it was the outgoing Permanent Secretary who chose their successor rather than the Head of the Civil Service as was the norm. Compared with other civil service departments a higher proportion of LCO staff were also appointed at senior grades. Moreover, rather than being located in Whitehall or near the Royal Courts of Justice, as other Departments overseen by the Lord Chancellor were, the LCO was situated in the House of Lords (Heuston, 1987). [ix] Most noticeably, in a civil service characterised by generalists, the LCO was one of a small number of civil service enclaves staffed almost exclusively by lawyers (Heuston, 1987).[x] Reflecting on this lawyer-ridden state of affairs Stevens (1987) has argued that:

> It [was] indeed a remarkable example of professional self-regulation. A body that [was] responsible not only for reform but also, more importantly, for running the legal system, had until the 1970s no regular civil servants (p.182).

These privileges were reinforced by the fact that the work of the LCO was not scrutinised by any select committees until 1990,[xi] despite it acquiring 10,000 staff and a large budget to manage in the wake of the Courts Act 1971 (Heuston, 1987).

These differences served to reflect the distinctive role of the Lord Chancellor in government and the perfectly legitimate constitutional concern that the work of the head of the judiciary should not be overseen by the political or executive branch of government. But it also mean that LCO staff saw themselves protectors of the legal system positioned above bourgeois

meritocrats in the civil service (Woodhouse, 2001). This provides an explanation for ongoing resistance from within to proposals that a Ministry of Justice in the style of other civil service departments should be established to replace the LCO (Stevens, 1993). The result was that lawyers in the LCO were regarded by other mandarins as outsiders (Hall & Martin, 2003, p.43). LCO was not a place to look for signs of a modern civil service department. Sir Thomas Legg (2017), a former Permanent Secretary of the LCD (1989-1998), has argued that their premises were rather like the officer's mess of a good regiment, where the military culture of hierarchy, duty and discipline still permeated and an air of ossified tradition and limited horizons prevailed. Drewry (1981) has argued that resistance to becoming more like other civil service departments reflected a deep rooted fear of bureaucratic socialism and others have described officials as a self-interested group who saw their role as that of lobbyist for the judges and the Bar from which they were recruited (Abel-Smith & Stevens, 1967; Stevens, 1988, 1993).

Despite taking on additional responsibilities through the twentieth century, the LCO remained small until it acquired responsibility for the newly centralised court service in 1971. By 1969 there were just twelve staff in the Office, all of whom were barristers.[xii] The focus of the Office was on high end policy and appointments with operational matters hived off to other Departments overseen by the Lord Chancellor, such as the County Courts branch or the Council on Tribunals. This elite band in LCO briefed the Lord Chancellor on any matter that was within his remit and supported him in appointing judges, Queen's Counsel and making other public appointments. The small size of the Office meant that all members of the office enjoyed a direct and close working relationship with the Lord Chancellor (Skyrme, 1983). This modest appraisal of the size and ambitions of the LCO belies their actual importance. The fact that they had easy access to a Minister and were engaged in formulating policy, rather than operational or perfunctory tasks places them in the top strata of Drewry's (1988) characterisation of civil service hierarchy. Together with the Judiciary and Bar, the Office constituted the highest ranks of the legal establishment able to influence policy, reform and the career trajectory of all aspiring lawyers. Polden (1998) has argued that an adverse appraisal by an official was likely to be fatal to a candidate's chances of silk or appointment to the bench. Elsewhere, Stevens (1988) has claimed that the Permanent Secretaries of the Office were as important as the Lord Chancellor and wielded an influence that was quite out of proportion to the size of the office.[xiii] These senior civil servants were frequently aided in their acquisition of power by the high turnover of Lord Chancellors (Polden, 1998), and the fact that they might choose to focus on particular aspects of their large portfolio.[xiv] The result was that many Permanent Secretaries were seen as instigators rather than implementers of reform (Polden, 1998).[xv] Claud Schuster, who served the Lord Chancellor between 1915-1944, is even said to have become the most powerful of all Permanent Secretaries in the civil service between the first and second world war (Hall & Martin, 2003). Sir George Coldstream, Permanent Secretary from 1907-2004, has been described as 'one of the ten men who ran Britain' by the *Daily Telegraph,* with no proposal of constitutional significance being decided without him being consulted (Oulton, 2008).

The position of the LCO altered following reforms introduced in the aftermath of the Royal Commission on Assizes and Quarter Session chaired by Lord Beeching (1966-69). Changes to the administration of courts introduced in the Courts Act 1971 heralded a radical programme of reform which led to the abolition of an 800 year old system of Assizes and

heralded the birth of a modern and well organised court system which better served the needs of the people. Significantly, it has been described as the reform agenda that 'got away' from lawyerly and conservative influences within the LCO (Stevens, 1993 p.117). While there was consensus about the inefficiency of the administration of justice and squalid conditions of many courts (see for instance Polden, 1999), it was not immediately obvious that it would be LCO that would be tasked with responsibility for righting these defects. Previous inquiries into the administration of the courts in the twentieth century that had been chaired by lawyers had been unsuccessful in introducing the radical reforms that most commentators considered necessary (Mulcahy & Rowden, 2020) and had tended towards a de-centralised solution. A more ambitious reform programme became more likely when Lord Gardiner was appointed Lord Chancellor in 1964. Less interested in politics than in the efficient administration of justice he was instrumental in persuading the Prime Minister, Harold Wilson, to break with tradition and appoint the industrialist, Lord Beeching as Chair of the Commission. The combination of Lords Gardiner and Beeching rendered a radical restructuring of the courts not just possible but likely (Rock, 2019; Stevens, 1993; Mulcahy & Rowden, 2020).

Against the opposition of the Bar and judiciary, the Courts Act 1971 centralised all courts except the magistrates' courts into one system which was to become the responsibility of the Lord Chancellor.[xvi] This radically transformed the LCO into 'a very different animal', responsible for delivery of a key national service as well as policy and patronage (Stevens, 1993, p.118). A former Permanent Secretary, Derek Oulton, has since explained that the possibility that the courts might be radically reformed and centrally organized in this way came as a complete surprise. In his words: 'It was a good example of just how much our Department was out of touch. It came as a bolt out of the blue …. Our antennae in those days, because we had not field officers, were extremely weak.'[xvii] Four major challenges faced the LCO in the wake of the Act. Firstly, officials were newly tasked with the administration of an outward-looking government service that required them to engage with the day-to-day workings of the courts. This was an area in which they had no expertise. Secondly, it required them to take over a number of responsibilities which had previously been overseen by regional judges.[xviii] Thirdly, the number of staff in the Department, for which the Lord Chancellor was responsible, increased by some 10,000 personnel spread across the nation (Hailsham, 1975; Skyrme, 1983).[xix] Finally, the LCO became responsible for arranging for the provision of adequate accommodation for all courts except the magistrates' courts. The introduction of these radical reforms are normally discussed as though they were a discrete event with immediate impact. In the sections which follow we demonstrate that cultural change took much longer than political change. More importantly we argue that at times it was actively avoided.

All Change!

There were two major tasks that needed to be undertaken by LCO in the aftermath of the Courts Act 1971 before a centralized court service could come into place. The first of these, known as 'Operation Beeching', involved the integration of thousands of regional court staff into the Lord Chancellor's Departments. To the concern of senior staff, the government set 1st January 1972 as the date when the reforms would go 'live.' Derek Oulton, who was one of two Secretaries to the Beeching Commission and was later to become the Permanent Secretary of the Lord Chancellor's Department, recalled that this required them to accomplish three years' work in the space of two exhausting years.[xx] Paul Osmond, who had

recently transferred from the Civil Service Department to LCO, drew attention to the complexities involved in transferring staff from local government employment conditions to civil service ones, and the difficulties in setting up a new headquarters for the court service within such a tight time frame. Particular concern was expressed on behalf of the civil service staff involved:

> In all matters of this kind, once the main policy approach has been settled, the human element predominates ... it is people's dislike of particular solutions, or their fear of the unknown that causes most trouble. Resistance of this kind can make itself felt from many sources and in many ways but, in a situation like this, it is likely chiefly to affect members of the staff, partly because they feel ill-placed to influence events. For them a period of considerable uncertainty began with the publication of the Beeching Report (Osmond, 1971, pp.7-8).

The second major task was the legal acquisition of a regional court estate and the design of a new buildings where existing stock was inadequate. With this in mind, the government announced the launch of a major new court building programme shortly after the 1971 Act, designed to replace antiquated regional facilities. Although the Lord Chancellor had previously been responsible for oversight of the County Courts, this had been hived off to a small County Courts Branch located away from the House of Lords and responsibility for new buildings had been delegated to the Office of Works (Polden, 1999). Derek Oulton recalls that it soon became clear that LCO needed help with the more ambitious programme now being envisaged and that this was work for which LCO had little aptitude:

> The civil service department saw us as a tiny little office with just a few people and said 'these people are never going to be able to do this. It is a massive undertaking.' So they brought us in some people from the Property Service Agency to help with the transfer of estate.[xxi]

Sir Thomas Skyrme who was serving in the LCO as the Secretary of Commissions at the time, has argued that this transfer of staff caused a 'population explosion' and a 'transmogrification of the Office' (1983, p.26), representing a breach of the lawyers' stronghold in LCO and the beginning of a process in which non-lawyers began to outnumber lawyers.[xxii] Others have identified the period as one in which the Lord Chancellor became a 'real', or 'full blown', departmental minister (Woodhouse, 2001, p.6; Oulton, 1994, p.567). However, as Paul Osmond predicted, a thirst for change was not shared by all staff, and old ways of working prevailed. One interviewee, who had recently been appointed to the LCO at the time of the reforms, told us that most LCO lawyers considered it 'beneath their pay grade' to run courts after working so closely with one of the State's most important figures.[xxiii] Another, newly seconded from the Department of Environment, was only too aware of the sense of hierarchy that prevailed in LCO:

> [T]hey used to have … what in old civil service circles [is] known as a prayer meeting: a sort of office meeting with the top of the office. And [my line manager] used to go to those, I was never invited to any of them and [the senior LCO official] was [a] rather sort of remote and an almost sort of arrogant man, I think, and didn't have much time for all these people who had been drafted in from the civil service to tell them how they should be running the new court service. There was … a really deplorable set of officers and other ranks atmosphere between the big wigs in the

> House of Lords and … the junior staff … My memory is that the county court staff were regarded as very low grade by the toffee-nosed people in the House of Lords. [xxiv]

Arrangements for organizing an updated court estate formed an important part of the changes introduced. An intra-government group which was after to become known as the Court Standards Working Party (CSWP), was soon created to oversee the new building programme and went on to produce eleven detailed design guides over the 50 years that followed (see further Mulcahy & Rowden, 2020). The CSWP was made up of representatives from LCO, Home Office and Department of the Environment. The LCO was expected to articulate what accommodation was needed, the Home Office to advise on security matters[xxv] and the Property Service Agency (PSA) in the Department of Environment brought extensive experience of designing and building a large range of central government buildings. Between 1971-1986, the LCO was represented by a combination of lawyers from the Westminster Office and staff that had been seconded to LCO from various civil servant departments.[xxvi] Figure one below shows the relationship between each government department and the various stakeholder groups they worked with:

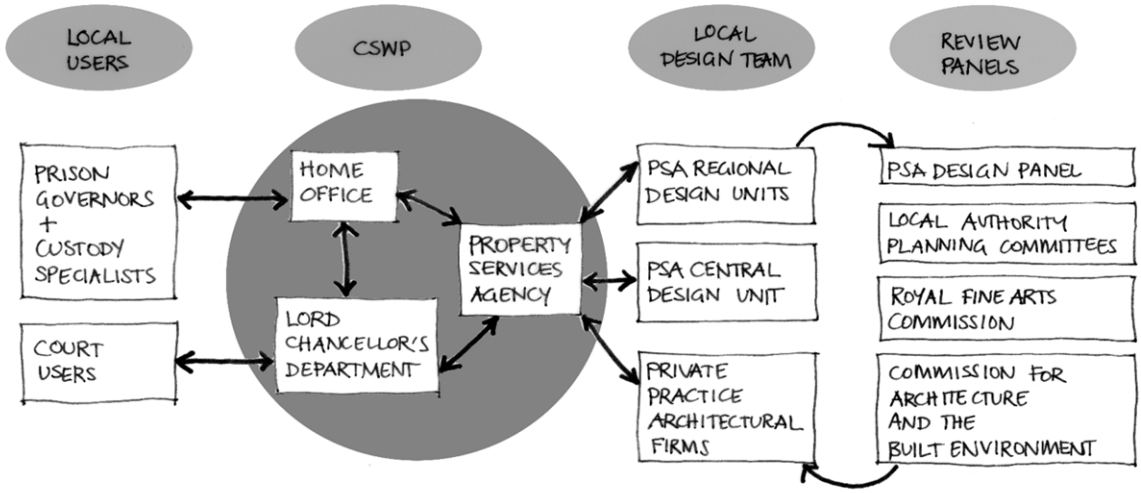

Figure one: Court Building Programme Stakeholders (image by Linda Mulcahy and Emma Rowden) Source Mulcahy & Rowden (2020, p.114).

While the Department of Environment and the Home Office had a history of working on such initiatives, compiling a comprehensive design brief for a large-scale building programme involving a complex building type was never going to be a straightforward endeavour for the newly reformed LCO. Indeed, there is evidence in the archives analysed of them floundering in their attempts to meet the expectations of the CSWP. As the 'client' in the process, the LCO was required to provide architects and engineers in the PSA with answers to a wide range of questions on topics as varied as how many robing rooms were required per courthouse, how many seats in each courtroom were needed for the public and press, who should have access to dedicated car parking, the appropriate distance between the witness and the defendant in the courtroom, or how many separate courthouse circulation routes were required for security purposes? It soon became very clear that the LCO lacked any day-to-day working knowledge of the courts to enable them to answer these questions. These problems were compounded by the fact that LCO had no detailed data about how the courts operated on a daily basis. Staff who had rarely had to leave Westminster in pursuit of their work prior

to the reforms (Skyrme, 1983), were suddenly given the responsibility for specifying the detailed needs of regional courts locations.

Deference to the elite?

In an attempt to address their paucity of knowledge LCO relied heavily on the judiciary, the Bar and newly appointed circuit administrators for information about the operation of the courts they were now responsible for. This included vital insights into such things as the need for clear sightlines, and the relative position of judge, barrister, solicitor, defendant, jury, public and press. Judges were particularly useful in making clear the need for separate entrances and exits to diminish the chance of violent or unwanted exchanges, and advising on design features that could help maintain the gravity and ceremonial functions of the trial. Many other examples in the archives go beyond the accumulation of practical knowledge and reflect a deference to the opinion of the bench and bar on the part of LCO in ways that reflect a backward looking agenda rather than the one anticipated by the Labour administration that introduced the Courts Bill. Deference to Bar and Bench frequently occurred at the expense of adequate consultation with less powerful users of the court system. While the opinions of many other stakeholders, such as court clerks, stenographers, the press, probation officers, the police, social workers, local authorities and some other pressure groups, were occasionally sought,[xxvii] the opinions of legal elites were not only consulted more frequently, but held significantly more weight and were rarely ignored (Mulcahy and Rowden, 2020).[xxviii] The need for judicial support was so powerful, and the status of judicial opinions so great, that they were often strategically invoked by other stakeholders to advance a particular viewpoint.[xxix] On occasion quite outlandish ideas were countenanced by civil servants simply because of the status of the speaker. Examples include Lord Hailsham's suggestion that cinemas should be installed in courthouses for use while witnesses and jurors were waiting to be called into court. One LCO official, who was seconded from the Department of Environment and not a lawyer, expressed some doubts about the suggestion , and queried 'whether the power of the Secretary of State for the Environment extended to the provision of commercial cinemas in public buildings.' Despite this the suggestion continued to be taken seriously.[xxx]

There are also numerous examples of the needs of the Bar being closely attended to. The most blatant example of this was the influence they exerted when a mock-up court was made available for inspection at Millbank in 1970.[xxxi] The purpose of the exercise was to determine which floorplans would be adopted as national templates. Numerous stakeholder groups were invited to inspect the mock court and alternative floorplans and only the Bar Council declared that none of them were considered suitable. The CSWP went to some trouble to explore the alternative suggestion that the Bar Council put forward.[xxxii] This involved a re-design of their prototype, the construction of a second mock courtroom and engagement in a further round of consultations. The Bar Council's plan, which placed barristers at the centre of a visual arc in the courtroom, was eventually abandoned because the design interfered with the jury's view of the witness stand. In fact this problem had been anticipated by the CSWP, but the Lord Chancellor had made clear that obtaining the Bar Council's support was important and that they should be indulged.[xxxiii] The Bar continued to assert their authority throughout the course of the building programme, often interjecting when it was felt that their own comfort or needs might be in question. Examples include demands about the provision of dedicated car parking,[xxxiv] the nature and design of their seats in court,[xxxv] requests for more space and freedom to move in the well of the court, as well as concerns about the scale and nature of their robing rooms, or the catering and dining room facilities provided. [xxxvi]

The ongoing strength of ties to the Judiciary and Bar, and failure to embrace a reform agenda that placed a new emphasis on lay users of the justice system is further evidenced by the fact that lay users were *never* included in consultations between 1971-1986. Indeed, a survey of the views of witnesses proposed by the Department of Environment was halted, and consultation with the press deliberately limited, after LCO staff argued that they were well positioned to represent the perspectives of both. In an interview with one of the authors Derek Oulton reflected:

> Looking back, I am rather embarrassed that we didn't give a thought to the impact of the courts on ordinary people, to the psychological aspects of design. For hundreds of years it has been used as a control system. There was little compassion for ordinary people using the courts.[xxxvii]

It could be argued that this behaviour simply reflected a long standing tradition in which it was a primary *obligation* of staff in the LCO to represent the interests of the profession and promote its independence.[xxxviii] The judiciary had been accustomed to administering their own affairs in regional courts and were suspicious of being directed in any way by the Executive because of their respect for the separation of power. This expectation is reflected in assertions by the judiciary and Bar that they should be regularly consulted in advance of other users and in the dismay they expressed when their input did not result in the impact they desired.[xxxix] LCO staff soon found themselves caught between these powerful stakeholders and other civil servants, most notably those from PSA, who were much more accustomed to consulting users but leading on design decisions. Instead, LCO were regularly forced to express concerns to the PSA that new ideas about court design would not be well received. Newly appointed circuit administrators, employed by the Lord Chancellor's Department and located in the regions, followed this steer and shared concerns that if draft provisions and standards did not reflect the interests of bench and Bar they might provoke a "disproportionate adverse reaction."[xl] On one occasion a proposition that Judges' lounges might be removed from the design guide to save costs prompted a circuit administrator to ponder whether enough Judges had been consulted on the issue.[xli]

Changes that risked impinging upon the perceived prestige of lawyers, were regularly approached with caution. In one example, LCO representatives wanted the idea of combining a Solicitor's Clerks room with the Solicitor's room to be 'cleared more carefully', anticipating a fight from the Law Society if pursued. In another example, a circuit administrator complained of inadequate consultation provided on the release of a PSA document 'Court Accommodation Standards' in 1980, and laid out a clear hierarchy in the relationship between civil servants, the judiciary and the solicitors trade union:

> … we think our relationship with the Bar on Circuit will be undermined if the standards document is published without prior notification of this variant … there may be conflicting views here among the court users concerned but many of them hold very firm opinions on the issue. Again, the decision having been taken, it is for LCO to advise the Council of Circuit Judges … Not to do this is deceitful, and will be looked on in this light if the standards document is published without prior notification of this variant also … suggesting that Barristers' Clerks will have the run of the Solicitor's Room when a Barristers' Clerks room is not provided will attract the opposition of Law Societies at large. Has this innovation been put to the Law Society for comment?[xlii]

LCO staff were hampered in their relationship with the judiciary by the fact that they had little statistical data on day-to-day use of the courts and knew so little about their operation.

The very act of acquiring such expertise had traditionally been perceived as an interference with the independence of the judiciary; as an attempt to regulate or oversee their work (Hall & Martin, 2003). The move towards a new centralised administration may have been heralded by the Courts Act 1971, but that did not mean that the legal elite were happy about ceding influence over the organization of regional courts. Indeed, it has been argued that the judiciary became increasingly concerned by the encroachment of the civil service on judicial business in the post war era as their traditional powers and privileges diminished and the powers of the civil service increased (Tiley, 1997; Stevens, 1988). This is a general trend which the Courts Act 1971 did much to augment through its centralization of administration and personnel. Woodhouse (2001), for instance, has asserted that that the Courts Act 1971 ushered in a level of uncertainty about the new relationship between circuit administrators, answerable directly to the LCO Head Office, and their presiding judges. One way in which the frequent, and occasionally excessive demands that judges and the Bar made of the LCO and the CSWP can be interpreted is as an attempt to re-assert their control over processes they had once been in control of.

There is a danger that existing accounts of the relationship between the LCO and the legal elite place undue emphasis on civil servants' deference. The few accounts of the office and its work that do exist d hint at a much more nuanced set of relations in which the judiciary and Bar did not routinely get their way. One of the most powerful former Permanent Secretaries of the LCO, Claud Schuster is reported to have argued that many judges had parochial outlooks and delusions of grandeur which meant that input from them usually involved 'influence, irritation and obstruction' (quoted in Hall & Martin, 2003, p.35). In this context it is important to acknowledge that the Office did not always accede to the demands placed on them. This is particularly true of negotiations involving newly appointed generalists in the LCO and many of the new circuit administrators recruited by LCO. By way of example suggestions that overnight accommodation in courts should be provided for judges in case it snowed and they could not get home, were dismissed without discussion. Likewise 'minor extravagances' such as showers in judges' room that appeared in early plans of Liverpool Crown court, were soon rejected.[xliii] There was also evidence that the claims of some adjudicators were deemed less important than others. County Court registrars had to fight much harder than the senior judiciary to have their needs met in design brief consultations and were more likely to be unsuccessful (Mulcahy & Rowden, 2020). Deference to the Bar was also far from uniform. Early suggestions for inclusions of private Barrister's chambers and local law society offices within the new Crown Court complexes, while debated and considered, were discounted by new generalists in the LCO.[xliv] Provision of private dining areas for the Bar also remained a hotly contested issue. But despite these unusual examples, the overall impression gleaned from analysis of the surviving archive suggests that old habits in ceding to the whims of barristers and judges died hard and attention to the need of lay users remained marginal in the development of policy.

Betwixt and Between

Ensuring the support and goodwill of the legal elite at the same time as attempting to work in a new partnership with other civil service departments did however prove challenging for the newly expanded LCO. Mainstream civil service departments such as the Home Office and the Department of Environment might expect to consult with elite specialist groups like the judiciary without the expectation that they would defer to them. This is what Drewry (1981) has labelled the practice of generalist civil servants keeping specialist opinion on 'tap' rather than on 'top'. While the civil service department headed up by the Lord Chancellor was eventually to become much more customer focused and less dependent on the goodwill of

elite legal groups, in the period under consideration in this article they were still at the beginning of this transformation. This goes some way to explaining a mismatch of expectations about how the court building programme should be implemented within the intra-departmental CSWP and the serious tensions that arose between the LCO and PSA when the former was expected to behave like other civil service departments. Conflict with LCO manifested itself in two particular ways in the 1970s. Firstly, PSA expressed increasing surprise and concern at the inability of LCO staff to predict current and future need. They failed to understand the political nuance behind the absence of detailed data on the number of jurors, witnesses, ushers, defendants, press, members of the public passing though different courts across the country. What they did see was the negative impact this had on the ability of CSWP to implement policy.[xlv] Secondly, tensions arose because of the frequency of consultation with the legal professions. Initially, PSA were very happy to hear the views of local stakeholders, but it became apparent, as early as 1974, that they were frustrated by what they had come to see as excessive consultation with local professional groups and the delays this caused.[xlvi] Consultation typically scuppered attempts at standardisation of courthouse design. PSA viewed ratification of centralised standards as a way to curb expensive and time-consuming tailoring to local preferences. However, the LCO, presiding judges and circuit administrators continued to resist the initiative. This often resulted in LCO postponing signing-off new build until alterations suggested by local stakeholders could be reviewed (National Audit Office, 1986).

Tensions between LCO and PSA began to rise to unacceptable levels by the 1980s. As the decade dragged on, and centralized standards had yet to be agreed, PSA became increasingly concerned that frequent consultations with the judiciary paid disproportionate regard to the wishes of another branch of government that had no financial responsibility for the success of the programme.[xlvii] When a judge provided feedback in 1979 to the LCO on proposed new courtrooms copies were sent to the PSA with a view to the comments being incorporated into national standards.[xlviii] Officials at the PSA rejected the suggestion arguing that the comments were no more than 'a rag-bag of undigested thoughts which the 'new boys' at the Lord Chancellor's Department have been unable or unwilling to research properly'.[xlix] At one point in the mid-1980s, PSA compared their relationship with the LCO with the one they had with the Home Office, concluding that they failed to understand why building courts was not as straightforward as building prisons. Aghast at the comparison, LCO were scathing of PSA's underestimation of the differences between inmates and judges.[l]

By 1986, extensive delays prompted scrutiny of the court building programme by the National Audit Office and the Committee of Public Accounts. Both concluded that the Lord Chancellor's Department had been remiss in delivering the court building programme (National Audit Office, 1986; House of Commons, 1985-86). The result was that LCO was reluctantly forced to agree to limit consultation with the legal professions and prioritise its responsibilities to PSA. While it was acknowledged that some delays had been inevitable, the Public Accounts Committee were to comment:

> We approve of the departments setting themselves difficult targets, but they will not succeed unless it is brought home forcibly to the court users whom it is necessary to consult that they too must accept the greater discipline … (House of Commons, 1985-1986, pp.xiii-xiv).

The National Audit Office investigations into what were seen as failures in the Court Building programme made it clear that yearly reviews of design guidance ordered by the LCO[li] had significantly delayed the completion of centralized guidance and caused endless requests for local variation to designs.[lii] The reports were to have a significant impact on the

future organization of the court building programme. Judicial involvement did not disappear after 1986, and particular senior judges continued to exert considerable influence on it, but judicial influence was tempered and civil servants began to play a more active role in assessing what did and did not work well at local level. In time, there was also greater direction from the Lord Chancellor's Department which went on to assume the chairmanship of the CSWP and responsibility for the drafting of design guides as they acquired more detailed knowledge of construction projects and the day-to-day running of courts (Mulcahy & Rowden, 2020). Deference to the Bar was also beginning to wane. By way of example, when a local Bar association employed their own architect to draw up alternatives plans for a new courthouse in Bristol their actions were condemned by the civil servants involved, including the LCD.[liii] In the course of these later transformations, the headquarters of the ministry moved from Westminster to the heart of Whitehall and began to employ ever more generalists. The growing pains we have discussed in this article became of historical interest when the Office of the Lord Chancellor was dramatically reformed in the Constitutional Reform Act of 2005, and non-lawyers began to occupy the role.

Conclusion

There is no doubt that the Courts Act 1971 signalled a seismic change in the relationship between the Lord Chancellor's Department and the legal elite. It could even be argued that it opened up the possibility of a fundamental shift in the close relationship between civil servants in the Department and the judge that led them. In this article we have contended that while changes in the law can occur overnight, changes in legal culture, loyalty and behaviours takes much longer. Seen through this lens, the period up until reviews by the National Audit Office and Public Accounts Committee demonstrate that the Lord Chancellor's Department continued to make what was no doubt considered to be valiant attempts to maintain the same constitutionally ambiguous relationship with the judiciary that they had always enjoyed. At the same time, they were under increasing pressure from elsewhere in Whitehall to mimic the approach to specialist advice adopted elsewhere in the civil service in the interests of achieving the efficient and timely implementation of policy. In the process, it became apparent that the delicate constitutional balance between the Judiciary and Executive that the LCO had long supported their Minister in achieving was increasingly impossible to navigate.

Existing accounts of the history of the Lord Chancellor and his staff have focused on the personalities and achievements of the Office holders and their Permanent Secretaries. The unique constitutional position of Chancellor up until 2005 is often presented as a quirky English anachronism. In this account of the court building programme we have tried to shine a spotlight on those have worked away from the public eye in the maintenance of this complex bridge between Executive and Judicial branches of government. Our analysis makes clear that the efforts of civil servants to maintain the close relationship between the Lord Chancellor and his Office did not only serve to maintain the independence of the judiciary, but allowed the judiciary to interfere with the work of the Executive in ways that other civil servants felt got in the way of the civil service doing its job.

Appendix: Research Note

Adopting accurate nomenclature has been a challenge in this research and we hope that the following note is of value to other researchers entering the field. Several authors have asserted that the LCO has been known as the Lord Chancellor's Department since 1972 (Stevens, 1987; Tiley, 1997, Polden 1998).[liv] However, the *British Imperial Calendar and Civil Service List* for 1969, an official government publication, notes the existence of several Lord Chancellor's Departments, with the LCO sitting at the apex of what a former member of the LCO has called a group of 'subordinate' departments (Skyrme, 1983). These various departments were physically distinct with the LCO based in the House of Lords; a County Courts Branch based in Whitehall; the Supreme Court of Judicature based at the Royal Courts of Justice in the City of London; and the Pension Appeal Tribunals, Lands Tribunal and the Office of the Judge Advocate General of the Forces all being located at additional locations.[lv] This appears to reflect the fact that the Lord Chancellor had historically had oversight of a large number of disparate functions, performed by clusters of staff. However, entries in subsequent versions of the *British Imperial Calendar and Civil Service List* do cause some confusion. In the 1973 edition various departments are all listed under the 'Lord Chancellor's Office' but there is also reference to the County Court Registrars (rather than the County Courts Branch mentioned in other editions) being part of a Lord Chancellor's Department. The fact that several Departments which were the responsibility of the Lord Chancellor existed before 1971[lvi] and that a LCO continued to exist within the Lord Chancellor's Department after that date is also evidenced by the National Archives catalogue. This indicates that files relating to the Lord Chancellor's Department are held prior to 1972 and that post 1972 files relating to the LCO are also held. [lvii] The logic for continuing to refer to a LCO appears to be that a small band of senior lawyers, based in the House of Lords, continued to be called the Office after 1972. Indeed the principal address of the whole Lord Chancellor's 'Department' continues to be listed in the *British Imperial Calendar and Civil Service List* (later *The Civil Service Yearbook*) as the House of Lords until 1996, even though most of the Divisions of the Department that had emerged by that time had never been based in Parliament.[lviii] Significantly, for our case study, the calendar lists a separate 'Court Service Headquarters' was set up to oversee such things as accommodation, personnel, finance, gathering of statistics and court rules from at least 1974.

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Endnotes

[i] See Appendix One for a description of references to this Office.

[ii] As is well known, the nature of his Judicial, Legislative and Executive duties created something of a constitutional puzzle for those concerned about the separation of powers, being a leading member of each of the three branches of government (Oliver, 2004; Oulton, 1994; Woodhouse, 2001). The Constitutional Reform Act 2005 transferred the role of presiding officer of the House of Lords from the Lord Chancellor to the Lord Speaker, the role of head of the judiciary to the Lord Chief Justice and the presiding judge Chancery Division of the High Court of Justice to the Chancellor of the High Court.

[iii] Several Lord Chancellors have also produced their own autobiographies which have revealed much about their personal experience of the role. See for instance Hailsham, 1975 and Elwyn-Jones, 1983.

[iv] See for instance Skyrme, 1983.

[v] There were no female Lord Chancellors before Liz Truss was appointed in 2016 by which time the nature of the office had changed fundamentally following the Constitutional Reform Act 2005.

[vi] Underhill (1978, p.188). I refer to 'he' here as of the many people who have occupied this Office since the eleventh century Liz Truss was the only woman post holder (2016-17).

[vii] By 1969, these included the County Courts Branch, the Supreme Court of Judicature, the Pensions Appeal Tribunal, Lands Tribunal , the Office of the Judge Advocate, the Land Registry, the Law Commission, the Public Record Office and the Office of the Public Trustee, all of which were located in Whitehall or close by to the Royal Courts of Justice in the Strand (*The British Imperial Calendar and Civil Service List*, 1969).

[viii] According to Stevens' analysis of the records of the Office this was something that the Treasury grumbled about on a regular basis during the 1960s, but to no avail. The Civil Service Commission was set up 1855 as a result of the need to decouple the appointment of senior civil servants by ministers with a view to ensuring the impartiality of the service following the Northcote-Trevelyan Report.

[ix] The location of parts of the Lord Chancellor's Departments can be tracked using the *British Imperial Calendar and Civil Service List* which later became known as *The Civil Service Yearbook.*
[x] Barristers also dominated the Charity Commission, the Colonial Office and the Director of Public Prosecutions (Abel, 1998).
[xi] This is a system that had been set up in 1979.
[xii] *The British Imperial Calendar and Civil Service List*, (1969) also records the fact that there were two additional staff responsible for ecclesiastical patronage and three Executive Officers.
[xiii] In particular he makes much of the influence of Sir Claud Schuster, Permanent Secretary to the Lord Chancellor's Department and his close connections to the bar.
[xiv] No Lord Chancellor appointed in the twentieth century before the passing of the Courts Act 1971 had served for more than eight years and several of the nineteen appointed in this period had served for one or less (such as Buckmaster, Haldane, Maugham and Calicote).
[xv] No Lord Chancellor appointed in the twentieth century before the passing of the Courts Act 1971 had served for more than eight years and several of the nineteen appointed in this period had served for one or less (such as Buckmaster, Haldane, Maugham and Calicote).
[xvi] The Lord Chancellor had, for some time before this, been responsible for the appointment of magistrates. See further Skyrme's (1983) detailed account of this process.
[xvii] Interview with Linda Mulcahy and Dvora Liberman, Cambridge, 2015.
[xviii] Responsibility for courts other than the Royal Courts of Justice and County Courts or court estate were largely left in the hands of regional authorities, judges or the Home Office which oversaw the magistrates' courts. Thus, they appointed judges but were otherwise had little to do with the administration of justice.
[xix] Many of these personnel, such as the newly appointed circuit administrators, had previously managed the courts but had been employed by local authorities.
[xx] Interview with Linda Mulcahy and Dvora Liberman, Cambridge, 2015
[xxi] Interview with Linda Mulcahy and Dvora Liberman, Cambridge, 2015.
[xxii] The Secretary of Commission managed work relating to commissions of the peace which empower local Magistrates to act, and correspondence with clerks of the peace, town clerks and members of parliament.
[xxiii] Interview with Linda Mulcahy Oxford July 2019
[xxiv] Interview by the authors with a former member of the CSWP, London, July 2016.
[xxv] The Home Office oversaw policy decision-making relating to security, including the sections of the buildings involving the movement and securing of the defendant. See National Archives (TNA): CM 37/103–104.
[xxvi] Some were seconded from the county court service within the LCD, but others came from the Ministry of Public Building and Works, the Cabinet Office and the Department of Education. Interview by the authors with a former member of the CSWP, London, July 2016. See further Rock (2019).
[xxvii] TNA: CM 37/110.
[xxviii] TNA: CM 37/113.
[xxix] For instance, a proposed visit by architecture students for a scoping and briefing exercise relevant to the building programme was summarily dismissed by a circuit administrator, emphasising as they did so that they felt certain they would be supported by presiding judges in this move (TNA: CM 37/109). See also LCO 71/29.
[xxx] TNA: LCO 71/23.
[xxxi] There were three mock-up courtroom experiments which sought the feedback of users. These were the Millbank experiment (1971-72), Snaresbrook (1972-73) and Teddington (1989-90). See further Mulcahy & Rowden, 2020.
[xxxii] TNA: CM 37/106 and 110. See also CM 37/109, Minutes, 16 December 1971.
[xxxiii] TNA: CM 37/110.
[xxxiv] TNA: LCO 71/29.
[xxxv] This included lengthy discussions as to the merits or otherwise of flip-up seating, benches or individual swivel chairs. See TNA: LCO 71/24, CM 37/110 and 115.
[xxxvi] TNA: LCO 71/29.
[xxxvii] Derek Oulton in interview with Linda Mulcahy and Dvora Liberman, Cambridge 2015.
[xxxviii] This obligation included the need for the LCO to protect the judiciary from unnecessary inconveniences or intrusions. See further TNA: LCO 71/23.
[xxxix] TNA: LCO 71/29.
[xl] TNA: CM 37/113. For similar anticipated negative reactions from legal elites by circuit administrators, see TNA LCO71/29.
[xli] TNA: LCO 71/28.
[xlii] TNA: LCO 71/28.
[xliii] TNA: NA, CM 37/110; LCO 71/28-29. The report of a cost-cutting exercise, the 'Review of Accommodation Standards' of 1976 by circuit administrators, suggested a number of curbs to what was seen as excessive standards for judicial accommodation.

[xliv] TNA: CM37/109.
[xlv] TNA: CM 37/108.
[xlvi] TNA: CM 37/113, Minutes, 10 December 1979.
[xlvii] TNA: CM 37/113.
[xlviii] TNA: CM 37/113.
[xlix] On the files it is noted that PSA further objected to the fact that LCD wished these comments to be "considered" but provided PSA with no positive statement that they were being put forward as serious proposals, "sponsored by LCD/HQ". See further: TNA: CM 37/113.
[l] TNA: LCO 71/4.
[li] As noted in Appendix 5 of National Audit Office (1986), circuit administrators were engaged in various reviews of different aspects of the court building programme, including user requirements, the statistical basis for space planning, and reassessing priorities annually between 1973-1977 and 1979-1984.
[lii] The Public Accounts Committee also found that the delays to adequate progress on the programme included: the need for central sites and the difficulty in obtaining them; a failure to take proper account in projecting courtroom needs or setting targets to overtake backlog; and, the need to refine the procedure for variation approvals (House of Commons, 1985-1986).
[liii] TNA: CM 37/123 and LCO 7/5.
[liv] See also https://discovery.nationalarchives.gov.uk/details/r/C198
[lv] Other units such as the Law Commission and Council on Tribunals have separate entries.
[lvi] Lord Chancellor's Department is used as a term to describe officials working for the Lord Chancellor outside of the Office in government reports on the civil service that pre-date the Courts Act 1971 (see: Committee on the Civil Service, Fulton and Fulton, 1968).
[lvii] The National Archives continues to list files created as late as 1980 as being produced by the Lord Chancellor's Office. See, for instance TNA: BA/25/1931. However, the National Archives also have LCD files going back to 1949, for example, TNA: TS 31/77.
[lviii] Staff supporting judicial appointments, which had previously been overseen by the LCO moved to 'Southside' in Whitehall in 1994.