Supreme Court UK: radical change or business as usual?

'Justice should not only be done, but should manifestly and undoubtedly be seen to be done.' Lord Chief Justice Hewart's aphorism, from a case in 1924, encapsulates a principle at the heart of the United Kingdom's legal system. Nobody ever really doubted that justice *was* done by the Appellate Committee of the House of Lords; but the recent move across Parliament Square into the Middlesex Guildhall is a manifestation of an increasing desire by politicians, and perhaps to a lesser extent the judiciary, that the public also *sees* it to be done.

Symbolic as well as literal transparency has been brought to the new Supreme Court by the glass screen at the back of Court 2 behind which visitors may stand to watch proceedings. It is a tangible example of a new culture of open justice. So, too, is the fact proceedings in the new court will be televised. Yet what viewers and visitors will see will be business as usual.

The open justice agenda has not been confined to the country's highest court: last April, for example, the Ministry of Justice introduced new rules aimed at opening up the family courts to journalists and the media. Speaking at the time of the changes, Jack Straw explained that he wanted 'to ensure a change in the culture and practice of all courts towards greater openness, and this is an important step towards that goal.'

The changes, though, did not go as far as they could have done, one High Court judge complaining in a speech that they were about 'system rather than substance.' So it is with the Supreme Court. It has a new name and a new building, but this is not the radical change for which some had hoped. In substance the court remains largely unchanged: its jurisdiction is practically the same and ten of the twelve previous Law Lords have become the first Justices of the Supreme Court.

Herein lies one of the problems: whilst a glass screen may have granted the public access to Court 2, a glass ceiling continues to limit access to its bench. Baroness Hale is the only female justice of the Supreme Court, and whilst the various legal systems of the United Kingdom are represented by two Scottish justices and one from Northern Ireland, ethnic minorities remain conspicuous only by their absence.

Indeed, some commentators have suggested that the tradition of the Law Lords being drawn exclusively from the upper echelons of the judiciary should be abandoned in favour of a more American model of appointments. The controversy surrounding the possibility of Jonathan Sumption QC being catapulted from the commercial bar straight to the Supreme Court has brought the issue into the public eye. And this controversy is indicative of a wider problem: paradoxically, the more independent the court becomes, and the more it is in the public eye, the more politicised it risks becoming.

The Supreme Court's website may trumpet the fact that it 'has been established to achieve a complete separation between the United Kingdom's senior Judges and the Upper House of Parliament,' but the idea that the separation of powers was ever really endangered by the judicial function of the House of Lords is a fallacy. The three branches of the state *were* separated, but by metaphorical glass walls such as the convention that the Law Lords would abstain from debates in the House.

The problem with glass walls is that whilst they provide a structure with rigidity, you cannot necessarily see them. The move across Parliament Square has provided a nice bit of visual rhetoric – the legislature, executive, judiciary and church forming a quadrangle – but in reality it has done nothing more than to make more readily visible what was already the status quo.

Lord Scarman, writing in 1973, hoped 'that a supreme court of the United Kingdom would be established with powers to invalidate legislation that was unconstitutional and to restrain anyone – citizen, government, or even Parliament itself – from acting unconstitutionally.' The first of these objectives remains unobtainable under our current constitutional settlement and in the absence of a codified constitution. As for the second, whilst the new Supreme Court is not in itself a dramatic departure, Lord Scarman would not be disappointed: the point is simply that a radical change has already taken place.

Returning to Lord Chief Justice Hewart, five years after coining the infamous phrase he wrote *The New Despotism* (1929), in which he warned of an increasing tendency 'to subordinate Parliament, to evade the Courts, and to render the will, or the caprice, of the Executive unfettered and supreme.' The role of the courts, he felt, was 'defending individual rights against encroachment.'

Seventy years later, two new bulwarks against such encroachment had arrived on the UK legal scene: the Human Rights Act 1998, and Lord Thomas Bingham. Nobody who witnessed the work of the House of Lords in the eight years during which Lord Bingham was at its head can have any doubt that a powerful check existed on the will of the Executive. Bingham, writing a generation after Lord Scarman, explained that the courts have 'the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power.' A clear message indeed, and one put into practice in the post-Human Rights Act era in a host of appeals such as the Belmarsh case.

In the same passage, Bingham went on to explain that the court 'must not shrink from its fundamental duty to "do right to all manner of people".' The latter phrase is taken from the words of the judicial oath; words which are engraved on the glass screen at the back of Court 2, thus symbolizing not just transparency and accountability, but also continuity. It is for this reason that Lord Bingham predicted, in an interview in *The Times* in November 2007, that in the Supreme Court 'it will be business as usual.' As so often, he was right.

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