

The Three Most Important Features of My Country's Legal System that Others Should Understand

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Perhaps the first thing to define here is the term 'my country'. My passport tells me that as well as being a citizen of the Europe Union, I am a British citizen. The nation of which I am a part is the United Kingdom of Great Britain and Northern Ireland – and within that, there are a number of legal systems. There is one in England and Wales (although following the Government of Wales Acts 1998 and 2006, people in Wales may begin to dispute that), one in Scotland, one in Northern Ireland – to say nothing of those in the Isle of Man and the Channel Islands which are not part of the United Kingdom but whose indigenous inhabitants are British citizens and which are often perceived as being part of the nation state. If this gives some indication of schizophrenia then it may not be so far from the mark! If it gives an impression of informed coexistence then that probably would be wide of the mark – by a long way!

Two points are being made here – that what I am going to talk about is the legal system of England and Wales and that it is part of but only part of the legal system of the nation state in which I reside.

My first 'Important Feature' without which the second and third would be virtually useless is Judicial Independence. This is not to suggest that there is anything unique in the notion of judicial independence or its application in England and Wales, just perhaps about the means of achieving it in a country with no written constitution. In truth, despite my earlier comments, this section holds good for all of the UK save for the early history.

In the UK, judicial independence is secured by a number of provisions. Firstly, judges' decisions in their cases are final and authoritative (albeit subject to appeal), and reflect the individual judge's judgment. Secondly, judges enjoy security of tenure during "good behaviour" (ie provided they are not found guilty of criminal offences), unless unseated by a resolution of both Houses of Parliament. Thirdly, judges' pay is set by the recommendations of the Senior Salaries Review Body, whose recommendations are rarely if ever rejected by Parliament. Fourthly, judges are forbidden from acting as directors of private companies, and are required to remain uninfluenced by any outside organisation or person - including other judges. Fifthly, and maybe most importantly, their appointment is now presided over by an independent Judicial Appointments Commission.

If the above paragraph is a brief statement of how things are now, clearly there is some history to be unpacked about how we got there. Although today's judiciary has its origins in 1178, when Henry II appointed five members of his personal household "to hear all the complaints of the realm and to do right", and although the role of Lord Chancellor is understood to date back to the 7th Century, the notion of judicial independence from the power of the executive did not secure its victory over arbitrary Royal Prerogative until the Act of Settlement of 1701.

On inviting William of Orange to take the Crown from James II in 1688, Parliament presented its "Heads of Grievance", amongst which were proposals for freeing the

judiciary from the interference it had suffered under the Stuarts. Although these measures were omitted from the Bill of Rights, William III observed the constitutional proposals, which were enacted in 1701.

The "Glorious Revolution" thus established the rule of law in the place of the will of the monarch, although in the absence of a "written constitution", the doctrine of Parliamentary sovereignty meant that the law was whatever Parliament voted it to be. Beyond that, the judges interpreted statute law and fill in the gaps: the common law: subject to the right of Parliament to overrule judicial decisions of which it did not approve by statute (for example, the War Damage Act 1965 overturning the effect of the house of Lords decision in *Burmah Oil Company Ltd v Lord Advocate [1965] AC 75*).

The 18th Century saw a flourishing of political and constitutional theorising, with the "separation of powers" doctrine receiving its most fluent expression in "L'Esprit des Lois" by Charles, Baron de Montesquieu, in 1748. This and related works were a clear influence on the Founding Fathers of the United States, who explicitly adopted a separation of powers on achieving independence. Characteristically, however, Britain resisted this constitutional innovation, preferring development on the basis of precedent and experience.

Although Parliament retains the power to repeal the laws ensuring the independence of the judiciary, they have long been respected by convention. Only once has a judge been removed by a resolution of Parliament (Sir Jonah Barrington, a judge of the High Court of Admiralty in Ireland, in 1830 – when all of the island of Ireland was part of the nation state of ‘the United kingdom of great Britain and Ireland’), while provisions for the removal of a Circuit Judge have also been invoked only once, in 1983, against Judge Campbell who admitted to acts of smuggling – and not just the odd bottle of whisky over his duty free allowance!

Constitutional reformers have long held the UK's "fusion of powers" to be unsatisfactory and the position of the Lord Chancellor anomalous in a modern democracy. However, as with most of the UK's constitutional anomalies, the longstanding apparent evidence that the status quo "works", has meant that this argument has little appeal amongst the wider public.

Nevertheless, to the surprise of many, in July 2003, the Government announced radical plans to reform the judicial system.

"I think the time has come to put the relationship between the judges and the executive on a proper footing. It is wrong that a member of the cabinet appoints all the judges and it is wrong that a member of the cabinet can sit as judges."

Lord Falconer of Thoroton, Lord Chancellor, November 2003

The speed with which they were brought out led many to suggest that the plans were not well thought out: some claimed that the proposals were brought forward purely as a political manoeuvre to unseat the incumbent Lord Chancellor, Lord Irvine, who was

opposed to any reform. In July 2004, the House of Lords overturned provisions to abolish the historic post. However, the House accepted those elements of the Bill relating to the appointments commission and the end of the Lord Chancellor's active judicial role and the Constitutional Reform Act 2005 is now in force. Not only does it make the specific provisions referred to here for independence in appointment of the judiciary, it enacts a statutory form of independence for the first time:

3 Guarantee of continued judicial independence

(1) The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.

The past 30 years have seen a growing judicial activism and this is worthy of mention as **my second 'Important Feature'**. In a way this is only an extension of 'the common law of England[and Wales]' but could only come about because of the way that common law had developed and that development itself was due in no small part to judicial independence. Part of this activism stems from the growing body of supranational jurisprudence growing out of the UK's entry into the European Union, and part from the abandonment by governments of the postwar political and legal consensus. However, the Human Rights Act 1998 has had a profound impact in this sense. Notably, in the case of *R (on the application of Q and others) v Secretary of State for the Home Department [2003] 2 All ER 905*, Mr Justice Collins, sitting in the High Court, criticised the provisions of the Nationality, Immigration and Asylum Act 2002, stating that the removal of benefits from asylum seekers who did not apply on arrival in the country was unfair and breached their human rights.

This and similar cases, and an increasing willingness on the part of judges to speak out on political issues (notably that of the former Lord Chief Justice, Lord Woolf), have lead Ministers to accuse judges of attempting to usurp the democratic process. Nevertheless, this trend predates the Human Rights Act: under the last Conservative government Home Secretary Michael Howard was publicly criticised by the then Lord Chief Justice Lord Taylor on minimum sentencing, and by Lord Donaldson, a former Master of the Rolls, on the 1997 Police Bill.

"They are responsible for the rule of law in this country; they should not be pilloried by politicians for interpreting independently the welter of laws that Parliament has passed. Ministerial bullying of the judiciary via the national media is an unsavoury sight in a free democracy."

John Wadham, Liberty, March 2003

In recent times, the Human Rights Act 1998 (HRA) - which incorporated many of the provisions of the European Convention on Human Rights into UK law - has had a substantial impact on the balance between the Government and the judiciary. By

giving judges the power to rule that domestic laws are incompatible with the Convention (although not as such to overturn them – see s 4 HRA), the doctrine of Parliamentary sovereignty has arguably been partially replaced with a body of ‘prior’ constitutional law. Moreover, by requiring judges to interpret domestic law in line with the Convention, the Act has resulted in a number of judgments setting precedents in conflict with the Government's intentions. Judicial attempts to define the powers under s 3 HRA²⁹² so as to ‘read in’ words to a statute (eg. *R v A [2001] UKHL25*), ‘read out’ or ‘read down’ the words (eg. *Sheldrake v DPP [2003] 2 All ER 497*) or ‘read around’ words (*author’s invention!*) (eg *R v Secretary of State for the Environment, Transport and the Regions ex parte Holding and Barnes [2001] UKHL23*), seems to have seen an interpretative activism in the courtroom which balances the extra judicial activism frequently frowned upon by politicians and the media but referred to above and frequently seen, in mature reflection, as more sensible than the thoughts of the vote driven politicians.

My third ‘Important Feature’ is simply this – almost 200 years after that other radical sort of souls, the Bishops of the Church of England, gave up wearing horsehair wigs, it was announced in July 2007 that with effect from January 2008, court dress will be simplified in England and Wales and that in civil cases, wigs will no longer be worn. At last, the participants in the legal system serving the people of England and Wales will stop dressing like ridiculous refugees from a Gilbert and Sullivan opera when they go to work!

From the above, what conclusion can be drawn? Certainly, that from the author’s point of view the judiciary and its behaviour, though unelected, has been a great part of any success our legal system has had. This does not mean that there have not been appalling judges, but the system of appeals has usually mitigated the effect they can have on the system if not always on individual litigants. This may lead you to believe that the author has great sympathy for and empathy with the judges of England and Wales – not so: tales of his time as a practitioner abound with odd judicial characters and will be trotted out at the conference over drinks and dinner given any excuse so to do. The potential for things to have gone disastrously wrong were and to a lesser degree still are there in relation to appointments, promotions and retirements. Perhaps, despite the system within which it has developed, rather than because of it, the English common law has flourished and this has to be a tribute to a body of people even if the individuals who comprise that body have had the usual human failings and weaknesses.

²⁹² S3(1) HRA 1998 – ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.’