

The Passionate Shepherd

Come live with me ...

It is an axiom of common law, so deeply rooted and well established as to need no specific authority, that 'justice should not only be done but manifestly and undoubtedly be seen to be done'. The first meaning of this maxim is that officials of the court, and the judge in particular, must act in a manner that cannot reasonably be viewed as anything but impartial. There must be no hint of a suggestion of interest or of the judge deciding in his or her own cause. Implicit in this particular rule is a second and broader principle, namely that the appearance of justice, the open and publicly accessible dispensation of justice is 'so precious a feature' of common law as to be 'the salt of the constitution' (Macpherson v Macpherson (1936)). The courts of common law are precisely the open face and manifest public theatre of justice both seen and being seen to be done.

The requirement that, as Lord Haldane once put it, 'Every Court of Justice be open to every subject of the [Queen]' (Scott v Scott (1913)) bears with it a panoply of further rules of visible propriety and solemnized process. The courts are sites of legal decorum and of theatrical ceremony. They are the primary social space of serious speech and as such, require elaborate manifestations of obedience and of respect expressed through architecture and furnishings, as well as through elaborate rhetorical requirements, reverential forms of address, restrained modes of response, appropriately dull clothing, wigs and gowns for judges and barristers, and deference in both speech and behaviour throughout all proceedings. Common law rules of contempt of court, reinforced by statute, subject those who act in an offensive manner, who disrespect or threaten to lower the standing of the judge, or the court, in the eyes of the public, to summary imprisonment, meaning incarceration on the spot. The root of that rule of contempt goes back to the laws of Henry I and to the power of the Crown, through its sheriff, to imprison those who acted in contempt of royal writs. The royal roots of the rules governing court procedure provide interesting clues as to the derivation and function of what is now called the court service, meaning most broadly the hierarchy of tribunals and courts.

The original court of common law was simply the King's (or occasionally Queen's) court, his or her suite, meaning place of habitation and following. It was to the Royal court and then, later, to its itinerant royal delegates that disputants would come and air their grievances. When the hierarchy of common law courts was later established, each court bore with it some element, vicarious or delegated though it be, of majesty or sovereign power. Even after the Civil Procedure Act 1997 and the Civil Procedure Rules 1998 revamped civil litigation, and the more recent passage of the Constitutional Reform Act 2005, which replaces the House of Lords as final court of appeal with a Supreme Court, the Oath of Allegiance and Judicial Oath, as set out in the Promissory Oaths Act 1868, remain in force and require that all judges swear allegiance to the Crown and fidelity to the divinity. The Lord Chancellor's Oath is set out anew in section 17 (1) of the 2005 Act and after requiring 'respect for the rule of law' ends with the traditional invocation 'So help me God'.

Historically the highest court of common law was Parliament, properly speaking the Crown in Parliament, which through legislation would determine disputed issues and promulgate new rules. Parliament remains the supreme source of law, although the legislature is no longer conceived to be a court. There are also limits to its powers. After entry into the European Union, parliamentary sovereignty has been subjected to the restraint of European law, and now also to the review of the Supreme Court (UK). Where legislation conflicts with European law or the European Convention on Human Rights, the Supreme

The Passionate Shepherd

Come live with me ...

Court may disapply it. In practice this means that the House of Lords and its successor (the Supreme Court (UK)) will interpret legislation so as not to conflict with European directives or Convention rights; but there is now, with the advent of the Supreme Court, a further and more formal separation of powers along the lines of the United States constitutional framework in which the eponymous Supreme Court can review and restrain legislative enactments on constitutional grounds.

The symbolic importance of the establishment of the Supreme Court lies in the creation of a third and formally independent branch of government. The court system, represented here by its pinnacle, gains thus an even more visible role as bearer of rights, reviewer of government, and dispenser of justice. Without a written constitution the exact parameters of the Court's power to limit parliamentary sovereignty is open to case-by-case interpretation; but recent decisions already suggest that 'rights inherent and fundamental to democratic civilised society' (*R v Secretary of State for the Home Department, ex p. Pierson* (1998)) will be recognized and protected by the courts as inherent in precedent and immune to executive or legislative intrusion. As one judge recently put it: 'The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based' (*Jackson v Attorney General* (2006)).

The Supreme Court is simply the most visible exemplum of the court system. It is the final court of appeal and last arbiter of disputes. It is also the exception in that it deals with final appeals in what is necessarily a very small number of cases within a court system that itself deals with only approximately 1 per cent of all civil disputes and a slightly higher percentage of criminal indictments. Negotiation, compromise, agreement, and non-legal sanction in civil cases, and guilty pleas in criminal cases, resolve the overwhelming bulk of disputes but such resolution nonetheless takes place in the shadow of the courts; and where lawyers are involved, as they often are, the shade cast is structured by the relevant court pronouncements, the precedents and other rules of law. It is again the symbolism, the exceptional character of court decisions, the rare and solemn theatre of the court term and determination that is of greatest significance. What happens in court is a matter of record and must be seen and heard outside of court, first by other lawyers and legislators, latterly and less often by the public at large.

The formality and the technicality of court procedure grows according to the place in the hierarchy that any particular court holds. At the bottom of the hierarchy are the magistrates' courts. These are technically inferior courts of first instance, and are usually presided over by lay magistrates unimpeded by legal qualifications. They hear in the main the less serious criminal cases. Appeals from their decisions go to the Crown Court and from thence to the Court of Appeal. The Court of Appeal is in reality the final court of appeal in most cases, it being very rare indeed for a case to go on from there to the House of Lords/Supreme Court. In civil cases the County Court is the usual tribunal of first instance and appeals from there go first to one of the three divisions of the High Court, and from thence to the Court of Appeal and ultimately to the Supreme Court.