

Supreme Court UK: radical change or business as usual?

There are three things you may have gathered from the media coverage of the new UK Supreme Court; the court has a new café, a 'jaunty' carpet, and the Welsh are annoyed because the new crest only contains the leaves of the leek, rather than the whole of the noble bulb. As far as radical constitutional change goes, the Supreme Court seems quintessentially British in spirit; characterized by an obsession with the accessibility of hot beverages, questionable taste in interior design, and being inadvertently offensive to Plaid Cymru.

This may seem a frivolous introduction to an analysis of an event that has been labeled as the conclusion of six centuries of judicial tradition. But the media obsession with the Supreme Court's soft furnishings is indicative of the uneasy relationship between the British people and formal constitutional theory, which makes the creation of the Supreme Court and its impact on the British constitution and the legal world so difficult to analyse. The British constitution is uncodified and the British people are, as preeminent constitutional theorist Vernon Bogdanor states, notoriously uninterested in their nation's constitution. Finally, according to Lord Irvine 'we are a nation of pragmatists, not theorists, and we go quite frankly with what works.'

In this context it seems surprising that a Supreme Court came into being at all. It has been presented by the government as a means of ironing out a constitutional wrinkle and ensuring the separation of powers in the UK. For a nation of pragmatists this seems like an exercise in judicial nit-picking. In his opening speech Jack Straw emphasized that the court 'keeps the historic balance between Parliament,

Government and the judiciary, the bedrock of the British constitutional settlement.’ The message from the government and the new judges themselves has focused on business as usual, albeit a new improved business that involves greater transparency and accessibility.

Yes, it is business as usual, but what is often not appreciated is how much business as usual has changed in recent years. This is the critical point. Opponents of the court fear that it will challenge what has often appeared as the only certainty of the British constitution; the principle of Parliamentary sovereignty famously described by the 19th century theorist A.V. Dicey. Lord Neuberger warned that "The danger is you muck around with a constitution at your peril, because you don't know what the consequences of any change will be." With all due respect, this is a case of shutting the stable door after the horse has bolted. The constitution has already been mucked around considerably, the vast majority just haven't really noticed. The presence of a new shiny Supreme Court might just act as the required wake-up call.

H.W.R Wade, in his 1955 article ‘The Basis of Legal Sovereignty’, stated that Parliamentary sovereignty based its legitimacy upon political fact and could only be changed by revolution. In his 1996 article ‘Sovereignty - revolution or evolution?’ he argued that such a revolution, albeit a quiet one, had indeed taken place. This claim is difficult to dispute. Following a series of landmark cases (culminating in Factortame) it is clear that European Community law takes precedence over Parliamentary statute. The courts can not only declare a statute incompatible with EC law but also suspend statutes in certain circumstances. Furthermore, the 1998 Human Right Act requires that all legislation should be given effect in a manner compatible with the European

Convention of Human Rights. The idea of bi-polar sovereignty – divided between Parliament and the courts - no longer seems beyond the pale.

In recent years judges have been increasingly assertive in recognising the possibility that there may be times when it is valid for the courts to challenge Parliament. In the 2005 fox hunting case *Jackson v Attorney General* Lord Steyn referred to the possibility of ‘constitutional fundamentals’, which even a sovereign Parliament could not abolish. In a lecture a later date he also said that in certain circumstances the ‘rule of law may trump Parliamentary sovereignty.’ These comments built on Lord Laws’ idea of ‘constitutional statutes’, mentioned in the 2002 ‘Metric Martyrs’ case *Thoburn v Sunderland*. The Law Lords are thus no strangers to asserting the role of courts in limiting the sovereignty of Parliament.

Seen in this light, the opening of the Supreme Court is a symbolic recognition of the fact that the framework of constitutional and political debate has already shifted to a considerable extent. There is little doubt that the new name and location will have an effect on the role of the newly appointed judges, it would be extraordinary if it didn’t. But the tools they use to fulfill their role, and potentially exercise judicial authority more assertively, have already existed for some years. The pleasing new symmetry of Parliament Square has been referenced by a number of commentators; justice on the one side, government on the other and Westminster Abbey facing both. This new layout can also be seen as symbolic of an evolving legal order best described by Dawn Oliver; where Parliament is ‘no longer at the apex of a simple hierarchy of simple legal norms’ but at the centre of a web of developing relationships between different laws and rules from various sources.

If the Supreme Court signifies business as usual rather than radical change, can it be dismissed as a piece of expensive window dressing? No. The opening of the Supreme Court will drag constitutional and legal debate further into the public arena. It is a sign that, constitutionally, Britain may be growing up. We can no longer shirk constitutional debate and the role of the courts within it as Dicey did (on the basis that it is a bit French). When the novelty of the coffee and carpet has worn thin, we can finally engage in a more mature and open debate concerning the British constitution.