Divided by a Common Legal Tradition

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It goes without saying that America and England are an ocean apart, but it bears mention that we are also “divided by a common legal tradition.” So says Stephen Moriarty, QC of Fountain Court Chambers—one of England’s top barristers, an eminent legal scholar, and chairman of the English Commercial Bar Association’s North American Committee. Stephen—and his remark—were among my first encounters (along with three other Temple Bar Scholars) during our month-long tenure in Legal London. Each encounter pushed us to consider similarities and differences between our legal traditions as we thought about lessons we might learn from them. Indeed, perhaps the most striking observations were the differences despite the apparent similarities and common origins of many of our laws.

Tradition in Legal London loomed large in our visits to its major veins: The Inns of Court, the Royal Courts of Justice, Westminster, and various other legal organizations.

**Inns of Court & Sets of Barristers’ Chambers**

The Inns of Court are a professional enclave that are said to make Chancery Lane the “spine of London”—with Gray’s Inn to the north, Lincoln’s Inn (and the Royal Courts of Justice) to the west, and the Inner and Middle Temples to the south with Old Bailey (the Central Criminal Court) a bit farther to the east. At the Inns of Court, leading senior barristers and judges called Masters of the Bench (or Benchers) introduced to us the histories of what their great halls have witnessed in attorneys and apprentices congregating since the fifteenth century. There, we learned of the unique system of mentorship, teaching, and society that helped hone the skills of advocates and build the legal profession. We were also exposed to the modern use of the Inns, as places where lawyers still gather for working lunches, advocacy training sessions, and cutting edge discussions of legal issues of the day in a way that echoes the earlier system.

The bulk of the training seems to have shifted to sets of barristers’ chambers annexed to the Inns. In my mini-pupilage at the Essex Court Chambers, I worked with an extremely intelligent and skilled barrister on a rather dramatic case relating to Gibraltar—which can be described as being mired right now in a constitutional crisis with respect to its Supreme Court, composed only of a Chief Judge and a Puisne Judge. My barrister was asked to represent one party in a related action on a human rights action. I was to help research whether there was a colorable claim, drawing on European human rights law, English law, and the laws of other common law countries. After some crash-course training in the research engines appropriate to those legal systems, I found myself quickly acclimated and able to access these various laws (for there were similarities) and challenged but again able to navigate their varied solutions and approaches (for there were differences). With these tools, I attempted—with the input of the barrister for whom I pupiled—to extract common principles and precedents and weave them into a
single, nuanced argument. At the Fountain Court Chambers, the experience was similar. The barrister also discussed with me his work concerning interpretive difficulties arising from the latest changes to the Civil Procedure Rules that materially affected the outcome of a commercial reinsurance dispute. I learned a great deal about reinsurance as well as the modes of legal argumentation that carry weight in the courts. I found them similar to our arguments, yet different in significant ways. Most notably, they drew liberally on international and foreign law both as a part of their law (on issues relating to European community law and treaties to which they were signatories) and as an aid to understanding similar legal concepts used in similar legal systems. Moreover, my barristers provided me with direction, advice, and plenty of feedback on the research and their own cases. Their example was another reminder to me of the value of mentorship and training, plus the need to provide the same in all spheres of legal advocacy and (for me) legal academia at home.

**Royal Courts of Justice**

At the Royal Courts, a statue of Sir William Blackstone loomed large in the cavernous gothic halls, clutching *Some Commentaries on the Laws of England*, a work that has had considerable influence not only in England but in other common law jurisdictions—as evidenced by the fact that this very statute was a gift from the American Bar Association in 1924. There, we met Lord Philips of Worth Matravers, the Lord Chief Justice of England and Wales, he presided over the Court of Appeals and the High Court—the highest courts in the judiciary (though the highest tribunal in the land was actually housed in Parliament: the Appellate Committee in the House of Lords). He explained to us the workings of the legal system and some of the recent reforms that he had championed.

Lord Philips also invited us to witness a case by one of England’s most accomplished barristers: Sir Sydney Kentridge. Here was a man who had crusaded against Apartheid by representing the likes of Nelson Mandela and the family of Steve Biko, had prevailed against the Lord Chancellor in a suit challenging the failure to upgrade legal aid fees, has acted as an *amicus curiae* to our Supreme Court on the English law of *habeas corpus* in the Guantanamo cases (*Rasul v. Bush* in 2004, *Hamdan v. Rumsfeld et al.* in 2006, and *Boumediene v. Bush* in the 2007-2008 Term), and has developed a stellar record otherwise in areas of public and international law. On our visit, Sir Sydney was arguing for the appellant in *Islamic Republic of Iran v. Barakat Galleries*, a high-profile case addressing the question of whether Iran is entitled to recover certain artifacts now in possession of a British company, Barakat Galleries. Iran contends that the artifacts are a part of its heritage, its property, and were illegally obtained; it is therefore suing for conversion of its property. The Galleries counter that they bought the artifacts legitimately from a third party. The sentiment in London seems to be that Iran should be entitled to recover these centuries-old artifacts, but there appears to be no clear legal path for doing so. The lower court found against Iran on every count. On appeal, Sir Sydney spoke eloquently about the history of English concepts of property and conversion, placing them in context with issues related to statutory and constitutional interpretation of both English and Iranian law, drawing on precedents from all over the world. Throughout, he spoke extemporaneously with reference to his notes and a
“skeleton argument” presented in lieu of the lengthy briefs that characterize the written submissions in our appellate courts. But we saw that the brevity of these skeletons was a qualified notion at best. The Chief Justice commented to us, tongue-in-cheek, that “there are several hundred-page skeletons. We have many skeletons in the cupboard!” These skeletons were accompanied by seven four-inch binders with “supporting authority” upon which Sir Sydney and his “learned friend” (opposing counsel) drew during argument. The upshot was that these were two experienced barristers on whose insight, expertise, and supporting authority the judges could place some reliance; at the end of the arguments—which lasted for three days—each judge had read and considered the same material and has gotten the opportunity to ask probing questions in a single sitting.

One would imagine, though, that the English judges—like American judges—still retreated for their own research and consideration of the issues; and one would imagine that the call to do so would be all the greater if they did not have the benefit of counsel from the country’s most skilled barristers. What we gained in efficiency through written submissions and limited oral arguments, we probably lost in breadth and commonality when counsel was superb; but what they gained in those regards may not have been uniform or as efficient, particularly when lacking counsel required much more extensive research. In this case at least, potential drawbacks were not a concern; the judges said that here, they had top counsel.

**House of Lords**

At Westminster, at the very beginning of our trip, we witnessed the Opening of the Legal Year. (It is always the first Monday in October, whence our Supreme Court’s start-date minus the pomp and circumstance.) This was basically a church service “attended by the Lord Chancellor and Secretary of State for Justice, the Lord Chief Justice, Judges, and other Members of the Legal Profession,” as announced on the front of the program. Outside, we watched these various groups file in, “bewigged and bewildered,” as one of them later put it, red-coated at times (high court and criminal law judges), violet-sashed at other times (circuit court civil law judges), and black robed with golden trim only rarely (the Lord Chancellor and certain knights). The Law Lords did not wear court dress at all, as they technically sit as legislators (in the House of Lords) and Privy Counselors (in the Privy Council), even as they actually sit in judgment over the most divisive and important cases in the land.

We were to encounter these plain-clothes “judges” in our first and last weeks of the program. During the first week, we met with Lord Bingham of Cornhill, Senior Lord of Appeal in Ordinary (or Law Lord). He too discussed many reforms, such as the creation of a new Supreme Court (by the Constitutional Reform Act of 2005) and transfer of the Appellate Committee to the Judiciary. He was quick to point out that this Court would not have the power of judicial review enjoyed by our Supreme Court, and the renaming of the current Supreme Court appropriately. Yet, the body would continue otherwise—like our Supreme Court—to pick cases that presented significant legal issues that called for definitive resolution. When it comes to picking cases, he said, “we dine *a la carte*.” Another recent reform was the recent addition of “judicial assistants,” akin to our law clerks. There was no four-person team of clerks of the type accompanying each
of our Justices and appellate judges; here, the Law Lords shared the pool of four JAs who did no opinion-drafting. But our institution was ostensibly the inspiration for this new addition even though they wondered at the wisdom of four-clerks-per-judge, as they had managed without them [us!] until now.

During the last week, we each shadowed a Law Lord. I sat with Lord Richard Scott of Foscote. At his invitation, we sat in on judicial sessions in the House of Lords, the Privy Council, the three-lord meetings at which decisions were made—“a la carte”—as to “whether to grant permission to appeal” (our Supreme Court’s equivalent of deciding whether to grant petitions for certiorari), and the Giving of Judgment—where one of the Law Lords read out recent decisions on the floor of the House of Lords. The opinions were received by the barristers and their junior counterparts who had argued them and were voted into legislation by Parliament.

One case that we observed on the Appellate Committee involved a question of statutory construction concerning the ability for immigrants to attain asylum who had not petitioned for it immediately upon entry. This type of question naturally touches upon human rights matters that have gained importance since the passage of the immigration clauses in question, particularly with the enactment of England’s 1998 Human Rights Act. Some of the Law Lords noted generally that EC law may be regarded as a sort of federal law when it comes to important questions of fundamental rights. Though the Law Lords do not have our Supreme Court’s power of judicial review, they said, their approach must serve as a check on government as much as it must be a faithful agent to the legislature. Presumably, this was true long before recent developments in the European and international communities. For example, the Lords explained, a common English approach to statutory interpretation is a Breyer-esque view of laws as “always speaking statutes” and a push toward fairness in reading them. In addition, at least a majority of a 1993 Law Lord-panel felt that a rigidly textualist approach had its drawbacks when they handed down Pepper v. Hart, which relaxed the judicial rule against citing legislative history in instances of textual ambiguity. But perhaps with the advent of the human rights regime and the oversight of the European Court of Human Rights, the Law Lords seem to have taken their role as an institutional check alongside their role as faithful agent more seriously. I find these perspectives particularly interesting as we in American still hotly debate the precise institutional role of the courts, whether legislative history can ever provide a useful interpretive aid, and whether citations to foreign law are ever appropriate or useful.

Legal Organization & Reform

One of the legal organizations we visited was the Bar Council—the regulation and membership organization of barristers. Its head, Geoffrey Vos, focused on the commonalities of our legal traditions in explaining London’s competitive stance vis-à-vis New York and its ultimate ascendancy over continental European law. According to him, common law jurisdictions such as Hong Kong, London, New York, and Sydney win out over Europe’s civil law jurisdictions because of the concern with finding “the right answer” (through assessing previous authoritative interpretations to guide the case at hand) and pursuing “justice” (rather than some principled solution governed by
compromise rather than fairness). Hence there is more certainty in our laws, he concluded, which is attractive to multi-national corporations looking to minimize risk. According to him, these factors combined with London’s simple, non-federal, flexible, and permissive system of laws to help make it the “financial legal capitol of the world.”

On observation, these comments seemed appropriate to London’s extremely sophisticated legal regime governing commercial litigation and arbitration. But the simplicity and stability he described in that arena contrasted with a sense of increasing complexity and shifts in the law through recent and forthcoming reforms in myriad areas that affect both the system writ large and the everyday lives of lawyers. There were the shifts in interpretive trends and the increasing use of international and human rights authorities, as English law became increasingly “federalized” vis-à-vis the European courts with jurisdiction over it. There was the collapsing difference between barristers and solicitors, as solicitors gained rights of audience before the bench. There was recognition of the urgent need to diversify the bench and the bar through changing the existing application, education, and financial structures that have had the effect of reproducing the elite as lawyers who gain access by virtue of wealth and legacy. There were the recent reforms to the Civil Procedure Rules—which had minimized Latin phrases and moved to a hybrid European-English style of codification that required yearly updating to accommodate recent precedential decisions. There was the Criminal Cases Review Commission that has been in operation for ten years and now looking to expand its efforts domestically and to reproduce its successes internationally. There was the abolition of the wigs in all but criminal cases, to take effect on January 1, 2008. There was the creation of the Supreme Court and the Law Lords’ impending move there in 2009. There was the proposed legal services bill now in consideration in Parliament to repair the system of representation for indigent plaintiffs and defendants in civil and criminal cases. And there were many more reforms on the horizon. In short, despite the stability in the commercial law arena (with some reforms even there), there were many changes afoot.

**Conclusion**

Through these major avenues, I learned a tremendous amount about the English legal system and the standards at the bench and bar that make many of its parts exemplary and instructive. All the activity and moves toward reform made this year a particularly exciting time to visit Legal London. They occupied the thoughts of the English members of the bench and bar, who were eager to discuss the recent and impending changes. And the changes engendered curiosity on their part and ours on the different ways that common legal problems with an ostensibly common legal tradition in similarly common law systems could be handled. In the end, Stephen’s opening remarks rang true: Indeed, we are divided by a common legal tradition. This division—because of its commonalities—is one that, in my mind, offers possibilities for perspective and growth for lawyers in both countries. Beyond gaining a better understanding of the English legal system, I certainly gained much food for thought as I look forward to practicing and teaching keeping in mind some of the lessons learned in Legal London. I am grateful to Combar and the American Inns of Court for organizing this program to make this all possible.