Justice in America:

LESSONS FROM THE NEW WORLD

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In 1831, Alexis de Tocqueville was sent from France to study the American penal system. What resulted is the work known as 'Democracy in America'. In many ways, these volumes tell the reader more about the Old World than they do about the New. At that time, the burgeoning USA struck de Tocqueville as having 'an equality of conditions' that could serve as a model for France and its penal system.

I undertook a Masters at Harvard Law School this last year, and, like de Tocqueville, the greatest lessons I learned were when I saw my own country through an American lens. However, if de Tocqueville's journey was to a land of equality, then mine was to one of inequality. America has a larger percentage of its population in prison than any other developed country, the highest levels of income inequality, and race is inextricably interwoven with the justice system; one in every three black men living in the US will spend some part of his life behind bars.

Like de Tocqueville, I didn't spend any significant time in the Southern states, but the ramifications of race and racism could still be felt in genteel Cambridge, Massachusetts as the 'Reclaim Harvard Law School' movement was in full swing during my time there. The movement pushes for racial equality at Harvard Law School and was successful in its campaign to have the Law School's shield removed: a shield carrying associations with the slave-owning (and slave-murdering) Royall family.

Inequality in terms of race and socio-economic status – those two things often coinciding – inform the processes of the American justice system, and offer potential lessons and warnings to the British.

Judicial appointments

Alongside the presidential primaries, my visit coincided with the death of conservative Associate Justice Antonin Scalia. The President is constitutionally required to fill such vacancies. Such an appointment is one of the most significant things a President does. Potential candidates were discussed in the media. The decision is intensely political. The (currently Republican) Senate was likely to block whatever nomination President Obama (a Democrat) made in the hope that a re-appointment would be made after the election by a Republican President. Obama's move was politically astute. Choosing a moderate would still shift the Supreme Court's composition away from the political right, and at the same time lay allegations of unreasonable non-cooperation at the Senate. The nomination of centrist Merrick Garland achieved exactly this.

As an Englishman following this story, I had become more familiar with the names and faces of the Supreme Court of the United States ('SCOTUS') than in my country's own Supreme Court. Of course, the Constitution grants SCOTUS significant powers, and the Court often makes decisions with large-scale policy implications when deadlock eventuates in the political process. But this still raised the question for me of whether we should be concerned about the relative obscurity of the Justices in Parliament Square, the opaque processes of the Judicial Appointments Committee, and the apparent complacency with which our society accepts the entirely white and almost totally male make-up of our Supreme Court. Applying political pressure to appointments could promote diversity; the US scores better than the UK in terms of recruiting women onto the Supreme Court bench.

Jury composition

Jury trials are a constitutional right. The Sixth Amendment requires that an 'impartial jury' be asked to adjudicate on all criminal matters, although this right can be waived. Aside from the obvious cost to the State, it is possible – at great expense – to hire a jury consultant, who will run predictions on the result based on juror ethnicity, gender, age, and so on. Handbooks on litigation deal extensively with the voir dire process that jurors must undergo. Jury selection in the most contentious cases can take weeks.

There is an historical justification for this. Until the Civil Rights Movement, it was almost impossible for blacks to register to vote in the South. Juries were compromised of people on the electoral roll. The result was that all-white juries adjudicated on black defendants' cases. Even more heinous were cases where a white man would be on trial for murdering a black man. Acquittals were common, even on the strongest evidence. The need for ethnically-balanced juries had become self-evident.

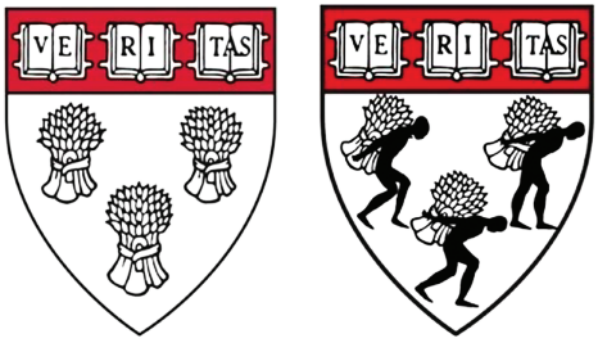
The US and the UK each have something to learn from the other. The extravagance of the American system and its obsession with juries – even in cases where they are manifestly unsuitable – is troubling. But British lawyers should also be more concerned about who is sitting to the side of the courtroom. For example, a juror's racist comments on social media would probably go undetected in the UK. We ought to be worried about that.

Litigation tactics

By the same token, American advocates make no assumptions that juries are rational. The courtroom is treated like a stage. Outrageous, dramatic, and colourful cross-examinations are the order of the day. As much as possible is memorised so that the attorney can position himself or herself so as to appeal to the jury; to make the witness turn away from the jury to appear reticent; to show the murder weapon close-up; to shout at or beg to the jury to 'do the right thing'. Extensive periods of time are spent laying out the back story of each witness in their direct evidence (evidence-in-chief) so as to 'humanise' them.

Objections are common. Counsel must be ready to spring to their feet at any moment, lest something prejudicial to their client's case reach the ears of the jury. Judges make rulings on the propriety of questions. At Harvard we were taught to use objections tactically – objections can be used to disrupt an opponent's flow. Use it too much, and it may demonstrate pettiness or opportunism. Failure to intervene could shut the door to an appeal.

With regard to objections, I am of the opinion that, if a judge is unhappy with the way a question is put, he or she should discount or interrupt the evidence without counsel's request. Requiring interruptions racks up costs, lengthens proceedings, and paves the way for good actors to flourish at the expense of good lawyers.



The controversial shield amended.

But, again, we should be more honest about our audience. Maybe barristers should be more theatrical. We should certainly be trained in how to adjust the tone and volume of our voices, and to alter the palette with which we paint our submissions. Most importantly, we should be prepared to call a spade a spade – our job is one of persuasion. More time should be focused on these psychological aspects early on in our training.

Professional ethics

A barrister's duty to his or her client also includes a duty to take judgment calls when it comes to chargeable time. It is a question of proportionality – what will this step yield? Is it worth taking? And all of this in a system that requires both parties to bear their own costs as the default rule.

This sense of proportionality seemed barely to exist in the US. A duty to one's client means simply to win the case. That means no joint experts, no compromises, and long timeframes for resolution. Most troubling is the extent to which witnesses are 'prepped' for cross-examination. In America it is standard practice to help witnesses present their evidence by instructing the witness on the questions counsel intend to ask, and giving an idea of the questions that may be asked of them by opposing counsel. This contradicts the British understanding of rC9.4 of the Bar Standards Board's handbook, which states that a barrister 'must not rehearse, practise with or coach a witness in respect of their evidence'.

Conclusion

In short, American litigation seems ripe for a Woolf-esque overhaul – an idea which surprisingly few people were talking about at Harvard. Like Alexis de Tocqueville, I have returned with a crisper image of how things are done at home. My time abroad has made me intensely aware of our need to continue to make litigation as open and fair as possible while maintaining a reasonable level of costs for those who find themselves mired in a lawsuit.

But the US also taught me that we should be more frank about what we expect from our own legal system. It confronted me with the brute fact that our courts are an emanation of the state, and that they are inhabited by people; people that carry their own prejudices and experiences; people that are susceptible in ways we fail to acknowledge. America may not have the right answers, but they are at least asking the right questions. ■