

Of Wigs and Gowns: A Critique of the Abolition of Court Dress in the Inner House of the Court of Session

Introduction

In Practice Note No. 1 of 2014, which was issued on 16 April 2014 and took effect on 22 April 2014, the Lord President declared that Senators of the College of Justice sitting in the Inner House of the Court of Session:

“[W]ill, ordinarily, no longer wear wigs and judicial robes. Where this is the case the court will not insist that counsel should appear with wig and gown or that solicitors with rights of audience should appear with gowns.”¹

It was the Lord President himself who first proposed this change, and ‘[t]he 11 judges sitting in the Inner House endorsed the change’.² The purpose of this piece is twofold: to explain the relevancy of wigs and gowns in the modern Scottish legal system, and to critique the way in which the decision to abolish wigs and gowns was undertaken.

Relevancy

Intense passions and identity

It is true that the issue of court dress is not of the same importance as the two main changes facing Scots law at the time of writing: the abolition of corroboration (proposed by Lord Carloway), and the reform of the civil court structure (proposed by Lord Gill). While it may not hold the same weight in terms of the liberties of the subject, court dress is still a contentious and important matter. That court dress provokes intense interest and passions was demonstrated in England in 2003 when:

¹ Brian Gill, ‘Sittings of the Inner House’ (Practice Note No. 1 of 2014, Court of Session 2014).

² British Broadcasting Corporation, ‘Judges ditch wigs and gowns for Scottish civil appeals’ (*BBC News*, 17 April 2014) <<http://www.bbc.co.uk/news/uk-scotland-27066955>> accessed 20 May 2014.

[T]he then Lord Chancellor, Lord Irvine, began a consultation by asking what lawyers felt about a dress code that was first introduced in 1714 when the country was in mourning for Queen Anne. That consultation produced what was then the biggest-ever response to a consultation issued by his department, but was never ultimately acted on.³

Furthermore, when the idea of abolishing wigs and gowns arose in 2002, a 'Faculty of Advocates survey of its 440 practising members found 80% of respondents wished to keep their distinctive courtroom dress',⁴ the reason being that 'members felt the strict dress code provided advocates with a sense of identity'.⁵ This sense of identity is part of the argument for the relevancy and retention of court dress. Court dress provides an *esprit de corps* for the legal profession. Wigs and gowns are similar to the 'golden threads' and battle honours of regiments, connections that link them with the accomplishments of their predecessors. Court dress is the legal equivalent of golden threads and battle honours as 'it represents a positive link with the best traditions in the practice of the law by the independent bar in Scotland'.⁶ Roy Martin, a former vice dean of the Faculty of Advocates, observed that 'court dress provides advocates with an obvious symbol of their professional identity in the mind of the public'.⁷ The author will also submit that court dress instils respect for the law and the courts. Court dress also upholds 'the majesty of the law' by setting it apart from everyday business.⁸

Practical benefit

One of the most common, yet still important, reasons for court dress is that it is able to 'assist court users, including jurors and witnesses, to quickly identify staff in a busy

³ Jon Robins, 'Dress to impress' *Law Society Gazette* (24 November 2006) <<http://www.lawgazette.co.uk/analysis/dress-to-impress/2921.article>> accessed 20 May 2014.

⁴ British Broadcasting Corporation, 'Advocates keen to keep wigs' (*BBC News*, 14 October 2002) <<http://news.bbc.co.uk/1/hi/scotland/2326943.stm>> accessed 30 May 2014.

⁵ *ibid.*

⁶ *ibid.*

⁷ *ibid.*

⁸ Philip Johnston, 'Judges' dress should uphold the majesty of law' (*The Telegraph*, 1 October 2008) <<http://www.telegraph.co.uk/comment/columnists/philipjohnston/3562511/Judges-dress-should-uphold-the-majesty-of-law.html>> accessed 30 May 2014.

environment where other individuals and organisations are also present’.⁹ This practical benefit, highlighted by a spokeswoman for the Scottish Court Service, is not to be dismissed out of hand. Especially in the present time with the Court of Appeal in England and Wales broadcasting its proceedings, it is desirable that the public are able to quickly identify lawyers in court proceedings: judges, advocates, barristers, solicitor-advocates, and solicitors. Also, being able to identify who is who enables the lay participants of the court to better understand what is happening. If the legal system is to be more transparent, then easy signs of identification are helpful.

Tradition

The reasons for the abolition of court dress in the Inner House, as Lord Gill is reported to have said, do not seem to take into account the enormity of the proposed changes. His Lordship explained that ‘[i]n deciding to sit in civil appeals without robes or wigs the judges of the Inner House are in line with the practice of the United Kingdom Supreme Court’.¹⁰ In my view, this reasoning does not suffice in justifying the abolition of court dress because the practices and traditions of the United Kingdom Supreme Court do not equate with the practices and traditions of the Inner House of the Court of Session. The predecessors of the Justices of the United Kingdom Supreme Court, the Lords of Appeal in Ordinary, did not wear court dress, and the Justices, being faithful to tradition, do not wear court dress either, save for ceremonial occasions. The Court of Session, on the other hand, has a tradition of unique court dress for its Senators, and it is part of its separate identity from the United Kingdom Supreme Court. The Court of Session is older than the United Kingdom Supreme Court, and it should not necessarily copy the customs of newer court. Also, His Lordship says that ‘[i]t makes sense in this day and age’ to abolish court dress.¹¹ In response to this claim, I contend that an attempted reading of current fads does not justify abolishing something that has existed for centuries. The element of tradition is also about respect for

⁹ Amanda MacMillan, ‘Courts spend tens of thousands of pounds on wigs and gowns for judges’ (*Deadline News*, 26 June 2011) <<http://www.deadlinenews.co.uk/2011/06/26/courts-spend-tens-of-thousands-of-pounds-on-wigs-and-gowns-for-scottish-judges/>> accessed 30 May 2014.

¹⁰ British Broadcasting Corporation, ‘Judges ditch wigs and gowns for Scottish civil appeals’ (n 2).

¹¹ *ibid.*

that which has been handed down through the centuries and maintaining it for future generations. Though, of course, 'being traditional' does not mean that reform is eclipsed: one need only look at the idea of the "hermeneutic of reform", of renewal in the continuity of the one subject-Church' proposed by His Holiness Benedict XVI, Pope Emeritus when His Holiness was still the serving Successor of Saint Peter.¹² One can replace 'Church' with 'the legal profession', as both are institutions that work towards truth and justice. The idea proposed by His Holiness reminds everyone that for intuitions of such magnitude as the Church and the State, with the legal profession being a branch of the latter, there may be reform, but reform must not mutate the institution into something that does not respect its past.

Continued use by the Faculty of Advocates

Prima facie, it would have been expected that following the Lord President's Practice Note, both judges and advocates would no longer don wigs and gowns in the Inner House. [Is this what you mean?] However, this is not the case. An email sent by the Dean of Faculty of Advocates, James Wolffe Q.C. instructed his fellow advocates:

"Members should note this link to Practice Note No 1 of 2014 concerning court dress in the Inner House.

Faculty Council recently discussed this change of practice on the part of the Court, and decided that members of Faculty should continue to wear formal court dress. Members appearing in the Inner House should accordingly continue to wear wig and gown.

James Wolffe QC
Dean of Faculty"¹³

¹² His Holiness Pope Benedict XVI, 'Address of His Holiness Benedict XVI to the Roman Curia Offering Them His Christmas Greetings' (*The Holy See*, 22 December 2005) <http://www.vatican.va/holy_father/benedict_xvi/speeches/2005/december/documents/hf_ben_xvi_spe_20051222_roman-curia_en.html> accessed 31 May 2014.

¹³ Email from John Robertson to author.

Even though the Faculty of Advocates has been given the option of appearing unrobed before the Inner House, it clearly deems court dress to be of such relevance that it has instructed its members to continue to wear it. The decision of the Faculty to retain the symbols of their profession, the wig and the gown, shows that it recognises the importance of a 'corporate identity' and respect for tradition.

Continued use in other courts

Paragraph 4 of the Practice Note states that '[t]his Practice Note does not affect existing custom and practice in the Outer House or in the High Court of Justiciary'.¹⁴ The question must be asked: what is the point of abolishing court dress in the Inner House, but not the Outer House, the Court of Criminal Appeal, or the High Court of Justiciary? There appears to be a trend that court dress is dispensed with in civil courts, but not criminal courts, as can be seen by the 2008 reform of court dress in England and Wales. The Lord President does state that '[i]n deciding to sit in civil appeals without robes or wigs the judges of the Inner House are in line with the practice of the United Kingdom Supreme Court'.¹⁵ As was mentioned previously, in my view, the idea of being 'in line' with the United Kingdom Supreme Court is misguided. The Lord President would have a more solid base upon which to stand if he had abolished court dress in both the Inner House and the Outer House, on the basis that court dress was not necessary in civil courts. By only abolishing court dress in the Inner House, it appears that the court is taking an arbitrary stance. Furthermore, if the arguments for retaining court dress are accepted for the criminal justice system, then it follows that they would be acceptable for the civil justice system.

Conclusion for relevancy

The author submits that court dress is a desirable part of the legal process as it provides a sense of identity to its wearers. It also serves to reinforce the dignity of the law.¹⁶ Finally,

¹⁴ Gill (n 1).

¹⁵ British Broadcasting Corporation, 'Judges ditch wigs and gowns for Scottish civil appeals' (n 2).

¹⁶ Johnston (n 8).

‘[t]o dispense with something which is instantly recognisable would be of no benefit to the legal profession or the nation as a whole’.¹⁷

Public consultations, or lack thereof

The second part of this piece will examine the way in which the decision to abolish court dress in the Inner House was reached. Prior to the overhaul of court dress in England and Wales in 2008, there were two public consultations on the matter (1992 and 2003).^{18,19} Members of the public were able to express their preferences as to how the people who represent them in court and judge them should dress. In Scotland, it seems that there was no public consultation at all; the Scottish Court Service website has no consultation regarding court dress in the sections for past or current consultations.²⁰

The lack of a public consultation is problematic because it leads to an assumption that the decision to abolish court dress was decided without due consideration of what people actually want. It must be said that the Court of Session could expect to face criticism for not announcing that it was considering this change, and by not giving the public notice of what was happening until the decision had been made. It was not until I contacted the Scottish Court Service and the Faculty of Advocates that I found that there were discussions with parties other than the Senators in the Inner House, who agreed with the change.²¹

That the decision was announced to the public after it had been made is regrettable. In England and Wales, there was an opportunity for members of the public to make their views known, which is a demonstration of true progressiveness, progressiveness that ‘makes sense in this day and age’, to use the Lord President’s quotation.

¹⁷ British Broadcasting Corporation ‘Advocates keen to keep wigs’ (n 4).

¹⁸ Lord Chancellor’s Department, *Court Working Dress in England and Wales* (Lord Chancellor’s Department 2003) <<http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/consult/courtdress/>> accessed 20 May 2014.

¹⁹ Lee Glendinning, ‘Legal argument as judges ditch wigs’ (*The Guardian*, 13 May 2008) <<http://www.theguardian.com/news/blog/2008/may/13/judgesditchwigs>> accessed 24 May 2014.

²⁰ Scottish Court Service, ‘Consultations’ (*Scottish Courts*) <<http://www.scotcourts.gov.uk/about-the-scottish-court-service/consultations>> accessed 24 May 2014.

²¹ British Broadcasting Corporation, ‘Judges ditch wigs and gowns for Scottish civil appeals’ (n 2).

Conclusion

Court dress, while not a fundamental part of the Scottish legal system, is, nonetheless, an important and desirable feature. Wigs and gowns provide a sense of 'corporate identity' to the wearer, which, in turn, strengthens the legal profession, as it is able to move forwards in confidence and continue to fight for truth and justice for all in society. Furthermore, the manner in which court dress was abolished for Senators of the College of Justice sitting in the Inner House of the Court of Session was regrettable, due to the lack of public consultation. It is the author's hope that the Lord President will reconsider the abolition of court dress.