Freedom under the common law

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The Gladstone Club
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Those bent on revoking political freedoms always start by tinkering with the law. Thus Apartheid became official policy in South Africa in 1950 with the Population Registration Act's definitions of White, Black and Coloured. Barrister Peter Linstead points also to Germany in 1933 allegedly combating terrorism the Fire Decree suspended personal freedom, free speech and association and privacy.

It is the common law, says Linstead, often more than government that protects our liberty. Governments get excitable when there is a threat or they want to be seen to be tough. Thus the 2004 Asylum and Immigration Act sought to oust the right of appeal to the courts if an application was rejected. The relevant clauses were defeated by determined opposition in the House of Lords lead by senior judges.

Characteristics of the common law
Common law is case law from decisions in cases as distinct from law drafted as statutes, decrees or codes. Hence it is called 'judge made' although the judge's aim is not to invent but to discover 'what the law is', even in unprecedented cases such as when it is right to turn off a life support machine. It is done by reference to authority, analogy or reason alone and a reasoned judgement is always given. General principles of law are developed from the cases sometimes over centuries. Precedent is a significant feature. On the principle that it would be unjust to treat similar cases differently judges are bound by the decisions of their predecessors. Common law is of Anglo-Saxon origins formalised in C12th when Henry II sent his judges on 'circuit'. Local customs were upheld but those common to more places were collected and given greater weight.

In contrast, civil law systems in Europe derive from Roman and Napoleonic codes. They have case law too because statutes have ever required interpretation in cases but the Napoleonic code prohibited judges from deducing general principles of law. Today 2.3bn people, 1/3rd of the world, live in common law jurisdictions. Of the rest 60% have predominantly civil codes and 6% religious (Islamic) law. Some are mixed. Egypt has a civil code but applies Sharia on family issues for muslims. Ex-British colonies have the English common law but South Africa has an amalgam keeping much of its former Roman-Dutch code.

The quality of the law ultimately depends upon the quality of the people: 'Truth in the breast of the judges'. They must apply even bad statute laws but can find creative interpretations to deliver just outcomes.

Appointment of judges
Selection of judges is therefore of great importance. A unique feature of the common law is that judges are drawn from experienced lawyers whereas in France and Germany they apply for judge school straight out of university. The English system was collegiate, judges being appointed, it was said, by 'a tap on the shoulder in the Temple corridors'. Seen as opaque and failing to deliver diversity in 2006 a Judicial Appointments Committee was created. It aims at selecting strictly on merit and to that end there is now a 9-page questionnaire, tests and role play. A concern with the new system is that top barristers may not relish the indignity of having to 'sell themselves' in this way. Particularly as the post brings a considerable drop in earnings. Judges earn from £100k to £250k for the Lord Chief Justice. A High Court judge earns about £180k. Senior barristers are earning c.£400k with QCs specialised in commercial work earning twice that. Ironically the old invitation may have been more difficult to refuse. There is a subtle distinction between obligation and privilege but a Platonic virtue in the old system was that the best people for high office are often not those ambitious for it.

Supreme Court
In another recent reform a new court of last resort began work in 2009 ending 400 years of the House of Lords in that role. Since 1876 the judicial function of the House had been exercised on its behalf by appointed 'Law Lords', senior judges sitting in a separate committee room, a reform initiated by Gladstone. Again there was no suggestion of fault in the old system as Lord Falconer's 2003 report 'A Supreme Court for the UK' recognised. The change was an ideological one. On the notion of 'separation of powers' the judiciary should be *seen* more clearly to be independent of parliament. Some have suggested it was about harmonisation with Europe promoted by Tony Blair with an eye to the future role of President. Others that is was simply 'modernisation for modernisation's sake'. Whatever the reason Linstead foresees little effect on day-to-day justice. 'Same people different building' is his conclusion but he adds that the 'separation of powers' concept ignores substantial benefits of overlap such as the input of the former Law Lords into review of new legislation. Another instance is the place of the head of the judiciary, the Lord Chancellor, in the cabinet empowering him there to defend the judges. It was a frenchman Montesquieu in 1748 who derived the theory of separation of powers from observing the British system but apparently he missed some of its subtlety.

Trial by jury is unique to common law. 12 laymen must decide the facts of the case including the subtle question of the accused's inner intentions. The judge and advocates advise on the applicable law. It too dates from Henry II and in 1215 Magna Carta immortalised it in the words: *'nor will we proceed against any free man but by the lawful judgement of his peers'.*

The power of both parliament and the courts derives ultimately from the Crown but it is often government itself from whose trespass liberty must be defended. In 1607 Justice Coke bravely stood up to James I (quoting Brachton) that even the king must be under God and the law. During WWII a statute for Internment of Hostile Aliens allowed detention of a person who '*there was reasonable cause to believe had hostile associations'.* In two cases the Home Sect said 'he had reason to believe' but did not give the reasons. Lord Atkin's famous dissenting judgement was that the case hinged on whether *'if a man has'* can mean *'if a man thinks he has'.* The only authority he knew for such a claim was Humpty Dumpty in Alice in Wonderland *'When I use a word it shall mean just what I choose it to mean'.*
In 2010 the Court of Appeal overruled Home Sect David Milliband ordering publication of evidence of MI6 complicity in the torture of Binyam Mohammed.

Convention on Human rights
The common law procedure of habeas corpus places the burden on the Executive to prove legitimate authority for detaining a suspect but a weakness was always that government can legislate itself authority. Since the 1998 Human Rights Act judges have a new power to declare a statute 'incompatible'. In 2004 the Terrorism etc Act 2001 was judged to include an element of imprisonment without trial and declared incompatible. Since 1998 there have been 16 other declarations upheld including four around mental health, five on detention, family and marriage in Immigration Acts, a rejection of minimum life sentence lengths in the Crime (Sentences) Act 1997 and sundry others. With the list of 17 simple rights: the right to life, freedom from torture, respect for private and family life etc the judges have this new power and Linstead says the common law is in as good shape as ever.