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Protection of Political Liberty in the British Empire: Behind the Double-Edged Sword

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Abstract

In the second half of the 19th century, a firm belief was held amongst Englishmen that the common law provided effective protection of civil liberties. This picture, however, came to be challenged when the common law applied beyond the borders of the metropolis, in the wider British Empire. This article proposes a framework to unpick the precise role played by the common law in protecting civil liberties throughout the Empire. By focusing on some central cases, two conflicting pictures emerge: on the one hand, the common law seemed to protect civil liberties; on the other, it enabled them to be thwarted. This points to the conclusion that in this period, the common law was instrumentalised to further conflicting political aims.

Keywords: common law, civil liberties, British Empire, habeas corpus, Kwok A Sing

I. Introduction

Dicey's *Law of the Constitution* expresses a firmly held belief in English society that the common law unwaveringly protected political liberties for English subjects.[1] Whether this was true for subjects in the wider British Empire came to be considered at the end of the nineteenth century, when a number of 'rule of law moments' came to the fore:[2] While prisoners from Upper and Lower Canada were

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1 Michael Lobban, 'Habeas Corpus, Imperial Rendition, and the Rule Of Law' (2015) 68(1) Current Legal Problems 27.

2 Michael Taggart, 'Ruled By Law?' (2006) 69(6) Modern Law Review 1006, 1024.

able to challenge their deportation to Van Diemen's land,[3] it was not evident that the common law always protected political liberties. Indeed, the brutally repressed 1865 rebellion in Jamaica, where *habeas corpus* had been suspended in favour of martial law, showed how the common law could also be used to undermine liberties in the Empire.[4]

The common law was used in this period as a double-edged sword, effective in the protection of civil liberties in some instances, thwarting them in others. Section II will unpick the term 'political liberties' by distinguishing 'political rights' from 'civil'.[5] The focus will be on this second notion of 'civil liberties'. Section III explores the times when the common law was effective in protecting civil liberties. Section IV examines cases in which it thwarted them. Whether or not the common law was used to protect these liberties depended on which facets of the common law were put forward. By comparing and contrasting different ways in which the common law apprehended civil liberties in the nineteenth century, much will be said about the common law itself, specifically on its malleable and instrumental character. Ultimately, the conclusion will be drawn in Section V that protection of civil liberties in the Empire greatly depended on prevailing political attitudes.

II. 'Political Liberty' – Breaking Down The Concept

The nebulous notion of 'political liberty' invokes different ideas relating to both positive and negative rights. Under this umbrella phrase, rights to freedom from state power are conflated with rights which invest individuals with a role in the conduct of their government. Mitchell proposes a useful distinction to make sense of this term.[6] Indeed, he notes that during the nineteenth century, a bright line was drawn between 'civil rights' (which were enjoyed by all) and 'political rights' (reserved for a small group of persons). A quasi-consensus existed in the political sphere which opposed granting these 'political rights' to subjects of the wider British Empire. John Stuart Mill, for example, firmly believed that uncivilised colonies should be run by bureaucrats selected by the metropolis – London would, in this way, keep a firm hold on overseas territories.[7] Expansion of the franchise to colonised territories was not credibly debated in England until the era of decolonisation. Furthermore, when this did happen, it was not the doing of

[3] Alfred A Fry, *Report of the Case of the Canadian Prisoners: With an Introduction of the Writ of Habeas Corpus* (A Maxwell 1839).

[4] See Rande W Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (OUP 2005).

[5] Taggart (n 2) 1013.

[6] Leslie Mitchell, *The Whig World 1760-1837* (Hambledon and London, 2005) ix, 141.

[7] See John Stuart Mill, *Collected Works of John Stuart Mill: Writings on India*, edited by John M. Robson, Martin Moir and Zawahir Moir (University of Toronto Press 1990) Vol XXX.

the common law, but rather the result of political struggle. To avoid anachronistic assessment of the period, and to centre the debate on aspects where the common law was determinant, this article will focus on the first notion of 'civil rights' or 'civil liberties', those which supposedly extended to all British subjects. This notion specifically addresses the liberty of individuals from the state – its protection therefore turns on the restraint of state authority by law.[8]

III. The Common Law – Partially Effective in Protecting Civil Liberties in the Empire

A. Two examples of the common law effectively protecting civil liberties in the empire

Several 'rule of law' moments in the nineteenth century captured the effective role sometimes taken by the common law in protecting civil liberties throughout the Empire. A first example occurred in the aftermath of the 1837-1838 rebellions in Upper Canada. Authorities decided against holding mass trials against the rebels for reasons of political expediency. Rather, the policy adopted consisted in punishing certain leaders with transportation to Van Diemen's land without trials. A writ of *habeas corpus* was sought by these prisoners in English courts. In the absence of conviction and sentence, the Queen's Bench struggled to find any legal power to transport these men. Thus, they were released.[9] This case raised two important points about the working of the common law. Firstly, the Canadian authorities' obdurate decision to avoid submitting rebels to a jury trial showed that they feared the possibility of 'normal' common law channels effectively protecting these men's civil liberties. The second point is that civil liberties were upheld through application of *habeas corpus*, even where this opposed the political will of both government and the judges. As Michael Lobban notes, this episode produced a sense that the common law was disseminating a 'cultural' rule of law value throughout the Empire.[10]

Another situation in which the common law was used to protect civil liberties arose in 1871, when mutineers on a 'coolie' (indentured labourer) ship from China sought the protection of British-ruled Hong-Kong. China sought to

[8] Abraham D. Kriegel, 'Liberty and Whiggery in Early Nineteenth-Century England' (1980) 52(2) Journal of Modern History 253.

[9] See Cassandra Pybus, 'Patriot Exiles in Van Diemen's Land' in Greenwood and Wright, *Canadian State Trials: Volume Two: Rebellion and Invasion in the Canadas*, 1837-1839 (University of Toronto Press, 2002) 190-92.

[10] Lobban (n 1) 30.

extradite one such subject, Kwok A Sing, for him to face the same punishment as the other mutineers - summary execution. The case was heard in Hong Kong by the radical abolitionist Chief Justice Smale.[11] In a surprising judgement, Smale CJ refused China's request. Several reasons for his decision were put forward. Firstly, Smale CJ refused extradition on the ground that China could not ask for the extradition of a prisoner whose crime was committed on the high seas.[12] Secondly, he held that Kwok, in a bid to break free, was justified in murdering the captain and crewmembers – this, he believed, equated to slave emancipation. He depicted Kwok as rightfully exercising self-defence.[13] Whether Smale CJ was justified in comparing the situation of slaves and coolies was fiercely debated,[14] but did not detract from the fact that he used the slave narrative to invoke common law protection. Influencing Smale CJ's judgement was a sentiment of deep distrust in the Chinese justice system, combined with an idea of the moral superiority of English common law. Smale CJ stated in his judgement that "China could not be trusted as a nation to do justice within her own territories".[15] The common law was used in this case as a shield, effectively protecting against the frustration of civil liberties in the Empire and the wider world.

B. What aspects of the common law were put forward to protect civil liberties in the empire?

Specific facets of the common law were emphasised in the above cases, as well as in other cases where the common law effectively protected civil liberties throughout the Empire. These were: (i) viewing the common law as a unitary jurisdiction and (ii) thinking of common law values as universal.

(i) Empire as One Common Jurisdiction with the Same Principles Applying in the Same Way Throughout

Portraying the law of England and Wales as applying unitarily throughout the Empire enabled constitutional protections to be exported outside Britain. Importantly, these protections would apply in the same way as they did in the metropolis. Although some argued that in practice the common law did not apply

[11] Elliott Young, 'Chinese Coolies, Universal Rights and the Limits of Liberalism in an Age of Empire' (2015) 227(1) Past & Present 121,123.

[12] ibid, 139.

[13] Smale CJ, 'Supreme Court, Hong Kong, 25 March 1871 — Judge Chambers Before the Hon. Chief Justice Smale, in the Matter of Kwok-a-sing on Habeas Corpus — Judgment', 195-207.

[14] Philip A Kuhn, *Chinese Among Others: Emigration in Modern Times* (Lanham MD: Rowman and Littlefield Publishers, 2008) 113-14.

[15] Smale CJ, 'Supreme Court, Hong Kong, 25 March 1871 — Judge Chambers Before the Hon. Chief Justice Smale, in the Matter of Kwok-a-sing on Habeas Corpus — Judgment', 199.

as one common jurisdiction,[16] the political and legal world persistently upheld the idea that it did. The cases of *Upper Canada* and *Kwok A Sing*, but also the case of *John Anderson*,[17] are examples of this: the constitutional writ of *habeas corpus* was invoked to protect the civil liberties of subjects throughout the Empire. As such, these judgements upheld that 'fundamental principles',[18] inherent to the common law, restricted the authorities' power to act, regardless of where the action was taking place.

(ii) Common Law Values as Universal

Transpiring from Smale CJ's judgement in the case of *Kwok A Sing*, where he discards the Chinese legal system, is a vision of the common law as morally superior to any opposing forms of law. The common law represented, on this view, a universal good as far as it diffused rights throughout the Empire. Equipped with universal principles, the common law was empowered to assert its jurisdiction wherever it sought to do so. As Young notes, on a strictly legal basis, the assertion of jurisdiction in the case of *Kwok A Sing* was rather questionable: "it was, after all, a British extraterritorial court in Hong Kong that was asserting jurisdiction over a French ship that left from a Portuguese territory and was on the high seas when the rebellion occurred".[19] And yet, in the name of universal rights, it was found to fall under the British courts' jurisdiction. Even when it was appealed, the Privy Council did not question the common law's right to intervene in such cases.[20]

This point connects narrowly with the aforementioned point about the unitary application of the common law. Indeed, if the rights and values safeguarded by the common law purport to have a universal scope, then the way in which the common law applies can itself only be unitary. It would be a logical fallacy to both assert that rights are universal, and then to refuse to protect these very same rights universally. The fear, within this strand of thought, was that if a different, weaker, standard of legality applied in the Empire, nothing would insulate England from being subjected to the corrosive influence of a weakened standard of legality.[21]

Such a position reflected the political thought of John Stuart Mill, who saw the English as endowed with a civilizing mission, bringing universal rights to the

[16] See Opinion of A-G Sir William Robson in *R v Earl of Crewe, Ex parte Sekgome* [1910] 2 KB 576 (CA) [42].

[17] *Ex parte Anderson* (1861) 3 El & El 487, 121 Eng Rep 525, 30 LJQB 129 (QB).

[18] Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (Joseph Butterworth & Son 1820) 29.

[19] Young (n 11) 128.

[20] ibid.

[21] See Ian Baucom, *Out of Place: Englishness, Empire, and the Locations of Identity* (Princeton University Press 1999).

Empire and the wider world.[22] This was characteristic of Anglo-centric thought in the period. As Stapleton notes, a certain 'legal mindednesses' had come to be subsumed with 'Englishness' in collective consciousness.[23] And yet, although this played to the advantage of certain individuals such as Kwok A Sing, whose civil liberties would doubtlessly have been thwarted under a different jurisdiction, it also dragged with it an inherent justification of imperialism.[24] More specifically, the unchallengeable value of the common law created a moral obligation on the English to diffuse their system universally.[25] Exporting the rule of law was in fact one of the Empire's self-proclaimed justifications. Therefore, thinking of the common law as a universal good may have been instrumental in protecting civil liberties throughout the Empire, but it was also highly problematic.

IV. The Common Law Could also be Used to Thwart Civil Liberties

A. Two cases where the common law effectively thwarted civil liberties

Although at times the common law effectively protected civil liberties, it also had the capacity to justify curbing these liberties in the Empire. This occurred in several cases which challenged detention without trial, such as that of *Ex parte Sekgome*.[26] Because he was viewed as a political threat to British rule in Bechuanaland, Sekgoma was summarily detained by the region's High Commissioner under an Order in Council. He sought to obtain a writ of *habeas corpus*, arguing that the king's prerogative was limited by fundamental constitutional principles. This was refused.[27] The proclamation ordering detention was viewed as an exercise of crown power – the exercise of prerogative was limited by no principle. As such, Sekgoma's detention was justified under the law.

The Jamaican uprisings of 1865 also provided fertile ground for the common law to hamper civil liberties. After several rebellions occurred in the region of Morant Bay, Governor Eyre proclaimed martial law to ruthlessly suppress political uproar.[28] Within this context, the event that spurred the greatest debate involved Eyre's political opponent, George William Gordon, who had no hand in the uprisings. Yet, Eyre took advantage of the proclamation of martial law

[22] John Stuart Mill, *On Liberty* (2nd edn, John W Parker and Son 1859) 135-6.
[23] Jane Stapleton, 'Dicey and his Legacy' (1995) 16 History of Political Thought 234, 255.
[24] Young (n 11).
[25] ibid.
[26] *R v Earl of Crewe, Ex parte Sekgome* [1910] 2 KB 576 (CA) [612].
[27] ibid.
[28] Kostal (n 4).

to detain Gordon, subject him to a sham trial in a martial court, and summarily execute him. As Dyzenhaus notes, Eyre was encouraged in his actions by the tacit bargain between government and the military according to which the acts of the military would not be subjected to justice.[29] Yet, this event caused political furore in England, so much so that Eyre and other officials were brought before the courts. Nevertheless, neither of the three trials that were held found Eyre and his officials to be acting outside the scope of their powers. Rather, they found that the common law empowered colonial legislatures to pass acts, such as the proclamation of martial law, which go against all 'fundamental laws'.[30] Gordon's fate was sealed, according to the common law courts, in strictly legal terms.

B. Which aspects of the common law were put forward to thwart civil liberties in the empire?

Several facets of the common law point to the idea that it could also be effective in thwarting civil liberties throughout the Empire. This was the case (i) when a highly formalistic understanding of law was adopted and/or (ii) when the application of the common law was suspended.

(i) A Highly Formalistic Understanding of Law within the Common Law

A highly formalistic understanding of law enabled the Empire to be cut up into different jurisdictions. Indeed, on this reading, all that mattered was that laws were made by the correct legislative channels. Once this was guaranteed, the authorities of the Empire did not need to worry about protecting constitutional rights when applying law beyond the metropolis. A prime example of this is Bengal Regulation III, which effectively removed the writ of *habeas corpus* for the whole of India via statute.[31] Farwell LJ's dicta in the case of *Sekgome* also highlighted the supreme importance of tracking authority for action: he defended the High Commissioner's decision on the basis that it was taken under the Foreign Jurisdiction Act, which itself was a proper delegation of sovereign power from Parliament.[32] On this view, Parliamentary Sovereignty was the sole limiting constitutional principle. There existed no fundamental law which could limit the

[29] David Dyzenhaus, 'The Puzzle of Martial Law' (2009) 59 U Toronto LJ 1.

[30] See William Francis Finlason, 'Report of the Case of The Queen v Edward John Eyre, on His Prosecution, in the Court of Queen's Bench, For High Crimes and Misdemeanours Alleged to have been Committed by Him in his Office as Governor of Jamaica; Containing the Evidence, (Taken from the Depositions), the Indictment, and the Charge of Mr. Justice Blackburn' (Chapman and Hall 1868) xxii (Blackburn, Case of *The Queen v Edward John Eyre*).

[31] Bengal State Prisoners Regulation (III of 1818).

[32] *R v Earl of Crewe, Ex parte Sekgome* [1910] 2 KB 576 (CA), 615 (Farwell LJ).

will of Parliament. Through this highly formalistic understanding of law, however, it was possible for entirely different standards of legality to apply in the Empire.

(ii) When Common Law Suspended its Own Jurisdiction by Allowing Application of Martial Law and Prerogative Powers

Armed with the unwavering certitude that Parliamentary Sovereignty is the common law's sole constitutional principle, Parliament could effectively suspend the application of the common law. This occurred during the Jamaican uprisings when martial law was violently used to repress political opponents, but also when the British Empire was acting under the king's prerogative, as was the case in 1923 in Egypt.[33] According to Dicey, the use of such extraordinary powers did not undermine the principle of the rule of law – indeed, such powers would only be conferred when the rule of law itself was imperilled.[34] What Dicey's argument did not account for, however, was the wide and arbitrary use made of these powers. Ordinances were frequently employed for detention and deportation of political activists throughout the Empire,[35] in situations that could rarely be qualified as 'threats to the rule of law'. Kostal shows that, strikingly enough, the common law not only bowed down to executive power in times of emergency, but also provided a space within the constitutional framework for claims of power and survival to go unchallenged.[36] It effectively created the mechanism for suspending its own jurisdiction– and with it any protection of civil liberties.[37] Considering this, Dicey's assertion that "Englishemen are ruled by the law, and the law alone"[38] can be deemed, as Taggart puts it, "wishful thinking".[39] In any case, it was patently wishful thinking for subjects of the wider Empire.

One potential objection could be raised here, contending that breach of civil liberties in these cases was not strictly the fault of the common law, but rather the fault of political exercise. William Finlason, who proposed a theorisation of martial law, argued in this vein that when a war or rebellion arises, the common law is suspended.[40] It is replaced by acts of state which exist wholly outside the legal domain. This argument is not convincing, because it invites a logical fallacy –

[33] Lobban (n 1) 53.

[34] AV Dicey, *Lectures Introductory to the Law of the Constitution* (The Oxford Edition of Dicey, JWF Allison (ed), OUP 2013) 164.

[35] Lobban (n 1) 58.

[36] Kostal (n 4).

[37] Dyzenhaus (n 29) 11.

[38] AV Dicey, Introduction to the Study of the Law of the Constitution (first published 1885; London: Macmillan and Co, 8th ed 1915) 198.

[39] Taggart (n 2) 1025.

[40] William Francis Finlason, *A Treatise of Martial Law: As Allowed by the Law of England: In Time of Rebellion* (Stevens & Sons 1866).

namely, it purposefully ignores that in the first hand, the common law enabled the conditions for its own replacement by martial law and prerogative. At the start of the chain lies the common law. As such, the common law *is* to blame in these cases for failing to protect civil liberties throughout the Empire.

C. What view was underpinning this conception of the common law?

A short point must be added to understand the political thought of those who put forward these facets of the common law. The predominant perspective here was different to the aforementioned 'universality' view. Indeed, subjects of the wider Empire were not seen as equally deserving of civil liberties. Rather, a racially informed perception of rights attribution was adopted. Farwell LJ, in the case of *Sekgome*, asserted that the "bulwarks of liberty might, if applied there [Africa]], well prove the death warrant of the whites".[41] This echoed the perspective of Vaughan Williams LJ, who, in the same case, contended that Mr Sekgoma was not a full British subject. Lobban notes that in Williams' view, "although the Englishman might be able to obtain a writ of *habeas corpus*, the African could not".[42] Such a vision informed these judges' use of the common law and allowed them to construe it in a way which effectively legalised the frustration of civil liberties throughout the Empire.

V. Instrumental Nature of the Common Law - Allowing Political Views to Prevail

Emanating from the above discussion is an image of the common law as an instrument used to further divergent ends: At times, it enabled the protection of civil liberties in the Empire; at others, it undermined them. This depended, as has been argued, not only on the facets of the common law brought forward but also on its timing. The truth about the common law is that it captured and represented all these facets – it could not be subsumed into one.

As such, it then becomes important to look at the ends to which the common law was applied. This article has hinted at the contrasting political views which underpinned the contrasting uses of the common law. On the one hand, a liberal, Millian perspective informed the use of the common law to protect civil liberties.[43] English values, including the common law system, were seen as a

[41] R v Earl of Crewe, Ex parte Sekgome [1910] 2 KB 576 (CA) [616] (Farwell LJ).

[42] Lobban (n 1) 46.

[43] John Stuart Mill, *Three Essays: On Liberty, Representative Government, and the Subjection of Women* (Oxford University Press 1976) 409.

universal good which needed, on a moral imperative, to be diffused throughout the Empire.[44] It represented a form of political superiority over competing systems which nevertheless affirmed equality of all the Empire's subjects before the law. On the other hand, a more conservative, racist-informed perspective of rights used the common law as an instrument for undermining civil liberties in the Empire. To be precise, on this view, subjects of the Empire were not even seen as having civil liberties that could be thwarted – indeed, such liberties existed only for the Englishman.[45]

VI. Conclusion

In summary, the common law was not fully effective in protecting civil liberties within the Empire. At times, it could be effective, when the common law was viewed as applying unitarily throughout the Empire and when English common law values were thought of as universal. However, in many other circumstances, the common law thwarted civil liberties – this occurred by way of a highly formalistic understanding of law, one which enabled it to suspend the protection of fundamental liberties. Transpiring from the discussion above is a picture of the common law as highly instrumental, made up of different facets that could be used to advance different causes. As such, the ends which were sought during this period are much more important in understanding the protection of civil liberties than an analysis of the common law itself. We have explored the tension between prevailing political attitudes during the nineteenth century, and seen how, ultimately, they instrumentalised the common law to set forth their world view.

I wish to raise two additional points in this conclusion. The first is that our study of the common law purposefully steered away from delving into a discussion of the 'rule of law'. Although this was done to avoid confusion, it must be noted that an important and fruitful overlap exists between the notions of common law and rule of law, as they appeared during this period. Exploring their relationship may therefore produce interesting insights. The second point is that our discussion confined itself to assessing how the common law protected civil liberties within the Empire. This was done to reflect the way in which liberties more generally were conceived during the nineteenth century. As Kostal notes, for instance, the liberal Jamaica Committee was set up explicitly to "defend public liberty from the incursions of the state".[46] Yet, liberty has since then taken on a fuller meaning, invoking not simply 'liberty from' the state's power, but also a more Arendtian

[44] Taggart (n 2) 1012.
[45] Lobban (n 1) 46.
[46] Kostal (n 4) 159.

sense of 'liberty to' act within the political sphere.[47] It may be of interest to assess the colonial era considering this fuller notion of liberty, exploring the extent to which subjects of the Empire were invested in the exercise of government.

[47] Hannah Arendt, *The Human Condition* (Chicago University Press 1998) 22-78.