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## LECTURE I

### The Common Law and State Power

Under the Crown, the unifying principle of our constitution is the common law. The common law's distinctive method has endowed the British state with profoundly beneficial effects.

In this Lecture I will explain why this is so. I will say that by force of the common law, efficacy is allowed but oppression is forbidden to the power of the state; and this is achieved by a benign *continuum* of developing law. I will tell what is a constitution's unifying principle, and what is the distinctive method of our constitution's unifying principle, the common law. I will give two instances of changes wrought without revolution by the common law's processes; the first concerns the sovereignty of Parliament, the second the judicial review jurisdiction. Then I will explain how Parliament's legislation only has effect through the methods of the common law. The common law is the interpreter of our statutes, and is the crucible which gives them life. The process of interpretation is intensely coloured by the common law's insights of substantive principle: reason, fairness and the presumption of liberty. So is the judicial review of executive action. The result is that statute law and government policy are alike delivered to the people through the prism of such principles. This is the gift of the common law, the unifying principle of our constitution. It is the means by which legislature and government are allowed efficacy but forbidden oppression.

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This process both requires and produces a delicate constitutional balance between law and government. This Lecture is about the nature of this balance and its benign effects. In this context I will explain how the sovereignty of Parliament ought now to be understood. But there are two contemporary threats to the constitutional balance. The first is that present-day fears, real and imagined, of the grip of extremism exert an unwanted, perhaps dangerous, pressure on the moderate liberality of the common law. I will explain and confront this in Lecture II, 'The Common Law and Extremism'. The second is that the actual or perceived effects of law made in Europe upon our domestic system may undermine virtues of the common law: its catholicity and its restraint. I will explain and confront this in Lecture III, 'The Common Law and Europe'.

### **What is a Constitution's 'Unifying Principle'?**

The term 'constitution' means, at least, that set of laws which in a sovereign state establish the relationship between the ruler and the ruled. Law in one form or another is therefore a defining element of every constitution, save in a territory where the people are ruled by the brute commands of whoever is the strongest leader from time to time; but we would deny the term 'constitution' to so coarse a state of affairs. In a constitutional state the sovereign is always a body whose designation, as R. T. E. Latham put it, 'must include the statement of rules for the ascertainment of his will, and those rules, since their observance is a condition of the validity of his legislation, are rules of law logically prior

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to him'.<sup>1</sup> The laws of the constitution will also contain definitions of the powers and duties of the sovereign, and the exercise of these powers will mark the reach of individual freedom in the state.

Such laws make the constitution. This is true of every constitution, written or unwritten, exotic or familiar, common law or civilian; for laws of this kind are what a constitution means. But written constitutions of the modern age typically contain much else besides. These are usually prescriptions, often framed in terms of rights, for the proper exercise of the sovereign's powers and duties. Such prescriptions are not a necessary condition of a constitution properly so called; but where they are found, they take their place among the constitution's provisions.

Law, then, is the unifying principle of every constitution; every constitution is made with a set of laws which (a) define the ruler and in doing so establish the relationship between the ruler and the ruled; and (b) contain definitions of the powers and duties of the sovereign. A constitution will also generally include (c) principles for the proper exercise of the sovereign's powers and duties. In the British state (a), (b) and (c) are given by an amalgam of the common law and statute, without a sovereign text. Statute has provided important pillars in the edifice, such as the Act of Union 1707, the legislation which confers the franchise, and the devolution legislation: all these go to (a) – they define the ruler. The Magna Carta of 1215, the Bill of Rights of 1689 and the

<sup>1</sup> R. T. E. Latham, *The Law and the Commonwealth* (Oxford University Press, 1949), p. 523 note 4.

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European Communities Act 1972 go to (b) – they define, in part, the sovereign’s powers and duties. It is important to note that the European Communities Act goes to (b) rather than (a), for it means that at law there has been no transfer of state sovereignty from Westminster to Brussels (but this is to trespass into Lecture III). The Human Rights Act 1998 goes to (c) (principles for the proper exercise of the sovereign’s powers and duties).

Now, every one of these statutes, and every other statute, is mediated to the people by the common law. An Act of Parliament is words on a page. Only the common law gives it life. It is a commonplace to say that the judges interpret legislation, and so they do. But as I shall explain more fully, this is the opposite of an austere linguistic exercise. The construction of statutes, just as surely as the development of common law principles not touched by legislation, is the product of the common law’s reason matured over time. The force of our constitution’s provisions – (a), (b) and (c) above – is therefore delivered by the common law and its distinctive method. The unifying principle of our constitution is the common law. So I turn to my second topic: what is the common law’s distinctive method?

### **The Common Law’s Distinctive Method**

I have said before that the method of the common law is fourfold: evolution, experiment, history and distillation.<sup>2</sup>

<sup>2</sup> I developed this description of the common law’s method in the ICLR Annual Lecture, which I was privileged to give on 1 March 2012 under the title ‘Our Lady of the Common Law’.

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I referred earlier to the common law's insights: reason, fairness and the presumption of liberty. But they are enriched and matured through the law's fourfold method. Evolution – rules of law honed through the doctrine of precedent; experiment – working hypotheses discarded if they are not robust; history – the power of continuity; distillation – the modification and adjustment of the law to meet new conditions. Plainly these methods run into each other. They are the matrix of the common law's genius, which is the refinement of principle over time. Generally, they involve what may be described as reasoning from the bottom up, not the top down. The common law is not *dirigiste*. Its principles are constantly renewed by the force of fresh examples. It is not by chance that our constitution is uncodified; it is because, being conditioned over the centuries by the changing common law, it is not and cannot be the creature of a single moment. The elusive strength of the common law of England is that it reflects and moderates the temper of the people as age succeeds age. It is especially fit for a democratic state, for it builds on the experience of ordinary struggles. It stands for no grand theory of anything, but it is endlessly creative. Although it is much older, it enshrines a cardinal principle of the Enlightenment: that people should think for themselves.

To give these generalities sharper focus, I will say a little more about the common law's fourfold method: evolution, experiment, history and distillation.

- (1) Evolution. By this I mean that rules of law are honed through the doctrine of precedent. It is to be noted that the law of *stare decisis* prescribes that although the Court of

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Appeal binds itself, neither the Supreme Court nor the High Court does so. Thus precedent strikes a balance between certainty and adaptability. But there is a more subtle effect. It is that every principle has a tried and tested pedigree. It is refined out of what has gone before. It is never constructed from untried materials. Accordingly, every principle has deep foundations.

- (2) Experiment. This is closely related to the evolutionary process which inheres in the doctrine of precedent. It was the American writer, Munroe Smith, who said in 1909 that '[t]he rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice'.<sup>3</sup> If the analogy is not pressed too far, this is not unlike Prof. Sir Karl Popper's theory of scientific discovery first published in 1934:<sup>4</sup> science proceeds by postulating hypotheses which are only good so long as they are not disproved. So also a common law principle works until new experience shows it must be changed or abandoned.
- (3) History. The common law's respect for our history is an important driver of a principal virtue of the constitution: the power of continuity. In this respect the law's wisdom is the wisdom of Edmund Burke's vision of society as a

<sup>3</sup> Quoted by Benjamin Cardozo in the first of his lectures on *The Nature of the Judicial Process* (Yale University Press, 1921). Munroe Smith (d. 1926) was a distinguished legal academic at Columbia University. He was managing editor of *Political Science Quarterly* for many years.

<sup>4</sup> *The Logic of Scientific Discovery* (1934).



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contract between the living, the dead and those who are not yet born.<sup>5</sup>

- (4) Distillation. This is the modification and adjustment of old law so that it becomes new. Authority exposes and then mends the law's weaknesses. A new case articulates the law's present state. But in doing so, it also clears its future path.

I have said that these four methods – evolution, experiment, history and distillation – run into each other. It might be more accurate to say that they are four aspects or dimensions of a single process. It is the process of continuous self-correction, which is at once allowed and restrained by the law's four methods. Its fruit is the common law's genius, the refinement of principle over time. The common law reflects and moderates the temper of the people as age succeeds age. It stands for no grand theory of anything, but it is endlessly creative. It is the crucible of the moderate and orderly development of state power.

The common law has had no Justinian, whose summations of the Roman law in the sixth century after Christ have proved the foundation of civilian codes of law in Europe to the present day. Gibbon has this to say:<sup>6</sup>

When Justinian ascended the throne, the reformation of the Roman jurisprudence was an arduous but indispensable task . . . Books could not easily be found; and the judges, poor in the midst of riches, were reduced to the exercise of their illiterate discretion.

<sup>5</sup> Burke, *Reflections on the Revolution in France*.

<sup>6</sup> Gibbon, *Decline and Fall of the Roman Empire*, vol. V, ch. 44.

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And so, as Gibbon tells us, the Emperor directed Tribonian ‘and nine learned associates to revise the ordinances of his predecessors’. Gibbon continues:<sup>7</sup>

As soon as the emperor had approved their labours, he ratified, by his legislative power, the speculations of these private citizens: their commentaries on the twelve tables, the perpetual edict, the laws of the people, and the decrees of the senate, succeeded to the authority of the text; and the text was abandoned, as a useless, though venerable, relic of antiquity. The *Code*, the *Pandects*, and the *Institutes*, were declared to be the legitimate system of civil jurisprudence; they alone were admitted in the tribunals, and they alone were taught in the academies of Rome, Constantinople, and Berytus.

By the common law the text is not a relic of antiquity, useless or venerable or otherwise. It is living law, built on what has gone before, but open to constant renewal.

I said I would give two instances of the common law’s processes in action: the sovereignty of Parliament, and the judicial review jurisdiction. There are many others in the field of private law. They include the evolution of the law of negligence into a coherent whole; and the recent movement of the law of defamation towards a principled arena of privacy and free speech. But I am concerned with the common law and state power, to which my two instances are most germane. I turn to the first: the sovereignty of Parliament.

<sup>7</sup> *Ibid.*