

THE CONCEPT OF THE HUMAN PERSON IN ANGLO-AMERICAN LAW

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English Law

Winston Churchill in his *History of the English-Speaking Peoples*, Vol. II, makes the point that the English and American legal systems diverged radically from each other in the 17th Century in the way in which they rejected (in large part) the Royal Prerogative.

The Royal Prerogative – the concept that the King can do no wrong, that he is above the law – was challenged in England by the Lord Chief Justice, Sir Edward Coke. He contended that conflicts between Prerogative and Statute should be resolved not by the Crown but by the Judges. The law was supreme. For his pains he was dismissed in 1616 by James I. Some years later he entered the House of Commons.

And it was through the House of Commons that the English defeated the Royal Prerogative by asserting the power of the people, as represented by their members of Parliament. They developed a Parliamentary democracy. But what crossed the ocean to New England with the 'Mayflower' was the more logical interpretation of Sir Edward Coke's idea. It was the law that was to be supreme in the New World. The Americans established a Constitutional democracy.

The English have always distrusted theories – much to the puzzlement of the French – and by the device of the Supremacy of Parliament no mere judge could overrule an Act of Parliament, and no written Constitution existed to limit the power of Parliament. There was thus a flexibility in English governance and a freedom from theories and concepts. The fact that the system worked well was its own justification. One sees even today the English nervousness at being governed from Brussels by 'people with theories'. The triumph of beaurocracy over democracy.

True to that English tradition, I will not follow Prof. Glendon into her discussion of the American Founders' Concept of the Nature of Man. The English Common Law developed long before Locke and Hobbes expounded their ideas. It was designed to ensure that each man's rights within the fabric of society as it then existed were protected.

Although the Common Law was already well established, there were many disputes with the King over specific rights. In consequence contentious parts of the Common Law were re-enumerated in the Great Charter (Magna Carta) of 1215. But Magna Carta was not a philosophical treatise. It was a list of sixty-three specific grievances, which the King undertook to put right. It was a document forced upon the King, which he never intended to observe. Indeed it was denounced, under pain of excommunication, by the Pope, Innocent III. But it chanced that the King died the following year. The rebel barons made peace with those representing his nine year old son, the future Henry III. By 1225, the Charter, slightly modified, became the basis for governance under the new regime. Lord Denning, in 1956, described it as 'the greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot'.

Nevertheless, it was not a constitution. It was a list of demands ranging from the general –

39. No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined; nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.

40. To no-one will we sell, to no-one will we deny or delay right or justice.

to the very particular –

33. Henceforth all fish-weirs shall be completely removed from the Thames and the Medway, and throughout all England, except on the sea coast.

So, under the Common Law, wrongdoers were punished, regardless of rank, after a fair trial by their peers, i.e. their social equals and neighbours. The law was robust and pragmatic. The jury which decided on guilt consisted of men who knew the accused, had grown up with him and knew his family. They were not required to give reasons for their verdict. They would have agreed that every man (or woman) was entitled to a fair trial, but if you had asked them about the fundamental rights of men, or women, or foreigners, or homosexuals or lunatics or unborn children they would have

been taken aback. They did not think in that way. There were long-standing rules governing some of these situations, and others were introduced gradually over the years by legislation.

There were, of course, theories of legal personality. By that I mean concepts concerning the right of women, children and lunatics to sue, the age at which a minor child could inherit or marry, and things of that sort. But these were practical rules rather than concepts of the human person. The law was concerned on the one hand with protecting the structure of society, and on the other with protecting individuals from injustice within that structure. It had, I venture to suggest, no conscious concept of the human person as such.

I would agree that English Law, like American Law, has always seen the individual as its focus of concern, rather than 'the people' or 'the masses' or 'the proletariat'. And equally there is a mistrust of government, which finds its expression in a sturdy individualism among members of Parliament and a tradition, now dying out, of voting for the man rather than the party at election time.

But if one is to look at the concept of the human person in modern day law in the English speaking world, one has to look at the legislation passed by Parliament in each specific country. One may look for an underlying social theory as to the nature of man, and one may recognise the huge impact of the Universal Declaration of Human Rights, but in the final analysis – what does the statute say?

Thus abortion laws, and laws about stem cell research define for each country when a human person is deemed to come into existence. Euthanasia laws define when a person (personality?) may be deemed to have ceased to exist. A host of other laws relating inter alia to employment, discrimination, gender, sexual orientation and religious freedom define and protect rights of individuals which are perceived to be threatened.

One may perhaps say, in conclusion on this aspect that the trend in modern law, or more correctly, in modern legislation, is to reduce the Catholic definition of 'human person' at both ends, i.e. conception and death, and to expand it in the middle by, for instance, according more sympathy and recognition to homosexuality – the homosexual human person.

Law, Religion & Morality

In the English law, as in any other legal system, there has always been an interplay between law, religion and morality. People like to think that the three must be kept entirely separate. But this is not possible. Without

religion, there can be no morality; and without morality there can be no law (to quote Lord Denning again). In a famous dictum in 1932, dealing with the manufacturers' liability for damage to the ultimate purchaser, Lord Atkin said

The rule that you are to love your neighbour becomes in law 'you must not injure your neighbour'; and the lawyer's question, 'Who is my neighbour?' receives a restricted reply.

The refusal of Europe to include the 'invocatio Dei' in the new European Constitution's preamble may be an attempt to maintain the separation between Church and State, but to an outsider it seems more like an attempt to apologise for Europe's Christian cultural heritage. It is true that the preamble does refer to:

the universal values of the inviolable and inalienable rights of the human person, democracy, equality, freedom and the rule of law.

But these values themselves have been developed through Europe's Christian heritage.

Stoic Philosophy, Roman Law and Medieval Theology and Jurisprudence

I suppose it may be argued that these universal values in fact predate Christianity. The Stoics conceived of the fundamental equality of man, and this concept was readily accepted into the Roman Law and thence into mediaeval philosophy and jurisprudence. From there it became part of the Roman-Dutch Law of the Netherlands.

Roman Dutch law of Southern Africa

Since the Common Law of much of Southern Africa is the Roman-Dutch Law, it is worth considering briefly how that came about. The Dutch in 1652 established a settlement at the Cape of Good Hope in South Africa, essentially as a staging post for the Dutch East India Company's operations in what is now Indonesia.

The Law of the Cape Colony was the Roman-Dutch Law of Holland. The British then conquered the Cape, but maintained the legal system as they found it, subject only to English procedural law. Thus when Napoleon imposed the Napoleonic Code in the Netherlands, and abolished the Roman-Dutch Law, his action had no impact on the law of the Cape Colony. The Roman-Dutch Law then spread to the whole of South Africa, Zimbabwe, Namibia, Botswana, Lesotho and Swaziland.

Although the principle of the fundamental equality of man is at the heart of the Roman-Dutch Law, one has to recognise the basic contradiction that the legal system ran parallel with the political system of slavery in the early days and apartheid or separation between the races in more recent times. Where was 'the concept of the human person' in such a system?

One can only say that the judiciary, by and large, tried its best, within the confines of all-embracing discriminatory legislation, to treat all men as equal.

But there is in fact no avoiding the conclusion that the concept of race predominated. The Common Law was everywhere overridden by statute law or legislation. Group rights, and the rights of one group in particular, were predominant over individual human rights.

The Emergence of Bills of Rights

The solution, in the post-apartheid era, has been found, all over Southern Africa, in the acceptance of written constitutions, establishing and entrenching Bills of Rights. In these Bills of Rights, differently worded in the various countries, the concept of the human person and his/her individual human rights is spelled out. In South Africa there is a Constitutional Court to interpret and defend these rights. In other countries the Supreme Court acts as a Constitutional Court when questions of human rights arise.

The Courts thus have the power to strike down legislation which conflicts with the Bill of Rights. In a pragmatic sense one may say that the concept of the human person in any particular Southern African country will emerge from a study of the Bill of Rights of that country, and from the interpretation of that Bill by the Constitutional/Supreme Court of that country.

It is perhaps too early in the history of Southern African constitutional democracies to determine whether the criticisms of the US Supreme Court, so delicately expressed in Prof. Glendon's paper, are relevant also in Southern Africa. In human affairs, wherever a decision has to be made, there will be those who do not agree with the decision made. But by and large, one may say that the concept of the human person and that human person's fundamental human rights is well understood and accepted. What is increasingly in dispute is the definition of 'human person'. When does that person begin to exist? When does that person cease to exist? What recognition should be given to the sexual orientation of that person? What are the rights of the human person in relation to the indissolubility of marriage? These are the problem areas.