

Over Mighty Governance.

The English Constitution. The Bill of Rights v Arbitrary Power

An essay to consider what protections the liberty of the Subject has been afforded against Arbitrary power.

Basic principles need to be accepted and considered for us to see that we are indeed well protected if the constitution is fairly consulted and truthfully applied. It is a basic principle that no man is above the rule of law, and where there is Right there is Remedy.

The Settlement of our Glorious Revolution of 1688/9 sought to remove all Arbitrary powers from our Governance yet successive administrations have used every contingency over the intervening period to ride roughshod over our Liberties. It is my belief that many administrative actions of our government today need to be constitutionally challenged, against the inherent Protections. Where overreach is found, then invalidity, or being a nullity, or *ultra vires* must be declared by the Courts. Liability then must be apportioned against the violators and the powers surreptitiously usurped, neutralised. This corrective action must surely define the meaning and purpose of Constitutional Protections.

Any territory which the Crown governs is afforded the protections of our fundamental Constitution and Bill of Rights. Since 1689 there can be no doubt that the settlement terms upon the Crown apply in all its governance throughout all its territories. There appears no power to bypass this limitation of constitutional authority to any subsequent governance deriving its legitimacy there from.

Let's look at the constitutional mechanism which secures this broad protection for the Subject's Liberty against Over Mighty Governance. How might the Subjects raise a challenge to check suspect administration for vindication of their freedoms by deploying the constitutional protections? Should the whipping of party politics be allowed to drive roughshod through these constraints? What meaning is '*the rule of law*' is it '*do as we say*' or do as is prescribed by the constitution?

Firstly we can be clear that the Courts are Duty bound to give overriding precedence to the Bill of Rights. This does not fall upon or to any particular Court. Under our constitution any and all Courts are fully able to uphold and maintain the fundamentals. This is established as constitutional law applying to the Crown against which no contrary position may lawfully exist.

The Bill of Rights enjoys a unique status in our law for it is both a revolutionary settlement document backed by enactment and is the legal basis upon which the Crown is held in constitutional limitation for our governance. It is all personally sworn by each succeeding Monarch to be upheld and maintained in its true intent, reign long, at their Accession. It has had that unique status by design since its inception over three centuries ago.

Understanding the constitutional power of the Bill of Rights will reveal to those who seek its protections a brilliant and most wisely constructed document that has stood the test of time and whilst some of its language may seem antiquated it is of as vital importance to day as when it was written. There is a wonderful judgement given in its favour in the famous case of *Bowles v Bank of England* which should be taken to heart by all and seek to be fostered for the future:-

Parker J 1912 Chancery Division

"The Bill of Rights still remains unrepealed, no practice or custom, however prolonged, or however acquiesced in on the part of the subject, can be relied on by the Crown as justifying any infringement of its provisions."

How do the provisions defeat Arbitrary power?

Firstly reading the Bill of Rights will reveal the following passage

*"...whom it hath pleased Almighty God to make the glorious instrument of delivering this Kingdom from popery and **arbitrary power**."*

Thus it is clearly declared in written text of the settlement documents as a principle objective of the settlement. To remove all **arbitrary power**.

How might the provisions manifest this objective and defend the Subjects against all intrusive impositions hence forth? It is effected by the process of the separation of Powers. Arbitrary power requires the unification of two ingredients the power to declare an objective unilaterally, and the power to enforce it.

The Bill of Rights has provisions to secure separation of those Powers. It declares that only the ordinary Courts are to exist and that Juries shall be empanelled. Thus a conviction may only be obtained through a Jury's consent.

This ensures you have a Common Law position where the Jury may always declare a '**not guilty**' verdict, if it is not satisfied that a conviction should be imposed. In the case of oppressive law this absolute right of the jury may be prove to be a defence against tyrannical or despotic law making. The Jury will decide the intent and adjudge where they see that justice lies. This is absolute and inviolable. It is a separation of the Power of any conviction from the state. That this is so is cemented into the constitution by the promise of the Monarch at their Coronation "*to cause law and justice in mercy to be used in all judgements.*" The Crown is thus bound to observe the verdict of the Jury. This is an overarching confirmation of the Power of the Common Law in favour of the Liberty of the Subject.

The Bill of Rights declares that there can be no fines or forfeitures of individuals without prior conviction all such promises are *illegal and void*. That there may be no excessive bail, nor excessive fines nor cruel and usual punishments inflicted.

Thus it can be seen that if the power of the State is denied access to all these points then Arbitrary power is indeed held in check and unenforceable.

So that is the outline of the inserted provisions of the Bill of Rights in ensuring separation of the Power of enforcement from the state to the People. How then may this be bought to bear upon infringement to obtain redress and remedy.

I have already mentioned that any ordinary Court has the power to maintain the Rule of Law contrary to any apparent statutory provision where there is Constitutional conflict. This point has been denied in the Courts. It has been said that a Court may only look to see if a statute is upon the statute book and not enquire into its efficacy. Perhaps its most far reaching example is to be found in :-

Pickin v British Railways Board (1974) AC 765 at 789.

“It is the function of the Courts to administer the laws which Parliament has enacted. In the Courts there may be argument as to the correct interpretation of enactment; there must be none as to whether it should be on the statute book at all” (Lord Morris).

This case has been widely used to promulgate the supremacy of Parliament. It is quite obvious that Pickin will not stand logical scrutiny in principle when tested against the provisions of the Bill of Rights. One of those who was there the late Leolin Price CBE. QC told me when I raised this point with him that he had always felt that this case was wrongly decided.

Clearly if the Pickin case had involved a law imposing a condition contrary to the Bill of Rights the Courts would have the following duty to consider and observe.

Firstly the Bill of Rights texts demands the following consideration and recognition re the Subject's liberties:-

"And they do claim, demand and insist upon all and singular the premises as their undoubted rights and liberties, and that no declarations, judgements, doings or proceedings to the prejudice of the people in any of the said premises ought in any wise to be drawn hereafter into consequence or example."

That text is clear instruction to any Court in its duty to uphold the Subjects' Liberties. This text immediately confronts the logic of Lord Morris's judgement nothing is to stand to diminish the strength of the provisions, absolutely nothing. By grandfather right this has been the basic limitation upon which the Crown has been held for our constitutionally limited governance since this revolutionary settlement of 1689. It must therefore qualify what may be perceived as legitimate ever since. It is not that a Parliament has bound its successor for it is a Constitutional law that is to be applied to the institution of the Crown in all its governance an entirely different doctrine creating a Constitutionally limited Monarchy entrenched by oath and to which true allegiance is owed by all including Party! Political policy may not override the fundamental laws of Liberty.

Next can be found the specific instructions of duty to the those who serve the Crown:-

"that all and singular the rights and liberties asserted and claimed in the said declaration are the true, ancient and indubitable rights and liberties of the people of this Kingdom, and so shall be esteemed, allowed, adjudged, deemed and taken to be; and that all and every the particulars aforesaid shall be firmly and strictly holden and observed as they are expressed in the said declaration, and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come."

Suppose a provision had been passed in error by a careless Parliament to create Arbitrary powers (and there are many so called statutes that should be put to this test in my view) Lord Morris logic would be in clear violation of the duty laid down if he was to declare that his Court had not jurisdiction to intercede. The wording of the text commanding the Crown to uphold the rights of liberty from Arbitrary power is plain and it is emphatically the primary duty of the Crown though its oath of office to uphold and maintain. If an errant provision had somehow got to the statute book and it had thus been approved for Royal Assent it would immediately be apparent to all that the Assent would have occurred in violation of the Constitution, for the Monarch may not breach the oaths of office or be placed in breach of those oaths by those in office under the Crown.

Thus the offending legislative provision would have been a deception in the grant of that Assent and the provision whilst apparently on the statute book would clearly be *ultra vires*. Any and all Courts would have legal duty and jurisdiction to declare such. The Parliamentary authority binding the Crown is set out and commanded in the text of the Bill of Rights. The Bill of Rights is itself in command of the Crown's governance if we are governed in accordance with the rule of law! This is what makes it Constitutional. Because it is a law specifically laying down the constraints of the Crown and its Parliaments.

Further to this The Subjects have an absolute right to the remedies and liberties laid down. To that end provision is not only made for the Constitutional Liberty to be the fundamental duty of governance but that the Subjects may always Petition the Crown directly to secure redress of genuine constitutional grievance.

Thus the Constitutional law makes two routes of remedy available to the subject. And of course there is the additional ability to seek Parliamentary representation in addition to the Courts and the direct Right of petitioning the Crown. The Right of Petition is enshrined in the Bill of Rights and the interpretation imposed upon any judicial process is to find for the widest possible application in favour of the liberty of the subject. That, in my view, is most extremely powerful.

There are many areas of legislation where the public may feel overreach exists. I shall not seek to set such things out here but leave that for those who may wish to explore the Constitutional logic I have extrapolated in this essay, to consider the potential for remedy.

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