M. JANSSON
USA Yal University

WHICH LAW? THE STRUGGLE FOR SUPREMACY BETWEEN ENGLISH COMMON LAW, CIVIL LAW AND THE CROWN'S PREROGATVE COURTS

Long before the Norman Conquest, indeed, it was said, from «time immemoriam», the idea of the rule of law existed in the minds of Englishmen. It found its earliest expressions in the legal codes of Ethelbert, the first Christian King of Kent; Ina, King of the West Saxons; Off a. King of the Mercians; and Alfred, the great monarch who united the Saxon heptarchy[1]. In the seventeenth century the great judge and jurist. Sir Edward Coke, would join with John Selden and other legal theorists in placing these Anglo-Saxon codes within the framework of English Common law. They designated these early law codes, along with Magna Carta, the Great Charter of Liberties, and the statutory laws drafted by parliaments from the earliest time. *Lex Terrae* or the law of the land. English common law was the law of the land. It was practiced in the courts of common law where the judges by tradition were appointed by the King.

As the country moved from the middle ages into the early modern period the institutions of state and government – Crown, Church, Parliament, and judiciary – were shaped in response to the needs of a growing population and changing society. The law courts and the systems of law practiced in them developed and expanded in response to new social conditions.

By the time James I came to the English throne from Scotland in 1603 the idea that English common law, practiced in the Court of King's Bench, the Common Pleas, and the Exchequer, constituted a body of cases and parliamentary statutes that formed the Law of the Land or Lex Terrae was well established. But its role within the broader sphere of English government and politics was unsettled.

For one thing the common law courts were not the only courts in England and common law was not the only legal system in practice. The Court of Chancery, presided over by the Lord Chancellor, heard cases in equity not based on the ancient cases and principles of common law, and made decisions without a jury.

The merchants' courts, the admiralty courts and the Court of the High Constable and Earl Marshal, a military court, practiced Roman law based on the *Corpus Juris Civilis* and comprising Justinian's *Institutes*, the *Digest*, and Code, etc. These courts were presided over by legal practitioners called «civilians» who had earned the degree of Doctor of Civil Law (D. C. L.) at Oxford, or Doctor of Laws (LL. D.) at Cambridge[2]. The Star Chamber,[3] the court which

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Maija Jansson, Ph. D., Prof, Director of the Center for Parliamentary History at the Yale University

[1] Johnson et al. Proceedings in Parliament 1628. Vol.2. P. 333.

[2] Levack B.P. The civil lawyers in England 1603-1641. S.a. P. 2-3.

[3] Butterworth. The English Legal System. S.a. P. 174.

under the early Stuarts became most closely connected with the crown in its struggle with parliament over sovereignty, was also a court of Civil Law. the early Stuarts became most closely connected with the crown in its struggle with parliament over sovereignty, was also a court of Civil Law.

The church courts and the Ecclesiastic High Commission Courts practiced a mixture of Canon Law based on Gratian's *Decretum* and civil law, an amalgamation unique to the English experience and the Henrician reformation.

The Counciliar courts, that is the special courts that constituted the legal branch of the King's Council of the North and the Marches of Wales, heard cases under the crown-appointed Lord President, the Secretary of the Council, and the councilors, who were a combination of civil and common law judges[4]. These courts generally gave opinions according to the broadest interpretation of the crown's interest in the case at hand.

Along side of the common law then, as we have seen, other legal systems were practiced in different courts: equity in the court of Chancery; civil or Roman law in the naval and military courts, as well as the Star Chamber and the ecclesiastical courts. Within this confusing and varied judicial complex but very much part of the common law system, the High Court of Parliament stood as a court of appeal for cases in common law. Unlike all of the other common law courts, however, when parliament functioned as a court the judges were not crown appointees but were members of the institution of parliament itself. And the parliament differed from the other common law courts in anotherrespect: uniquely, it had the power by custom and tradition to create law as well as to preserve it.

By 1625, with the accession of Charles I, conflicts, which had always to a certain extent existed, about the authority and jurisdiction of these different courts and judicial systems began to come to a head. It was often not clear what cases were heard by what courts and there was confusion about how that was determined. During the years of personal rule in the 1630s the established church and the crown relied more heavily on the use of the civil law courts, the High Commission and particularly the Star Chamber. It must be remembered that with the accession of Queen Elizabeth, after the brief Marian lapse into Catholicism, the ancient jurisdiction of all ecclesiastical and spiritual matters of the state had been restored to the crown by act of parliament. By the act of 1 Elizabeth «all spiritual Jurisdiction was [again] united to the crown». Although the union of church and state was not new under the early Stuarts, they interpreted the word «union» more literally than had Elizabeth. And they were also encouraged to strengthen this union by members of the Arminian movement within the Church of England. Archbishop Laud, in particular, saw the advantages of a close link between church and crown in promoting a strong ecclesiastical hierarchy that could ensure uniformity on the popular front. Through the appointment of church officials the crown could exercise control in the decisions of the courts in which they sat. In the absenceof parliament the Star Chamber and the Ecclesiastic Commissions flourished without check.

By November 1640 at the opening of the Long Parliament it is clear that law reform was high on the agenda. The speeches and debates of the members illuminate in form and content their central focus on the nature of law, the structure of the law courts, and the jurisdiction of those courts, all of which had bearing on the MP's notion of monarchy. They argued that the law courts had become the vehicle for crown control. They questioned the expanding jurisdiction of the ecclesiastical courts; recent decisions in the common law courts made by

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[4] Reid R.R. The King s Council in the North. S.a. P. 246.

crown appointed judges, as in the case of ship money; and the general confusion caused by overlapping jurisdiction in many of the lesser courts. Underlying all of these debates about jurisdiction was the larger concern with the struggle for the supremacy of English common law over civil law. I would argue that the new relationship of the church and crown under the Stuarts, pushed to the extreme in the absence of parliament during the 1630s, moved this struggle from the theoretical to the real. Moreover, the struggle was not limited to England but took shape across the border in Scotland with the creation by the English crown of the See of Edinburgh in September 1633 and the concomitant appointment of Scottish bishops; and in Ireland with the appointment of a deputy who controlled the judiciary and, by royal commission, assumed the reins of royal power in conjunction with his Council. The conflict of common law with civil law transcends all of the debates of the Long Parliament; it had an impact on the structure and vocabulary of the articles of the Grand Remonstrance, and was responsible in part for the claim of parliamentary sovereignty in the Nineteen Propositions.

Hitherto arguments over the two systems have focused on writings of the Tudor period, perhaps through the influence of Mait-land's work in the early part of this century, and conclude that the issue was settled by the time of the accession of James I. I think, on the contrary, that the debate resurfaces in the 17th century, reaching an apex with the Long Parliament in the early 1640s. The Stuart claim of divinely sanctioned monarchy and the advent of a group of Arminian ecclesiastics was a recipe for greater cooperation between church and crown. The civil law , courts became the vehicle for their control of dissenting forces, providing legal sanction for expansive new powers.

Briefly, the history of these developments begins with the argument over the superiority of a system of civil or common law that began well before the reformation and was defined by the work of Thomas Starkey around 1529. Starkey, in true renaissance fashion, rejected the barbarism of the Normans and proposed instead that rather than harking back to the Anglo-Saxons, who were barely known about at the time, England «receive the civil law of the Romans, which is now» he argued, «the common law almost of all Christian nations»[5]. Richard Helgerson, in his bookon *Forms of Nationhood*, comments that later Tudor writers like Sir Thomas Fortescue who came to the defense of common law did so as part of a dialogue with Starkey. «It was, after all» Hel-gerson writes, «the »glorious fame» of Roman law and the possibility that an English prince beguiled by that fame might wish to impose Roman law on his people that made Fortescue's defense of English law necessary». Helgerson carries his arguments through the work of Sir Edward Coke who, he contends, cloaked some of his common law in terminology comfortable to civilians in order to make it palatable to a wider audience. The very title, the written form, and the inspiration for Coke's glosses on the statues of England, is by way of Justinian. Coke, in fact, in his Institutes harnessed the form of the codification of civil law to serve the substance of common law.

There had always been a certain dilemma in English legal theory regarding law and the King, and while Bracton had written that the King was not above the law, the maxim persisted that «No writ runs against the King». In 1640 ecclesiastical courts claimed they were the King's courts by virtue of the statute of 1 Elizabeth; common lawyers, however, argued that the King could not have

[5] Helgerson R. Forms of Nationhood: The Elizabethan Writing of England. Chicago,1992. P. 68-70. With regard to the ancient constitution and the legal tradition, see: Cristianson P. Ancient Constitutions in the Age of Sir Edward Coke and John Selden // The Roots of Liberty. 1993. P. 89-146.

a praemunire against himself. Those who had read James's work, the *True Law of Free Monarchies,* written in 1598, five years before he left Scotland, knew his position with regard to this question, for he writes there that: «Kings were the authors and makers of the laws, and not the laws of the Kings». Jamesdismissed Bracton's position and not only embraced the civilian, John Cowell's, *Interpreter* but also Sir Thomas Ridley's book, the *View of Civil and Ecclesiastical Law* published in 1607, which, as Helgerson notes, «moved Coke from thence to prophesy the decay of the common law». Charles the First, schooled by his father's tutors and imbued with the theory of the divine right of Kings, rejected the works of Coke. In 1634 he seized Coke's manuscripts and suppressed his work, leaving it to the members of the Long parliament to retrieve the material and arrange for its publication.

The position of common law was further undermined by the Crown's power to issue proclamations. Proclamations became a means to legally circumvent the legislative function of parliament or, in the case when no parliament was meeting, to assume the parliamentary function. On 24 November 1640 in the arguments in parliament against ship money Sir John Strangways and others proposed that «proclamations might not be of infinite power to alter or make laws». The subsequent parliamentary resolutions against the ship money case, that passed without dissent on 7 December, charged that levying ship money was against the law of the realm and contrary to former resolutions in parliament and the petition of right enrolled as statutory law. Moreover, the extra judicial opinions of the judges given to the King before the hearing of the case, and the ship money writs themselves, they argued, were against the law of the land. The Members of theHouse of Commons drafted impeachment proceedings against the King's judges in the case. Sir John Wray echoed Coke in saying «lex currat lex, let the law run, and let the common law destroy them that would have it destroyed»[6].

Aside from the courts themselves, ecclesiastical commissions that assumed judicial authority from royal commission, such as those at Durham and York, had proliferated in connection with the expansion of the High Commission. The members of the Long Parliament went about to examine these as well as the abundance of royal commissions issued during the years of personal rule that enlarged the position of the church in a variety of spheres, giving enormous latitude to Bishops and Archbishops in secular as well as religious affairs. A quick survey of the Patent Rolls reveals, for example, in 1634 a special commission to the Archbishop of Canterbury with Thomas Lord Coventry, Keeper of the Great seal, «to execute all spiritual and ecclesiastical jurisdiction, and to amend and suppress heresies, abuses, and offenses whatsoever in England and Ireland».

Many of the same personnel sat on the commissions as well as in the courts. Besides the high churchmen who sat in the civil law courts, after 1601 nearly all of the officers of the courts in England were ex officio members of the High Commission. «The commission was thus connected», as Roland Usher points out, «ex officio. with every court in England, for, in each, one of its own members presided»[7]. Usher neatly puts his finger on the prob-lem of overlapping personnel. The House of Commons committee to examine the High Commission in 1641 asked questions not about the activities and decorations of the church but about law and the jurisdiction and practice of the ecclesiastical courts: on what do they ground their jurisdiction, on the patent of creation alone, or on

[6] Jansson M. Proceeding in the Opening Session of the Long Parliament // Boydell and Brewer. 2000. 7 December.

[7] Usher R. G. The Rise and fall of the High Comission. Oxford, 1913. P. 307.

the statute of 1 Elizabeth? By what authority do they send forth attachment for the first and original process against any person to be brought before them? By what authority do they enforce any to enter bond or recognizance? By what authority do they authorize messengers to search or seize any man's books or goods? And so forth.

The tension between parliament, the church and the crown had increased during the 1630»s as the civil courts and prerogative courts enlarged their authority in trying cases outside of their customary jurisdiction. Even popular literature claimed that the bishops and church courts had «usurped upon his Majesty's prerogative royal» and had «proceeded in the High Commission and other Ecclesiastical courts contrary to the laws and statutes of the realm». In response to those opinions, Charles gave new life to their arguments by issuing a proclamation in 1637 that officially granted royal powers to those courts, and indeed to the bishops themselves. In fact, the proclamation granted to ecclesiastical courts the traditional functions of the common law courts in proclaiming that: Processes may issue out of the ecclesiastical courts in the name of the bishops; and that a patent under the great seal is not necessary for the keeping of the said ecclesiastical courts, or for the enabling of citations, suspensions, excommunications, and other censures of the church, and that it is not necessary that summons, citations, or other processes ecclesiastical in the said courts or institutions, or inductions to benefices, or corrections of ecclesiastical offenses by censure in those courts be in the King's name, or with the style of the King, or under the King's seal, or that their seals of office have in them the King's arms.

I would suggest that this proclamation granting broad judicial powers to church officials paved the way for the New Canons that were the work of the Convocation that met in the spring of 1640 and continued after the dissolution of the short parliament.

Parliamentarians shaped their arguments against the New Canons in legal terms because, as MPs, John White, Edward Bagshaw and others said, religion aside, the Canons subverted the law. The members of the Long Parliament challenged the legality of the Canons by first challenging the legitimacy of the Convocation that penned them. Could Convocation sit when parliament was not in session? They subsequently attacked the legality of the Canons themselves starting with the first Article that stated that any ecclesiastical person anywhere who by word or by writing maintained any position in opposition to any part or article of the canons should be excommunicated by the power of his Majesty'scommissioners for causes ecclesiastical. In its argument against this article Parliament was joined by those thousands of church attenders who presented the London petition where, in article 19, they addressed this canon and point out that although it says excommunication is the penalty for speaking against the canons, there is «no law [that] enjoined a restraint from the ministry without subscription», and, moreover, it says «that appeal is denied to any that should refuse subscription». The power that had been granted to the bishops in the King's proclamation was sanctified by the New Canons. This meant that the Bishops through the Canons legally controlled the parameters of belief. In effect, the confirmation of uniformity was provided by a convocation that sat by special commission from the crown after the dissolution of parliament.

The complaint about the sixth canon, entitled, «An oath enjoined for the preventing of all innovation and doctrine» also addressed a legal point by claiming that the oath itself was an infringement of the liberties of ministers by more closely defining what they could and could not do. Sir Nathaniel Fiennes complained that the ecclesiastics who penned the Canons have «taken upon

them[selves] to define what is the power of the King, what the liberty of the subject, and what propriety he has in his goods». Sir Edward Dering noted that the poor subject «sadly groans, not able to distinguish between power and law».

Let me digress for a moment and say these arguments from the Long Parliament were cited by Thomas Jefferson in his writingswherein he compares ecclesiastical uniformity to inquisition. [10] He had in his library, not the full, detailed, private diaries of proceedings that are extant now, but the set speeches printed in Rushworth, Nalson, and contemporary pamphlets. From the legal precedents cited in these debates he drafted the bill to disestablish the church of England in Virginia and argued the case for separation of church and state. Jefferson's work demands consideration within the context of the parliamentary literature on the conflict between civil and common law and the Jeffersonian perception of government and judiciary.

Returning to the Long Parliament, though, I want to point out that some of the same legal polemic regarding the authority of civil law and common law underlies the arguments in the impeachment trial of Thomas Wentworth, Earl of Strafford. Article I accuses him of having heard cases when he was President of the Council of the North that were «determined according to the course »of proceedings in the court of Star Chamber whether [those cases] were provided for by acts of parliament or not». Article 5, that he used a power above and against the laws of Ireland in issuing from Council a death sentence against Lord Mountnorris in peacetime, when the common law courts were open. And finally, as if in a restoration comedy witnesses and lawyers alike fell to arguing about whether Stratford's words recollected by several witness were that «the King's little finger was heavier than the loins of the law» or that «the little finger of the law washeavier than the loins of the King», or «the loins of the law were heavier than the loins of the King». A loaded question no matter how you phrase it. The point in any case was lust where was the King's power in relation to the law?

In conclusion, then, I reiterate that the transcendent theme in the proceedings in the Long Parliament is law. The influence of the crown in the expansion of civil law into spheres of jurisdiction traditionally held by English common law, and the concomitant undermining of common law was part of a flirtation with absolutism abhorrent to most Englishmen. The discussion was not about rule of law but about rule of which law.

АННОТАЦИЯ

Какое право выше? Борьба за верховенство между общим правом, цивильным правом и королевскими прерогативными судами

Для предреволюционной Англии характерно наличие конфликтов между различными судебными и государственными учреждениями. Особенно часто споры по поводу верховенства и юрисдикции возникали между судами общего права, церковными судами на цивильном праве и прерогативными судами. Особенно острыми эти конфликты стали в последнее, беспарламентское, десятилетие правление Карла I, когда англиканская церковь во главе с архиепископом Лодом стала пропагандировать идеи сакральности королевской власти, а королевская власть стала поощрять экспансию цивильного права в сферу общего.