

ENGLISH COMMON LAW: EMBODIMENT OF THE NATURAL LAW

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Abstract

This essay is a brief overview of the historical role of Natural Law theory in the development of fundamental principles and practices within the Common Law of England as it emerged and developed. The discussion is focused on four of the key jurists whose combined careers span more than five hundred years of the Common Law – Henry De Bracton, Sir John Fortescue, Sir Edward Coke, and Sir William Blackstone.

I INTRODUCTION

The development of the common law was heavily influenced by the contributions of several jurists that drew on natural law theory. Key natural law theorists that affected the development of the common law were Henry De Bracton, Sir John Fortescue, Sir Edward Coke, and Sir William Blackstone.

II HENRY DE BRACTON

Henry of Bracton was an early common law writer whose work was preceded largely by customary law. He wrote *On the Laws and Customs of England* and was a ‘justice of the nascent court of King’s bench’.¹ His work ‘made use of the Roman concept of natural law [and] regarded the King as subject to law but did not suggest any effective remedy for a breach of law by the King’.² However, as a practical matter, he argued that ‘counts and barons are the King’s masters, who must restrain him if he breaks the law’.³ The supremacy of the law over the King was his main intellectual contribution to the development of the rule of law. This concept laid the foundations for Coke who later relied on his famous statement. In fact, ‘Bracton’s *Note Book* was known to Fitzherbert’ and ‘[t]hrough Fitzherbert the cases which he took from the *Note Book* were known to Coke’.⁴

Bracton’s work became a powerful compilation of case law which came ‘at the end of a period of rapid growth’ and served to sum up and pass [the law] on to future generations of lawyers’.⁵ His work was ‘genuine English law laboriously collected’ which ‘cites

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¹ Frederick Pollock and Frederic Maitland, *The History of English Law: Before the Time of Edward I* (Cambridge University Press, 2nd ed, 1923) 206.

² Charles Haines, *The Revival of Natural Law Concepts: A Study of the Establishment and of the Interpretation of Limits on Legislatures with Special Reference to the Development of Certain Phases of American Constitutional Law* (Russell & Russell, 1965) 33.

³ William Holdsworth, *Some Makers of English Law: The Tagore Lectures 1937-38* (WS Hein, 1983) 19.

⁴ *Ibid* 22.

⁵ *Ibid* 17.

some five hundred decisions' and resulted in 'forty or fifty manuscripts'.⁶ His work was also memorable because it 'display[ed] much more than the facts and the decision ... [and it] often incorporate[d] the arguments of the parties'.⁷ Furthermore, it was useful as it 'gave English law one authority upon many matters which were outside the routine of practising lawyers of the thirteenth, fourteenth, and fifteenth centuries'.⁸

Bracton had an impact on judges as well as lawyers in his time. He 'stressed the king's need to choose capable men to be judges since they were acting in his place'.⁹

III SIR JOHN FORTESCUE

Fortescue came over a hundred years after Bracton and is best known for his work, *In Praise of the Laws of England*. He was 'made Chief Justice of King's Bench in 1430, and the Lord Chief Justice of England in 1442' but was later exiled between 1464-1470.¹⁰ He wrote his work in exile 'for the instruction of the young Prince [Edward], but very likely also as an answer to an essay which advocated the adoption in England of the civil law of Rome'.¹¹ He advanced the curious argument that the English common law was left behind by the Romans because it was of excellent quality, 'otherwise [they] would have replaced English law with their own, as they had done everywhere else'.¹²

His natural law background led him to be a proponent of personal liberty. In expounding the common law he highlighted that it allowed trial by jury and was against torture.¹³ He argued that 'as a result of the wisdom and the liberality of the common law, English kings are greater and more powerful, in the liberties and properties of their people, than the arbitrary rulers of the civilian countries of their people'.¹⁴ *In Praise of the Laws of England* 'was the first important book to propound the peculiar spirit of the common law. It was the herald of the age in which the lawyers would be prepared to stand up to the King and later to Parliament in defence of the legal rights of Englishmen'.¹⁵

Also, his 'knowledge of the machinery of the English government ... led him to originate the theory of a *dominium politicum et regale* – that is the theory of constitutional or limited monarchy' which, up to that point, 'no writer on political theory had envisaged'.¹⁶

⁶ Pollock and Maitland, above n 1, 208, 209.

⁷ AKR Kiralfy, *Potter's Historical Introduction to English Law and its Institutions* (Sweet & Maxwell, 4th ed, 1958) 282.

⁸ Holdsworth, above n 3, 22.

⁹ Ralph Turner, *The English Judiciary in the Age of Glanvill and Bracton, c.1176-1239* (Cambridge University Press, 1985) 270.

¹⁰ Hastings Lyon and Herman Block, *Edward Coke: Oracle of the Law* (FB Rothman, 1992) 341.

¹¹ *Ibid.*

¹² Margaret Davies, *Asking the Law Question* (Thomson Legal & Regulatory, 3rd ed, 2008) 59.

¹³ Lyon and Block, above n 10, 342.

¹⁴ *Ibid.*

¹⁵ Kiralfy, above at 7, 285.

¹⁶ Holdsworth, above n 3, 62.

IV SIR EDWARD COKE

Coke was perhaps the most zealous of the common law lawyers. He was a chief justice and his natural law ideas came forth mainly in his *Institutes* and judgements. In *Bonham's Case*,¹⁷ he argued that 'the common law will control Acts of Parliament, and sometimes judge them to be utterly void' if they are 'against common right and reason'.

He believed that the King as well as the parliament should be subject to the common law. In his famous conflict with King James, James understood that Coke's arguments meant 'I am to be under the law-which is treason to affirm' to which Coke replied '[t]hus wrote Bracton, *Rex non debet esse sub homine, sed sub Deo et lege*'.¹⁸ In English, he literally meant that the king ought not to be under man, but under God and the law.

Coke believed that judges had God's blessing, 'the favourable kindness of the Almighty', and that 'God [would] defend [them] as with a shield'.¹⁹ It almost seems as if he believed that judges were divine revelators and their judgements were scripture.

The impact of his law reports is that they 'gathered up the past precedents, and so bound them together for the benefit of his generation, that he transformed the Common Law into a living system capable of regulating the lives and fortunes of a developed civilization'.²⁰ Finally, Coke 'cemented the old standing alliance between Parliament and the common law', 'eliminat[ed] torture from criminal procedure ... and establish[ed] the rule of law'.²¹

V SIR WILLIAM BLACKSTONE

Blackstone was the great compiler of English common law. He was a chief justice of England and believed that "if any human law should allow or enjoin us' to transgress the natural or divine law then we are *bound to transgress* the human law, or else we must offend both the natural and divine".²² These types of remarks inspired American rebellion.

His *Commentaries on the Laws of England* was a monumental work mostly because of its popularity. Indeed, '[f]or the first time the common law had been so clearly delineated and exposed to the public gaze that an irresistible pressure for reform was created'.²³ His work was likely popular because it incorporated Newton's 'science', Locke's rationalism, and emphasised 'logic and principle'.²⁴

¹⁷ (1610) 8 Co Rep 114, 118b.

¹⁸ William Seagle, *Men of Law: From Hammurabi to Holmes* (The Macmillan Company, 1948)

¹⁹ Lyon and Block, above n 10, 350.

²⁰ Earl of Birkenhead, *Fourteen English Judges* (Cassell, 1926) 43.

²¹ Holdsworth, above n 3, 131.

²² James Steintranger, *Bentham* (G Allen and Unwin Ltd, 1977) 16.

²³ Seagle, above n 18, 211.

²⁴ *Ibid* 210.

His *Commentaries* was also influential because it again organized the common law. He ‘rescued the law of England from chaos’ and rivalled Bracton as an ‘English judicial writer’ who ‘paid ... attention to the selection and collation of words’.²⁵

Perhaps his greatest influence was on education. Before his *Commentaries* ‘only Roman and canon law had been taught at the universities’.²⁶ Blackstone ‘liberalised and clarified the law for the purpose of instruction of students who were not necessarily intending to practise law’.²⁷

VI CONCLUSION

Bracton influenced Coke who later held the King to be under the law, enabled the lawyers of his generation, and helped establish a professional judiciary. Fortescue advanced personal liberty under the common law and the idea of limited monarchy. Coke challenged parliament and the King with the common law. Blackstone inspired rebellion, popularised and organized the law, and provided an English legal text for university students. The natural law foundation that these men drew upon began a sharp decline with the emergence of legal positivism. Natural law largely disappeared until the atrocities of Nazi Germany and the subsequent Nuremburg trials. It was then revived by American judges.

²⁵ Lewis Warden, *The Life of Blackstone* (The Michie Company, 1938).

²⁶ Kiralfy, above at 7, 290.

²⁷ *Ibid.*