Sir Edward Coke
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The common law mind in the age of Sir Edward Coke

by Michael Lobban

Sir Edward Coke (1552–1634) was the greatest lawyer of his age. Having been Elizabeth I's Attorney-General, he became Chief Justice, first of the Common Pleas in 1606, and then of the King's Bench in 1612. He held this post until his dismissal four years later in the aftermath of his notorious clash with Lord Chancellor Ellesmere over equity's jurisdiction to stay executions of common law judgments. In the following decade, he played a prominent role in Parliament, notably in the debates leading to the Petition of Right in 1628. Having published the first eleven volumes of his *Reports* before leaving the bench, he later turned to writing the four volumes of his *Institutes*, the first part of which – known as *Coke upon Littleton* – was published in 1628, and the other three parts posthumously, in 1642–1644.

INFLUENTIAL WRITINGS

Coke's writings remained hugely influential, notably on Hale and Blackstone. Many generations of lawyers continued to be raised on *Coke upon Littleton*. It was the first law book used by Thomas Jefferson and John Adams. As late as 1831, Francis Hobler, seeking to improve legal education for the lower branch of the profession, published some *Familiar Exercises between an attorney and his articled clerk*, which took the form of Coke's book reduced to questions. Coke remains profoundly important for our understanding of the roots and nature of common law thinking. Yet in many ways, he is far from easy to understand, and there has been continuing debate, from the publication of JGA. Pocock's *The Ancient Constitution and the Feudal Law* in 1957 to JW Tubbs's *The Common Law Mind* in 2000 over what Coke's vision, and that of seventeenth century common lawyers, was.

In Pocock's view, the common lawyers believed their law was essentially customary. For example, Sir John Davies (1569–1626), Attorney-General for Ireland, described it in the preface to his *Irish Reports* (1612) as 'nothing else but the *Common Custome* of the Realm' which was 'recorded and registred no-where but in the memory of the people.' Equally, it is argued, they felt the law was immemorial and unchanging. Thus, in the prefaces to his *Reports*, Coke sought to prove that particular institutions or legal rules had existed in the same form prior to the conquest, and to argue that where, in the past, the ancient common law had been diverted from its true course, it had over time been restored again to its purity.

Yet, as Pocock pointed out, this vision seems paradoxical. A customary legal system implies change and development. Sir Matthew Hale (1609–76) realised this, when he compared the common law with the growing body of a man, which could change while remaining essentially the same. By contrast, Coke's vision of history, in part inspired by that of Sir John Fortescue (c1395–c1477), seems crudely static. Historians have sought to resolve this paradox by arguing that Coke's vision of history is either unimportant to his jurisprudence or unrepresentative of common lawyers. However, it may be equally suggested that the paradox can be resolved, that Coke could at the same time acknowledge the dynamic nature of legal development, while retaining a view of the fundamental principles of law which stressed its timeless nature.

SHAPED BY PRACTICE

Coke's vision of the law was profoundly shaped by practice. It is notable that he did not set out to write a principled summary of the nature of the law, in the manner of *Bracton* or Blackstone's *Commentaries*. Indeed, in the preface to the third volume of his *Reports*, he dismissed attempts to methodise the common law, commenting that they profited the authors, but 'have brought no small prejudice to others.' It was only once he was removed from court that Coke turned to write his own *Institutes*, as a kind of *pis aller*. For Coke, the report was the preferable type of legal literature, for it 'doth set open the windows of the law to let in that gladsome light whereby the right reason of the rule (the beauty of the law) may be clearly discerned' (9 Co. Rep. preface).

It was not that the lawyers felt that there were no clear principles of the common law. Indeed, Davies said they were 'fixed and certain'. However, lawyers saw little need to set them down, in part because they had already been recorded in the past. Thus, Coke described Sir Thomas

Littleton's *Tenures* of 1481, which formed the basis of his commentary in *Coke upon Littleton*, as 'the most perfect and absolute work that was ever written in any humane science'. If the key rules of land law had been digested by this judge, it was not for Coke to duplicate. Elsewhere, he seemed to take the view that the fundamentals of English law were to be found in medieval statutes such as Magna Carta and the Statute of Merton, as well as the original writs in the *Register*. These sources, he said, 'are the very Body, & as it were the very Text of the common Laws of England.' By contrast, the Year Books and Records were 'but Commentaries and Expositions of those laws' (8 Co. Rep. preface).

Yet these principles alone were inadequate for the lawyer. Explaining his decision to publish reports, Coke argued that 'the law is not uncertain *in abstracto* but *in concreto*' (9 Co. Rep. preface). Errors were often made by lawyers who reasoned badly. Davies similarly said that the greatest difficulty came not from the principles of law, but from their application to human actions, which were constantly in flux. Reports were thus a way of exploring the application of the law in the concrete situations of a case, in a manner to clarify and correct errors brought about by the weak reasoning of other men. It is in the context of this ambition that we should read one of Coke's most famous statements, that (*Coke upon Littleton*, 97b):

'reason is the life of the Law, nay the common law itself is nothing else but reason, which is to be understood of an Artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason'.

Coke's concept of artificial reason was, of course, a useful defence of the common lawyers' control of the law against the claims of King James I that if the law were nothing but reason, then he could in his royal capacity decide cases, since he 'had reason, as well as the Judges' (12 Co. Rep. 63–65). But it was more than that. For Coke said that 'no man alone with all his true and uttermost labours, nor all the actors in them themselves by themselves out of a Court of Justice, nor in Court without solemne argument' could ever come to the right reason of a rule. His point was that the common law needed to be found and applied through the very procedure of argument in court (9 Co. Rep. preface).

SOURCES OF COMMON LAW

In arguing in court, what were the sources of the common law for Coke? For *Bracton* and Blackstone, the law of nature and custom were the two principal sources of the common law. The law of nature, however, was not a directly important source of laws for early modern writers. It was generally treated as a founding principle of the law, but not as a practically applicable one. Sir John Fortescue, the first Englishman to write a treatise on natural law, thus compared the law of nature (which he also called the law divine) with the sun, which gives light and life to the planets. However, in his view, one would never understand the planets by merely studying the sun. Arguing from this analogy to the laws, Fortescue stated:

'so also all laws of men acquire their force by influence of the law Divine ... and yet they who are skilled, however profoundly, in the knowledge of the Divine law cannot, without the study of human laws, be learned in human laws' (De Natura Legis Naturae *i 43)*.

Similarly, positive human law played a crucial part in the vision of Christopher St German (c. 1460–1541). In his *Doctor and Student* (1528–30), he stated that while some laws were directly related to reason (such as the rule against killing), the larger body of the law (such as the rules of property) involved applying the law of reason secondary particular, which was based on customs, maxims and statutes.

NATURAL LAW

For most common lawyers, natural law was only to be applied directly when the common law was silent. Thus, Sir John Dodderidge (1555–1628) stated that when new matter was considered, 'we do as the Sorbonists and Civilians' resort to natural law, as the ground of all laws, and draw from it that which was best for the commonwealth. Coke himself cited natural law as a basis of argument in *Calvin's Case* in 1608 (7 Co. Rep. 13), stating that it was the eternal law infused into the heart of man at the time of his creation, and declaring that it existed before any municipal or judicial laws. However, Coke was using the principle to answer a question for which there was no clear solution in the common law: whether a subject of the king of Scotland, born in Scotland after James VI's accession to the throne of England, was an alien in England.

CUSTOM

At first glance, custom seems a more important source of law. St German talked of general customs as a source of law, customs which had been approved by the king and his progenitors and all their subjects. Yet St German, in common with all legal commentators of the age, distinguished clearly between local customs and general ones. The existence of a general custom was a matter to be decided by the judges, as a matter of law, whereas the existence of local customs was a matter of fact to be decided by juries. Coke similarly kept clear the distinction between 'Customs reasonable,' and the common law. The distinction is found again in a speech by Thomas Hedley in the House of Commons in 1610. Hedley said that customs were confined to particular places, were triable by the jury, and were tested for their reasonableness or unreasonableness by the judges. By contrast, the common law was 'extended by equity, that whatsoever falleth under the same reason will be found the same law.' Hedley stated that the common law did not have any custom for its

immediate cause, 'but many other secondary reasons which be necessary consequence upon other rules and cases in law'. Ultimately, however, they could be traced back to 'some primitive maxim, depending immediately upon some prescription or custom.'

According to this view, which was shared by Coke, the ultimate origin of all law was customary, but it had been expanded and developed by the judges, when applied to new cases and new situations. It was at most a very distant source of law. When Coke discussed the sources of law which the practitioner would have to use, then, he referred primarily to forms of reasoning, or to conclusions derived by legal argument. Coke noted that Littleton's proofs of common law were taken from twenty different fountains. The first fountain was 'the maximes, principes, rules, intendment and reason of the common law.' Coke then went on to list such sources as the books or law, or writs in the *Register*, arguments from approved precedents, the common opinion of the sages of the law, arguments *ab inconvenienti* or *ab impossibilii* and so on. In this set of sources, the most important were maxims, which were postulates of the common law ultimately derived from custom. Glossing Littleton's phrase that it was a maxim in law that inheritance may lineally descend but not ascend, Coke observed that what was here called a maxim could interchangeably be called a principle, axiom or a rule.

MAXIMS

Maxims were of crucial importance to the early modern lawyer, finding their earliest discussion in Fortescue. St German had called them 'divers principles' which had always been 'taken for law in this realm.' As with general customs, they were determined by judges rather than juries, but where general customs were known throughout the realm, St German argued that maxims were only known in the king's courts and among those learned in law. This distinction between the conclusions of reason derived from general custom, known to all, and those axioms 'peculiarly known, for the most part, to such only as profess the study & speculation of laws' was echoed by Sir John Dodderidge (*Lawyer's Light*, p. 45). In practice, the distinction was hard to maintain, for it depended on what legal principles were widely known, a matter on which commentators might disagree. Thus, Littleton's principle that lands could never ascend but only descend was treated by Coke as a maxim, but by St German as a general custom. In either event, the legal status of the rule depended not on popular usage but on legal decision. Perhaps aware of this problem, Coke himself did not make the same distinction of general customs and maxims, but instead minimised the importance of the former. For Coke, 'the maine triangles of the lawes of *England*' were 'common law, statute law, and custome.' While the latter had to be proved to have been in continual usage without interruption from time out of mind, the common law 'appeareth in our books and judicial records' (*Coke upon Littleton* 11b, 110b). In his view, the use of maxims and other forms of legal reasoning allowed the law to adapt itself to new situations, allowing a fluid development of the law.

It should be noted that even in the prefaces to his *Reports*, Coke did not have a wholly static view of the common law. In the eighth volume, he stated 'That the grounds of our common laws at this day were beyond the memorie or register of any beginning', implying that the origins were immemorial, not that the whole content was unchanging. In the tenth volume, he stated that new writs were added by parliament in the middle ages to the *Register* 'in cases newly happening', and elsewhere he approved of reforms where needed. Coke was very keen to prove, not the timeless existence of every rule, but the immemorial origins of the fundamentals of the common law – notably, the institutions and the rules of property which had no other statutory source. He therefore laid stress particularly on the ancient existence of common law institutions: sheriffs, jury trial, the courts. He sought to show that they were timeless in order to confirm that they were ultimately customary in origin. This was hardly a new point. When, in St German's *Doctor and Student*, the student was asked to reveal some of the general customs of the kingdom, his first reply was that 'the custom of the realm is the very ground of divers courts'. The student's next set of examples turned on basic principles of land law, such as primogeniture. The key point was that 'there is no statute or other written law that treateth of the beginning of the said customs of English law ... the old custom of the realm is the only and sufficient authority' for them (*Doctor and Student*, p. 57). The point that law was ultimately customary – that it owed its authority to immemorial custom – was particularly important for Coke, for if it could be shown that a time existed when the custom did not pertain, the authority of the law, and the lawyers' control over it, would be undermined. Given Coke's determination to ensure that the common law remained the preserve of the common lawyers, this was something which had to be avoided.

AUTONOMY OF THE LAW

Coke's concern with the autonomy of the law can be seen in one of his most famous judgments, *Dr Bonham's Case*, where he stated (8 Co. Rep. 118a):

> *'when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void'.*

This case has been the subject of fierce debate for many years, with scholars disagreeing over whether Coke merely meant that such statutes should be strictly construed, or whether he had in mind a power of judicial review, whereby the courts could control parliament. The question at issue was whether the College of Physicians could fine and cause to be gaoled a physician who practised without being admitted by the college; in effect

acting as judges in their own cause. This was not the only case where a judge stated that a statute giving a man power to be judge in his own cause would be void; in *Day v Savadge* (Hobart 85) Hobart CJ stated that such a statute 'made against natural equity ... is void in itself, for *jura naturae sunt immutabilia* and they are *leges legum*'.

It may be suggested that in *Bonham*, Coke was neither seeking to subject all statutes to a potentially expansive judicial review, nor was he simply looking towards judicial construction of statutes. Rather, he may have had in mind that there were constitutional boundaries which parliament could not cross. At one level, Coke appears a champion of parliamentary sovereignty, at one point calling it 'so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds' (4 *Institutes*, 32). Yet he did set bounds to what parliament could do. For instance, it was a maxim of the law of parliament that no parliament could bind its successor. Equally, 'No Act can bind the King from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a *non obstante*' (12 Co. Rep. 18). There were clear constitutional rules about the status of the king, and the status of parliament. Did this extend to the courts? Coke was clear that the courts did not derive their authority from parliament: hence parliament could not impede them. By this view, the common law courts were not to be set above parliament to test and control its legislation, but they were to be protected from being undermined. We may wonder, if this is true, why Coke used the phrase 'common right and reason', and why Hobart referred to the law of nature, rather than articulating a constitutional view referring directly to the courts' customary autonomy. One answer to this may be that there were dangers in resting too much on the customary or chronological origins of the common law's authority. Not only was the history less than convincing, but even Coke proved inconsistent. Thus, where in the *Reports* he had sought to show that the common law courts existed before the time of Arthur, in the *Institutes* he said that they derived their authority from the king. If he sought to defend the position of the common lawyers, and their control of the law, Coke did not in the end want others to look too deeply at the original basis of its authority.

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The International Criminal Court: complementarity with national criminal jurisdiction

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The 1998 Rome Statute established an International Criminal Court. Is its jurisdiction truly complementary to the national criminal jurisdictions?

In an historic event, on 17 July 1998, at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy, the Statute Creating the International Criminal Court (the 'Rome Statute') was adopted by 120 nations and opened for signature.

While the US generally supports the creation of a permanent International Criminal Court (the 'ICC'), it opposes such a court as set forth in the 1998 Rome Statute, as it leaves open the potential for US military personnel and government officials to be prosecuted before the ICC for the unintended and accidental killing