SIR EDWARD COKE AND THE COMMON LAW

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I am honoured to have been invited to speak to you today. I am very happy to be here in Hong Kong; and to have the opportunity to speak to you about the common law.

I acknowledge immediately that I am here today because Hong Kong and Australia share in the inheritance of the common law. It is because I have been a judge of another common law jurisdiction that, by virtue of Article 82 of the Basic Law that I was eligible to be appointed to the Court of Final Appeal.

When we speak of the common law, we use an expression that, in its broadest sense, refers to a method of adjudication of disputes, and the accompanying mindset of those engaged in the process of adjudication, whether they sit on the Bench or at or behind the Bar table. An aspect of the process of adjudication that distinguishes the common law from other legal systems is the force attached to previous decisions of the courts in accordance with the rules of "Stare decisis", the doctrine of precedent. In this regard, Article 84 of the Basic Law provides that the courts of Hong Kong "may refer to precedents of other common law jurisdictions".

In resolving disputes about contracts or civil wrongs or the principles of equity, the method of adjudication that we speak of as the common law is characterised by the application of rules laid down at an earlier time, and often in another place, by other judges. Within the constraint of legislative pre-eminence, subject to the Basic Law, the common law is enforced by courts which, while enforcing the law, may also make law, by taking steps not previously taken to confer rights or impose liabilities albeit in accordance with the perceived logic of a course plotted by earlier decisions.

Since the 18th Century, it has been recognised within the common law tradition. The great value of equality before the law, and the rule of law itself, require that the power to make the

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laws be exercised separately from the power to enforce those laws. As John Locke said in his *Two Treatises of Government*[1]:

> "for the same Persons who have the power of making Laws, to have also in their hands the power to execute them … they may exempt themselves from Obedience to the Laws they made, and suit the Law, both in its making and execution, to their own private advantage."

As Jeremy Waldron has explained, if the processes of making, adjudicating upon and enforcing laws are in the same set of hands, those hands may "direct the burden of the laws they make away from themselves."[2]

So we have an apparent contradiction. The feature which is characteristic of the common law seems to be in conflict with its bedrock value of equality before the law reflected in the separation of powers as that idea has been understood since the end of the 17th Century in the writings of John Locke. If judges make law in the course of enforcing it, they may advance their own class interests to their own advantage, and direct the burden of the laws away from themselves and others of their class, and onto others. Since the end of the 17th Century this contradiction has largely been resolved, at least as a practical matter if not as a matter of theory, by the recognition of the legislature as the pre-eminent law-making power as against the executive and judiciary. This pre-eminence was not established as a matter of legal theory, but pragmatically by the triumph of Parliament in the English civil wars that concluded with the constitutional settlement at the end of the 17th Century.

I do want to say something about this aspect of the common law, but it is more interesting to speak about people rather than abstractions. And so I propose to focus upon one of the most interesting people in the history of the common law, Sir Edward Coke. He is celebrated, especially in North America, as a great hero of the common law[3], especially by those who champion judicial power as a brake on the perceived excesses of the legislature. In this regard, Coke was not only a proponent of the judicial power to make law but a champion of the view

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[1] Locke, *Two Treatises of Government*, Peter Laslett (ed), (1988) at 364.
[2] Waldron, "Separation of Powers in Thought and Practice?" (2013) 54 Boston College Law Review 433 at 446.
[3] Alward, "Coke: The Great Oracle of the Common Law" (1912) 32 The Canadian Law Times at 929; Boyer, Law, Liberty and Parliament: Selected Essays on the Writings of Sir Edward Coke (2004); Hostettler, Sir Edward Coke: a Force for Freedom (1998).

that the common law, that is to say the judges, could control the legislature. He was not, however, consistent in this regard. In the course of his extraordinary career, he supported both the absolute power of Parliament and the controlling power of the judges. It is not unknown in history that one finds a hero who fights for both sides in a particular struggle. But it is rare. A study of Coke's contribution to the development of what we have come to understand as the common law brings to mind the saying that where one stands on an issue often depends on where one sits. A study of Coke work as a lawyer, parliamentarian, scholar and judge confirms that where Coke stood on these great issues depended very much on where he sat.

Beginnings

Coke was born in 1552[4]. He grew up with seven sisters in Norfolk. The most important of his early formative influences was the Church of England. As Catherine Drinker Bowen says, in her magisterial 1957 biography of Coke, *The Lion and the Throne*[5]:

> "There is no overestimating the effect of ... burning missionary Protestantism on the youth of Edward Coke. Morning and evening the boy knelt with his fellows on the stone schoolroom floor and chanted the Lord's Prayer and the Creed, with some final devotion in English from the recently established Book of Common Prayer. The reiterated words, English and Protestant where, since time immemorial, they had been Latin and Catholic, reached very deep. Coke lived – and died (his daughter was to testify) – a Church of England man, 'a deare lover of its Liturgie, constant to it in his life and at his death.'"

In the autumn of 1567, Coke set off for Trinity College, Cambridge. The University was favoured by Queen Elizabeth; it was, unlike Oxford, a Protestant stronghold.

We tend to associate Cambridge at this time with that strain of fiery evangelical Protestantism celebrated in its Puritan graduates, the most famous of whom was Oliver Cromwell; but there were many other important, albeit less radical, Protestants produced by Cambridge. As Macaulay said: "Cambridge had the honour of educating those celebrated Protestant Bishops whom Oxford later had the honour of burning."[6]

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[4] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 45-46.
[5] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 49.
[6] Macaulay, *Critical and Historical Essays Contributed to the Edinburgh Review*, 5th ed (1848), vol 2 at 287.

Coke was virulently anti-Catholic. But notwithstanding Coke's later clashes with the ecclesiastical courts and the royal prerogative, his world view remained in the Anglican mainstream. He was an Episcopalian rather than a Puritan. And just as he was a committed Anglican, so he was a proud Englishman. He became an eloquent champion of English legal exceptionalism. His exalted view of the supremacy of the common law of England was of a piece with his belief in the inferiority of the institutions of continental Europe. These he saw as irretrievably tainted by their association with the Catholic Church. His anti-Catholicism suffused his opposition to all things European, the courts of equity in particular.

After three years, Coke left Trinity College without obtaining a degree, which was not unusual at that time. He travelled to London, his sights set on becoming a barrister.

Early Career

On 21 January 1571, Coke first entered that "little kingdom of the law", the ancient Inns of Court[7].

After completing a year's study of law at Clifford's Inn, Coke made his way across Fleet Street to join the fellowship of the Inner Temple where, for seven years, he studied law.

In 1578, Coke was admitted to the bar. He travelled back to Norfolk, finding himself at the right time and in the right place for his first big case. It was a libel suit that involved great names and the abiding controversy over religion[8].

Coke's client, an orthodox Vicar of the Church of England, accused Lord Henry Cromwell, the grandson of Thomas Cromwell, of sedition by reason of Cromwell's puritanism. Cromwell sued Coke's client for damages under the ancient legislation which was intended to prevent people speaking ill of the aristocracy, the statute *Scandalum Magnatum*. Bowen relates that:

> "Coke … discovered a mistake in the written declaration of [Cromwell's] counsel – only one word, but it sufficed. The original Act of *Scandalum*

[7] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 59-60.
[8] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 69-71.

> *Magnatum* had been, since its passage in 1378, translated from Latin into law French, then into English. Cromwell's lawyer, instead of referring to the original statute, had been content with a third-hand English version which rendered the French word *messoinges* (lies) as 'messages.' Translating this back into Latin, Coke's opponent wrote *nuncia* (Latin for *messages*), 'whereas' Coke told the court triumphantly, 'it should have been *mendacia* [lies].'"

Cromwell's case was thrown out, and Coke's reputation was made. That Coke's career took off on the basis of this piece of pettifogging pedantry says as much about the legal system of the time as it says about Coke's talent.

This is an example of the hyper-technical formalism of the rules of pleading at this time. In Coke's triumphant mastery of the arid technicalities that have little to do with justice, we can see the power of the emergent professional class of lawyers who were able to insist upon these arid rules of their own devising as a demonstration of their social power. We will see later, in Coke's confrontation with King James, how Coke's professional mindset as a lawyer and judge shaped his insistence that the "reason" of the common law – and of the judges of the common law – was different from, and privileged above, the reason of layman, including even the King and the elected representatives of the people in Parliament.

From 1579 to 1581, Coke was involved as counsel for one of the defendants in the famous *Shelley's Case*, from there onwards he started to appear without a leader in important cases[9].

In 1582, he married his first wife Bridget Paston (then aged 17). Bridget was a devoted and loving wife and mother. She bore Coke 10 children over 15 years. She also made him a very rich man: her dowry was £30,000[10].

Speaker of the House of Commons

In 1592, Queen Elizabeth named Coke Solicitor-General, making him second among the government's lawyers only to the Attorney-General, Sir Thomas Egerton, who later became Lord Ellesmere. Six months later, Elizabeth named Coke Speaker of the House of Commons[11].

[9] Coke had appeared many times as junior counsel to Plowden and Popham.
[10] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 71.
[11] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 12-15.

Given Coke's reputation as a champion of the common law, it should be noted here that, as Speaker of the House of Commons in 1592-1593, he made a point of exalting Parliament as "the great corporation or body politic of kingdom". Significantly, for the man who as a judge would write the judgment in *Dr Bonham's Case*[12], in the role of Speaker, he was a proponent of Parliament's "absolute powers"[13].

Here, we get an early glimpse of Coke as an example of what might be called the Thomas Becket syndrome. That is the condition, common to the great careerists, whereby the beliefs and allegiances of an office holder change to accommodate the requirements of the office that he or she currently holds.

Coke's time as Speaker was short. Encouraged by his evident powers of persuasion as Speaker, and angered by a speech given in Parliament by Francis Bacon questioning the Crown's attempts to secure supply, Elizabeth settled upon Coke, rather than Bacon, as her next Attorney-General. On 10 April 1594, "Elizabeth signed letters patent advancing Thomas Egerton to the vacant office of Master of the Rolls … and granting the Attorney-Generalship to Edward Coke."[14]

Attorney-General

Coke's time as Attorney-General was marred, four years later, by the sudden death of his wife in June 1598.

Coke remarried immediately. His choice of bride, Lady Elizabeth Hatton, was entirely venal and opportunistic. Lady Hatton was wealthy and well-connected, being related to the all-powerful Cecils. He pursued her with unseemly haste. Coke buried Bridget Paston in July 1598. In August, he proposed and was accepted by Lady Hatton. In November 1598, they were married. This was all to the chagrin of Francis Bacon, who also had his eye on Lady Hatton.

As a barrister, Coke appeared in many important cases. His involvement as prosecutor in the trial of Sir Walter Raleigh for high treason deserves a mention here. The principal witness against Raleigh was Lord Cobham. In 1995, a summary of the prosecution brief prepared for

[12] (1610) 8 Co Rep 1136 [77 ER 646].
[13] Holdsworth, *A History of English Law*, 3rd ed (1945), vol 4 at 184.
[14] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 81.

Lord Ellesmere was discovered. It showed that after Cobham had made his statement implicating Raleigh in his own treason, he had retracted it before the investigators[15]. It is inconceivable that Coke did not know of Cobham's retraction. It is to his shame that at the trial he never mentioned that Cobham had retracted his statement implicating Raleigh. For the student of the common law, there is no little irony in his aspect of Coke's conduct.

In Coke's time, criminal trial procedure was very different from that with which we are familiar. The accused was unrepresented and was subject to interrogation by the prosecutor and the judge. The prevailing theory was that the prosecutor and the judge could be relied upon to ensure that the accused received a fair trial. Coke himself wrote in support of this theory in the Third Part of the *Institutes*: "[T]he Court ought to be … of counsel for the prisoner, to see that nothing be urged against him contrary to law and right."[16] Coke's conduct as a prosecutor went a long way to demonstrating that this theory was pious nonsense.

As Professor Langbein has shown, it was the work of defence counsel, once legal representation came to be permitted, which forged the adversarial system as we know it, with its in-built protections of the accused, including the right to silence and the privilege against self-incrimination, this work taking place between the mid-17th and late 19th Centuries[17]. The diligent work of defence counsel over the subsequent decades, which culminated in the accusatorial system of criminal justice with its protections of the individual against prosecutorial oppression, was a reaction to the kind of abuses perpetrated by Coke, the iconic defender of the liberty of the subject.

In the eyes of King James, Coke's performance as Attorney-General qualified him for promotion.

Chief Justice of the Common Pleas

In early 1606, Robert Cecil indicated that appointment as Chief Justice of the Common Pleas might be in the offing. Coke, ever the controlling pedant, wrote to Cecil advising him of the proper procedure: "I am bold to inform you what course I must take", Coke said.

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[15] Nicholls, "Sir Walter Raleigh's Treason: A Prosecution Document", (1995) 110 *English History Review* 902.
[16] Cited by Langbein in "The Historical Origins of the Privilege Against Self-Incrimination at Common Law", (1994) 92 *Michigan Law Review* 1047 at 1050, fn 9.
[17] Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law", (1994) 92 *Michigan Law Review* 1047 at 1050-1052.

> "First, I must be made Serjeant, which may be on Saturday next, and the Chief Justice on Monday. There must be a writ (for which my Lord Chancellor will have warrant) returnable on Saturday to call me to be a Serjeant, and a warrant for the patent of the office of Chief Justice of the Common Pleas."[18]

In accordance with Coke's demands, he was made a Serjeant-at-law on 20 June 1606 and was elevated to the Chief Justiceship on 30 June.

As Attorney-General, Coke had been a champion of the royal prerogative even in its darker aspects, as we shall see. As Chief Justice of the Common Pleas, Coke's attitude toward the prerogative of the King would undergo an almost complete reversal. In his new position he became a spokesman for the institutional claims of the courts of common law against the claims of the prerogative.

Nicholas Fuller – a barrister and member of Parliament and an enthusiastic Puritan – in the course of defending Puritan clients on charges of contempt of the ecclesiastical court known as the High Commission, insulted the bishops who were members of the court. He was imprisoned by them for contempt.

Writs of prohibition were issued by the Court of Common Pleas restraining the ecclesiastical and civil courts from proceeding further against Fuller on the basis that the conduct of a barrister, even in an ecclesiastical court, was exclusively regulated by the courts of common law whose officer the barrister was[19].

The King sought to resolve the case himself in order to break the deadlock between the courts, which he saw as mere agents through which he exercised sovereign power. James' position was that his prerogative was supreme, given that, as he put it, there were kings "before any Parliaments were holden, or laws made"[20]. He arranged for a meeting of the ecclesiastical and common law judges to be held at Whitehall on 6 November 1608. The report of the meeting is

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[18] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 279.
[19] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 298-299.
[20] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 294.

called the *Case of the Prohibitions*[21]. The first meeting was inconclusive, so a further meeting was held the following week. At this meeting James said:

> "In cases where there is not express authority in law, the King may himself decide it in his royal person; the Judges are but delegates of the King, and the King may take what causes he shall please from the determination of the Judges and may determine them himself."[22]

Coke disagreed, saying the King may consult with the Judges but not decide cases himself. Growing agitated, the King said[23] that:

> "as supreme head of justice, [he] would defend to the death his prerogative of calling judges before him to decide disputes of jurisdiction. Moreover, he would 'ever protect the common law.'
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> 'The common law,' Coke interjected, 'protecteth the King.'
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> 'A traitorous speech!' James shouted. 'The King protecteth the law, and not the law the King! The King maketh judges and bishops. If the judges interpret the laws themselves and suffer none else to interpret, they may easily make, of the laws, shipmen's hose!'"

Coke's own report[24] of the incident picks up the story:

> "[T]hen the King said that he thought the law was founded upon reason, and that he and others had reason as well as the Judges: to which it was answered by me, that true it was that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects are not to be decided by natural

[21] (1607) 12 Co Rep 64 [77 ER 1342].
[22] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 303.
[23] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 304.
[24] (1607) 12 Co Rep 64 at 64-65 [77 ER 1342 at 1343].

> reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege* – that the King should not be under man, but under God and the law."

Coke's own report of this famous incident ends there; but we know from other sources that, in fact, the confrontation continued. The King rejected Coke's quotation from Bracton; and Coke fell weeping to his knees begging forgiveness.

But he was not beaten: "[n]ext morning a new prohibition, under Coke's seal, went out to the High Commission from the Court of Common Pleas."[25]

Coke championed the supremacy of the common law as an essentially continuous body of law derived from Anglo-Saxon custom and reflecting natural law as Coke saw it. His view was that the authority of the common law pre-dated the Norman Conquest. But this view was not that of a disinterested scholar. Coke's position was polemical and political. In supporting the notion that the power of the King was itself the creature of the common law, Coke was supporting the claim of the judges, of whom he was now the leader, to the lion's share of sovereign power at the expense of the King and Parliament.

As a legal historian, Coke's scholarship was deficient. The historical reality as a matter of fact was that the English judiciary was the creature of Henry II. The judges were, from the first moments of the common law's self-consciousness, directly dependent on the King in whose name they dispensed justice throughout the realm. The judges even discussed their cases directly with the King. As Ralph Turner has noted[26], the judges at the time of the Angevin Kings often marked their cases "loquendum cum rege", that is, "to be discussed with the King".

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[25] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 306.
[26] Turner, "The English Judiciary in the Age of Glanvill and Bracton", (1985) *Cambridge University Press* at 159.

And as noted by Edward Rubin, the researches of Pollock and Maitland have amply demonstrated that, as a matter of history, it is to Henry II and his justiciars that we must look for the creation of the common law as a body of rules administered throughout the realm[27]. In this, the better view of the historical development of the common law, the King, and the sovereign power initially embodied solely in the King, was the true fountain of justice.

We can detect echoes of Coke's argument in the observations of Lord Steyn in the House of Lords' decision in *R (Jackson) v Attorney General*[28] to the effect that while the supremacy of Parliament is the basic principle of the UK constitution, the principle was itself a construct of the common law created by the judges who might, in some circumstances, create qualifications to the principle. Admirers of Henry II, or of Oliver Cromwell, would respond that the British constitutional principle as to the Supremacy of Parliament might have been *described* by the judges of the common law, but the principle being described was established, as a political fact, by means other than the decisions of the courts.

The second, and more obvious, point about Coke's position on the supremacy of the common law is that he did not consistently maintain the view he espoused in the *Case of the Prohibitions*. As we have seen, when his interest in his own advancement coincided with the institutional claims of the sovereign legislature, he spoke in favour of the "absolute" authority of the King in Parliament.

Chief Justice of the King's Bench

Coke's conduct as Chief Justice of the Common Pleas did not endear him to James, and fell into disfavour. Upon the death of Coke's friend and patron Robert Cecil in May 1612, Coke's arch-rival Francis Bacon was at last able to gain greater influence with the King. Bacon sought to isolate Coke.

Bacon's opportunity came on 7 August 1613, when Chief Justice Fleming of the King's Bench died. Bacon proposed that Coke be removed from the Common Pleas to the King's Bench. Bacon made the cynical suggestion that "[a]s Chief Justice, Lord Coke would see the coveted

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[27] Rubin, "Seduction, Integration and Conceptual Frameworks: The Influence of Legal Scholarship on Judges", (2010) 29 *University of Queensland Law Journal* at 106-107.
[28] [2006] 1 AC 262. See also, Dixon, "The Common Law as an Ultimate Constitutional Foundation", (1957) 31 *Australian Law Journal* 240.

position of Privy Councilor dangling 'and thereupon turn obsequious.'"[29] The King agreed, and Coke became Chief Justice of England on 25 October 1613[30].

But contrary to Bacon's expectations, as Chief Justice, Coke continued to frustrate the prerogative by promoting the supervisory jurisdiction of the common law courts over what they regarded as inferior tribunals. Writs of prohibition were issued to the Chancery and to the High Court of Admiralty. The jurisdictional war waged by Coke came to a head in the *Case of the Commendams*, which concerned the right of the King to fill benefices of the Church of England as they became vacant.

When James became aware that it was being argued in the Exchequer Court that the King had no right to fill the benefices, he commanded Coke, by a letter from Bacon his Attorney-General, to halt proceedings until after he had given the matter his personal consideration.

The case proceeded in defiance of the Royal instruction. Coke drafted his famous letter to James, which was signed by 12 judges:

> "Most dread and most gracious Sovereign [it began]: We, your Majesty's Justices of the courts of Westminster … hold it our duties to inform your Majesty that our oath is in these express words: That in case any letters come unto us contrary to law, that we do nothing by such letters, but certify your Majesty thereof, and go forth to do the law, notwithstanding the same letters. We have advisedly considered of the said letter of Mr Attorney [Bacon] and with one consent do hold the same to be contrary to law, and such as we could not yield to the same by our oath."[31]

The King responded by summoning the judges to Whitehall. The King, in the presence of Ellesmere and 17 of his Privy Councillors, demanded of the judges why they had not:

> "checked and bridled 'impudent lawyers' who encroached not only on the prerogative but 'on all other courts of justice?' The Judges' letter was itself 'a

[29] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 338-339.
[30] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 340-341.
[31] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 371.

> new thing, very undecent and unfit for subjects to disobey the King's commandment, but most of all to proceed in the meantime and to return to him a bare certificate.'"[32]

James then tore the judges' letter up. The 12 judges fell to their knees begging pardon. Seeking to mollify the King, they humbly confessed that their letter – drafted by Coke – was "wrong in form". But while Coke would accept that the letter might have been better expressed, he would not yield on the point of principle. Still on his knees, he faced the King and said: "The stay required by your Majesty was a delay of justice and therefore contrary to law and the Judges' oath."[33]

James described this response as "mere sophistry", and asked Ellesmere for his opinion on the lawfulness of the stay. The wily Ellesmere was not to be drawn into this crisis between the King and his judges. In one of English legal history's most oleaginous performances, Ellesmere responded to the King's question by saying that the King's Attorneys were better qualified than he to answer.

Bacon seized his chance, and attacked the judges for dereliction of duty. Coke, still on his knees, turned to Bacon and said[34]: "I take exception! The King's counsel learned are to plead before the Judges, and not dispute with them!" Bacon struck back: "A strange exception! By oath and office, the King's learned counsel are to proceed against judge, peer or House of Parliament, should the King's prerogative be called in question." When James agreed with Bacon, Coke gave in. He said: "I will not dispute with your Majesty."[35]

By now, James had had enough of Coke; and Bacon took the opportunity to ensure the downfall of his great rival. He drew up a lengthy document entitled "Innovations into the Laws and Government" recounting Coke's "offences". Seventeen such charges were listed. He sent the charge sheet to James accompanied by a note:

> "I send your Majesty a form of discharge for my Lord Coke from his place of

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[32] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 373.
[33] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 373.
[34] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 373.
[35] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 372-373.

> Chief Justice of your Bench.
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> I send also a warrant to the Lord Chancellor for making forth a writ for a new Chief Justice, leaving a blank for the name to be supplied by your Majesty."[36]

The King executed the form of discharge, which was sent to Coke in his chambers. The discharge stated:

> "For certain causes now moving us, we will that you shall be no longer our Chief Justice to hold pleas before us, and we command you that you no longer interfere in that office, and by virtue of this presence, we at once remove and exonerate you from the same."

This was in November 1616. Earlier, on 20 June 1616, James himself had sat in the Star Chamber, something that no monarch since Henry VIII had done.

> "'Give thy judgments,' he began, 'to the King, O God, and thy righteousness of the King's son. … Kings are properly called judges, and judgment properly belongs to them from God: for Kings sit in the throne of God, and thence all judgment is derived. It is atheism and blasphemy to dispute what God can do; so it is presumption and high contempt in a subject to dispute what a King can do, or say that a King cannot do this or that. … I remember Christ's saying, 'My sheep hear my voice,' and so I assure myself, my people will most willingly hear the voice of me, their own Shepherd and King."[37]

This was a pretty grandiose claim. Even at the time, James must have seemed quite unhinged to his evidence. And the Stuarts did not improve after James I: the Stuart family was living proof that the Divine Right of Kings is a very bad theory of government. And the spectacle of the King using the Court of Star Chamber as the forum for the solemn proclamation and enforcement of his theory of the divine right of the King to concentrate in himself all the powers

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[36] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 388.
[37] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 374-375.

of government ensured that the Star Chamber would be abolished just as the political nation would reject the theory of divine right.

Time would show that, in the struggle for judicial independence from the Crown, Coke had the better of the argument with Bacon and the King. The constitutional settlement at the end of the 17th Century reformed the position of the judiciary in relation to the Crown. While the judges continued to be appointed by the Crown, their work became independent of it for all practical purposes because they no longer continued to serve at the pleasure of the King. Until the beginning of the reign of William III, the judges were appointed "durante bene placito", i.e. "during [the King's] pleasure". From the beginning of his reign, the judges were appointed "quamdiu se bene gesserint", i.e. "for as long as they are of good behaviour". And importantly, the judge of judicial misbehaviour was not the King but the Parliament.

And so Coke's courage in his battle over the power of the King to control his judges was ultimately vindicated. It is apparent, though, that his courage was shored up by the alignment of his self-interest and the institutional interest of the courts on which he sat. It might even be said, as Macaulay wrote, that "Coke's opposition to the Court … was the effect, not of good principles, but of a bad temper."[38] But making due allowance for all these things, Coke's courage is undeniable, and impressive. As Macaulay said[39], he was a "pedant, bigot and brute[;] [but nevertheless] an exception to the maxim ... that those who trample on the helpless are disposed to cringe to the powerful."

The scholar

In 1615, King James and his son, Charles, went to Trinity College, Cambridge, to watch the performance of a play written by George Ruggle.

The play was a comedy, the "principal character [of which] was a pompous, silly old Inns of Court lawyer named Ignoramus"[40]. (This name was borrowed from the legal procedure whereby grand juries who were unable to find a case worthy to be tried wrote on the indictment

[38] Macaulay, *Critical and Historical Essays Contributed to the Edinburgh Review*, 5th ed (1848), vol 2 at 346.
[39] Macaulay, *Critical and Historical Essays Contributed to the Edinburgh Review*, 5th ed (1848), vol 2 at 330.
[40] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 358.

Ignoramus [we don't know][41]. It was from this play that the word "ignoramus" came into common English usage, meaning an ignorant and foolish person[42].)

Ignoramus was intended to parody a local lawyer who had given grief to Cambridge University, but as soon as the character appeared on stage, dressed ostentatiously in his robes, everyone in the audience identified him as Edward Coke. He strutted about the stage spouting bad schoolboy Latin – "Quota est clocka nunc?", he asked when he wanted to know the time – much to laughter and applause of the King and the aristocratic crowd who were, of course, all well-versed in Latin.

Coke tried to have the play suppressed, but acknowledged that "Never did anything so hit the King's humour as this play did."[43] He was humiliated. His cherished *alma mater* had held him up to public ridicule, and in front of the King. James enjoyed the play so much that he saw it twice.

Coke's critics teased him for not being able to take a joke (which, of course, was completely true); and this teasing, which was unlikely to have been harmless fun, added to his ill-humour. "The Lord Chief Justice," wrote Chamberlain, "both openly at the Kings Bench and divers other places hath galled and glaunced at schollers with much bitterness."[44]

While it is no doubt unfair that a public man of Coke's eminence should have been dismissed in fashionable court circles as a pedantic and posturing fuddy-duddy, the Ignoramus episode makes a significant point about Coke as a scholar, which is all the stronger because of its contemporaneity. The point is that his scholarship was so polemical in its tone and partisan in its content that it was inevitable that he should become a political target for those of his contemporaries who disagreed with his views. It also became a target for later scholars who thought that historians should aspire to a degree of objectivity.

Returning to Parliament

[41] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 358.
[42] Riddell, "Ignoramus or the War of the Gowns", (1921) 7 *American Bar Association Journal* 109 at 110.
[43] Riddell, "Ignoramus or the War of the Gowns", (1921) 7 *American Bar Association Journal* 109 at 110.
[44] Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 358.

When Coke left the Bench he returned to Parliament. Here, he made his greatest contribution to the English articulation of the relationship between the individual and the State as the author of the Petition of Right.

The Petition of Right set out in clear and unambiguous terms what Coke regarded as the pre-existing rights of Englishmen to be free from martial law, billeting of soldiers, non-Parliamentary taxation and imprisonment without cause. The petition was initially resisted by the Crown, but the pressure of Parliament eventually proved too great. Coke was active in securing its passage through the Parliament.

On 7 June 1628, King Charles I capitulated and gave the petition his unqualified assent. The existence of some fundamental rights of individuals was definitively established; and the scope of the royal prerogative was substantially reduced.

In the course of his work as a parliamentary spokesman for what would later become recognisable as the Whig position in politics, Coke became the sponsor of the adulatory view of Magna Carta, what Edward Jenks described as "The Myth of Magna Carta". Speaking of Coke's time, Jenks said[45]:

> "It was an age in which historical discoveries were received with credulity, in which the canons of historical criticism were yet unformulated. Doubtless, more than one of Coke's contemporaries (John Selden, for example) must have had a fairly shrewd idea that Coke was mingling his politics with his historical research. But, for the most part, those competent to criticise Coke's research were of his way of thinking in politics, and did not feel called upon to quarrel with their own supporter. Zeal for historical truth is apt to pale before the fiercer flame of zeal for political victory. It is a tribute to Coke's character and ability, that he imposed his ingenious but unsound historical doctrines, not only on an uncritical age, but on succeeding ages which deem themselves critical."

In the course of Coke's promotion of the Petition of Right, and in the second book of his *Institutes* written after he left the Bench, he presented Magna Carta to the political nation as a

[45] (1904) 4 *Independent Review* 260 at 272-273.

guarantee of individual liberty and Parliamentary government. Coke's work provided the foundational myth of the English State which inspired the English Whigs. And it was this inspiration which also drove the political imagination of the American colonists and no doubt why he is still venerated in the United States today. It was Coke the visionary politician, and not Coke the judge, whose work was the great dynamic force in the movement to constitutional monarchy in England over the succeeding centuries.

Lord Sumption has made the point that, before Coke, English ideas of limited government owed more to Aristotle and Aquinas than to Magna Carta. Until Coke began to trumpet Magna Carta as an original expression of the special English genius for constitutional government, Magna Carta had little claim on the English imagination. Lord Sumption makes the telling point that in Shakespeare's play "King John", there is no mention of the incident at Runnymede in June 1215.

The Institutes and the Law Reports

In the *Institutes*, which included *Coke on Littleton*, Coke attempted an authoritative and comprehensive statement of the common law. I am confident that none of you has ever read it; you are none the worse for that. Indeed, you are fortunate not to have had to grapple with Coke's prose; it is no accident that no one has ever speculated that Coke (rather than Bacon) might have been the true author of the works of Shakespeare.

Dr McPherson in *The Reception of English Law Abroad*[46] explained that the enormous and immediate success in America of *Blackstone's Commentaries on the Laws of England* upon its publication in 1765 occurred because, in contrast to the "incoherent mass" of *Coke on Littleton*, so described by the brilliant John Quincy Adams, *Blackstone's Commentaries* presented a comprehensible, clear and elegant statement of the common law.

In Coke's academic work, his overweening concern for his own reputation led him to be less than candid. In the third volume of his *Institutes*, which was published after his death, he famously asserted that: "There is no law to warrant tortures in this land." In truth, although torture was not authorised under the common law, it was authorised in England under the royal prerogative when treason and sedition were alleged. So torture did occur pursuant to a warrant

[46] McPherson, *The Reception of English Law Abroad*, (2007) at 485, 242-243.

issued in the name of the monarch. Coke's name appears on seven warrants authorising the torture of Catholics and Puritans[47].

One of Coke's more important scholarly contributions was the establishment of the Law Reports. He produced the first full set of law reports in England. It was not so much the quality of the reports themselves that was important; but the idea that it was essential then, as it is now, to the common law as a system founded upon the judicial observance of precedent, that precedents should be collected and made available to the profession and the courts for application to like cases.

The importance of this aspect of Coke's contribution to the common law cannot be overstated. A system of "stare decisis" requires the systematic collection of precedents. Bacon himself said that before Coke's Reports "the law had been like a ship without ballast". To draw further upon Bacon's nautical metaphor to illustrate the power of the precedents Coke collected, it is noteworthy that a partial set of Coke's Reports travelled to America on the Mayflower[48].

Later life

He spent the later decades of his life at Stoke House working principally on his Reports, updating his commentaries on Littleton as part of his on-going work on the *Institutes*. He died in late 1634. By this time, he and his wife had effectively separated.

Judicial legacy?

One aspect of Coke's judicial legacy warrants particular attention. It might fairly be said that judicial activism, that supposedly modern phenomenon which so excites some commentators (who, curiously, also tend to be admirers of Sir Edward Coke), actually reached its apogee in the early 17th Century when Coke made a claim for judicial power that was apt to exalt the judiciary over the legislature as the principal voice of sovereign power.

Most famously, in *Dr Bonham's Case*[49], Coke wrote:

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[47] Spigelman, "Lions in conflict: Ellesmere, Bacon and Coke – the years of Elizabeth", (2007) 28 *Australian Bar Review* 254 at 276.
[48] Thorne, "Sir Edward Coke: 1552-1952", *The Selden Society Lectures 1952-2001*, (2003) 3 at 3.
[49] (1610) 8 Co Rep 113b at 118a [77 ER 646 at 652].

> "[I]n many cases, the common law will … controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void".

Coke was here speaking in support of a view with deep roots in natural law thinking, the idea that the exposition of the law was a matter for learned men, steeped in the traditions of their profession, and for them only. That mindset was very much at odds with the radical Protestant view that individuals can find their way to the truth for themselves without the mediation of a priestly caste.

When Coke spoke of the "common law" as an abstraction, the practical reality, well understood by his contemporaries, as his exchanges with the King show, was that he was promoting the supremacy of the judges over the King in Parliament.

At this historic crossroads, Coke's great rival, Francis Bacon, took the road that led to Parliamentary supremacy. In the course of argument in *Chudleigh's Case* in which, fittingly, Bacon and Coke were opposed as counsel, Bacon argued that the judges' authority over the laws of England was merely "to expound them faithfully and apply them properly"[50].

The English civil wars of the 17th Century established, in the most emphatic way, that Sir Francis Bacon had the better of this argument. The claim of the Parliament to be the sole organ of government with authority to say what the law should be was established in England following the constitutional settlement at the end of the 17th Century. After that time, any claim of the judiciary for the larger share of sovereign lawmaking power remained dormant, until the founding of the United States, shortly after which the great judgment of Marshall CJ in *Marbury v Madison*[51] established that the Supreme Court of the United States could invalidate Acts of Congress held by the judges to be inconsistent with the Constitution.

Coke's observations in *Dr Bonham's Case* might be thought to have foreshadowed the strong form of judicial review established by the US Supreme Court in *Marbury v Madison*; but to the

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[50] Holdsworth, *A History of English Law*, 3rd ed (1945), vol 4 at 186.
[51] 5 US 137 (1803).

disappointment of those who would claim Coke as the originator of judicial review of legislation, it is noteworthy that *Dr Bonham's Case* was not even mentioned in the celebrated judgment of Marshall CJ in *Marbury v Madison*.

Marshall's decision in *Marbury v Madison* was founded squarely on the eminently practical ground that interpreting written documents is simply what judges do. It is what they had always done within the common law tradition. Constitutional adjudication is an exercise in interpreting the effect of the Constitution as a written document; and that exercise is of a piece with the work which characterises the work of judges in interpreting deeds and wills. For Marshall, there was no occasion to seek more direct authority.

Marshall's insight, that "it is emphatically the province and duty of the judicial department to say what the law is"[52] reflected the practical experience of practising lawyers that declaring what the law is is a characteristic function of judges in the common law tradition. This practical and institutional approach informed by the separation of powers effected by the US Constitution is, of course, very different from the doctrinaire and highly authoritarian approach of Coke in *Dr Bonham's Case*. The pragmatic approach of the common law reflects in *Marbury v Madison* is embodied in Articles 8 and 11 of the Basic Law which confer the power of constitutional view on the courts of the Hong Kong Special Administrative Region.

Conclusion

The story of the development of the common law is not a story of the work of judicial heroes but rather, as exemplified by the evolution of the adversarial system and the criminal law, of a practical process of iteration, from generation to generation of lawyers of the bench and the profession, whereby the common law moved, slowly and often tentatively, to meet the nation's needs in an ongoing process of self-definition.

In the turbulent age in which Coke made his mark in the history of ideas, he was at the very centre of some of the most dramatic moments in England's history. Medieval and modernising ideas of law and government swirled and clashed in the dangerous currents of Elizabethan and

[52] *Marbury v Madison* 5 US 137 at 177 (1803).

Stuart politics. Coke's life and work were shaped by the violent tensions between conservative medieval ideas of natural law and the central importance of the customs of the realm, the radical claims of a divinely ordained monarchy to absolute power, and emerging notions of nationhood and sovereignty dependent upon the consent of the governed which would, in due course, find fuller, and very different, expressions in Hobbes' *Leviathan* published in 1651, and in Locke's *Second Treatise on Government* published in 1689.

It would be simplistic and wrong to see in Coke's work the vindication of the modern mind over the medieval: he was too inconsistent to be neatly compartmentalised. His inconsistencies were certainly such as to throw into doubt, both the veneration of Coke as "a hero judge", and the very notion that the common law can be sensibly understood as the product of hero judges. Coke's career was itself an expression of the contradictions of which I have spoken. He did not resolve these contradictions; they were resolved by others. The common law, whether considered as a body of judges made precedents or as an approach to adjudication, is not the creation of Coke or any other hero judge. Rather, the doctrine of precedent, stare decisis, has served to ensure that the development of the common law is distinctly not the creation of hero judges, but the work of more modest minds, who as a matter of a deeply ingrained professional ethos recognise the paramount law-making role of the legislature subject to a constitution or Basic Law. It may be fair to say that the common law could not afford more than one Sir Edward Coke.

In this regard, it is fitting to leave the last word to the long-suffering Lady Hatton, his wife of 36 years. Upon Coke's death at the age of 82, she said: "We shall never see his like again, praise be to God."[53]

[53] Simpson, "Review of *Sir Edward Coke and the Grievances of the Commonwealth* by Stephen D White", (1982) 98 *Law Quarterly Review* 174 at 174.