

Coke's 'Tales' about Sovereignty

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I. Introduction

1. Context of constitutional struggles of seventeenth-century England

In English legal history, the seventeenth century marks the peak of conflicts between monarchical prerogative and Parliament, rooted in the common law courts' procedural control over prerogative courts¹. It is common knowledge that the Bill of Rights, with its constitutive principle of Parliament's sovereignty, stands at the end of this line. What is hardly known, though, is the fact that the English concept of sovereignty is based on Parliament's historical self-understanding as highest court of justice and, therefore, as the highest common law court². The main issue on the road to the establishment of the Bill of Rights in 1689 was the determination of who had the final say in a situation of emergency (necessity). Necessity (*necessitas*) was the Stuart monarchs' justification for taxes and forced

loans without parliamentary approval; when Parliament decided to stand against the king openly by issuing the Militia Ordinance in 1642, it also did so by appealing to the authority of "necessity".

The historical bases for this sovereignty concept can be traced back to the control of courts by prerogative writs. On the legal battlefield against Stuart absolutism, this found its antagonists in Lord Chief Justice Edward Coke and Lord Chancellor Ellesmere. The underlying conflict over judicial sovereignty dates back to the sixteenth century and sets the initial scene for the following paper. Coke's "tales" have three acts: Firstly, procedural control as part of monarchical judicial sovereignty (residual royal prerogative of justice); secondly, the precedence of (common) law over monarchical judicial sovereignty; finally, Parliamentary sovereignty as the highest interpretative authority over the general consensus incorporated in the common law. These components all contributed to the grand finale of Coke's legal work.

2. *The prerogative courts in general*

In 1534, the Church of England broke away from Rome, and Henry VIII declared himself its supreme head³. Just as the confessional bonds between Canterbury and Rome were cut, so too were the judicial ties. All legal remedies in ecclesiastical issues became "in-house" business, to be dealt with at Star Chamber and the Court of High Commission⁴. Since they evolved from the judicial sovereignty of the King's Council, the latter, along with the Court of Chancery, were referred to as prerogative courts. In English court history, the common law courts' evolution from the King's Council in the twelfth century left judicial sovereignty with the king – the residuary royal prerogative of justice, which he made use of in cases where the actions of common law seemed inadequate⁵. The monarchical prerogative of justice was exercised by the Lord Chancellor, by appointees (in the Star Chamber and the Court of High Commission), or by the king or queen himself or herself⁶. This denomination demonstrates that Star Chamber and Court of High Commission, just as Chancery, were not based on common law, but on royal prerogative⁷, and that the monarch or the monarch's politically-dependent appointees decided in these prerogative courts at their discretion⁸.

a. *The Court of Star Chamber*

The Star Chamber derived its name from the *camara stellata*, a room in Westminster Palace, whose ceiling was decorated with stars and where the Privy Council congregated for judicial matters from 1347 onwards⁹. For over a century, the Council of the Star Chamber was nothing more than a council

congregation at a special venue¹⁰; during the reign of Henry VIII, Lord Chancellor Thomas Wolsey (in office 1515-29) established the judicial duties as the main task of the Council and promoted the basic division from governmental affairs. With the break from Rome, the judicial duty of the Star Chamber was consolidated under Lord Chancellor Thomas Cromwell from 1540 onwards¹¹. Meetings were no longer viewed as Privy Council sessions, but as judicial congregations. Here, the councilmen exercised the royal prerogative of the judiciary as appointees dependent on the monarch¹².

At first, civil cases dominated the chamber's business. Later, from the time of the Stuart monarchs (beginning in 1603 with James VI and I, and continuing with interruption until the death of Queen Anne in 1714), more criminal cases came up, which the king delegated to his appointees only for sentencing, due to the shortcomings of common law in regards to serious crimes¹³. From the monarchical point of view, Star Chamber's advantage lay in the fact that it was unaffected by the *Magna Carta*'s requirement to involve jurors in proceedings¹⁴. This made its proceedings not only shorter, compared to common law courts, but also open to monarchical influence, especially in cases of sedition against the crown or parochial misdemeanours, where jurors would not necessarily follow the crown's line¹⁵. The Star Chamber, therefore, soon became known for its arbitrary sentences.

b. *The Court of High Commission*

The Court of High Commission was set up in 1580 by Elizabeth I (1533-1603), daughter of Henry VIII, to enforce the English Reformation (Art. VIII, *Acts of Supremacy*

1558), especially exercising monarchical judicial ecclesiastical sovereignty in criminal cases¹⁶. As a disciplinary court on behalf of the monarch as head of the Church of England, the High Commission received instructions via letters patent to collect evidence in all cases of apostasy, heresy, heterodoxy, schism, and conspiracy against the state church¹⁷. As a result, the High Commission was strongly instrumentalized by monarchical church policy and, together with Star Chamber, was an expression of the crown's claim to lead the Church of England¹⁸. Both courts adopted the *ex officio* oath, an oath «of calumny to tell the truth in ecclesiastical causes»¹⁹ that required the accused to answer any questions put to him truthfully²⁰. The oath had its origins in medieval 'remote' England to compensate the lack of parochial judiciary structures for implementing the reforms of Innocent III (r. 1198-1216)²¹. Parliament had banned the oath on several occasions²². Indeed, the basis of common law opposition against the prerogative courts argued that this oath to tell the truth in ecclesiastical matters (*de veritate dicenda*) forced the accused, even before the first interrogation and the first notice of the crimes of which he was accused, to incriminate himself. Refusal to take the oath led to imprisonment for contempt of court²³.

This practice was especially prevalent against the Puritans²⁴. Already in 1584, John Whitgift had taken office as the Archbishop of Canterbury (1583-1604) from the moderate Edmund Grindal (r. 1575-83). Whitgift was a ferocious proponent of Elizabeth's anti-Puritan politics and empowered the High Commission as an instrument of these policies. Whitgift himself wrote: «[T] he whole ecclesiastical law is a carcasse [sic]

without soul; yf [sic] it not be in the wants supplied by the commission»²⁵. While Archbishop Whitgift defended the *ex officio* oath practice by claiming that a high level of disobedience often marked the attitude of the accused in religious matters, the opposing Puritans compared proceedings there with those of the Spanish Inquisition and sharply attacked the coercion to self-incrimination²⁶.

3. Initial unease with prerogative courts

In the beginning, the common lawyers' disapproval of the prerogative courts arose from their fears that they would circumvent common law²⁷. Hamlet did not complain about «the law's delay»²⁸ for nothing in his famous monologue²⁹; common law procedure by this time was characterised by the preponderance of technicality, particularly in relation to the *actiones*. While common law courts relied on witness accounts to shape a jury verdict, prerogative courts only allowed written evidence, with the relevant facts of the case being determined by the judges themselves. Furthermore, common law courts adhered to the principle of *in dubio pro reo*, whereas prerogative courts assumed the guilt of those accused.

The sympathies for speeding up of proceedings were twinned with a certain amount of tolerance for the new ecclesiastical jurisdiction, mainly because of the still slightly chaotic situation concerning both internal and procedural control of the clerical law during the reign of Elizabeth I (until 1603). In addition, the common law was familiar with equity, the Court of Chancery having been established for a long

time. The relationship between common law and prerogative courts was therefore not hostile from the outset. The verdict in *Caudrey's Case* (1591), and Coke's statement³⁰ as crown prosecutor about the need for prerogative courts³¹ and the peculiarities of ecclesiastical law (regarding issues of heresy and schism)³², did not foreshadow the legal battle to come. The Puritan priest Robert Caudrey had filed an action for trespass against one George Atton, who had illegally entered the parsonage during a clerical visitation authorized by the Act of Supremacy. However, Caudrey had lost his sinecure by High Commission verdict, as he had been preaching and holding church services not using the *Book of Common Prayer*, as demanded in the Queen's letters patent; therefore, it was relevant for the trespassing case in front of the common law courts whether the High Commission judgement had been legitimate or void. Questioning the High Commission's verdict in front of the common law courts was unsuccessful³³, and the common law courts were held to be bound to respect the judgements of the High Commission³⁴. Coke pointed out the need for prerogative courts in regard to clerical cases and accepted their independence from the principles of common law, due to the nature of clerical law and the royal prerogative. In his closing statement against the plaintiff's arguments, Coke clarified the jurisdiction of the Court of High Commission³⁵ by pointing to the issues of heresy and schism³⁶. This would change in the years to come, however, when Coke became one of the fiercest opponents against the prerogative courts. In his argumentative bag of tricks were the prerogative writs as the judicial means of the common law courts against the prerogative courts.

II. *Procedural control as part of monarchical judicial sovereignty (residuary royal prerogative of justice)*

1. *Prerogative writs in general, the writ of prohibition in particular*

To understand the prerogative writs in general, it is important to recognize that their origins remain murky; it is possible that they developed from the «wills of grace»³⁷ as described by Glanvill³⁸. The term «prerogative writs» first appeared in the context of the habeas corpus writ in the *Richard Bourns Case* of 1620³⁹, to illustrate these as benevolence on part of the king⁴⁰. In the 1759 case *R v Cowle*⁴¹, the term was used collectively to describe the writs of prohibition, habeas corpus, mandamus, and certiorari⁴². Nowadays, the writ quo warranto is also counted on this list⁴³. For the purposes of the present discussion, it is sufficient that the term «prerogative writs»⁴⁴ expresses the strong belief that monarchical judicial sovereignty should adhere to the law in material and procedural sense, as well as offering a legal means to the subjects in the event that a court exceeded the boundaries set forth in the law (rule of law)⁴⁵.

The exercise of this control over courts was viewed as part of the royal prerogative and was placed mainly with the Privy Council, but was later bestowed upon the Courts of King's Bench⁴⁶ as the king's court⁴⁷. This led to a systematic control of the use of prerogative powers by the prerogative courts as of the beginning of the seventeenth century. The common law jurists who used the writs as an instrument of power against the prerogative courts would have therefore probably repudiated the term «prerogative writs»⁴⁸. The writs were extraordinary le-

gal means⁴⁹ that were available to the courts themselves⁵⁰. Therein they differed from other writs, which served as the court order gained by one party summoning the second party to appear before court⁵¹. While the prerogative writs had initially been developed for purposes of routine, they were now not available in the regular proceedings. Instead, they were deployed at the discretion of the court⁵².

In the conflict between common law and prerogative courts, the writ of prohibition was of particular importance. Originally, this oldest of the prerogative writs was a mean utilized often by the parties to move proceedings from the clerical courts to the common law courts⁵³. After the dissolution of canonical judiciary by the *Act of Supremacy* of 1534⁵⁴, however, the common law courts began to remember the writ of prohibition as a means to move legal proceedings from the clerical courts to the courts of the king⁵⁵.

2. *The writ of prohibition as legal instrument to remove proceedings from clerical courts*

During the later years of the reign of Elizabeth I, the writ of prohibition was used only cautiously by the common law courts. In the early proceedings, a certain opposition to the High Commission can be sensed, but it lacked a broader political dimension. The 1590 *Man's Case*⁵⁶ dealt with a prohibition that had been issued against a clerical court due to an illegitimate divorce decree; in *Love v Prin* (1599)⁵⁷, a personal injury case was taken away from the High Commission by a common law court with a writ of prohibition, as it was only a simple injury case, and the victim had not been a member of the clergy.

In all of these proceedings, the jurisdiction of the prerogative and especially that of the clerical courts was doubted only sporadically in single cases; there was, in other words, no generalized rejection of prerogative authority. Rather, the case of *Baker v Rogers* (1599), in which a priest was relieved of his office for simony, showed that the common law courts did not question the authority of the High Commission for clerical matters. In this case, the common law court disallowed the prohibition, reasoning that it was bound by the decision of the High Commission regarding the question if simony had been committed and that it was not allowed to interfere in questions of clerical law⁵⁸.

Yet there were signs of prototypical resistance, even if these could not yet be generalized in a common law-prerogative antagonism. In the case *Collier v Collier* (1590/1), for example, the *ex officio* oath provoked a writ of prohibition⁵⁹. This suggests that the High Commission and its procedure were being doubted in its very foundations. When the Court of High Commission interrogated the parties in the matter of unchastity, such a writ was decreed against it by the Court of Common Pleas, claiming that no one could be forced to give evidence against himself. As the *ex officio* oath was a characteristic of the High Commission, the conclusion that the liberty of refraining from self-incrimination would prohibit the use of the oath amounted to a frontal attack on the prerogative court. The Common Pleas' dissention was probably due to how fundamentally adverse the *ex officio* oath was to the principles of common law⁶⁰. Significantly, in this particular case the counsel for the defence, formulating this argument against the *ex officio* oath, was none other than Edward Coke⁶¹.

3. *Coke's Institutes of the Laws of England as Bible of seventeenth-century common law*

Coke's *Institutes of the Laws of England* (published 1628-44) was a ground-breaking legal textbook when it first appeared, and even today remains a book of authority. Partly, this was due to its forceful, articulate power. A particular example was Coke's explanation of why the Court of King's Bench, which Coke himself had presided over since 1613⁶², gave its rulings without being influenced by the king⁶³. The king, Coke reasoned, had transferred all his judicial powers to the courts, who would forthwith exercise this power in his name. Therefore, rulings in questions of the law were only allowed to be answered by these courts. The king was also not empowered to transfer this authority of judicial power for a second time to different institutions. The Court of King's Bench was also, pursuant to its historical function, the court concerned in legal matters regarding the king, but the king himself could not be the judge in his own proceedings. For Coke, the common law courts' authority not only included the correction of errors in legal proceedings, but also transgression in the extrajudicial sphere, such as breaches of the peace, oppression of subjects or other forms of misgoverning, so that every kind of public or private injustice could be reviewed by a court and punished. Coke's argumentation drew heavily on former legal authorities, such as Henry Bracton's *De Legibus et Consuetudinibus Angliae* (*On the Laws and Customs of England*; 1264)⁶⁴, to provide evidence that his views were, in fact, consistent with long-standing legal tradition⁶⁵. The importance of custom in the English legal system, and the legitimating

justification "since former times", were almost unimpeachable arguments in English political discourse, and utilizing this for his own arguments was the goal Coke was striving for.

4. *The common law courts' use of writs of prohibition*

After it became clear that the reforms fought out between James I and the Church of England at the 1604 Hampton Court Conference had failed, the floodgates opened. In the same year, Lord Chancellor Ellesmere summoned the judges of the King's Bench and the Court of Exchequer, and interrogated them in the probably deliberate absence of the Court of Common Pleas judges, as to whether the latter could issue writs of prohibition when the case concerned was not pending before their court⁶⁶.

The judges of the King's Bench and the Exchequer opposed Ellesmere's suggestion and unanimously resisted the attempt to pit the common law courts against each other⁶⁷. Likewise Coke, who was asked upon the urging of Archbishop Bancroft in 1606 to testify before the Privy Council regarding the accusations⁶⁸ that the writ of prohibition was used by the common-law courts too often and in an unjustified, careless way, and issued on a poor basis of facts⁶⁹. Attention should be drawn to the justification of the common law opposition by means of quotes of ancient Christian texts at the end of the report, presumably inserted into the report by Coke himself. The Biblical quote «*Laqueus confractus est, et nos liberti sumus*» («We have escaped like a bird from the snare of the fowlers»)⁷⁰, as

well as the apocryphal citation «*Et magna est veritas, et praevallet*» («The truth is great and will prevail»), show the common law judges viewed themselves as the apologists of the liberty guaranteed by the common law.

Several times, Bancroft bemoaned the *zeitgeist* against the clerical judiciary, evidenced by the massive use of prohibitions⁷¹. This had led to an erosion of the same even in cases such as heirloom and marriage cases, which had been among its core authorities⁷². He complained of a «scientific and conscious obstruction of the clerical courts» by the common law judges, who were misusing the writs of prohibition for their own purposes⁷³. He especially saw the monarch's authority in parochial affairs questioned in the case of the Court of High Commission as a royal prerogative court⁷⁴. To protect the clerical courts from these unjustified prohibitions, Bancroft suggested that only the Court of Chancery, represented by the distinguished person of the Lord Chancellor, and not the common law courts, should be allowed to issue these writs⁷⁵. Apparently, Bancroft hoped to place the clerical prerogative courts under the control of another prerogative court, the Court of Chancery, to eliminate the interventions by common law jurists and to bring the conflict between common law and prerogative courts to an end.

Coke denied all allegations against the common law judges and emphasized that only a parliamentary law could change the legal situation in Bancroft's favour⁷⁶. He countered Bancroft by claiming that prohibitions ensured the enforcement of authorities between clerical and secular courts in individual cases; issuing them was therefore not a question of complacency, but of

justice, and could be issued following appeal by either side, including the claimant, who himself had chosen the clerical court as forum, as well as the respondent, who had already accepted the clerical court as forum, or even a third party⁷⁷. Coke replied to the Archbishop's suggestion of making the Court of the Chancery solely responsible for prohibitions by pointing out that common law judges had always had the right of issuing prohibitions when the clerical judiciary interfered with the worldly one⁷⁸. The corresponding passage in Coke's *Institutes* is titled *Articuli Cleri*, making a clear connection to the law banning the *ex officio* oath and limiting the jurisdiction of the clerical courts from the fourteenth century, again using historic arguments to provide a basis for his position.

This clash made Coke one of the fiercest opponent of Bancroft⁷⁹. It clearly shows the role of the prerogative writs in the conflict between common law and prerogative courts. The writs, especially the *writ of prohibition*, were used systematically, and not only in specific cases. As a result, the prerogative judiciary as a whole was called into doubt. The writs were used as a political instrument of power with the aim of fighting the prerogative courts, especially the High Commission, and to limit or even shatter its power⁸⁰. The leading case in this attempt to curb the power of the High Commission was the *Nicholas Fuller's Case* (1607)⁸¹. The *Coke Reports* only show the reasoning of this case, but the actual procedural history and its political dimension go much further.

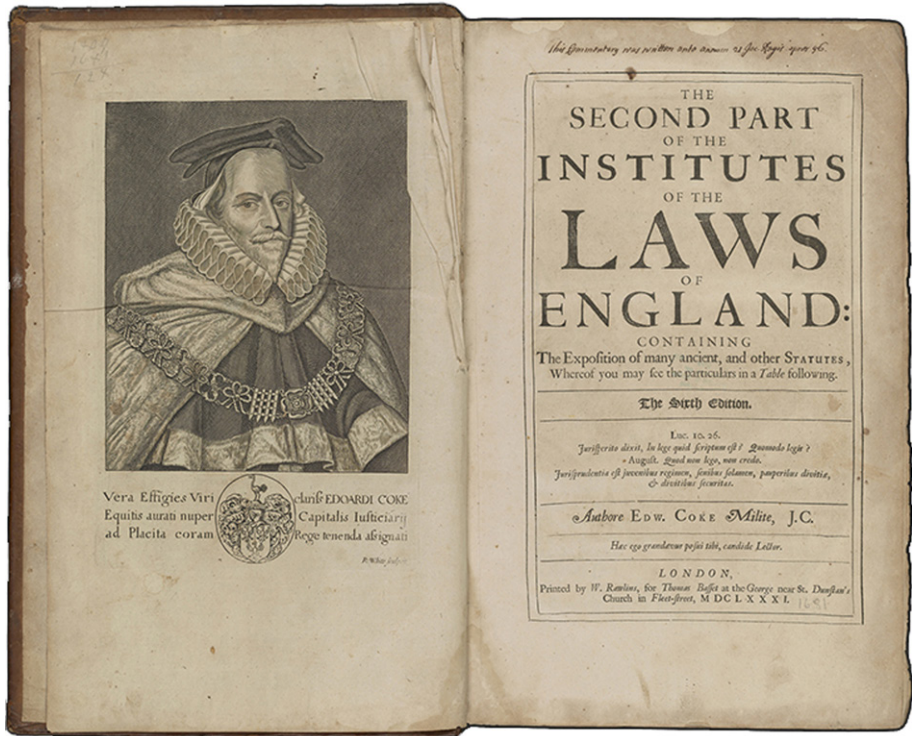
5. *The Nicholas Fuller's Case (1607) and the attempted divestiture of the High Commission*

Nicholas Fuller, a Puritan Member of Parliament and lawyer, attempted, on behalf of the Puritans, to have the Court of High Commission in itself declared illegal by the common law courts. Fuller was representing as defence counsel two men who had refused to take the *ex officio* oath and had been imprisoned for contempt of court. He made use of the writs of habeas corpus to achieve their release and questioned the right of the High Commission to imprison and penalize subjects⁸².

The origins of the prerogative writ of habeas corpus (which, in English, translates to «you shall have the body») can be traced back to the previously mentioned famous clause of the *Magna Carta*, in which «no free man shall be arrested or imprisoned [...] except by the lawful judgement of his peers or by the law of the land»⁸³; the term «habeas corpus» itself does not appear in the famous document⁸⁴. Later, the writ of habeas corpus served exclusively to fight the imprisonment of certain privileged persons⁸⁵. In the sixteenth century, the Court of King's Bench developed the variant *habeas corpus ad subjiciendum*, with which unlawful arrests could be fought. The writ included the order to present the incarcerated person along with the reasons for the deprivation of liberty before the court, so that the lawfulness of his incarceration could be determined⁸⁶. In his *Institutes*, Coke further mentioned that this writ could be granted to persons without special court privilege⁸⁷.

After he had achieved the temporary release of his clients by the King's Bench, Fuller extended his attack on the High

Commission in his closing statement. He deemed the court «popish» and unlawful, claiming that it did not serve Christ's justice, but that of the Antichrist; the *ex officio* oath would lead to the damnation of the souls of those taking the oath⁸⁸. Before the Court of King's Bench could rule on the case of the men he was representing, the High Commission prosecuted Fuller himself for heresy, schism, and faulty teachings. He immediately refused to take the *ex officio* oath and gained a *writ of prohibition* in the King's Bench against the acts of the High Commission⁸⁹. In its ruling, the Court of King's Bench claimed the authority to decide which cases were clerical and therefore belonged before the High Commission, according to the *1 Eliz. cap. 1* law. Accordingly, a simple attack on the authority of the court, as Fuller had presented in his closing statement, was to be ruled upon by the common law courts⁹⁰. Only if the crime of heresy, schism, or something comparable was given was it under the authority of the clerical courts to act⁹¹. However, as soon as the charges before a clerical court included, among others, one of those that belonged before a common law court, issuing a *prohibition* was permitted⁹². Following this, Fuller was still sentenced to pay a fine of 200 pounds, and he was imprisoned for heresy, schism, and faulty teaching⁹³, but the common law judges had been able to establish their position regarding the order of competences between common-law and prerogative courts. Regarding the High Commission, they relied upon the *Ecclesiastical Appeals Act* of 1533⁹⁴, according to which the Church was subject to the crown and all power originated from the king⁹⁵. By utilizing this, the common law judges not only wanted to achieve the subjugation



1681 edition of Institutes of the laws of England by Edward Coke

of the clerical courts under the king but also the control by common law courts. Whether this could, in fact, be taken from the law is doubtful⁹⁶. Regardless, the conflict now gained a constitutional component⁹⁷.

A further assessment, edited by Coke⁹⁸, expressly denied the High Commission’s power to arrest people. Such a competence could only be bestowed by an *Act of Parliament*, and the letters patent, which granted the High Commission certain powers in religious matters, were not sufficient for this. Even though the High Commission was established by the 1 *Eliz. cap. 1* law, Coke argued that the monarch could not change the worldly or clerical law in such a

manner that the clerical court was entitled to arrest people. Furthermore, Coke – together with the then-Chief Justice of the King’s Bench, John Popham for the Whitehall Council⁹⁹ – proposed an answer under which circumstances clerical judges could conduct an interrogation under the *ex officio* oath. In their answer, both of these high-ranking common law judges deemed the oath itself to be permissible, but wanted to limit its use. The accused had to be informed before their interrogation what they were being accused of. Also, nobody – neither the layman nor a member of the clergy – could be forced by the oath to reveal their secret thoughts. Laymen could

only be questioned under the *ex officio* oath in two areas of the law (inheritance and marriage contracts), as there were often secret agreements in these areas, and because the honour of the accused, unlike in questions of infidelity, unchastity, usury, simony or heresy, was not impugned. Referring to *Hinde's Case*¹⁰⁰, decided in 1576, the authors reaffirmed the lack of authority to perform arrests. The arguments made by the common law judges were supported by the common law itself. This assessment constituted an expansive attack against the High Commission, stripping it of its most important method of attaining evidence against laymen. In these proceedings, use of the controversial oath was only allowed in questions of marriage contracts and heirloom questions, as intended by the *Articuli Cleri* statute; heresy and other clerical proceedings, which were the core authority and the primary purpose of the court, were therefore heavily impeded.

This view was transferred into the legal practice shortly afterwards by the Court of Common Pleas by means of a writ. The cause for this was *Edward's Case* of 1608¹⁰¹, in which the layman Thomas Edward was being sued by a member of the High Commission, Dr John Walton, for various insults and slander against him. The court accepted the *ex officio* oath and interrogated him under the same. Coke and his judge colleagues issued a *prohibition* against the High Commission, holding the accusation of slander to be a temporal one that did not belong before a clerical court. Furthermore, in hearing its own case, the court had been guilty of the *Premunire*¹⁰². The reasoning mirrored Coke's and Popham's assessment, recalling that a layman could not be forced under the *ex officio* oath to

reveal his secret thoughts. *Edward's Case* shows in exemplary fashion how common law courts used *prerogative writs*, especially the *writ of prohibition*, to enforce their view of the law regarding the order of competences in practice.

Fuller's Case and Coke's arguments encouraged the common law courts in issuing prerogative writs against the clerical courts¹⁰³. Even though the focus was always on the *writ of prohibition*, which had been created for the use against the clerical judiciary, other writs, especially the previously mentioned *writ of habeas corpus*, were used outside of *Fuller's Case* in the conflict with the High Commission. In *Sir Anthony Roper's Case*, for example, Roper was initially imprisoned by the High Commission for not paying a vicar's claim to a pension; subsequently, a *writ of habeas corpus* was filed, and Roper was released, on the grounds that the High Commission had no competence over the payment of pensions¹⁰⁴. Greater publicity was achieved by *Sir William Chancey's Case* of 1612¹⁰⁵. Chancey was incarcerated in the notorious Fleet Prison for infidelity and violation of alimony obligation towards his wife. Following an application by his lawyer, the Court of Common Pleas issued a writ of habeas corpus for the release of Chancey on bail. Even though the High Commission had been ruling in comparable cases for quite some time, in the estimation of Coke and his colleagues it was still bound by the law and order of England, pursuant to which it did not have the authority to rule over misdemeanours such as those of which Chancey was being accused. Therefore, these were held to belong before the common law courts.

6. *The lee site of the Star Chamber*

In regard to the Star Chamber the available sources are scarcer; in spite of its notoriety, the resistance against this extraordinary civil and criminal court and also the use of writs in this context seem to have been less pronounced. There were only a few disputes between common law courts and the Star Chamber up to the end of Tudor rule in 1603¹⁰⁶, and the few were aimed at limiting the court's power. The 1566 *Onslowe's Case*¹⁰⁷ included a legal assessment by the common law courts according to which the Star Chamber did not have sentencing power in perjury cases; in a further assessment from 1591¹⁰⁸, the common law courts lamented the illegal arresting practice of the prerogative court. Even Coke, the protagonist of the common law judges' uprising against the prerogative courts, was conspicuously less ferocious in his critique of the Star Chamber as opposed to the High Commission¹⁰⁹. In the discourses on the Star Chamber, printed in his *Institutes*, Coke recognizes that the common law did not suffice for especially severe crimes violating the king's peace and the royal laws and these, therefore, had to be adjudicated by the Star Chamber¹¹⁰. At the same time, however, Coke emphasized that the laws establishing the Star Chamber could in no way curtail the jurisdiction of the ordinary courts. Crimes that could be penalized adequately by common law courts thus did not belong before the Star Chamber¹¹¹.

Coke also criticized the manner of finding sentences at the court, which in cases of an equal balance of the votes granted the decisive vote to the Lord Chancellor. Allegedly this violated the rule of precedent *paribus sententiis reus absolvitur*. Still,

Coke hardly rejected the Star Chamber as a whole. At a time he was already opposing the Court of High Commission, he wrote that Star Chamber «is the most honourable court, (our parliament excepted) that is in the Christian world, both in respect of the judges of the court, and in their honourable proceeding according to their just jurisdiction, and the ancient and just orders of the court»¹¹². He also saw the Star Chamber's right to hand down severe penalties of honour and physical punishment in its long-established tradition, which dictated it to follow on its previous rulings balanced by the education and respectability of its members¹¹³. In practice, this was exemplified by the case of *Andrew v Ledsam* (1610). In this case, the writer Ledsam was sued by the lender Andrew in the Star Chamber, as Ledsam had taken a loan he could not repay by presenting fraudulent securities. The Star Chamber sentenced Ledsam to pay Andrew back double the amount, and both his ears were to be cut off. Edward Coke as Chief Justice of the Common Pleas and Thomas Fleming as Chief Justice of the King's Bench were asked of their opinion in this case. They saw the sum of the payment covered by the laws of the realm and simply requested to limit the physical punishment to the cutting of a single ear¹¹⁴. Similarly, in the *Countess of Shrewsbury's Case* (1613), Coke, as a member of a committee, affirmed the legitimacy of the imprisonment of Countess Mary Talbot of Shrewsbury, on the grounds of perjury¹¹⁵. The countess' plea for noble privilege, which should have been relevant, was dismissed¹¹⁶. Furthermore, although Star Chamber also used the *ex officio* oath, which had prompted a wave of writs against the *High Commission*, the common law judges found no way of

handling this, even after Edward Coke had been appointed to the Court of Common Pleas¹¹⁷. Accordingly, there was never a ruling against the Courts of Star Chamber by the common law courts, even though the common law judges had developed a clear scepticism towards this prerogative court by the 1630s at the latest¹¹⁸.

III. Precedence of (common) law over monarchical judicial sovereignty

1. Dismounting the king as supreme judge in *Prohibitions del Roy* (1607)

The common law instrumentalization of procedural control for limiting monarchical judicial sovereignty is associated with the cases *Prohibitions del Roy* in 1607 and *The Case of Proclamations* in 1611.

In the case of the *Prohibitions del Roy* in 1607¹¹⁹, Archbishop Bancroft took the plea to the king to decree the ambit of the prerogative courts' competences himself. The king, Bancroft reasoned, could – based on his divine right – take on any and every legal case himself and decide, insofar that the judges were only his representatives. As his method of choice, James I would have intended the writ *de non procedendo rege inconsulto*¹²⁰. This writ originates from the older legal sources of England and is viewed as prerogative writ¹²¹. It allowed the monarch to withdraw from the common law courts such cases in whose endings he may have had an interest¹²².

Against this move towards unlimited and uncontrolled judicial monarchical sovereignty Coke, the Chief Justice of the Court of Common Pleas, formulated clear limits

for the royal prerogative and his argumentation in *Prohibitions del Roy* (1607) denied the monarch the personal exercise of the judicial power:

To which it was answered by me [...] that the King in his own person cannot adjudge any case, either criminal [...] or betwixt party and party [...] but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England; and always judgements are given, *ideo consideratum est per Curiam*, so that the Court gives the judgement¹²³.

According to the Chief Justice, the king was the highest judge in the community of the spiritual and worldly lords (Lords Spiritual and Temporal) in the Upper House of Parliament, where complaints against appeal judgments of the King's Bench over the Common Pleas were heard¹²⁴. His presence in court, notably in the Star Chamber, «was to consult with the justices, upon certain questions proposed to them, and not *in judicio*»¹²⁵. Coke pointed out that the king was not allowed to participate in the making of the judgment that will be rendered by the court according to law and custom of England but at counseling the judges: «and it is commonly said in our books, that the King is always present in Court in the judgement of law; and upon this he cannot be nonsuit: but the judgements are always given *per Curiam*; and the Judges are sworn to execute justice according to law and custom of England»¹²⁶. By this argumentation Coke set the path for the functional differentiation between royal jurisdiction and ordinary jurisdiction.

Such a rhetorically tricky dismounting of the monarch as the supreme ordinary judge expelled the direct exercise of judicial sovereignty by mandated commissioners of the Star Chamber and High Court out of

justice and denounced it as non-justice, addressing it at a formal basis, though meaning it at a substantial basis. Neither the major nor the minor state seal enabled the monarch to deprive a court of a case nor to decide it by himself, the exception being any situation when his prerogative rights were concerned (*writ de non procedendo Rege inconsulto*)¹²⁷. Against the decisions of the monarch, there was no appeal, meaning that the parties would thus be without any further rights once the King had rendered the verdict¹²⁸.

Coke opposed the differentiation between natural reason and artificial reason to the monarch's objection that the law was based on reason that he shared with the judges¹²⁹. He justified the precedence of law over the monarchical prerogative with the technical reason of law, «which requires long study and experience, before that a man can attain to the cognizance of it». Of course, academic legal training began long after Coke, but the nucleus of his argumentation nevertheless demonstrated that legal professionalization was a vehicle for the independence of the courts¹³⁰. Coke's rhetorical regret that «His Majesty was not learned in the laws of his realm of England» was followed by his differentiating statement that «causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by artificial reason and judgment of law». Coke's characterization of the artificiality of writs, *stare decisis*, and the precedents was no minor flourish¹³¹. Instead, Coke drew a magic circle around the Inns of Court, declaring that «the law was the golden met-wand», and thereby instrumentalized the rhetorical point in order to prepare his endgame: that judi-

cial sovereignty and, with it, all prerogative courts should be under the law: «to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*»¹³². With this, the conflicts with the English prerogative courts led into the constitutional restriction of monarchical sovereignty, as embodied in the *Bill of Rights* of 1689. This was partly to do with Parliament's self-understanding as the final authority derived from its concept as a High Court of Justice and its safeguard for "reason", as embodied in common law.

2. *The subjection of any power to the rule of law in the Case of Proclamations (1611)*

Following the petition of the Commons of 7 July 1610¹³³, which was directed against the royal proclamation of a new court and against the decree of responsibility before extraordinary courts, James I (1603-25) demands the advice of the judges. Their answer is formulated by Coke in *The Case of Proclamations* (1611), which retains a celebrated place in English constitutional history as a minor *carta* of liberty¹³⁴. According to him, the arbitrary will of the monarch had no legal force whatsoever. Mandates issued by the king to the judges could not mitigate the fact that they were bound by the law. There was no prerogative to change the common law or statute since, as John Fortescue had established nearly two centuries earlier, «in the kingdom of England the kings make not laws, nor impose subsidies on their subjects, without the consent of the Three Estates of the realm»¹³⁵. Contemporaries of *The Case of Proclamations* (1611) were already familiar with this concept, fol-

lowing Fortescue's idealization of the English monarchy in his *In Praise of the Laws of England* (ca. 1470). By deliberately echoing the *Magna Carta*, which retained its reputation as the primary text of English law, it was stated that a judgment was subject only to the law, and that the king only had the powers that the law allowed him, as «even the judges of that realm are all bound by their oaths not to render judgement against the laws of the land (*leges terre*), even if they should have the commands of the prince to the contrary»¹³⁶. The subjection of any power to the rule of law did not allow any dispensation from law nor any judgement outside the law.

For the correct interpretation of the *Case of Proclamations* (1611), one has to bear in mind the contrast between individual royal decisions (proclamation) and the law (laws of the land = common law) that was formed by Coke¹³⁷. This differentiation between royal proclamations and parliamentary law becomes particularly evident in the final paragraph of the *Case of Proclamations* (1611), where Coke declared royal proclamations to be outside any legal category: «also the law of England is divided into three parts, common law, statute law, and custom; but the king's proclamation is none of them». In this passage, then, the legal force of royal proclamations was explicitly negated. The monarchical prerogative was predetermined by the law, and Coke resolved «that the King hath no prerogative, but that which the law of the land allows him». The monarch was thus unable to order a penalizing verdict before the Star Chamber or the Court of High Commission, nor mandate the commissioners to decide contrary to statutory law, since «if the offence be not punishable in the Star-Cham-

ber, the prohibition of it by proclamation cannot make it punishable there»¹³⁸.

The precedence of the law over the monarchical judicial power as it was expressed in the *writs of prohibition* against the prerogative courts as well as in the precedent cases of *Prohibitions del Roy* (1607) and the *Case of Proclamations* (1611) was rooted in the supremacy of the law. This, Coke made categorical by the reference to its unaltered usage since time immemorial, combined with the technical superiority of its artificial reason.

3. *Coke's supremacy of the law due to immortality and reason*

a. *The concept of immortality*

As old law, common law is perceived to be "good law". Its age is considered as the legitimation of the common law and guarantees its quality. As Fortescue argued:

[T]he realm has been continuously regulated by the same custom as it is now, customs which, if they had not been the best, some of those kings would have changed for the sake of justice or by the impulse of caprice, and totally abolished them [...] [no other laws] are so rooted in antiquity. Hence there is no gainsaying nor legitimate doubt but that the customs of the English are not only good but the best¹³⁹.

This praise of the English law to which Fortescue's oeuvre owes its name deemed the proof of the quality of the common law to reside in its unaltered usage since the oldest ages. In other words, continuous general custom¹⁴⁰ legitimizes the unwritten common law¹⁴¹. According to Christopher St. German (about 1460-1541), the general custom equals the consensus of all:

the king, his predecessors, and all his subjects¹⁴².

b. *The lawyers' artificial reason*

On the other hand, the common law is lawyers' law, which, as St. German pointed out, was «unknown outside the Inns of Court»¹⁴³. Common law was characterized by its technicality and professional sophistication in a realm of knowledge populated only by a legal elite, yet its practitioners insisted that its legitimacy could be traced back to a broad and general popular consensus¹⁴⁴. This could only be achieved by judicial consent being taken to represent popular consent, thus signifying that the authority of the collective knowledge of the judiciary replaced popular consent as a legitimating power¹⁴⁵. Hence, the legitimation replaces the authority of the general custom¹⁴⁶ by means of the artificial reason to which the function of an interpretation measurement (the best interpreter of laws) is attributed, rather than a legislative consensus¹⁴⁷. Here, we return to Coke's argumentation in the *Prohibitions del Roy* (1607) and in *The Case of Proclamations* (1611).

Like an artist, the lawyer exercises his legal capabilities. The reasonableness of the law is perceived as its character and nobody is deemed legally knowledgeable who has not understood that first: «The reason of the law is the life of the law, for though a man can tell the law, yet if he knows not the reason thereof, he shall soon forget his superficial knowledge». To this statement in the first part of his *Institutes*, Coke adds the need for sustainable professionalism. The reason of the law, after all, cannot simply be understood in passing: «But when he findeth the right reason of the law, and

so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the understanding of that particular case, but also many others, for *cognitio legis est copulata et complicata*, and this knowledge will long remain with him»¹⁴⁸. «Artificial reason» is the collective knowledge of the common law judges and Coke seems to allude to the scholastic interconnection of human and divine ratio proposed by Thomas Aquinas: «*ratio est radius divini luminis*». The metaphorical contrast between the «darkness of ignorance» and the «light of legal reason» elevates legal training «by reasoning and debating of grave learned men»¹⁴⁹ as *ratio legis* and cements thereby the monopoly of interpretation for the learned lawyers and their superiority over the legally untrained monarch, since judgement could only be given «according to the law, which is the perfection of reason»¹⁵⁰. This legitimation of the common law by means of judicial reasonableness¹⁵¹ corresponds to the authority of the general custom amended through the ages: «if all the reason that were dispersed into so many heads were united into one, yet would he not make such a law as the law of England is, because by many successions of ages it hath been fined and refined by so many learned men»¹⁵².

It is by making use of this conception of reason that Coke justified the supremacy of the common law. The common law was the result of the perfection of reason, commanding what had to be done while excluding what did not. The highest degree of reasonableness, being divine wisdom, was completed in the human spirit in the form of judicial wisdom. Common law, therefore, was the judicial understanding of the divine reasonableness and hence of divine

origin: «without question *lex orta est cum mente divina*, and this admirable unity and consent in such diversity of things proceeded from God the fountain and founder of all good laws and constitutions»¹⁵³. Here, one is also reminded of Coke's invocation of the Bible to justify common law resistance against the prerogative courts, as noted earlier.

At the heart of Coke's conception of the law was that common law was the embodiment of artificial reason, and artificial reason was superior to the natural reason of the monarch. Made most explicit in *Prohibitions del Roy* (1607), this required that monarchical judicial sovereignty was also subject to the common law¹⁵⁴. The argumentation in the *Case of Proclamations* of 1611 negated any kind of monarchical prerogative not granted by the common law, asserting that «it was resolved, that the King hath no prerogative, but that which the law of the land allows him»¹⁵⁵. Coke had already denied the monarch the personal use of the judicial sovereignty in *Prohibitions del Roy*¹⁵⁶. The supremacy of the law over the prerogative excluded the monarch from the personal exercise of the judicial power apart from the equitable need for correction. The independence of the common law courts, founded on the supremacy of the law, was not based on the institutionalization of the granting of law, but on the general consensus of longstanding custom¹⁵⁷. The twelve judges of the ordinary common law courts (four each on the King's Bench, the Common Pleas, and the Exchequer) were the highest counselors of the king and hence majestic figures. This meant that their unimpeachable character often reflected that of the monarch. In 1626, for example, Chief Justice Ranulph Crew was dismissed by

Charles I (r. 1625-49) during the confrontation with the common law judges on tax increases without parliamentary approval; this effectively ended any kind of support for the crown in the judiciary, which would prove disastrous for Charles in the coming years¹⁵⁸.

4. *Common law resistance against the equitable adjustment by the Court of Chancery*

The association of the royal prerogative with extraordinary competences was also shown during the struggle for an equitable correction of the common law verdicts by the Court of Chancery. The reason-based strictness and adherence to precedence did not allow for common law to correct and alleviate judgements within the jury-centred common law courts. The correcting function was jurisdictionally separated in the equity courts (Court of Chancery and Star Chamber for criminal equity)¹⁵⁹. The judicial discretion inherent in the correcting function (discretionary powers of the equity judge)¹⁶⁰ made equity synonymous to extraordinary royal power (whereby regal power was equated with extraordinary power and thus absolute power)¹⁶¹. The Lord Chancellor had to issue the writs in the name of the king (duty to provide justice) under the Great Seal for the claimant. As a member of the clergy, he was officially regarded as a man of conscience. Consequently, he had to decide in terms of equity in the name of the king when a common law remedy was inaccessible. The equitable powers of the Lord Chancellor originated in the time of Henry VI (1422-61) and do not have any parliamentary basis¹⁶². The Court

of Chancery was thus the highest prerogative court¹⁶³.

Coke, however, rejected this reasoning. It was inconceivable that the conscience of the Lord Chancellor¹⁶⁴ could be superior to the artificial reason of the common law judge¹⁶⁵, since the unsuccessful party before the common law courts could restart litigation before the Chancery, resulting in a remedy that was not intended by the common law¹⁶⁶. This deprived common law verdicts of their decisiveness while both extending Chancery jurisdiction and restricting that of common law¹⁶⁷. Similarly, the judges of the Exchequer Chamber in 1598¹⁶⁸ rejected a correction of the common law verdicts by the Court of Chancery, stating that «[i]t would be perilous to permit men after judgement and trial in law to surmise matter in equity and by this to put him who recovered to excessive charges. And by these means suits would be infinite and no one could be in peace for anything that the law had given him by judgment». Besides talking of the nightmare of never-ending proceedings, the Exchequer judges rejected equitable remedial corrections by the formal objection of the lacking protocol in Latin on a parchment paper; this, the judges believed, would open the system to the «absurd[ity]» of a court that was «not a court of record» being able to «control judgements which are of record»¹⁶⁹.

In 1613, Edward Coke was removed as Chief Justice of the Common Pleas and appointed to the formally more prestigious post of Chief Justice of the King's Bench. While nominally a promotion, this move was motivated by the king's (ultimately vain) hope that Coke would not be able to provoke as much trouble from here¹⁷⁰. Thomas Egerton had been appointed as

Lord Chancellor by James I in 1603, taking the title of "Baron Ellesmere" at the same time; from this point he would be customarily known as Lord Ellesmere. Ellesmere was a close advisor of the king and so an advocate of the royal prerogative. Furthermore, his judicial decisions in equity could possibly revoke the achievements gained by the common law courts in the conflict of competences¹⁷¹. Ellesmere claimed the right for him and the Court of Chancery to reopen cases that had already been closed before the common law courts¹⁷². However, this approach violated the statute *4 Henry IV, c. 23* (1403)¹⁷³, pursuant to which a proceeding that had been concluded before a common-law court could only be reopened by a writ of error¹⁷⁴. The Court of Chancery itself had adhered to Ellesmere's view in *Throckmorton's Case* (1590)¹⁷⁵ – a circumstance that provided wind in the sails for the common law judges' actions¹⁷⁶.

The House of Commons discussed a bill against the reexamination of common law verdicts by the prerogative courts in the first reading on 3 June 1614¹⁷⁷. Coke opposed judicial injunctions of the Chancery¹⁷⁸. In the case of *Heath v Ridley*, decided in 1614, the judges of the King's Bench refused the adjournment of a proceeding which had been ordered by the Chancery: «It was delivered for a general maxim in law that if any court of equity doth intermeddle with any matters properly treated at the common law, [...] they are to be prohibited»¹⁷⁹. Coke claimed that the reopening of cases by the Chancery violated the *Praemunire* statute¹⁸⁰, which prohibited the reopening of proceedings apart for cases of a writ of error¹⁸¹. From this rather old law the name of a criminal offence was taken, which sanctioned knowingly calling upon

the wrong court and so questioning the authority of the monarch¹⁸².

Already in 1616, the year that would mark the peak of the conflict between Coke and Ellesmere¹⁸³, the common law courts developed a further strategy to prevent the further incision of their competences by the Court of Chancery. The use of writs of prohibition to this end was apparently discussed by the common law judges but ultimately dismissed¹⁸⁴; the Chancery was not a clerical court, at which the prohibitions were directed. The remaining option was the writ of habeas corpus, which had already been used a couple of times in the conflict with the High Commission to release the unlawfully incarcerated. It put the common law courts in the position of being able to guarantee the freedom of the subjects¹⁸⁵. As early as 1585, there are indications in the *Year Books* that such a writ was used against Chancery. Coke's *Institutes* established that the Court of King's Bench could assume proceedings by means of a writ if the Court of Chancery had overstepped its competences¹⁸⁶. So the habeas corpus writ became an instrument of power between the King's Bench and the Chancery. These writs were intended to free persons who the Chancery had imprisoned for being in contempt of court, as they had refused a new proceeding before the court¹⁸⁷. When using a habeas corpus writ, the so-called return was central, that is the reply of the arrested party. It could not be too general regarding the circumstances of the incarceration, as *Addis' Case*¹⁸⁸ from 1609 shows. Even before Edward Coke was transferred to the King's Bench it dismissed a return maintaining that Addis had been held by order of the Lord Chancellor in a case concerning the king as too vague, «for it shews not for

what causes he was committed, for it might be for a cause which would not hinder him under his privilege»¹⁸⁹. Those few concrete returns threatened the success of a habeas corpus writ, which was specifically intended to determine the reasons for a person's imprisonment and to assess the legality of the incarceration.

The common law courts used the writ of habeas corpus in similar circumstances to the writ of prohibition. While in the latter case the accusation was more that of violation of competences by the prerogative court, habeas corpus seems to have been the method of choice when the common-law judges wanted to achieve the quick release of an accused from prison. At the same time the use of a habeas corpus writ included the accusation of excess of authority by Chancery. Over its direct aim to preserve the rights of the accused from the *Magna Carta*, this writ had also become an instrument of power at the beginning of the seventeenth century.

With the writs of habeas corpus, the King's Bench questioned the legality of the arrest by the Lord Chancellor («*per considerationem curie Cancellarie Domini Regis pro contemptu eiusdem Curie*»). *Glanvill's Case* (1614)¹⁹⁰, *Apsley's Case* (1615)¹⁹¹, and *Ruswell's Case* (1615)¹⁹² document the struggle between arrests made by the Chancery and the writs of habeas corpus issued by the King's Bench, a struggle that culminated in the *Allen's Case* (1615)¹⁹³ and the *Earl of Oxford Case* (1615)¹⁹⁴.

Coke and his colleagues held in *Apsley's Case* to review the incarceration of Michael Apsley, which had begun in 1608¹⁹⁵. The reply of the custodian in Fleet Prison, according to which Apsley had been held due to contempt of court by the Court of Chan-

cery, was criticised as insufficient by the judges of the King's Bench and after some consultation the release of the prisoner was ordered. The same approach was taken in the same year in *Glanville's Case*¹⁹⁶. A landmark decision was also *Ruswell's Case*. The tailor William Ruswell fought his 1614 arrest with a habeas corpus writ issued in 1615. The custodian's reply, claiming that Ruswell had been held for being in contempt of the court by the Court of Chancery, was dismissed by the King's Bench as being too vague. The reason for the incarceration had to be clearly given, to make it possible for the controlling court to determine the legality of the imprisonment. Ruswell's defence counsel emphasized the precedence of the King's Bench when he declared that «this Court [the King's Bench] is the judge of all causes of imprisonment»¹⁹⁷.

The fact, that the common law judges suddenly strictly controlled the reasons for imprisonment clearly shows that they were aiming to limit the power of the Court of Chancery as a further prerogative court, which questioned the supremacy of common law, and that they were less concerned with the individual concerns¹⁹⁸. The habeas corpus writs were an ideal instrument of power against the Court of Chancery, whose only option of enforcing its decision was to imprison the persons concerned. Coke's claim that his control, based on the use of prerogative writs, was an aspect of the royal prerogative, provoked Lord Ellesmere's objection. These writs had at least been created with the aim of limiting the exercise of the royal prerogative by the royal councils and the courts¹⁹⁹. What followed was a serious conflict between the two highest jurists, Coke and Ellesmere.

The conflict escalated in 1616, when Ellesmere arrested Glanville, who had been freed the previous year. This led the King's Bench to order his second release²⁰⁰. In his treatises the Lord Chancellor criticized the use of prohibitions and habeas corpus writs against the clerical courts, which were endangered of losing their legitimate jurisdiction on the basis of mere contentions²⁰¹. He also refuted Coke's assumption that the reopening of a closed case by the Court of Chancery was illegal, by showing that the *Praemunire* statute invoked by Coke only prohibited the reopening by a clerical court²⁰². William Holdsworth agrees with Ellesmere that the accusations against the Chancery were partly without a basis. The actions of the common law courts had been too harsh and the reliance on the *Praemunire* statute had been a misuse of justice²⁰³.

After Coke and his colleagues had refused the reply to a habeas corpus writ in the *Earl of Oxford's Case*²⁰⁴, which had been reopened in the Chancery, Coke ordered the prosecution of the Chancellor for violating the *Praemunire* law²⁰⁵. This attempt failed and Coke steered himself and the cause of the common law judges into political margins²⁰⁶. After Coke again openly criticized the king by refusing to follow his order to adjourn proceedings in the *Case of Commendams* in June 1616²⁰⁷, he was suspended and then sacked a couple of months later²⁰⁸. Combined with the petitions to the Privy Council²⁰⁹, this provided Ellesmere²¹⁰ and his contemporary, Francis Bacon²¹¹, the opportunity to discredit Coke in the eyes of James I²¹², as he had committed a public affront against the Chancery and thus against the royal prerogative itself. James I decided the issue in favour of the Chancery by relieving Coke of his duties in

November 1616 by virtue of the Royal Decree of 18 July 1616²¹³.

Coke's successor, Henry Montagu, was a passionate royalist who wanted to avoid the impression that the writ had been used as an instrument of power against the prerogative²¹⁴. In his ruling in Richard Bourn's Case (1620) he described the writ of habeas corpus as «a prerogative writ, which concerns the King's Justice to be administered to his subjects; for the King ought to have an account why any of his subjects are imprisoned»²¹⁵. Even though this case only touched upon the question if a writ could also be applicable in an ordinary proceeding in the special legal area of the Cinque Ports²¹⁶, it can be assumed that Montagu wanted to express his political orientation by presenting the writ as the means of a merciful king concerned about the wellbeing of his subjects²¹⁷.

The Lord Chancellors following Ellesmere – Francis Bacon²¹⁸, John Williams²¹⁹, and Thomas Coventry²²⁰ – restored the rule-exception relation between rule-based common law and discretion-based equity. It is thanks to the maxim formulated in *Hervey v Aston* (1738) – «*aequitas sequitur legem*» (equity follows the law)²²¹ – that Lord Chancellor Hardwicke marked the complementary correction function of equity in case of an insufficiency of the common law due to the strictness of the *actiones*²²². Thus, the Court of Chancery was neither able to intrude into the cases dealt with by the common law courts, nor to revise the verdicts rendered by the common law courts²²³. Because of this, the judicial discretion in equity, which lies at the heart of its association with the royal prerogative, could be reconciled with the precisely-de-

finied legal rules that were intended to guarantee liberty under English law²²⁴.

5. *The supremacy of law-concept as basis for the rule of law-enforcement in the Glorious Revolution*

On 8 May 1628, the House of Commons formulated the *Petition of Rights* under the guidance of Sir Edward Coke. This was accepted by the King Charles I on 7 June and thus became the first statutory restriction on royal powers since the beginning of the Tudor dynasty²²⁵. Apart from the guarantee of the ordinary judicial procedure, the call for the abolition of extraordinary commissions was formulated for the first time in the *Petition*²²⁶. This success was short-lived, as Parliament was soon disempowered by the king in 1629. The restoration and securitization of the power of Parliament only occurred with the advent of the Long Parliament in 1640. This Parliament lasted until 1660; in this time, not only was Parliamentary competence for all tax laws confirmed, but all extraordinary courts were abolished, via the *Act for the Abolition of the Court of Star Chamber* (5 July 1641)²²⁷ and the *Act for the Abolition of the Court of High Commission* of the same date²²⁸. In doing so, the Third Part of the *Act for the Abolition of the Court of Star Chamber* affirmed the supremacy of the common law over the prerogative and the independence of the common law courts based thereupon:

Be it likewise declared and enacted by authority of this present Parliament, that neither His Majesty nor his Privy Council have or ought to have any jurisdiction, power or authority by English bill, petition, articles, libel, or any other arbi-

trary way whatsoever, to examine or draw into question, determine or dispose of the lands, tenements, hereditaments, goods or chattels of any the subjects of this kingdom, but that the same ought to be tried and determined in the ordinary Courts of Justice and by the ordinary course of the law²²⁹.

The Nineteen Propositions sent by the Two Houses of Parliament to the King at York of 1 June 1642 built upon this foundation, demanding that judges be bound to the law²³⁰.

That all Privy Councillors and Judges may take an oath, the form whereof to be agreed on and settled by Act of Parliament, for the maintaining of the Petition of Right and of certain statutes made by the Parliament, which shall be mentioned by both Houses of Parliament: and that an enquiry of all the breaches and violations of those laws may be given in charge by the Justices of the King's Bench every Term, and by the Judges of Assize in their circuits, and Justices of the Peace at the sessions, to be presented and punished according to law²³¹.

The call for the independence of the judge was repeated in the *The Propositions presented to the King at the Treaty of Oxford* of 1 February 1643, which stipulated that «all Judges of the same Courts, for the time to come, may hold their places by Letters Patent under the Great Seal, *Quam diu se bene gesserint*, and that the several persons not before named, that do hold any of these places before mentioned, may be removed»²³². This prepared the ground for the provision of judicial independence granted in the later *Act of Settlement* of 1701.

The end of the Long Parliament in 1660 coincided with the collapse of the Commonwealth and Protectorate (1649-60), and restored the Stuart monarchy to power. This put an end to an unprecedented period of upheaval that had begun with the Puritan Revolution (1642-9). However,

the relationship between the crown and Parliament had irrevocably altered. When James II (r. 1685-8) attempted to re-establish Catholicism through absolutism, he sparked the Glorious Revolution that eventually deposed him. With the agenda being set by the *Declaration of Rights* of 13 February 1689, the Conventional Parliament that was elected on the initiative of William III of Orange (1689-1702) and Mary II (1689-94) enforced the adherence of the crown to the law, through the instrument of the *Bill of Rights* (1689). Apart from the abolition of the ecclesiastic courts and the call for regular jury trials with regularly appointed jury members, the ban of all extraordinary court commissions in chapt. I section 2, No. 3 is of the most relevance, holding «[t]hat the Commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other Commissions and Courts of like Nature, are illegal and pernicious»²³³.

The *Act of Settlement* of 1701 (or, to give its full name, *An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject*) secured the results of the Glorious Revolution. Of particular interest are the guarantees of the personal independence of the judges and that judges were appointed for life and could not be dismissed from office; these had already been demanded by the Long Parliament in 1641. In the context of the *Act of Settlement*, they were explicitly mandated in Part III: «That after the said Limitation shall take Effect as aforesaid, Judges Commissions be made *Quandiu se bene gesserint* (As long as they behave properly, it should be generally known), and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them»²³⁴.

IV. *Parliamentary sovereignty as highest interpretative authority over the general consensus incorporated in the common law*

1. *Mediating function of the political power (adjustment)*

a. *Common law as stand for the mediating function of royal power*

The foundation of the idea of the common law, which is immanent to the English understanding of the state as well as of the basic adherence of the royal power to the law, is the mediating function of political power (adjustment). Coke formulated monarchical mediation as a paternal function: «Since no Law can fit every Country, the king who is *pater patriae* will like a father be most impartial to all his subjects. The realm trusts the king when they will not trust a private man»²³⁵. The mediating function of political power corresponds to the ideal of balance. James Morice's²³⁶ praise of the Elizabethan ideal of balance continued to have an effect on the political consciousness of the seventeenth century. For instance, in 1604, the House of Commons formulated the interaction of all state powers towards the common good: «An harmonical [*sic.*] and stable state is framed, each member under the head enjoying that right, and performing that duty, which for the honour of the head and the happiness of the whole is requisite»²³⁷. In the sixth chapter of the eleventh book of *De l'Esprit des lois* (1748), Montesquieu's description of this ideal of balance provided a literary monument to the idea itself²³⁸.

b. *Parliament as incorporation of the ideal of balance*

The balance engendered in the institution of Parliament was most impressively illustrated by the contemporary description of the legislative elaboration in Parliament as an act of mediating interests between the rights of the subjects and the royal prerogative:

But now [...] the parties in Parliament (in those things that concern the publique) meddle not as meere Judges, but as Parties interested, with things that concerne every of their own Rights, in which case it is neither Law nor Reason, that some of the Parties should determine of that that concerns all their mutuall interests, *invita altera parte*, against the will of anyone of the parties. But that all parties concurre or else their mutuall interest to remain in the same condition it was before²³⁹.

During the final deliberations before Parliament's dissolution by Charles I in 1629, Sir John Coke reminded the chamber of the incorporation of the crown in the balance as it is institutionalised in Parliament: «The King is a Parliament man as well as we are»²⁴⁰. Sir John Davies, the Queen's Counsel in Ireland and a fervent advocate of the royal prerogative, described the interaction of the representative in Parliament by means of pictures of musical harmony:

These parliaments though they consist of three different Estates, the King, the Nobility, and the Commons, Yet as in Musick, distinct and severall Notes do make a perfect Harmony, so these Councils compounded of divers States and Degrees, beeing well ordered and Tuned, do make a perfect Concord in a Commonwealth [...] And this Concord and Harmony doth ever produce the Safety and Security of the People²⁴¹.

This interpretation is supported by the tradition of Parliament acting in the role of a royal counsel²⁴². The Queen's Counsel, Sir Robert Heath, argued that «[t]he Par-

liament is a great Court, a great Counsell, the great Counsell of the Kinge; but they are but his Counsell, not his governours»²⁴³. In *The jurisdiction of the Lords House, or parliament, considered according to ancient records* (1675-6), the barrister Sir Matthew Hale also described Parliament as a counsel²⁴⁴. The primacy of the judge amongst the royal counsels corresponds to this observation²⁴⁵. Parliament was not an institution aimed at eliminating the royal prerogative but a forum of political balance between the royal prerogative and the rights of the subjects as secured by common law. What resulted from this was the understanding of Parliamentary laws as the legal embodiment of this balance: the law served the wellbeing of the King, the subject, and the Commonwealth as a whole²⁴⁶. As John Selden argued, «[e]very law is a Contract between the king and the people; and therefore to be kept»²⁴⁷. Thomas Hobbes' (1588-1679) and John Locke's (1632-1704) theories of the social contract are to be found in the line with this tradition. The fact that the medieval idea of the contract was interwoven with the English Parliamentary system is the reason why this particular contractual conception has played this role in Western parliamentarianism²⁴⁸.

2. *Parliament's claim to be the highest court for the rights and liberties of the kingdom*

a. *'Enabled by the laws to adjudge and determine the rights and liberties of the kingdom'*

Even during the constitutional struggle with the Stuarts, the Westminster Parlia-

ment never exercised its right to override the royal veto; as a result, it refrained from introducing a popular sovereignty (and separation of powers) that corresponded to Rousseau's *volonté générale*. This was due to the fact that the royal obligation in the coronation oath to agree to any law proposed by the people (*leges quas vulgus elegerit*)²⁴⁹ originated from the royal veto in the legislative procedure.

Rather, Parliament claimed to be the highest common law court: «The High Court of Parliament is [...] a court of judicature, enabled by the laws to adjudge and determine the rights and liberties of the kingdom, against such patents and grants of His Majesty as are prejudicial thereunto, although strengthened both by his personal command and by his Proclamation under the Great Seal»²⁵⁰. While the scholarship surrounding the conflict between Parliament and the Stuarts is extensive, this court aspect has hardly been addressed in research²⁵¹. The emphasis of this function as a legislative branch due to the representative consensus in Elizabethan England²⁵² may have obscured the view in this regard²⁵³. On the other hand, jurisdictional discourse was already evident in contemporary works addressing the Elizabethan period, such as William Lambarde's *Archeion, or the High Courts of Justice in England* (1635), Richard Crompton's *L'autorité et jurisdiction des courts de la Majeste de la Roigne* (1637), and Thomas Smith's *De republica Anglorum* (1636)²⁵⁴. The court conception of Parliamentary resistance against Stuart absolutism was obvious due to the increase in impeachment procedures, and in the number of civil law cases that were heard before the upper chamber after 1620²⁵⁵.

b. *Coke's parliamentary conception as embodiment of the highest form of reason*

The formulation of the court concept within Parliament's resistance to the Stuarts had its origins in Coke's argument that Parliament embodied common law and, therefore, artificial reason, which was the highest form of reason. «[A]s in the natural body when all the sinews being joined in the head do join their forces together for the strengthening of the body there is *ultimum potentiae*», Coke wrote, «so in the politique body when the king and the Lords spiritual and temporal, knights, citizens and burgesses are all by the king's command assembled and joined together under the head in consultation for the common good of the realm, there is *ultimum sapientiae*»²⁵⁶. To Coke, the wisdom of Parliament was guaranteed in its representative function:

And as it is said in Powden [²⁵⁷] the parliament is a court of the greatest honour and justice, of which none ought to imagine a dishonourable thing, and the Doctor and student [²⁵⁸] it cannot not be thought that a statute that is made by authority of the whole realm, as well of the King and of the Lords temporal and spiritual, as of all the Commons, will do a thing against the truth²⁵⁹.

Conceiving of Parliament as the highest court was fundamental to the formulation of Parliament's sovereignty. This came from the fact that, while the monarch could veto Parliamentary bills, he could not veto judicial verdicts, «for that, by the constitution and policy of this kingdom, the King by his Proclamation cannot declare the law contrary to the judgement and resolution of any of the inferior courts of justice, much less against the High Court of Parliament»²⁶⁰. To this end, the classical commentary of Parliamentary sovereignty in Blackstone's *Commentaries on the Laws of*

*England*²⁶¹ starts with Coke's definition of the highest jurisdiction of the High Court of Parliament: «Of the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds. Of this court it is truly said: *Si antiquitatem spectes, est vetustissima, si dignitatem, est honoratissima, si jurisdictionem, est capacissima*»²⁶².

c. *Supreme power of interpretation of the fundamental laws*

In the *Declaration of the Houses in Defence of the Militia Ordinance* of 6 June 1642, Parliament claimed the supreme power of interpretation of the fundamental laws²⁶³ as the highest common law-court. Never being precisely phrased as to their content, the fundamental laws²⁶⁴ were nevertheless brandished by the leaders of the Parliamentary opposition of Hakewill, Coke, and Pym²⁶⁵ against the Stuart's claim for sovereignty, just as they were by Bacon²⁶⁶, Samuel Daniel²⁶⁷, and even James I²⁶⁸ and Charles I²⁶⁹ in order to *justify* monarchical sovereignty²⁷⁰. Their importance is revealed by a close look at the struggle between the common law and the monarchical prerogative, and in particular with reference to the issue of whether unforeseen and unregulated questions of the public good could be resolved arbitrarily by royal discretion, or whether the monarchical prerogative was bound by higher law. This raised the question of sovereignty as the competence of "the last word"²⁷¹, as the competence of deciding the legally unregulated case²⁷². The fundamental laws contained the natural and equitable solution for any situation

of the common good. Therefore, they corresponded to the omnipotent reason-based conception of the common law, determining that public good was to be decided not by the will of the ruler but by common law²⁷³. A royal decision-making right contravened the common law²⁷⁴. This highest power of decision-making of Parliament concerning the public good was higher than the will of the monarch; the sovereignty of Parliament is the result²⁷⁵. Parliamentary sovereignty is enshrined in 1689 by Article XI of the *Bill of Rights*:

All which Their Majesties are contented and pleased shall be declared, enacted, and established by Authority of this present Parliament, and shall stand, remain and be the Law of this Realm for ever; and the same are by Their said Majesties, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled, and by the Authority of the same, declared, enacted, and established accordingly²⁷⁶.

The importance of this concept is also reflected in the fact that the above wording can be found to the present day in the introductory formula of English laws, in which it is declared: «BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows...».

V. Conclusion: Misuse of procedural justness for substantial incorrectness

Originally, the writs of prohibition were initially intended as methods of intervention for the king against the clerical courts to

prevent a curtailing of royal rights. On this point, the judge Sir Anthony Fitzherbert asserted in 1534 that «[t]he King himself may sue forth this writ, although the plea in the spiritual court be betwixt two common persons, because this suit is in derogation of his Crown»²⁷⁷. The protection of private interest was only a reflex of the writs of prohibition; mainly, it was intended to protect the royal prerogative from interference from administration and the justice²⁷⁸. By using the writs of prohibition against the Court of High Commission, which was working with the direct approval of the king, the common law judges removed them from their original purpose as a core writ of the king and claimed the right for themselves to protect the law in the realm as representatives from the king, including against his will if need be. Effectively, common law courts turned the king and his prerogative courts' own weapons against them, especially in regard to the writs of prohibition.

In doing so, though, the key protagonist – Sir Edward Coke – was compelled to engage in his own legal fictions, thereby inventing “tales” of legality and legitimacy. First, Coke himself was not consistent in regard to the prerogative courts. Whereas he postulated that all prerogative courts exercising the royal prerogative were subject to the common law, he was prepared to recognise courts with which he had no conflict as a judiciary independent from the common law courts²⁷⁹. For example, as Holdsworth notes, the common law courts also had to admit a certain legitimacy of the Star Chamber, even though they viewed its jurisdiction outside of theirs with some scepticism, and its methods were similar and, sometimes, indistinguishable to those the courts condemned in the context of the

High Commission²⁸⁰. Secondly, Coke's argumentation about the limitation of the monarchical judicial sovereignty by the supreme reason of common law did not correspond to the historical understanding of the English monarchy as being the fountain of justice. According to Dicey's later assessment, Coke's arguments were «pedantic, artificial and unhistorical»²⁸¹.

Coke was wrong, and he knew he was wrong, but he was so nicely wrong. His argumentation was the basis for the *Petition of Rights* (1628), which called for the abolition of extraordinary courts and the guarantee of a fair trial²⁸². The stubborn insistence of Coke on prerogative writs finally paid off in 1641, when the Long Parliament abolished the Court of the High Commission²⁸³ and the Star Chamber²⁸⁴; in light of the common law attacks, public opinion had by this point turned against the Star Chamber, as its exercise of prerogative power was often viewed as tyrannical in political cases²⁸⁵. King James II attempted to re-establish the prerogative courts, but this led to the outbreak of the Glorious Revolution in 1688²⁸⁶. Finally, Coke's supremacy of law can be traced within John Locke's antecedent natural law, binding every political authority to guarantee life, liberty, and individual ownership²⁸⁷.

Last but not least, the jurisdictional conflict between common law courts and prerogative courts by means of procedure was meant to be a constitutional struggle in substance, insofar that it meant the subjection of the royal prerogative under the rule of law. This goal of 1689 was reached by resetting royal prerogative in a rhetoric contradiction to law, addressing the law as the rule and the discretion of the prerogative as the exception. The rule-exception relation-

ship between legally-bound ordinary power and extraordinary prerogative is mirrored in the ordinary and extraordinary jurisdiction²⁸⁸. According to the *Bate's Case* (1606), which reads as a preparatory pamphlet of Locke's treatises, ordinary power was focused on the wellbeing of individual subjects, on the civil justice, and the definition of property: «That of the ordinary power is for the profit of particular subjects, for the execution of civil justice, and the determining of *meum*»²⁸⁹. It was exercised by the ordinary courts and corresponded to the *ius privatum* in Roman law and the common law in English law. The latter was «exercised by [...] justice in ordinary courts, and by the civilians is nominated *ius privatum* and with us common law; and these laws cannot be changed without parliament»²⁹⁰. Extraordinary royal power was not to be exercised for the private good or «to the benefit of any particular person, but is only that which is applied to the general benefit of the people, and is *salus populi*; And as the constitution of this body varieth with the time, so varieth this absolute law, according to the wisdom of the king, for the common good; and these being general rules and true as they are, all things done within these rules are lawful»²⁹¹. This basis was used in the *Bate's Case* to establish the argument that the taxation of Corinth was not a tax on local goods but a tariff on foreign imported goods. The demand of tariffs was a part of the prerogative sphere since the king had absolute power in the harbours with direct access to the sea and thus was independent from the consent of Parliament²⁹². In the *Ship Money's Case* as well as the *Hampden's Case* (1637), it was established that the money needed for ship-building was not a tax but

a contribution to the royal task of defending the territory²⁹³.

The relationship between legally-bound ordinary power and discretionless extraordinary absolute power was used to negate the jurisdiction of prerogative courts as extraordinary jurisdiction. According to the *Bate's Case* and the *Ship Money's Case*, the adherence to the law of the ordinary power also comprises the adherence to the rules of competence, procedure and the forms of action of the ordinary jurisdiction²⁹⁴. It can be figured from the *Bate's Case* that cases of civil law and those concerning property were only dealt with by the ordinary common law courts, since «[t]hat of the ordinary power is for [...] the execution of civil justice, and the determining of *meum*»²⁹⁵.

Sources prove the rejecting attitude of the King's closest counsels against the arbitrary extension of the jurisdiction of the Star Chamber and the Privy Council. In 1616, for instance, Francis Bacon suggested that private law trials marked by reciprocal claims were «not fit» for the Privy Council and that «[these cases] should be left to the ordinary course and courts of justice»²⁹⁶. In 1641, Attorney-General Sir Robert Heath, who defended the royal prerogative in 1627 in the *Darnel's Case* (also referred to as *the Case of the Five Knights*)²⁹⁷, supported the limitation of the jurisdiction of the Privy Council²⁹⁸. The supremacy of law assures the continuing existence of the ordinary jurisdiction by the adherence to the law; the royal prerogative beyond the ordinary rules of procedure and forms of action is thus exceptional²⁹⁹. Thus, the strictness and rule adherence of the common law guaranteed the material independence of the common law courts, while the personal independence of the judges is state funda-

mentally assured by the Act of Settlement of 1701. The protective dimension of the common law that contains the legal binding of monarchical power was fundamentally affirmed in the *Bill of Rights* of 1689, which affirmed English law's abolition of extraordinary courts via monarchical prerogative. The Court of Chancery is recognized as prerogative court due to the necessity of the corrective function, but the Star Chamber and the Court of High Commission were already abolished by the parliamentary laws of 1641. It was in these actions that Coke's "tales" of sovereignty found their suitable epilogue.

- ¹ P.B. Waite, *The Struggle of Prerogative and Common Law in the Reign of James I*, in «The Canadian Journal of Economics and Political Science», n. 25, 1959, p. 144.
- ² U. Müßig, *Constitutional Conflicts in the Seventeenth-Century England*, in «Tijdschrift», n. 76, 2008, pp. 27-47. For the influences of the English Parliamentary Sovereignty on the Italian Constitutional discourse of the nineteenth century, see G. Mecca, *The Omnipotence of Parliament in the Legitimation Process of 'Representative Government' under the Albertine Statute (1848-1861)*, in U. Müßig (ed.), *Reconsidering Constitutional Formation I: National Sovereignty. A Comparative Analysis of the Juridification by Constitution*, Cham, Springer, 2016, pp. 159-214.
- ³ *Act of Supremacy 26 Henry VIII*, c. 1, cited in G.R. Elton (ed.), *The Tudor Constitution*, Cambridge, Cambridge University Press, 1982², pp. 364 f. See also U. Müßig, *Recht und Justizhoheit: Der gesetzliche Richter im historischen Vergleich von der Kanonistik bis zur Europäischen Menschenrechtskonvention, unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, England und Frankreich*, Berlin, Duncker & Humblot, 2009², p. 162.
- ⁴ By the *Ecclesiastical Appeals Act (1533)* (24 Henry VIII. c. 12); see also J. H. Baker, *An Introduction to English Legal History*, Oxford, Oxford University Press 2007⁴, p. 130.
- ⁵ Baker, *An Introduction to English Legal History*, cit., pp. 17 ff. U. Müßig, *Höchstgerichte im frühneuzeitlichen Frankreich und England - Höchstgerichtsbarkeit als Motor des frühneuzeitlichen Staatsbildungsprozesses*, in R. Lieberwirth, H. Lück (eds.), *Akten des 36. Deutschen Rechtshistorikertages in Halle an der Saale 2006*, Baden-Baden, Nomos, 2008, pp. 544-77.
- ⁶ Baker, *Introduction to English Legal History*, cit., p. 117; Müßig, *Recht und Justizhoheit*, cit., p. 153.
- ⁷ *Ibidem*.
- ⁸ *Ibidem*.
- ⁹ Baker, *Introduction to English Legal History*, cit., p. 118.
- ¹⁰ *Ibidem*.
- ¹¹ *Ibidem*; J.A. Guy, *The Court of Star Chamber and its Records in the Reign of Elizabeth I*, London, HMSO, 1985, p. 5.
- ¹² Müßig, *Recht und Justizhoheit*, cit., pp. 154 ff.
- ¹³ *Ivi*, p. 155; Baker, *Introduction to English Legal History*, cit., pp. 118 ff.
- ¹⁴ *Magna Carta*, c. 27. However, capital cases could not be conducted without a jury court of peers, and so neither Star Chamber nor the Court of High Commission had the authority to issue death sentences. Baker, *Introduction to English Legal History*, cit., p. 119; Müßig, *Recht und Justizhoheit*, cit., p. 157.
- ¹⁵ Baker, *Introduction to English Legal History*, cit., p. 119.
- ¹⁶ *Act of Supremacy Eliz. c. 1*, in G.W. Prothero (ed.), *Select Statutes and other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I*, Oxford, Clarendon Press, 1913⁴, p. 1. See also Müßig, *Recht und Justizhoheit*, cit., pp. 157-163; Baker, *Introduction to English Legal History*, cit., p. 157.
- ¹⁷ *The Letters Patent of 1611*, in Prothero (ed.), *Select Statutes*, cit., pp. 424 f.
- ¹⁸ J.P. Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, in «Illinois Law Review», n. 36, 1941, p. 129.
- ¹⁹ Cit. according to Leonard W. Levy, *Origins of the Fifth Amendment. The Right against Self-incrimination*, New York 1986, p. 46.
- ²⁰ See W. Cobbett, T. Bayley Howell, T.J. Howell (eds.), *Cobbett's Complete Collection of State Trials and Other Crimes and Misdemeanours from the Earliest Period to the Present Time with Notes and Other Illustrations*, London, 1809, vol. III, pp. 1321, 1332; more recently also *Miranda v. Arizona*, 384 U.S. 436.
- ²¹ The *ex officio* oath was introduced as a "present" from Pope Gregory IX. (rul. 1227-41) to Henry III. (rul. 1216-72) by his papal legate, Cardinal Otho (r. 1227-51). After his arrival in England, the papal legate Otho convened a congregation of all English bishops and decreed a number of so-called constitutions regarding the parochial procedures. One of these constitutions concerned the oath *de veritate dicenda*, which was later known as the *ex officio* oath, as judges could order it of their own motion. L.W. Levy, *Origins of the Fifth Amendment. The Right against Self-incrimination*, New York, Macmillan, 1986, p. 45 (and following pages for the confirmation of these reforms by the Fourth Lateran Council). For the constitutive reorganization of ecclesiastical jurisdiction by the decretal *Ad nostram audientiam (Liber extra 1.4.3.)* cf. Müßig, *Recht und Justizhoheit*, cit., pp. 70-1.
- ²² After Boniface of Savoy (1217-70), then the Archbishop of Canterbury (r. 1241-70), further strengthened the oath by threatening those who declined to take it with excommunication, Parliament fully banned its use during the reign of Edward II (1307-27). The *Prohibitio Formata de Statuto Articuli Cleri* limited not only the taking of the oath but also the jurisdiction of ecclesiastical courts. Many cases were asserted exclusively to the common-law courts and the ecclesiastical courts were also forbidden from ruling in these. Laymen were prohibited from testifying under the *ex officio* oath outside of inheritance and marriage cases. Coke would cite this decree in his dispute with Archbishop Bancroft.
- ²³ Waite, *The Struggle of Prerogative and Common Law*, cit., p. 148. See also J. Hostettler, *Sir Edward Coke: A Force for Freedom*, Chichester, Barry Rose, 1997, p. 68.
- ²⁴ Waite, *The Struggle of Prerogative and Common Law*, cit., p. 148.
- ²⁵ J. Whitgift, *Reasons for the Necessity of the Commission for Causes*

- Ecclesiastical*, 1583.
- ²⁶ T. Fuller, *The Church History of Britain*, Oxford, University Press, 1845, vol. V, pp. 298 ff.
- ²⁷ Waite, *The Struggle of Prerogative and Common Law*, cit., p. 145.
- ²⁸ W. Shakespeare, *The Tragical History of Hamlet, Prince of Denmark*, Act 3, Scene 1.
- ²⁹ Waite, *The Struggle of Prerogative and Common Law*, cit., p. 145.
- ³⁰ *Coke Reports*, Part V, 1 a; also known as *Caudrey (Cawdry) v Atton*.
- ³¹ W. Epstein, *Issues of Principle and Expediency in the Controversy over Prohibitions to Ecclesiastical Courts in England*, in «Journal of Legal History», n. 1, 1980, p. 218.
- ³² Waite, *The Struggle of Prerogative and Common Law*, cit., p. 146.
- ³³ The plaintiff, Caudrey, doubted the jurisdiction of the High Commission as well as the legitimacy of its procedure which led to the loss of the sinecure, as there had been neither a jury verdict nor a confession of the accused. The letters patent had furthermore not provided for the loss of the sinecure for the first offence of not using the *Book of Common Prayer*. *Coke Reports*, Part V, 1 a (3 b ff).
- ³⁴ *Coke Reports*, Part V, 1 a (7 a, 8 a ff).
- ³⁵ See Müßig, *Recht und Justizhoheit*, cit., pp. 166 ff.
- ³⁶ Müßig, *Recht und Justizhoheit*, cit., pp. 166 ff.; Waite, *The Struggle of Prerogative and Common Law*, cit., 146.
- ³⁷ S.A. de Smith, *The Prerogative Writs*, in «Cambridge Law Journal», n. 11, 1951, p. 43.
- ³⁸ Glanvill, XIV, c. 3. For a broader methodological context, see U. Seif (=Müßig), *Methodenunterschiede in der europäischen Rechtsgemeinschaft oder Mittlerfunktion der Präjudizien*, in G. Duttge (ed.), *Freiheit und Verantwortung in schwieriger Zeit*, Baden-Baden, Nomos, 1998, pp. 144-5.
- ³⁹ Cro. Jac. 543; also known as *R. v Lord Warden of the Cinque Ports, ex parte Bourn*.
- ⁴⁰ De Smith, *The Prerogative Writs*, cit., p. 53.
- ⁴¹ 97 E.R. 587.
- ⁴² 97 E.R. 587 (599); see also de Smith, *The Prerogative Writs*, cit., p. 53.
- ⁴³ See Baker, *Introduction to English Legal History*, cit., p. 145.
- ⁴⁴ De Smith, *The Prerogative Writs*, cit., p. 55.
- ⁴⁵ Baker, *Introduction to English Legal History*, cit., p. 143.
- ⁴⁶ *Ibidem*.
- ⁴⁷ De Smith, *The Prerogative Writs*, cit., p. 55.
- ⁴⁸ Ivi, p. 52.
- ⁴⁹ In Müßig, *Recht und Justizhoheit*, cit., p. 165 (fn. 81), prerogative writs are described as «extraordinary legal means». This may be mistakable for continental European readers familiar with suspense and devolutive effects in the continental legal systems. The prerogative writs, however, do not lead to such effects.
- ⁵⁰ See Baker, *Introduction to English Legal History*, cit., pp. 143 f.
- ⁵¹ See T. Plucknett, *A Concise History of the Common Law*, Boston, Little, Brown and Co., 1956⁵, p. 355.
- ⁵² Baker, *Introduction to English Legal History*, cit., p. 144.
- ⁵³ *Ibidem*, and pp. 128 ff.
- ⁵⁴ Waite, *The Struggle of Prerogative and Common Law*, cit., pp. 146 ff.
- ⁵⁵ Ivi, p. 147.
- ⁵⁶ 78 E.R. 484.
- ⁵⁷ 78 E.R. 985.
- ⁵⁸ 78 E.R. 1018.
- ⁵⁹ Moore 906 = 72 E.R. 1265.
- ⁶⁰ At the same time, the statement showed that there should be different standards in inheritance and marriage cases, and that the High Commission would still hold some authority; its whole existence was not cast into doubt. Furthermore, a connection was established with the law *Articuli Cleri*, which had already banned the use of the *ex officio* oath outside of inheritance and marriage cases in the fourteenth century.
- ⁶¹ J.H. Wigmore, J.T. McNaughton, *Evidence in Trials at Common Law*, Boston and Toronto, Little, Brown and Co., 1961, vol. VIII, p. 280.
- ⁶² U. Müßig, *Coke, Edward*, in A. Cordes (ed.), *Handwörterbuch zur deutschen Rechtsgeschichte*, Berlin, Erich Schmidt Verlag, 2012², vol. I, p. 871.
- ⁶³ E. Coke, *The Fourth Part of the Institutes of the Laws of England. Concerning the Jurisdiction of Courts*, London, 1671⁵, pp. 70 ff.
- ⁶⁴ For example, see *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 E.R. 1343 per Edward Coke, C.J. which directly addresses Bracton's introduction to his second volume: «[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 reason but by artificial reason and judgment of law, [...] [and answering the king Coke continues]; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*». For more details cfr. Müßig, *Recht und Justizhoheit*, cit., pp. 171, 177.
- ⁶⁵ Cf. A.V. Dicey, *An Introduction to the Study of the Law of Constitution*, London, Macmillan, 1959¹⁰, p. 18.
- ⁶⁶ 12 *Coke Reports* 109.
- ⁶⁷ At the same time, they emphasized that precedents before one court justified further proceedings of the same nature before the court, concluding that, «for a long time, and in many successions of reverend judges, prohibitions upon information, without any other plea pending, have been granted». 12 *Coke Reports* 109.
- ⁶⁸ Epstein, *Issues of Principle and Expediency*, cit., p. 232.
- ⁶⁹ E. Coke, *The Second Part of the Institutes of the Laws of England*, London, 1642, pp. 601, 606 f., 609 f.

- ⁷⁰ Psalm 124, Verse 7.
- ⁷¹ «[T]he humour of the time is growne to be too eager against all Ecclesiastical jurisdiction». Coke, *The Second Part*, cit., p. 603.
- ⁷² Ivi, pp. 608, 609 f., 613.
- ⁷³ Ivi, p. 604.
- ⁷⁴ Ivi, p. 615.
- ⁷⁵ Ivi, p. 609.
- ⁷⁶ See, for instance, Ivi, pp. 601 f., 608 f.
- ⁷⁷ Ivi, pp. 602, 607.
- ⁷⁸ Ivi, p. 609.
- ⁷⁹ Coke even went so far as to accuse Bancroft of perpetrating the biggest scandal in the history of English law: «[A]nd what scandall it will be to the justice of the Realme to have so great levity, and so foule an imputation laid upon the Judges, as done in this, is too manifest. And we are assured it cannot be shewed, that the like hath been done in any former age». Coke, *The Second Part*, cit., p. 617. See also Epstein, *Issues of Principle and Expediency*, cit., p. 232.
- ⁸⁰ See also Dawson, *Coke and Ellesmere Disinterred*, cit., p. 130.
- ⁸¹ *12 Coke Reports* 41.
- ⁸² Hostettler, *Sir Edward Coke*, cit., p. 68.
- ⁸³ Cited in D. Willoweit, U. Seif (= Müßig) (eds.), *Europäische Verfassungsgeschichte*, Munich, C.H. Beck, 2003, p. 41.
- ⁸⁴ P.D. Halliday, *Habeas Corpus: From England to Empire*, Cambridge, MA and London, Harvard University Press, 2010, p. 15.
- ⁸⁵ Cf. e.g. *Kaysers Case* (1465), 1 Dyer's report 108 (= 72 E.R. 101); Baker, *Introduction to English Legal History*, cit., p. 146.
- ⁸⁶ Baker, *Introduction to English Legal History*, p. 146.
- ⁸⁷ Coke, *The Fourth Part*, cit., p. 71.
- ⁸⁸ R.G. Usher, *Nicholas Fuller: A Forgotten Exponent of English Liberty*, in «The American Historical Review», n. 12, 1907, pp. 747 f.
- ⁸⁹ Hostettler, *Sir Edward Coke*, cit., p. 68.
- ⁹⁰ *12 Coke Reports* 41 (42 f.).
- ⁹¹ *12 Coke Reports* 41 (43).
- ⁹² *12 Coke Reports* 41 (44).
- ⁹³ *Ibidem*.
- ⁹⁴ 24 Henry VIII. c12, also known as *Statute in Restraint of Appeals*.
- ⁹⁵ «[T]his realm of England is [...] governed by one supreme head and king [...] unto whom a body politic compact of all sorts and degrees of people divided in terms and by names of spirituality and temporality [sic], be bounden and owe to bear next to God a natural and humble obedience; he being also institute and furnished by the goodness and sufferance of Almighty God with plenary, whole and entire power, preeminence, authority, prerogative and jurisdiction to render and yield justice and final destination to all manner folk resiants or subjects within this realm». Cited in Elton (ed.), *The Tudor Constitution*, cit., p. 353.
- ⁹⁶ W.S. Holdsworth, *A History of English Law*, London, Methuen, 1924, vol. V, p. 431.
- ⁹⁷ Hostettler, *Sir Edward Coke*, cit., p. 69.
- ⁹⁸ *12 Coke Reports* 19.
- ⁹⁹ *12 Coke Reports* 26.
- ¹⁰⁰ 4 *Leonard Reports* 22 = 74 E.R. 701.
- ¹⁰¹ *13 Coke Reports* 9.
- ¹⁰² See *12 Coke Reports* 37.
- ¹⁰³ Hostettler, *Sir Edward Coke*, cit., p. 69.
- ¹⁰⁴ *12 Coke Reports* 47.
- ¹⁰⁵ *12 Coke Reports* 82.
- ¹⁰⁶ Holdsworth, *A History of English Law*, cit., vol. I, pp. 508 f.
- ¹⁰⁷ 2 *Dyer's Reports* 242 b (= 73 E.R. 537).
- ¹⁰⁸ Printed in Holdsworth, *A History of English Law*, cit., pp. 495 f.
- ¹⁰⁹ See Waite, *The Struggle of Prerogative and Common Law*, cit., p. 146.
- ¹¹⁰ Coke, *The Fourth Part*, pp. 61, 63.
- ¹¹¹ Ivi, p. 63.
- ¹¹² Ivi, p. 65; Waite, *The Struggle of Prerogative and Common Law*, cit., p. 146.
- ¹¹³ Coke, *The Fourth Part*, cit., p. 65.
- ¹¹⁴ 2 *Brownlow & Goldenbrough* 49 (= 123 E.R. 808).
- ¹¹⁵ *12 Coke Reports* 93.
- ¹¹⁶ Wigmore, McNaughton, *Evidence in Trials at Common Law*, cit., p. 282 (fn. 64).
- ¹¹⁷ Ivi, p. 281.
- ¹¹⁸ Ivi, p. 282. See also *Stroud's Trial*, in W. Cobbett, *Cobbett's Parliamentary History of England*, London, R. Bagshaw, 1807, vol. II, col. 504.
- ¹¹⁹ *12 Coke Reports* 63.
- ¹²⁰ A writ de non procedendo rege inconsulto brings about a suspension of the procedure in cases in which royal property is concerned, until the crown enters the trial as a party by means of a change of party. After the change of party to the king, the case is no longer heard before the King's Bench, but before the Chancery. A writ de non procedendo rege inconsulto does not allow the crown to give substantive orders to the common law judge. *Brownlow v Cox & Michil* 3 *Bulstrode* 32 = 81 E.R. 27 per *Edward Coke, C.J.*
- ¹²¹ See *Brownlow v Cox and Michell*, 3 *Bulstrode* 32 (33) (= 81 E.R. 27).
- ¹²² De Smith, *The Prerogative Writs*, cit., p. 41.
- ¹²³ *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) *12 Coke Reports* 64 = 77 E.R. 1342 per *Edward Coke, C.J.* C.f. C. Stephenson, F.G. Marcham (eds.), *Sources of English Constitutional History: A Selection of Documents from A.D. 600 to the Present*, London, Macmillan, 1937, No. 91 B, pp. 437-8.
- ¹²⁴ *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) *12 Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.*
- ¹²⁵ *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) *12 Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.*
- ¹²⁶ *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) *12 Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.* C.f. also the confirmation of this thought in *Extracts from the speech of Oliver St. John in the ship-money case* (November 1637), cited in S.R. Gardiner (edited by), *The Constitutional Documents of the Puritan Revolution 1625-1660*, Oxford, Clarendon Press, 1906³, No. 21, pp. 111-12.
- ¹²⁷ «And it appears by the Act of Parliament of 2 Ed. 3. cap. 9 2 Ed. 3. cap. 1 that neither by the Great Seal, nor by the Little Seal,

- justice shall be delayed; ergo the king cannot take any cause out of any of his Courts, and give judgement upon it himself, but in his own cause he may stay it, as it doth appear 11 H. 4. 8». *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.*
- ¹²⁸ «And the Judges informed the King, that no King after the Conquest assumed to himself to give any judgement in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the Courts of Justice: and the king cannot arrest any man, as the book is in 1 H. 7. 4. for the party cannot have remedy against the King; so if the King give any judgement, what remedy can the party have». *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 ER 1343 per *Edward Coke, C.J.*
- ¹²⁹ «[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». *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.*
- ¹³⁰ U. Müßig, *Superior Courts in Early Modern France, England and the Holy Roman Empire*, in P. Brand and J. Getzler (edited by), *Judges and Judging in the History of the Common Law and Civil Law*, Cambridge, Cambridge University Press, 2012, pp. 213–14.
- ¹³¹ U. Müßig, *Precedents – Stare Decisis*, in S.N. Katz (ed.), *The Oxford International Encyclopedia of Legal History*, Oxford and New York, Oxford University Press, 2009, pp. 380–2.
- ¹³² *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.* Coke's argumentation regarding the independence of judges is examined in depth by Dicey, *An Introduction to the Study of the Law of the Constitution*, cit., p. CXXXVII. Beginning with the *Prohibitions del Roy* (1607), the bench evolved into an independent authority under Coke, in order to mediate between crown and subjects. J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689*, Cambridge, Cambridge University Press, 1928, p. 37. Even in the nineteenth century, decisions relied heavily upon this. In the matter of the *Petition of Complaint of the Right Rev. John William Colenso, D.D., Lord Bishop of Natal* (1864), for instance, it was ruled that «[i]t is a settled constitutional principle or rule of law, that although the Crown may by its Prerogative establish Courts to proceed according to the Common Law, yet that it cannot create any new Court, to administer any other law; and it is laid down by Lord Coke in the 4th Institute, that the erection of a new Court with a new jurisdiction cannot be without an Act of Parliament. There is, therefore, no power in the Crown to create any new or additional ecclesiastical Tribunal or jurisdiction, and the clauses which purport to do so, contained in the Letters Patent to the Appellant and Respondent, are simply void in law». III Moore N.S. 115, 154 = 16 E.R. 43, 58.
- ¹³³ Cited in Prothero (ed.), *Select Statutes*, cit., pp. 302–3.
- ¹³⁴ W.R. Anson, *The Law and Custom of the Constitution*, Oxford, Clarendon Press, 1922⁵, vol. I, p. 343: «Here are set forth in a few words some salient features of our Constitution: and this at a time when a clear statement of the points at issue between Crown and Parliament was greatly needed, and when the first step to be taken towards a settlement of constitutional difficulties was that the nature of those difficulties should be understood». Cfr. also Tanner, *English Constitutional Conflicts*, cit., p. 38.
- ¹³⁵ J. Fortescue, *In Praise of the Laws of England*, Appendix A, in J. Fortescue, *On the Laws and Governance of England*, S. Lockwood (edited by), Cambridge, Cambridge University Press, 1997, pp. 127–8.
- ¹³⁶ *Ibidem*.
- ¹³⁷ C.f. *If High Commissioners have Power to Imprison* (Hil. 4 Jac. Regis) 12 *Coke Reports* 19 = 77 E.R. 1301.
- ¹³⁸ *The Case of Proclamations* (1611, Mich. 8 Jac. 1) 12 *Coke Reports* 74, 76 = 77 ER 1352, 1354.
- ¹³⁹ Fortescue, *In Praise of the Laws of England*, cit., chapter XVII (*The customs of England are very ancient, and have been used and accepted by five nations successively*), pp. 26–7. C.f. also R. Schmidt-Weigand, *Deutsche Rechtsregeln und Rechts-sprichwörter: Ein Lexikon*, Munich, C.H. Beck, 1996, p. 264; S. Lockwood, *Introduction*, in Fortescue, *On the Law and Governance of England*, cit., p. xxxi; D. Willoweit, *Vom guten alten Recht: Normensuche zwischen Erfahrungswissen und Ursprungslegenden*, in L. Gall (ed.), *Jahrbuch des Historischen Kollegs 1997*, Munich, R. Oldenbourg, 1998, pp. 24–5.
- ¹⁴⁰ The same applies to *national custom* as opposed to *local custom*. The national, general custom was defined as the entirety of all rules of the country since 3 September 1189. This date was determined in the Statute of Westminster I of 1275 as the date marking the beginning for land property. A right that was claimed to have originated before that date had to be proved. J. Selden, *Opera Omnia*, D. Wilkins (ed.), London, 1726, vol. III, p. 1671.
- ¹⁴¹ Anonymus, *The Mirror of Justices*, W.J. Whittaker and F.W. Maitland (edited by), London, Selden Society, 1893, p. 5. C.f. also N. Doe, *Fundamental Authority in Late Medieval English Law*, Cambridge, Cambridge University Press, 1990, p. 26; D. Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain*, Cambridge, Cambridge

- University Press, 1989, p. 72.
- ¹⁴² C. St. German, *Dialogue between a Doctor of Divinity and a Student of the Common Law of England*, T. Frank, T. Plucknett, J.L. Barton (eds.), London, Selden Society, 1974, p. 45.
- ¹⁴³ St. German, *Doctor and Student*, cit., p. 59. C.f. also J.A. Guy, *St. German on Equity and Statute*, London, Selden Society, 1985, pp. 20-1; P. Stein, *Regulae iuris: From Juristic Rules to Legal Maxims*, Edinburgh, University Press, 1966, p. 10.
- ¹⁴⁴ The technicity of the legal rules could only be learnt by means of oral practice before court and the Inns of Courts. J.H. Baker, *The Inns of Court and Legal Doctrine*, in T.M. Charles-Edwards, M.E. Owen, D.B. Walters (eds.), *Lawyers and Laymen: Studies in the History of Law Presented to Professor Dafydd Jenkins on his 75th Birthday*, Cardiff, University of Wales Press, 1986, pp. 274-5; W.R. Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640*, Oxford, Clarendon Press, 1986, p. 14; W.R. Prest, *The Inns of Court under Elizabeth I and the Early Stuarts: 1590-1640*, London, Longman, 1972 pp. 10-11.
- ¹⁴⁵ H. Finch, *A Description of the Common Laws of England*, 1759, pp. 52-3. C.f. also J. Dodderidge, *The English Lawyer*, 1631, p. 103; W.R. Prest, *The Dialectic Origins of Finch's Law*, in «Cambridge Law Journal», n. 36, 1977, pp. 326-7. Further assessments of British legal-comparative science: Doe, *Fundamental Authority*, cit., p. 26; E.W. Ives, *The Common Lawyers of Pre-Reformation England: Thomas Kebbell: A Case Study*, Cambridge, Cambridge University Press, 1983, p. 161.
- ¹⁴⁶ The authority of the general custom for the common law, however, was not negated. C.f. explicitly Edward Coke, *Ninth Reports* 75b = 77 E.R. 843 (*Combes's Case*).
- ¹⁴⁷ Coke, *Second Reports* 81a = 76 E.R. 597 (*Lord Cromwel's Case*); *Sixth Reports* 5b = 77 ER 261 (*Sir John Molyn's Case*).
- ¹⁴⁸ Edward Coke, *The First Part of the Institutes of the Laws of England: A Commentary upon Littleton*, London, Charles Butler and Francis Hargrave, 1794¹⁵, vol. I, p. 183b. C.f. also p. 394b: «ratio est anima legis, for then we are said to know the law when we apprehend the reason of the law, that is when we bring the reason of the law so to our own reason, that we perfectly understand it for our own».
- ¹⁴⁹ Ivi, 232b.
- ¹⁵⁰ *Ibidem*.
- ¹⁵¹ «[G]ood law, if it be well understood; for non in legendo sed intelligendo leges consunt» (Edward Coke, *Eighth Reports*, 167a = 77 E.R. 726 (*The Earl of Cumberland's Case*)).
- ¹⁵² Coke, *The First Part*, cit., p. 97b.
- ¹⁵³ Edward Coke, *Third Reports*, iv, in J.H. Thomas, J.L. Fraser (eds.), *The Reports of Sir Edward Coke*, London, Joseph Butterworth & Son, 1826, p. 110.
- ¹⁵⁴ *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 E.R. 1343 per *Edward Coke, C.J.*
- ¹⁵⁵ *The Case of Proclamations* (1611, Mich. 8 Jac. 1) 12 *Coke Reports* 74, 76 = 77 E.R. 1352, 1354. C.f. also R.G. Usher, *James I and Sir Edward Coke*, in «English Historical Review», n. 18, 1903, pp. 664-5; J.P. Sommerville, *History and Theory: The Norman Conquest in Stuart Political Thought*, in «Political Studies», n. 34, 1986, pp. 249-50.
- ¹⁵⁶ *Prohibitions del Roy* (1607 = Mich. 5 Jacobi 1) 12 *Coke Reports* 64 = 77 ER 1342 per *Edward Coke, C.J.*: «To which it was answered by me [...] that the King in his own person cannot adjudge any case, either criminal [...] or betwixt party and party [...] but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England; and always judgements are given, ideo consideratum est per Curiam, so that the Court gives the judgement».
- ¹⁵⁷ Cf. St. German, *Doctor and Student*, cit., p. 45: «[T]he common law proper was divers general customs of old time used through all the realm, which have been accepted and approved by our sovereign lord the King and his progenitors and all their subjects».
- ¹⁵⁸ Tanner, *English Constitutional Conflicts*, cit., p. 60.
- ¹⁵⁹ Lieberman, *The Province of Legislation Determined*, cit., p. 75.
- ¹⁶⁰ Ivi, p. 79.
- ¹⁶¹ J.H. Baker, *The Common Lawyer and the Chancery 1616*, in J.H. Baker (ed.), *The Legal Profession and the Common Law: Historical Essays*, London, Hambledon, 1986, pp. 205-6; W.H. Dunham, *Regal Power and the Rule of Law: A Tudor Paradox*, in «The Journal of British Studies», n. 3, 1963-4, pp. 24-5. On equity, see C.M. Gray, *Copyhold, Equity, and the Common Law*, Cambridge, MA, Harvard University Press, 1963, pp. 12-13; F.W. Maitland, *Equity. A Course of Lectures by Frederic William Maitland*, A.H. Chaytor and W.J. Whittaker (edited by), Cambridge, Cambridge University Press, 1936², pp. 10-11.
- ¹⁶² Coke, *The Fourth Part*, cit., p. 82; Coke, *Second Reports* 78b = 76 ER 592 (*Lord Cromwel's Case*); C.M. Gray, *The Boundaries of the Equitable Function*, in «American Journal of Legal History», n. 20, 1976, pp. 192-3; W.J. Jones, *Conflict or Collaboration? Chancery Attitudes in the Reign of Elizabeth*, in «American Journal of Legal History», n. 5, 1961, pp. 12-13; W.J. Jones, *The Elizabethan Court of Chancery*, Oxford, Clarendon Press, 1967, pp. 10-11.
- ¹⁶³ Baker, *The Common Lawyer and the Chancery*, cit., pp. 205, 207.
- ¹⁶⁴ *Garth v. Cotton* (1750) 1 LCE 559 = 28 E.R. 510; *Newcoman v. Bethlem Hospital* (1741) 1 Ambler 8, 2 Ambler 785 = 27 E.R. 501; *Scroggs v. Scroggs* (1755) 1 Ambler 272, 2 Ambler 812 = 27 E.R. 182, 513; *Stace v. Mabbott* (1754) 2 Vesey Sr. 552 = 28 E.R. 352.
- ¹⁶⁵ Baker, *The Common Lawyer and the Chancery*, cit., pp. 205-6.

- ¹⁶⁶ London BL, Additional MS. 35957, fo. 55v: «Et ceo est ore usuali que quant le defendant al comon ley ad try son fortunes la et stood out all the course of the law and in the end the matter adjudged against him then will he exhibite his bill in Chauncery and ground yt upon poinctes of equitie for which he might have preferred his suite in Chauncery before the judgment et issint double et infinite vexacion».
- ¹⁶⁷ Cf. in general Gray, *The Boundaries of the Equitable Function*, cit., pp. 192-3; L.A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere*, Cambridge, Cambridge University Press, 1977, pp. 123-4; C.W. Thomas, *James I, Equity and Lord Keeper Williams*, in «English Historical Review», n. 91, 1976, pp. 506-7.
- ¹⁶⁸ Report by Coke himself: London BL, Harley MS. 6686, fo. 226v-229r.
- ¹⁶⁹ London BL, Harley MS. 6686, fo. 228v.
- ¹⁷⁰ Holdsworth, *A History of English Law*, cit., pp. 436 ff.
- ¹⁷¹ Dawson, *Coke and Ellesmere Disinterred*, cit., p. 131.
- ¹⁷² Baker, *An Introduction to English Law*, cit., p. 109.
- ¹⁷³ Cited in W.D. Evans, A. Hammond, and T.C. Granger (edited by), *Collection of Statutes connected with the General Administration of the Law*, London, E. Lumley, 1836, vol. II, p. 350.
- ¹⁷⁴ Dawson, *Coke and Ellesmere Disinterred*, cit., pp. 132 ff.
- ¹⁷⁵ Moore, 291 = *Croke Reports Tempore Elizabeth I*, 221.
- ¹⁷⁶ Dawson, *Coke and Ellesmere Disinterred*, cit., p. 135.
- ¹⁷⁷ Draft Bill, 3 June 1614. London, House of Lords Library, *Historical Manuscripts Commission Third Report*, Appendix, p. 15.
- ¹⁷⁸ *Heath v. Ridley* (1614) 2 *Bulstrode* 194 = 80 E.R. 1062; Cro. Jac. 335 = 79 E.R. 286. Cf. Jones, *The Elizabethan Court of Chancery*, cit., pp. 463-4.
- ¹⁷⁹ 2 *Bulstrode* 194.
- ¹⁸⁰ 27 Edward III. St. 1 c. 1.
- ¹⁸¹ Holdsworth, *A History of English Law*, cit., vol. I, p. 462.
- ¹⁸² See 12 *Coke Reports* 37.
- ¹⁸³ Dawson, *Coke and Ellesmere Disinterred*, cit., p. 127.
- ¹⁸⁴ See Francis Bacon's letter to King James I, in J. Spedding, R.L. Ellis, and D.D. Heath (edited by), *The Works of Francis Bacon*, London, Longman, 1872, vol. XIII, p. 92.
- ¹⁸⁵ Dawson, *Coke and Ellesmere Disinterred*, cit., p. 139 f.
- ¹⁸⁶ Coke, *The Fourth Part*, cit., p. 71.
- ¹⁸⁷ Dawson, *Coke and Ellesmere Disinterred*, cit., p. 140.
- ¹⁸⁸ *Croke Reports* 219.
- ¹⁸⁹ *Croke Reports* 219.
- ¹⁹⁰ While the writ of error was pending before King's Bench, the accused lodged his petition at the Court of Chancery. Then, the Master of Rolls, as the representative of the Lord Chancellor, repealed the common law verdict. *Richard Glanvill's Case* 4° *Jacobi*, London BL, Harley MS. 1767, fol. 37r; Harley MS. 4265 fol. 75v; Lansdowne MS. 163, fol. 122r. Due to his opposition, the claimant Glanvill was arrested in 1613; the King's Bench issued a writ of habeas corpus in 1614. *Richard Glanvill v. Francis Courtney* 1 *Rolle Reports* 111 = 81 E.R. 365; 2 *Bulstrode* 302 = 80 E.R. 1139. Lord Chancellor Ellesmere had Glanvill arrested again on 7 May 1615 while the King's Bench issued a writ of habeas corpus once more. The answer of the Chancery, «*quod commissus fuit prisone per mandatum Thome Domini Ellesmere Cancellarii Anglie*», was revoked by all twelve common law judges. London BL, Additional MS. 35957, fol. 2v.
- ¹⁹¹ 1 *Rolle Reports* 193 = 81 E.R. 365, 367.
- ¹⁹² 1 *Rolle Reports* 219 = 81 E.R. 445. Cf. also London BL, Harley MS. 1691, fol. 55v.
- ¹⁹³ *Allen's Case in Chancery*, London BL, Harley MS. 1767, fol. 39r; Harley MS. 4265, fol. 78v. Moore K.B. 840 = 16 E.R. 385.
- ¹⁹⁴ The decision of the King's Bench, criticized by the Chancery, can be found by the name *The Case of Magdalene College (Warren v Smith)* (1615) (11 Rep. 66 = 77 E.R. 1235; 1 *Rolle Reports* 151 = 81 E.R. 394). The claimant failed to appear before the Court of Chancery and was subsequently arrested on the order of Lord Chancellor Ellesmere. Ellesmere justified this by claiming that, by failing to appear, the claimant had lost his right not only to appear before Chancery, but also the common law courts. This delineation of both jurisdictions was deemed a provocation by Coke. *The Earl of Oxford's Case (Oxford and Smith v Googe and Wood)* (1615) (1 Chancery Report, part i. 1; London BL, Harley MS. 1767, fol. 30v; Harley MS. 4265, fol. 68v; University of Cambridge, MS. Mm. i. 43, fol. 466r).
- ¹⁹⁵ 1 *Rolle Reports* 192, 218.
- ¹⁹⁶ 1 *Rolle Reports* 219.
- ¹⁹⁷ 1 *Rolle Reports* 219 = 81 ER 445. Cf. London BL, Harley MS. 1691, fol. 55v.
- ¹⁹⁸ See Holdsworth, *A History of English Law*, cit., vol. I, p. 461.
- ¹⁹⁹ Baker, *Introduction to English Legal History*, cit., p. 144.
- ²⁰⁰ Cf. 1 *Rolle Reports* 219; Dawson, *Coke and Ellesmere Disinterred*, cit., p. 145.
- ²⁰¹ Cited in Knafla, *Law and Politics in Jacobean England*, cit., pp. 283, 291.
- ²⁰² Cited in Knafla, *Law and Politics in Jacobean England*, cit., p. 332.
- ²⁰³ Holdsworth, *A History of English Law*, cit., vol. V, pp. 438 f.
- ²⁰⁴ 21 E.R. 485.
- ²⁰⁵ Cf. Bacon's letter to the king on 15 February 1616, in Spedding, Ellis, Heath (eds.), *The Works of Francis Bacon*, cit., vol. XII, pp. 247 f.
- ²⁰⁶ Holdsworth, *A History of English Law*, cit., vol. V, pp. 438 f.; Dawson, *Coke and Ellesmere Disinterred*, cit., p. 145.
- ²⁰⁷ = *Colt v Glover*, 1 *Rolle Reports* 451.
- ²⁰⁸ Baker, *Introduction to English Legal History*, cit., p. 167; Dawson, *Coke and Ellesmere Disinterred*, cit., p. 130.
- ²⁰⁹ Copies of the petitions of Glanvill

- and Allen in: London BL, Additional MS. 11574, fol. 44r, 46v.
- ²¹⁰ London BL, Additional MS. 35957, fol. 54v.
- ²¹¹ Francis Bacon, *Letter to the King's most excellent Majesty, concerning the praemunire in the King's Bench, against the Chancery*, 21 February 1616, in Spedding, Ellis, Heath (eds.), *The Works of Francis Bacon*, cit., vol. V, p. 252.
- ²¹² For James I, the limits of the different jurisdictions were determined by the king and not by common law judges. James I, *His Majesties Speech in the Starre Chamber the xx [20] of June Anno 1616*, sig. D4*, cited in C.H. McIlwain (ed.), *The Political Works of James I*, Cambridge, MA, Harvard University Press, 1918, p. 329; cf. also London BL, Additional MS. 35957, fol. 55v. Hence, the king rejected the indictments of *praemunire* against the Lord Chancellor and the Chancery: «I thought it an odious and inept speech, and it grieved me very much, that it should bee said in Westminster Hall, that a praemunire lay against the Court of Chancery and the officers there: how can the King grant a praemunire against himself? It was a foolish, inept and presumptuous attempt, and fitter for the time of some unworthie King: understand me aright; I meane not, the Chancerie should exceede his limite; but on the other part, the King onely is to correct it, and none else. And therefore sitting here in seate of judgement, I declare and command, that no man hereafter presume to sue a praemunire against the Chancery». McIlwain (ed.), *The Political Works of James I*, cit., p. 329.
- ²¹³ The royal decree of 18 July 1616 is widely dispersed in the form of manuscripts (London BL, Harley MS. 1767, fo. 49v; Harley MS. 4265, fo. 83r; Lansdowne MS. 174, fol. 119r; Lansdowne MS. 613, fol. 47v; Lansdowne MS. 826, fol. 2r; Stowe MS. 298, fol. 217v; Stowe MS. 415, fol. 63v; Hargrave MS. 227, fol. 583r; Hargrave MS. 249, fol. 159v). It only safeguarded the Court of Chancery, but not the other prerogative courts. See, for instance, *Calmady's Case* (1640) Cro. Car. 595 = 79 E.R. 1112. As a result, equity remained a questionable issue even during the Commonwealth period (1649-59). See, for example, H. Rolle, *Un abridgement des plusieurs cases et resolutions del common ley alphabeticallyment digest desouth severall titles*, 1668, vol. I, p. 381. Cf. also the resolution of the House of Commons in 1676-7 and the Bill of House of Lords in 1690, referenced in Holdsworth, *A History of English Law*, cit., vol. I, p. 464. The principal direction of the common law opposition remained the *in personam* effect of equity verdicts. Anonymus (1627) Litt. Rep. 37 = 124 E.R. 124: «[I]f judgement is rendered in an action of common law, the Chancellor cannot alter it or meddle over the judgement, but he can proceed against the person for corrupt conscience because he has the advantage that law encounters conscience». Cf. also *Tompson v Hollingsworth* (1641) March N.R. 83 = 82 E.R. 422; Anonymus (1647) Style 27 = 82 E.R. 503.
- ²¹⁴ De Smith, *The Prerogative Writs*, cit., p. 52.
- ²¹⁵ *Croke's Reports* Jac. 543; also known as *R. v Lord Warden of the Cinque Ports, ex parte Bourn*.
- ²¹⁶ For this confederation of coastal towns in Kent and Sussex cf. R. Jessup and F. Jessup, *The Cinque Ports*, London and New York, Batsford, 1952, pp. 16-17.
- ²¹⁷ De Smith, *The Prerogative Writs*, cit., p. 53.
- ²¹⁸ In the appeal of the *Ruswell's Case* (1615) (1 Rolle Reports 219 = 81 E.R. 445), Bacon reconfirms: «Equity could not operate against the a maxim of law, which would be to make a new law, but could only relieve in cases of particular mischief».
- ²¹⁹ «[A]nd it were most absurd to let the King's conscience be at enmity and opposition with his laws and statutes. This Court (as I conceive it) may be often occasion'd to open and confirm, but never to thwart, and oppose, the grounds of the laws». John Hackett, *Scrinia Reserata*, 1693, p. 73. Cf. also Thomas, *James I, Equity, and Lord Keeper Williams*, cit., pp. 506-7.
- ²²⁰ *The Character of Lord Keeper Coventra*, London BL, MS. Stowe 619v: «Where it falls into observation that this high place [Lord Keeper] is rarely well served but by men of law and persons of deepest judgment in the statute and common lawes of the land; whereby they may distinguish of cases whether they lye proper in that court to be relieved in equitie without intrenching on the jurisdiction of the kingdome, which is the inheritance of the subject».
- ²²¹ *Hervey v Aston* (1738) West T.Hard. 350, 425 = 25 E.R. 975, 977. Cf. also *Anonymus* (1746) 3 Atkyns 350 = 26 E.R. 1002; *Jesus College v. Bloom* (1745) 1 Ambler 54 = 27 E.R. 30; *Lord Montague v. Dudman* (1751) 2 Vesey Sen. 396 = 28 E.R. 253.
- ²²² *R. v. Hare and Mann* (1719) 1 Strange 146, 151 = 93 E.R. 439: «Where the common law afforded no remedy most commonly churchmen, men of conscience would seek to provide a remedy by summoning the litigants and laying it upon the conscience of the wrongdoer to do right».
- ²²³ U. Seif (= Müßig), *Der Bestandschutz besitzloser Mobiliarsicherheiten im deutschen und englischen Recht*, Tübingen, Mohr Siebeck, 1997, pp. 157-8.
- ²²⁴ W. Blackstone, *Commentaries on the Laws of England*, 1768, vol. 3, chapter XXII, p. 327 Cf. also A. Smith, *Lectures of Jurisprudence*, R.L. Meek, D.D. Raphael, P.G. Stein (eds.), Oxford, Clarendon Press, 1978, pp. 275, 282.
- ²²⁵ «[N]evertheless of late divers commissions under your Majesty's Great Seal have issued forth, by which certain persons have been assigned and appointed

- Commissioners with power and authority to proceed within the land, according to the justice of martial law against such soldiers and mariners, or other dissolute persons joining with them [...] that the foresaid commissions for proceeding by martial law may be revoked and annulled, and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid». Gardiner (edited by), *The Constitutional Documents of the Puritan Revolution*, cit., p. xx. Although the *Petition of Rights* was only to describe the extant state, later it was regarded as a stronghold of citizens' constitutional rights. Their interpretation led to the beginning of the Puritan Revolution in 1642. The *Petition of Rights* was fully brought to fruition by the *Habeas-Corpus-Act* of 1679 and the *Declaration of Rights* of 1689. D.L. Keir, *The Constitutional History of Modern Britain since 1485*, London, Black, 1966⁸, p. 191.
- ²²⁶ *The Petition of Right* (7 June 1628), in Gardiner (edited by), *The Constitutional Documents of the Puritan Revolution*, cit., No. 10, pp. 66, 69. See also Eduard Kern, *Der gesetzliche Richter*, Berlin, Otto Liebmann, 1927, pp. 19, 24.
- ²²⁷ 17 Car. I c.10. Gardiner (edited by), *The Constitutional Documents of the Puritan Revolution*, cit., No. 34, pp. 179-80.
- ²²⁸ Ivi, p. x; 17 Car. I. c. 11. Ivi, No. 35, pp. 186-7.
- ²²⁹ 17 Car. I c.10. Ivi, No. 34, p. 183.
- ²³⁰ «That all Judges, and all the officers placed by approbation of both Houses of Parliament, may hold their places *quam diu bene se gesserint*». Ivi, No. 53, pp. 249-50.
- ²³¹ Ivi, No. 53, p. 253.
- ²³² Ivi, No. 57, p. 265.
- ²³³ 1 Gul. & Mar. Sess. 2 c.2, cited in J. Raithby (ed.), *The Statutes at Large of England and of Great-Britain: from Magna Carta to the Union of the Kingdoms of Great Britain and Ireland*, London, G. Eyre and A. Stratham, 1811, vol. III, pp. 275-6.
- ²³⁴ 12 & 13 Gul. III. c.2, cited in ivi, pp. 574, 576.
- ²³⁵ Edward Coke, in W. Notestein, F.H. Relf, H. Simpson (eds.), *Commons Debates 1621*, New Haven, Yale University Press, 1935, vol. II, p. 228.
- ²³⁶ J. Morice, *A Remembrance of Certain Matters concerning the Clergie and their Jurisdiction*, 1593, p. 51: «Wee agayne the Subjects of this Kingdome are borne and brought upp in due obedience, butt farre from Servitude and bondage, subject to lawfull authoritye and commaundement, but freed from licentious will and tyrannie; enjoyinge by lymitts of lawe and Justice ourr liefs, lands, goods, and liberties in greate peace and security».
- ²³⁷ Stephenson, Marcham (eds.), *Sources of English Constitutional History*, cit., p. 421.
- ²³⁸ U. Seif (=Müßig), *Der mißverstandene Montesquieu: Gewaltbalance, nicht Gewaltentrennung*, in «Zeitschrift für Neuere Rechtsgeschichte», n. 22, 2000, 149-50.
- ²³⁹ D. Digges, *A Review of the Observations upon some of his Majesties Late Answers and Expresses*, 1643, p. 12.
- ²⁴⁰ W. Nordstein, F.H. Relf, *Commons Debates for 1629*, New Haven, Yale University Press, 1921, p. 230.
- ²⁴¹ Two Speeches by Sir John Davies before the Lords Deputy of Ireland (1613), Sir Thomas Clarke and Lord Alvanley's MSS. Lincoln's Inn London, fol. 6r. Cf. also J. Davies, *A Perfect Abridgement in English of the Eleven Books of Reports*, 1651, p. 6.
- ²⁴² Coke also described Parliament in similar terms: «The King of England is armed with divers Councils, one whereof is called *Commune Councilum*, and that is the Court of Parliament». Coke, *First Part*, cit., p. 110. In 1635, William Lambarde added: «The generall Assembly in Parliament, is termed in our old Writs, *Commune Consilium Regnis Angliae*, the Common Council of the Realme of England, called to getheer by the King, for advice in matters concerning the whole Realme». This coincides with the definition given by Thomas Smith, published fifty years earlier. See, respectively, W. Lambarde, *Archeion, or the High Courts of Justice in England*, 1635, p. 102; T. Smith, *De Republica Anglorum*, M. Dewar (ed.), Cambridge, Cambridge University Press, 1982, chapter 1, book 2, p. 48. Cf. on Sir Thomas Smith: J. Strype, *The life of the learned Sir Thomas Smith, Principal secretary to King Edward the sixth and Queen Elizabeth. Wherein are discovered many singular matters relating to the state of learning, the reformation of religion and the transactions of the Kingdom, during his time. In all which he had a great and happy influence*, Oxford, 1820, pp. 27-8.
- ²⁴³ R. Heath, *Speech in the Case of Alexander Leighton in the Star Chamber, 4 June 1630*, S.R. Gardiner (ed.), London, Camden Society, 1875, p. 9.
- ²⁴⁴ The English monarch governs by virtue of the *consilium privatum* (Privy Council), by virtue of the *magnum consilium* (House of Lords) and by virtue of the *commune consilium* (House of Commons), also *consilium ordinarium*. M. Hale, *The Jurisdiction of the Lords House, or Parliament, Considered According to Ancient Records*, F. Hargrave (ed.), 1796, pp. 5-6. Cfr. E. Husbands (ed.), *An Exact Collection of all Remonstrances, Declarations, Votes, Orders, Ordinances, Proclamations, Petitions, Messages, Answers and other Remarkable Passages between the King's Most Excellent Majesty and his High Court of Parliament*, 1643, p. 304: «[...] but it is likewise a council, to provide for the necessities, prevent the imminent dangers, and preserve the public peace and safety of the kingdom, and to declare the King's pleasure in those things as are requisite thereunto». Cf. also M.J. Mendle, *The Great Council of Parliament and the First Ordinanc-*

- es: *The Constitutional Theory of the Civil War*, in «Journal of British Studies», n. 31, 1992, p. 13.
- ²⁴⁵ Hale, *The Jurisdiction of the Lords House*, cit., p. 6: «But when the business were of a more contracted nature, and fell more specially under the cognizance of some of his council, then those were called to it that were fittest to advise about it; as the Chancellor and the judges when the advice concerned matters in law».
- ²⁴⁶ M.A. Judson, *The Crisis of the Constitution: An Essay in Constitutional and Political Thought in England 1603-1645*, New Brunswick, Rutgers University Press, 1949, p. 77.
- ²⁴⁷ J. Selden, *Table Talk*, F. Pollock (ed.), London, Selden Society, 1927, p. 102.
- ²⁴⁸ Judson, *The Crisis of the Constitution*, cit., p. 74.
- ²⁴⁹ Husbands (ed.), *An Exact Collection*, cit., p. 269.
- ²⁵⁰ *Declaration of the Houses in Defence of the Militia Ordinance* (6 June 1642), in Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution*, cit., No. 54, pp. 254-6. C.f. also *The Votes of the Houses for Raising an Army* (12 July 1642), in the same, Nr. 56, p. 261.
- ²⁵¹ C.H. McIlwain, *The High Court of Parliament and Its Supremacy. An Historical Essay on the Boundaries Between Legislation and Adjudication in England*, New Haven, Yale University Press, 1934, pp. 118-20; A. Cromartie, *Sir Matthew Hale 1609-1676: Law, Religion and Natural Philosophy*, Cambridge, Cambridge University Press, 1995, p. 24.
- ²⁵² G.R. Elton, *The Parliament of England 1559-81*, Cambridge, Cambridge University Press, 1986, p. 39; D.M. Dean and N.L. Jones, *The Parliaments of Elizabethan England*, Oxford, Blackwell, 1990, pp. 2-3.
- ²⁵³ As Thomas Smith argued, legislative Parliament «representeth and hath the power of the whole realm both the head and the body. For every Englishman is intended to be there present». Smith, *De Republica Anglorum*, cit., p. 49. Lambarde agreed: «[F]orasmuch as every man, from the highest to the lowest, is there either in person or by procuracy, every man is said to be bound by that which doth pass from such an assembly». Lambarde, *Archeion*, cit., p. 245.
- ²⁵⁴ Cromartie, *Sir Matthew Hale*, cit., p. 53.
- ²⁵⁵ C.f. for example *The Impeachment of one Member of the House of Lords, and of Five Members of the House of Commons* (3 January 1642), in Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution*, cit., No. 46, pp. 236-7. C.f. also Art. 2 IV *Constitution of the United States of America*.
- ²⁵⁶ Coke, *The Fourth Part*, cit., p. 3.
- ²⁵⁷ 8 *Coke Reports* 107a = 77 E.R. 638 (*Dr Bonham's Case*). C.f. also T.F.T. Plucknett, *Bonham's Case and Judicial Review*, in «Harvard Law Review», n. XL, 1926, pp. 30-1; S.E. Thorne, *Dr. Bonham's Case*, in «Law Quarterly Review», n. LIV, 1938, pp. 543-4.
- ²⁵⁸ St. German, *Doctor and Student*, cit., p. 300.
- ²⁵⁹ Coke, *Eleventh Reports*, 14a = 77 ER 1163 (*Priddle and Napper's Case*): «[I]t was also urged that if the said act [should have a particular effect, then] it would do a wrong». While authors like Thomas Smith and William Lambarde emphasized consensus, Coke stressed knowledge: «[T]he law intends that every person hath knowledge thereof, for the parliament represents the body of the whole realm». Coke, *The Fourth Part*, p. 26. Coke was not the first to consider the knowledge of the represented subjects on the parliamentary statute, but his dismissal of consensus in favour of knowledge as a legitimizing factor was new. Cf. R. Crompton, *L'autorité et juridiction des cours de la Majeste de la Roigne*, 1637, fol. 16r.
- ²⁶⁰ *Declaration of the Houses in Defence of the Militia Ordinance* (6 June 1642), in Gardiner (edited by), *The Constitutional Documents of the Puritan Revolution*, cit., No. 54, pp. 254-6. C.f. also *The Votes of the Houses for Raising an Army* (12 July 1642), in the same, Nr. 56, p. 261. This position of the Parliament in 1642 was also justified by the Member of Parliament Charles Herle (1598-1659) with reference to the status of the Parliament as supreme (appellate) court: «[H] is Majesty often professeth himself no lawyer, therefore in law he judgeth not, but by his courts, in the meane of which the sentence passed stands good in law, though the king by proclamation or in person should oppose it: whereas there is nothing more frequent or proper to parliaments, than to reverse any of [the courts'] judgements». C. Herle, *A Fuller Answer to a Treatise Written by Doktor Ferne, 1642*. C.f. also Husbands (ed.), *An Exact Collection*, cit., p. 206-7.
- ²⁶¹ Blackstone, *Commentaries*, cit., vol. 1, chapter II (*Of the Parliament*), p. 156.
- ²⁶² Coke, *The Fourth Part*, p. 36.
- ²⁶³ C.f. the interpretation of the law as self-defence in the *Declaration of the Houses in Defence of the Militia Ordinance* (6 June 1642): «[...] but ought to be obeyed by the fundamental laws of this kingdom [...] so the question is [...] whether there is not a power in the two Houses to provide for the safety of the Parliament and peace of the kingdom, which is the end for which the Ordinance concerning the militia was made». Cited in Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution*, cit., No. 54, p. 254.
- ²⁶⁴ On the theory on the *leges fundamentales*, which was generally widely spread since the seventeenth century, c.f. H. Quaritsch, *Staat und Souveränität*, Frankfurt am Main, Athenäum, 1986, vol. I, p. 364.
- ²⁶⁵ Cf. the opposition against a legislative draft on the grounds that «it alters the fundamental law», see S.R. Gardiner (ed.), *Debates in the House of Commons*

- in 1625, London, Camden Society, 1873, p. 90.
- ²⁶⁶ Francis Bacon, *A Collection of some principal Rules and Maxims of the Common Lawes of England, Epistle Dedicatory*, in Ellis, Heath (eds.), *The Works of Francis Bacon*, cit., vol. XIV, p. 10.
- ²⁶⁷ S. Daniel, *A Panegyrike Congratulatory*, 1603, p. 30: «We shall continue one, and be the same In Law, in Iustice, Magistrate, and forme, Thou wilt not touch the fundamentall frame Of their Estate thy Ancestors did forme, but with a reuerence of their glorious fame Seeke only the corruptions to reforme, Knowing that course is best to be obseru'de Whereby a State hath longest beene preserued».
- ²⁶⁸ McIlwain (ed.), *The Political Works of James I*, cit., p. 54.
- ²⁶⁹ J. Rushworth (ed.), *Historical Collections of Private Passages of State, Weighty Matters in Law, Remarkable Proceedings in Five Parliaments: 1618-1629*, London, D. Browne, 1721, vol. I, p. 268.
- ²⁷⁰ J.W. Gough, *Fundamental Law in English Constitutional History*, Oxford, Clarendon Press, 1961², pp. 13, 30-1. Cf. also Quaritsch, *Staat und Souveränität*, cit., vol. I, pp. 363-4.
- ²⁷¹ H. Krüger, *Souveränität und Staatengemeinschaft*, in H. Krüger, C. Erler (eds.), *Zum Problem der Souveränität, Verhandlungen der Tagung der Gesellschaft in Frankfurt am 31.3.-1.4.1955*, Karlsruhe, C.F. Müller, 1957, p. 20.
- ²⁷² Quaritsch, *Staat und Souveränität*, cit., p. 363.
- ²⁷³ The monarchical right to the sole decision on the public good was argued in the *Ship money's case* or *Hampden's Case* (1637): «And we are also of opinion that in such case your majesty is the sole judge both of the danger and when and how the same is to be prevented and avoided». Stephenson and Marcham (edited by), *Sources of English Constitutional History*, cit., No. 94 C, p. 459. The opposite argument was provided by the common law judges in their response of 7 February 1637: «[A]nd whether in such case is not the King the sole judge both of the danger, and when and how the same is to be prevented and avoided». Gardiner (edited by), *The Constitutional Documents of the Puritan Revolution*, cit., No. 20, p. 108. Matthew Hale also argued: «That he alone is the Judge of all publique dangers and may appoint Such remedies as he please and impose what Charges he thinkes fitt in Order thereunto. Those wild Propositions are 1. Utterly false. 2. ag[ainst] all Naturall Justice. 3. Pernicious to the Governm. 4. Destructive to the Common good and safety of the Governmt. 5^{thly} Without any Shadow of Law or reason to Support them». M. Hale, *Reflections by the Lord Chief Justice Hale on Mr. Hobbes His Dialogue of the Lawe, Second Essay: Of Sovereigne Power*, cited in Holdsworth, *A History of English Law*, cit., vol. V, p. 509.
- ²⁷⁴ Hale, *Reflections by the Lord Chief Justice Hale on Mr. Hobbes His Dialogue of the Lawe, Second Essay: Of Sovereigne Power*, cited in Holdsworth, *A History of English Law*, cit., vol. V, p. 509: «They are utterly false, in things of this Nature the best measures of Truth or Falsehood are not imaginary Notions or Reasons at large, but the Laws and Customes of this Kingdome w^{ch} have determined Reasons at large and bound itt up within the boundes of Such Lawes and Usages. Itt is certain that the King without the Consent of ther Lordes and Commons in Parlem^t neith^r by Proclamation nor by Ordinance, Act of Council or Ordinance cannot make a bindeing Law [...] And as he cannot make a Law without Consent of Parliam^t, Soe neither can he Repeale a Law without the like Consent».
- ²⁷⁵ Speech by J. Whitelocke (1610), in Cobbett (edited by), *State Trials*, cit., vol. II, pp. 482-3: «The sovereigne power is agreed to be in the king; but in the king is a two-fold power, the one in parliament, as he is assitied with the consent of the whole state; the other out of parliament, as he is sole, and singular, guided merely by his own will. And if of these two powers in the king one is greater than the other, and can direct and controule the other; that is supreme potestas, the soveraigne power, and the other is subordinata. It will then be easily proved, that the power of the king in parliament is greater than his power out of parliament: and doth and controule it; for if the king make a grant by his letters patent out of parliament, it bindeth him and his successors: he cannot revoke it, nor any of his successors; but by his power in parliament he may defeat and avoyd it; and therefore that is the greater power».
- ²⁷⁶ 1 Gul. & Mar. Sess. 2 c.2, cited in Raithby (edited by), *Statutes at Large*, cit., vol. III, pp. 275, 278.
- ²⁷⁷ A. Fitzherbert, *The New Natura Brevium*, Dublin, 1793, p. 40 E; see also Baker, *Introduction to English Legal History*, cit., p. 144.
- ²⁷⁸ De Smith, *The Prerogative Writs*, cit., pp. 49 f.
- ²⁷⁹ Waite, *The Struggle of Prerogative and Common Law*, cit., p. 149. See also *Empringham's Case* (ca. 1611), 12 *Coke Reports* 84.
- ²⁸⁰ Holdsworth, *A History of English Law*, vol. I, pp. 512 ff.
- ²⁸¹ Cf. Dicey *An Introduction to the Study of the Law of Constitution*, cit., p. 18 (esp. fn. 140).
- ²⁸² *The Petition of Rights*, in Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution*, cit., pp. 66, 68 f.
- ²⁸³ *The Act for the Abolition of the Court of High Commission*, 17 Charles I c. 11, in Ivi, p. 186; see also Hostettler, *Sir Edward Coke*, cit., p. 76.
- ²⁸⁴ *The Act for the Abolition of the star Chamber*, 17 Charles I c. 10, in Gardiner (edited by), *The Constitutional Documents of the Puritan Revolution*, cit., p. 179.
- ²⁸⁵ Holdsworth, *A History of English Law*, cit., vol. I, p. 514.
- ²⁸⁶ Hostettler, *Sir Edward Coke*, cit.,

- p. 76.
- ²⁸⁷ For details cf. Müßig, *Recht und Justizhoheit*, cit., pp. 181-2, 195-6.
- ²⁸⁸ C.f. also J. Dodderidge, *Treatise on the King's Prerogative Dedicated to Lord of Buckhurst*, 1610, London BL, Harley MS. 5220, fo. 9v. The differences between absolute and ordinate power, by contrast, are not elaborated in the introductory announcements: «[W] herein it doth consist and in what causes in discourse whereof are determined at large manie notable questions of most high importance touching the dignitie Roiall and the estate of the Realme, by the Lawes, Statutes, and publick Records of this Realme».
- ²⁸⁹ Cited in Stephenson, Marcham (ed.), *Sources of English Constitutional History*, cit., No. 91, pp. 435-6 per Chief Baron Thomas Fleming.
- ²⁹⁰ *Ibidem*.
- ²⁹¹ *Ibidem*. C.f. also Fortescue, *In Praise of the Laws of England*, cit., chapter XIII (*How kingdoms ruled politically first began*), p. 22 (*political and royal dominion*); Fortescue, *The Governance of England*, cit., chapter II (*Why one king reigns royally and another politically and royally*), p. 87 (*Dominium politicum et regale*).
- ²⁹² Stephenson, Marcham (eds.), *Sources of English Constitutional History*, cit., No. 91, pp. 435-6 per Chief Baron Thomas Fleming.
- ²⁹³ The King's Counsel, Sir John Banks, attributed the disputed question to both spheres of power, as it «concerneth the king both in his ordinary and absolute power». Ivi, No. 94 C, p. 459; Cobbett (ed.), *State Trials*, cit., vol. III, p. 1016.
- ²⁹⁴ M.A. Judson, *The Crisis of the Constitution*, cit., p. 114.
- ²⁹⁵ Cited in Stephenson, Marcham (eds.), *Sources of English Constitutional History*, cit., No. 91, pp. 435-6 per Chief Baron Thomas Fleming.
- ²⁹⁶ Ellis, Heath (eds.), *The Works of Francis Bacon*, cit., vol. VI, p. 41.
- ²⁹⁷ Gardiner (ed.), *The Constitutional Documents of the Puritan Revolution*, cit., No. 8, pp. 59-60; Cobbett (edited by), *State Trials*, cit., vol. III, p. 10; Stephenson, Marcham (eds.), *Sources of English Constitutional History*, cit., No. 94 A, p. 457.
- ²⁹⁸ According to Heath, «I did willingly subscribe to that part of the act ... havinge Long been of opinion: that the privie Counsell, and that honorable board the Counsell table, should not have meddled with questions of meum and tuum». Cited in Judson, *The Crisis of the Constitution*, cit., p. 50.
- ²⁹⁹ Ivi, p. 114.