Zeitschrift: The Swiss observer : the journal of the Federation of Swiss Societies in the UK

Herausgeber: Federation of Swiss Societies in the United Kingdom

Band: - (1961)

Heft: 1388

Artikel: British and Swiss constitutions and their histories [Continuation from the last Issue]

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DOI: https://doi.org/10.5169/seals-690250

What you should know about
BRITISH AND SWISS CONSTITUTIONS AND THEIR HISTORIES

by

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(*Continuation from the last issue*)

To agree on a constitution covering such a diversity of outlook as conditioned by three main languages, catholic and protestant factions, purely agricultural cantons, industrial town cantons, etc., was an enormous achievement. But the outstanding thing is that after forty years of constant and often vicious quarrelling, after having been unable for four hundred years to achieve unity, they should have been able in so short a time — even if you take into account the fact that some of the promoters of the new constitution evidently had given long and serious consideration to the probable solution beforehand — that they should have been able in so short a time to complete such a comprehensive and progressive piece of legislation.

One can only surmise that in spite of disagreements and quarrels, in spite of actions by some of the factions often little short of treason, such strong bonds of spiritual fraternity had been forged that, once the will to find agreement was found, the edifice was built in no time.

But now let us go back in time and look at the roots of constitutional development in England.

From King Alfred to The Lawyer King

We have to linger here for a moment or two. It helps us to understand the almost religious deference to *The Law* by the people of this country — almost as if *it,* too, had come down from Mount Sinai, brought down by Moses himself. I cannot do better than quote from S. B. Shrimes's English Constitutional History: *The law was tribal custom, or* folkright, *to which the king was subordinate in every respect, as any other member of the folk . . . The king was not regarded in any sense as an arbitrary law-giver . . . the characteristic which proved to be of permanent and fundamental importance in history was the strong position accorded by immemorial custom to the common free man, the lawful man, as he was called later . . . The fundamental assumption of the trustworthiness of the lawful free man was Anglo-Saxon in origin, and was part and parcel of ancient Germanic custom.*

For the purpose of the law it was also essential that every freeman should have somebody to support him and swear for him in court if the need arose; this and the need for protection in the physical sense and, lastly, the vicissitudes of life, brought about a social structure akin to feudalism. An example: Alfred the Great, in order to strengthen his amateur *fyrd,* his " Landwehr ", offered the honour of thaneship (knighthood) with its privileges to every *churl* (freeman) who owned four hides — which may have been several hundred acres of land — who would train himself and fit himself out with horse, sword and shield to become a professional soldier.

* * *

There is little or nothing in early English law which owns influence to Rome. As we saw, the Angles and Saxons, as well as the Vikings and the Danes who came later, brought their own customs and *folklaws* with them. Out of them the basis of English law was developed. The Church played in due course her own part in this development. She left her first impress on Anglo-Saxon law in a royal declaration of about A.D. 602 by King Ethelbert of Kent. It may well be that the *Witan,* or *Witena Gemot,* their " council of the wise men ", which decided over war and peace and elected, or at least confirmed, the kings, also was of germanic origin, the same as the " Landsgemeinde " in parts of Switzerland.

Alfred's immediate four successors, and later the Anglo-Danish Canut, were great kings. They built up workable systems of administration and judicature so that, according to the historians, England was better governed at the time of William's usurpation than any country on the continent of Europe.

Thus, when Duke William of Normandy came to the throne he could continue where his predecessor, Edward the Confessor, had left off — King Harold did not have time to get the civil reins of his country into his hands.

Edward had built at Westminster an abbey and church which had been consecrated a few days before his death. In that Church of St. Peter, on that fateful Christmas-day twelve months later, as William I, the Conqueror, stood before the altar, the officiating archbishop and his assistants would read the same service which had been composed and read by Archbishop Dunstan at the coronation of Edgar a century earlier. Arthur Bryant has a beautiful passage on it in his " Story of England " from which I quote:

Behind the solemn rites — the royal prostration and oath, the archbishop's consecration and anointing, the anthem, ' Zadok the Priest ', linking the kings of the Angles and Saxons with those of the ancient Hebrews, the investiture with sword, sceptre and rod of justice, the shout of recognition of the assembled lords — lay the idea that an anointed king and his people were a partnership under God. After that sacramental act loyalty to the Crown became a Christian obligation. The ideal of patriotism first began to take vague shape in men's minds superseding the older conception of tribal kingship.

Crowned William I, the Conqueror set his hand and mind to the task of building up a state organisation worthy of an absolute monarch. But though he took over existing institutions, he gave them new contents. He kept the *Witenagemot* and made it his own Great Council; he kept the shire-courts and the village hundreds-courts. And he also kept the *fyrd,* the militia of the Wessex kings — no doubt with a view to keeping his newly created Norman barons in their place.

The Anglo-Saxon earls and their following did not see eye to eye with William; they revolted and thereby gave him the opportunity to get rid of them and to confiscate their lands. He made use of the semi-feudal customs he found and adapted their practice to his own ends. All the land was declared to be in the king's gift, and he established for good the system whereby service to the Crown became the basis of land tenure. Service

to the Crown originally meant attending at court and military service and provision. The latter, however, could be changed in later reigns to the payment of *scutage,* in other words, the lords and knights had to pay for the king's mercenary army, quite apart from a number of other special taxes and fines, some of which went into the king's private treasury. This scutage business and the special fines played a considerable part in the reign of John Lackland and, indeed, led to the *Magna Charta.*

William also established the office of a *justicar,* Minister of Justice and Chief Justice combined. During the next reign this became a post best described as that of acting Vice-Roy in the king's absence.

In the reign of William's third son, Henry Beauclerc, known as Henry I, the development of judicial systems made great progress. We now hear of such terms as *treasury* and *curia regis,* both of which were now presided over by the judicar above mentioned. The *Curia Regis,* was, what one might call, the king's Privy Council, which was also charged itself with some of the judicial functions. But of a representation of the people in government affairs there is as yet no sign.

Whilst Henry I was to become known as the *Lion of Justice,* his grandson, Henry II, was the *Lawyer King.* Professional judges going on circuit — escorted by sheriffs and javelin men — judges sitting on marble benches in Westminster Hall forming permanent judicial tribunals of the Curia Regis, were created during this fruitful reign. Later, these last-mentioned tribunals developed into the King's Bench, for matters concerning the Crown, and the Court of Common Pleas, which deal with matters of common and private concern.

It appears that people in those far-off days were as eager " to go to Law " as some of them are now. But the joke is: because government encouraged the litigants — sometimes by very high-handed methods — because *" justitia est magnum emolumentum "* (justice is greatly profitable), for the king's treasury, of course!

Henry had to contend throughout his reign with the Church on the division of power between the two. He and his former Chancellor Thomas à Becket, then Archbishop of Canterbury, personified the long struggle between Rome and London, ending, as theirs did, in the martyrdom of à Becket and bitter remorse of the king. A constitutional struggle if ever there was one.

Magna Charta and After

This brings us to King John, John Lackland as his father had called him because he was the youngest of Henry II's sons; he also succeeded his brother Richard, called Lion Heart. John's rule was one of extortion and disregard of customs and decency. He increased scutage at will, imposed feudal and ordinary fines to enrich himself. The barons became united and forced the king to meet them and to put his hand to a lengthy document. Because of its length it was called the " *magna* " *charta.* Most of the clauses of it are concerned with legitimate grievances and their remedy. But though it was a document concerned mainly with feudal customs and rights, there were in it items which should have benefited all classes of the population, mainly, that is to say, because recognised customs and conventions of feudal and common law were laid down in writing. Much of it, barring the most biting bits, was confirmed in statutory form in 1297 in the *Confirmation Cartarum.*

During the reigns of Henry III and Edward I the old Curia Regis underwent a great deal of change. The office of justicar was abolished; the great courts of Common Law — the Court of Common Pleas and that of the King's Bench — were split off from the Council to act as separate branches of royal jurisdiction. About a hundred years later the same happened to the Chancery Court, and around the same decades the House of Lords was charged with the function of a court of appeal.

We then hear of a new council, the *Privy Council.* Hood-Phillips quotes Holdsworth and Williamson; the one saying that the Privy Council was in direct line of descent from the Curia Regis; the other, that the Curia Regis ceased to exist and that the council which emerged was something more than that which was left over . . ., as a disinct body it was something new. Under the Tudors it was made into a powerful instrument of government subservient to the Kings and Queens.

Simon de Montford, Earl of Leicester, is often credited with the calling of the first parliament. Actually there had been numerous parliaments of sorts before his time. Every King sometimes summoned a council — especially when he was in trouble and wanted more money. But de Montford's parliament — actually called for just such a purpose too, because he badly needed the support of the people — was the first to which knights of the shire *and* burgesses of the boroughs received a summons *at the same time.* This happened towards the end of the " barons' " war in 1265.

* * *

After Edward I returned from a crusade, in 1275, both knights and burgesses were summoned to a parliament, and some important legislative and fiscal business was done. Twenty years later he called, what later was called, the " Model Parliament " of 1295, where, in addition, the inferior clergy also were present. In the Statute of York in the reign of Edward II in 1322 it was laid down that " constitutional changes (etc., etc.) ought to be settled in parliaments by the king, and the assent of the prelates, earls, barons, and the Commons in parliament ". In the parliament of Edward III in 1340 we get the rule that no taxes or other aids should be made except by the common assent of prelates, magnates and the Commons.

On the whole, however, the Commons were subservient to the Kings. As Shrimes says, *they were not born to greatness, but had it thrust upon them.* Indeed it is not until the last of Edward III's parliament in 1376 that we hear of the Commons taking part in attacking the government. But, it is reported, the administration went on as before. Even in Elizabeth's time the Commons were left in no doubt about the queen's displeasure when they apparently talked too much on such items as money grants asked for by the Queen.

I should add here that the monarchy of the Tudors immensely strengthened its executive power, in part at least by evolving in its service the office of the king's secretary, destined to a grant and remarkable future as the Secretary of State. One needs only to remember William Cecil, Lord Burghley, who may well be called Queen Elizabeth's right hand.

Towards the end of Elizabeth's reign the Commons tended to become more independent, but it was only under the two first Stuarts that the struggle with the king took on sharper forms. In the end, as you all know, it turned into a battle between king and parliament in which the former not only lost his throne but also his head.

The half-century that followed might almost be called an interregnum. It was certainly a time of questioning, not dissimilar to the Restoration period in Switzerland a century and a quarter later.

(To be continued)