H-Net Reviews
in the Humanities & Social Sciences

John Phillip Reid. *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries.* DeKalb: Northern Illinois University Press, 2004. 150 pp. $32.00 (cloth), ISBN 978-0-87580-327-2.

Reviewed by Howard Nenner (Department of History, Smith College)

Published on H-Law (April, 2005)

When Law Was Sovereign, Maybe

John Phillip Reid's extended essay on rule of law in the Anglo-American world of the seventeenth and eighteenth centuries points to the modern shift in the meaning of the rule, its movement from a substantive restraint on arbitrary power to a procedural safeguard on individual rights. In telling his story, he brings into sharp relief the difference between Bracton's thirteenth-century dictum that the king is under the law and the modern Austinian doctrine of law as the command of the sovereign. According to Reid, the Bractonian vision, as interpreted and embraced by the common lawyers of the seventeenth century, was the essence of the rule in early modern England. Law, not the king, was understood to be sovereign and, to the extent that this understanding prevailed, there would be an effective restraint on the exercise of arbitrary royal power. It was, Reid posits, "the cornerstone of the jurisprudence of liberty in the years when liberty was struggling to survive" (p. 93). Only in the nineteenth century, and then only in Britain, did the legislative sovereignty of parliament emerge without challenge and thereby make rule of law an imperfect restraint on the power of parliament and, by extension, a weaker guarantor of individual liberty. In America, on the other hand, the separation of powers enshrined in the Constitution deprived the legislature of an effective claim to sovereignty.

In larger compass, Reid rehearses the familiar interpretation of common law as the reservoir of custom, the expression through precedent of an ancient constitution with political claims to immutability. What was drawn from that reservoir was always selective and controversial, sometimes specious, and often confounding. Common lawyers who routinely asserted that law was merely declarative of custom and, as such, not made new, found themselves at odds with Stuart kings who insisted that it was kings who made the law. The Stuarts promised to obey the laws they made; however, they insisted, should they not abide by their laws they were answerable only to God. The difference, neatly underscored by Reid, was found in the argument of the common lawyers that "from time immemorial the legal heritage of Europe beyond the pale of Roman law had been law as restraint, not law as command" (p. 12). It was the difference between the rule of law as a "bridle" on monarchical power and the power of royal government as discretionary, arbitrary, and un-

restrained.

Yet, much of the time the controversy was obscured by rhetoric of seeming constitutional agreement. In seventeenth-century England both sides of the growing political divide between parliamentarians and royalists made obeisance to the law, but whether and to what degree law limited the prerogative and, more important, who was to be the interpreter of the law, were matters that widened the divide. Each recognized the existence of the prerogative, the king's unilateral hegemony in certain matters of state, but whether the prerogative was under the law or outside the law was the essential question, not to be decided until the interruption of a mid-century civil war and the conclusion of a late-century revolution. After 1689 the prerogative was clearly limited and tamed, especially as the king's dispensing and suspending powers had disappeared and parliament was effectively guaranteed to meet regularly. As a result, the law was no longer subject to the discretion and abuse of kings, but there was now the new and emerging danger that control of the law might become the exclusive instrument of parliament. In the opinion of the Tory polemicist Charles Leslie in 1709, the law had already become "nothing else but the Declar'd Will and Pleasure of the Legislature" (p. 69).

Reid, however, is only tangentially interested in the modern problems of the rule of law. His principal concern is to demonstrate through two seventeenth-century case studies, one in England and one in the colonies, that both societies understood the rule of law as a brake on governmental power. In England, his discussion focuses on the offer of the crown to Oliver Cromwell in 1657. In that case, Cromwell, as Lord Protector, was effectively king in all but name, but when he was formally offered the crown he refused. By way of explanation, historians have made much of the political constraints operating on him: the army was resistant to monarchy and Cromwell, in turn, was dependent on the army for political support. Significantly, the emphasis in this explanation is on the practical reasons for the *refusal*. Although by no means ignored, less attention has been focused on the rule of law reasons for the *offer*. Put simply, there was concern in parliament about the absence of any constitutionally recognized restraints on the power of a protector. A king and his limited prerogative were known to the "ancient constitution"; a protector and his unbounded power were not. The fear was that of the ruler being free to act outside of the rule of law. As one contemporary observed, "We yet waite upon God and upon his Highness [Cromwell] to establish government by a lawfull authority, and that necessity may bee laide aside" (p. 53).

In America, Reid examines the rule of law in the controversy over discretionary sentencing in the early years of the Massachusetts Bay Colony. In Massachusetts the issue was not so much that sentences were unduly harsh. On the contrary, many of Governor John Winthrop's sentences were considered too lenient. That, however, did not remove them from the shadow of being arbitrary. However reasonable it may have been for Winthrop to want freedom for judges to prescribe individual sentences that would be both Christian and fair, discretionary sentencing was seen as arbitrary. In the end Winthrop was obliged to back down. The result was a victory for "the settlers of Massachusetts who forced their reluctant leaders to codify the law and specify criminal punishments [because they] wanted to be governed by known rules, not by magisterial discretion" (p. 50).

Reid writes, as well, of two other British expressions of the early importance of the rule of law, the trial of Charles I in 1649 and the Declaratory Act of 1766. In the earlier instance Charles, on trial for his life, had made an eloquent defense of the rule of law. He refused to plead to the charges against him on the ground that the ad hoc High Court of Justice had not been established by any known legal authority and had no jurisdiction by which to try him. Charles, who had been accused of subverting "fundamental law" and choosing to rule by his arbitrary will alone, effectively turned the charge against his accusers. In a prepared speech that he was not allowed to give, he wrote of the people's liberty as residing in the law and of there being no hope for the preservation of that liberty "so long as power reigns without rule of law" (p. 30). The king's argument would be of no help to him personally, but it laid down a marker for an understanding of the distinction between the arbitrary exercise of power and the restraints upon that power by the law.

A century later, the Declaratory Act asserted the right of parliament to legislate for the colonies and led, within a decade, to the American Revolution. Parliament had enacted a stamp tax, which was resisted by the colonists as a violation of their constitutional right as British subjects not to be taxed without the consent of their own representatives. That resistance, ultimately successful, marked the watershed between parliamentary sovereignty in Britain and the emergent shield of fundamental law in America. In consequence, Reid sees the American Revolution as the vindication of the rule of law on one side of the Atlantic at the same time it was in full retreat on the other. The rule of law would sur-

vive in Britain, but as something other than as a brake on the exercise of sovereign power. It came to mean something significantly different. Reid concludes that "it may even be that in Great Britain rule-of-law was no longer substantive. It had become procedural only, requiring at most that governmental actions must conform to legislative command while that command could change at legislative will and pleasure" (p. 78).

Reid's treatment of the rule of law and its significance for liberty is tightly focused and largely persuasive. If it is to be faulted, it is for two reasons. In the first instance, Reid has taken on a large topic within the confines of a small book. Treating critical episodes in the Anglo-American story of the rule of law in less than one hundred pages of text, he has necessarily touched only briefly on those episodes, and not at all on the developments that occurred between them. Still, it is a credit to Reid that he has established an important conceptual framework which will invite others to explore it further and go much deeper into detail. The other fault, often found in studies that propound a watershed thesis, is the propensity to see things on either side of the divide in terms more clear cut than they actually were. In equating the early modern rule of law with the autonomy of the law, and seeing the law as determinative rather than subject to will or power, Reid confuses rhetoric for reality. Contemporary paeans to the law, whenever they arose across the seventeenth and early eighteenth centuries, were never really serious about insisting on the law's autonomy. In the early modern culture of the law it was well understood that the law did not have a life of its own. Politicians and controversialists of every stripe who routinely spoke of the sovereignty of the law, understood that the idea of an autonomous law was polemically powerful but nonetheless a fiction. The critical question, therefore, was not whether the law was sovereign, but who in the end would control it.