

FORMAL CONTINUITY OF AMERICAN (COLONIAL) LAW AND ENGLISH LAW

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Key Words:

Common law, statutory law, continuity, colonies, law, charters, parliament, colonial assemblies, constitution, development

Resumé:

The entry deals with problems of formal continuity of early American (colonial) law and English law.

In the first part of the entry are generally analysed the mere material conditions for transmission of English Common law to the specific social environment developing in the early stages of American colonial history, its gradual transformation and influence over transfer of English law patterns to the colonial world. The entry here deals with the fact, that the Common law perceived from the point of view possessed by early colonists presented only relatively distant normative system whose content or conceptual background could not have been known to the colonists in any authentic way and certainly in their minds must have presented only a remote and sometime even hostile phenomenon. Therefore any matching transmission of the English law to the new conditions, which as it must be pointed out by no means corresponded with conditions which the English law anticipated, was out of question.

The growth of early American law was much less an exact duplication of a definite model, than crude and uncomplex imitation of inaccurately remembered things.

Colonists didn't start to turn their attention to what was the Common law of England before plantations itself went through a long social and economical development and of course not before social and economical relations (and especially cultural level) in the colonies itself started to seek more advanced system of normative regulation. In this new conditions the Common law began to constitute an integral component of colonists requirements toward local and imperial, eventually proprietary power.

Further on the entry analyses fundamental sources of normative inspiration of the colonial law, as especially role of local customs well known to the colonists and above all normative provisions of an Old Testament is mentioned and emphasized.

Here too the gradual transition to use of Common law as one of dominant sources of inspiration for the growth of the colonial law is subsequently described.

In the next part, the entry analyses basic formal scope of continuity of colonial and English law formed namely by colonial charters, which presented a fundamental (but also only fragmental) framework of the colonial law (and basic definition of relations between colonial and English law) and by particular reception statutes passed by colonial assemblies, which in one way or in another declared transposition of certain parts of the English law to the colonial legal system. In the context of this reflection there are analysed particular formal delimitations of the mutual relationship between colonial and English legislative, measure of autonomy of colonial law, its vaguely fixed limits and last but not least also mechanisms serving to the reservation of development of the colonial law in relative agreement with the English law, eventually with the interests of English imperial policy.

In this way determinate frame of formal continuity between colonial and English law is afterwards assessed as a mere delimitation of fundamental principles of its mutual relationship rather than as a directly applicable provision, which would enable us to accurate and precise identification of norms of the English law which formed an ineluctable part of colonial legal system or if you like of how verifiably is determinate an extent of autonomous colonial legislature.

The entry further analyses particular directions of colonial legislation. Special focus is here put on the way of adoption or adjustment of particular parts of Common law and Statutory law to the specific conditions of American colonies. Special focus is afterwards dedicated also to the development of some discontinuous elements in American law.

The next part of the entry analyses position of colonies within English empire. Emphasis is here put on the question of applicability of the English unwritten constitution within particular colonies, if you like search for answers on question, whether and if in what extent, it is possible to consider rights and liberties implicated in this constitution as directly applicable on colonial territory. This question is at the same time regarded from the point of view possessed by formal law, as well as in light of aspects of practical possibilities of portability of particular parts of this constitution to the colonial environment. On this place is subsequently step by step demonstrated rising antagonism in perception of the relationship of

English unwritten constitution to the colonies, emerging especially in course of 18th century between colonies and English imperial government.

Following lines then describes factual influence of English unwritten constitution in formation of colonial law and especially attitudes of the colonies toward enforcement of imperial government. The unwritten English constitution is here presented as integral part of requirements of the colonists asking for rights guaranteed to them by colonial charts, as well as important inspiration for colonial legislation.

Final part of the entry then demonstrates problems of institutional relationship between colonies and the English empire. Special attention is here devoted to the indistinct delimitation of position of the English parliament toward colonies and especially to the long-term absence of actually usable delimitation of competence between colonial assemblies and parliament.

In the final summary the author claims, that the mutual relation between English and colonial law is in fact impossible to sum up by simple delimitation of formal continuity. This relation is necessary to perceive in its dynamic and variability. The English law without doubts presented one of the most important starting points of the development of the colonial law, its role however wasn't limited to this extent. In the same time English law went along gradual development of colonial law, supported it and intervened to it practically throughout two centuries.

None of the attempts of formal delimitation of mutual relation between American and English law brought solution, which would constitute unambiguous answer on naturally emerging questions. In the same way we have to conclude that objective answer to the question of the range of rights which colonists, in light of the English unwritten constitution disposed is practically impossible. This relation has never been formally solved, particular findings made on one or second coast of the Atlantic ocean were always subjected to actual doctrine or simply presented display of interpretative opportunism. These problems finally were one of main reasons of crisis, which in the end, led to the war of independence.

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