Legal Mythology

• The House of Lords cannot err, but, thank God, their mistakes can be put right by Parliament.

M M Park
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ABSTRACT: the impotence of man-made law to override natural laws is considered.

KEYWORDS: John Thomas Scopes — Clarence Darrow — William Jennings Bryan — evolution — “monkey” trial — Tennessee — man-made law — natural law — natural science — physical law — physical sciences

[1] There are some laws that are natural and physical. They are beyond the power of men to tamper with. An early example is that of King Canute (or Knut). Here was a ruler fully cognisant of the limits of his powers. Not so his sycophantic courtiers. To disabuse them of their misguided belief in his unlimited regal powers he commanded the tide to recede and promptly got his feet wet. Unfortunately for the memory of this wise old king, he is incorrectly remembered as a vainglorious dill who believed in his power to rule the waves.

[2] Not so Charles Stuart: little did Charles I suspect just how close he was to his God when he asserted the divine right of the monarchy.

[3] John Washington Butler, an elected legislator for the State of Tennessee, is deservedly remembered as a foolish man of unjustified faith in the power of a decree enacted by mere mortals. It was he who announced that he would introduce a Bill to ban gossip in the state.

[4] One measure he did successfully introduce was the Butler Act, otherwise known as the Tennessee anti-evolution law under which John Thomas Scopes was prosecuted by William Jennings Bryan and defended by Clarence Darrow.

[5] There exists some doubt as to whether Scopes did in fact teach (or preach) evolution to his students — Scopes was a mathematics teacher and according to Alfred Holt, Phrase and Word Origins (1961), Scopes told Holt that he did not actually teach the theory of evolution to his students although he believed the theory.
On the other hand, one of the co-counsel for the defence, Arthur Garfield Hays, Let Freedom Ring (1937), writes that —

Howard Morgan, a clean-cut youngster of about fourteen, thereupon testified that he was in Scopes’ class and that Scopes taught the following: “He said that the earth was once a hot molten mass, too hot for plant or animal life to exist upon it; in the sea the earth cooled off; there was a little germ of one cell organism formed, and this organism kept evolving until it got to be a land animal, and it kept on evolving, and from this was man.”

[6] To add further confusion; as a Tennessee state teacher, Scopes was obligated to teach his students pursuant to the authorised text: Hunter’s Civic Biology. This book was prescribed by the State of Tennessee and it set out the theory of evolution — for Scopes to deviate from the set text would have been a crime and yet it was a crime for him to teach his students according to the book.

[7] Of course, the whole episode was a beat-up. One Saturday morning in a Dayton drugstore, the local larrikin, George Rappelyea — a mining engineer originally from New York, Scopes and three local lawyers discussed the just enacted anti-evolution law as reprinted in the Chattanooga Times. The American Civil Liberties Union had announced that it would back any school-teacher who would test the law. Johnny Cash fans will no doubt be pleased to learn that one of the lawyers was Sue K Hicks (a man whose parents had played him a grim joke). Rappelyea figured out how to put Dayton on the map. Would Scopes agree to place himself and his munificent school teaching job in jeopardy? Scopes would. Here was a magnificent opportunity to test the law and make Dayton world famous. No time was to be lost. Other towns, once they caught on, would compete for the publicity of a trial involving Science, the Bible, and Tennessee. Scopes, bemused by it all, approached his fate like a sacrificial lamb — his fate was to be prosecuted by William Jennings Bryan, three times the Democratic Party’s candidate for President of the United States, and to be defended by the legendary Clarence Darrow and Dudley Field Malone and Hays and, wonder of wonders, Hollywood would eventually make a film-play of it all starring Henry Fonda.

[8] Whether or not Scopes taught evolution to his class is irrelevant. The defence did not desire an insignificant victory confined to Scopes alone; they sought to defeat the law itself and consequently declined to take the point that Scopes had not taught
evolution as alleged. The defence was not defending Scopes, it was defending science and the theory of evolution.

[9] The trial fulfilled Rappelyea’s expectations — it was a carnival-cum-circus complete with hot dog vendors, holy-rollers and other assorted ballyhoo artists and, best of all, the renowned journalist H L Mencken was present to report back to the rest of the United States and the whole wide world was watching. What would Mark Twain have made of it all, had he still been alive to witness?

[10] John Washington Butler, the farmer legislator, who introduced the statute, is reported to have said that he never knew that there was more than one Bible until he heard this stated in Court. Apparently he had never heard of the Catholic Bible [of eighty books], or the Hebrew Bible [of sixty-six books], or of any other translations. It is doubtful that he inquired as to the language used in the original Bible and whether he knew that the Hebrew bible was unvocalised and that, by a change in the vowels, important changes in the text could be effected. He did not realise, apparently, that many priests made their own longhand copies (before the age of the printing press) and these priests did not hesitate to make a change for their own purposes. He certainly was not aware that in the fifteenth century it was an offence punishable by death in England to read the Bible in the original tongue and that thirty-nine persons were hanged for this heinous crime. Apparently, John Washington Butler thought, if he thought at all, that the King James version of the Bible was handed down by God in person to Moses in printed form and in the English language — perhaps published under the imprint of the Gideons and left on the bedside table in Moses’ Mt Sinai hotel room. It is of small wonder to us that Moses is known as a prophet given that he was to receive the whole Bible (including the New Testament) back in Old Testament days.

[11] The highlight of the trial was when Dudley Field Malone, unknown to Darrow, announced to the Court that as their first witness, the defence would call the prosecutor William Jennings Bryan. Caught unawares, Darrow suggested that Malone and then Hays should examine the witness. Each in turn declined and it was left to Darrow to examine (or cross-examine?) his own witness in an encounter later
portrayed by Henry Fonda, who for the benefit of younger readers, was the father of “Easy Rider” Peter and Academy Award winner Jane.

[12] Bryan thought that the world was created in 4004 BC, the date appearing in the King James version of the Bible. The calculation was made by Bishop Ussher who figured it out from the ages of the prophets. The Bishop was adamant with regard to the time — not only was the year 4004 BC but the date was the 23rd day of October at nine o’clock in the morning which elicited the interjection “Eastern Standard Time” from a wag sheltering in the anonymity of the crowded courtroom audience.

[13] The eventual outcome of the Scopes case (or the “Tennessee monkey trial” as it is often referred to) was an initial conviction later overturned on appeal. This result ended for a time the passage of anti-evolution laws though sadly there seems to have been a revival of attempts to re-introduce them into the US in the last decade.

[14] Shortly after the 1925 Tennessee debacle, when a similar bill was pending before the Kentucky state legislature, one of the representatives introduced a complementary measure noting that there were other natural phenomena of more concern to Kentucky than evolution: everyone knows that it is too cold in winter and too warm in summer and a law should be passed to compel an even temperature all year round. Similarly, the cost of electric power in Kentucky would be greatly reduced if the law of gravity were repealed thus allowing water to run uphill as well as down. Commonsense prevailed and the Kentucky bill lapsed.

The idea of invalidating “the monkey law” seemed to tickle him [Fortas]. Dean Louis Pollak of Yale Law School called on Fortas during that time and found the justice working on the case. The justice’s portrait, which his former partners had commissioned as a gift for the law school, sat in a corner. Fortas was dubious about the painting, which was impressionistic. He told Pollak that while he worked on *Epperson v Arkansas*, 393 US 97 (1968) he looked at the painting occasionally and tried to decide whether it indicated mankind “ascended or descended from apes”. Kalman, *Abe Fortas: a biography* (1990) 275.

[15] Indiana had a narrow escape in 1899. There, a bill fixing the value of the mathematical constant pi (π) as 4 actually passed through the lower house and it was left to the upper house to salvage the state’s good name for sanity by rejecting the bill.
Such goings on say a lot for the benefits of bicameral parliaments. The only unicameral system in Australia is in that state which until recently was led by a fundamentalist who had publicly supported the Horvath water-powered automobile.

[16] The Indiana measure was house Bill Number 246 and was introduced by Representative T I Record sent there by the enlightened electors of Posey County. When first introduced into the House it was referred to the Committee for Swamp Lands. The unsung hero responsible for having the bill referred to this committee deserves recognition for his astute appraisal of its merits.

[17] The Swamp Lands Committee soon recognised themselves to be in over their heads and moved that the bill be considered by the Committee on Education which reported back to the House of Representatives with a recommendation that it should pass, which it did unanimously — 67 votes to 0.

[18] Thereafter the bill went to the Senate. There it was referred to the Committee on Temperance (perhaps by a kindred spirit of the lower house member responsible for its previous referral to the Committee for Swamp Lands). The bill passed its first reading in the Senate but by then the joke was up and on its second reading this “epoch-making discovery” was tossed out amid much mirth.

[19] It was this recognition of the distinction between natural and man-made law that caused the president of Brinco (the builders of the Churchill Falls Hydro-electric project in Canada) to include in a speech the following passage at a time when relations between the Brinco consortium and the government of Newfoundland were at a low ebb:

    Power cannot be made cheap by decree. The costs of generation and transmission are governed more by the laws of physics than by statements of cabinet ministers or company presidents.

[20] Diplomatically, the passage was deleted in the oral delivery of the speech but it had been handed out to the press beforehand.

[21] One of US President Lyndon Johnson’s favourite stories of the Depression had to do with a young man, desperate for a job, who appeared before a school board
based in the Texas Hill country as an applicant for a teaching position. The board was impressed; the young man was eloquent, well-informed, and conscientious. When the interview ended, one of the board members said, “Well, we think we would like to have you teach and we would like to retain your services. But tell us, there is some difference of opinion in our community about geography. And we want to know which side you are on. Do you teach that the world is round, or do you teach that the world is flat?” Said the desperate young man at once: “I can teach it either way.”

[22] Returning now to Tennessee, in 1976 it was reported that the then 63-year-old state senator Fred Berry, during the traditional end-of-session silly season, introduced a bill to name an official state fossil. When a voice vote was taken amending the bill to nominate Senator Berry as the state’s official fossil, he withdrew the bill.
Author/s: Park, M. M.

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