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THE INHERITANCE OF THE COMMON LAW

HAMLYN LECTURERS

1949 The Right Hon. Lord Justice Denning

1950 Richard O'Sullivan, K.C.

THE HAMLYN LECTURES
SECOND SERIES

THE INHERITANCE
OF
THE COMMON LAW

BY

RICHARD O'SULLIVAN
One of His Majesty's Counsel; Recorder of Derby;
A Master of the Bench of the Middle Temple

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THE HAMLYN TRUST

THE Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn of Torquay, who died in 1941 aged 80. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of dominant character, intelligent and cultured, well versed in literature, music, and art, and a lover of her country. She inherited a taste for law, and studied the subject. She travelled frequently on the Continent and about the Mediterranean and gathered impressions of comparative jurisprudence and ethnology.

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery division of the High Court, which on November 29, 1948, approved a Scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows :—

> ' The object of this charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland the knowledge of the Comparative Jurisprudence and the Ethnology of the Chief European Countries, including the United Kingdom, and the circumstances of the growth of such Jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other

European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them '.

The Trustees under the Scheme number nine, viz. :

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The Trustees decided to organise courses of lectures of high interest and quality by persons of eminence under the auspices of co-operating Universities with a view to the lectures being made available in book form to a wide public.

The second series of four lectures was delivered by Richard O'Sullivan, Esq., K.C., in Leeds University in October and November, 1950.

JOHN MURRAY,
Chairman of the Trustees.

November, 1950.

THE CONCEPT OF MAN
IN
THE COMMON LAW

1

THE CONCEPT OF MAN IN THE COMMON LAW

THE Common Law of England is one of the great civilising forces of the world.

Over a long series of centuries men have recorded their conviction of its essential worth and excellence. In one of the Year Books of Henry VI—the Year Books, which are the record of debates and events in court during a period of two and a half centuries from Edward I to Henry VIII, are the earliest source books of the Common Law—in one of the Year Books of Henry VI an anonymous scribe offers the opinion that 'the law is the highest inheritance of the King by which he and all his subjects shall be ruled. And if there were no law, there would be no king; and no inheritance'. In line with this opinion is an entry in *Hawarde's Reports of Cases* in the last decade of Elizabeth: 'The Common Law is the surest and best inheritance that any subject hath, and to lose this is to lose all. Qui perde ceo perde tout'. In the eighteenth century the same conviction was re-affirmed by the author who gave to the world his imperishable *Commentaries on the Laws of England*. For William Blackstone the Common Law is 'the best birthright and noblest inheritance of mankind'. In passing let us re-mark the line of development of the one constant theme: the inheritance is ascribed in succession to the King, to his subjects, to mankind.

In the decade preceding the *Declaration of Independence* some 2,500 copies of Blackstone's *Commentaries* were purchased and received by the Colonies of the Atlantic seaboard, nearly as many as were sold in England. The Common Law, of which the *Declaration of Independence* and the American Constitution are in many ways the natural offspring, thus became and is today the basis of the law of all the States save one of the American Union. The organic unity of the legal institutions and the legal science of England (and Ireland) and the United States has survived the passage of nearly two centuries of independent legislation and judicial activity.

Australia and New Zealand also belong to the living tradition of the Common Law which guides the course of professional and public opinion and thus determines the character of Federal and of State legislation. The several provinces of the Dominion of Canada also share the inheritance and, though the Civil Code of Quebec is avowedly modelled on the *Code Napoléon*, yet in more ways than one the Common Law has set its mark on the substance of legal justice and on the law of Procedure in French Canada. In like manner the Roman-Dutch jurisprudence of South Africa, and in a measure also the Roman elements in Scottish jurisprudence, have been unable to resist the missionary spirit of the Common Law and have suffered a reception of certain of its leading principles and ideas. In fact the tradition of the Common Law (which has a history of less than a thousand years) disputes nowadays with the older tradition of the Roman Civil Law (which has a history of twenty-five centuries) the hegemony and rule

of the civilised peoples of the world. For the forms of law which govern the continental nations of Europe and their extra-European offshoots or dependencies, however much these laws may have been modified by custom or recast in codes, are still those of the Roman Civil Law.

In tracing the origin and growth of the Common Law one may accordingly hope to satisfy the terms of the *Hamlyn Trust* by indicating some of the privileges that are part of our inheritance, and some of the responsibilities and the obligations that go with these privileges. *Qui sentit commodum debet sentire et onus.* He who takes a benefit must also bear the burden of responsibility that goes with it.

Origin and Growth of English Law

It is, according to the Venerable Bede, in imitation of the Romans—*juxta exempla Romanorum*—that the first recorded utterance of the English Law was written down. 'God's property and the Church's, twelvefold; bishop's fee, elevenfold; priest's fee, ninefold; deacon's fee, sixfold; clerk's fee, threefold.' These are the opening words of the decrees that King Ethelbert is said to have established in the lifetime of Augustine. Perchance they had heard in Kent of the Code that a Christian Emperor of Byzantium had lately given to the world. For Roman law had made its testament just before the English law began to speak. 'Churches, bishops, priests, deacons, clerks—no German institutions these: they are Greek and Latin, names which must be taken up bodily into the language of the new converts.' 'English law', adds

Maitland, ' has no written memorials of its heathenry. Every trace but the very faintest of the old religion has been carefully expurgated from all that is written, for all that is written passes through ecclesiastical hands. A new force has already begun to transfigure the whole aim and substance of our law before the law speaks the first words we can hear.'

In due course the laws of Ine and the West Saxons were also written down ' by the advice of the bishops and the oldest and the wisest men '. The laws of Alfred are introduced by a long preamble, with translations of the Ten Commandments and passages from Exodus, followed by an account of Apostolic history and of the development of ecclesiastical law as laid down by Councils, Oecumenical and English. In these Anglo-Saxon documents there is no trace of the laws and jurisprudence of Imperial Rome as distinct from the precepts and traditions of the Church. In the Ten Articles he published after he obtained possession of England, William the Conqueror proclaimed that ' one God shall be honoured throughout the whole of the kingdom and that the Christian faith shall be kept inviolate '.

King's Courts and Courts Christian

The episcopal laws of the Conqueror direct that ' no bishop shall henceforth hold pleas in the Hundred Court, nor shall they bring forward for the judgment of laymen any case which concerns spiritual jurisdiction; but whoever has been summoned for some suit or offence within the province of episcopal jurisdiction shall make answer in accordance with the Canon Law '.

This separate organisation of temporal and spiritual courts, of the King's Courts and the Courts Christian, or (as they were called at a later time) the King's Ecclesiastical Courts of the Church of England, was confirmed by the first clause of Magna Carta : ' We have granted to God, and by this our present Charter have confirmed for us and our heirs for ever, that the Church in England shall be free and shall have all its laws in their integrity and all its liberties unimpaired '.[1] The twofold jurisdiction and discipline of temporal and spiritual courts was a regular feature of English life down to 1857, and its memory lingers even in our own time.

As King and ruler the Conqueror demanded the personal oath and loyalty of all free men. In 1066, in the Charter he gave to the City of London he recognised the family, and freedom of inheritance : ' I will that every child shall be his father's heir after his father's day and I will not endure that any man offer any wrong to you : God keep you '. It is a mark of tyranny (not unknown in our own time) to thrust men out of their inheritance.

Free and Unfree

The legislation of William the Conqueror, one may observe, recognised a distinction between men who were free and men who were not free. Magna Carta makes the same distinction. In fact, the institution of

[1] Cf. the other provision in Magna Carta: ' We have also given and granted to all the free men of our realm, for us and our heirs for ever, these liberties underwritten, to have and to hold to them and their heirs of us and our heirs for ever '.

slavery, which was a leading feature of pagan civilisation, and which endured throughout the whole history of the Roman Republic and the Roman Empire, continued into the Anglo-Saxon time. All the Germanic peoples recognised slavery. In Anglo-Saxon England the slave trade was active, the main routes being to Ireland and to Gaul. The name of Patrick carries its own memories; and the story of the *Angli* who, in the sixth century, were mistaken by a Pope for *Angeli* in the slave market in Rome. The manumissions of slaves which appear among the old Charters continue in England all through the Anglo-Saxon time. Even more, in his book on Anglo-Saxon England, Professor Stenton states that the central force of old English social development may be described as 'the process by which a peasantry at first composed of essentially free men, acknowledging no law below the King, gradually lost economic and personal independence'. Towards the end of the eleventh century Wulfstan, Bishop of Worcester, who held his place right through the Conquest, protested vigorously against the slave trade that was being carried on from Bristol.

So it was that, when the Conqueror arrived in England, 'the slave was still a vendible chattel and the slave trade was flagrant'. The mass of those who cultivated the soil were slaves or serfs or villeins (or bordarii or cottarii) or otherwise of unfree condition. The Domesday Inquest asks: 'How many villeins? How many slaves? How many free men? How many soke men?' And so on. The slave class was composed of men and women who were slaves by birth, or of those 'who in evil days had bowed their heads for

bread '. The cowherd, the ploughman, the cottar, and their progeny were often serfs attached to the soil and sold with the soil. They were the most valuable part of the stock of the farm and their pedigrees were carefully kept.[2]

Such an order of things was inconsistent with the witness of Augustine that ' God did not make man to lord it over his fellows but only to be master of irrational creatures '; and again that ' the desire to rule over our equals is an intolerable lust of soul '. It was inconsistent also with the declaration of Gregory ' that the main purpose of the Incarnation was to break the chain of slavery by which men are bound and to restore them to their natural freedom '.[3]

The Sense of Equality

The Christian sense of the equality of human nature was reflected in the writings of the canonists and in the legislation of the universal church. In 1215—the year of Magna Carta—a decree of the Fourth Lateran Council—*Omnis Utriusque Sexus Fidelis*—laid a duty on every Christian of either sex who had reached the age of discretion to confess his sins at least once a year and to receive Holy Communion during the Easter time. This sense of human equality passed into the texture of English thought and language and became a leading principle in the law. In the English prose literature of the Middle Ages—in books like the

[2] Holdsworth, *H.E.L.*, ii, 42.

[3] One of the earliest indications of the new spirit that had come into the world is to be found in the exquisite letter of Paul to Philemon.

Cloud of Unknowing and the *Seale of Perfection*, and again in the writings of Sir Thomas More—Everyman is to Everyman an 'even Christian'. The *Canterbury Tales* of Chaucer open in an Inn and end in a Cathedral, the two places within the realm where men and women are wont to meet on equal terms: and they follow a common purpose too on pilgrimage. The thought is explicit in *Piers Plowman*:—

> For we are all Christ's creatures . and of his coffers rich
>
> And brethren as of one blood . alike beggars and earls.

And kings also: 'The medieval king', says Maitland, 'was every inch a king, but just for this reason he was every inch a man and you did not talk nonsense about him. You did not ascribe to him immortality or ubiquity, or such powers as no mortal can wield. If you said he was Christ's vicar you meant what you said, and you might add that he would become the servant of the devil if he declined towards tyranny. In all that I have read I have seen very little said of him that was not meant to be strictly and literally true of a man, of an Edward or a Henry'.

In the course of the twelfth century the Assize of Clarendon and the Assize of Northampton introduce the great conception of the Common Law; the conception of the free and lawful man—*liber et legalis homo*. The lawful man is one who is free from every kind of disability; outlawry, excommunication, non-age, infamy that results from perjury and the like. In the first of the textbooks of the Common Law—the book

that is called *Glanvil*—the 'free and lawful man' is already so to say an institution. The king, by his writs, regularly orders the sheriff to summon so many 'free and lawful men' to determine a matter of fact in dispute between the parties to the litigation. 'Among laymen', says Maitland, 'the time has already come when men of one sort, free and lawful men, *liberi et legales homines*, can be treated as men of the common, the ordinary, we may perhaps say the normal sort, while men of all other sorts enjoy privileges, and are subject to disabilities which can be called exceptional. The lay Englishman, free but not noble, who is of full age and who has forfeited none of his rights by crime or sin, is the law's typical man, typical person.' 'The very idea of a normal person', says Sir William Holdsworth, 'is the creation of a common law which has strengthened the bonds of Society by admitting an equal justice to all its members. All through this period the medieval Common Law was creating the idea of the normal person, the free and lawful man of the English law.'

Free and Villein

In the presence of this noble conception of man slavery ceases. In England, before the end of the twelfth century, anything that could be called slavery in the old Roman sense was extinct. In the course of time all the unfree and dependent classes were merged in one mass under the general title of *villani* (or villeins). All the men of England were now of free or of villein, that is, of unfree status. The mass of the rural population were in this sense unfree. The unfreedom of

the villein was or came to be a relative thing. He was free in face of all men save his lord; against his lord he was protected in life and limb by the criminal law.

In the middle years of the thirteenth century Henry of Bracton wrote his classical work *De Legibus et Consuetudinibus Angliae* (on the Laws and Customs of England). The book has been called the crown and flower of English medieval jurisprudence and had no comparison in literary style or completeness of treatment until, after a lapse of five centuries, Blackstone composed his *Commentaries on the Laws of England.* Taking a text from the Roman jurist Florentinus, Henry of Bracton infused into it new life and energy and declared that ' by virtue of his nature man is free '. On this principle he boldly argues that slaves are entitled to their freedom : *Sed secundum hoc servi sunt liberi.* The Roman Civil Law and the *Jus Gentium* which recognised the institution of slavery are accordingly condemned. *In hac parte jus civile vel gentium detrahit juri naturali.* In this matter Roman Civil Law and the *Jus Gentium* (which was the private international law of the ancient world) run counter to the natural law. In the next sentence, Bracton denounces servitude as a rule of the *Jus Gentium* by which one man is subjected to the dominion of another against natural right and justice (*contra naturam*). The natural law is for him and, one may say, for all the lawyers and philosophers of his time the reflection of the divine wisdom in the mind and life of reasonable creatures, and a first principle of morals.

In this forthright declaration in favour of freedom, the Father of the Common Law comes into collision

with his younger contemporary St. Thomas Aquinas, whose doctrine seems to be that, though the institution of slavery is not prescribed by the primary principles of natural law, yet it appears in the *jus gentium* as a kind of secondary institution, which natural reason established among men; an institution, that is to say, not proper to human nature as such, but of utility and advantage to this or that individual man or woman to whom it may be profitable to serve and to be ruled by one more wise.

Growth of the Common Law

In face of the written Corpus of the Roman Civil and of the Roman Canon Law, the men who first sat down to state the principles and rules of the Common Law, Hubert Walter (afterwards Archbishop of Canterbury) and Henry of Bracton (sometime Chancellor of Exeter Cathedral) were at pains to argue that it is not absurd to call the Law and Customs of England, though they are not written, by the name of law. With the *ratio scripta* of Justinian and of the Canonists before their eyes, they deliberately chose, on the basis of the natural law and with a strong sense of human dignity and of freedom, to elaborate a new and organic system of law that would fulfil their vision of a society of free men and women living in the fellowship of a free community; and, as the instrument of that law, to frame a register of writs that would run in the king's name everywhere, and in time to come in the name of kingless commonwealths on the other shore of the Atlantic Ocean.

The men who thus gave to the Common Law its creative principles and its distinctive energy were not merely writers of textbooks. They were also royal judges charged, like their colleagues, with the duty of administering justice to all manner of men throughout the realm. As the King's Court organises itself, say Pollock and Maitland, 'slowly but surely justice done in the King's name by men who are the King's servants becomes the most important kind of justice, reaches out into the remotest corners of the land, grasps the small affairs of small folk as well as the great affairs of earls and barons. Above all local customs rose the custom of the King's Court: *tremendum regiae majestatis imperium*': the Common Law of England.

In the legislation of the thirteenth and the fourteenth centuries, which reflects the spirit of the Common Law, the distinction between *omnis homo* and *omnis liber homo* disappears.[4] The Statute of Winchester of Edward I lays upon every man, rich and poor alike, active duties of citizenship. Every good citizen must assist the forces of order and government. A statute of 5 Edward III enacts that 'no man shall be attached by any accusation nor forejudged of life or limb, nor his lands, tenements, goods or chattels seized into the King's hands against the form of the Great Charter and the law of the land'. Another statute of 28 Edward III declares that 'no man, of what estate or

[4] In 1252, at the moment almost at which Henry of Bracton was writing his great Treatise, a writ enforcing the Assize of Arms makes it clear that villeins as well as free men were now being called upon to bear arms for the defence of the realm.

condition that he be, shall be put out of land or tenement, nor taken nor imprisoned nor disinherited, nor put to death, without being brought in answer by due process of law '. Sir Edward Coke was thus able in his day to assert that Clause 39 of the Charter (which affords protection to free men) extended also to villeins.

Emergence of the Inns of Court

The withdrawal from the Bench, in obedience to the decrees of the Lateran Council, of the prelates and canonists who were the earliest of the royal judges, brought into view the groups of lay lawyers who had been in course of formation throughout the thirteenth century. 'We see at Westminster a cluster of men which deserves more attention than it receives from our unsympathetic because legally uneducated historians. No, the clergy were not the only learned men in England, the only cultivated men, the only men of ideas; vigorous intellectual effort was to be found outside the monasteries and universities. These lawyers are worldly men, not men of sterile caste; they marry and found families, some of which become as noble as any in the land; but they are in their way learned, cultivated men, linguists, logicians, tenacious disputants, true lovers of the nice case and the moot point. They are gregarious, clubable men, grouping themselves in *hospices* which became schools of law, multiplying manuscripts, arguing, learning and teaching, the great mediators between life and logic, a reasoning, reasonable element in the English nation.' Elsewhere, of the *hospices* which became schools of

law, Maitland wrote: 'No English institutions are more distinctively English than the Inns of Court. . . . Unchartered, unprivileged, unendowed, without remembered founders, these groups of lawyers formed themselves and in the course of time evolved a scheme of legal education: an academic scheme of the medieval sort, oral and disputatious. For good and ill that was a big achievement; a big achievement in the history of some undiscovered continents'.

From the fourteenth to the seventeenth century the Inns of Court constituted a true legal university. In the fine phrase of Dr. Lévy-Ullmann, they were the 'university and church militant of the Common Law'. In a letter to one Faber apropos Sir Thomas More, Erasmus says: *Natus est Londini, in qua civitate multo omnium celeberrima natum et educatum esse apud Anglos nonnulla nobilitatis pars habetur.* In the reign of Elizabeth, Sir Thomas Smith, Regius Professor of Roman Civil Law at Cambridge, exclaimed upon the skill in disputation of the students and apprentices of the Inns of Court, his admiration being particularly excited by the way in which they were apt to handle the matter '*etiam cum quid e philosophia theologiave depromptum in questione ponatur*'. Early in the seventeenth century in his *Description of the Common Law of England*, Sir Henry Finch explains that the rules of reason are of two sorts: some taken from foreign (*i.e.*, other than legal) learning, both divine and human; the rest proper to law itself. Of the first sort are the principles and sound conclusions from foreign learning. 'Out of the best and very bowels of Divinity, Grammar, Logic, also from Philosophy,

natural, political, economic, moral, though in our Reports and Year books they come not under the same terms, yet the things which you find there are the same; for the sparks of all the sciences in the world are raked up in the ashes of the law.'

Throughout the whole period of its creative life and power the Common Law of England was in touch with, sensitive to, and nourished by the tradition of classical and Christian philosophy and theology. Fortified and inspired by all this learning, and their own constant ideals, the Masters and Apprentices at law of the Inns of Court—lawyers and judges like Herle and Gascoigne, Fortescue and Littleton, Rede and St. German, and Thomas More and Edmund Plowden—elaborated over a series of centuries a body of law—private law and public law, for the English constitution is part of the Common Law—that illustrated and embodied the great conceptions of the dignity and the freedom and the responsibility of Everyman that were from the beginning a distinguishing feature of the Common Law of England. And here, it may be, lies the explanation of the claim that one of the greatest of the judges of the Supreme Court of the United States—Justice Oliver Wendell Holmes—was able to make when he declared that the Common Law is ' a far more developed, more rational, and mightier body of law than the Roman ' Civil Law.

The Reasonable Man of the Law

The Common Law starts with man as he is, with man in his actual constitution, as a reasonable being: the

reasonable man of the law. Man thus considered is a being of spirit and of sense.

> What is a man, if his chief good and market of his time
> Be but to sleep and feed? A beast, no more.
> Sure He that made us with such large discourse
> Looking before and after, gave us not
> That capability and god-like reason
> To rust in us unused.

Everyman is, accordingly, a reasonable man; and by virtue of his nature free; for freedom is rooted in reason. The Common Law was therefore intolerant of slavery. The principle that Lord Mansfield put into words in the case of the slave Somersett, was implicit in our law from the beginning: 'By the Common Law of England no man may hold property in another . . . let the black go free'. On the same principle the growth of the Common Law was unfavourable to the existence of a class of villeins or serfs or other men of unfree condition. In the course of time, as we have seen, all the unfree and dependent classes had been merged in one mass under the general title of villein. So long as it survived, the existence of villein status teased the conscience of Englishmen. In the *Doctor and Student* of Christopher St. German (1470–1540) the theologian in the dialogue raises grave doubts as to the righteousness of villeinage: 'Methinketh it first good to see whether it may stand with conscience that one may claim another to be his villein and that he may take from him his lands and goods, and put his body in prison if he will: it seemeth hee loveth not his

neighbour as himself that doth so to him'. Though the villein was not 'at Common Law', he was a *persona*. He had a spiritual life of his own, and was responsible before the doomsmen of the Manorial Court. He managed his own affairs. The lord was not answerable for his acts or his defaults; and though the lord might give him orders he was bound to obey only such orders as were '*licita et honesta*'—lawful and right. The rules of the moral law thus afforded protection to the dignity and the freedom of the simple folk.

Emancipation of the Villein

It used to be thought that the Peasants' Revolt in the reign of Richard II was provoked by an attempt on the part of the landlords to reverse the natural trend of social and economic development, and to reimpose conditions of serfdom. The opinion is no longer held. The revolt was in fact one symptom of a malady which afflicted rural society until villeinage completely disappeared. The failure of the rising was immediate and complete. The natural movement towards the emancipation of the villein which had now been long in progress continued as before; and 'during the fifteenth century a great silent revolution slowly took place'. The mass of men who had been serfs gradually acquired economic independence. 'Lords of manors leased their lands to free labourers or to labourers who were soon to become free, or else tacitly conceded to their peasants the benefits of ownership in their holdings. The rightless villein slowly acquired customary property rights in the land on which he toiled.' 'The fate of the erstwhile villein', we are told elsewhere, 'is

linked with some of the momentous movements in our legal history. . . .' In the early days of Henry III, when Patteshull and Raleigh were judges, the villein was almost protected, even in the Royal Courts. It would, perhaps, be more accurate to say that he had hardly yet been entirely excluded from royal justice. Soon—under the influence it seems of certain lawyers who sought to equate the villein with the *servus* of the Roman Civil Law—the doctrine takes shape which will deprive the villein of his property. Within two centuries the tide begins to turn. 'Custom will be recognised by the Courts of Equity and they will begin the sober task of "receiving" rather than reforming manorial custom.' The man who held his land at the will of the lord holds it now at the will of the lord according to the custom of the manor. In the lifetime of Littleton, the Courts of Common Law follow the example of the Chancery and allow the copyholder to bring ejectment as if he were a freeholder. In his little work on the *Complete Copyholder*, Sir Edward Coke illustrates the spirit at work among the lawyers and the judges. Copyhold had grown out of the old villein tenure but now 'copyholders stand upon a sure ground, now they weigh not their Lord's displeasure, they shake not at every sudden blast of wind! they eat, drink and sleep securely only having a special care of the main Chance, *viz.*: to perform carefully what Duties and Services soever their Tenure doth exact and Custom doth require: then let the Lord frown, the Copyholder cares not knowing himself safe and not within any danger'. In this way the heirs and successors in title of the villein of the fourteenth century are

once again restored to their property rights. 'There are surely few movements in legal history so curious as this silent shifting of property back and forth', writes Professor Plucknett, 'one need only glance at the corresponding processes in France and Russia to realise the gravity of this social revolution which in England was effected without an insurrection, without legislation, and almost without deliberate thought.'

The law of villein status, we may add, was never repealed. It fell into disuse because the persons to whom it applied ceased to exist during the Tudor time. In obedience to its own principles and in the interests of social welfare, the Common Law had come to treat the villein as a free and lawful man. Out of slave and serf and villein the Common Law had created the copyholder and the yeoman. Everyman had at last been raised to the status and the dignity of freedom.

Everyman: A Good and Lawful Man

The achievement of the Common Law was thus slowly to elaborate a social system based upon the dignity of human personality and the intellectual and moral autonomy of Everyman. By virtue of his nature as a reasonable being, Everyman had a title to freedom. A free man is his own man; one who is master of his own acts and answerable for them,[5] one who lives on

[5] At Common Law no man is answerable for the act of another unless he has commanded it or consented to it: *quia quis pro alieno facto non est puniendus.* 'It would be against all reason to impute blame or default to a man where he has none in him, for the carelessness of his servant cannot be said to be his act.' The law of Employers' Liability is not an original rule of the Common Law.

his own, who is able to manage and maintain his own family and rear and educate his own children; one who is able to administer his own property and his own affairs, in a society which is conceived as an association of families of free and lawful men and women, living in the fellowship of a free community.

Everyman is presumed at Common Law to be a good and lawful man. The principle was laid down from the beginning by Henry of Bracton: *De omni homine presumitur quod sit bonus homo donec probetur in contrarium.* Everyman is presumed to be a good man, free from crime and sin and wrongdoing, until the contrary is proved by lawful evidence. The principle is of primary importance. Everyman is presumed to be a good man (for all his frailty) and a friend at heart to his fellow-man. 'There is in man a natural inclination to the love of all men: as if Everyman was to Everyman a familiar and a friend.' The doctrine of Aquinas is echoed in the *Utopia* of Sir Thomas More: 'No man ought to be counted an enemy who hath done no injury. The fellowship of nature is a strong league, and men be better and more surely knit together by friendship and benevolence than by covenants of leagues, by hearty affection of mind than by words'. The thought of Erasmus is in line with that of his friend. 'Nature, or rather God, hath shaped this creature (that is, Man) not to war but to friendship, not to destruction but to health, not to wrong but to kindness and benevolence.' On the basis of this natural friendship, Franciscus de Vitoria, a contemporary of More and Erasmus, and one of the Spanish founders of international law, lays down the principle

that Everyman has a right to speech and intercourse with Everyman and (within the limits of justice) to exchange goods with him. The doctrine of the Common Law as to the good character of natural man is in line with the teaching of modern anthropologists like Professor Elliot Smith, in his book on *Human History*.

The law and the lawyers are naturally aware of the actual existence of crime and wrongdoing. On an early page of his celebrated work, the *De Laudibus Legum Angliae*, Sir John Fortescue refers to the effects of 'original sin', and to the need, in those who strive after law or virtue, of the assistance of divine grace. The exclamation of an evangelical or nonconformist divine on seeing some criminals taken to execution: 'But for the grace of God there goes John Bradford', has found and finds an echo in many minds upon the Bench and at the Bar.

'For every man with his affects is born
Not by might master'd but by special grace.'[6]

Though conscious of human frailty (which it is the office of the Church through her sacraments and the grace of God to cure), the Common Law has no hint of the radical corruption of human nature, of the teaching of Thomas Hobbes that Everyman is at heart evil and enemy to Everyman, *homo homini lupus*; and that the natural life of man is 'solitary, poor, nasty, brutish and short'. If men are of an evil nature, it is

[6] The thought of Shakespeare was anticipated in a passage of *Piers Plowman*:

Therefore these words . be written in the Gospel
Ask and it shall be given you . for I give all things,
And that is the lock of love . that letteth out my grace,
To comfort the careworn . cumbered with sin.

necessary that they be coerced by an external authority to lead them to decent courses and ways of living. The teaching of Thomas Hobbes leads straight to the totalitarianism or the neo-totalitarianism of our time.

The ideas and institutions of the Common Law lead in the opposite direction, towards the establishment of men and women in individual and constitutional freedom. The transformation over a whole course of centuries of slave and serf and villein into the copyholder and the yeoman is a singular proof of the power and the energy of a great ideal. The social type which the Common Law of England was designed to produce was the yeoman and the small owner : free, responsible, independent, God-fearing. ' Whatever the future may contain ', says Professor R. H. Tawney, ' the past has shown us no more excellent social order than that in which the mass of the people were the masters of the holdings which they ploughed and of the tools with which they worked, and could boast with the English freeholder that " it is a quietness to a man's mind to live upon his own and to know his heirs certain ".'

Pith and Substance

In the reign of Elizabeth, according to William Harrison, it was by the copyholder that ' the greatest part of the realm doth stand and is maintained '. It was, we are told, the increase in free personal status of those who had lately risen from an estate of villeinage and the advantage they took of that freedom to move about and improve their condition that brought many tenants to the condition of yeomen. The fact that the lands of yeomen were their own or under their

direct control, bred in them (according to Dr. Notestein), a sense of pride and a personal interest and responsibility not discernible nor to be expected in the poorer husbandmen and tenant farmers who worked at somebody else's bidding. Sir Thomas Smyth, Secretary of State to Queen Elizabeth, called the yeoman 'the liver veins of the Commonwealth, yielding both good juice and nourishment to all other parts thereof'. To Nathaniel Newbury they were 'the pith and substance of the country'. They were, indeed, on several counts 'the backbone of the English nation'.

In *Cases and Causes*, it is said that 'the law of England hath conceived a better opinion of the yeomanry that occupy lands than of tradesmen, artificers, or labourers'. None the less, the tradesmen, artificers and labourers had their own proper dignity and status. The ideal of the Common Law was a moral ideal: honest manufacture, a just price, a fair wage, a reasonable profit. 'To supply a bad article was morally wrong, to demand excessive payment for goods or for labour was extortion, and the right and wrong of every transaction was easily understood.'

In the industrial economy the counterpart of the yeoman was the small proprietor and the small independent craftsman. It was this class, says Dr. Lipson, which enlisted the unstinted praise of contemporaries, and ever since has been held up to the admiration of posterity.

As a revelation of English social life and aspiration in the opening years of the seventeenth century the Registers of the University of Oxford for the period

1557–1622 provide some interesting material. The Registers show :

Sons of Noblemen (Earls, Lords and Barons)	84
Sons of Knights	590
Sons of Esquires	902
Sons of Gentlemen	3615
Sons of Plebeians	6635
Sons of the Clergy	985
Those whose status is not given	758

In the portraits that Shakespeare draws of the minor characters that fill in the background of his plays—the Fool in Lear, the Gardeners and the Groom in Richard II, old Adam in As You Like It, we catch a reflection of the ordinary man as he appears in the society of the seventeenth century.

Take Corin, the shepherd, in his answer to Touchstone :

> ' Sir, I am a true labourer : I earn that I eat, get that I wear ; owe no man hate, envy no man's happiness ; glad of other men's good, content with my harm ; and the greatest of my pride is, to see my ewes graze and my lambs suck.'

Changing Course

Soon after the middle of the seventeenth century the whole course of English social history was changed. The small holder and the small proprietor began to decline and to disappear. According to Mr. Arthur Johnson, in his Ford Lectures for 1909, the period of intensive disappearance of the small freeholder was in the century 1660–1760. The really critical period it

seems, was ' somewhere after 1688 '. The general drift of property in the sixty years after 1690 was in favour of the large estate and the great lord. The Houses of Parliament, the central executive and local bodies of administration, all worked towards a common end : the advancement of the interests of a great commercial and land-owning aristocracy. Parliament (now beginning to think of itself as Omnipotent and above the moral law) assisted enclosure by allowing it to be effected by a series of Private Acts. Arthur Young says that by nineteen out of twenty Enclosure Bills the poor were injured and some were grossly injured. A very poor man might truly say : ' I had a cow, and an Act of Parliament has taken it from me '. The small farmer was beaten by the larger man just as the small craftsman found himself unable to compete with the commercial spirit of the great masters of the new industry. In despair he abandoned his holding to seek a new life in town or abroad; or fell back into the class of landless labourers whose numbers had already been recruited from the cottagers. Within a century of 1689, the yeomanry, once the pride of the nation, had been annihilated. In 1770 Goldsmith wrote *The Deserted Village*. When John Stuart Mill penned his *Treatise on Political Economy*, the yeoman was only a memory : ' The yeomanry who were vaunted as the glory of England while they existed, and have been so much mourned o'er since they disappeared were either small proprietors or small farmers, and if they were mostly the last, the character they bore for sturdy independence is the more noticeable '. The first use of the Omnipotence of Parliament was thus to attack and

to undo the small farmers and the small proprietors. Omnipotence has no fellowship with freedom. The effort of successive Parliaments to undermine and to undo the independent type of citizen, has continued into our own time. Is it possible that Parliament is intolerant of the idea of the free and lawful man?

In relation to the Common Law, Lord Macmillan has lately said : ' The lover of our ancient laws and institutions . . . cannot but look with some dismay at the process which we see daily in operation around us, whereby the customary Common Law of the land, which has served us so well in the past, is being more and more superseded by a system of laws which have no regard for the usages and customs of the people, but are dictated by " ideological theories ". There will soon be little of the Common Law left either in England or in Scotland, and the Statute Book and vast volumes of statutory rules and orders will take its place. The work of our courts is more and more concerned with the interpretation of often unintelligible legislation, and less and less concerned with the discussion and development of legal principles. . . . It is of vital importance that the new policy, while truly promoting liberty by securing better conditions of life for the people, should not, in its zeal for interference, deprive them of their initiative and independence, which were the nation's most valuable asset '.

In a recent broadcast Professor Glanville Williams has plainly said that a new philosophy of man is now being substituted for the old philosophy of the Common Law. The Common Law conception of a man, ' stalwart, independent, self-reliant ', is being replaced by a new

concept—the 'statutory man'—'a creature whose vigour is retarded by a maze of regulations', but who is said at least to be 'better cushioned against the buffetings of life'.

A recent book by Douglas Jay, M.P., gives an insight into the new concept: 'Housewives as a whole cannot be trusted to buy all the right things, where nutrition and health are concerned. This is really no more than an extension of the principle according to which the housewife herself would not trust a child of four to select the week's purchases. For in the case of nutrition or health the gentleman in Whitehall really does know better what is good for people than the people themselves'.

The new creature of the Statutes and the statutory rules and orders is, it would seem, in some sense mentally and morally incomplete, not to say defective; and needs for the perfection of his mind and will the light of the anonymous gentleman in Whitehall which lighteth Everyman that cometh into the realm. Even a long and expensive education which costs the country some hundreds of millions a year seems to be insufficient to raise this statutory creature to the ordinary level of mental and moral competence.

The future, it seems, is to be a struggle between this statutory creature and the reasonable man of the law: the free and lawful man. The struggle may not finally be determined in England, for the Common Law is now an inheritance of mankind. Even in England we may be sure which way the verdict will go in the final round of the contest between this novel creature of impaired intelligence and dependent will and the

reasonable and responsible man of flesh and blood, of sense and spirit, who has been from the beginning the ordinary man of the law.

The ordinary man of the law who is the despair of the Gentleman in Whitehall may yet be the hope of the world.

THE FAMILY

2

THE FAMILY

'THE household is a mean between the individual and the city or the kingdom.' In the classical and the Christian tradition which animates the Common Law, the political community consists in the last analysis of three elements: the individual, the family, the City or State (or *Polis*).

In fact our lives are lived not on one level only but on three different levels. There is the level, out of doors, of the forum and the market-place, which is the proper plane of politics. There is again the deeper and more intimate level of our life, indoors, of the hearth and of the home. The relation of husband and wife and of parent and child is something other and deeper than the simple relation of citizen and citizen which is the foundation of politics. The life of the family is lived on a deeper level—of physiology, of biology, of psychology—than the life of burgesses on the hustings and in the market-place.

On a still deeper level than the life of the family is the intimate life of the mind and conscience where Everyman is 'alone with the Alone'. It is the lesson of Seneca and of the Stoics as well as the lesson of the Gospels. 'The first rule for the good order of the soul is to seek peace within oneself.' 'If I have few companions, I am content; if I have only one companion, I am content; if I have no companion, I am content.'

'But when thou art praying, go into the inner room and shut the door upon thyself and so pray to thy father in secret; and the father who sees what is done in secret will reward thee.'[1]

Ethics, Economics, Politics

To guide and discipline our life on each of these three levels of living, there were, in the thought of Aristotle and of Aquinas (both of whom greatly influenced the philosophy of the Common Law)[2] three several sciences. 'The individual good, the good of the family and the good of the City or Kingdom are different ends, wherefore there must be different species of prudence (*sc.* of the science of living) corresponding to these different ends.'

The science proper to the life of the mind and conscience was the science of ethics; the science proper to the life of the family was the science of economics;

[1] One may refer here to a beautiful passage written by the most illustrious of the Common lawyers while awaiting death in the Tower of London: 'Let him also choose himself some secret solitary place in his own house, as far from noise and company as he conveniently can. . .'. See *Dialogue of Comfort against Tribulation* by Sir Thomas More, edited by Philip E. Hallett, Burns Oates (1937), at p. 155.

[2] One may refer to the writings of Sir John Fortescue *passim*, to the *Doctor and Student* of Christopher St. German, and to the comments in Vinogradoff, *Collected Works*, Vol. II, on *The Sources of the Law*; to the speeches and the writings of Sir Thomas More who was, according to Stapleton, an accomplished scholar in the works of Aquinas as well as of Aristotle; to the *Commentaries* of Plowden (1599), pp. 303–4. The flourish with which Littleton concludes his work on *Tenures*, *lex plus laudatur quando ratione probatur*, reads like a paraphrase of Aquinas (S.T. 1a 2ae 95.2). See also, *e.g.*, *C.* v. *C.* [1921] P. 399–400; and *J.* v. *J.* [1947] P. 158. The Year Books also contain many relevant passages.

the science proper to the life of the community was the science of politics. If the teaching of these great masters sounds strange in our ears it is because in modern times we have been taught to think of the community (or the State) as a simple aggregation of individuals, rather than of families. Sir Henry Maine stated the current view when he wrote, in 1861, that 'the unit of an ancient society was the family; of a modern society, the individual'. This way of thinking we owe to the early economists of the eighteenth and the nineteenth centuries who conceived society in the image of two or more men cast on an otherwise uninhabited island.[3] In the Utopia of their fancy there were no women and no families and no children. All the problems of life and politics were reduced to a simple matter of emphasis or of choice between the Individual on the one hand and the Collectivity on the other hand. In his Lloyd Roberts Lecture for 1948, Mr. Richard Titmuss protested that an area of conflict stretches over much of our social and economic policy, not because we do not care about the family but because we do not think about the family.

In contrast with the economists, the wisdom of our forefathers saw in the family group the natural unit of society, the source of life alike of the Church and of the State; and a principle of identity and of continuity, as William the Conqueror recognised in the Charter he gave to the City of London: 'I will that

[3] In the middle of the nineteenth century Walter Bagehot protested that every treatise on political economy which he read in his youth began with the supposition that two men were cast on an uninhabited island. See Dicey, *Law and Opinion in England* (1919), p. 412.

every child shall be his father's heir after his father's day'. The Law of Succession is in truth an attempt to express the family in terms of property.

In the tradition of western civilisation marriage, which Lord Westbury called 'the very foundation of civil society', is understood to be the voluntary union for life, of one man with one woman, to the exclusion of all others. An American Chief Justice has said: 'The institution of marriage is the first act of civilisation; and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals and of laws'. A man cannot at one and the same time have more than one wife, or a woman more than one husband. To contract a new marriage before the expiration of the first is an offence against the law. The rule of monogamy is based on reason and experience, and is designed to secure a certain equality in the status of husband and wife, and the order and unity, in love and peace, of the household in which the children are born and brought up. The child of human parents is a dependent creature, and, until it reaches the age of twenty-one, is in our law in the technical sense an infant. At twenty-one it reaches maturity, and as we say it comes of age. There is no provision in English law for the emancipation of a son or of a daughter. At the age of twenty-one they become independent and *sui juris*.[4]

[4] In contrast with the Common Law the Roman Civil Law vested the *paterfamilias* with sovereign power. He could control his son of any age; he could forbid his marriage at any age; he could force a marriage on him; he could compel him to divorce his wife; he gave his daughters in marriage. His

The Stability of Marriage

In the interests of the child or of the children it is necessary that the relation of marriage should possess a certain stability, that it should endure. It is in the highest interest of the children that the marriage should endure until the youngest child has reached maturity, that is to say, until the child is able to take full care of itself and provide for itself. In the order of nature, Aquinas points out that in the lives of those animals in which the female suffices for the rearing of the offspring, the male and the female stay no time together. In the case of animals in which the female by herself does not suffice for the rearing of offspring, male and female dwell together so long as is necessary for the rearing and training of the offspring, as, for instance, in the case of birds whose young are incapable of finding their own food immediately after they are hatched, there is in the male a natural instinct of standing by the female for the rearing of the brood. In the human order, the mother of the child is insufficient of herself for its rearing and education. It is fitting, therefore, that the husband should stand by the woman until the child is fully reared. Again, children need instruction and a certain measure of discipline, and not least on the part of the husband in whom 'there is at once reason more perfect to

disciplinary powers were unfettered, any chastisement was permitted, even capital punishment. The *paterfamilias* owned all the property and determined its distribution within the household. No claims could be made by the members of the household against the *paterfamilias*, no claim to maintenance, no right to a dowry on the part of a daughter. See *Roman Law and Common Law*, Buckland and McNair, pp. 35–37; and Schulz, *Principles of Roman Law*, p. 166.

instruct and force more potent to chastise'. In the intellectual and moral order, guidance and discipline are particularly necessary at the age at which boys pass into manhood and girls into womanhood. All this line of reasoning is confirmed in our own time by the psychotherapists who assure us that 'the best guarantee of a happy adult life is a childhood spent in the visible love and protection of both parents'.

In the tradition of the Common Law the natural unit of the family is fully recognised, and the father stood forth as the representative of the family before the law. The economic unit of an early time was the 'hide' of land, which was the amount of land necessary and sufficient to maintain a normal family according to some measure of decent comfort.[5] 'The land of Everyman', writes St. German, 'is in contemplation of law enclosed from others, though it lie in the open field; and therefore if a man do trespass, the writ shall be "*quare clausum fregit*".' Within the homestead, the father will undertake the rule of the family, and the education of the children and the management of his own property and the administration of his own affairs. The Peace of our lord the King will be matched by the Peace of every homestead in the land. 'The house of Everyman is to him as his castle and fortress as well for defence against injury as for his repose. . . . *Domus sua cuique est tutissimum refugium.*' 'The privities of husband and

[5] One may remark that in the Irish Agrarian Reforms which began in 1870, the unit taken was the 'economic holding' which is again the amount of land necessary and sufficient to maintain a family. In an industrial economy the 'living wage' is again defined by reference to the family.

wife are not to be known.' More than once, even in our own time, the courts have recognised the father's undoubted right 'as master of his own house, as king and ruler in his own family, to enforce his command by his own authority within his own domain'. 'The Common Law', said Lord Atkin, one of the greatest of our judges, in 1919, 'does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for little in these cold courts. The terms may be repudiated, varied or renewed, as performance proceeds or as disagreements develop, and the principles of the Common Law as to exoneration and discharge, and accord and satisfaction, are such as find no place in the domestic code. The parties themselves are advocates, judges, court, sheriff's officer and reporter. In respect of these promises each house is a domain into which the King's Writ does not seek to run, and to which his officers do not seek to be admitted.' [6]

Unity and Autonomy

These citations and references illuminate the conception that the Common Law had of the unity and of the autonomy of the family. The family was in a sense an *imperium in imperio*, a separate domain in which the King's Writ did not seek to run. The right of a father to the custody and the care and the education of his children and their religious training was

[6] *Balfour* v. *Balfour* [1919] 2 K.B. 571, 579.

fully recognised. If it appeared that direct and serious injury might happen to the child through its being under the control and custody of its father, the Court of Chancery, representing the King as *parens patriae*, might interfere to protect the child, and was under obligation so far as possible to act as an affectionate and careful parent in its interest and for its welfare. In the Court of Appeal in 1883 the rule was stated: 'The court holds this principle that, when by birth a child is subject to a father, it is for the general interest of families and for the general interest of children, and really for the interest of the particular infant that the court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising the power which nature has given him by the birth of the child. . . . The right of the father to the custody and control of his children is one of the most sacred of rights. No doubt the law may take away this right, or may interfere with his exercise of it just as it may take away his life or his property or interfere with his liberty, but it must be for some sufficient cause known to the law'. And Lord Justice Bowen added: 'The court must not be tempted to interfere with the natural order and course of family life, the very basis of which is the authority of the father, except it be in those very special cases in which the State is called upon to set aside the parental authority and to intervene for itself. . . . To neglect the natural jurisdiction of the father over the child until the age of twenty-one would really be to set aside the whole course and order of nature, and it seems to me it would disturb the very

foundation of family life. . . . The father has the natural authority. As a rule this court does not and cannot interfere because it cannot do so successfully or, I should rather say, because it cannot do so with the certainty that its doing so would not be attended with far greater injury both to the infant itself and to the general social life '.[7] In a more recent case [8] the Court of Appeal referred with apparent approval to an article in the *Summa* of St. Thomas Aquinas in which the question is asked whether the children of Jews and unbelievers ought to be baptised against the will of their parents. The answer is given ' that a child being, after its birth and until it reaches a certain maturity of mind, enfolded in the spiritual care of its parents (*sub quodam spirituali utero parentum*) it would be contrary to natural law and justice if it were taken away from its parents' custody or if anything were done to it against their will '.

Sanctity of the Home

The law had a profound respect for the institution of the Family and for the status and the dignity of the parents who give life to the community. The language of an Irish judge has been cited with approval in the English courts : ' The authority of a father to guide and govern the education of his child is a very sacred thing bestowed by the Almighty and to be sustained to the uttermost by human law. . . . For the parent and the child alike its maintenance is essential that their reciprocal relations be fruitful of happiness and

[7] *Re Agar Ellis* (1883) 24 Ch.D. 335, 336.
[8] *Re Carroll* [1931] 1 K.B. 317.

virtue'. Though the Common Law had thus a deep and one may say a religious sense of the sanctity of the home, and of the office and of the dignity of the parent, it remains to add that, throughout the period which stretches from the Norman Conquest to the Reformation, England had no temporal law of marriage. Marriage was a sacrament, and subject therefore to the law and jurisdiction of the Church. At the opening of his fourth book, which, following the classical order of the Canon Law, deals with *Sponsalia*, Lyndwood, the leading English canonist of the fourteenth century, writes: 'Here we might discuss what is marriage, whence it derives its name, how it is contracted, where it was instituted, what are the causes of its institution, what good flows from it, and what impediments there are to it'. And he adds: 'Of all these matters Innocentius has treated, and yet more fully Johannes Andreae'. In other words, to ascertain what is the English law of marriage, one is referred to the works of these two canonists, of whom one was '*laicus et uxoratus*' and the other of whom was Pope.

The King's courts were accordingly never called upon to say in so many words whether a marriage was valid or invalid, or to grant a decree of nullity or of divorce *a mensa et thoro*, or to say whether a child was legitimate or illegitimate. Adultery was not, bigamy was not, incest was not an offence punishable by the temporal courts.[9]

[9] By a statute of James I, bigamy was made a felony punishable by the temporal courts. Incest was made a criminal offence by statute in 1908.

Apart from matters of ecclesiastical economy and of ecclesiastical status, of the ordination and the degradation of clerks and of all purely spiritual functions, the Courts Christian in England had jurisdiction over the laity in all matters concerning marriage and divorce (*a mensa et thoro*) and legitimacy.[10]

The Marriage of Slaves

The law administered in the Courts Christian was the Canon Law or *Jus Commune* of the Roman Church. In the middle of the twelfth century, when Gratian, a monk of Bologna, endeavoured in his *Decretum* to state the law of the Universal Church, the authorities he used were canons new and old, Decretals new and old, passages from the Scriptures and the Fathers, established customs, and rules taken from the Roman Civil Law. The reception and the use in England of the *Decretum* of Gratian, and the Decretals, that is to say, decisions given by successive Popes on points of law proposed for their determination, is well attested. In the reign of King Henry II, an English pope, Adrian IV, being asked to determine whether the marriage of slaves contracted without the consent or against the will of their masters were to be treated as invalid and void in the ecclesiastical courts, answered in a Decretal letter that 'as in Jesus Christ there is neither free nor slave and the sacraments are open to all, so also the marriage of slaves must not be prohibited; and even if the contract is made without the

[10] The Courts Christian also had an exclusive jurisdiction over testamentary causes and the distribution of the goods of intestates.

consent or against the will of the master (so as to be invalid according to the Roman Civil Law) the marriage is not to be dissolved or declared void in the Ecclesiastical Court'.

It is a noteworthy fact that out of some 400 Decretals of one of the great lawyer popes, Alexander III (1159–1181), about 180 were directed to England. The fact that one in three of the Decretals of Alexander III of permanent importance had English cases for their subject-matter is, according to Professor Maitland, one of the most prominent facts in the history of the Church in England in the Middle Ages.[11]

Papal Decisions

In certain of these Decretals some of the leading principles of the Canon Law of marriage were defined. Thus, in a letter to the Bishop of Norwich, the Pope distinguishes *sponsalia per verba de presenti* and *per verba de futuro*.

'We understand from your letter that a certain man and woman at the command of their lord mutually received each other, no priest being present and no such ceremony being performed as the English Church is wont to employ, and then that, before any physical

[11] The putting of difficult questions was not always encouraged. The answer to a question proposed by Archbishop Richard of Canterbury opens with the cheerful words: *Qua fronte?* 'With what face dare you consult us about questions of law which we can scarcely understand seeing that you are said to be perverting the order of justice in matters that are plain and free from doubt?' Another reply to an English correspondent concludes with the genial words: '*Ita quod nos propter hoc iterato tibi scribere non compellamur*'.

union, another man solemnly married the same woman and knew her. We answer that if the first man and woman received each other by mutual consent directed to time present saying the one to the other "I receive you as mine" (*meam*) and "I receive you as mine" (*meum*), then albeit there was no such ceremony as aforesaid, and albeit there was no carnal knowledge, the woman ought to be restored to the first man, for after such consent she could not and ought not to marry another. If, however, there was no such consent by such words as aforesaid and no union preceded by a consent *de futuro*, then the woman must be left to the second man who subsequently received her and knew her, and she must be absolved from the suit of the first man.'

The Decretal sums up in few words the current doctrine of the canon law. 'On the one hand stands the bare consent *per verba de presenti*, unhallowed and unconsummated; on the other a solemn and consummated union. The formless interchange of words prevails over the combined force of ecclesiastical ceremony and sex relation.'

Again, by a mandate or Decretal addressed by Alexander III to the Bishop of Exeter the Church became definitely committed to the rule of the Roman Civil Law that children born out of wedlock are legitimated by the subsequent marriage of their parents.

Ethos of the Common Law

Neither of these Decretals—the Decretal recognising marriage by the formless interchange of consent *per*

verba de presenti, and the Decretal legitimating children by the subsequent marriage of their parents—was entirely to the taste or liking of the early masters of the Common Law. These men, some of them prelates of the Church who, we are told, 'might at any time be called upon to learn the lessons in law that were addressed to them in papal rescripts', were consciously attempting at this time to formulate a new system of law, founded on Christian principles, which was destined in the centuries to come, to rule countries and continents unknown and undiscovered in their day. The law they were fashioning—the Common Law of England—would have an *ethos* quite different from the *ethos* of the Roman Civil Law which (for all that it was promulgated by a Christian Emperor) was essentially a pagan system of law. These early common lawyers thus engaged in the formulation of a new system of law were, it seems, inclined to think that they were as good lawyers as the popes; and better Christians than the continental canonists in circumstances and cases in which the canonists adhered too slavishly or followed too closely the example of the Roman Civil Law. Holding from the first that law and justice is a *public* thing, the man who wrote the first textbook of the Common Law, 'the book that is called Glanvil', Hubert Walter, now Archbishop of Canterbury, with a saving clause for the honour and privilege of the Roman Church, published in a Council at Lambeth in A.D. 1200, a Constitution which declared that no marriage was to be celebrated until after a triple publication of banns,

and that no persons were to be married save publicly, in the face of the Church and in the presence of a priest. At the Lateran Council in 1215, Pope Innocent III extended over the whole of Western Christendom the rule and custom of publishing the banns of marriage.[12]

In 1563, by the Decree *Tametsi* of the Council of Trent, in places still subject to the jurisdiction of the Roman Church, marriage ceased to be a contract needing no external formalities and holding good by simple consent. It became a solemn contract, invalid unless celebrated in the presence of three witnesses, one of whom must be the local parish priest or his delegate. In the Codex of Canon Law of 1917 the legislation initiated at Trent, hitherto limited to certain countries, was made of general application.[13]

Dispute about Legitimation

Likewise on the point of legitimation, the English judges and lawyers showed little liking for the rule of the Canon Law, derived from the Roman Civil Law,

[12] A marriage with banns thus acquired certain legal advantages over a marriage without banns though in England and elsewhere, until the due publication of the Decrees of the Council of Trent, a formless, unblessed marriage was still technically a marriage. Hubert Walter directed that persons marrying otherwise than after publication of the banns should not be admitted into the Church without a licence from the bishop.

[13] In England by a statute of 1754 no marriage was to rank as valid unless celebrated in the parish church of the parties and after due publication of banns: the Archbishop, however, having power to grant special licence for a marriage to be contracted elsewhere, and without the delay entailed by banns; and the Bishop retaining the right to dispense from banns.

which legitimated by the subsequent marriage of their parents children who were born before the marriage. In this connection again, the man who wrote 'the book that is called Glanvil', Hubert Walter, afterwards Archbishop of Canterbury, speaks of the '*canones legesque Romanorum*' with a tone of aversion. At the Council of Merton in 1236 the aversion of English layfolk and lawyers to this rule of the Civil and the Canon Law, became vocal when they declared with one voice that they were unwilling to change the laws of England—*nolumus leges Angliae mutare*—so as to enable children born before the marriage of their parents to inherit English land. The famous *Nolumus* of the Council of Merton appears to have expressed not only a national but also a professional conservatism: 'It was no baron', says Professor Maitland, 'but a lawyer, an ecclesiastic, a judge, Bracton's master, William Raleigh, who had to meet the clerical forces and to stand up for English practice against the laws and canons and consensus of Christendom'. Nor does the line he took in opposition to a long and powerful argument contained in a letter from Robert Grosseteste, the famous Bishop of Lincoln, appear to have prejudiced the ecclesiastical career of William Raleigh, who was at the time a canon of St. Paul's, and who was in the course of years promoted to be Bishop of Norwich and afterwards of Winchester.

In his day, and on this point of controversy about the legitimation of bastards, Henry of Bracton, the father of the Common Law was, we are told, 'as staunch an opponent of the *leges* and *canones* as the

most bigoted baron could be'. In the fifteenth century Sir John Fortescue, Chief Justice, whose little Dialogue on *Faith and Understanding* 'bears witness to the vivid religion of a busy man of affairs, a religion which rings as true as the cloistered virtue of à Kempis', upholds against the *leges* and *canones* the English rule, for which he gives a curious and interesting reason: 'Illegitimate children contract from their procreation a blemish over and above that contracted by legitimate issue, for it is the culpable and mutual lust of both their parents that contrives their engendering, which is not wont to prevail in the lawful and chaste embraces of married couples'. After a reference to the Book of Wisdom, and to the story of the man born blind in the Gospel of St. John, he adds, with the approval of the Prince in the Dialogue, that the law which makes bastards by birth equal to legitimate offspring in the matter of inheritance, does not observe the right distinction, seeing that the Church regards them as unequal in the succession to spiritual office (*in hereditate Dei*), and Holy Scripture also marks the difference, and Nature distinguishes them in her gifts, marking illegitimate children with what appears to be a natural blemish, 'though it be latent in their minds'.

In the ordinary course of things if an issue of legitimacy arose incidentally in a case in the King's court it was determined by referring the matter as a point of law to the Court of the Ordinary for his certificate. If, however, the case had to do with the inheritance of land the King's judges assumed the right to refer to

a jury as a point of fact the question whether the person concerned was born before or after the marriage of his parents; and according as the answer was one way or another he was allowed to succeed or forbidden to succeed to the inheritance.[14]

The difference in *ethos* between the Common Law and the Roman Civil Law appears again in their attitude to the sex relation outside marriage. The Roman Civil Law and the law of the countries that retained the tradition of the Roman Civil law recognised—and recognise—brothels as a necessary institution. The *maison tolérée* continues to exist in certain countries of the Roman Law tradition in Europe and elsewhere, and existed even in France until the liberation at the end of the last world war. To keep a brothel or a bawdy house is in the Common Law of England a criminal offence. That is not to say that such houses have never existed or do not exist within the realm. The point is that their existence has never had the sanction of the law or of public opinion. In fact not only were bawdy houses forbidden by law but the practice of fornication was an offence punished by the imposition of a fine or *leyrwite* in the manorial courts.[15]

[14] After the Reformation, for reasons there is no time to trace, the rule of the Common Law Courts came to prevail in all but purely ecclesiastical causes. In 1926 the Common Law rule was abolished by a statute which introduced the principle of legitimation by subsequent marriage of the parents and which, after seven centuries, gave the substance of victory to the *leges* and *canones romanorum*.

[15] Again, in the English law, unnatural practices between males were in the reign of Henry VIII declared to be a felony; and (even though done in private and by consent of both parties)

The Rule of Indissolubility

In the centuries before the Reformation, as we have seen, the institution of marriage (being a sacrament) had around it all the sanctity and the consecration of Christian thought and tradition. In the period between the Reformation and the Matrimonial Causes Act, 1857, the law of marriage, now being administered in the King's Ecclesiastical Courts of the Church of England, subject to an appeal to the Crown in Chancery, or to the Crown in Council, in substance retained its old sanctity and its ancient character. Let us take the evidence of a Catholic law lord who might perhaps have been a hostile witness: 'My Lords, when England was a Catholic country matrimony was a sacrament, conferred upon themselves by the spouses. This sacramental nature of marriage, the holy state of matrimony, was the basis of the civil law of Europe with regard to it. When in the reign of Elizabeth, England abandoned the old faith and became a Protestant country, matrimony ceased, according to the new dispensation, to be ranked among the sacraments of the Gospel. The twenty-fifth of the twenty-nine articles so provided. The status of marriage became the product or result of a contract between the parties; but the obligations

have long been ranked among the gravest of criminal offences. The offence being a felony was at one time punishable by death; and until the year 1891 a minimum punishment of ten years' penal servitude was prescribed. Of late a private committee of magistrates and psychiatrists has proposed an early official inquiry into the advisability of the English law being brought into line with continental law in respect of private misconduct of this kind by consenting adults.

resulting from the status, the solemnity of the status, the importance to a civilised community of its maintenance remained almost unimpaired. Until the first Divorce Act in 1857 the marriage tie was indissoluble except by legislation '.[16]

From 1535 to 1857, that is to say, the King's Ecclesiastical Courts, arranged on the old plan and following the old tradition (so far as it was not forbidden by statute) continued to administer the law of marriage on the old principles and in the old spirit. The attitude of the ecclesiastical courts at the turn of the nineteenth century to the separation of the spouses by divorce *a mensa et thoro* is illustrated by a judgment of Lord Stowell: 'The humanity of the court has been loudly and repeatedly invoked. Humanity is the second virtue of courts, but undoubtedly the first is justice. If it were a question of humanity simply, and of humanity which confined its means merely to the happiness of the present parties, it would be a question easily decided upon first impressions. Everybody must feel a wish to separate those who wish to live separate from each other, who cannot live together with any degree of harmony and, consequently, with any degree of happiness; but my situation does not allow me to indulge in the feelings, much less the first feelings, of an individual. The law has said that married persons shall not be legally separated upon the mere disinclination of one or both

[16] [1938] A.C. at p. 27. It must be admitted that in the same judgment, Lord Russell of Killowen went on to say: 'What was once a holy estate enduring for the joint lives of the spouses is steadily assuming the characteristics of a contract for a tenancy at will'.

to cohabit together. The disinclination must be founded upon reasons which the law approves, and it is my duty to see whether these reasons exist in the present case. To vindicate the policy of the law is no necessary part of the office of a judge; but if it were, it would not be difficult to show that the law in this respect has acted with its usual wisdom and humanity, with that true wisdom and that real humanity that regards the general interests of mankind. For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives, for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples, who now pass through the world with mutual comfort, with attention to their offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good '.

The Law and the Gospels

Before 1857 we are told 'English courts would from their nature be inclined to refuse to recognise a decree of dissolution of marriage because in their view of the law marriage (*matrimonium verum et ratum*) was indissoluble. They were Church courts and the law of the Church so taught them. Neither they nor foreign courts, in their view, could break the indissoluble chain. It was only in obedience to the so-to-speak brute force of a private Act of Parliament that they submitted to recognise a dissolution. And this law of the Church was the marriage law of England '.[17]

Down to 1857, again, it has been authoritatively said that the Bar of England could not have furnished a single counsel who would have set his name to the opinion that judicial indissolubility was not a legal quality of every English marriage.[18] During the passage of the Matrimonial Causes Bill of 1857 the Greek text of the Gospels was fully debated in the House of Commons; and Lord St. Helier declared in the *Encyclopaedia Britannica* that: 'The textual controversy was nowhere carried on with greater acuteness or under more critical conditions than within the walls of the British Parliament '.

Jurisdiction in Divorce

The Act of 1857 centralised in a new statutory court all jurisdiction (except in respect of marriage licences)

[17] [1927] A.C. *per* Lord Phillimore, at pp. 664–5.
[18] [1927] A.C. at p. 661.

exercisable by any ecclesiastical court in all matrimonial causes, suits and matters; and endowed the new court with a regular jurisdiction to grant decrees of divorce *a vinculo* in appropriate cases. In all suits and causes coming before it the new statutory court was directed to proceed and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the old ecclesiastical courts had acted and given relief. Marriage was to retain its Christian character; to be 'the voluntary union for life of one man with one woman, to the exclusion of all others'.

In 1870, more than a decade after the passing of the Act of 1857, Lord Penzance, the President of the court, said: 'Marriage is an institution. It confers a status on the parties to it and upon the children that issue from it. Though entered into by individuals, it has a public character. It is the basis upon which the framework of civilised society is built; and, as such, is subject in all countries to general laws which dictate and control its obligations and incidents independently of the volition of those who enter it'.

In 1917, long after divorce had become an established and even a familiar institution in the land, Lord Sumner declared in the course of an important judgment: 'Ours is and always has been a Christian State. The English family is built on Christian ideas and if the national religion is not Christian, there is none. English law may well be called a Christian law; though (he adds) we apply many of its rules and most of its principles with equal justice and equally good government in heathen communities'. As lately as 1947

the President of the Probate, Divorce and Admiralty Division allowed the validity in English law, of a marriage celebrated by proxy in South America between two German nationals of Jewish origin (one of them being in England at the date of the ceremony) and found that in this form of celebration there was ' nothing abhorrent to Christian ideas '.

Changing Tides

There are many indications that the current in favour of divorce which reached its height in the Act of 1937 that is associated with the name of Sir Alan Herbert, is now beginning to abate. The preamble to the Act of 1937 itself is not without significance : ' Whereas it is expedient for the true support of marriage, the protection of children, the removal of hardship, the reduction of illicit unions, the relief of conscience among the clergy, and the restoration of due respect for the law, that the Acts relating to marriage and divorce be amended '. Under the statute no clergyman of the Church of England or of the Church in Wales may now be compelled to solemnise the marriage of any person whose former marriage has been dissolved on any ground, and whose former husband or wife is still living or to permit the marriage of any such person to be solemnised in the church or chapel of which he is minister.[19]

The reference in the preamble to the ' protection of children ' seems to show that the new and deeper

[19] These provisions are in striking contrast with the previous law which is contained in s. 184 (2) and (3) of the Judicature (Consolidation) Act of 1925.

understanding of the psychical and moral dependence of children on their parents and of the inevitable injury to the character and welfare of the children that follows the divorce or separation of the spouses is beginning to influence public opinion and legislative practice. The report of the Curtis Committee on the condition of children under the care of public authorities strengthened the conviction that public institutions offer no adequate alternative to parental care.

With these changes in the popular mind and in law-making opinion one may perhaps recall the constant existence in England (outside the Roman Catholic minority) of a body of opinion that is on religious or other grounds opposed to the principle of divorce, and the misgivings and afterthoughts that have haunted the consciences of many who had practical experience of the administration of the law in England. Mr. Gladstone, for instance, fought and voted against the Bill of 1857 on the ground that it was opposed 'to the law of the church, the law of nature and to the law of God'. And though Lord Cranworth, the Lord Chancellor of the day, favoured the passage of the Bill, he had his reservations: 'I think the recognition of the sanctity of marriage underlies the essentials of our quality as a people. No measure could be more injurious or more calculated to interfere with the social welfare of the country than one which tended to shake the solidity of marriage and the strength of the marriage tie'. As early as 1859 Lord Campbell, who had presided over the Royal Commission of 1853, made an entry in his diary: 'I have been sitting two

days in the Divorce Court and, like Frankenstein, I am afraid of the monster I have called into existence. Upon the average I believe there were not in England above three divorces a year *a vinculo matrimonii* and I had no idea that the number would be materially increased if the dissolution were judicially decreed by a Court of Justice instead of being enacted by the Legislature. But I understand that there are now 300 cases of divorce pending before the court. This is rather appalling. In the first place, the business of the court cannot be transacted without the appointment of fresh judges, and there seems some reason to dread that the prophecies of those who opposed the change may be fulfilled by a lamentable multiplication of divorces, and by the corruption of public morals'. In giving evidence before the Royal Commission of 1909 the President of the Divorce Division, Lord Mersey, said in evidence: 'The advantages of divorce to the rich are so questionable that I do not care to extend it too much to the poor'. Police court missionaries from the Metropolitan area who were called as witnesses before the Commission were all against an extension of grounds for divorce, and one of them whose work lay in the Westminster area said he did not know of a single instance among the cases with which he had been concerned where a person of the poorer classes had expressed a desire for fresh grounds of divorce.

Speaking with thirty years' experience at the Bar and on the bench of the Divorce Division, Mr. Justice Bargrave Deane told the Commission: 'I think it is a misfortune the divorce laws were ever passed. The

existence of divorce makes people think less of the marriage tie. They take the risk . . . because they think they can get rid of it afterwards '.

The changing tide of opinion in relation to marriage and divorce is perhaps best illustrated by the abdication of an English king.

In the year 1935 Lord Merrivale, who had sat for years as President of the Probate, Divorce and Admiralty Division, introduced a Bill which aimed at administrative action, organised and directed towards the conciliation of the spouses.[20] Reconciliation rather than divorce is now the order of the day.

The task before us—it is really a part of our defence of western civilisation—is to rebuild the family on new and firmer foundations; recognising once more that the relationship between husband and wife and parent and child is something other and deeper than the mere relationship between citizen and citizen. The family is the true unit of society; and the parent who gives life to the community is entitled to the highest status and dignity. Old wisdom and new science alike teach us that the services the parents render to the child in his mental and moral as well as in his physical life, are unique and almost irreplaceable; and that it is for the good of the whole community that children should be taught in the experience of love, the habit of obedience and the meaning of authority.

[20] After his retirement from the bench, Lord Merrivale published in 1936 a little volume entitled *Marriage and Divorce* which ends with the words: 'Let us bear in mind that marriage is an outstanding means of benefit and that divorce is its enemy '.

THE POLITICAL COMMUNITY

3

THE POLITICAL COMMUNITY

SHAKESPEARE in a famous scene in *Othello* illustrates a principle which operates alike in politics and in theology:

Othello: 'I pray thee, speak to me as to thy thinkings,
As thou dost ruminate; and give thy worst of thoughts
The worst of words'.

Iago: 'Good my lord, pardon me:
Though I am bound to every act of duty,
I am not bound to that all slaves are free to.
Utter my thoughts? . . .'

Othello: 'Thou dost conspire against thy friend, Iago,
If thou but think'st him wrong'd, and mak'st his ear
A stranger to thy thoughts'.

Iago: 'It were not for your quiet nor your good,
Nor for my manhood, honesty, and wisdom,
To let you know my thoughts'.

. . . . .

Othello: 'By Heaven, I'll know thy thoughts'.

Iago: 'You cannot, if my heart were in your hand;
Nor shall not, whilst 'tis in my custody'.

Again, in *Measure for Measure*, Isabella pleads with the Duke:

'For Angelo,
His act did not o'ertake his bad intent,
And must be buried but as an intent

That perish'd by the way: Thoughts are no subjects,
Intents but merely thoughts'.

These lines of Shakespeare recall a celebrated dictum of Brian, Chief Justice, in a Year Book of Henry VII: 'Comen erudition est que l'entent d'un home ne sera trie, car le diable n'ad conusance de l'entente d'home'. —'It is common learning that the thought of a man is not triable, for the devil himself knoweth not the thought of a man'.[1]

The juridical aspect of the doctrine is stated by Christopher St. German in the *Doctor and Student* in a passage[2] which has its source and origin in the *Summa Theologica* of St. Thomas Aquinas. Here it is argued that human tribunals can only determine the law in matters of which they are able to judge. But no judgment can be made of the interior movements of the mind which are hidden, but only of exterior acts about which evidence can be given.[3]

In a famous State Trial, the most illustrious of the Common lawyers was charged with maliciously keeping

[1] It is said to be one of the classical doctrines of mystical theology that neither angel nor devil has any natural knowledge of the secrets of the heart. Maritain, *Les Degrés du Savoir*, p. 507; *Satan, Desclée de Brouwer*, p. 325; *Aquinas, Summa Theologica*, I, Q. 57, A. 4; Q. 140, A. I, ad 4; Ia IIae. Q. 80, A. 2.

[2] *Doctor and Student*, Dialogue I, cap. 3.

[3] 'Since for the perfection of virtue it is necessary that men should observe rectitude in both kinds of acts' the Article concludes that divine law is necessary to curb and direct the interior acts and movements of the mind. It is the third of four arguments for the necessity of a divine law. The synthesis of the argument is found in the lovely line of the psalm: *Lex Domini immaculata, convertens animas, testimonium domini fidele, sapientiam praestans parvulis.*

silence (*malitiose poenitus silebat*) and declining to give a direct answer to an interrogatory put to him in the Tower by Thomas Cromwell, Secretary of State, asking whether he accepted and reputed the King as the Supreme Head on earth of the Church in England. Against this charge of silence Sir Thomas More protested: 'Touching I say this challenge and accusation, I answer that for this my taciturnity and silence neither your law nor any law in the world is able justly and rightly to punish me, unless you may besides lay to my charge, either some word or some fact in deed'. In the particular instance though the silence of Sir Thomas More was held to be an act of Treason of which he was found guilty, and for which he was executed on Tower Hill, the principle that human courts have no jurisdiction over the silences and the interior movements of the mind is no longer controverted in civilised communities. You do not indict men for their thoughts, without any overt act.

In the protest that he made to the King's servants who were appointed to try him, Sir Thomas More reminded the Commissioners: 'For ye must understand that in things touching conscience every true and good subject is more bound to have respect to his conscience and to his soul than any other thing in all the world beside'. The principle of freedom of conscience and the right to resist the command of a superior which violates the rules of right morals and of natural law is one of the characteristic gifts of Christian civilisation. The right is implicitly asserted in the question put by Peter in the Acts of the Apostles: 'Whether it be right in the sight of God to hearken

unto you more than unto God, judge ye'. The obedience that the serf and the villein owed to his lord, and the wife to her husband, and the subject to his king, was limited by this principle: the command must be obeyed, *dum tamen licitum et honestum*,[4] provided it is in accordance with good morals and natural law. In his opening speech at the trial of the Major War Criminals at Nuremberg, Sir Hartley Shawcross, K.C., M.P., Attorney-General, gave a universal extension to the principle of the Common Law: 'The warrant of no man excuseth the doing of an illegal act. Political loyalty, military obedience are excellent things, but they neither require nor do they justify the commission of patently wicked acts. There comes a point where a man must refuse to answer to his leader if he is also to answer to his conscience'.[5]

The recognition in this way of human personality—*persona, id quod perfectissimum est in tota natura*—and of the autonomy of the spiritual life led in England and in Europe to the distinction between Church and State—between the spiritual and the temporal power—which is one of the most striking differences between the law of pagan antiquity and of modern civilisation. Under the Roman Empire, the cult of the pagan gods was a part of the ordinary duty of the citizen: *Sua cuique civitate religio est, nostra nobis*, says Cicero, in a lapidary phrase. And when in the course of time the personal worship of the Emperor was introduced, the law was rigorously enforced. The long roll of

[4] Bracton, Edn. Woodbine, Vol. II, p. 37.
[5] Official Report, p. 87.

Christian martyrs are witnesses to the rule and to the resistance.

'Render to Caesar the things that are Caesar's and to God the things that are God's'. The teaching of our Lord put an end to ancient doctrines of State Absolutism. The Christian view of the relation between Church and State was put forward authoritatively in the fifth century by Pope Gelasius I. In his Letters and Tractates he declared that in a Christian society the spiritual and the temporal powers are entrusted to two different orders, each deriving its authority from God, and each supreme in its own sphere and independent, within its own sphere, of the other. Nevertheless, each of these powers was in a way dependent on the other and obliged to have relations with that other; so that while each is supreme in its own sphere, each is also subordinate in the sphere of the other.[6]

The soul of man now has an individual relation with God which goes beyond the control of the political community. This is not to say that religion has no social aspect or that political communities have no moral or spiritual character or reference. It does mean that men have been compelled to recognise that the individual religious and moral experience transcends the authority of the political (and even of the religious society), and that the religious society, as embodying this spiritual experience, cannot tolerate the control of the State. Behind the forms and the clamour of the age-long conflict between Church and State we have, says Dr. Carlyle, 'to recognise the

[6] Carlyle, *Medieval Political Theory*, I, 188–192; II, 144.

appearance in the consciousness of the civilised world of principles new and immensely significant. For behind it all there lies a development of the conception of individuality or of personality which was unknown to the ancient world'.[7] The Church, which was the bearer of the Christian revelation had, by a necessity of its being, to maintain that the moral and spiritual life of man shall be beyond the power and reach of the political officers of the community.

The principle of the dual organisation of Church and State which was laid down by Pope Gelasius was reflected in the legislation of William the Conqueror, which secured a place in England for the canonical jurisprudence of the Roman Church. In the long run it was, according to Maitland, by far the most important piece of legislation he enacted. In his struggle with Henry II, Thomas Becket won for the Church in England the right to take its place with the rest of Christendom in the full administration of the Canon Law, with the right of appeal to Rome and freedom of intercourse with the Pope.[8] The freedom that had been won by Becket was ratified and so to say consecrated by the first clause of Magna Carta[9] that 'the Church of England shall be free and shall

[7] Carlyle, *Medieval Political Theory*, III, pp. 7–9.

[8] Zachariah Brooke, *The English Church and the Papacy*, 1931, pp. 209, 214.

[9] *Quod Ecclesia Anglicana libera sit et habeat omnia jura sua integra et libertates suas illaesas.* Sir Edward Coke calls attention more than once to the Preamble in which the King confesses that the Charter was made and granted for the honour of God, for the exaltation of Holy Church, for the amendment of the Kingdom and for the good of the King's soul.

have all its laws in their integrity and its privileges unimpaired '.

The separate organisation of Church and State and their co-ordinate jurisdiction is treated by Bracton as a matter of course : ' Among men there are differences in status, since some men are pre-eminent and preferred (*prelati*) and rule over others: our lord the Pope, for instance, in matters spiritual which relate to the priesthood (*sacerdotium*) and under him are archbishops, bishops and other inferior prelates. Likewise in matters temporal there are emperors and kings and rulers in things relating to the kingdom (*regnum*), and under them dukes, counts, barons, magnates and knights '.

' The spiritual primacy of the Pope and his authority in matters of faith were reverently admitted ', says Professor Plucknett, ' but the exorbitant claims of jurisdiction and territorial power asserted by Hildebrand and his successors, together with the pecuniary exactions founded on those claims, were persistently, though with varying degrees of firmness, resisted by the English kings and people. Impatience at discipline, and discontent at taxation, however, need not imply a denial of the fundamental right of government. Clergy and nobles grumbled loudly at the new vigour of a succession of powerful, reforming and centralising popes, but they had no answer to the logic of the theologians and the canonists. The Canon Law moreover was accepted by English Ecclesiastical Courts as the undoubted law of the Church and it is erroneous to suppose that the

English Church ever asserted its independence by denying it.'[10]

Throughout the Middle Ages there was in England an uneasy partnership in co-operation and in conflict between the canonists and the Common Lawyers. There is a whispered conversation between Adrian IV, the only English Pope, and the famous John of Salisbury:

Adrian: 'What do people really think of the Pope and of the Church?'

John: 'People are saying that the Roman Church behaves more like a stepmother than a mother; that in it was a fatal vein of avarice, scribes and pharisees laying grievous burdens on men's shoulders, accumulating precious furniture, covetous to a degree; and that the Holy Father himself was burdensome and scarcely to be borne. 'The Pope laughed and congratulated me on the freedom with which I had spoken, bidding me as often as I heard anything evil about him to let him know it without delay.'[11] We can also listen in to a conversation between Walter Map, the genial author of the *De Nugis Curialium*, and Ranulf Glanvil, Chief Justiciar of Henry II. Walter happened on a case in the Court of Exchequer in which a poor man obtained a speedy judgment against a rich antagonist. Of this, as of a marvellous thing, he speaks

[10] Taswell-Langmead, *Constitutional History*, 10th edition, ed. Plucknett, p. 287.

[11] *Risit pontifex et tantae gratulatus est libertati praecipiens ut quotiens sinistrum aliquid de ipso meis auribus insonaret, hoc ei sine mora nuntiarem.*

to Glanvil. 'Yes', says the Chief Justice, preening himself a little, 'we in the King's Courts are quicker about our business than your bishops are'. 'Very true', comes the retort, 'but you would be as dilatory as they if the King were as far away from you as the Pope is from the bishops.' Glanvil smiles: *Et ille risit.*[12]

Again in the reign of Edward II, Chief Justice Bereford utters his mind: 'The men of holy Church have a wonderful way. If they get a foot on to a man's land they will have their whole body there. For the love of God, the bishop is a shrewd fellow.' Finally there are the cruel words that Matthew Paris used of the great canonist Hostiensis as he left England in the reign of Henry III. 'He is going to Italy', says Matthew, 'to buy a bishopric with money he has embezzled'.

Even so, one has to acknowledge the debt which Common Law and Equity owe to the Canon Law and the canonists. 'The Canon Law', as Dr. Figgis has pointed out, 'made a natural bridge to connect legal rights with ethical and theological discussion'. It is due largely to the canonists and the theologians that the Common Law was built on a foundation of Christian jurisprudence. 'Men who knew something of the Civil and the Canon Law', says Professor Holdsworth, 'so transfigured the old English customary law that they made it a system of law fit to govern a modern State.'[13]

[12] *De Nugis Curialium* (C.S.) 241.

[13] Holdsworth, *H. E. L.*, II, p. 125. Compare the testimony of Professor Plucknett, *Concise History of the Common Law*, 4th ed., pp. 287, 289.

One other remark needs to be made. English Christianity is a more venerable thing than the English State. A certain balance between Church and State appears to be natural to the English language and to the English mind. An attempt to subdue the Church to the State would therefore be likely to meet with resistance; did in time meet with fierce resistance from Catholics and Nonconformists. It is otherwise in the Continental countries of the Roman Imperial inheritance. The tradition of those countries leads the mind back not to a balance between the spiritual and the temporal authority, but to the figure of one man ruling both Church and State—to an Emperor who was at once *Princeps* and *Pontifex Maximus*. His will was law: *quod principi placuit legis habet vigorem*. The tradition of the Roman Civil Law runs easily to totalitarianism.[14]

Apart from this balance and distribution of power between Church and State, the recognition of the existence and operation of an objective system of principles and rules of natural law afforded a fresh guarantee of what men are now beginning to call human rights and fundamental freedoms. 'Natural law', declared Stephen Langton, 'is binding on princes and bishops alike: there is no escape from it.

[14] 'Our modern theories,' says Maitland, 'run counter to the deepest convictions of the Middle Ages, to their whole manner of regarding the relation between Church and State. . . . The State has its King (or Emperor), its laws, its legislative assemblies, its courts, its judges. The Church has its popes, its prelates, its councils, its laws, its courts. . . . Obviously while men think thus, while they more or less consistently act upon this theory, they have no sovereign in Austin's sense Before the Reformation Austin's doctrine was impossible'.

It is beyond the reach of the Pope himself, who could not dispense from it, seeing that the fabric of any form of society is bound up with it'.

These principles and rules of natural law are rooted in the order of the world and in a view of a man as a part of that order; and in a study of the inner constitution of man, of psychology and of ethics and the metaphysical foundations of our being. The observation of external things reveals in the universe a related series of orders: the mineral, the vegetable, and the animal order, each serving its own end, and at the same time subserving each higher order, and all of them serving and subserving the life of man. As the flower and the plant, unlike the mineral thing, has a principle of life and growth in it, we recognise and study the law according to which it lives and grows. So with animals, they too have being and life and a law according to which their life is led. So too with man, who shares with the lower order of things the first law of all being: *perseverare in esse suo.* All civilised systems of law recognise the *inclination* and the right of Everyman to defend his own existence against unjust attack; and the right of every organised community of men to do the same. On another plane, man shares with the animals their proper being and life, and the law according to which their life is lived —the *jus naturale quod natura (id est ipse Deus) omnia animalia docuit, ut conjunctio maris et feminae et educatio prolis.*

The rational nature of man belongs to a plane which is superior to that of the mineral or vegetable or animal order. The rational life of man has its own

aspiration and appetite and perfection. The appetite of the mind is for the True and the appetite of the will is for the Good. And this appetite for the Good and for the True takes us beyond ourselves and beyond the community of men and beyond the State. It is 'the cry of the finite for the infinite'.

> And thus I know
> This earth is not my sphere
> For I cannot so narrow me
> But that I still exceed it.

'Law', says Professor Vinogradoff, 'is imposed on the nature of man as on the nature of stones, plants and beasts. Natural law partakes, therefore, of the same character as the laws of weight or of light or of nutrition. No one doubts that sex attraction and parental love are innate in man and in animals alike, and so is reflective reason in the special case of human beings. The distinction between right and wrong, the consciousness of duty and of right, of reciprocal obligations and reciprocal consideration are as inevitable in human reason as the requirements of logic or the table of multiplication'.

One may also remark that the reasonable man of the law, the free and lawful man, *liber et legalis homo*, reflects in himself so to say the balance between Church and State. The free and lawful man, 'the law's typical man, typical person, is a lay Englishman, free but not noble, who is of full age, and who has forfeited none of his rights by crime or sin'. Of his nature the ordinary citizen belongs at once to the spiritual and the temporal order; most English folk profess a religion, whether it be Church of England,

Roman Catholic, Nonconformist or other denomination. The percentage of persons who as parties or witnesses or jurors ask to be allowed to make a declaration instead of taking an oath, is very small. There are in England no large masses of people who declare they are *confessionslos*, as happens in countries of a different tradition.

The 'ordinary man of the law', a being of spirit and of sense is, according to the lawyers and to the theologians, by virtue of his nature free. He is 'King and ruler' of his own family.[15] His house is his 'castle and fortress.' As a member of a local community, of manor or township or borough, he works and wins and gets and grows or makes or produces and buys or sells and exchanges commodities and goods and things of all sorts.

If, as villein or as copyholder, he is tenant of a manor, he sits as doomsman in the manorial court and in the give and take between the tenants and their lord he helps to form, and to formulate, the customary law of the manor, which helps to regulate the life of the little community. If (there being no lord) he is a member of a township, a *villata*, the community (he will know) is under obligation to see that its members are in frank pledge and to arrest malefactors.

[15] After the Norman conquest, the woman of full age who has no husband is in England a fully competent person for all the purposes of private law. Public law gives a woman no rights and exacts from her no duties, save those of paying taxes and performing such services as can be performed by deputy. The main idea which governs the law of husband and wife is not that of unity of person, but that of guardianship, the *mund*, the profitable guardianship which the husband has over the wife and over her property. Pollock and Maitland, 2nd edition I, 482, 485; II, 437.

It will be the duty of the township also to raise the hue and cry, and to follow the trail of stolen cattle. In the course of time there will be upon the township a statutory duty to appoint a constable, and four men also to keep watch throughout the night. (Shakespeare has made us familiar with the Watch: 'We will rather sleep than talk: we know what belongs to a watch'. And again: 'Well, masters, we hear our charge: let us go sit here upon the church bench till two, and then all to bed'). The township will also send representatives to the court of the county, and to the court of the King's Justices in Eyre or making the assize.

Before the Justices in Eyre the township is represented by its reeve and four men. The city or borough is represented by a jury of twelve. The borough shows a more advanced stage of development than the township. It is, we may say, a local authority and a unit of local self-government. It is to all intents and purposes a body corporate with a life of its own and a capacity to hold property, to enter into contracts and to do wrongs, in its corporate character. Each borough has its own institutions which are regulated by custom or by charter. It has a market and a meeting place; the Borough Court has a civil and a criminal jurisdiction. The council of the borough enacts by-laws and levies tolls and rates, and safeguards the interests of the burgesses when they conflict with those of other boroughs. There will also be a merchant gild with its own distinctive organisation and all that it entails in the life of father and son, and master and apprentice.

Beyond the borough is the county, which may almost be regarded as a body corporate.[16] The county appears in the Comitatus or Shire Moot which was at one and the same time the court and the general assembly of the shire. It was convened by the sheriff, who is the King's officer, twice a year and was of old attended by the ealdorman or earl, the bishop, and other public officers, by freeholders of the shire (who owe suit to the court and are its doomsmen), by the parish priest and the reeve and four men of each of the townships. The court entertains or may entertain some of the initial proceedings in criminal cases, but it is for the most part a court for civil causes. It has an original jurisdiction in personal actions. Real actions come to it when the feudal courts fail to do justice. Cases are sent down to it for trial by jury from the King's Court.

The great original principle of the English judicial system being that of trial in local courts popularly constituted, it is easy to see that one of the chief duties of the 'good and lawful man' was the rendering of jury service. The juries, which became a most vital part of the procedure in criminal and civil law constituted perhaps the most important use of men in the way of government. The burden of jury service in the manorial and hundred and county court

[16] County and county court were one. On the judicial rolls of the time complaints are not uncommon of what the county has done: the county has delivered a false judgment; the county by four representative knights comes into the King's Court and denies that it has given a false judgment. The county even wages battle by its champion: Maitland, *Constitutional History*, 85.

postulates the existence and growth in England of a considerable body of men with sufficient means and leisure to be able to discharge the extensive and always increasing mass of public duties that were imposed by custom or by statute. The inability of Continental nations to follow 'the law by which the truth is sought in England' is said by Sir John Fortescue to be due to their inability to find an adequate number of men to do similar jury service. The jury was thus in England the safeguard of civil liberty. In passing one may reflect upon the burden of jury service, and the training it gave; the time and energy it consumed; the responsibilities and dangers it involved. 'Through it men were thrust into the very arcana of the judiciary, and forced to become finders of fact, and judges in the most important crises of one another's affairs. For better or for worse, the lives, the limbs, the property, the prosperity or adversity, the happiness or sorrow of the bulk of the English people in most of the crises of their lives depended upon the knowledge, discretion, goodwill or judgment of their neighbours.'

In addition to the 'good and lawful men' whom it summoned to act as jurors or otherwise to assist its inquiries, the law recognised and used the independent or semi-independent communities of the land by means of which agriculture and trade were organised, and local government was carried on, and local jurisdiction exercised. These communities of the land were in due course subordinated to the law without losing their individual character or their independent life. When in the fourteenth century the justices

of the peace took over the bulk of their administrative functions, the old communal divisions were retained and the work of government was continued under judicial forms, and subject to the ordinary law of the land which allowed the local communities a free discretion in the exercise of their powers. The fact that English local government was based upon communities of this type and not upon bodies which acted as mere delegates of a Sovereign State gives (or gave) a special character to English 'self-government'. It is, we are told, in consequence of the choice of a judicial person as an intermediary between the State and its citizens that local administration, which was conducted in continental States without regard to the law by the absolute decree of the Prince and his council, was built up by the English Parliament on the basis of the common law.[17] 'The doctrine of the State that was reared upon a classical groundwork had nothing to say of groups that mediated between the State and the Individual. . . . All intermediate groups were first degraded into the position of more or less arbitrarily fashioned creatures of mere positive law, and in the end were obliterated.'[18]

The individual character and the independent life which continued to be exhibited in the English local communities is said by Professor Holdsworth to be 'one of the most striking of the achievements of the Common Law'. The judicial processes which were

[17] Redlich and Hirst, *Local Government*, ii, 54.

[18] Gierke, *Political Theories of the Middle Ages*, trans. Maitland, pp. 99–100. The suppression of 'sodalitates et congregationes' is said to be a mark of tyranny: Aegidius Romanus III, 2, c. 10; and Aquinas, de Reg. Princ, I, c. 3; *ibid.* 196.

used in the business of local government helped to maintain the tradition of the rule of law. The officials of English local government were inspired not by the ideas of a department of the central government but by the ideas of the common law. Their ordinary every-day work was done under judicial forms which left them free to act independently so long as they obeyed the rules of the common law.

In the course of time the representatives of these communities, of the shires and of the towns, came to constitute an estate of the realm, the third estate, the Commons of the realm; and with them the other estates, of the prelates and the barons, were summoned by the King to consult and to determine what was to be done, or to consent and to do what had been determined in the colloquy of the King's Council, that came to be known as 'Parliament'. 'The Commons', says Bishop Stubbs, 'are the communities or *universitates*, the organised bodies of free-men of the shires and towns, and the estate of the Commons is the *communitas communitatum*, the general body into which for the purposes of Parliament these communities are combined.' The representatives who appeared in the Commons' House in Parliament were in no way representatives of inorganic collections of individuals, they represented the organic bodies of shire and borough.

In the beginning, as we know, the King's Council was 'the core and essence' of Parliament; and Parliament meant rather a colloquy or a talk together than a defined body of persons. At this colloquy important cases were decided, and petitions were received.

Parliament is thus, in its origins, a Court of Justice where 'judicial doubts are determined and new remedies are established for new wrongs and justice is done to every one according to his deserts.' The 'High Court of Parliament' has (or had) a most important place among the courts which administer law and justice in the State.

Besides Counsel and Justice, the King soon found another use for his Parliaments. His ordinary revenues did not suffice for all the expenses of justice and administration. He asked for a subsidy. Writs of Summons went out to the sheriffs enjoining them to see that two knights from the county and two of the more discreet burgesses from each borough or city should appear at Westminster 'with full and sufficient power for themselves and their respective communities to do and to consent to those things which in our parliament shall be ordained'.

According to the current (1946) edition of May's *Parliamentary Practice*, the whole theory of representation and consent is 'traced to an ecclesiastical origin by attributing to the Lateran Council of 1215 the motive source, to the practice of the English Church Councils from 1226 onwards the precedents and to the ecclesiastical leaders the principle first applied in connexion with taxes on "Spiritualities" that taxation demands both representation and consent. The feudal doctrine of consent to taxation lacked the element of representation. The Church, affirming the principle *Quod omnes tangit ab omnibus approbetur*, linked the two practices together and so laid the foundation of the power of the Commons. Even more important was

the contribution of the leaders of the Church in England, both in principle and in practice, to the union of the different estates of the realm into one *universitas regni*'.[19]

The *universitas regni*, the university of the realm, includes and transcends the King. The King is under the law; it is the lesson of Magna Carta. *Rex est sub Deo et sub lege*, Henry of Bracton will say, the King is under God and the law. The sentence will echo through the centuries of English history and will be pronounced by a Justice of the Supreme Court of the United States before the Military Tribunal at Nuremberg: who asked that rulers also (as well as Kings) shall be 'under God and the law'.

The King is under God and the law, that is to say, under the law of God, the law of nature, and the law of the realm. In the first chapter of the first law book that was written in English on the English Constitution, Sir John Fortescue points 'the deference bi twene *dominium regale* and *dominium politicum et regale*', that is, broadly speaking, the difference between absolute monarchy (which, he says, existed in France) and limited monarchy (which obtained in England). 'There bith two kyndes off kyndomes, of the wich that on is a lordship callid in laten *dominium regale*, and that other is callid *dominium politicum et regale*. And thai diversen in that the first Kynge may rule his peple bi such lawes as he makyth hym self. And therefore he may sett uppon thaim tayles and other imposicions such as he wol hym self, withowt thair

[19] May, *Parliamentary Practice*, ed. 1946, p. 7.

assent. The secounde Kynge may not rule his peple by other lawes than such as thai assenten unto. And therefore he may sett uppon thaim non imposicions withowt thair owne assent'.

In the constitutional struggles of the post-Reformation period the books of Bracton and of Fortescue were in the hands, and their words were on the lips of all those who sought to defend the old tradition against the new doctrine of the Royal Prerogative and the Divine Right of Kings. The conflict is exhibited in the clash between James I and Sir Edward Coke in the Star Chamber in 1616:

James: It is atheism and blasphemy to dispute what God can do. Good Christians content themselves with His Will revealed in His Word. So it is presumption and high contempt in a subject to dispute what a King can do or say, that a King cannot do this or that; but rest in that which is the King's Will revealed in his Law.

Coke: Your Majesty, the law is the golden measure to try the causes of his subjects, and which protects His Majesty in safety and peace. The King cannot take any case out of his Courts and give judgment upon it himself. The judgments are always given *per curiam* and the judges are sworn to execute justice according to the Law and Customs of England.

James: This means that I shall be under the law which it is treason to affirm.

Coke: Sir, Bracton saith: *Quod rex non debet esse sub homine sed sub Deo et sub lege*: That the King ought to be under no man but under God and the Law.

'His Majesty fell into that high indignation as the like was never known in him, looking and speaking fiercely, with bended fist offering to strike him, which the Lord Coke, perceiving, fell flat on all fower.'

The claim of the King to rule by Prerogative and by Divine Right was debated in the schools and in the courts, in Parliament and on the battlefield, and issued finally in the Revolution of 1689. Of the effects of the Revolution, Macaulay has given a summary. 'The change seems small. Not a single flower of the Crown was touched. Not a single new right was given to the people. The whole English law, substantive and adjective, was, in the judgment of all the greatest lawyers, of Holt and Treby, of Maynard and Somers, almost exactly the same after the Revolution as before it. Some controverted points had been decided according to the sense of the best jurists; and there had been a slight deviation from the ordinary course of succession. This was all; and this was enough.'

Not quite all perhaps; and more than enough. The latest of the historians of the English law has pointed out that the Revolution did for the State what the Reformation had done for the Church. The summary Macaulay gave of the effects of the Revolution 'is, if applied to the Reformation, both good law and sound Anglican doctrine. But if we look a little beyond the immediate consequences of either the

Reformation or the Revolution we can see that the changes involved have been very far-reaching. The result of the Revolution was the transference of control over the Executive from the Prerogative to Parliament through the growth of the Cabinet system. The result of the Reformation was the abolition of the dual control of Church and State, the transference to the State of complete control over the Church, and the substitution for the Canon Law of the King's Ecclesiastical Law'.[20] A power which controlled the Church and State necessarily had something of a divine character. The divine right of Kings yielded place to the divine right of Parliaments.

'There is a mystery—with whom relation
Durst never meddle—in the soul of State
Which hath an operation more divine
Than breath or pen can give expressure to.'

The cessation of the academic study of the Canon Law and the disappearance of the canonists of the authentic tradition from the Chancery and the Courts Christian was inevitably followed by a slow change in the intellectual and moral principles which guided the action of the Executive and the legislation of Parliament, and the administration of justice in the Courts of Chancery and of Common Law. Men's conceptions of the relations of law and equity were naturally affected by the substitution of a background of material force, on which the Sovereign State was based, for the religious and moral background which underlay

[20] Holdsworth, *History of English Law*, 3rd ed., Vol. I, 598.

the political theories of the Middle Ages. 'The legislation which had deposed the Pope', says Sir William Holdsworth, 'and made the Church an integral part of the State, had made it clear that the morality of the provisions of a law or the reasons which induced the Legislature to pass it could not be regarded by the Courts. It was realised that Acts of Parliament, whether public or private, were legislative in character; and the judges were obliged to admit that these Acts, however morally unjust, must be obeyed' . . . 'There was no need therefore for the Courts of Common Law to be anything but useful servants of the Crown'.[21] The weapon that Henry VIII used, says Professor Plucknett, 'was the Omnipotence of the Crown in Parliament. The inescapable corollary from his action was the inherent right of the supreme authority of Parliament to confiscate any property, private or corporate, lay or ecclesiastical, for reasons of which it is itself the sole judge. The Act of Attainder asserted the same irresponsible despotism over the individual as the Acts of Suppression had done over ecclesiastical corporations, and both of them denied the profoundest conviction of the Middle Ages, namely, that the liberty of the subject rested upon the inviolability of his person and his property within the limits of due process of law'.[22] 'And true enough', writes the same authority elsewhere, 'there soon came the State, as a sort of anti-Christ to wage war with the

[21] Holdsworth, *H. E. L.*, iv, 185, 186, 188.

[22] Taswell-Langmead, *Constitutional History*, 10th ed., T. F. T. Plucknett (1946), pp. 319–320. And see Plucknett, *A Concise History of the Common Law*, 4th ed., pp. 40–41.

idea of law. The issue of this conflict is perhaps still uncertain but medieval thought is today fighting hard for the cause of law against the amoral, irresponsible State. It was medievalists in England, armed with Bracton and the Year Books, who ended Stuart statecraft, and the Constitution of the United States was written by men who had *Magna Carta* and Coke upon Littleton before their eyes. . . . Instead of the medieval dominion based upon divine right and subject to law, we have the modern State based upon force and independent of morality'.

The words and the implied criticism are in their measure true of Britain. The old idea that the whole State, Prince and people, is bound by the rules of divine and natural law—the moral law—is inconsistent with the new claims that are made for Parliament and that Parliament makes for itself. In the eighteenth century Blackstone could write that Parliament 'hath sovereign and uncontrolled authority in making laws; this being the place where that *absolute despotic power*, which must in all governments reside somewhere, is entrusted by the Constitution of these kingdoms'. In the current edition of May's *Parliamentary Practice* it is plainly said that 'the Constitution has assigned no limits to the authority of Parliament. . . . A law may be unjust and contrary to the principles of sound government; but Parliament is not controlled in its discretion, and when it errs its errors can only be corrected by itself'. In a speech which is reported in *The Times* of May 13, 1946, Sir Hartley Shawcross points the orthodox doctrine: 'Parliament is sovereign: it can make any

laws. It could ordain that all blue-eyed babies shall be destroyed at birth; but it has been recognised that it is no good passing laws unless you can be reasonably sure that, in the eventualities which they contemplate, these laws will be supported and can be enforced'. Parliamentary jurisprudence, that is to say, is a nice calculation of force.

The modern doctrine of Parliamentary Omnipotence, which finds an argument and an illustration in the Massacre of the Innocents, would, one imagines, be acceptable—and perhaps useful—to a Communist Government. It is inconsistent with principles which constitute the foundation of the Common Law, and which governed English legislation over a course of centuries. The new doctrine was rejected by Sir Edward Coke in *Bonham's Case*; and by Lord Holt who thought it was part of the daily work of a judge 'to construe and expound Acts of Parliament, and adjudge them to be void'.

The principle of Parliamentary Omnipotence was challenged in its beginnings by the most illustrious of the Common lawyers, Sir Thomas More, who protested with his life against a Statute which (as he declared) sought to set aside not only the provisions of Magna Carta, but also certain principles of the law of Reason and the law of God.

It is perhaps not good for the health of a political community that the acts of the Legislature should be allowed to prevail over fundamental moral and ethical principles. Nor is it good that the people of any realm should (even in theory) be without any constitutional guarantee of fundamental human rights. In the Foreign Office Draft of an International Bill of

Human Rights issued in 1947, it is explained that proposals that the provisions of the Bill of Rights should be embodied in the constitutions of States parties to the Bill, or otherwise consecrated by special constitutional guarantees, are not practicable for all countries. 'Some countries, like the United Kingdom, have no rigid constitution and, as a matter of internal law, it is not possible to surround any provision with any special constitutional guarantee. No enactment can be given a greater authority than an Act of Parliament, and one Act of Parliament can repeal any other Act of Parliament. Therefore, the legal provisions which safeguard human rights can only have as their special safeguard the solemn International obligations undertaken in this Bill together with the firm foundation which these principles have in the deepest convictions of Parliament and the people'.

It is, you may think, a little odd that the people who gave to the world the inheritance of the Common Law should be compelled to rely upon a Declaration or Convention of International Law for the safeguarding of their fundamental human rights. One way or another it is essential that these rights shall be safeguarded.

LAW AND CONSCIENCE

4

LAW AND CONSCIENCE

MEN of the classical and Christian tradition have always believed in an order of law and justice which is part of the order of the world. Thus, to the Greek philosopher Empedocles, the law against killing was not limited in its scope :

> 'Nay, but an all-embracing law,
> Through the realms of the sky
> Unbroken it stretcheth,
> And over the earth's immensity'.

In the *Antigone* of Sophocles the heroine of the tragedy appeals from a law of King Creon to a higher law :

> 'Because it was not Zeus who ordered it
> Nor Justice, dweller with the Nether Gods,
> Gave such a law to man; nor did I deem
> Your ordinance of so much binding force
> As that a mortal man could overbear
> The unchangeable, unwritten code of heaven;
> This is not of today and yesterday
> But lives forever, having origin
> Whence no man knows.'

The distinction between a superior order of natural law and justice and an inferior order of national (or Imperial) law and justice is an integral part of the philosophy of Plato and of Aristotle. For Plato, a judge, in order to be a true judge, must fulfil in himself

the idea, one may say the ideal, of a judge. Again, in the *Laws* the Athenian declares : ' When there has been a contest for power, those who gain the upper hand so entirely monopolise the government as to refuse all share to the defeated party and their descendants. . . . Now according to our view, such governments are not polities at all, nor are laws right which are passed for the good of particular classes and not for the whole State. States which have such laws are not polities but parties, and their notions of Justice are simply unmeaning '.[1]

Plato and Aristotle alike contrast the ideal and true law with the actual and positive law, and find in the former the measure and criterion of justice. Positive law has its origin in the will of a lawmaker or in the act of an assembly. The natural law has its source in the Divine Wisdom and contains the essentials of justice. The imperfections of positive law (which does not fit all cases) are overcome by Equity whose aim is to do justice in the individual case. In cases for which the law makes no provision the judge has to decide in the way in which a true law-giver—who is assumed always to will what is just—would determine.

The Stoics made agreement or non-agreement with reason the criterion of law and justice. Judged by this test Epictetus declared that the laws which upheld slavery were laws of the dead, a fearful crime. And in the teeth of the institution of slavery and gladiatorial combats and shows exhibiting men and women being thrown to the beasts, Seneca spoke bravely of human

[1] *Laws*, IV, 17 (Jowett's Translation).

dignity : *Homo sacra res homini.* Cicero too declared in a celebrated passage that: 'True law is right reason in agreement with nature. It is of universal application, unchanging and everlasting. It summons to right action by its demands, and averts from evil-doing by its prohibitions. It is a sin to try and alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by Senate or people. . . . And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is God, over us all, for he is the author of this law, its promulgator and its enforcing judge'.[2] The idea of a universal law is taken up by Marcus Aurelius : 'My city and my country, so far as I am Antoninus, is Rome; but so far as I am a man, it is the world'.

The greatest of the classical jurists of the Roman Empire inherited the concept of the natural law and thought of jurisprudence as 'the knowledge of things divine and human, and the science of the just and the unjust'. St. Paul insisted on the essential equality of men in nature and on their essential dignity in their character of free and reasonable beings. He insisted also on the necessity for justice and charity in the mutual relations of mankind. The tendency and operation of this twofold principle of equality and justice was in the internal order of politics to abolish the

[2] *Republic*, III, 22.

absolute power of master over slave, and of the State over its subjects; and in the external order of politics to provide the intellectual and moral basis for a true system of international law.

The Christian Fathers took the ideas of the Greek philosophers and those of the Roman jurists and transformed them in the light of the Christian revelation.[3]

Pagan notions of national exclusiveness, which were put to shame by the parable of the Good Samaritan, were shattered by the sentence of St. Paul to the Colossians: 'There is neither Gentile nor Jew, circumcision nor uncircumcision, barbarian nor Scythian, bond nor free'.

The Christian character of the English State appears in the Coronation Rite which has a continuous history from the days of St. Dunstan. In the Coronation Oath used by St. Dunstan, the King is forbidden to give any pledge except this one which he laid on the altar: 'In the name of the Holy Trinity: To the Christian people who are under my authority I promise that true peace shall be assured to the Church of God and to all Christian people in my realm. (I forbid all rapine and iniquity to all ranks.) I promise and enjoin Justice and Mercy in

[3] One may not minimise the extent of this revolution: 'What is perhaps the key to the whole history of Christian philosophy . . . is precisely the fact that from the second century A.D. on, men have had to use a Greek philosophical technique in order to express ideas that never entered the head of any Greek philosopher'. Gilson, *God and Philosophy*, p. 43. For the transformation of the Roman idea of law, see F. Hölscher, *Die ethische Umgestaltung der römischer Individual-Justitia durch die universalistische Naturrechtslehre der mittelalterlichen Scholastik*, Paderborn, Schöning, 1932.

the decision of all cases in order that God, who liveth and reigneth, may in His grace and mercy, be brought thereby to grant us all His eternal compassion'. The aim of a Christian king was thus the promotion of the law of God and of His justice. 'The King is under God and the law.' It is the lesson of Magna Carta: 'To no man will we sell, to no man will we deny, to no man will we delay right and justice'. It is the teaching of Henry of Bracton: 'The King is under no man but under God and the law, since the law makes the King. . . . And there is no King when Will and not Law is the principle of his rule'.

Throughout the centuries an obligation of doing justice and mercy lay upon the conscience of the King. '*Ad hoc enim creatus est rex et electus ut justitiam faciat universis*'. 'For this is the King created and elected that he do justice to all men', to all manner of men. The conception of conscience is constant from the beginning and receives classical expression in the *Doctor and Student*: 'Conscience is the judgement of reason judging on the particular acts of man. . . . He hath a good and clean conscience, that hath purity and cleanness in his heart, truth in his word, and rightwiseness in his deed. And as a light is set in a lantern, that all that is in the house may be seen thereby; so Almighty God hath set conscience in the midst of every reasonable soul as a light whereby he may discern and know what he ought to do and what he ought not to do. Therefore forasmuch as it behoveth thee to be occupied in such things as pertain to the law; it is

necessary that thou ever hold a pure and clean conscience, specially in such things as concern restitution : for the sin is not forgiven, but if the thing that is wrongfully taken be restored. And I counsel thee also that thou love that is good and fly that is evil; and that thou do to another as thou wouldest should be done to thee and that thou do nothing to other that thou wouldest not should be done to thee, that thou do nothing against truth, and that thou do justice to every man as much as in thee is : And also that in every general rule of the law thou do observe and keep equity. And if thou do thus, I trust the light of the lantern, that is, thy conscience, shall never be extincted '.

The obligation on the King to do justice was discharged in the King's Council. ' The King has his Court in his Council, in his Parliaments, in the presence of the prelates, earls, barons, nobles, and other experienced men where doubtful judgements are decided, and new remedies are established as new wrongs arise, and where justice is done to everyone according to his deserts '. In the course of time certain of the duties of justice were delegated to judges who formed part of the royal household and were in the beginning members of the King's Council. In this way there came into existence the Courts of King's Bench, Exchequer, and Common Bench which, as part of the household, followed the King in his journeys through the realm.[4] Like the King,

[4] The inconvenience to litigants and jurors led to the provision in Magna Carta that the Court of Common Pleas—the court which tried cases between subject and subject—should not

the King's judges were sworn to do justice and right 'to all manner of people after the laws and usages of the realm, without fear or favour, affection or ill-will'. And the determination to do right led the courts to impose their ideas of fair play on the parties to the litigation before them. 'The behaviour which is expected of a judge in different ages and by different systems of law seems to fluctuate between two poles. At one of these the model is the conduct of the man of science who is making researches in his laboratory and will use all appropriate methods for the solution of problems and the discovery of truth. At the other stands the umpire of our English games, who is there, not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed. It is towards the second of these ideals that our English medieval procedure is strongly inclined. The judges sit in Court not in order that they may discover the truth but in order that they may answer the question: "How's that?" This passive habit seems to grow upon them as time goes on and the rules of pleading are developed. In Bracton's day they not infrequently addressed questions to the parties in the hope of obtaining admissions and abbreviating the suit. The judges conceived themselves

follow the King's Court but should be held in some certain place. For seven centuries the Court of Common Pleas—called by Coke the Lock and Key of the Common Law—was held in the Great Hall of William Rufus at Westminster. In the reign of Edward III the other courts, the Court of King's Bench and the Court of Exchequer also ceased to follow the King and were also established at Westminster.

to be endowed with certain equitable powers, and as yet the rules for the intricate game of special pleading had not been formulated. But even in a criminal cause, even when the King is prosecuting, the English judge will if he can play the umpire rather than the Inquisitor '.[5]

The truth is, as Maitland hints, that Equity was inherent in royal justice whether it was administered by the King directly in his Council or by the King's judges in the courts of common law. The design of the *Doctor and Student*, we are told, ' is to inquire into the grounds and reasons of the Common Law of England; and to show how consistent every of its precepts are with right reason and a good conscience '.

The principles of the Common Law are founded on reason and equity. Henry of Bracton, who wrote whilst the law was in course of formation, lays it down that the Common Law Courts may be guided by equity even in cases where the question is one of strict law.[6] The Plea Rolls assert the existence of an overriding equity in the King. A Statute of Edward I imposes or admits an obligation on the King who is sovereign lord to do right unto all such as will complain. By the custom of the realm, which is confirmed by the Statute of Marlborough, all men great and small, shall do and receive justice in the King's courts.

[5] Pollock and Maitland, *History of English Law*, II, 670–1.

[6] As late as the eighteenth century a great judge declared: ' Principles of private justice, moral fitness and public convenience, when applied to a new subject, make Common Law without a precedent '. *Millar* v. *Taylor* (1769), 4 Burr. 2303, 2312, *per* Willes, J.

In cases touching the welfare of the poor, the weak and the friendless, the obligation to do justice lay heavily on the conscience of the King, and of his judges. The Justices in Eyre were under duty to do 'what right and justice demanded'. Bills and complaints were accordingly addressed to the judges 'who are put in the place of the King to do justice'. These Bills were largely used by very poor people. There were, says Dr. Bolland, no rules as to form, so that expert knowledge was not necessary. A Bill could be framed and presented by anyone who could write or get another to write for him. 'There is no evidence that any fee was payable on presentation of a Bill but there is conclusive evidence that the way of a very poor man to the ear of the King's Justices was made easy for him. All this points to the immemorial belief that inherent in the King are the right and the power to remedy all wrongs independently of Common Law or Statute Law and even in the teeth of these; the right and the power in fact to do as he likes whatever hard law and still harder practice may dictate; and the hope and the trust that, his own personal interests being in no way concerned, he will right the wrong and see that justice is done.'

Apart from these petitions to the judges, Bills and petitions were submitted directly to the King making complaint and asking for justice 'for the love of God and in the way of charity'. The first task of Edward I on his return to England in 1289 was 'to listen to the cries of the wretched' and to take action on their petitions. These petitions were referred to the judges

of the Common Law, or were delegated to the Chancellor with instructions that justice should be done; or they were retained for consideration by the King in Council. The Council was called to advise as to the exercise of the Prerogative in all cases in which a remedy was sought for injuries and acts of oppression, where from the heinousness of the offence or the rank and power of the party or any other cause there was likely to be an impediment to a fair trial, or to the attainment of appropriate redress in the ordinary tribunals.

In cases referred to him, the Chancellor or his deputy the Master of the Rolls, was sometimes directed to consult with the judges and the serjeants. Thus in the reign of Edward IV, on delivery of the Great Seal to Kirkham, Master of the Rolls, he was ordered to determine according to equity and good conscience, and to the old course and laudable custom of the court, taking advice of the King's justices in case of difficulty. 'Mes quant al matters de conscience il eux determinera solonque conscience.'[7] The Commons protested from time to time against the growing jurisdiction of the Chancellor, but the regular answer to their remonstrances was that the King would preserve his Prerogative.

The tendency to establish the Chancery not only in a separate lodging, but as a separate department with

[7] Matthew Paris refers incidentally to Radulphus de Neville, Bishop of Chichester, and Chancellor, as a man 'qui erat Regis fidelissimus Cancellarius, et inconcussa columna veritatis, *singulis* sua Jura, precipue *pauperibus*, juste reddens et indilate'.

its own stipends and revenues, was due not merely to the specialisation of its functions, but also to a general need for more space and freedom in the royal palaces. In the reign of Richard II, the Chancery was established as a distinct and permanent court with its own peculiar mode of procedure; and matters began to be delegated to the Chancellor by authority of Parliament. The Chancellor was to cause the parties to come before him in the Chancery and there diligently to view and examine the matter contained in the Bill or Petition and to hear the parties. 'And further let there be done by authority of Parliament that which right and reason and good faith and good conscience require.'

'The advent of the Chancellor as a judicial officer of the Crown was at a time when the older tribunals, although expanding their own system to meet the needs of a growing society, were nevertheless fettered in their powers by statute and precedent, as well as by the conservatism and technicality of the legal profession. The Chancellor's Court exercising very wide discretionary powers, gradually developed the elaborate and effective system of rules and principles which we know as English equity. While fully recognising the achievements of the Chancery, let us not forget that the new tribunal built partly upon the older practice of the Common Law and other courts whose equitable jurisdiction it supplanted. The new tribunal did not originate English equity, for it simply carried on the work of the older courts by developing in greater fullness and with a different machinery the equity inherent in royal justice.'

In passing, we may note that the serjeants and apprentices at law might be required by any of the King's courts to appear and plead for a poor man. In one of the Bills in Eyre of 1292 there is a request by the petitioner that the court 'will grant them a Serjeant, for that they are poor folk'. In one of the Year Books of Edward IV, Brian Chief Justice is recorded as saying that if a serjeant declined to plead for a poor man when the court orders him 'nous ne lui poyomes faire non Serjeant car il ad ce nosme donne par le Roy, mais nous poioms luy estrange del barr, issint que il ne serra resceu de pleader'.

Another question of conscience arose for counsel in connection with the statements they made to the court. Counsel appear to have considered themselves in some sense responsible for such statements and not entitled therefore to repeat the statements to the court on the mere instructions of their client. They examined their clients before they put forward a plea; and even declined to plead a fact as to the truth of which they had doubts. One of the Year Books of Henry VI contains the record of a case in which the tenant and his attorney in a writ of right had made default at *nisi prius*. The judges had recorded the default and discharged the jury. In the next term the tenant came to the bar, and counsel for the demandant prayed judgment against him. The tenant requested his counsel to plead certain facts in explanation of his previous default; but the serjeants, knowing nothing of the facts and apparently suspecting the truth of the statements made by the tenant, declined

to plead them. Counsel for the demandant then moved for judgment, commenting on the character of a plea so suspicious that even the tenant's own counsel would not plead it. Counsel then tried to excuse the tenant, but the Chief Justice said to them: 'You will get no worship by meddling with these false and suspicious matters; for this and such-like business will get no favour here'. And he said to them: 'If you wish to plead this matter, plead it or otherwise it will be good for nothing'. And they replied they dared not plead this matter knowing nothing of it except what the tenant told them; and they said they did not wish to meddle any further with it.[8]

The conscience of the judges, too, was vexed by the question whether their decision in a particular case must be based solely upon the matters proved in evidence; or upon their private (extra-judicial) knowledge of the true facts. The problem was much discussed among canonists and moral theologians: 'utrum judex secundum allegata judicare debeat an juxta conscientiam?'[9] In English law it was established at an early date (following the opinion of Aquinas) that the judge must decide not upon his own private knowledge, but upon the matters proved in evidence before him. In 1332–3 Herle, Chief Justice, refused to go outside the record and recognise that a

[8] Holdsworth, *H.E.L.*, III, 638, 646–8.

[9] Cp. Aquinas, S.T., IIa, IIae, Q. 67, A.2, one of a series of articles in which the great doctor examines in succession the species of injustice that may be committed by the judge, by the prosecution, by the accused, by witnesses, and by advocates. And see Y.B. 7 Ed. III Hil. p. 7, Y.B. 7 Henry IV Pasch. pl. 5, *Partridge* v. *Strange*, 1553, Plowden 83; Holdsworth, *H.E.L.*, IX, pp. 136–7.

defendant was dead, merely because his death was alleged to be a notorious fact. In a dictum which was often cited Gascoigne, Chief Justice, declared that if a jury found a man guilty of murder whom the judge knew privately not to be guilty, the proper course was to respite judgment and ask the King for a pardon. In an argument of Sir Edward Coke we read : ' Here is a variance in substance between the name given to the hospital . . . and the name usurped in the lease. And if the name given to the hospital upon the foundation of it, and the name usurped in the lease be not *unum in sensu* (not in your private understanding as private persons, but in your judicial knowledge upon the record) then this lease is void. For you ought not upon your private knowledge to give judgement, unless also your judicial knowledge agree with it; that is the knowledge out of the records which you have before you '. Of Chief Justice North, his brother Roger North relates : ' I wondered once to find him, after an hour's sticking and picking upon an evidence, at last all at once to give it up. I asked him why he left off so abruptly. He told me that he discerned a roguery; but the evidence was not sufficient to justify him to direct the jury to find it. And thereupon he directed, as the strength of the evidence required, even contrary to his own private judgement. For, in point of fact, whereof he was neither judge nor witness, he must have warrantable reasons for what he said or insinuated to the jury, who were the only proper judges '.

A similar problem of conscience may arise in the

case of a juror, and probably has arisen. It is common knowledge that a juror must base his verdict upon the evidence of witnesses given in open court and not upon reports he has read in the newspapers or heard from his friends; and least of all upon some kind of intuition of his own. Yet if a juror is certain, of his own private knowledge, that the accused is innocent of the offence with which he is charged, he obviously will not be convinced by evidence given in court to the contrary, and he cannot in conscience join in a verdict of guilty. In such circumstances the duty of the particular juror may be to communicate his private knowledge of the innocence of the accused to the other jurors; though the preferable course would be for him as soon as his name was called and before he was sworn as a juror, to make a communication to the court so that he might be discharged from service as a juror and be available as a witness for the defence.

To return. The emergence of the Chancery as a distinct and separate court was due in some measure to the growing rigidity and technicality of the law administered in the Courts of Common Law; and in some measure also to the superior modes of procedure that were used by the Chancellor, as for instance the introduction of the *Sub Poena*, and the canonist method of collecting evidence, even from the parties, by way of written depositions. The turbulence of the times led also to a certain distrust of juries against whom, especially in the 15th century, complaints were made that they were packed or bribed or intimidated or partial and difficult to obtain within a reasonable time. In the reign of Henry V the Court of Chancery

had already borrowed the procedure of the Canon Law. In addition to the *Sub Poena* it had the examination on oath of the parties 'according to the form of the Civil Law and the law of Holy Church in subversion of the Common Law'. In the course of time a sense of competition and of rivalry began to appear. Chancery issued Injunctions against parties from pursuing their remedies at Common Law, and the Common Law courts began to threaten Prohibitions against proceedings in Chancery. In an Answer to the *Doctor and Student*, a Serjeant at law marvelled what authority the Chancellor had to issue an Injunction in the King's name, and how he dare presume to make such a writ to let the King's subjects to sue the King's laws; the which the King himself cannot do right wisely; for He is sworn to the contrary. The Serjeant argued that the Equity of the Chancellor was wholly uncertain and arbitrary; and that the Chancellors thought the Common Law needed amendment only because they were ecclesiastics and knew not its goodness. 'I perceive by your practice that you presume much upon your mind and think that your conceit is far better than the Common Law; and therefore you make a Bill of your conceit and put it into the Chancery saying it is grounded upon conscience.'

The frequency with which Wolsey issued Injunctions was made one of the Articles of his Impeachment. His successor Sir Thomas More was a Common lawyer. Of his relations as Chancellor with the judges of the Common Law, Roper writes: 'And as fewe Iniunctions as he graunted while he was (lorde) chancelour, yeat were they by some of the Judges of the lawe misliked,

which I understanding, declared the same to Sir Thomas More, who aunswered me that they should have litle cause to find fault with him therefor. And thereuppon caused he one master Crooke, cheif of the six clerks, to make a docket contayning the whole number and causes of all such Iniunctions as either in his tyme had alredy passed, or at that present depended in any of the king's Courtes at westminster before him. Which done, he invited all the Judges to dyne with him in the councell chamber at westminster where, after dynner, when he had broken with them what complaintes he had heard of his Iniunctions, and moreouer shewed them bothe the number and causes of euery one of them in order, so plainely that, uppon full debating of thos matters, they were all inforced to confess that they, in like case, could haue done no other wise themselves. Then offred he this unto them : that if the Iustices of euery courte (unto whom the reformacion of the rigour of the lawe, by reason of their office, most especially appertained) wold, uppon resonable considerations, by their owne discretions (as they were, as he thought, in consciens bound) mitigate and reforme the rigour of the lawe themselves, there should from thenceforth by him no more Iniunctions be graunted. Whereunto when they refused to condiscend, then said he unto them : " Forasmuch as your selves, my lordes, drive me to that necessity for awardinge out Iniunctions to releive the peoples injury, you cannot hereafter any more iustly blame me ". After that he said secreatly unto me : " I perceiue, sonne, why they like not so to doe, for they see that they may by the verdicte of the Iurye cast of all quarrells from them selves

uppon them, which they accompte their cheif defens; and therefore am I compelled to abide thadventure of all such reportes " '.[10]

The names of Wolsey and Sir Thomas More remind us of the meaning and significance in medieval England of the Chancery and the Chancellor. The Chancery was the great secretarial bureau : a Home Office, a Foreign Office, a Ministry of Justice. It was the centre of the English legal system and the political centre of the Constitution. The Lord Chancellor was the highest rank of the King's servants, ' the King's natural Prime Minister '. He acted as Secretary of State for all departments, and was the Keeper of the Great Seal which was, in Matthew Paris' phrase, the key of the kingdom. Under him were numerous clerks, the highest among them corresponding to our Under-Secretaries of State. The Chancellor, be it added, admitted the judges to their office and controlled their action. Nor is it without significance that during the whole of the medieval period the principal clerks or Masters in Chancery took rank above the Attorney-General and the Solicitor-General and the Serjeants at Law.

Contemporary with Sir Thomas More, and his opponent in religious controversy, was Christopher St. German, the author of the *Doctor and Student* which was to influence the theory and practice of English equity over a period of two centuries and more. In the *Dialogue of Doctor and Student*, the Doctor of Divinity explains the meaning of Equity.

[10] Roper, *Life of More*, ed. Hitchcock, E.E.T.S., pp. 44–5.

'Equity is a rightwiseness that considereth all the particular circumstances of the deed, the which also is tempered with the sweetness of mercy. And such an Equity must always be observed in every law of man, and in every general rule. . . . And for the plainer declaration what Equity is, thou shalt understand, that sith the deeds and acts of men, for which laws have been ordained, happen in divers manners infinitely, it is not possible to make any general rule of law, but that it shall fail in some case: and therefore makers of laws take heed to such things as may often come, and not to every particular case, for they could not though they would. And therefore, to follow the words of the law were in some case both against justice and the commonwealth. Wherefore in some cases it is necessary to leave the words of the law, and to follow that reason and justice requireth, and to that intent Equity is ordained; that is to say to temper and mitigate the rigour of the law. And it is called also by some men *epieikeia*; the which is no other thing but an exception of the law of God, or of the law of reason, from the general rules of the law of man, when they, by reason of their generality, would in any particular case judge against the law of God, or the law of reason: the which exception is secretly understood in every general rule of every positive law.' By following out these principles of reason and good conscience in the grant of equitable relief and equitable remedies, a succession of English Chancellors added to our legal system, together with a certain number of detached doctrines, 'one novel and fertile institution, namely the Trust; and three

novel and fertile remedies, namely the decree for specific performance, the Injunction and the judicial administration of Estates'. In the *History of Real Property* by Kenelm Digby the lack of skill which the Common-lawyer Chancellors of the post-Reformation period exhibited in handling the philosophical ideas that underlie the institution of 'uses' and 'trusts', is contrasted unfavourably with the 'enlightened system which had been constructed by the succession of ecclesiastical Chancellors'.[11] The 'use' or 'Trust', you will know, is an institution which came into existence through the action of the Chancellor in cases where one person was under a moral duty, a duty of conscience, to deal with property for the benefit of another. It was from the beginning a popular institution. It was of service to the Convents of friars who had taken a vow of poverty. It was freely used by the Common lawyers in their own affairs and in their testaments. And here we may note a signal service which the institution of the Trust has performed. 'All that we mean by religious liberty has been intimately connected with the making and the enforcement of Trusts. When the time for a little toleration had come', writes Professor Maitland, 'there was the Trust ready to provide all that was needed by the barely tolerated sects. All that they had to ask from the State was that the open preaching of their doctrines should not be unlawful'. The universal character of the Trust appears from the circumstance that it includes the

[11] Digby, *History of Real Property*, 4th ed., pp. 342–3, 368–9.

Church of Rome (as seen by English law), the Wesleyan connection, Lincoln's Inn, the London Stock Exchange, the London Library and the Jockey Club.

The rest of the story is soon told. The history of English Equity in the centuries since Ellesmere may be likened to the history of the Common Law in the course of the earlier centuries. It is the history of a flexible and in a sense a formless system of jurisprudence gradually becoming more fixed and technical. It is the history of a process which Sir Frederick Pollock and after him Professor Lévy-Ullmann have called the Transformation of Equity.

According to Sir Frederick Pollock the old form of Equity predominated in the King's administration of special remedial justice during the 14th and 15th centuries. The 16th century was a period of transition. Before the end of the 17th century the Court of Chancery was not only a regular court of justice but had started on the road of technical and scientific elaboration.

It is scarcely necessary to trace the process in detail. In the reign of James I, Ellesmere in common with the lawyers of his period would seem to have inherited the full tradition of Equity. In his little Treatise he describes the court in the old manner as 'the refuge of the poor and afflicted : the altar and sanctuary for such as against the might of rich men and the countenance of great men cannot maintain the goodness of their cause and the truth of their title'. The 1619 edition of Lambard's *Eirenarcha* would seem to show that the life and institutions of the realm are still

inspired and guided by a moral ideal. The points of charge of the justices in quarter sessions, says Lambard, 'do either concern God, the Prince or subject'. All these laws 'do either command or prohibit things agreeing or repugnant to some of the four cardinal virtues, Prudence, Justice, Fortitude, Temperance. All these ordinances do either draw us to the good or withdraw us from the evil of the mind, the body or fortune'.

In the period after the Restoration in 1660 Equity slowly developed into a consistent and definite body of rules, and could fairly be described as the law which was administered by the Chancellors. In the course of time precedents began to be cited in Chancery—to the scandal of Chancery practitioners.[12] In an earlier time it had been laid down that no appeal lay from a decision of the Lord Chancellor on a matter of Equity; and in the 16th century though it seems to have been thought that the Chancellor might review his own decrees, a debate upon the question whether they could be reviewed in Parliament or by any other court was summarily stopped by the King's Secretary: 'Le Secretary luy enterrupte et dit ne parlez plus del autorite de cest court'. Before the end of the 17th century the House of Lords asserted its right to hear appeals from the Chancery, though the Commons denied the right of their Lordships and had on their

[12] Thus, Lord Keeper Williams says: 'Some judges, when they seem doubtful what to determine in a cause, will be inquisitive after precedents, which I cannot conceive to what purpose it should be, unless being desirous to pleasure a friend . . . they would faine know whether any before them have done so ill as they intend to do'.

side Lord Nottingham, Lord Chancellor, Hale, Vaughan and practically all the lawyers of any note in England. The introduction of the rule of precedent and of appeals in equity cases led to the practice of making reports and to the rapid development of Equity as a system of case law supplementary to the Common Law. In accordance with all this line of development, Lord Nottingham, sometimes called the Father of English Equity, declared that the conscience of the Chancellor is not his natural and private (*naturalis et interna*) conscience but a civil and official one (*officialis et externa*).

In 1908 a Chancery judge sitting in a Chancery court declared ' This court is not a court of conscience '.

The declaration of the Chancery judge must not be taken to mean that conscience is no longer active in our courts and our community. Even if the words bore this meaning, one who recalled the universal character of the Common Law in the modern world, might find comfort in the more recent statement of Justice Cardozo of the Supreme Court of the United States : ' What really matters is that the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience '.

But the words of the English judge do not bear such a meaning. In our courts and our community, conscience is always active. The King is sworn at his Coronation. Judges and magistrates are sworn : ' I swear by Almighty God that I will well and truly serve our sovereign lord King George VI in the office

of Justice of the Peace and I will do right to all manner of people after the Laws and Usages of the Realm without fear or favour, affection or ill-will.' The 'good and lawful' men and women who are called as jurors are sworn, solemnly and individually: 'I swear by Almighty God that I will well and truly try and true deliverance make between our sovereign lord the King and the prisoner at the bar and a true verdict give according to the evidence'. Witnesses and parties (if they elect to give evidence) are sworn: 'I swear by Almighty God that the evidence I shall give to the court, shall be the truth, the whole truth and nothing but the truth'.

The procedure of the courts is plainly designed for men and women (like the men and women in the *Utopia* of Sir Thomas More) who do not conceive 'so vile and base an opinion of the dignity of man's nature, as to think that souls die and perish with the body; or that the world runneth at all adventures governed by no divine providence'.[13] The ordinary man with whom the law has to do is the man contemplated by the poet Wordsworth:

> The individual Mind that keeps her own
> Inviolate retirement, subject there
> To Conscience only, and the law supreme
> Of that Intelligence which governs all.

[13] One who does not believe in the existence of God and the immortality of the soul, the Utopians count 'not in the number of men, but as one that hath debased the high nature of his soul to the vileness of brute beast bodies, much less in the number of their citizens . . . Wherefore he that is thus minded is deprived of all honours, excluded from all offices

The spirit and the tradition survive, in the courts and the community that gave to the world the inheritance of the Common Law. 'The imposing edifice of the Comon Law' has been said by Professor Vinogradoff to be 'a structure testifying in no less degree than Gothic Cathedrals to the power of the medieval mind'. And if 'what matters is the direction in which men's faces are set', it may be that in these last times the faces of English men and English women have not always been so directed as to receive 'the true Light which lighteth every man that cometh into the world'.

Hence, it may be, the temporary decline of the things which (as we know from history) go with that Light: a certain decline of Conscience and of Freedom and of the Sanctity of the home, and a weakening of the Commons' control of the political community.[14] To know the cause is not in this case to be able to command the remedy. Yet we who are called upon in war and peace to defend the Christian civilisation of the West, may hope for a renaissance of faith and freedom; and a restoration of the old Integrities of the Common Law; the Integrity of the Individual man; of the Family; and of the Political Community.

and removed from all administration of the Common Weal. And thus he is of all sorts despised as being necessarily of a base and vile nature'.

[14] Holdsworth, *History of English Law*, Vol. 6, p. 73: 'In the nineteenth and twentieth centuries most of the powers which the Stuart kings claimed to exercise by virtue of their prerogative and many others, have, from time to time, been given to the Executive by the Legislature'.

Let me end with a sentence from one of the greatest of the Common lawyers who has been called 'the authentic voice of English character', Sir John Fortescue: 'Freedom is a thing with which the nature of man has been endowed by God. For this reason if it be taken away from man it strives of its own energy always to return'.[15]

[15] Sir John Fortescue, *De Laudibus*, ed. Chrimes, 1942, pp. cviii, 104.