

NATURAL LAW AND THE COMMON LAW

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THE NATURAL LAW AND THE COMMON LAW

THE Common Law of England and the United States is the only great system of temporal law that came out of the Christian centuries. It came out of the centuries which gave us the great English Cathedrals and Abbeys and the old Universities and the lovely parish churches of the English country-side.

The 11th and 12th centuries were throughout Europe a period of active renaissance in legal studies. The first waves of influence of this renaissance reached England with Lanfranc, the lawyer of Pavia, master of Roman Civil and Roman Canon Law, who in England was to carry all before him even when the talk was of sac and soc.

In the Anglo-Saxon time England had established a Christian tradition in law and letters. "English law," says Maitland, "has no written memorials of its heath-enry. 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." In the legislation of Ethelbert and Ine and Alfred and Cnut there is no trace of the laws and jurisprudence of Imperial Rome as distinct from the precepts and traditions of the Church. "And this inroad," says the historian, "of the Roman ecclesiastical tradition, of the system which in the course of time was organized in the

Canon Law, was the first and by no means the least important of the Norman invasions of our polity."

Even so, in the century immediately preceding the Conquest, the social and religious condition of England was backward and in some ways retrogressive. The manumissions which are found among the Anglo-Saxon Charters show the existence of slaves all through the period. The slave trade was active, the main routes being to Ireland and to Gaul. (The name of Patrick carries its own memories.) In the reign of Ethelred, the Archbishop of York denounced the practice in his homilies. Towards the end of the 11th century Wulfstan, Bishop of Worcester, who held his place right through the Conquest, protested vigorously against the slave trade that was carried on from Bristol. "The central force of old English social development," says Professor Stenton, "may be described as the process by which a peasantry composed of essentially free men, acknowledging no law below the king, gradually lost economic and personal independence." Thus it was that the Conqueror left Normandy, where there were few slaves, for a land where there were many; "where the slave was still a vendible chattel and the slave trade was flagrant."

And so, immediately after the Conquest, the mass of the English folk who cultivated the soil were slaves or serfs or villeins 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, which was composed of men and women who were slaves by birth, or of those

who in evil days had bowed their heads for bread, tended in the course of time to become merged in the miscellaneous class of persons who actually cultivated the soil. 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.

The condition of the Church also, in the century before the Conquest, was in many ways unsatisfactory. The bishops were mostly uneducated and secularized: ecclesiastical synods and ecclesiastical law were falling into disuse; there was no separate ecclesiastical jurisdiction.

The spiritual and intellectual renaissance that came with the Conquest effected a rapid reform. The legislation of William went straight to the sources of life, and of more abundant life. Even before he demanded the personal oath and loyalty of all free men the Conqueror proclaimed that "one God shall be honoured throughout the whole of the kingdom and the Christian faith shall be kept inviolate." Again, in 1066, the Charter he gave to the City of London recognized the family, and freedom of inheritance: "I will that every child shall be his father's heir after his father's day." A man is free and knows himself to be free to the extent to which his inheritance is inviolable. It is a mark of tyranny (not unknown in our own time) to thrust men out of their inheritance.

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 the spiritual jurisdiction." This separate organization of temporal and spiritual courts is a distinctly Christian thing. In pre-Christian civilization there was no distinction between Church and State. Religion was an affair of groups rather than of individuals. The parallel organization in England of King's Courts and Courts Christian involves the recognition of the great Christian principle (which today is everywhere under challenge) that the moral and spiritual life of man must be beyond the power and reach of the political officers of the community. The words that John and Peter spoke in the Acts of the Apostles, "whether it be right in the sight of God to hearken unto you rather than unto God, judge ye" mark a revolution in the attitude of the individual citizen to society: the claim that man is answerable in his own mind and conscience to a Power and an Authority higher than the State. The individual moral and religious experience transcends the authority of the political society, and the Church, as embodying this spiritual experience, cannot tolerate the control of the State. In the years to come, after the bitter quarrel between Henry II and Thomas Becket, the first clause of the Magna Carta will consecrate the doctrine: That the Church in England shall be free and have all its laws in their integrity and all its privileges unimpaired.

England under the Norman and Angevin kings was in close touch with the now vivid, intellectual life of Europe. Already in 1118 the author of the *Leges Henrici I* endeavours in a rational, and even in a philosophical form,

to restate the medley of customs of Mercia and Wessex and East Anglia that make up the law of the land after the amendment by William I and by Henry I of the supposed laws of Edward the Confessor. He finds in the writings of Isidore of Seville and of the Canonist Burchard of Worms a source of general jurisprudence. The works of Burchard and of Isidore restate the teaching on Natural Law of Aristotle and of Cicero. They will be among the sources from which in the years to come the Common Law will draw its proper doctrine.

Henry II had not yet come to the throne when the *Decretum* of Gratian, the first great text-book of the Canon Law, was published. It opens with a definition of law and of natural law. "The race of mankind," says Gratian, "is ruled by two things, by natural law and custom." We are at a turning-point in the history of the law of the church; it is also a turning point in the history of English law.

In the reign of Henry II, law and literature grew up together. At the Court of Theobald of Canterbury is Bartholomew of Exeter, canonist and theologian from the schools of Paris, and John of Salisbury, who has served for some time in the Papal Chancery, and will have stern words to say to kings and tyrants. In the *Polycraticus* he affirms the existence and operation everywhere of a system of natural law, and declares that human law must not be at variance with it. If human law contradicts the natural law it is invalid and not to be enforced. At Canterbury also was Vacarius, the first professor of Roman Civil Law in England. Before the

end of the century Richard Bishop of London in the *Dialogus de Scaccario* and Hubert Walter, afterwards Archbishop of Canterbury, in the book that is called *Glanvil*, raised English law to the level of literature. *Glanvil*, newly edited for us by Professor Woodbine of Yale, is the first great text-book of the Common Law, which owes its beginnings to the reorganization of the Curia and the Kings Courts in the reign of Henry II.

With the *ratio scripta* of the Roman Civil Law and the *Decretum* before their eyes, the early common lawyers deliberately chose, on the basis of natural law and on principles of Christian freedom, to frame a new system 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; and round these writs would grow an organic system of unwritten law that would be the common law of England. In face of the written law of Imperial and of Papal Rome, the man who wrote *Glanvil*, whom we take to be Hubert Walter and, after him, Henry of Bracton are at pains to argue that it is not absurd to call the laws and customs of England, though they are not written, by the name of law. It was for the good of the whole world, says Maitland, that one race stood apart from its neighbours, turned away its eyes at an early time, from the fascinating pages of the *Corpus Juris*, and made the grand experiment of a new system of writs and formulas.

Soon after the middle of the twelfth century, the Assize of Clarendon and the Assize of Northampton introduce

a Christian idea, derived from natural law, which becomes one of the leading conceptions of the Common Law. It is the conception of the *liber et legalis homo*: the free and lawful man. In the writs that we read in *Glanvil* and at a later time in Bracton, the Sheriff is regularly ordered to summon so many free and lawful men to determine a matter of fact in dispute between the parties. "Among laymen," says Maitland, "the time has already come when men of one sort, free and lawful men, 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."

In the presence of this noble conception of man, slavery ceases. At the end of the twelfth century anything that could be called slavery was extinct.

Just at this time too, an English Pope, Adrian IV, in a Decretal Letter, laid down for all Christendom the rule 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 consent 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." The *Decretum* of Gratian too includes a Canon which forbids the dissolution of the marriage of slaves; on the ground that, as God is the

father of all men, in things related to God the same law is binding upon all men.

At the end of the twelfth century the course of the Common Law is already set towards the making of a society of free and responsible men and women united in obedience to one law in the fellowship of a free community. The King will be below the law. The design is clear in Magna Carta of which Archbishop Stephen Langton was the architect and the common lawyers of the school of Glanvil were the clerks of works. The most famous words of the Charter embody the formula of Novel Disseisin. "No free man shall be taken or imprisoned or disseised of his free tenement . . . or outlawed or exiled or in any wise destroyed nor will we go upon him nor will we send upon him unless by the lawful judgment of his peers, and by the law of the land."

Like John of Salisbury, Stephen Langton affirmed the rule of natural law, that it is binding on Princes and Bishops alike, that there is no escape from it, that 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. In our constitutional history, Stephen Langton, a real English Prelate, troublesome alike to Pope and King, rightly takes his place alongside the great common lawyers; or Somers; or Burke.¹

In the year in which the Charter was wrung from John, the Fourth Lateran Council was held. The Decrees of the Council had many repercussions in the Common

¹ As the author of what is perhaps the greatest of the Christian hymns—the *Veni Sancte Spiritus*—he has a place apart.

Law,² on the constitutional theory, for example, of representation and consent. "The theory of representation and the doctrine of consent are 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 onward the precedents, and to ecclesiastical leaders the principle applied first in connection with taxes on Spiritualities that taxation demands both representation and consent. It is now shown that the feudal doctrine of consent to taxation lacked the element of representation. The Church affirming this 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 of England, both in principle and in practice to the union of the different estates of the realm into one single *communitas regni*.³

Another decree of the Lateran Council imposed on individual Christians everywhere the duty of confessing their sins at least once a year and of receiving the Eucharist during the Easter time. The opening words of the Decree *Omnis utriusque sexus fidelis* are an enfranchisement to the mind.

Of the same tenor is a Proclamation issued by Hubert Walter in the year 1195, *Quod omnes homines regni Angliae pro posse suo servabunt*. Such decrees and proc-

² The abolition of the Ordeal caused a serious crisis in the King's Courts and on the Circuits, and hastened the advent of trial by jury.

³ May's *Parliamentary Practice*, 1946 ed., p. 7.

lamations deepening the Christian sense of equality tended in course of time to annihilate the distinction that was still retained in Magna Carta, the distinction between the free man and the unfree man or villein, between *omnis liber homo* and *omnis homo*.

In the legislation of the 13th and 14th centuries the distinction disappears. The Statute of Winchester of Edward I lays upon every man, rich or poor alike, active duties of citizenship. Every good citizen must assist the forces of order and of 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 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."

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, for villeins were free against all men, save only against their lord. Even against their lord the law protected them always in life and limb. 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*.' In due time the King's Courts granted the villein a writ of trespass against his lord. And without the assistance of any Statute villeinage withered away and came to an end. The villein had come to be a free and lawful man. Out of slave and serf and villein the common law had created the copyholder and the yeoman.

Animated by this spirit of equality and freedom, the king's judges of the Central and Circuit Courts declared and administered the new and growing body of rational principles of the common law as opposed to the special customs and privileges of the Counties and Boroughs. As the King's Court organized itself, "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 custom rose the custom of the King's Court: *tremendum regiae majestatis imperium*."

The earliest Judges of the Common Law were Clerks and Laymen who were appointed to hear all the complaints of the kingdom and to do justice and right: *Ut audirent omnes regni et rectum facerent*. Acting with youthful vigor and a bold simplicity, and unhampered as they were by precedent, these men and their successors, among them Glanvil and Hubert Walter, laid the deep foundations of the Common Law. They were Christian men, — Ranulf Glanvil died on the Crusade and Hubert Walter became Archbishop of Canterbury — and they

were guided by the principles of Christian ethics and of natural law.

In the outlook of these men, and of men like Martin Patteshull and William Raleigh at a later day, there is a certain Christian sense of classlessness:

“For all we are Christ’s creatures. And of
His coffers rich.

And brethren of one blood. Alike beg-
gars and earls.”

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. . . . If you said that 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 toward tyranny. In all that I have read I have seen very little said of him that was not meant strictly and literally true of a man, of an Edward or a Henry.”⁴

In the preamble to Magna Carta, King John confesses that the Charter is made and granted for the honour of God, the exaltation of Holy Church, the amendment of the kingdom, and the good of the king’s soul.

And here we may recall that the ordinary man of the law, “the free and lawful man” is a layman who is of full age and who has forfeited none of his rights by crime or sin. The ordinary man of the law is related directly to the Church and to the State. The Common

⁴ Law Quarterly Review, XVII, 132.

Law takes for granted the organization of Church and State as distinct and coordinate powers. According to the common Christian teaching (as Fortescue will explain to the prince in the early chapters of the *De Laudibus*) law is ineffective without grace. It is the lesson of Aquinas in the Introduction to his Treatise on Law: that God, who is the external principle moving us to good action, instructs our mind by law and assists our will by grace. The Pelagianism of the modern secular state with its multiplicity of laws and regulations will not suffice.

It is a characteristic of the Common Law that the law for great men shall become the law for all men. The law of Baron and Feme, for example, will come to be the law of husband and wife. Again, the Peace of Our Lord the King will be matched in 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 wife are not to be known." "The land of Everyman is in contemplation of law enclosed from others though it lie in the open field and therefore if a man do trespass, the writ of trespass shall be *quare clausum fregit*." Within the homestead, the father will bear 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. All will be in accordance with the principles of the natural law.

"The greatest and most lasting triumph of the Norman and Angevin kings," says Maitland, "was to make the

prelates of the Church their Justices: Let us imagine a man whose notion of the law and the logic of law is that displayed in the *Leges Henrici I* coming upon a glossed version of the *Decretum* or on the *Summa*, say of William of Longchamp. His whole conception of what a lawbook, what a judgment should be, of how men should state law and argue about law, must undergo a radical change. The effect produced on English law by its contact with the Romano-Canonical learning, seems immeasurable or measurable only by the distance that divides Glanvil's treatise from the *Laws of Henry I* (the distance, we are told elsewhere, between reason and unreason; between logic and caprice). "During the whole of the 12th and 13th centuries, English law was administered by the ablest, the best educated men in the realm: by the self-same men who were the Judges Ordinary of the Courts Christian. At one moment Henry III had three Bishops for his Arch-Justiciars. In Richard's reign we can see the King's Court as it sits day by day. It is often enough composed of the Archbishop of Canterbury, two other Bishops, two or three Archdeacons, two or three ordained clerks, and two or three laymen. The majority of its members might at any time be called upon to hear ecclesiastical causes and learn the lessons in law that were addressed to them in Papal Rescripts. Blackstone's picture of a nation divided into two parties 'the bishops and clergy' on one side contending for their foreign jurisprudence, 'the nobility and the laity' on the other side adhering 'with equal pertinacity' to the old Common Law is not true. It is by popish clergymen that

our old Common Law is converted from a rude mass of customs into an articulate system, and when the popish clergymen, yielding at length to the Pope's commands, no longer sit as the principal justices of the King's Court, the creative age of our medieval law is over." ⁵ At the beginning of the reign of Edward I the main outlines of the medieval common law will have been drawn for good. The subsequent centuries will be able to do little more than fill in the details of a scheme which is set before them as unalterable. English Law during the sixteenth and seventeenth centuries is likewise continuously developed from its medieval principles.

Even when the popish clergymen yield at length to the Pope's commands, one of them, Henry of Bracton bequeathed to the world a book *De Legibus Et Consuetudinibus Angliae* which was destined to be the text-book of the Common Law until Blackstone wrote his *Commentaries* after a lapse of five whole centuries.

Conscious of the danger that threatened through the appointment to the Chair of Justice of unlettered and ignorant men who were apt, in deciding cases, to follow their fancy rather than the authority of law, Bracton undertook a scrutiny of old decisions given by his predecessors on the Bench, and in particular his immediate masters Martin Patteshull and William Raleigh, and extracted and set in order the rules of the law that were illustrated by the old authorities.

In the introduction to his work (of which we owe the

⁵ Pollock and Maitland, *History of English Law*, I. 132-3.

text again to the life-long labors of Professor Woodbine of Yale) Bracton, "a man of genius as a lawyer and of talent as a Latinist" elaborates the living principles of English medieval jurisprudence, of which his book has been called the crown and flower. He seeks his source in the *Old* and the *New Testament*, in the Councils and the Fathers of the Church, in the *Decretum* of Gratian and the *Decretals* of Gregory IX. Though he is said to be neither a legist nor a canonist, he had a current knowledge of Roman Civil and of Canon Law. He is familiar with the works of Azo of Bologna, and of John of Salisbury, from whom he borrows a characteristic passage on tyranny. He uses the writings of the Canonists, Tancred and John the Teuton and Raymond of Pennafort. (John the Teuton, author of the *Glossa Ordinaria*, was the link, so to say, in the discussions then in progress between the Canonists and the Theologians on the topic of natural law.) Raymond of Pennafort, sometime Master General of the Dominican Order, edited the *Decretals* of Gregory IX and some years afterwards suggested to a young Dominican from Aquino, the writing of the *Summa Contra Gentes*. Bracton is thus brought very close to his younger contemporary St. Thomas, whom he predeceased by only five or six years. Had he lived a little longer who can doubt that the great master of the Common Law would have had in his hands the first and most enduring Treatise on the Philosophy of Law which forms part of the *Summa Theologica*. Who can doubt that, within a little time after its first appearance, the Treatise of Aquinas on Divine and Natural and Human Law would find its way into the hands of English

lawyers who were now being organised at the Inns of Court and Chancery, as advocates and attorneys? That it did so is to my mind clear from the textbooks and the Year Books, from the writings of Fortescue and Littleton and Thomas More and Christopher St. Germain.

On an early page of his work Bracton roundly condemns servitude and slavery, as institutions contrary to the natural law. Servitude is summarily declared to be *contra naturam*. "*Est quidem servitus constitutio juris gentium qua quis dominio alieno contra naturam sub-jicitur.*" The Roman civil law and the *Jus Gentium* are condemned for their attitude to slavery. *In hac parte jus civile vel gentium detrahit juri naturali*. In this matter the civil law of Rome and the *jus gentium* go contrary to natural law. Manumission is rather the recognition than the gift of freedom, for freedom, which is a thing of natural law, could not be rightly taken away, though by the *jus gentium* the principle was obscured (*obfus-cata*). *Jura enim naturalia sunt immutabilia*. The law of nature is immutable.

Bracton takes from Ulpian the definition of natural law: *jus naturale est quod natura omnia animalia docuit*; and, by a simple amendment (following Azo of Bologna) transforms its meaning: *jus naturale est quod natura, id est ipse Deus, omnia animalia docuit*. And he proceeds to discuss infringements of natural law in terms of moral theology. Though English law had received the tradition of Aristotle and of Cicero and the classical jurists, the Christian understanding, in the light of its proper conception of God and of creation, transforms the whole tradition and immediately carries the

discussion to a higher plane. For all his beliefs in the natural law, Aristotle was tolerant of slavery. Cicero, too, was tolerant of slavery; and likewise the Roman Civil Lawyers. All these men were tolerant of a great many things that are also repugnant to the Christian understanding of natural law. The god of Aristotle or of Cicero or of the civilian lawyers of Imperial Rome, was not the God of Hubert Walter or of Henry of Bracton. The tolerances of the Roman Civil Law and of some modern States that inherit the Civil Law tradition for ideas and institutions that run contrary to Christian conceptions of natural law have never belonged to the native tradition of the Common Law. From the beginning the Common Law has been hostile not only to slavery and such things as the practice of abortion but also to unnatural offences and the institution of the brothel or the *maison tolérée*.

And here we may remark that at the Council of Merton, when Englishmen refused to accept the principle of *legitimatio per subsequens matrimonium* it was no baron but a lawyer, an ecclesiastic, a judge, William Raleigh, the master of Bracton, who stood up for the English practice against the Roman Civil Law and the Canons of the Church and the consensus of Christendom. The hostility of the common lawyers to the rule of *legitimatio per subsequens matrimonium* is shown over the period of centuries by Glanvil and Raleigh and Bracton and Sir John Fortescue, who argues that bastards contract from their procreation a blemish (even though latent in their minds) other than that contracted

by legitimate issue, for it is the culpable and mutual lust of their parents that contrives their engendering which is not so in the lawful and chaste embraces of matrimony.

In the matter of freedom also, one may remark that Bracton is far more forthright than his younger contemporary St. Thomas Aquinas, who seems to regard the institution of slavery, as it appears in the *jus gentium*, as a thing which natural reason instituted among men; an institution appropriate not to the nature of man as such but to the condition of this or that man to whom it may be an advantage to be ruled by one more wise.

The aim of the Common Law, acting in consonance with the principles of natural law, is to make free men living in the fellowship of a free community. Bracton will announce the great constitutional principle which will sound through all the centuries and encircle the world: "The King is under God and the law."

With this principle, which is implicit in Magna Carta, Sir Edward Coke will meet the claim of the first Stuart King to rule by divine right. With these words, the President of a scarcely constitutional tribunal will condemn a second Stuart King to death. With these words, another Stuart King will be admonished in the hour of the Restoration. At Nuremberg Justice Robert Jackson of the Supreme Court of the United States will invite an International Tribunal to declare that not kings only, but rulers also, are "under God and the law."

The King is under God and the law. Bracton states the principle and finds his proof in the example of Our Lord and of Our Lady.⁶ The King is under God and the

law. He is under the law of God, he is under the natural law. The will of man cannot alter the nature of things. *Voluntas hominis non potest immutare naturam*. The rules of human law cannot derogate from the divine or the natural law. There are superior rules of right which guide and limit all human law and legislation. It is teaching and the tradition of the Inns of Court.

The constitutional doctrine of Henry of Bracton was accepted and reaffirmed by Sir John Fortescue, Chief Justice, who lived and suffered during the Wars of the Roses. The most popular of the works of Fortescue, the *De Laudibus Legum Angliae*, gives a first sketch of the system of education, that was followed at the Inns of Court, which were, during all the centuries of the Middle Age, 'the University and Church Militant of the Common Law.' In the interval between the 13th and 15th centuries, the Inns appear to have assimilated and made their own the main doctrines of Aquinas in relation to law and ethics and theology. Fortescue, who seems never to have studied elsewhere than at the Inns of Court, is entirely familiar with the political and legal philosophy of St. Thomas. On the first page of his *De Monarchia*, which is the first book on the English Constitution to be written in English, he borrows from Aquinas

⁶ 'Et quod sub lege esse debeato, cum sit dei vicarius, evidenter apparet ad similitudinem Ihesu Christi, cuius vices gerit in terris. Quia verax dei misericordia, cum ad recuperandum humanum genus ineffabiliter ei multa suppeterent, hanc potissimam elegit viam, qua ad destruendum opus diaboli non virtute uteretur potentiae sed iustitiae ratione. Et sic esse voluit sub lege, ut eos qui sub lege erant redimeret. Noluit enim uti viribus, sed iudicio. Sic etiam beata dei genetrix, virgo Maria, mater domini, quae singulari privilegio supra legem fuit pro ostendendo tamen humilitatis exemplo legalibus subdi non refugit institutis. Sic ergo rex, ne potestas sua maneat infrenata.' Bracton (ed. Woodbine) Vol. II, p. 33.

nas the distinction between *dominium regale* and *dominium politicum et regale*, between absolute and limited monarchy. "And thai diuersen in that the first kynge mey rule his peple bi suche lawes as he makyth hym self. And therefore he mey sett uppon thaim tayles and other imposicions, such as he wol hym self, with owt thair assent. The secounde kynge may not rule his peple bi other lawes than such as thai assenten unto. And therefore he mey sett upon thaim non imposicions with owt thair owne assent."

By contrast with the kingdom of France where the King has absolute power, the kingdom of England is a limited monarchy, *dominium politicum et regale*. The day will come when a French King will assert: *l'état c'est moi*. The tradition of Roman Civil Law runs easily to totalitarianism.

In addition to *De Monarchia*, Fortescue also wrote an important work *De Natura Legis Naturae* in which he makes extensive use of the writings of Aquinas and also of Aristotle and Augustine. The natural law is for him as it was for the general run of English lawyers at the turn of the 16th Century *mater et domina omnium legum humanarum*, the mother and the mistress of all human laws. The stress which Sir John Fortescue laid in all his writings upon the supreme importance of the law of God and of the law of nature was a factor in the transmission to modern times of the concept of a fundamental law to which all other laws must conform.

The precious little Dialogue of Faith and Understanding by Fortescue "bears witness to the vivid religion of a busy man of affairs — the religion of a layman — which

rings as true as the cloistered virtue of a'Kempis."

Like Fortescue, Thomas Littleton, the author of the *Tenures*, "the most perfect and absolute work in any human science," was also a deeply religious man. He was a member of the famous Guild of the Holy Cross at Stratford-on-Avon. (The fact appears to be overlooked in the definitive edition of Littleton's masterpiece which we owe to Eugene Wambaugh of Harvard University). Littleton also was skilled in the philosophy of the Schools and ends his *Tenures* with a flourish entirely in the manner of Aquinas: *lex plus laudatur quando ratione probatur*. The flourish reads like a gesture of defiance, as if Littleton were taking sides in the crucial debate that had arisen between the followers of Aquinas and the followers of Ockham; between those who held that the essence of law was reason and those who argued that the essence of law was will.

An early instance of the conflict appears in the Year Book 18-19, Edward III, where, in a dispute on an obscure point of Real Property Law, Sharshulle, J., refers to precedents and adds: "nulle ensaumples est si fort come resoun."

Thorpe (of Counsel): I think you will do as others have done in like cases; or else we do not know what the law is.

Hillary, J.: Volunté des justices.

Stonore, C. J.: Nanyl: ley est resoun.

The tension between realist and nominalist, between Thomist and Occamist, exercised the mind of Christopher St. Germain, whose Doctor and Student was to

influence English law and equity for more than two centuries. In the main the exposition follows the pattern laid down in the classical Treatise of St. Thomas. The foundations of law are laid first, in the eternal law which is the wisdom of God moving all things to a good end, and secondly in the law of nature of reasonable creatures, "the law of reason as it is commonly called by those that are learned in the law of England." The law of nature, St. Germain says, is never changeable by diversity of time or place. Against this law, prescription, statute or custom may not prevail, any alleged prescription or statute or custom brought in against it being void and against justice. St. Germain borrows from Aquinas, not directly, but indirectly through John Gerson, Chancellor of Paris. Now Gerson was a nominalist and a follower of Ockham and so we find in St. Germain a certain hesitation and an inclination in his later writing to say that the eternal law is rather the Divine Will than the Divine Wisdom ruling all things to a good end. To this argument Leibnitz will make answer: *Recht ist nicht Recht weil Gott es gewollt hat sondern weil Gott gerecht ist.*

During all the centuries before the Reformation the thought and language of the Common Lawyers followed a kind of pattern or rhythm: the law of God, the law of nature, the law of the land. It is the teaching of Henry of Bracton. It is the teaching of Sir John Fortescue. It is the rhythm of English jurisprudence that is on the lips and in the writings of statesmen and of lawyers.

In 1468 the Lord Chancellor told the assembled peers that Justice "was ground, well, and root of all prosper-

ity, peace and public rule of every realm, whereupon all the law of the world had been ground and set, which resteth in three; that is to say, the law of God, the law of nature, and the positive law.”

At a later time the Speaker of the House of Commons declared that ‘the laws whereby the ark of the government hath ever been steered are of three kinds, first the Common Law, grounded or drawn from the law of God, the law of nature or of reason, not mutable; the second, the positive law founded, changed and altered by and through the occasion and policies of the time; the customs and uses, practised and allowed with the time’s approbation, without known beginnings.’

The judges are sworn to do equal law and justice to all the King’s subjects, rich and poor. “Therefore should even a Statute be contrary to justice, according to Revelation, Nature or Reason, they may, indeed they must, nullify it.” The Serjeants are sworn to give counsel according to the law, that is to say, the law of God, the law of reason and the law of the land.

The Year Books bear witness to the same order or hierarchy of laws. There is in Plowden a report of the well-known case of *Hales vs. Petit* in which the Common Bench declared that suicide (in this case the suicide of one of the King’s judges) is an offense against God, against Nature and against the King.

1.) Against God, in that it is a breach of His commandment, “Thou shalt not kill” and to kill oneself, by which act he kills in presumption his own soul, is a greater offense than killing another.

2.) Against Nature; because it is contrary to the rule of self-preservation which is the principle of nature, for every living thing does by instinct of nature defend itself against destruction and then to destroy oneself is contrary to nature and a thing most horrible.

3.) Against the King in that hereby he has lost a subject . . . he being the head has lost one of his mystical members.

At the crisis of English History, one who had been Lord Chancellor, and Speaker of the House of Commons, and Reader of the Inns of Court, and practitioner in the Common Law, stood forth as the incarnation of English Law and Equity and of the Christian philosophy and theology that gave it character and energy. The life and writings of the most illustrious of the common lawyers, show that he held in all their fullness the Christian sense of human dignity and human personality, and of the sanctity of marriage, and of the necessary distribution and balance of power between the Church and State in a free community. In an age that had now grown evil, he who as a stripling had lectured on the City of God of St. Augustine before all the chief and best learned men of the City of London, and who, as we know from his long letter to Dorpius (now made available to us all by the beneficence of Princeton) and from the many passages in his writings, was deeply read in the philosophy and the theology of Aquinas, — this man was now led as a prisoner from the Tower of London to Westminster Hall, to take his trial on a charge of treason.

A statute dictated by Thomas Cromwell had de-

clared the king to be the Supreme Head on earth of the Ecclesia Anglicana. It gave the king authority to reform and redress all errors and heresies in the land. A second Statute made it treason for anyone maliciously to wish, will or desire by words or in writing to deprive the King of his dignity, title or name of his royal state.

In the first of the four counts of the Indictment it was alleged that the prisoner, being asked in the Tower, by the Secretary of State whether he "accepted and reputed the King as the Supreme Head of the Church in England," remained silent and declined to make answer (*malitiose poenitus silebat*).

To this count in the Indictment, the prisoner took exception: "Touching, I say, this challenge and accusation, I answer that for this my taciturnity and silence neither you nor your law nor any law in the world is able justly and rightly to punish me unless you may beside it lay to my charge either some word or some fact in deed."

The objection was overruled, and the pretended trial proceeded to its close on all four counts in the Indictment. After a verdict of guilty on each count had been returned, Thomas More claimed the right to speak his mind: "seeing that I see ye are determined to condemn me (God knoweth how) I will now in discharge of my conscience speak my mind plainly and freely touching my Indictment and your Statute withal."

He proceeded to argue that the Act under which he had been charged and condemned was contrary to the law of God, the law of reason and the law of the land.

"And forasmuch as this Indictment is grounded upon an Act of Parliament directly repugnant to the laws of

God and His Holy Church . . . it is therefore in law among Christian men insufficient to charge any Christian man."

The Statute was against the law of reason: "For this realm being but one member and a small part of the Church, might not make a particular law, disagreeable with the general law of the Church, no more than the City of London being but one poor member in respect of the whole realm, might make a law against an Act of Parliament to bind the whole realm."

The Statute was against the law of the land. It was "contrary to the law and Statutes of this our land, yet unrepealed, as they might evidently perceive in Magna Carta: *Quod Ecclesia Anglicana libera sit et habeat omnia jura sua integra et libertates suas illaesas*."

In the reign of Henry VIII, says Professor Holdsworth, Vinerian Professor of English Law at the University of Oxford, "It was realized that the Acts of Parliament, whether public or private, were legislative in character and the judges were obligated to admit that these acts however morally unjust must be obeyed. . . . The legislation which had deposed the Pope 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 obviously difficult to assign any limits to the power of the Acts of a body which had effected changes so sweeping as those effected by the Reformation Parliament. Lord Burleigh is reported by James I to have said that he knew not what an Act of Parliament could not do

in England. When an Act of Parliament had acquired this authority, says Professor Holdsworth, the last remnants of the idea that there might be fundamental laws, which could not be changed by any person or body of persons in the State necessarily disappears.

After the Reformation, the Parliament of England was no longer bound by the laws of nature or the law of God.

In the current edition of May's *Parliamentary Practice* it is said that the Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. 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 the year 1946, Sir Hartley Shawcross, K.C., M.P., Attorney General, spoke the orthodox constitutional doctrine. "Parliament is sovereign; it can make any laws. It could ordain that all blue-eyed babies be destroyed at birth; but it has been recognized 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, one may observe, is a nice calculation of force.

The Omnipotence of Parliament is inalienable. In the official comment to the British Draft of an International Bill of Human Rights, it is plainly said that, "Proposals that the provisions of the International Bill of Human 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 any greater authority than an Act of Parliament, and one Act of Parliament can repeal any other Act of Parliament." Soon after the enactment of the Statute of Westminster 1931, (which recognized the legislative autonomy of the dominions) a professor of Constitutional Law at a public lecture, in the presence and to the confusion of the Lord Chancellor, declared that the Imperial Parliament by virtue of its Omnipotence, was entitled at its pleasure to repeal the Statute at any time.

Now, though the theory (or the supposition) of the Omnipotence of Parliament was implicit in the Reformation Statutes, the process of translating this new theory into a practical rule of jurisprudence was not easy or simple. This new theory threatened the whole existence of the Common Law which had its foundation in the natural law and which was in the language of Justice Oliver Wendell Holmes, and for this reason we may think, "a far more developed, more rational and mightier body of law than the Roman."

From the first there was resistance. There was the resistance of John Fisher and Thomas More and the Carthusians. After all these had been done to death, there was in the very next year the resistance of the men who rose in the Pilgrimage of Grace, and who demanded among other things that "the Common Laws may have place as was used in the beginning of the reign." For the Common Law of medieval England was a popular

thing. "The law is the highest inheritance of the King by which he and all his subjects are now ruled, and if there were no law there would be no King and no inheritance." The words are those of an anonymous scribe in the Year Book. After an interval of centuries another scribe will say: "The Common Law is the surest and best inheritance that any subject hath, et qui perde ceo perde tout."

The publication in the Tudor and the Stuart time of successive editions of Bracton and of Fortescue and the Year Books gave new strength and courage to the resistance. But for these new editions, in the opinion of Maitland, the work which was done by Sir Edward Coke would have been impossible. In his enumeration of the kinds of law that exist in territories subject to the English Crown, Coke — who settled the last draft of the Charter of Virginia in 1606 — mentions in one breath the Law of Nature and the Common Law. There is perhaps a danger lest men may confuse and even identify these two things, the foundation and the building, since each in its separate way has reference to reason.

In *Bonham's case*, which has had a less fortunate history in England than in the United States, Coke sought to restore the idea of a fundamental law which should limit alike the Crown and Parliament. He claimed for the Judges of the Common Law the power and the duty to control Acts of Parliament and even to annul them if an Act were "against common right and reason or repugnant or impossible to be performed."

In the debate on the Petition of Right, Coke, resisting a clause which would save the sovereign power of the

King, declares: "I know that Prerogative is part of the law . . . but Sovereign Power is no parliamentary word. In my opinion it weakens Magna Carta. . . . Shall we now add it, we shall weaken the foundation of law and then the building must needs fall. Take we heed what we yield unto. Magna Carta is such a fellow that he will have no Sovereign."

And here we may recall the rule laid down at the opening of the colonial period in *Calvin's case*, that "conquered heathen countries at once lose their rights or laws by the conquest, for that they be not only against Christianity but against the law of God and of nature contained in the Decalogue." (On the other hand if an uninhabited country be discovered or planted by English subjects, all the English laws then in being which are the birthright of every subject are immediately there in force).

For a long century after Coke the idea that the law of reason, now beginning to be identified with the Common Law, could be regarded as a fundamental law, had the favour of many minds. Sir Henry Finch, in his *Nomotechnica*, which is "un description del common ley d'Angleterre," examining the law of nature and the law of reason, declares that the rules of reason are of two sorts: some are taken from 'foreign' learning; the rest are proper to the law. "Of the first sort are the principles and sound conclusions, out of the best of the very bowels of divinity, grammar, logic; also from philosophy, natural, political, economic, moral, though in our Reports and Year Books, they do not come under the same terms. Yet the things we find are the same, for the

sparks of all the sciences in the world are raked up in the ashes of the law." Natural law in the classical and Christian conception may be said to mean the sum in order of the dynamic tendencies that are proper to man as a rational being. Natural law has reference to the internal tendency or thrust of things, their "*dynamisme original*." It is rooted in the order of the world and in the conception of man as a part of that order; in a study of the inner constitution of man, of ethics and psychology and the metaphysical foundations of our being. The observation of external things reveals in nature a hierarchy of orders: the mineral, the vegetable, 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, have a principle of life and growth in them, we study the law according to which they live and grow. So, too, with animals, they have being and life and a law according to which their life is lived. So, too with man, he shares with all things the first law of all being: *perseverare in esse suo*. Everyman and every organised community of men will defend his or its existence and will be entitled to defend its existence against unjust attack. On another plane, the animal plane, *jus naturale est quod natura omnia animalia docuit, ut conjunctio maris et feminae et educatio prolis*, though, among rational beings, these things are naturally within the control of mind and conscience. Again, on the purely rational plane, there is the appetite for life in an organised society and the thrust and tendency of the mind to truth and of the will to 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."

So again, Matthew Hale, in his controversy with Thomas Hobbes, stands in the ancient ways. The theory of Hobbes, with its nominalism and its scepticism, was at once fatal to the tradition of divine and natural law, and to the conception of fundamental rights that were rooted in that tradition.

At the turn of the 18th century the idea of a fundamental law was firmly asserted by Chief Justice Holt, who thought it was part of a judge's daily task "to construe and expound Acts of Parliament and adjudge them to be void." He was, you may think, a pioneer of judicial review.

In Blackstone's *Commentaries*, the old tradition which distinguishes the law of God, the law of nature and the law of the land, and which recognizes certain fundamental rights that are based on this distinction, is restated and reaffirmed. As one who cherishes the old belief in the law of God and the law of nature, Blackstone qualifies as 'absolute' the rights to life, to liberty and to property (and certain auxiliary rights) which are declared in Magna Carta, the Petition of Right, the Bill of Rights and the Act of Settlement. And he detaches himself from those who "by a figure rather too

bold," identify the Supremacy of Parliament with Parliamentary Omnipotence.

The rights that Blackstone qualifies as absolute were already familiar to residents in the Thirteen Colonies, where a period of untechnical, popular law had been followed by the slow and gradual reception of most of the rules of the Common Law.

Early in the 18th Century, in a case in Massachusetts (*Giddings vs. Brown*) which will be well-known to you, one Symonds, the Magistrate, after referring with respect to the works of Sir Henry Finch and of Dalton, based his judgment on the "fundamental law which God and nature had given to the people and which cannot be infringed." The right of property he holds to be such a fundamental right. In most jurisdictions it would seem that the law of God and nature at this time was looked upon as the true and fundamental law and that all temporal legislation was considered to be binding only so far as it was an expression of natural law.

In the decade immediately preceding the Declaration of Independence, some 2,500 copies of Blackstone's *Commentaries on the Law* which was for him "the best birth-right and noblest inheritance of mankind" were purchased and received in the colonies of the Atlantic seaboard. James Wilson was at the time a busy practitioner and had drawn from Hooker and from Grotius, and beyond them from Fortescue and from Bracton, the traditional principles of the Common Law. "The Law of Nature," he will say, "and the law of revelation are both divine; they flow, though in different channels, from the same adorable source." Chief Justice Marshall and

Chancellor Kent, on their own acknowledgment, owed to Blackstone their vocation and their legal training.

In all these ways the tradition of the Common Law and of the philosophy that is latent in the Common Law, passed to the new States of the American Union, and to the men who sat under the new Constitution as the Justices of the Supreme Court. The Constitution of the United States was written by men who had Magna Carta and Coke on Littleton before their eyes. I shall not attempt to trace the arguments and the methods by which Marshall and Kent and Story and Taney imposed limits on the legislative power and added the substance of justice to due process of law. Let me indorse the opinion of Professor Holdsworth who says that the Supreme Court of the United States is a body of men which safeguards more effectively than any other tribunal in the world the medieval ideal of the supremacy of the law, an ideal which, one may recall, was in one way or another, common to Holt, to Coke and to Sir Thomas More. The Justices of the Supreme Court are in the authentic tradition of the Common Law and are called upon to be "the Grand Depositories of the fundamental laws" of the republic, and in a measure, of mankind.

I do not of course know whether the habit of your Justices is the habit of our old judges of the Common Law who were said by Fortescue "to sit only from eight o'clock to eleven o'clock in the forenoon, and after they have refreshed themselves, passed the rest of the day in studying the laws, reading Holy Scriptures, and otherwise in contemplation at their good pleasure, their life being more contemplative than active."

The Universities and scholars of the United States, with their constant study of the principles of the Common Law, and their critical editions of the texts of the great masters, of Glanvil, of Bracton, of Littleton, of the Year Books, are also in the authentic tradition of a law whose deepest foundations and latent principles are laid in the philosophy of Christian jurisprudence and of natural law.

At a time when the call of mankind and a great part of the efforts of the United Nations is for a restatement of the fundamental rights of human personality—and their enforcement—rights to life, to liberty, to property, and to the pursuit of happiness, there is on the lawyers and the Law Schools of the United States, a heavy responsibility, in the interests of their own people and of an attentive world, to elucidate the philosophy and the theology of the law which is their high inheritance.

The vocation of our time for a statement of the fundamental principles of law and justice has met with a splendid response at this shrine and University of Notre Dame du Lac. In the fulfillment of the work that you, Father Chairman, and Dean of the Law School have undertaken, you will naturally look for guidance and inspiration to one who is always the Mother of Good Counsel. At this time of her 'singular privilege,' and Octave may not we practitioners and professors of what is, in origin and essence, a great system of Christian jurisprudence, call her again, in hope and love, Our Lady of the Common Law.⁷

⁷ The paper was read on the morrow of the Feast of the Immaculate Conception of Our Lady, 1949. The title "Our Lady of the Common Law" was used by Sir Frederick Pollock. (See Pollock-Holmes Letters, English Edition, Introduction, p. xv.)