GOVERNMENT UNDER LAW IN THE MIDDLE AGES

WITH SPECIAL REFERENCE TO ENGLAND

By

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In the hierarchy of feudal courts, the king's court, which stood at the apex of the pyramid, had always had a special place. With the progressive disappearance of the bases (military, social, and psychological) on which the vast feudal edifice rested and the consequent decline in number and coercive power of seigniorial courts, the curia regis became less a court for the king's tenants-in-chief, more one in which "great and small shall have and receive justice". From the end of the twelfth century, an increasing number of litigants brought their causes there, though under no compulsion to do so; indeed, lords and tenants already were willing to invoke the royal jurisdiction even in the intimate matter of the internal economy of the fief — a matter which, in the days of classical feudalism, never had been the king's concern.

The custom of the king's court, the unwritten common law, was by 1178, under pressure of business, administered (particularly routine complaints of frequent occurrence which might readily be handled by subordinate officials) by judges who were rapidly becoming professional — a new and momentous departure. From that time, in matters that involved no question of principle or high policy, the court was left to carry on its task from day to day, undisturbed by changes among the figureheads, unshaken by

baronial revolt or change of dynasty, and, at Westminster, removed from local pressures that might influence judgements in seigniorial courts. This continuous professional establishment, keeping its terms year after year, therefore provided the answer to the twelfth-century baron's question: "*Si ego injuriam tibi facio, quis tibi faciet justitiam?*"—"If I do you wrong, who is there to do you right?" The curia regis rolls of Richard I's reign and later are still extant to testify that from Angevin times onward "the affairs of common persons were in the common course faithfully determined by the king's courts according to the king's processes at common law". It is true that the common law later fell somewhat short of dealing adequately with the problems subsequent ages presented to it. Nevertheless, to have established, almost fifty years before Magna Charta, a sedentary, impersonal court, open to all free men as of right and staffed by permanent, disinterested officials, was a great achievement, unmatched elsewhere in Europe.

In the early Middle Ages, the law applied in courts of feudal fiefs, by the tenants of those fiefs themselves, to settle disputes between two tenants, or between a lord and his tenant, or between the king and his tenant-in chief, was unwriten custom. This law, a by no means static expression of what the men of a fief or honor or community acknowledged as right, was destined to be overshadowed by an enveloping common law or, on the Continent, by a universal Roman law. These were to make customary law anomalous, "custom" then becoming something other than law, merely the special usages of a particular group or community and often nothing more than the fossilized remains of a remote past. But the unwritten common law of the king's court, applicable to Englishmen generally, rested upon the same simple assumption as that applied in lesser seigniorial courts dealing with the men of a particular fief. Bracton, in the middle thirteenth century, under the influence of Roman ideas, may already call it *lex* as againts *consuetudo*, but dignified by that title or not, the law of England did not rest on the words of a written text or on the decree or command of an emperor or king, but had its force simply (and for a reason that in Bracton's day, since

it left the king unmentioned, already was becoming old-fashioned) because of its acceptance as right and just and in accord with the notions and ideas of those who lived under it. Thus its affinity, like that of the law of a primitive tribe or Grotius's international law of the seventeenth century, was not with will, but with reason and right. Law was not *quod principi placuit* but the embodiment of intelligence and moral worth, reflecting, indeed hardly distinguishable form, the moral law, whose tenets the Middle Ages regarded as immediately accessible to all men of good will and good sense. Thus if we hear little in England of the law of nature, as St Germain remarked early in the sixteenth century, that is because it was hardly needed. The place it held elsewhere was filled by the common law, in no sense a product of the State but antedating it and preserving a pradoxically independent existence in the face of its growing omnipotence. Paradoxical because common law judges, though the king's appointees and servants, and common law courts, though clearly his creation, existing only with his, later only with parliament's, consent, nevertheless were independent of both, the guardians of a system pervaded throughout by reason, sometimes, to be sure, over-technical and artificial reason, but not *raison d'état*. Even when it is fully realized that parliament may make new law and unmake old, the seemingly inescapable conclusion that the common law's existence depends upon the sovereign will and the law a mere extension of it, is not drawn. "The person, goods and possessions of a man (as you know)," wrote Edward Hake, one of many who so wrote in the seventeenth century, "are the things which the common lawes of England doe protect" — not only from the acts of other common persons, but against the encroachments of the monarch and even the parliament. If the protection afforded was sometimes illusory and the law did not always save the subject harmless, it was, except for extravagant appeals to natural law or armed revolt, his only bulwark against arbitrary action.

That the king ought to be not only under God but under the law; that he was to obey the law, not depart from it; that a king who ruled by will rather than by law was was a tyrant—were ancient and widely accepted maxims of medieval political thought.

They meant that the king, like other men, was to abide by accepted notions of what was right and just, was expected to act according to common standards of reason. There were, of course, grave difficulties. It was already clear in the thirteenth century, and would become clearer with the further growth of independent, sovereign states, that the king within his realm had no equal, to say nothing of a superior, and that he held his power directly from God and by Him alone could be punished. Despite the maxims just quoted, it was evident that kings did act *per voluntatem*, by arbitrary will alone, and did do wrong consciously, unwittingly, or through their agents. The Articles of the Barons and Magna Charta, to name no other documents, bear sufficient witness to this, and not only John, but Henry and Richard before him, acted, as indeed many of their successors acted, in that way. What it is important to realize is this — that though the king was subject to no legal restraint or coercion and thus was in practice *legibus solutus*, so long as law is taken in a sense indistinguishable from and coextensive with morals, his unjust acts are not merely breaches of a moral obligation, a matter between himself and God, but illegal and unlawful. How to restrain a king who broke the law was the central problem of constitutional government from Magna Charta to the end of the Middle Ages and, indeed, long after. But the problem was seen as the vindication of the subject's legal rights rather than as a process of supplication, the negotiation of concessions from a monarch in no way obligated to grant them. This made a great difference. Then, too, since the law that stamped the king's acts as illegal was unwritten and fluid, much that in the thirteenth century was the king's of undoubted right became unlawful in the seventeenth. "As day and night creep grown upon us insensibly, every age altering something, and no age seeing more than what they themselves are actors in, nor thinking it to have been otherwise than as they themselves discover it by the present."

The customary law of the realm, even as we see it in Glanvill toward the end of the twelfth century, just as the customary law in force on the fiefs of the great magnates, was not wholly the result of unconscious growth, but had been amended and streng-

thened by rules, remedies, and procedures consciously evolved. The famous assize of novel disseisin, though the text that established it is lost and 1166 as its date remains a guess, was but one of a number of Henry II's innovating decrees. By the formulation of this new action the customary common law was supplemented, as he and his successors were often to supplement it, for the attainment of more rapid and more satisfactory justice. Only, however, on rare occasions does some memory or tradition that a change had been so effected come down to us from the twelfth and early thirteenth centuries, and we must assume that the problems such legislative action later would raise were as yet unknown. An analogy, crude as it is, to a memorandum changing an old or establishing a new office procedure in a large business firm may here be of some help. Once circulated and put into effect, its provisions absorbed into the corpus of customary operating practice, its date and precise words, matters of no continuing importance, need not be remembered. So the informal (perhaps oral) instructions to the judges or the senior writ clerk in chancery: once the changes they had contemplated had been introduced into the fabric of the common law, had been made part, so to speak, of standard operating practice, they might, without loss to any but future historians, be put aside and forgotten.

The last quarter of the thirteenth century was marked by a great outburst of legislative activity, beginning with the Statute of Marlborough (1267) and continuing through the great statutes of Edward I's reign. By 1300 a lawyer had before him a sizeable volume of detailed statutory material of fundamental importance. With this outburst, not equalled in extent or importance until the nineteenth century, the simple concept of English law as unwritten custom had to be replaced by the admission that there were two sources of law, the second being, in Bracton's words, "whatever has been justly defined and approved by the counsel and consent of the magnates on the initiative of the king or prince", though such law was still new and strange enough to require, like custom, "the common engagement of the

res publica", the assent and approbation of the community of those affected.

One of the results of the long and complex process, hardly yet chartered, which I must sum up in the simple words "the leveling out of the hierarchical feudal pyramid and the appearance of national, territorial states" — a consolidation by no means peaceful — was the magnification of power at the center, in the person and position of the king. Once *primus inter pares*, his position is now very much enhanced. As responsible to God for the protection of his nation and the promotion of its prosperity, he had, and had perforce to have, "full power and unhampered rule" — "*plenam potestatem et liberum regimen*", to use the words of St. Louis in 1264. The creation of rules binding upon his subjects, what is now seen and understood to be the establishment of law within his realm, was an application of that power. Bracton can quote the text in the Institutes "*quod principi placuit legis habet vigorem*", but it did not accord with English practice, for he is clear that law is not simply the uninhibited will of the prince but only that which, on the initiative of the king and with his authority, has properly been promulgated, after due deliberation and consideration, by the magnates of his council. Thus in a simple and characteristically feudal way, law-making is in the hands of the king *and* his council — the forerunner of a development which will eventually make it clear that legislation can be enacted only in parliament, and surround the passing of statutes with elaborate constitutional safeguards. Parliament itself, in the course of this development, will change from an afforced meeting of the king's council to a body directly representing the people of the realm.

When the law-making body is fully representative and thus speaks *with the authentic vox populi*, is bound by traditions that confine its omnipotence, and habituated to standards of reason and fair dealing, no further limitation may be necessary. Englishmen, whose rights and liberties are entirely at the mercy of a majority in parliament, have come to regard themselves, through not before the nineteenth century, as amply protected. Earlier

ages, less well protected, attempted to reconcile law as command with law as reason, as the common consciousness of right, as general and incontestable principles of justice beyond the reach of kings and parliaments. If the sovereign cannot (except voluntarily) be bound by its own will, it may yet be bound by divine or natural law, sometimes identified with the counsels of Holy Scripture, sometimes with what is reasonable and just, or by fundamental law, sometimes enshrined in a document or constitution, sometimes not. But logically a sovereign so limited is something less than sovereign, and states lately come to statehood, who do not inherit this unresolved antinomy from the past, tend to regard it as a useless anachronism, for much the same reasons that Bodin and Hobbes, both advocates of a strong state in days when it was subject to internal disorder and threatened attack, so regarded it. But the old lady who protests, in one of Dorothy Sayers' novels, that she is unable to see how the law could have allowed parliament to change the rules of succession to property to her disadvantage, is speaking not as an isolated individual, a strange survival from the medieval world, but as an ordinary, indignant, if unsophisticated person, one of many millions such, at least in the West. Arbitrary acts of a sovereing or its servants, social and economic exploitation based wholly on force, may not only be inconsistent with the ends for which the state exists, defined by Western standards as the preservation of peace and order, justice, the rights and dignities of the individual, but, in much more realistic terms, with the existence of the state itself. The presence of a state "conscience", which regards sympathetically the fundamental expectancies of man, may do more than force to preserve it intact. It may seem futile to pit, with any hope of success, such demands of the human spirit against the tanks and guns of a remorseless master. The experience of recorded history in this regard is not disheartening.
