D. LAW IN ENGLISH HISTORY

in A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW (London, 1966, repr. Gloucester, MA 1973) 242–62 [footnotes omitted])

THIS chapter will try to justify the assertion in the introduction that the history of the law is the history of society and to a large extent also of politics and the constitution.

THE LAW AND LIBERTY

Law was the protector of men from arbitrary government. The individual defendant was safeguarded by the due process of the Common Law, and the 'constant course' of Star Chamber. In 1328, the Statute of Northampton declared that a royal command disturbing the course of the law should be ignored by the judges, and fifteenth-century judges swore not to delay justice even at the king's order. The security and courage of the judges were therefore essential to liberty. Judges were originally appointed 'during the king's pleasure' (*durante beneplacito*), and from time to time one of them (like Coke in 1616) was dismissed for inconvenient judgments. It was in a way a compliment that few officials apart from legal ones were dismissed by the Stuarts for political reasons: law was too important for legal offices to become property and their holders irresponsible. Legends arose of the courage of judges before angry kings—of how Chief Justice Raleigh reversed the irregular outlawing of Hubert de Burgh by Henry III, and Chief Justice Gascoigne imprisoned Prince Henry—later King Henry V—for contempt of court.

Usually, the king had to resort to the same corrupt methods as his greater subjects to divert the course of justice, for he enjoyed few special advantages. Slowly the ordinary criminal was accorded reasonably equal terms in his contest with the Crown: proper, indeed excessively formal indictment, within a definite period from the alleged offence; freedom from giving evidence on oath, which might have compelled self-incrimination; and (as early as the thirteenth century) security from re-arrest for a crime of which he was once acquitted (autrefois acquit). After 1552 at least two witnesses were required to convict a man of treason (5 & 6 Ed. 6, c.II). On the other hand the sixteenth-century Privy Council authorized torture, and the Court of High Commission used the ex officio oath to compel the unorthodox to condemn themselves out of their own mouths. The criminal trials of that period look brutal and one-sided to us—the prisoner was allowed no copy of the indictment, no counsel, no witnesses on his behalf—but there was a certain logic in this: it was the Crown which had to make a case and prove guilt, and if the prisoner needed advocates he should find them in the judges.

Individual liberty was threatened as much by tyrannical officials or intolerant society as by the king. To a Parliament which condemned men unheard by acts of attainder the rule of law seems to have meant as little as to a modern 'people's court'. Some feared that the parliamentary lawyers were out to destroy the king's prerogative to become 'more absolute Governors than any legal prince in Christendom'. The royal prerogative might fail against Parliament, but it was an effective protection against the petty injustices of local officials. The writ of habeas corpus which ordered the giving up of a prisoner was a medieval 'prerogative' writ, put under the control of King's Bench only in the sixteenth century, and turned against an arbitrary monarch in the seventeenth.

No less important were the prerogative writs of *certiorari*, *prohibition*, and *mandamus*, for they were the means of restraining courts and other public bodies against which the individual is powerless, and the root of what is now called 'administrative law'. A normal action for damages was the remedy against the individual official, whose misdeeds fill the medieval plea-rolls: there was a large 'administrative' element from the beginning of English law. But some special means was needed to curb the organization which over stepped its authority. The writs of certiorari and prohibition were evolved in the Middle Ages to quash the judicial decisions of the J.P.s and the church courts respectively, when they seemed to have exceeded their jurisdiction, and in the mid seventeenth century that method was extended to the administrative acts of the J.P.s, particularly in connexion with the poor law. Mandamus, a weapon which Coke appears to have seized for the King's Bench from the Privy Council, was used to restore freemen deprived of their borough

franchise, and then any official arbitrarily deprived of his office by a corporate body—it was the office-holder's 'writ of right'.

THE LAW AND INEQUALITY

The law emphasized class distinctions, and to a great extent was the custom of the aristocracy. The villein was marked out by legal disabilities: since he could not own land, he could not use the real actions. The Common Law was the law of freemen—or rather, of freeholders. In a system worked by the corruption of juries and the 'grace' of officials the rich had an overwhelming advantage. 'Law,' said Langland in Piers Plowman, 'is so lordly, and loth to make end without presents.' In the sixteenth-century Chancery, peers could give evidence on their honour, and a lady objected successfully against impertinent interrogatories. Chancellor Hatton, indeed, asserted that 'law is the inheritance of all men' and developed special procedures for poor suitors. The scheme of *c.*1534 for 'conservators of the commonweal' would have provided a sort of legal aid, and even costs for acquitted defendants. But the cost of the law remained one of the chief grievances of the poor.

Justice might be described as the morality of class relationships; but it was in the control of the gentry. In the Court of Chivalry men were forced to confess their sins against 'the gentry laws'. As J.P.s the gentry put down the riots of their labourers, and as M.P.s they passed the statutes which allowed them to do so. A J.P. was sworn to 'do equal right to poor and rich', but at the end of the sixteenth century he was defined as 'a living creature that for half-a-dozen chickens will dispense with a whole dozen of penal statutes'. Mr J. P. Dawson believes that the main peculiarity of English legal history was the king's unusual reliance (for purposes of economy) on amateur justices and the courts of the local communities: thus it was that the Englishman established his freedom and learnt his well-known respect for the law which he administered. In fact, it may be doubted whether the respect was not a form of social subservience to justices who promoted nothing so much as the dominance of their class.

ln many ways, the law, which was primarily a law of land served the purpose and set the tone of the upper classes. In Henry VIII's reign there was a proposal to restrict the right of entail to the nobility, whose land was their foundation. A man's zhonour' was the collection of feudal services due to him, and he was 'out of countenance' if he was displaced from his *contenementum*, his piece of land and his position in society. Only the purchase of land could make an aristocrat of a merchant. Amongst the social phenomenon linked to the landed aristocracy is heraldry, which provided, in the coat of arms with its quarterings and marks of cadence, an exact register of the continuance, amalgamation and division of family lines. But genealogies and coats of arms could be forged, and a verdict of the too long inexpert heralds on one of their visitations or in the Court of Chivalry might indirectly establish one's claim to the material possessions of a line, along with its insignia. A second phenomenon, caused by the practice of magnates to re-enfeoff their lands to themselves and their wives jointly (an early device for avoiding the feudal obligations of relief, wardship and escheat), was a race of formidable dowagers, disposing of vast properties. One such was the authoress, Lady Russell (1528–1609), whose letters to her powerful kinsman, Lord Burghley, demanding justice for herself and her daughter and containing wonderfully confident verdicts on the complex subject of contingent remainders, fill many pages of the Hatfield MSS. One of her last actions was to write to Garter King of Arms to ask about her funeral—what number of mourners were due to her calling ... the manner of the hearse, of the heralds and church'.

Law-suits about land were the country gentleman's main preoccupation. At any time the average landlord would be carrying on two or three campaigns, each lasting several years, to extend his sway by a combination of law-suits and violent invasion of the disputed land. At the stage of violence criminal law came in as a counter in the private struggle, the J.P. using his duties in case of riot to condemn his rival's aggression and justify his own. An example will show how this was done. In the Autumn of 1589, the earl of Lincoln decided that he had a claim to the Oxfordshire manor of Weston-on-the-Green, then occupied by James Croft as the tenant of Lord Norris of Rycote, and tried to make good his claim by holding a manor-court at Weston. He arrived at Weston House while Croft was away visiting; gained admittance, 'to preserve her majesty's peace' according to his followers, 'riotously' according to his opponents; and, fearing

a counter-attack, called upon the constable of Weston to stay in the house overnight. Croft returned, and it so happened that he was a J.P. and had a special claim on the support of the lord-lieutenant of the county, none other than Lord Norris. At the door of his house he cried out in a loud voice, 'constable of Weston-on-the-Green ... here is a justice of the peace and of the quorum ... come forth of the house and see her majesty's peace kept'. But from inside came the reply: 'there is here in the house a justice of the peace and quorum, and he [the constable] shall not come forth'. There was deadlock for several days, each side exhorting the other 'to keep her highness's peace', till the Earl had to go away on business and further J.P.s, sent by Norris, decided the issue.

It has been suggested that one of the reasons why the aristocracy became less troublesome at the end of the sixteenth century was the complication of litigation, absorbing all their energies. Violence turned into litigiousness. At the same time, the appearance of a 'rise of the gentry', which has generated so much heat amongst present-day historians, may have been produced by better methods of endowing younger sons, with a consequent enlargement of the gentry class.

In seventeenth-century France, an absolute monarchy was doing something to protect the poor against the landlords. In England, the conciliar courts which attempted to follow suit went down in 1642 before the gentry, along with a would-be absolute monarchy. To a few radicals the landowning class and its law were at last revealed as the true oppressors. An effective revolution, they believed, would have to destroy the Common Law. The myth of a 'Norman Yoke', which in 1066 had descended cataclysmically on the primitive democracy of the Anglo-Saxons and had still to be shaken off, became the answer to Coke's 'Whig interpretation of history', depicting an uninterrupted growth of English freedoms under the rule of law. 'The tedious, unknown, and impossible-to-be-understood Common Law practice in Westminster Hall came in by the will of a tyrant, namely William the Conqueror' wrote John Lilburne in 1646. The source of law, Parliament, was tainted too, for, as Tom Paine said in the 1770s, it was a boon which had been granted by 'crowned ruffians', the successors of the 'French bastard' with his 'armed banditti'. After 1642 radical critics of the Common Law were never to be lacking, and the Leveller tradition eventually merged with the Marxist view of law as the tool of the dominant class.

THE LAW AND COMMUNITY

Another form of inequality was expressed in law—the natural inequality of persons of different age and sex. In law, the child and the wife, like the tenant-at-will, were regarded as entirely in the power of someone else—the father or guardian, the husband or the landlord, who must sue on their behalf. They were thus particularly vulnerable and in company with lunatics were extended the protection of Chancery. For the wife, the *feme covert*, her subordination was somewhat compensated by the reduction of her liability for crimes committed under her husband's control. Domestic servants have until very recently stood in the relation of children to their masters, and the same action of trespass on the case (*per quod servitium amisit*) lay for the enticing away of a servant and of a child. This was not so much the law of a few horizontal classes as of many vertical, that is hierarchical, communities in which inequality of status was reconciled by family relationships or land tenure.

Though, as Maitland maintained, a corporation is a moral reality before it is a legal fiction, all groups which are more than mere aggregates must have corporate funds, legal status (as though they were individual persons), and their own rules. The legal advantages of incorporation consisted in the power to undertake contracts and acquire property as a community, symbolized by possession of a common seal. In the sixteenth century many a borough got a charter from the Crown, making it 'a body corporate and politic by the name of the mayor, bailiffs and burgesses', in order to buy up the lands of a dissolved monastery or chantry lying within it. But the original growth of borough corporations was natural and independent of royal grant. Many towns had seals by 1300. London, though not itself formally incorporated till 1608, was invoking the idea of corporate responsibility by 1130, when it obtained the right to distrain any merchant from another town for the debts of his fellow-merchants to Londoners.

The state did and does keep a close control on such versatile bodies as corporations. One of them may last for generations, since it can replace its deceased members, and by a statute of 1391 secular corporations were therefore subjected along with ceclesiastical ones to the necessity of obtaining licences to acquire land in mortmain. The greater communities were marked out by the possession of all the apparatus of law. Long before it was officially incorporated, London legislated in the highest style, claiming on one occasion that the acts of its common council were 'of no less strength than acts of the high court of parliament'. It had its own bar, and its courts punished citizens for pleading in the king's courts.

But the Crown instructed the J.P.s to make a careful scrutiny of the bye-laws of the London guilds and companies and other corporations. For this reason, the Inns of Court and other organizations vested their funds in the alternative device of the trust, which opened the way for a quite undesigned liberty of association.

The lawyers formed a number of important communities within London society. There was the law term, the London 'season', focused on the colourful life of the palace of West minster, and there were the Inns of Court, nation-wide communities of lawyers and country gentlemen, whose loyalty to their 'old colleges' was lifelong. The very fabric of the inns grew by the efforts of members who tacked rickety extensions on to their chambers, frequently enraging neighbours in the process, and certainly there were no societies in London to rival them for turbulent life. Shallow, the Gloucestershire justice in Shakespeare's Henry IV, part II, recalls sentimentally 'the mad days that I have spent' at Clement's Inn, with 'little John Doit of Staffordshire, and black George Bare, and Francis Pickbone, and Will Squele a Cotsald man—you had not four such swinge-bucklers in all the Inns-of-court again'. The inns were known for high living and high spirits. Their Christmas revels were famous: Shallow recalled when he was 'Sir Dagonet in Arthur's Show', and it was at Gray's Inn at Christmas 1594 that *The Comedy of Errors* was first performed. The inns had still other attractions. It was said that one Ulveston got himself made steward of the Middle Temple in 1451, and one Isley, steward of the Inner Temple, 'for excuse for dwelling this time from their wives'.

Though the old nobility did not usually attend the inns, those who rose into the nobility through successful politics almost always had done so: of these were Thomas Cromwell, earl of Essex; William Cecil, Lord Burghley; Thomas Wentworth, earl of Strafford; and Edward Hyde, earl of Clarendon. At all stages of their progress such men could make use of the contacts made at the Inns of Court, much as a modern politician might use his youthful contacts at Balliol. The J.P.s who had been to the inns carried into the counties the social and political fashions of London: 'and now is this vice's dagger became a squire', marvelled Falstaff at the sight of Shallow. The more elusive, yet probably more important, influence was the reciprocal one: how far did the students at the inns reflect the loyalties of their localities, which remained the basis of English political life? The inns only in tensified the local divisions, in so far as the great families of each county sent their sons into the chambers of some local man who had made good, just as the lesser gentry apprenticed their sons to London tradesmen. But, at the inns also, bonds might be created between different parts of the country, for they were, like parliament, thriving marriage markets.

Within London there were communities created by the law in stranger ways. There were those exotic growths, the criminal societies in the sanctuaries and the debtors' society in the Fleet. Reading 'The Oeconomy of the Fleete or an apologetical answer of Alexander Harris (late Warden there) unto xix articles set forth against him by the prisoners' (*c.*1620), one begins to think that more happened inside the prison's walls than outside: 'To the Fleet they will bring their wives, children, and servants to cohabit, women are brought to bed there ... and no other breeding have some than there; ... they exempt themselves from house rent, parish duties, and all taxations ...; they endeavour to have a chamber in the Fleet, with gardens, yards, places of pleasure, at the third or fourth part that it would cost abroad, so that by excess of families there are two or three menial servants to one prisoner ... it is better than a hospital, for to an hospital none shall be admitted that hath livelihood abroad.... In the Fleet all this may be done, and from the Fleet many will not go though they be cleared or you would force them, because they can ... follow and solicit law-suits ... and with a little Fleet reading become counsellors, attorneys, doctors, chirurgeons, scribes, cooks, and all manner

of handicrafts to that precinct, where sometimes are plotted robberies abroad, cutting of purses in town ... and no hue and cry ... can follow, for the Fleet is a privileged place ...' The Fleet was 'a law unto itself.'

Only as the Common Law overcame custom did the greatest community of all, the nation, which learnt much from London, become a loyalty stronger than the local community, a man's *patria* or 'country', to whose verdict he had been accustomed to appeal from a criminal accusation. The peripatetic eyres and the swarms of attorneys brought the English counties closer to one another: nothing travelled so much as the law. It must be admitted that the enormous business of litigation was a more important unifying factor than the success of the law in 'healing and settling' disputes. The legal process of distraint was the 'beginning of all wars', according to Simon de Montfort. Litigants were to some eyes 'idle hot heads, busy bodies and troublesome men in the Commonwealth', who would have been better ending matters at home by the mediation of their neighbours than waiting at Westminster 'and gaping upon their rolls and process in the law'.

But the law did make possible the growth of communal responsibility on a national scale. The upkeep of medieval roads, drains and bridges was enforced by the presentment and trial of those who neglected their duties. The welfare of the poor and the sick was, however, left to the church. The puritan radicals of the reformed church took up these responsibilities with an enthusiasm born of the conviction that grace and election were already theirs, but tempered by the same secularism that had filled laymen's pockets with the wealth of the monasteries into a canny emphasis on visible works. If there was a 'puritan ethic' which contributed to the rise of capitalism, it was a sincere religious hatred of the indiscriminate almsgiving, encouraging indigence, which the reformers attributed to the monasteries, and of the endowment of chantries for the benefit of souls in purgatory. The purposes of puritan charity were not entirely new, but the puritan merchants were the first to glimpse the idea of capital investment in the sense of permanent endowments producing material results, and the trust was the legal institution which made their schemes capable of realization. The most typical item in a puritan's will was therefore a bequest of 'stock for the setting of the poor to work'. Trusts might also be set up to provide alms-houses, hospitals, loans as working-capital for young men and marriage subsidies for young women, roads and bridges, schools, workhouses (private charity here far outstripped official measures) and even public libraries.

Of course, benefactions to education and lectureships advanced Puritanism as a movement. By 1629, however, when Thomas Sutton gave the greatest sum of all to found the Blue Coat school in the London charterhouse, one may feel that charity had become a form of social exhibitionism; and in Jonson's *The Alchemist* it is Sir Epicure Mammon who promises to employ his wealth

> all in pious *uses*/ Founding of colleges and grammar schools,/ Marrying young virgins, building hospitals,/ And now and then a church.

Only a very small part of the sums thus invested has ever been lost, and inflation has now increased their value to several millions of pounds. This durability has been partly the result of the consistent attitude of the law: the list of charitable purposes given in a statute of 1601 protecting charitable trusts was reaffirmed by a legal committee in 1952. Partly it was due to the corporate sense and civic pride of the towns and particularly of London, where the livery companies, whose members the benefactors so often were, became the greatest trustees of all. Conversely, trusts cultivated corporateness and civic pride not in the towns only but in that newer community, the nation, for both London merchants and wealthy country yeomen began to feel responsibility for counties other than their own, where the people were less godly (as in papist Lancashire) or the poor were poorer. If England was ceasing to be medieval by 1642, law played its part in the change, along with religion and trade and government.

THE LAW, THE KING AND THE STATE

The law never played so large a part in the history of English society as in the early years of the seventeenth century for the political issue then was the rights of the king as against the rights of his subjects. Since the thirteenth century and the first political theory, the king in England had been regarded as 'under God and the law'. Richard Hooker was using the language of Bracton when he wrote, in the sixteenth

century, ‘so is the power of the king over all and in all limited that unto all his proceedings the law itself is a rule. The axioms of our regal government are these: “Lex facit regem” [the law makes the king].’ As it was put in the seventeenth century: ‘the King’s prerogative stretcheth not to the doing of any wrong: for it growth wholly from the reason of the Common Law and is as it were a finger of the hand...’ The bad king could be deposed because by the very fact of doing wrong he ceased to be king: this line of reasoning led to the crucial distinction between the king for the time being and the Crown as an institution. No new theory was needed to send Charles I the way of Edward II and Richard II.

There was, then, some rudimentary public or constitutional law. But the king’s position was much more fully worked out in terms of private law. Bracton thought of the nation in terms of a common element in civil litigation—the joint and inseparable interests of a number of parties to the same suit. Similarly, in the Middle Ages, the king’s prerogative meant no more than the special property rights of the crown as supreme feudal overlord, though Edward I’s broadening of proceedings on writs of Quo Warranto from feudal rights to the usurpation of franchises (all the profitable rights of local government which the king considered his alone to grant) perhaps made the king’s prerogative look more like a constitutional power. Since kingship was a complex of property rights it could be entailed and Parliament could regulate the descent of it, as the property of attainted men was taken and restored by act. ‘... The said imperial crown,’ ran a statute of 1534, ‘[shall descend] from son and heir male to son and heir male ... And for default of such sons ... to the eldest issue female, which is the Lady Elizabeth [Mary, Catherine’s daughter, being passed over].’

In another sense, however, the king was the source of law. The courts were his creation. Appropriately, some of the earliest portraits of kings were miniatures within the illuminated capital letters at the beginning of plea-rolls. The basis of every complaint was a breach of the king’s peace or protection, and so until very recently the Crown—the departments of government—could not be sued in tort, since this appeared to be suing the king for an offence against himself (as early as 1270, on the other hand, property could be recovered from the Crown by a petition of right). As the enforcer of law, the king might strike harder in certain cases—and he had the right also to hold back the blow, to show mercy, to pardon. This power was sometimes resented but could not be effectively challenged, for it was his own right which the king was waiving.

By the early seventeenth century there wele thus two known types of prerogative: the king’s feudal property rights and his executive rights in matters of war and peace and justice. The Stuarts precipitated a crisis by extending their executive powers too blatantly to dispensation from statute law: the law and not just the execution of it was identified with the king’s will. The Stuarts’ extension of their prerogative was aided by the growth of the distinct theory of the divine right of kings, a theory fostered by the circumstances of the Reformation, when many churchmen reconciled themselves to government coercion by the belief that ‘we may not in any wise resist ... the anointed of the Lord’. The civilian, Dr Cowell, deduced absolute prerogative from absolute obedience: ‘the King of England is an absolute King,’ he wrote in 1607, and he ‘is above the law by his absolute power.’ Yet oppose prerogative in action, Parliament did.

A connected question was whether the king’s powers in time of war and emergency permittecl extra-parliamentary taxation of his subjects’ property. In Bate’s Case (1606), the Exchequer (the court for matters of prerogative in the sense of the king’s property rights) decided that the king could legitimately impose export and import duties without consulting Parliament. Hampden’s Case (1637) decided that the king could levy ship-money by writ ‘when the good and safety of the kingdom in general is concerned’. For the king these were pyrrhic victories. If the law was against what they conceived to be their fundamental rights, the parliamentarians would be tempted to change it. They began with the (national) Petition of Right of 1628, which invoked Magna Carta and other medieval provisions against extra-parliamentary taxation, and asserted that imprisonment at the king’s command (discussed inconclusively in the Five Knights’ Case of the previous year) was not proof against a writ of Habeas Corpus.

The establishment of ‘royal supremacy’ over the church had been the symbolic affirmation of the king’s supremacy in the whole nation; and it was also the subjection of the church’s law of sin to the Common Law of peace. A rival legal system was destroyed, and in High Commission the king himself acquired some of

the resources of a totalitarian state for prying into a person's conscience and morals. The idea of the two political entities, Church and State, arose from medieval quarrels between bishops and kings, often over matteres of jurisdiction. One of the causes of the overthrow of the Roman church in the sixteenth century was the layman's hatred of the petty tyranny of the ecclesiastical courts—tyranny which produced in 1515 the scandal of the death of Richard Hunne in the Bishop of London's prison. The Reformation in England turned upon Parliament's Supplication against the Ordinaries or ecclesiastical judges (1532), and the Act in Restraint of Appeals to Rome (1533), the latter a declaration that 'this realm of England is an empire ... a body politic, compact of ... spirituality and temporality', all owing 'humble obedience' to 'one supreme head and king'. The study of Canon Law was banned at the universities and Roman civil law, the weapon of despotic princes, encouraged in its place. With jurisdiction over blasphemy, heresy and other sins, the Reformation was believed to have restored to the king the 'absolute empire and monarchy' which were rightfully his and anciently had been. But this theory, expressed in Cawdrey's Case (1591), and the practice of the Court of High Commission, were more limbs for the leviathan at which Parliament took fright.

THE COURTS AND THE CONSTITUTION

The medieval constitution might be described as a network of courts. Everyone had to attend some court regularly. There were special eyres for offences against the king's forest rights; a section of the Exchequer court dealt with Jewish cases; and the Cornish tin-miners had their court of the Stannaries. 'Jurisdiction was the first reason for making distinctions' between types of cases; and everyone knew the meaning of 'I will make a Star Chamber matter of it'. In medieval England political power was dispersed, and the arrangement of local courts and itinerant commissions conformed to its distribution. England was in effect a conglomeration of 'countries', held together by its legal system.

There were ruinous conflicts between the courts, for jurisdiction meant profit (till the early seventeenth century, fees paid to Chancery, King's Bench and Common Pleas amounted to over £100,000 per annum, as against about £20,000 to the government). Thus accustomed to a militant independence, the Common Law courts were not inclined to serve the purposes of the Stuarts, who tried to get from them opinions favourable to the prerogative. Richard II had put a series of questions to the judges about his rights, and the Stuarts made such a practice of it that Pym had to complain of 'the extrajudicial declarations of judges, without hearing of counsel or argument'. In Peacham's Case (1615), Coke resisted the king's scheme to take the opinions of the judges separately and individually, and in the Case of Commendams (1616), which caused his downfall, stood out against the king in collective debate. In the Case of Proclamations (1610), the judges, taught by the king the political value of their opinions, had gone on to the offensive, and claimed that the royal prerogative did not extend to the creation of new offences by proclamation. In the reports of a body of judgments largely hostile to the king a written constitution of a sort was making its appearance.

The opposition to the king was focused in the High Court of Parliament. The uniqueness of the English Parliament lay in its combination of the functions of a supreme court and a representative political assembly; and this is why it throve while the separate Parlements and Estates-General in France faltered. The petition was the link between the two roles, and, on petition, Parliament possessed entire jurisdiction—civil and criminal, original and appellate, the last including the hearing of errors in the Irish courts. This extraordinary jurisdiction came to be exercised predominantly by the Lords, and in 1400 the lower House petitioned to be relieved from legal business. The Lords already comprised a distinct court, for the very notion of peerage was derived from the privilege of a magnate accused of a criminal offence to be tried by his equals, who were conveniently assembled in the House of Lords and presided over for this purpose by the Lord High Steward of England. The actual jurisdiction of Parliament was reduced by thc development of thc other courts to the hearing in the Lords of infrequent petitions against error in King's Bench. As a Common Law court, Parliament did not until the seventeenth century consider itself competent to hear appeals from equity.

In the sixteenth century, the House of Commons began to claim that it was a court by itself, in order to gain for its members the normal privileges of officers and suitors in one of the king's courts. Strode's Case (1513) established that an M.P. could not be sued for what he said in the House. Until 1543, a Member

arrested by the order of another court could be freed by a writ of privilege sued out of Chancery by the Speaker, but in Ferrers's Case of that year the Commons began to act on their own warrant. By this means M.P.s and their servants escaped their creditors, though the House might itself send a defaulting member to the Tower. The next and much harder step for the Commons was to establish freedom of speech and freedom from arrest against the king as well as against other courts. As a court, the Commons also claimed to adjudicate disputed parliamentary elections, though previously these had always been decided in Chancery, which issued the writs of election and received the returns. In Goodwin's Case (1604), King James was constrained to recognize the Commons as 'a Court of Record and a judge of returns.'

The seventeenth-century Parliament—Lords and Commons together—fought the king by reasserting its fourteenth century position as a supreme court. But in 300 years its composition had changed, and after the accession of James I the council which had been its root lost all influence within it. 'The king in his council in parliament' no longer existed; the government and the highest court of the realm had parted company; and a great confrontation between them was possible, perhaps inevitable. The main judicial form of Parliament's attack was the condemnation of the king's ministers by impeachment and attainder. Impeachment was a way of arraigning political figures before the House of Lords, worked out by the magnates and the king against each other in the political crises of Richard II's reign. The Commons had then been employed as the accusors, and in James I's reign they revived the device, unused since 1459, on their own initiative. In March 1621, the Commons attended at the bar of the House of Lords to demand judgment against Sir Giles Mompesson, a monopolist, who was promptly sentenced to life imprisonment. That same year, the Lords were brought to condemn their own 'Speaker', Lord Chancellor Bacon.

To dispose of the earl of Strafford in 1641, the Commons did not plead—they condemned the earl themselves by introducing a bill, to state that his offences 'hath been sufficiently proved' and to enact that he 'be adjudged and attainted of high treason, and shall suffer ... pains of death ...' This was murder by act of Parliament, planned to deprive the victim of any defence: 'it must be done before he answer.' Justice and politics had contaminated each other. Yet the solemn process of impeachment still had something to give the constitution. Well into the eighteenth century it was the only reminder to ministers that they were responsible to Commons and people as well as to the king, and it found a permanent place in the constitution of the United States.

LAW, HISTORY AND THE ENGLISH REVOLUTION

All societies appear to have speculated and made myths about the origins of their laws. To invaders like the Normans, emphasis on the continuity of English law was a way of asserting their legitimate succession to English government. In China the same advantage was secured for usurpers by the practice of writing an official history of the displaced dynasty; but in the West mature historiography was a by-product of the political use made of law in the sixteenth century. Men turned to history to justify their view of the constitution, because antiquity was the only undisputed attribute of the fundamental law they all invoked. But English lawyers pushed the argument beyond history: the Common Law had always been as it was. The idea of the antiquity and uniqueness of the English political tradition (' the Whig view of history') followed from this myth of the immemoriality and uniqueness of English law.

Those who opposed an immemorial customary law to royal prerogative obviously could not admit historical legislators. Anyone who put forward a historical account of the growth of English law was immediately suspected of royalism. Sir Henry Spelman (?1564– 1641) was the first to show that all the Common Law's main features could be explained by the historical fact of feudalism. Sir James Harrington (1611–77) could then go on to formulate, in *The Commonwealth of Oceana* (1656), the general theory of the connexion between land tenure and constitutional changes which lies behind the 'rise-of-the-gentry' theory of the English revolution. Spelman, though he may not have known it, provided the historical account of English legal development which the parliamentary lawyers feared. It was easy to show that feudalism came with the Normans: the Conquest was reinstated as the great historical divide: no longer could the immemoriality of English law, of England's Parliament and liberties, go undisputed. These historical

matters were the meat of seventeenth-century political controversy, with better results, perhaps, for history than for politics.

The pure concept of fundamental law was a political weapon as two-edged as history. When he said in Bonham's Case that a 'repugnant' act of parliament would be 'controlled' by the courts, Coke was not proposing 'judicial review' of legislation, such as was later written into the constitution of the United States. He knew that the judges could not declare statutes unconstitutional and therefore void; but he did believe that there were some fundamental principles behind English law which it was inadvisable for Parliament to alter, and he was advocating the strictest interpretation of statutes which appeared to alter them. At their simplest these principles were the rights of the king and his subjects, often summed up in the words of Seneca: 'To kings belong power ... to citizens property.' People were beginning to see that these rights together made up a 'constitution'—even James I recognized it. The problem was the demarcation of these rights, made urgent by the vastly increased responsibilities of kingship, and of the value of the property on which the king might call in an emergency. Divergent interpretations of fundamental law appeared: the king, seeing his prerogative as the main part of it, used it to justify the impeachment of five rebellious M.P.s; while, in the Grand Remonstrance of December 1641, the Commons denounced the king for 'a malignant and pernicious design of subverting the fundamental laws and principles of government'. Against the king's cry of necessity, Parliament in the end came to state fundamental law in a new way—as the good of the people. 'Salus populi suprema lex' justified Parliament in acting without the king.

It has been argued that Parliament was guilty of an error of tactics in using the weapon of fundamental law (which admitted too much royal prerogative), rather than Fortescue's intrinsically more modern idea that England was a 'mixed monarchy', where the check on the king was the political necessity of gaining his subjects' cooperation in his projects. But, in fact, Fortescue's idea was another common formulation of fundamental law, meaning once again that both king and subject had rights. The imprecision, or rather comprehensiveness, of the fundamental law concept is one of its most interesting facets. For it shows that law was the universal political framework: law, not economic interests, still—but for not much longer—shaped men's political thinking.

In the Wars of the Roses the administration of the law in the counties had become the plaything of politics. In the early seventeenth century, politics were near to becoming the playthings of the lawyers and their doctrines; of the Common Law courts; and of the great corporations, like London and the merchant companies, which the law had helped to create. If there had ever been any danger from the civilians, by 1600 the Common Lawyers were triumphant. 'The medieval books poured from the press, new books were written, the decisions of the courts were more diligently reported.... We were having a little Renaissance of our own: or a Gothic revival if you please... .' The ebullient Common Lawyers were natural leaders of a Parliament falling out with the Crown, and their energies were concentrated on the abolition of the 'prerogative courts', Star Chamber and High Commission. Of the courts tainted with Romanism, Requests had been on trial for its life since late in Elizabeth's reign, and in 1599 had been declared by Common Pleas 'no court that had power of judicature'. In the short Parliament of 1640, Edward Hyde made a reputation for himself by launching an attack on the 'upstart court' of Chivalry, in which (so he said) a respectable citizen might be condemned for bidding an insolent waterman 'be gone with his goose' when his badge was really a swan. Under the attentions of a parliamentary committee, the Court of Chivalry ceased to function in 1641, when Requests also came to a silent end.

Star Chamber, High Commission, the Councils in the Marches and the North, and the Palatine Courts of Lancaster and Chester were, on the other hand, abolished with great ceremony on the 5 July 1641, as operating against the ordinary process of law and 'by experience ... found to be an intolerable burden to the subject, and the means to introduce an arbitrary power and government'. After that consummation, many of the lawyers, Hyde the most notable among them, moved to a position of neutrality or joined the king to oppose Parliament's more outrageous claims. It was not just that the lawyers were born trimmers. Law had a distinctive part to fill in defining and restricting the king's power: in the nature of things it could not work a revolution, which is the transformation of law.