MONARCHY, CHURCH & PARLIAMENT. FROM HENRY II TO HENRY III

Key Words and Related Topics

Temario de la GuíaDocente:1. The Origins and Evolution of English Institutions. 2. From *Magna Carta* to the Glorious Revolution: the origins of modern English Political Culture

- Magna Carta: history and myth (Magna Carta as a product of its own times vs the long-term significance it has gained as a founding myth for modern constitutionalism).
- The relations between the monarchy and the church (the case of Henry II vs Thomas Beckett)
- Religion and political thought.
- The use of Scripture to legitimise political doctrine.
- The law of Nature.
- The relation between parliament and the monarchy.
- Absolute monarchy vs limited monarchy.
- Classical Roman republicanism.
- Common law vs civil law: the specificities of the British legal system.
- Founding components of English legal and political culture: Domesday Book, Magna Carta, Common Law.

Introduction

Magna Carta resulted from a clash between King John, and part of his magnates, or barons, that is, the higher aristocracy. Reduced to its basic elements, this dispute originated over the resistance of the aristocracy to a more vigorous royal rule. Competition for power between the monarch and the barons in very specific circumstances—and not any sort of disinterested or idealistic concern for individual rights—constitutes the actual historical background that lies behind Magna Carta. In spite of this particular origin, there are parts of Magna Carta that have become very influential over the course of history. Some of them even remain in the statute books today. The document itself has become a cultural icon.

Proof of the lasting influence of this historical document is the fact that modern constitutions are frequently referred to as a country's Magna Carta (as you know, we use this expression in Spanish too). In a speech that Eleanor Roosevelt delivered on the occasion of the adoption of the *Universal Declaration of Human Rights* by the General Assembly of the United Nations in Paris on 9 December 1948, she referred to this most important document as "the international *Magna Carta* of all men everythere". In her speech, she related the concept of the Magna Carta of 1215 to the global principle of human rights. In her speech she mentioned some of the foundational momentsin the remote origins of this sort of rights and the subsequent milestones that defined its historical evolution (such as the French Revolution, or the American Declaration of Independence, which we shall refer to in units 6 and 7). This is part of her speech (which is quoted in full in unit 7, "Empire and Global Anglo-American Culture"):

> *We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind. This Universal Declaration of Human Rights may well become the international Magna Carta of all men everywhere. We hope its*

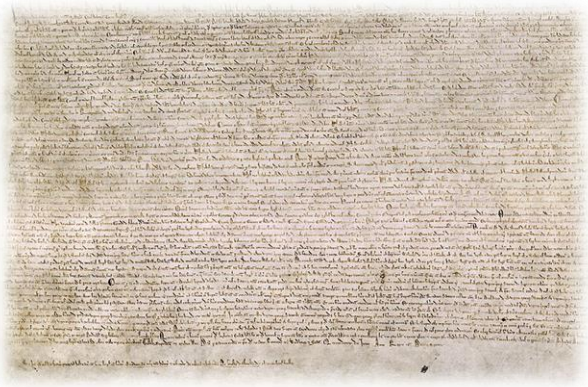
> *proclamation by the General Assembly will be an event comparable to the proclamation of the Declaration of the Rights of Man by the French people in 1789, the adoption of the Bill of Rights by the people of the United States, and the adoption of comparable declarations at different times in other countries.*

Magna Carta, the Domesday Book, and Common Law constitute foundational icons in the narrative of English national, cultural, and political identity. Another, more recent, example that illustrates the relevance of Magna Carta, first as part of English national identity, and then as an important component of globalAnglo-American culture is Margaret Thatcher's Bruges speech. This speech not only underlines the evolution of English history in its relation with Europe, but in doing so it also exemplifies how a certain narrative of English national identity views its own history, and the special role that the country plays within European and American history in general.

In this unit we shall learn about the historical origins of Magna Carta, and how some of the principles enshrined in it evolved in time. This evolution involved concepts like Natural law and the establishment of certain mechanisms that provided legal checks and balances to avoid abuses and unfair practices (such as habeas corpus, or the notion of due process). These ideas and mechanisms evolved in parallel with the tensions between the crown, on the one hand, and the aristocracy, on the other, who sought to control the monarch. This tension partially accounts for the generation of a theory of limited monarchy in the Middle Ages, which then grew into early modernity through texts like those by Sir John Fortescue, who added new components (such as the model of Republican Rome). Fortescue, in turn, would become very influential during the debates between parliament and the monarchy in the sixteenth century, and above all, during the tensions that led to the English Civil War in the seventeenth century.

Some of the principles and mechanisms inscribed within Magna Carta were built upon the legal and institutional reforms implemented by King Henry II.The legal and administrative reforms encouraged by Henry II contributed to the creation of a strong, functional state and also to the institutionalization of the English legal system upon common law—a distinctly English tradition which would spread around the globe centuries later with the expansion of the British Empire. We shall explore how this Anglo-American legal system differs from the other great legal model in the West, i.e. civil law.

In his troubled relations with the archbishop of Canterbury, Thomas Beckett, Henry II also illustrates another long-term trend in English history: the tension between Church jurisdiction and the power of the monarchy. This tension between the areas of influence of these two powerful institutions would come to the foreground during the Protestant Reformation in the early sixteenth century, and its eventual outcome would shape the model of Church-State relations in England for centuries.



Magna Carta, a copy of the 1215 text at the British Library

TASK. Texts [1] and [2]

1. Read the following text and find out the reasons that caused *Magna Carta* to be written.
2. After reading the clauses from *Magna Carta* provided in this text, can you imagine examples of the kind of reality the Barons tried to change with it? What was the situation like before *Magna Carta*?
3. Which was, according to these texts, one of the purposes of Magna Carta?
4. Read Prime Minister Margaret Thatcher's 1988 Bruges speech try to find out the terms of her comparison between the situation in early thirteen-century and late twentieth-century Britain.
5. How does Margaret Thatcher describe England's historical links to Europe?
6. What sort of political values and political institutions originated with the English and Magna Carta in 1215, according to Margaret Thatcher?
7. Which concept, according to Margaret Thatcher, "marks out a civilised society from barbarism"? Explain what she means by this.
8. Which other political values and principles does she attach to the European tradition?
9. For more information on Magna Carta, see the British Library website. According to the information provided in this website (http://www.bl.uk/treasures/magnacarta/basics/basics.html), only three of the original clauses of the 1215 Magna Carta are still law: describe them. Which is the most important of them all? Explain.

[1]

Magna Carta. The charter issued by King John to his realm at Runnymede on 15 June 1215, and known as Magna Carta, was the direct product of the political failures of his reign, but also reflected the practices of twelfth-century kingship and lordship. John had been notably unsuccessful in his rule, losing a large part of his continental possessions, including Normandy and Anjou, to the French king. His regime, driven in part by his need to raise money for his efforts to regain his lost possessions, was harsh and he also developed personal quarrels with leading men. The result in 1215 was baronial rebellion, and Magna Carta formed part of the attempted peace settlement for that rebellion.

King John, from a 13th-century manuscript

Magna Carta dealt with many matters relating to law and justice. Some clauses took the form of general statements of principle: 'to no-one will we sell, to no one will we deny or delay right or justice'. Others sought to make access to justice easier: 'common pleas shall not follow our court, but shall be held in some specific place'. There were also measures relating to criminal law: 'a free man shall not be amerced [that is, incur a monetary penalty] for a trivial offence, except in accordance with the degree of the offence'. There were also provisions concerning lordship and land-holding, notably on matters of inheritance: 'if any of our earls or barons or others holding of us in chief [that is, directly from the King rather than as a sub-tenant] by knight service shall die, and at his death his heir be of full age and owe relief [the payment to take up an inheritance], he shall have his inheritance on payment of the ancient relief, namely the heir or heirs of an earl £100 for a whole earl's barony, the heir or heirs of a baron £100 for a whole barony, the heir or heirs of a knight 100s. at most for a whole knight's fee'. The ability to exact an arbitrary relief, as John and his predecessors had sometimes done, was thus removed. Indeed one of the purposes of Magna Carta was to establish control over royal arbitrary lordship, corresponding to the control that royally-enforced law increasingly exercised over possible arbitrary lordship by others.

Whereas some continental rulers made grants of liberties to their leading men, Magna Carta was a grant to all free men of England. This characteristic helped to establish its central position in English law and English political thinking. Although King John had the charter annulled by the Pope soon after its issue, it was then reissued in slightly modified forms by his successors, as a

promise of good kingship. It appeared as the first statute in English statute books[1] as they started to be put together in the later middle ages. Then, in the political struggles of the seventeenth century, Magna Carta had an extremely prominent position in the constitutional debates of the period, notably through the work of the lawyer Sir Edward Coke. Sir William Blackstone published an edition in the mid-eighteenth century. Use of Magna Carta for political and rhetorical purposes continues to the present day. In her famous Bruges speech of 1988, concerning the contemporary political development of Europe, Prime Minister Margaret Thatcher stated that 'We in Britain are rightly proud of the way in which, since Magna Carta in 1215, we have pioneered and developed representative institutions to stand as bastions of freedom'. Meanwhile, clauses 1, 9 and 29 of the 1225 version of Magna Carta remained on the statute book into the twenty-first century.

John Hudson, "Magna Carta" in*The New Oxford Companion to Law*. by Peter Cane and Joanne Conaghan. Oxford University Press Inc. *Oxford Reference Online*. Oxford University Press. Universidad de Granada. 22 September 2011 <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t287.e1382>

[2]

Margaret Thatcher's Bruges Speech

(fragment, source: http://www.margaretthatcher.org/document/107332)

Mr. Chairman, you have invited me to speak on the subject of Britain and Europe. Perhaps I should congratulate you on your courage.If you believe some of the things said and written about my views on Europe, it must seem rather like inviting Genghis Khan to speak on the virtues of peaceful coexistence!

I want to start by disposing of some myths about my country, Britain, and its relationship with Europe and to do that, I must say something about the identity of Europe itself.Europe is not the creation of the Treaty of Rome.Nor is the European idea the property of any group or institution. We British are as much heirs to the legacy of European culture as any other nation. Our links to the rest of Europe, the continent of Europe, have been the dominant factor in our history.

For three hundred years, we were part of the Roman Empire and our maps still trace the straight lines of the roads the Romans built.Our ancestors—Celts, Saxons, Danes—came from the Continent.Our nation was—in that favourite Community word—"restructured" under the Norman and Angevin rule in the eleventh and twelfth centuries.

This year, we celebrate the three hundredth anniversary of the Glorious Revolution in which the British crown passed to Prince William of Orange and Queen Mary.Visit the great churches and cathedrals of Britain, read our literature and listen to our language: all bear witness to the cultural riches which we have drawn from Europe and other Europeans from us.

We in Britain are rightly proud of the way in which, since Magna Carta in the year 1215, we have pioneered and developed representative institutions to stand as bastions of freedom.And proud too of the way in which for centuries Britain was a home for people from the rest of Europe who sought sanctuary from tyranny.

But we know that without the European legacy of political ideas we could not have achieved as much as we did.From classical and mediaeval thought we have borrowed that concept of the rule of law which marks out a civilised society from barbarism.And on that idea of Christendom, to which the Rector referred—Christendom for long synonymous with Europe—with its recognition of the unique and spiritual nature of the individual, on that idea, we still base our belief in personal liberty and other human rights.

Too often, the history of Europe is described as a series of interminable wars and quarrels.Yet from our perspective today surely what strikes us most is our common experience. For instance,

[1] The statute book is "The book containing the statutes of a nation or state; usually (*sing.*, occas. *pl.*) the whole series of volumes forming the official record of the statutes." Statutes in this case refers to bills or laws passed by parliament. In other words, the statute book is the official record of English laws.

the story of how Europeans explored and colonised—and yes, without apology—civilised much of the world is an extraordinary tale of talent, skill and courage.

But we British have in a very special way contributed to Europe.Over the centuries we have fought to prevent Europe from falling under the dominance of a single power.We have fought and we have died for her freedom.Only miles from here, in Belgium, lie the bodies of 120,000 British soldiers who died in the First World War.Had it not been for that willingness to fight and to die, Europe would have been united long before now—but not in liberty, not in justice.It was British support to resistance movements throughout the last War that helped to keep alive the flame of liberty in so many countries until the day of liberation.Tomorrow, King Baudouin will attend a service in Brussels to commemorate the many brave Belgians who gave their lives in service with the Royal Air Force—a sacrifice which we shall never forget.And it was from our island fortress that the liberation of Europe itself was mounted.And still, today, we stand together.Nearly 70,000 British servicemen are stationed on the mainland of Europe.

All these things alone are proof of our commitment to Europe's future.The European Community is *one* manifestation of that European identity, but it is not the only one.We must never forget that east of the Iron Curtain, people who once enjoyed a full share of European culture, freedom and identity have been cut off from their roots.We shall always look on Warsaw, Prague and Budapest as great European cities.Nor should we forget that European values have helped to make the United States of America into the valiant defender of freedom which she has become.

TASK. Read the texts by Simpson [3] and Vogenauer [4] on Common Law and Civil Law, and answer the following questions.

1. When was common law institutionalised in England?
2. What important developments took place in the twelfth century?
3. Are there other regions in the world, besides Great Britain, where common law is part of the legal system? If so, why is this the case?
4. Which is the origin of civil law? How did it spread all over Europe? What sort of historical, political, and cultural legitimacy sustained the prestige of civil law?
5. What does the spread of common law and civil law, in their respective areas of influence, tell us about the concept of cultural translation and the transfer of political, legal, and cultural capital?
6. Why does the text say that “the civil law and the common law together constitute a single Western legal tradition”? Which features and principles do they share?
7. Write a paragraph describing the similarities and differences of common law and civil law.

[3]

Common law. The common law is the name given to the legal tradition which evolved in England after the Norman Conquest, and which has become one of the major world legal traditions. Most states use legal traditions which, either in whole or in part, have been borrowed from elsewhere; they rely on what have been called legal transplants. The common law, however, did not originate in such a process of cultural diffusion; it was an indigenous English legal tradition, though it has been considerably influenced by the other major Western European legal tradition, the **Roman law** (or ‘civil law’) tradition.

Like all such indigenous traditions, the common law evolved out of a practice of dispute resolution; this indeed is how Roman Law originally evolved back in the ancient world. The history of law and the resolution of disputes in England is a long one, and can be traced back to the reign of Aethelbert of Kent, a paramount chief in whose reign, in about 603, a code of written laws was promulgated, long before a unified realm of England had come into existence. However, historians tend to think of the common law as having assumed a characteristic institutional form at a much later date, during the reign of **Henry II** (1154–1189), when an unknown royal clerk was able to write a treatise (nominally associated with a Royal official

called Ranulf de Glanvill) which gave a coherent account of the procedures followed by the King's officials in adjudication.

At this time there existed in England a multiplicity of customary laws—laws of manors and towns, laws of particular industries, like the stannary law of Cornwall, and laws which applied to particular persons, such as churchmen. The common law was one such body of law, but it was royal law, and this was the basis for its superior authority. It was royal not in the sense that it had been laid down by the monarch, but because it was administered by royal officials, amongst whom the judges possessed their authority as deputies for the King. The King's law was 'common' in the sense that it was not local or personal, but was, like a common prostitute, available, or at least applicable, to everyone throughout the realm; this was the primary sense in which this body of law was said to be 'common'.

In the early middle ages the scope of royal adjudication was very limited, being concerned only with important property disputes relating to the landholdings of freeholders, and to the graver crimes. It was also largely concerned with the procedures which brought disputes to a point of decision. The actual decision was originally submitted to mechanisms the legitimacy of which depended on some form of divine intervention, such as ordeals, or ritualized battles. But in the twelfth century some disputes were being adjudicated upon by juries of neighbours, and in the following century the lay jury came to be the typical common law mode of trial. With the rise of the jury came the expansion of the common law not only to regulate the procedures to be followed, but also to impose conformity to substantive law, ie law which prescribes how the dispute ought to be decided. With this evolved the notion that questions of law were the responsibility of the professional judges, whilst questions of fact were for decision by the lay jurors under professional supervision.

[…]

Although, from an early time, the royal courts used writing, for example to formally record the proceedings, the common law was for long primarily an oral tradition, transmitted from the past to the present through practice and memory. But from the late thirteenth century lawyers came to compile unofficial notes of what had been said in court, and to use what had been done in the past as an argument for what should be done in the present. Reliance on precedents is indeed integral to any system of governing tradition, and common lawyers from an early time came to treat what had been done in earlier cases as a principal source of law, though legislative texts were also an important source of law. So when Chaucer in the Prologue to the *Canterbury Tales* gave a picture of a common lawyer, the Serjeant at Law, he said that he possessed law reports going back to the time of William the Conqueror. The term 'common law' came… to have the connotation of law based on cases, or law evolved through adjudication in particular cases, as opposed to law derived from the analysis and exposition of authoritative texts. Indeed sometimes 'common law' is more or less synonymous with the expression 'case law'…. A body of law developed in this way tends to be strong on detailed illustration and pragmatic sense, and weak on general principle; and this has often been remarked about the common law.

With the expansion of English power, first to Wales and Ireland, and later to the overseas empire, the territorial reach of the common law expanded. …. Where overseas territories were settled, and the culture of the indigenous inhabitants was wholly or partially destroyed, British settlers took with them so much of the common law as was appropriate to their condition. This all created a common law world—that is to say a world in which the common law tradition was exported. Thus Australia and most of Canada became part of this world, as in part did British colonies in Africa and elsewhere. Even after de-colonization the common law tradition remains as a permanent legacy of British imperialism.

A. W. Brian Simpson, "Common law", in*The New Oxford Companion to Law*. by Peter Cane and Joanne Conaghan. Oxford University Press Inc. *Oxford Reference Online*. Oxford University Press. Universidad de Granada. 22 September 2011.
<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t287.e354>

[4]

Civil law systems.'Civil law systems', 'civilian systems' and 'the civil law' are general terms used to denote those jurisdictions belonging to the Western world which are neither part of the Anglo-American common law tradition nor 'mixed' legal systems, ie systems combining civilian and common law elements. The civilian tradition comprises all European jurisdictions apart from English, Scots and Irish law, as well as Central and Latin American systems, and some African and Asian jurisdictions which modelled their law on Western lines.

Sometimes the civilian systems are also called 'Romano-Germanic' jurisdictions. This points to the fact that the civil law tradition is fairly heterogeneous. Thus civilian lawyers hardly use the term 'civil law systems'; instead they distinguish three legal families. The 'Romanist' family comprises the legal systems which were strongly influenced by French law. The 'Germanic' family includes the jurisdictions which were decisively shaped by German law. The 'Nordic' legal family encompasses the Scandinavian systems. Even within one and the same family, civilian systems often differ substantially as to the outcome of similar cases and as to their more general outlook.

But despite their significant differences, civil law systems share a distinctive heritage based on antique Roman law and its peculiar interaction in the Middle Ages with local, mainly Germanic, customs and with canon law, ie the law of the Roman Catholic church. The sources of Roman and canon law were studied, ordered, refined, and taught by medieval jurists in the first universities in Northern Italy to which students flocked from all over Europe. These students returned to their home countries and served as judges, advisors and administrators for secular and spiritual rulers. By virtue of their common background they shared the knowledge of a common legal language, a common body of law and legal literature, and a common method of rationalizing and organizing legal materials.

Roman-canon law was thus received in the different European territories and became the 'common law', or *ius commune*, of Continental Europe. This process of 'reception' was not only due to the qualitative superiority of the *ius commune* to the local laws and customs. It also rested on the inherent authority of Roman law as ancient 'written reason'…

[…]

Despite the diversity of civil law systems, there are a number of characteristic features setting them apart from the non-Western traditions, such as Islamic law, Hindu law, Chinese law, Japanese law and many other legal systems in Africa and Asia which are largely based on customary law. All civil law systems are secular and capitalist. They rely almost exclusively on written sources of law. Their conception of law is rationalist and state-centred. Law is seen as a means of settling disputes authoritatively, and its administration and enforcement is primarily dealt with by professional lawyers. Civil law systems are based on the rule of law in the sense that government authority is constrained by legal rules and procedures. They accord great importance to personal autonomy and individuality and acknowledge some form of human rights.

All these characteristics are shared by the common law systems, so it might be argued that the civil law and the common law together constitute a single Western legal tradition.

[…]

Civilian systems have traditionally denied that judges make law. Case law is still not accepted as a binding source of law, so there is no system of precedent as in Britain. Today, civilians are more conscious of the law-making function of the judiciary, and they accord strong persuasive authority to court decisions, but the force of precedent is still weaker than in the common law. Neither do they confer special prestige on their judges.

In the civil law tradition, the central actor of the legal system is the legal scholar. Under the *ius commune*, in the absence of powerful national legislators and courts, they were responsible for systematizing and updating the ancient Roman law. Law professors were also influential in creating major codes and, later, in interpreting, criticising, and developing them. Their enhanced

position is also due to the fact, in contrast to the position in England, that legal education on the Continent has always been the preserve of the universities rather than of the professions. A scholarly approach therefore shapes the mindset of all future lawyers. As a consequence, civilians tend to be less pragmatic than common lawyers. They pay less attention to facts of particular cases and think and rather argue in abstract categories and systematic contexts.

Stefan Vogenauer, "Civil law systems" *The New Oxford Companion to Law*. by Peter Cane and Joanne Conaghan. Oxford University Press Inc. *Oxford Reference Online*. Oxford University Press. Universidad de Granada. 22 September 2011.<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t287.e288>

Henry II, statue in Canterbury cathedral

HENRY II, HIS LEGAL REFORMS AND THE CONSTRUCTION OF THE STATE. THE MONARCHY AND THE CHURCH. HENRY II AND THOMAS BECKETT.

TASK. Read the following texts ([5] to [8]) and answer the following questions:

1. Which kind of far-reaching reforms did Henry II implement?
2. How did these reforms affect the development of the state, and English national identity?
3. What does text number [5] refer to when it claims that "two, probably unconscious, models underlie" Magna Carta? Which are these two models? Explain.
4. Which are some of Henry II's most significant reforms? Summarize them in a brief paragraph, and relate them to the information provided by the Domesday Book, and the principles enshrined in Magna Carta.
5. What sort of abilities earned Thomas Beckett the confidence and appreciation of Henry II?
6. When did Beckett's attitude toward Henry II change?
7. What kind of difference, involving disputes concerning the jurisdiction of church and state, cause some of Henry's quarrels with Beckett? Was this problem solved with Beckett's death?

[5]

Common Law - Henry II and the Birth of a State

By Dr John Hudson (http://www.bbc.co.uk/history/)

Whilst many remember Henry II for his turbulent relationship with Thomas Becket and his sons, Richard the Lionheart and John, it was the establishment of permanent professional courts at Westminster and in the counties for which he might be best remembered. These reforms changed forever the relationship of the King to Church, State and society.

Law and the State

In the mid-1230s, the rulers of England were confronted with a problem concerning bastards. Church law legitimised children born out of wedlock whose parents subsequently married. English lay law did not legitimise such children. This was a major problem, for a bastard would not be the heir to his father's lands. Churchmen sought that English practice be brought in line with ecclesiastical thinking, but the barons resoundingly rejected their advances: 'we do not wish to change the laws of England.' By the 1230s, therefore, law was seen as an important element in national identity, even though English law in reality still had many resemblances to that of France and indeed of other areas.

Such an association of law and national identity may be related to the development of the sovereign state, and certainly in modern thinking law and the state are often closely associated. However, 'state' is a problematic word in writing of the Middle Ages. It was not used in its modern sense in the England of c. 1200. It has implications of impersonality which seem inappropriate to a world where the king's anger could have a major impact upon individuals and upon the affairs of the realm. It is also a word with more than one meaning. It can refer to one state as opposed to another, say England as opposed to France. But it can also mean the state as opposed to society, or the state as opposed to the individual.

Nevertheless, it can be argued that law contributed significantly in the development of the English mediaeval realm towards what may be called a 'state'. Firstly, political thinking was greatly stimulated by clashes between kings and Church over their relative authority. These frequently were conducted through polemic resting heavily upon law and legal argument, and were a vital stimulus to the ideological thinking which underlay the development of abstract notions of the state. Secondly, the study of Roman and the church's canon law from the late eleventh century provided much of the language and many of the ideas for thinking about the state. Thirdly, a frequently used test of the existence of the state is that it should have a monopoly of legitimate violence. In the middle ages - as in all societies - law was only one method of resolving disputes. An alternative was the resort to violence. Rulers sought to limit or to prevent such direct action, to channel disputes through royal law. Fourthly, law was important in establishing a relationship between the king and his people as a whole, rather than simply the great men of their realm. Such a direct relationship between king and subject is another important element in many views of the state.

Law before Henry II and the Impetus for Reform from 1154

Even before the reforms of Henry II (1154-89), which are often seen as the vital period for the creation of English common law, England had known a legal regime characterised by considerable royal control. From Anglo-Saxon England came a tradition of law-making which focused on the king as the protector of the realm, the corrector of wrongs. Likewise, the powerful administration of the period tackled many of the same problems of theft and interpersonal violence as would Henry II, and in rather similar ways. This administration, characterised in particular by the courts of the shire and its sub-division the hundred, survived the Norman Conquest. Crucially, in contrast with some areas of France and elsewhere in Europe, these administrative areas largely remained under royal control. The Normans also brought important elements of their own to English law, most notably customs relating to land-holding.

In the middle of the twelfth century, however, both the extensive involvement of the king in particular legal matters and the general administrative pattern were severely threatened by the civil war of King Stephen's reign (1135-54). The need to restore royal authority, to return the realm to its condition in his grandfather's reign, was one of the main forces behind Henry II's reforms. The same desire underlay his efforts to reassert control of the Church. These efforts brought him into conflict with his own chosen archbishop, Thomas Becket, and the circle who conducted the dispute with Becket, and developed their ideas of kingship in that context, were the men whose ideas shaped the legal reforms. At the same time, impersonal factors, such as the growth of literate government, also had an impact upon legal development.

The Angevin Legal Reforms

[...]

Royal legislation, referred to as **assizes**, was issued at Clarendon in 1166 and Northampton in 1176 in an effort to clamp down on serious offenders. Royal justices were to travel throughout the realm, and:

> Inquiry shall be made throughout every county and every hundred, through twelve of the more lawful men of the hundred and through four of the more lawful men of each village upon oath ... whether there be ... any man accused or notoriously suspect of being a robber or murderer or thief.

These bodies of twelve are referred to as 'juries of presentment', and are the ancestors of the Grand Jury which survives in the U.S. legal system. Their accusations did not replace but rather supplemented the traditional form of prosecution where the victim, or a relative in cases of homicide, had to bring an individual accusation against the suspect. It seems that Henry regarded the traditional methods as insufficient, and hence introduced the general practice of presentment to the travelling justices. All accused by the presenting juries were to be put to ordeal of water, a test whereby those who floated were regarded as guilty, since they were rejected by the water which had been blessed by a priest. Any convicted were to lose a foot and, from 1176, their right hand. Even if acquitted by ordeal, those of particularly ill-repute were to leave the realm, under oath never to return.

[...]

Law, Magna Carta, and the development of the State

Henry II's reforms regarding land law protected tenants against their lords, by allowing them to look to the lord's superior, the king. One group of tenants did not have that option, the tenants-in-chief who held directly of the king. Their discontents are reflected in the varying attitude towards law displayed in Magna Carta, issued by King John in 1215. [...] Others protested about the abuses of royal law, for example the delaying or selling of justice, a problem which seems to reflect the huge amounts sometimes charged tenants in chief. They were demanding that law be applied to all free men in similar fashion.

It is further notable that whilst some clauses of Magna Carta talk in terms of lords and tenants, others refer to free men generally. It is as if two, probably unconscious, models underlie the charter, one regarding the realm as based upon a hierarchy of lordship, the second regarding it as consisting of the king and all his free subjects. This model, which we earlier associated with ideas of the state, had been encouraged by developments in law and justice. In 1170 Henry II's officers had heard complaints concerning the administration not only of sheriffs but also of lords. Likewise, his justices travelling throughout the realm had brought the free men in the local courts into regular, direct contact with central government, where their predecessors had dealt with local officials. Henry's regime was not necessarily more powerful than that of the greatest Anglo-Saxon or Norman kings, but it worked in a different way, a way which foreshadowed later mediaeval developments towards a state.

[6]

HenryII(1133 – 89), king of England (1154 – 89). The first of the Plantagenet kings of England was also one of the most able of all this country's monarchs. His achievements are the more remarkable since his responsibilities encompassed not just England, but also two-thirds of France as well, for Henry was also duke of Normandy, count of Anjou, and, by right of his wife Eleanor, duke of Aquitaine. England was but part of the vast Angevin empire, each constituent dominion requiring Henry's attention. The consequence was that Henry was frequently absent from England, as he was from his other lordships. Twice, indeed, he was absent for more than four years at a time, and it has been calculated that in the entire course of the reign he was in France for some 21 years.

The problem of government, and the maintenance of peace and stability, were among the greatest challenges facing Henry when he succeeded in 1154. Nowhere was this more so than in England, since Henry inherited a realm severely affected by the disorder that had occurred in Stephen's reign. He proceeded to restore, and then further develop, the governmental structure inherited from his grandfather Henry I, one which assumed an absentee ruler, authority being delegated to one or more chief justiciars who acted as viceregal figures. But to restore the crown's overall position, including the recovery of lands, offices, and castles lost in Stephen's reign, Henry needed the co-operation of the greater magnates. Equally, it was from this same group of men that Henry demanded the restoration of the crown's rights—a seemingly impossible task. But through a skilful mixture of policies, and using both carrot and stick, Henry attained his end. While bending the magnates to his will, he succeeded in placating them and finding a place for them in his regime. […]

This political settlement helped provide the necessary stable context for a notable extension of the crown's activities, especially through the introduction of the famous assizes[2]. A far greater positive role was being taken by the crown than hitherto, whereby the king's law was becoming truly national in scope, affecting the lives of royal subjects in a new way. Some concerned trade and commerce, such as the assizes of wine, ale, bread, and measures, whilst the Assize of Arms dealt with matters connected with the defence of the realm. But the most significant assizes were those which transformed both civil and criminal law. The grand jury, established by the Assize of Clarendon, would be fundamental in the prosecution of crime until the establishment of the director of public prosecutions in 1879, whilst the civil law reforms established essential procedures and principles that endured for centuries. National in scope, applicable to all freemen of the realm regardless of their feudal position, enshrining uniform rules and procedures, these various reforms marked the opening up of the royal courts as courts of first instance, to the inevitable detriment of the seigneurial courts. It is perhaps ironic that the 'grandfather of English common law' was a Frenchman.

[…]

[Henry II] was a man of violent passions, easily moved to anger and outbursts of his famous temper, at times uncontrollable. He was also capable of hatred, most notoriously revealed in his struggle with Thomas Becket. But much of the threatening side of his nature was deliberately cultivated, stage-managed to get his own way. This was an aspect of his personal statecraft, and he knew how to bind men to him, in respect tinged with fear if not in love. But there was another side to his character, simple, good-hearted fun. He was quite well educated, applying his intellect to practical matters in the art of government, analysing a problem, and then formulating solutions in association with his advisers.

S. D. Lloyd, "Henry II", in*The Oxford Companion to British History*. Ed John Cannon. Oxford University Press, 2009. *Oxford Reference Online*. Oxford University Press. Universidad de Granada. 22 September 2011. <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t110.e2076>

[2]**Assize** refers here to "A sitting or session of a consultative or legislative body", and, by extension, to a "**decree or edict** made at such a sitting".

[7]

Becket, Thomas (*c.*1120–70). Archbishop of Canterbury who was murdered in his own cathedral and so became a saint. Son of a Norman merchant settled in London, Becket worked as an accounts clerk to a banker (a cousin of his) before entering the service of Archbishop Theobald of Canterbury in 1145. He became Theobald's confidential agent and was rewarded with the rich archdeaconry of Canterbury. Soon after being crowned by Theobald, Henry II appointed Thomas chancellor. In this office he displayed a wide range of talents, administrative, diplomatic, and military. He also enjoyed an ostentatiously lavish life-style. His zeal in the king's interests, even when they appeared to conflict with the church's, gave Theobald cause for concern and, not surprisingly, led Henry to believe that Thomas was his loyal friend. When Theobald died, Henry decided that Thomas should succeed him. This ran counter to the strong Canterbury tradition that the archbishop ought to be a monk. Reluctantly the cathedral monks agreed to elect the king's good servant. On 2 June 1162 Becket was ordained priest, and the next day consecrated archbishop.

At once Becket began to oppose the king, even on fairly routine matters which raised issues of principle only for someone who was determined to find them. He began to campaign for the canonization of Anselm, a monk-archbishop who had defied kings. Many attempts have been made to explain the volte-face but, in the absence of good evidence for Becket's state of mind in 1162 – 3, they remain highly speculative. […]

Henry II and Thomas Becket

Whatever Becket's motives, Henry felt betrayed. […] King and archbishop were soon quarrelling over a wide range of issues, among them the question of ‘criminous clerks’, i.e. benefit of clergy. […] At the Council of Northampton (October 1164) Henry brought charges against Becket arising out of his conduct while chancellor. Becket, seeing that the king was determined to break him, fled in disguise to France, where he remained in exile until 1170, studying canon law, leading an ascetic life, and claiming to be defending the rights not only of the church of Canterbury but of the church as a whole. Both Louis VII of France and Pope Alexander III urged a reconciliation, but neither Henry nor Thomas could trust the other. After years of fruitless negotiations, the coronation of Henry the Young King in June 1170 by the archbishop of York brought matters to a swift conclusion. In Becket's eyes crowning the king was a Canterbury privilege. He agreed terms with Henry. This enabled him to return to England with the intention of punishing those who had infringed that privilege. In November he excommunicated the archbishop of York and two other bishops. They complained to the king, then in Normandy. Henry's angry words prompted four knights to cross the Channel and kill Becket on 29 December 1170, a murder that shocked Christendom. Little more than two years later, in February 1173, he was canonized by Alexander III.

During his lifetime few churchmen thought that Becket's truculence did much to help the cause of Canterbury, of the English church, or of the church in general. Probably no one thought his conduct was that of a saint, even if he had taken to wearing coarse and lice-ridden

undergarments. But his murder changed everything. It put Henry in the wrong. It forced him to do penance and to make concessions, though none of lasting significance. The church of Canterbury clearly gained. The Canterbury Tales bear eloquent witness to the fact that for centuries Becket's tomb in the cathedral was the greatest pilgrimage shrine in England. In 1538 Henry VIII declared Becket a traitor, but though he destroyed the shrine, he could not eliminate the cult.

John Gillingham, "Becket, Thomas", in*The Oxford Companion to British History*. Ed John Cannon. Oxford University Press, 2009. *Oxford Reference Online*. Oxford University Press. Universidad de Granada. 22 September 2011. <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t110.e399>

[8]

Becket, the Church and Henry II

By Dr Mike Ibeji (Source: http://www.bbc.co.uk/history/british/middle_ages/becket_01.shtml)

Becket and Henry

The murder of Thomas Becket and his subsequent martyrdom has so overshadowed the reign of Henry II that it is often as difficult to see behind to what caused it as it is to see beyond to the rest of the reign.

At its heart lies a personal dispute between Henry II, who felt betrayed by his friend, and Becket, who mistrusted the motives of the king. This bad blood between friends is what made the dispute so bitter.

Becket came to prominence at the start of Henry's reign when Henry asked Archbishop Theobald of Canterbury to recommend a candidate for the office of Chancellor. Theobald put forward his archdeacon, Thomas Becket, the son of a London merchant, who had demonstrated the brilliance of his mind in Theobald's service. Becket became Henry's friend and confidant. Like Henry, he was obsessed with the rights of his office and the crown, and was driven to do the best job he possibly could on their behalf.

[...]

Becket was probably very influential during the early part of Henry's reign. He acted as ambassador and chief negotiator in Henry's early dealings with King Louis VII of France. [...]

[When King Henry II managed to have Beckett appointed as Archbishop of Canterbury, everyone], Henry included, expected Becket to be a yes-man for the King. What no one realised was that Becket would take his new role quite so seriously. He had thrown himself into the job as Henry's chancellor with gusto, now he would do the same thing with the Church. He gave notice of this by resigning the chancellorship, much to everyone's surprise.

Religious wrangling

The crunch came with Henry's attempts to deal with the problem of 'criminous clerks'. About one in six of the population of England were clergymen, many of whom were not ordained to the priesthood. These lay clergy could claim the right to be tried in ecclesiastical courts like their ordained brethren, where they would invariably receive a more lenient sentence than if tried in the criminal courts of the land. For Henry, the problem was part and parcel of the need to restore order [...], but for Becket, the King's concern over criminous clerks was a question of clerical immunity from secular jurisdiction.

[...]

The murder of Thomas Becket lost Henry the main argument. Becket became an instant martyr, and the international opprobrium poured upon Henry's head may well have been one reason why he chose to cross to Ireland in 1171 (though the Irish crisis was in itself a very real incentive).

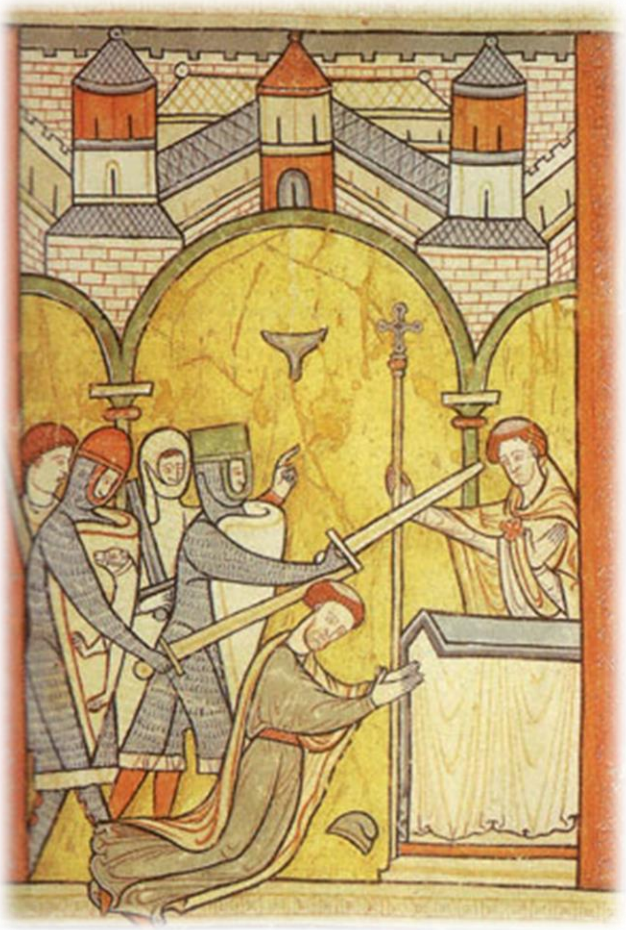
Contemporary chroniclers label Henry a murderer, his enemies clamoured for the King's excommunication and the outrage against the murder almost precipitated a war.

[...]

On Sunday 21 May 1172, Henry performed a ceremony of public penance at Avranches cathedral, where he swore:

- to provide money for 200 knights to crusade in the Holy Land
- to restore all property to the church of Canterbury
- not to obstruct any appeals to Rome by the clergy
- to abolish all customs prejudicial to the Church.

On the face of it, Henry lost little by this compromise. He could still appoint bishops, he was unlikely ever to interfere in ecclesiastical appeals to the Pope, and he was also able to tie the clergy to Forest Law. But like the Constitutions themselves, the implications of his agreement were enormous in principle. At the bottom line, he was forced to give in on the problem of criminous clerks, and this fundamental concession would create problems between Church and state right down to the Reformation.



The murder of Thomas Beckett in Canterbury Cathedral, 13th-century manuscript

SIR JOHN FORTESCUE AND THE LAWS OF ENGLAND

In the following texts Fortescue distinguishes between a king that rules "royally" (i.e. as an absolute monarch, whose will is the law) versus a king that rules "politically" (i.e. a king who is not above the law, but who rules according to the statutes established by parliament and his own subjects). This distinction will prove to be important in subsequent periods, for instance James I will argue in favor of the king as the source of the law versus George Buchanan, who defended that kings had to obey the laws.[3] In the disputes between parliament and king Charles I (which eventually led to the Civil War, the execution of Charles I, and the establishment of a republic in England) Sir John Fortescue was frequently quoted by the parliamentarians to defend their cause.

Fortescue here identifies the kind of governance in which a king rules "politically" as the kind of rule that humans enjoyed before the Fall, and also when God as the only king ruled the synagogue. In other words, this is the kind of Natural law that emanates from God as the ultimate universal authority. It is the law of nature because nature has been created by God, and therefore, in its intrinsic mechanism, it works according to the rational mind of the Creator—who is all-perfect, and can therefore do no wrong: he is the ultimate source of justice. We shall find that the concept of Natural law will become secularized over the course of the 17th and the 18th centuries: it will gradually lose its religious connotations, while remaining a sort of universal legal principle that can be applied to all individuals, and will eventually evolve into our current concept of *human rights*. In current thought, human rights enjoy the same universal status as natural law, which, as Fortescue declares in his text by quoting Aristotle, "*is that which has the same force among all men*".

Fortescue also prides himself on the fact that the laws of England were established a long time ago, and therefore have the legitimizing weight of tradition behind them. Note how Fortescue traces the history of England: from the Britons to the Saxons, then the Danes and eventually the Normans. Fortescue proclaims that the English law system is one of the oldest and most venerable in the world (he claims that they are even older than the laws of the Romans, and the Venetian laws, two very prestigious systems at the time). For many centuries afterwards, the invocation of the Ancient Laws or the Ancient Constitution of England will be used by those who tried to defend the country, or certain political positions against others.

Note also how, in spite of the fact that Fortescue is defending the monarchy here, the example he provides as a model of successful political and legal system is the Roman republic. The rule by council (i.e. by an assembly, such as the senate, or other legislative bodies, that counter the absolute power of the monarch) is presented here as the cause of Roman progress, and the loss of the Senate, and the gradual assumption of absolute power by the emperors is found to be responsible for the decay and eventual fall of the Roman empire. Fortescue also uses Athens as an example of the sort of justice and prosperity brought about by those political systems ruled "by council". As mentioned elsewhere, classical antiquity (Rome and Greece) are here used to legitimize the cause that Fortescue is trying to defend. It is also very significant that the other example he uses is Venice: the most successful republic in the Middle Ages (and beyond), which also ruled "by council". We may thus conclude that, in the sort of political doctrine that furnished English constitutional royalism, there has always been a republican component (albeit a moderate, not a radical one).

The texts by Fortescue constitute good examples of the different types of translation that we need to conduct for the proper interpretation of a text. In the first place, in the case of the texts taken from *De laudibus legum Angliae*, we need to translate from Latin into English. This is a case of inter-linguistic translation (i.e. translation between two different languages). And then we need two other, intra-linguistic translations (i.e. *translations* between the same language). One of them takes place between the discourse or language of political thought and legal issues, on the one hand, and the sort of everyday language used by common speakers, on the other. In the case of *On the Governance of the Kingdom of England*, we need to translate from the type of English used in the late 15th century (in which the text was originally composed) to present-day English.

[3] On Buchanan and James I, see unit 4.1. The Reformation, Print and Translation.

TASK. Read texts [9]and [10] and answer the following questions:

1. What is the difference between absolute monarchy and limited or constitutional monarchy, according to Fortescue?
2. How does Fortescue describe the powers of the English monarch in his texts?
3. Fortescue lived in the 15th century: how do his ideas about the English monarchy relate to what you already know about the history of the English monarchy, and the political and legal institutions of England since the Norman invasion? Write a paragraph putting Fortescue's ideas into perspective.
4. What do you think Fortescue means when he claims about "political law" that "*By such a law… the whole human race would have been ruled, if it had not transgressed the commands of God in paradise.*"?
5. Which are the three different types of law listed by Fortescue? Can you distinguish them, and explain their similarities and differences?
6. What does Fortescue say about civil law? Match Fortescue'ss comments with the definition of civil law that we have previously discussed in this unit.
7. What does Fortescue say about the laws of England? How does he describe their history and nature?
8. What does Fortescue say about the Greeks and the Romans? What sort of conclusions do you think he drew from their example?

[9]

Sir John Fortescue. Lawyer. Fortescue studied law at Lincoln's Inn, became lord chief justice in 1442, and received his knighthood. […] His two most important writings were *De laudibus legume Angliae*, in praise of the laws of England, and *On the Governance of the Kingdom of England*, probably written after 1470. Fortescue was at pains to distinguish between absolute monarchy ('dominum regale' as in France) and limited or constitutional monarchy ('dominum politicum et regale' as in England). The essential difference is that in the first state the king makes the law, in the second the king rules his subjects only by laws 'such as they assent unto'. In his characteristically Lancastrian parliamentary interpretation, Fortescue divided the two types too sharply—the French also had representative institutions. But by doing so he encouraged pride in the liberal character of English government and was much quoted by the opposition to Charles I in the 17th cent. Like Bagehot, Fortescue helped to create the situation he was describing.

J. A. Cannon, "Fortescue, Sir John", in*The Oxford Companion to British History*. Ed John Cannon. Oxford University Press, 2009. *Oxford Reference Online*. Oxford University Press. Universidad de Granada. 26 September 2011 <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t110.e1713>

[10]

Sir John Fortescue (ca. 1395 - 1477), *On the Laws and Governance of England*, ed. by Shelley Lockwood. Cambridge University Press, 1997.These texts were composed around 1468 – 1471.

"A king ruling politically is not able to change the laws of the kingdom", chapter IX of *In Praise of the Laws of England*

… the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only royal but also political. If he were to rule over them with a power only royal, he would be able to change the laws of the realm, and also impose on them

tallages[4] *and other burdens without consulting them; this is the sort of dominion which the civil laws indicate when they state that 'What pleased the prince has the force of law'. But it is far otherwise with the king ruling his people politically, because he himself is not able to change the laws without the assent of his subjects nor to burden an unwilling people with strange impositions, so that, ruled by laws that they themselves desire, they freely enjoy their goods, and are despoiled neither by their own king nor any other. The people rejoice in the same way under a king ruling only royally, provided he does not degenerate into a tyrant. Of such a king, the Philosopher*[5] *said in the third book of the* Politics *that 'It is better for a city to be ruled by the best man than by the best law'.*

But, because it does not always happen that the man presiding over a people is of this sort, St Thomas, in the book he wrote for the king of Cyprus, On Princely Government, *is considered to have desired that a kingdom be constituted such that the king may not be free to govern his people tyrannically, which only comes to pass when the royal power is restrained by political law. Rejoice, therefore, good Prince, that such is the law of the kingdom to which you are to succeed, because it will provide no small security and comfort for you and for the people. By such a law, as the aforementioned Saint said, 'the whole human race would have been ruled, if it had not transgressed the commands of God in paradise'. By such a law the synagogue was ruled under God alone as king, who adopted it as a realm peculiarly His, and defended it; but at last, a human king having been constituted for it, on its own petition, it was successively humiliated by only royal laws. Under these, none the less, it rejoiced when the best kings ruled, but when an undisciplined sort ruled, it lamented inconsolably, as the Books of Kings reveal more clearly. But as I think I have discussed this matter sufficiently in a small work* On the Nature of the Law of Nature, *which I wrote for your consideration, I desist from saying more about it now.*

(*In Praise of the Laws of England*, pp. 17-18)

Chapter XV, "All laws are the law of nature, customs, or statutes"

You have committed to memory, my good Prince, what I have so far mentioned to you, so that you deserve my explanation of what you now ask. I want you, then, to know that all human laws are either law of nature, customs, or statutes, which are also called constitutions. But customs and the judgments of the law of nature, after they have been reduced to writing, and promulgated by the sufficient authority of the prince, and commanded to be kept, are changed into a constitution or something of the nature of statutes. Thereupon they oblige the prince's subjects to keep them under greater penalty than before, by reason of the strictness of that command. Such is no small part of the civil law, which is reduced to writing by the Roman princes in large volumes, and by their authority commanded to be observed. Hence that part has now obtained the name of civil law, like the other statutes of the emperors.

If, therefore, I shall prove that the law of England excels preeminently in respect of these three fountains, so to speak, of all law, I shall have proven also that law to be good and effectual for the government of the realm. Furthermore, if I shall have clearly shown it to be adapted to the utility of that same realm as the civil law is to the good of the Empire, I shall have made manifest that the law is not only excellent, but also, like the civil law, is the best choice which is what you desire. Therefore, I proceed to show you sufficiently these two things.

Chapter XVI, "The law of nature is the same in all regions"

The laws of England, in those points which they sanction by reason of the law of nature, are neither better nor worse in their judgements than are all laws of other nations in like cases. For, as Aristotle said, in the fifth book of the Ethics, *'Natural law is that which has the same force among all men'. Wherefore there is no need to discuss it further. But from now on we must examine what are the customs, and also the statutes, of England, and we shall first look at the characteristics of those customs.*

[4] *Tallage* here refers to a form of arbitrary taxation.
[5] In the Middle Ages the expression *the Philosopher* (with a capital "P") always refers to Aristotle.

Chapter XVII, "The customs of England are very ancient, and have been used and accepted by five nations successively"

The kingdom of England was first inhabited by Britons, then ruled by Romans, then again by Britons and then it was possessed by Saxons, who changed its name from Britain to England. Then for a short time the kingdom was dominated by Danes, and then again by Saxons, but finally by Normans, whose posterity hold the realm at the present time. And throughout the period of these nations and their kings, the realm has been continuously regulated by the same customs as it is now, customs which, if they had not been the best, some of those kings would have changed for the sake of justice or by the impulse of caprice, and totally abolished them, especially the Romans, who judged almost the whole of the rest of the world by their laws. Similarly, others of these aforesaid kings, who possessed the kingdom of England only by the sword, could, by that power, have destroyed its laws. Indeed, neither the civil laws of the Romans, so deeply rooted by the usage of so many ages, nor the laws of the Venetians, which are renowned above others for their antiquity—though their island was uninhabited, and Rome unbuilt at the time of the origin of the Britons—nor the laws of any Christian kingdom, are so rooted in antiquity. Hence there is no gainsaying nor legitimate doubt but that the customs of the English are not only good but the best.

(*In Praise of the Laws of England*, pp. 24-27)

"How the Romans prospered whilst they had a great council", chapter 16 of *The Governance of England*

The Romans, whilst their council, called the senate, was great, got, through the wisdom of that council, the lordship of a great part of the world. Afterwards Julius, their first emperor, counselled by the same senate, got the monarchy of almost the whole world. Wherefore Octavian, their second emperor, commanded all the world to be described as subject unto him. But after this, when ill-disposed emperors, such as Nero, Domitian, and others had slain a great part of the senators, and scorned the council of the senate, the estate of the Romans and of their emperor began to fall down, and has fallen away since, into such decay, that now the lordships of the emperor are not as great, as are the lordships of some one king, who, while the senate was whole, was subject to the emperor.

By which example it is thought, that if the king should have such a council as is before specified, his land shall not only be rich and wealthy, as were the Romans, but also his highness shall be mighty, and of power to subdue his enemies, and all others upon whom he shall wish to reign. Many of the books of chronicles are full of such examples, and especially the chronicles of the Lacedemonians, and of the Athenians, who, while they prospered, were best counselled, and did the most by means of council, of any people of the world, except the Romans. But when they left such council, they fell into non-power and poverty; as of the city of Athens it may well appear from the fact that it is now but a poor village, and once was the most worshipful city of Greece.

(*The Governance of England*, pp. 117-118)