Social Democracy and the Traditions of Western Constitutionalism

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. . . *coruptissima re publica plurimae leges.*
. . . and when the State was most corrupt, laws were most abundant.

TACITUS, Annals, III, 27

I.

THE force of both liberty and totalitarianism is international in our day. Up to the XVIIIth Century each of the countries of Europe lived under constitutional arrangements which were the result of long standing custom and national history. But the Age of Enlightenment "introduced into the west a new current of ideas."[1] Constitutional principles not only began to be improvised on speculative foundations but, by a process of imitation, English principles of government as described and analyzed by Montesquieu and Blackstone came to be accepted and applied on the continent. In the XIXth Century it was possible to speak, as Esmein does, of the system, principles and institutions of modern liberty.[1a] As there is a western way of life which has roots in European civilization so also is there a common stock of principles and institutions forming the staple of western democracy.[2]

The Twentieth Century, however, has also inherited the problem

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1 1 Esmein, Elements de Droit Constitutionnel Francais et Compare 65-66 (7e ed. 1921).

1a 1 Esmein, *ibid.*

2 C. Dawson, Understanding Europe 16-23 (1952). For a contrary view Catlin, On Political Goals 11 (1957).

bequeathed by the Nineteenth of the transformation of government by the Industrial Revolution.[3] "Great Britain was the first country to attempt the adventure of an industrial society. This adventure was undertaken by a people with an old and agreed politico-social system. . . . The new . . . forces were . . . gradually shaped inside the existing politico-social fabric. . . ."[4]

If the Nineteenth Century in Britain was able to reconcile the traditional political system and the new industrial society, its solution apparently has not survived into the Twentieth Century. The kernel of social growth has been cracking the shell of the politico-social system in both Britain and the United States. Many people, even informed ones, may not be aware of the effects of modern legislative policies upon our constitutional system and in particular upon the reign of law and liberty which lies at the heart of that system. This paper represents an attempt to confront present trends in social politics with the record and judgment of history. Only the barest sketch of the historical process can be traced, while the details of the current legislative program must be left to other and more competent hands.

Put briefly, the question to be answered today is: Is the Welfare State with its undoubted appeal to the desire for security to obliterate the liberal and legal institutions inherited from the past? Perhaps some readers may regard the question as posing too sharp and artificial a dilemma and even as suggesting an appeal to a golden past as the guide to current action. Such is not the purpose of this study, for institutions, even the most beneficial in their day, are in constant flux. The dilemma moreover is as old as organized government and the form it takes is surprising only to those not accustomed to thinking in historical terms The perversion of the various types of government, monarchical, aristocratic and democratic, is a theme that was probably old when Aristotle handled it in his "Politics." What Aristotle, and for that matter his predecessors, discovered and what subsequent thinkers were constantly rediscovering was that a government, however called, which was not based on regard for law was a bad system of rule and that legal governments were in constant danger of being perverted into the illegal variety. Constitutional Democracy or Polity, as Aristotle called it, was as prone to this process as any other form of government and when so perverted it actually became with Tyranny

[3] Smellie, A Hundred Years of English Government 7 (2d rev. ed. 1950).
[4] R. J. Evans, The Victorian Age 1815-1914 3 (1958).

among the worst of all possible forms of rule.[5] Mr. Parkinson is one of those who has rediscovered this interesting fact in his "Evolution of Political Thought."

II.

The American Ideal has from the infancy of the Nation been that of a government of laws and not of men.[6] These words of the Massachusetts State Constitution were themselves the outcome of a long history that carries us back through Coke to Fortescue, Bracton and Demosthenes.[7] "The king is under no man but under God and the law."[8] The Middle Ages, in which feudal society reached its culmination and nadir, witnessed the establishment of a social and political system based upon customary law and contractual institutions which are the foundations of modern constitutionalism.[9]

Legal limitations on legislative activity, if not on sovereignty, existed in antiquity.[10] Ancient Athens had distinct rules against the introduction into the assembly of unconstitutional statutes or *psephismata*. The Roman Laws of the Twelve Tables contained a prohibition against special laws or *privilegia*.[11] Many Roman statutes contained saving clauses stating that they were not to be applied if found inconsistent with the fundamental principles incorporated in the old law or *Ius*.[12] Though Roman law made provision for privileges, or *privilegia*, as in the case of the Jews in the Empire,[13] it was not until the Middle Ages, as Esmein points out, that the notion of privilege

[5] I owe "constitutional democracy" to Sidgwick, The Development of European Polity 127 (2d ed. 1913). In general see Aristotle, Politics bks. III, IV, VI. III Politics ch. VII, translation by Ellis with modifications: "Now the corruptions attending each of these governments are these: a kingdom may degenerate into a tyranny, an aristocracy into an oligarchy and a polity (Gr. politea) into a democracy. Now a tyranny is a monarchy where the good of one man only is the object of government, an oligarchy considers only the rich and a democracy only the poor; but neither of them have a common good in view."

[6] Corwin, The "Higher Law" Background of American Constitutional Law 8 (1955).

[7] 1 Esmein, Elements 22, 23.

[8] Bracton, bk. I, ch. VIII, in Stubbs, Select Charters 412 (9th ed. by H. W. C. Davis 1929). Ipse autem rex non debet esse sub homine sed sub Deo et sub lege quia lex facit regem.

[9] McIlwain, The Growth of Political Thought in the West 173 ff. (1932). Vinogradoff, *Feudalism*, in 3 Cambridge Medieval History 458-484 (1936). Imbart De La Tour, L'evolution des idees sociales du XI[e] au XIII[e] siecle, in Questions D'Histoire Sociale et Religieuse 137-186 (1907).

[10] 1 Esmein, Elements 23 and note 47.

[11] 1 Esmein, *ibid.* Imbert, Sautel & Boulet-Sautel, Histoire Des Institutions et Des Faits Sociaux—Textes et Documents 158 (1957): "Privilegia ne inroganto."

[12] H. J. Wolf, Roman Law 67 (1951): "Si quid ius non esset rogarier eius, hac lege nihilum rogatum."

[13] Guterman, Religious Toleration and Persecution in Ancient Rome 103 ff. (1951).

became established in Medieval French law and continued to exist till the time of the French Revolution.[14] Only in England did the conception of legal government in the sense in which it is understood in our day take hold and continue to dominate English legal and constitutional thinking.

Liberty in the Middle Ages, in both France and England, however, consisted of privileges granted in charters, deeds and other instruments by which social arrangements were organized.[15] Magna Charta like other charters in Western Europe was a document of liberties in the plural rather than a bill of rights in the Eighteenth Century sense of the term.[16] It is not inaptly termed the Charte des Franchises by the French editors of the document.[17] The empirical and documentary approach to the whole question of individual liberty continued to distinguish English political and constitutional development until our own day, while this approach was abandoned by the French during the Old Regime and completely superseded by the deductive or Cartesian approach to individual rights, which was incorporated in successive Declarations of Rights during the French Revolution. As suggested below, the difference between the English and the French approaches to the subject of individual rights is not unlike the difference between the points of view of the historical school of jurisprudence and of that of natural rights.[18]

On the continent of Europe, the free institutions which were a legacy of the Middle Ages disappeared in the Sixteenth and Seventeenth Centuries and generally gave way to absolute monarchy.[19] In England, in spite of the subjugation Parliament underwent at the hands of the Tudor monarchs and in spite of the inordinate growth in the royal prerogative brought about by the King's assumption of the Papal powers in his realm, both the Common Law courts and Parliament survived to carry on a dramatic struggle with the Stuart Kings in the Seventeenth Century that finally ended the pretensions of the kings to personal and arbitrary rule over their subjects.[20]

[14] Esmein, Cours Elementaire D'Histoire du Droit Francais 174, 221, 262-263 (15e ed. 1930).

[15] Montague, The Elements of English Constitutional History 190-191 (1894).

[16] Pollard, The Evolution of Parliament 10-11 (2d ed. 1934).

[17] Bemont, Chartes des Libertes Anglaises (1892).

[18] Maine, Ancient Law ch. 4 (ed. Pollock).

[19] Esmein, Cours 338-341. Olivier-Martin, Histoire du Droit Francais 335-339 (1951).

[20] Keir, The Constitutional History of Modern Britain, 1485-1937 268-280 (4th ed. 1950).

Hardly did the power pass into the hands of Parliament following the Glorious Revolution of 1688 than a new despotism began to take shape when Parliament laid claim to an authority that overrode any law and to privileges that were nothing but selfish assertions of its own irresponsibility to either law or the public.[21]

This is precisely what Chatham said in arguing the case of Wilkes: "Tyranny, my lords, is detestable in every shape, but in none so formidable as when it is assumed and exercised by a number of Tyrants";[22] and what Colonel Barre declared in 1771: "You, who are only deputies or factors, have usurped a power not only superior to that of your creators, but destructive of the very rights by which they exist as freemen, and by which you yourselves exist as representatives. In the gulf of your privileges you have swallowed up the birthright of the people who are ultimately paramount to all three branches of the legislature."[23] It was this attitude of Parliament that finally brought on the revolt of the American Colonies, as it was the failure to suppress the revolt that led to the first halting steps in the reform of Parliament which the coming of the French Revolution only interrupted but did not check.

A good deal of misunderstanding concerning modern constitutionalism stems from the failure to see democracy or self government in historical perspective. We are inclined to exaggerate the historic importance of the organs of self government, principally Parliament, and to neglect what was more fundamental up to the Eighteeenth Century in England, that is, the rights of the subject embodied in the Common Law.[24] It is this concern that lies at the basis of the thinking of Coke, Selden and the other defenders of the Common Law against the claims of the royal prerogative to override the law of the land by means of the power of dispensing from, and suspending the operation of the Common Law. The rule of law means precisely that the rights of the subject are embodied in the normal working and substance of the Common Law and are to be protected by the Common

[21] Hallam, The Constitutional History of England, 1485-1760, with the Essay of Macaulay on the History ch. 16, 782-795 (N.D.).

[22] Western Civilization, A Course of Selected Reading by Authorities 185 (Somervell ed. 1958).

[23] Quoted in McIlwain, *The English Common Law, Barrier Against Absolutism,* American Historical Review 30 (1943).

[24] McIlwain, *The English Common Law, Barrier Against Absolutism,* American Historical Review 23 ff. (1943).

Law courts. In this scheme of thinking Parliament is only a means to an end, not the end in itself.

Prof. McIlwain has rendered a service in calling the attention of students to the effects of a retrospective modernism which has perverted our reading of English history up to the Seventeenth Century by making Parliament the axis of political thought and action when in reality it was the King who was the center of both legislative and executive power, to use a modern distinction, and when Parliament's role was merely to affirm and to defend the rights of the subject threatened by a swollen prerogative.[25]

The notion of fundamental law limiting both legislative and executive power and interpreted by an independent judiciary was taken over by the American Colonies and became the basis of the American Constitutional System, whereas in England, the place of its birth, it was abandoned in the Seventeenth Century for the doctrine of the sovereignty of Parliament which prevails today.[26] From time to time, as Mr. Gough points out, echoes of Coke's position in Bonham's case continued to sound in a few judicial decisions enounced through the Eighteenth Century, but without any practical challenge to the officially accepted theory of the supremacy of Parliament.[27]

In a very real sense, as Pollard has remarked, the United States of America carried on the medieval theory and practice of an overriding law, as the expression of the popular will and indirectly of the divine command and of the natural law,[28] and American medievalists like G. B. Adams and C. H. McIlwain have been better able to appreciate not only this continuity but certain aspects of the medieval conception of law and government.[29]

III.

The difference in the constitutional development of England and France is instructive. The causes of this difference have been traced, principally, to the feudal background of the French and English

[25] McIlwain, *The Historian's Part in a Changing World,* 42 American Historical Review 207-224 (1937).

[26] Pound, The Development of Constitutional Guarantees of Liberty 27 ff. (1957). Corwin, The "Higher Law" Background of American Constitutional Law 72 ff. (1955). McIlwain, The American Revolution, A Constitutional Interpretation, 186 ff. (1923).

[27] Gough, Fundamental Law in English Constitutional History 30 ff., 192 ff. (1955).

[28] Pollard, Factors in American History ch. I (1925). Pollard, The Evolution of Parliament ch. XII (2d rev. ed. 1934).

[29] G. B. Adams, The Origin of the English Constitution (1912). McIlwain, The High Court of Parliament and Its Supremacy (1910).

monarchies. As Esmein expresses it in a statement that has received endorsement from students of English as well as French institutions:

"England after the Norman Conquest began with an almost absolute monarchy and it is possibly for this reason that it ended in the Seventeenth Century in a representative monarchy. Feudal France began with a royalty almost completely impotent and it is probably for this reason that it ended in the Seventeenth Century in the absolute monarchy."[30]

Prof. Esmein adds two other reasons for the differing fate of constitutional government in England and France:

1. The fact that the English Parliament came as a result of the continued existence and activity of the shire, and of the fusion of the Knights and the Burgesses in the House of Commons, to represent the whole nation rather than separate orders of society or estates.

2. The other cause Esmein finds in the working of what he calls race but which we may render in our idiom as national character. The Englishman in the Norman and Angevin periods acquired a sentiment of law and a consciousness of right which have been the marks of his character ever since.[31]

How far the difference in the national character and development of France and England is due to the differing degrees of German and Roman influence exerted in each country is of course a matter of controversy.[32] There is little doubt that France was more fully the heir of the Roman ethnic, linguistic and legal traditions than England, but it remains difficult beyond a certain point to particularize on this inheritance and to trace its continuity in detail.[33] There is one aspect of this differing inheritance, however, that invites more attention than it has received at the hands of historians. I refer to the fact that in France the civil law was received, piecemeal to be sure, unlike the cataclysmic reception in Germany in the Sixteenth Century, but just as effectively for all its gradualness.[34] England on the other hand

30 1 Esmein, Elements 76,77. McIlwain, *Medieval Estates,* in 7 Cambridge Medieval History 700-714 (1932).

31 1 Esmein, *ibid.*

32 Tout, France and England—Their Relations in the Middle Ages and Now 43 ff. (1922).

33 The literature on Romanists and Germanists and their controversies is abundant. The works of Fustel, de Coulanges, Dopsch, and Pirenne may be consulted. For a summary see Gooch, History and Historians in the Nineteenth Century 200-204 (2d rev. ed. 1952).

34 Esmein, Cours 331 ff., 681 ff.

remains the country of the Common Law, Germanic or Feudal in substance and Romanesque only in form, as Maitland put it.[35]

Lawson points out the extent of the mixture of customary and romanistic elements in modern civil law systems, as McIlwain, agreeing with Dr. Cowell, emphasizes a similar mingling in the Common Law system.[36] The elements entering into the modern systems are, to be exact, three in number: (1) a mass of customary law (2) the law transmitted in the Corpus Juris of Justinian (3) Natural Law. In brief, in the words of Lawson, they are custom, a book, and reason.[37] The difference between England and the continent is not in the difference of ingredients but in the differing proportions of these ingredients incorporated in the Common Law. This difference on the political side has been the subject of much writing that not only misses the point of the comparison but is actually erroneous. I refer to the supposed Roman influence in favor of royal absolutism that is embodied in a few well known maxims such as Ulpian's "What has pleased the Prince has the force of Law. . . ." Actually this text like others was interpreted in its constitutional sense rather than as a counsel of absolutism by writers of the Twelfth and Thirteenth centuries like Glanvill and Bracton in England and Beaumanoir on the continent.[38] Prof. McIlwain has restored perspective on this subject by emphasizing the basic constitutionalism that pervaded Roman political thinking when it placed the source of sovereign power in the people, and that inspired these writers.[39] It is true, none the less, that in the Sixteenth Century the Roman legal texts were interpreted in an absolutist sense in order to bolster the authority of the Renaissance Monarch whose political sovereignty, as it was called, was now emancipated from morality and law. In the Middle Ages this was not an effect of the study of Roman Law, though some of the doctors who surrounded Frederic Barbarossa in the Twelfth Century and the

[35] 1 Pollock & Maitland, The History of English Law 206-210, 116-120, 223-225 (2d ed. 1911). McIlwain, Constitutionalism Ancient and Modern 63-64 (1940).

[36] McIlwain, *Our Heritage from the Law of Rome,* 19:3 Foreign Affairs 598-599 (April, 1941).

[37] F. H. Lawson, A Common Lawyer Looks at the Civil Law 9 (1953).

[38] Meynial, *Roman Law,* in The Legacy of the Middle Ages 384-386 (1948). The passage from Ulpian occurs in Digest 1, 4, 1, 1, pr. and Institutes 1. 2. 6. It continues as follows ". . . because the people by a *lex regia* confers on the prince its whole *imperium* and *potestas.*"

[39] McIlwain, *The English Common Law, Barrier Against Absolutism,* American Historical Review 23 ff. (1943). McIlwain, *Our Heritage from the Law of Rome,* 19:3 Foreign Affairs 599-605 (April, 1941).

legists who counselled Phillip the Fair in the early Fourteenth Century sought to make it so.[40]

The real and important contrast between the Civil and the Common Laws lay in "Two different ways of thinking," as Lord Macmillan has observed with perspicacity.[41] It is true that the Common Law retains the imprint of a relational or feudal society while the Civil Law represents more fully a great political tradition,[42] but so closely woven have the political and relational elements become in both Civil and Common Law systems that it seems desirable rather to emphasize the influences resulting from the contrasting manner in which the two systems were born and grew up. France and the countries of the continent "received" a code rather than an organic legal tradition, the Code of Justinian including the portion of the corpus destined for legal instruction, The Institutes. The ingenuity of lawyers was displayed in interpreting and adapting the statements and the methods of reasoning of the Institutes to the needs of their day. French law and French legal thinking from the first were, therefore, code-centered and it is not surprising that successive legal reforms were embodied in official statements and compilations of customary law culminating in the Napoleonic Codes.[43] The method of thinking of French lawyers and of those influenced by them came, therefore, to be strongly deductive, scholastic, their approach *a prioristic*.[44] Like the medieval schoolmen, they began with a text, and the modern French judge, like his predecessors in the Middle Ages, must begin and end his adjudication with the *ita scriptum* of the scholastic thinker, namely the exact words of the code.[45]

This tendency toward *a prioristic* thinking has affected political as well as legal thinking in France and explains in part the facility with which theories of natural law and of individual rights were received in the Eighteenth Century as dogmas and translated into political realities in the French Revolution.[46] People often speak of French "logic" when they mean the deductive mode of reasoning with

40 Vinogradoff, Roman Law in Medieval Europe 61-62 (2d ed. F. De Zulueta 1929). 1 Chenon, Histoire Generale du Droit Francais Public et Prive 816-818 (1926-1929).

41 Lord Macmillan, *Two Ways of Thinking,* Rede Lecture (1934).

42 Pound, The Development of Constitutional Guarantees of Liberty 9 (1957).

43 F. H. Lawson, *op. cit.* 25-27, 35-39.

44 Sidgwick, The Development of European Polity 372, 378 (2d ed. 1913).

45 Planiol, *French Law,* in Wigmore, A General Survey of Events, Sources, Persons, and Movements in Continental Legal History 293 ff., 299 ff. (Continental Legal History Series 1912). David & de Vries, The French Legal System 34, 113 ff. (1958).

46 1 Esmein, Elements 65-66.

which Frenchmen have drawn out the consequences of their political principles. An important consequence of the French psychology in this respect is the discontinuity in French history.[47] Up to the Revolution, to be sure, French institutions maintained a continuity comparable to that we associate with English history, and in the Seventeenth Century it was England that enjoyed the reputation for political instability. It is also true, however, that the old constitutional traditions of medieval France by the Eighteenth Century had given way to a thorough absolutism. If Bodin had in the Sixteenth Century recognized natural law, and Bossuet in the Seventeenth Century acknowledged religion as respective limitations on the monarchy, such thinking had obviously disappeared when Louis XV issued his famous affirmation of absolute power in 1770.[48]

The monarchy had accepted the principle embodied in the famous statement of the Digest: "Princeps legibus solutus est."[49] The government was obviously to a great extent an arbitrary rather than a legal one and a most characteristic expression of its authority was the *lettre de cachet* by which a sentence of exile or imprisonment without the benefit of trial could be issued by the King.[50] In spite of its continuity, therefore, the French monarchy had jettisoned some basic principles which it shared with the English monarchy in the Middle Ages. That the feudal and limited monarchies, as Esmein calls the successive stages of royal rule from the Twelfth to the Fifteenth centuries, had this character I have no doubt, in spite of the sharp challenge to this position by Olivier-Martin.[51] According to the latter, no rights of the subject were recognized by the rulers in the Middle Ages even in the days of Louis IX, the supreme exemplar among the medieval monarchs of the feudal and Christian virtues.

English history, for all its Seventeenth Century turmoil is marked by continuity. To this day the monarchy, Parliament, the courts and local government bear the marks of venerable antiquity extending

47 E. A. Freeman, Historical Essays 40-52 (1st Series 3rd ed. 1875).

48 Esmein, Cours 339-341. Edict of Dec. 1770, in 22 Isambert, Anc. Lois 506: "Nous ne tenons notre couronne que de Dieu. Le droit de faire des lois, par lesquelles nos sujets doivent etre conduits et gouvernés, nous apartient a nous seuls sans dependance et sans partage."

49 Esmein, *La Maxime Princeps Legibus Solutus dans L'Ancien Droit Public Francais,* in Essays on Legal History (ed. P. Vinogradoff 1913).

50 1 Esmein, Elements 24-25. Olivier-Martin, Histoire du Droit Francaise 520 (1951).

51 Olivier-Martin, *op. cit.* 337 and note 7, 340-342. Esmein, Cours 338-341. 2 Chenon, Histoire Generale du Droit Francaise Public et Privé 308-312 (1926-1929).

back in some cases to the Anglo-Saxon period. If the French national psychology was affected, if not determined, by the manner in which it received the code of Justinian, it is safe to say that English national character and thought were determined by her rejection of the Roman jurisprudence. The stand of the Barons, "we are unwilling that the laws of England be changed," fortified the action of the Common Law courts[52] and laid the foundation of a native English jurisprudence built on customs and judicial decisions rather than on the exposition of a pre-existent code, and taught at the Inns of Court.[53] The system of writs, of juries, of judicial circuits, in fine, of the *enquete de pays,* marked a sharp break, as Maitland points out, with the inquisition of the Civil and Canon law.[54] It meant the building up of a legal system by empirical methods. This was in keeping with English national character, or rather it was a factor in the making of English character.[55] England lost much by its failure to accept the legal science of Bologna and Perugia but it gained by the retention of native law[56] and avoided the sharp conflicts that occurred in France and in Germany between native and imported law. Above all, it strengthened the continuity of English institutions and rendered the law and the courts that declared it the protectors of individual rights.

The medieval rule of law was thus transmitted in England alone to modern times and in no other country. It was the method of making use of communal institutions rather than the absence of the maxims of absolutism of the Roman law texts that helps explain the survival of constitutionalism in England.[57] It is remarkable that the conceptions of individual rights in England and on the continent today do not differ radically. The explanation is that the continent borrowed from England some of her institutions and spirit while Englishmen and particularly Americans imbibed liberally of the doctrines of the school of natural rights which for all its French association could claim Locke as one of its pioneers.[58]

[52] Maitland, The Constitutional History of England 16 (1931).

[53] Maitland, *English Law and the Renaissance,* in 1 Select Essays in Anglo-American Legal History 195 ff. (1907).

[54] 2 Pollock & Maitland, The History of English Law 656-661, 672-674 (2d ed. 1911).

[55] E. Barker, National Character and the Factors in Its Formation 125-135 (4th rev. ed. 1948).

[56] Maitland, The Constitutional History of England 22 (1931).

[57] McIlwain, *Medieval Estates,* in 7 Cambridge Medieval History 665-667 (1932).

[58] Corwin, The "Higher Law" Background of American Constitutional Law 68 ff. (1955).

IV.

Any discussion of individual rights brings up the distinction between the realms of public and private law. The famous definition of Ulpian in the Digest that "public law is what has regard to the status of the Roman State, private law that which concerns the utility of individuals" is the basis of the modern distinction even in legal systems only indirectly dependent on Roman law.[59]

During the Middle Ages, public and private law often became confused and *imperium* became, according to one school of historians, the invariable appendage of *dominium,* or private property.[60] That some notion of public authority resident in the ruler survived throughout the Middle Ages has been made clear for the Carolingian period by Prof. Halphen and for the later periods by Below.[61] So much so is this the case that Prof. McIlwain is ready to accept as characteristic of the political thought of the later Middle Ages the well known aphorism of Seneca's *de Beneficiis*: "to kings belongs authority over all; to private persons, property."[62]

This difference between public and private law may not have been of great technical significance to the ancient Romans, as Jolowicz contends,[63] but the distinction forms an indispensable key to an understanding of modern legal and constitutional systems based on it, as Bacon rightly observed.[64] Modern communist systems of society may exaggerate the role of *imperium* or government, as the Middle Ages exaggerated that of property, but the notion of a public law associated with the State, as distinct from private law governing relations among individual citizens, has remained a clear legacy from the Roman past.[65]

The social conflict hinges on the line that is drawn in every

[59] Digest (1.1) 1.2: Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem. Sohm, The Institutes 25-27 (2d ed. tr. Ledlie 1901). Jolowicz, Roman Foundations of Modern Law 49-54 (1957). 1 Gierke, Deutsches Privatrecht 28 (1895), shows that the distinction is unknown to legal systems not dependent on Roman Law.

[60] Esmein, Cours 175-185.

[61] Halphen, A Travers L'Histoire du Moyen Age 83 ff. (1950). Below, Der Deutsche Staat des Mittelalters 201, 226-227 (1914). J. W. Jones, Historical Introduction to the Theory of Law 144 (1956).

[62] McIlwain, The Growth of Political Thought in the West 394 (1932).

[63] Jolowicz, Roman Foundations of Modern Law 51 (1957).

[64] 7 Works 731, in Jolowicz, *op. cit.* 53.

[65] F. Schulz, Principles of Roman Law 27 (1936). J. W. Jones, Historical Introduction to the Theory of Law 141 ff. (1956).

advanced society between public and private law.[66] The later Roman Empire saw State power enlarged until it crushed all initiative and turned the Empire into a social and political straightjacket for its inhabitants from which only the barbarian invasions delivered them. In the words of Homo, the Empire, born of Authority, perished of Etatism.[67]

In their quest for security the peoples of modern democracies have been treading the same path as the ancient Romans of the Empire. The difference in the experience of the two ages lies in the fact that in the modern age, unlike the ancient, Etatism is the means by which social equality is being pursued. The shift of emphasis from political to social democracy has not only threatened to sacrifice liberty to equality but has brought a fundamental change in our wa of looking at traditional concepts and institutions.

This is not only a question of semantics but it also involves a complete reorientation of the thinking of our generation. When freedom from want is placed among fundamental liberties the very notion of freedom as comprehended in the past becomes confused. For the traditional notion of freedom entailed a limitation on the powers of the State.[68] The modern obligation imposed on the State to provide security may be defensible on other grounds but can hardly be classified as an individual right in the sense that the authors of the Bill of Rights understood that term.

The invasion of private law by public law has proceeded at a pace that would have appalled Dicey who bemoaned the phenomenon on the eve of World War I.[69]

V.

The cooperation of the lawyer and the legislator have made English law what it is, unlike the situation in France where the Parlement was in constant conflict with the royal power of legislation during the Seventeenth and Eighteenth centuries.[70] It is this cooperation that explains the success of two institutions which lie at the basis of the whole system of individual rights of the English and American consti-

[66] Sohm, The Institutes 25 (2d ed. tr. Ledlie 1901).
[67] Homo, Nouvelle Histoire Romaine 556 ff. (1941).
[68] 1 Esmein, Elements 548.
[69] Jolowicz, *op. cit.* 49. Pollock, *The Contact of Public and Private Law,* 1 Cambridge Law Journal 255 ff. (1923).
[70] Olivier-Martin, Histoire du Droit Francais 541-561 (1951). Tisset and Ourliac, Manuel D'Histoire Du Droit Francais 241-244 (1949).

tutional and legal societies. These institutions are the writ of Habeas Corpus and the jury which, as Prof. Holdsworth has demonstrated, have benefited from the joint action of the legal profession and of Parliament.[71] The reasons for the curious collaboration which has made the fortune of the English Common Law must be sought in history rather than in race or national character.

As early as the Fifteenth Century, the Common Law courts found a bond with the members of Parliament in a common jealousy of the King's Council and of the prerogative courts which grew out of the Council's jurisdiction. The period, however, in which the alliance was really sealed was the Seventeenth Century when Whitelock's theory of the sovereignty of the King in Parliament devised around 1610, and Coke's complementary theory of the supremacy of law became respectively the official theories of Parliament and of the Common Law courts in their struggle with the king.[72] The result was that these otherwise incompatible views, the one of the sovereignty of Parliament and the other of the supremacy of the law became linked, and established a joint foundation for the English constitutional and legal system after the Revolution of 1688.

There is considerable question whether the role historically assigned to legislature and legal profession is being adequately discharged in either England or the United States. So far as the work of the legislature is concerned, in both countries a great deal of law-making is carried on by administrative bodies to which have been delegated specified powers by the legislature. The administrative law which Dicey contrasted in France with the English rule of law is no doubt here to stay, in the United States as well as in England.[73] What its effects will in the long run be on individual rights it is impossible to say. So far as France is concerned it must be admitted that the French administrative tribunals have maintained a fairly high standard of judicial activity and have been successful in protecting the rights of individuals against governmental authority.[74] But that all this requires in this country a fundamental change and expansion in

[71] Holdsworth, Some Lessons from Our Legal History 125, 59 ff., 75 ff. (1928).

[72] Holdsworth, *op. cit.* 125. McIlwain, Constitutionalism Ancient and Modern 97 ff. (1940).

[73] Dicey, Introduction to the Study of the Law of the Constitution 328 ff. (9th ed. 1950).

[74] David & de Vries, The French Legal System 61, 64 ff. (1958). R. C. FitzGerald, *French Law — Droit Administratif,* in 6 Chambers's Encyclopedia 54 (1950).

the traditional method of judicial protection of rights, no one will deny who is at all familiar with either system.

Prof. Keeton has shown how in England the twin props of the traditional constitution, the sovereignty of Parliament and the rule of law, have been undermined by the new administrative machine acting without benefit of regular legal procedure, under the authority of powers delegated by Parliament. Under color of the law it would be possible for dictatorship to take over as it did in Germany under the Weimar Republic.[75]

Mrs. Sieghart points out that the system of *decrets-lois* in France paved the way to the Vichy regime headed by Marshal Petain by enabling the latter, under the color of legitimacy, to discharge the role of legislator.[76]

The necessity for a properly organized system of administrative law which will preserve the basic virtues of the English rule of law has been advocated by C. K. Allen[77] and by William A. Robson.[78] Sieghart concludes with a plea for the establishment of adequate controls over delegated legislation.

"If this country fails to establish them—then, but only then, will the warning of a modern writer come true: that Great Britain is on the road to serfdom. It is submitted that she is still at the crossroads. It is true that she can no longer turn back; but a choice of ways is left to her. If she chooses the right one, the mother country of Liberalism will experience no unsurmountable difficulty in finding the necessary means of preserving liberty in a changed and changing world."[79]

We may fondly believe that in the United States, with its written constitution, its doctrine of authority ultra vires and of judicial review, we may be spared this danger. Schwarz does give the American system a greater resistance to this threat and ascribes it to the "judicialization of these new forces of social control towards fitting them into the existing constitutional framework. . . ."[80] Prof. Keeton also notes the absence in the United States of anything like "the Henry VIII clause"

[75] Keeton, The Passing of Parliament, 13 ff. (1952).

[76] Sieghart, Government by Decree, A Comparative Study of the History of the Ordinance in English and French Law 306 (1950).

[77] C. K. Allen, Bureaucracy Triumphant, 98 (1931). *Idem,* Law in the Making 493 (6th ed. 1958). *Idem,* Law and Orders 171-6, 288 ff. (1945).

[78] Robson, Justice and Administrative Law 506-7.

[79] Sieghart, *op. cit.* 319.

[80] B. Schwartz, American Administrative Law 128 (1950).

which gives the English ministry the right to issue ordinances having legal validity similar to statutes.[81]

While these observations are in general well founded they do not go far enough. The process of condemnation by which, for example, slum clearance is carried on under Title I has raised the basic issue of the social service state versus the individual in a new form in this country.[82] Perhaps, notwithstanding the differences, the judgment of a recent writer on England and France should be extended to the United States.

"If we try to summarize the results of our investigations we shall find that the wide difference which existed in the past between the English and French systems of administration tends to decrease in modern times under the impact of social and economic forces."[83]

VI.

How far do groups—organized groups—threaten individual political and economic rights? Edmund Burke said "liberty when men act in bodies is power."[84] In the Middle Ages, there were local, seigneurial and other groups which exercised power. The universities of the Middle Ages offer an example of such a group. These medieval federations or associations have received the eulogy of Gierke in Germany and Maitland in England.[85] Even the Church constituted a group in the Middle Ages that could be called a state. There were two powers in the Middle Ages, one temporal and the other spiritual, which for a long time divided the allegiance of men. Hence, the struggle for individual religious liberty had to overcome or eliminate the power of resistance of one of these bodies.[86]

The doctrine of sovereignty in France, as a result, adopted the concession theory of corporations, both civil and religious, which held sway until 1901 when wider freedom of association was granted.[87]

81 Keeton, *op. cit.* 181.

82 The Nation, Special Issue, Oct. 31, 1959, 291 ff.

83 Sieghart, *op. cit.* 305.

84 Burke, Reflections on the French Revolution 9, quoted in Holdsworth, Some Lessons from our Legal History 141-155 (1928).

85 Gierke, Political Theories of the Middle Age passim (tr. Maitland reprinted 1951). Mogi, Otto Von Gierke 29-57 (1932). R. Emerson, State and Sovereignty in Modern Germany 126-154 (1928).

86 Maitland, The Constitutional History of England 508 ff. (1931). 2 Esmein, Elements 601 ff. Ruffini, Religious Liberty 320-387, 148-208, 492-494 (tr. J. P. Heyes 1912).

87 1 Esmein, Elements 562.

This attitude was in line with Rousseau's distrust of associations as being rivals of state power.[88]

In England, the concession theory was always applied with moderation. Historic precedents were against it. The legal profession was organized in unincorporate inns of court since at least the Fourteenth Century.[88a] The trust enabled English lawyers to avoid, for a long time, the problems of incorporation faced abroad.[89]

A distinct reaction set in, in recent decades, toward the toleration of unincorporate groups with Duguit, Laski and Gierke—a nostalgic harking back to the past—while ignoring, in a certain sense, the "anarchy of the Middle Ages" and its lawlessness.[90] Even Esmein cried out against this destruction of sovereignty, the sole prop of a society founded on legal principles and independent of individual and selfish interests.[91]

Holdsworth complains that politicians have, by the act of 1906 which changed the Taft Vale decision of the House of Lords, put Trades Unions above the law.[92] The same complaint is uttered by conservatives in the United States and in continental countries against the rising power of large labor groups. Dicey has put the matter as follows: "A private citizen has often found it impossible to disobey the commands of a political association or of a church."[93] Holdsworth concludes: "It is necessary to restrict the right of association in order to prevent it from being so used as to destroy individual liberty."[94] So also Esmein advocated regulation of liberty of teaching for the same reasons.[95]

The liberal state of the Nineteenth Century was based on the interests of the free individuals rather than of social groups. So far as a great many of its inhabitants were unable to perform the duties of free citizens, it was the function of the liberal state through education, social legislation and other means to elevate such persons to full political equality. It is certainly not the function of the liberal state to sacrifice existing and prospective free citizens to the imperious

88 Rousseau, Social Contract bk. II, ch. III.
88a Plucknett, Concise History of the Common Law, 215-225 (5th ed. 1956).
89 Holdsworth, Some Lessons from our Legal History 146-147 (1928).
90 Holdsworth, *op. cit.* 148.
91 1 Esmein, Elements 43.
92 Holdsworth, *op. cit.* 152.
93 Dicey, Law and Public Opinion in England 154-155 (2d ed.).
94 Holdsworth, *op. cit.* 153.
95 1 Esmein, Elements 548.

and ever growing demands of interest groups, such as business combines or labor unions, exerting pressures on the state inimical to freedom.

VII.

In certain ways, the social service state through its preoccupation with the social and economic well being of its citizens carries us back to the theories of Proudhon. The latter placed the economic before the political needs of men. Esmein has remarked on the extraordinary reasoning which made the arrangements of primitive society the foundation for a theory of civilized community.[96] The federative, syndicalist and anarchistic theories, which exalt principles of social solidarity and disparage the State, have this in common with modern advocates of the social service state, that they are concerned with groups in society rather than with individuals.

The absence of real convictions among leaders of democratic thought when they speak of individual rights has often been noted. Unless a politically articulate group is involved the issue of individual rights is seldom raised in Congress or Parliament. There was relatively more independence in this respect shown by parliamentary bodies in the Nineteenth Century, the heyday of liberal thinking.[97]

In many ways, much of the current thinking about democracy and democratic rights would incur the criticism of the natural school voiced by Sir Henry Maine a century ago.[98] It singles out a few elements in the democratic tradition, to the exclusion of others, and develops on their bases a dogmatic system designed to satisfy the demands of spokesmen for the underprivileged groups in society. It not only ignores the tradition of liberty but sacrifices it to the ideal of equality.

Now if this approach is avowed to be a radical one, and by this I mean one not adequately rooted in the past, its justification would have to be argued on grounds of utility rather than of history. Unfortunately, advocates of the egalitarian point of view seek to create the impression that theirs is the true wine of democracy whose casks they alone now broach. Like King Josiah, they have rediscovered the Law neglected for many generations and will command obedience

[96] 1 Esmein, Elements 51-54.

[97] Keeton, The Passing of Parliament 58-60 (1952). R. J. Evans, The Victorian Age 1815-1914 181 (1958).

[98] Maine, Ancient Law ch. IV. Idem, Popular Government 5-7 (1886).

to it. That the demands for equality involve a threat to civil, legal and even religious liberty does not seem to bother them. That this modern attitude involves serious inconsistencies which make the egalitarian program anything but egalitarian in practice is either not realized or ignored.

The attempt, by the use of the State power, to force or promote labor unionization, racial desegregation, fair employment practices, the end of housing restrictions and international birth control information, to mention only a few of the current crusades, may in each case have something to commend it. But where in each instance the State power is encouraged in the pursuit of its object to override the rights of the individual, the *primum mobile* of the democratic machine, there is ample cause for alarm. Of the various ingredients of constitutional democracy such as self government, economic equality, the rule of Law and liberalism in the sense of recognition of individual rights, the latter two have been suffering constant abridgment in favor of the former.

Mr. David Thomson, regretting the fact that Liberty and Equality, after being linked in the Eighteenth Century, have become estranged in the Twentieth, ends with an eloquent plea for their reconciliation.

"Is it possible to reunite and to reconcile the twin sisters, finding thereby a revitalised conception of democracy which may better fit the needs of our times? It is the connections between liberty and equality that are supremely important if democracy is not to be a house divided against itself; and a society in which they are *jointly* operative ideals will be more truly democratic than a society in which they are in recurrent conflict, or in which one is sacrificed to the other."[99]

Perhaps there is, as Nineteenth Century thinkers contended, an incompatibility between liberty and equality that words cannot resolve.

Prof. Tawney concludes his stimulating work on *Equality* with the observation that "all advances in civilization have their cost." He then exorcises the supposed incompatibility between equality and liberty by questioning the value of a kind of liberty "which is always confined to a minority and which should more properly be denounced as privilege. Action which causes such opportunities to be more widely shared is, therefore, twice blessed. It not only subtracts from

[99] D. Thomson, Equality 24 (1949).

inequality, but adds to freedom."[100] The danger, it seems to this author, lies not so much in the principle of equality as in the lengths to which and the methods by which demagogues may pursue it.

VIII.

The advance of the social-service state has also endangered religious liberty.[101] The desire of the legislature to remedy all the abuses of society and to stamp members of the state with a common mind has produced conflicts in England and France in regard to education. In both these countries, the dominant churches have been reluctant to turn over what they conceive to be a vital religious function to the exclusive control of state authority. The problem of the state's relation to education and to religion is different in the United States but this simply means that different kinds of issues arise. Released time for religious instruction has raised questions in the minds of the people of several communities but this reaction may very well be mild in comparison with the growing problem of the relations of the state to the parochial schools. The increasing enrollment in these schools and the burdens imposed thereby on their supporters will intensify the drive for state financing of some of the services provided by these schools. The social-service state expanding its ideology as well as its services cannot expect to avoid a conflict in education which the traditional democratic state with its more limited program found difficulty in avoiding.

The extension of state power, in fact, makes more difficult the maintenance of the traditional distinction, rough though it be, between the civil and religious spheres which John Locke stated in its classic form.

"The commonwealth seems to me to be a society of men constituted *only* for the procuring, preserving and advancing their own civil interests. Civil interests I call life, liberty, health and indolency of body: and the possession of outward things, such as money, lands, houses, furniture and the like."[102]

The faith of Locke in the ability of a government to draw a line between politics and religion was shared by the men who engineered the American Constitution.[103] Even in their day, however, the ex-

[100] R. H. Tawney, Equality 268 (4th ed. 1952).
[101] H. G. Wood, Religious Liberty To-day 26 (1949).
[102] Quoted by H. G. Wood, *op cit.* 25.
[103] E. B. Greene, Religion and the State ch. II (1959).

perience of some of the states indicated that the demarcation of fields was difficult. It appeared so difficult to Rousseau that the author of the Social Contract was thrown back on the alternative of a civic religion which would be made obligatory on all citizens.[104]

If it has taxed statesmanship to maintain the wall of separation under the traditional democratic state based on principles of political and legal rather than social and economic equality, the new social service State which confronts us may well find it impossible to trace the boundary line so optimistically drawn by Locke. The coming of a civic religion, already achieved in Soviet Russian society[105] has been descried in the West also. Sutton observes that so long as the "activities of the state were confined to the narrow sphere of defense and police the conflict [of Church and State] was less acute." The modern state is returning "into the fullness of functions which it had in pre-Christian Europe; a struggle cannot be avoided. . . ."[106]

IX.

That social and economic democracy is here to stay no one can doubt. Its tenets not only inform policy in all the Western democracies but its spirit has found an abiding place in the Charter of the United Nations. But its victory will be dearly purchased if the principles of civil and legal government enshrined in the Anglo-American constitutional and legal tradition are sacrificed to the new dispensation, no matter how benevolent. It is of course easy to blind oneself to reality, as Lucan observed: "You may preserve the shadow of liberty, if you *will* whatever you are ordered to do."[107]

Our dilemma or crisis, whichever we consider it, is a political and ethical crisis as well as an economic and modern one.[108] Perhaps fixed moral and religious standards can no longer be found to maintain our political and social system and its centerpiece, the rule of law. In that event, we may be wise enough to heed the counsel of the late Vinerian professor who proposed History as a substitute guide.[109] And what History teaches is that peoples living under governments without legal limitations are doomed to be the victims of their own

104 Rousseau, Social Contract bk 4, ch. VIII. Elliott and McDonald, Western Political Heritage 667 (2d printing 1950).

105 Zaehner, *The Religious Instinct,* in The New Outline of Modern Knowledge 80-81 (ed. Pryce-Jones 1956).

106 C. Sutton, Farewell to Rousseau, A Critique of Liberal-Democracy 157 (1936).

107 Quoted by Inge, in C. Sutton, *op. cit.* 218.

creation. Perhaps the words of Professor Munro, uttered in 1942, that "if we must replace a government of laws by a government of men . . . let us make it a government of men selected for their intelligence"[109a] express a growing tendency in recent years. Perhaps it is a question of degree—of more or less—as well as of terminology, and it is possible that the cause of constitutional government is not in so perilous a state as the words seem to suggest. For the fatalism that they might otherwise express may well be fatal to free government.

I vouch two contemporary thinkers to warranty. Dean Pound, after noting how "English Constitutional Monarchy based on the idea of legal limitation of governmental action, legal responsibility of officials and judicial securing of rights of individuals against arbitrary action survived from the Middle Ages" goes on to present the case for legal government: "Whether the rule is born by a *Rex* or by *Demos,* a ruler ruling reasonably under God and the laws founds his kingdom on a rock."[110] Similarly Prof. McIlwain explains what he conceives to be the main ingredients of a constitutional state: "The two fundamental correlative elements of constitutionalism for which all lovers of liberty must still fight are the legal limits to arbitrary power and a complete political responsibility of government to the governed."[111]

[108] C. Sutton, *op. cit.* 218.

[109] Holdsworth, Some Lessons from Our Legal History 157 (1928).

[109a] W. B. Munro, *Our Vanishing Government of Laws,* 31:1 California Law Review 49-58 (December 1942).

[110] Pound, The Development of Constitutional Guarantees of Liberty 111 (1957).

[111] McIlwain, Constitutionalism, Ancient and Modern 149 (1940).