The Legal Transformations in Twelfth-Century England:

From Customary Law to Common Law

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Abstract of thesis entitled:

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My research focuses on the explanation of three issues: (1) the security of tenure in Anglo-Norman England; (2) the growth of royal judicial administration in the reign of Henry I (r.1100-1135); and (3) a comparison of legal ideas and legal procedures between *Leges Henrici Primi* and *The Treatise on the Laws and Customs of the realm of England Commonly called Glanvil.*

The aim of the study is to reexamine the significance of Norman England (1066-1154) in the development of English law. It has been said that the centralized royal administration and the legal reforms of King Henry II (r. 1154-1189) of Angevin England (1154-1399) stimulated the formation of the Common Law. The Anglo-Norman period was merely a seigniorial society in which landlords had discretionary power over their properties and tenants. As no united legal procedure existed in the Anglo-Norman age, tenants were subjected to a variety of local seigniorial customs, and thus Anglo-Norman society were in some sense "feudal" suzerains.

On the other hand, according to the surviving royal writs, financial records –*The Pipe Roll of 1130*, the legal treatises of the twelfth century (*Leges Henrici Primi* and *Glanvill*), and the writings of Chroniclers, however, tenant's tenure of land was

largely secured by customary law of property. The tenurial relationship within a seigniorial unit was, therefore, parallel at least, if not a domination of seigniorial lord over its tenants.

Early twelfth century England was characterized by the growth of a strong royal administration, which instituted and enforced a standardized legal procedure common throughout the country. King Henry I of Anglo-Norman England was among the successful rulers especially in this respect. He extended royal jurisdiction by employing royal justices (local justiciars, itinerant justices, and sheriffs). The process of creating a common legal procedure out of various local customs (such as transfer of pleas, the applicability of royal court for appeal, and the writ system) started in the late eleventh and early twelfth centuries.

Royal involvement in land inheritance was another feature of Anglo-Norman England. Royal writs show that the King was the fountain of justice in disputes about the ownership of tenure, land rights, and inheritance. In general, a tenant enjoyed security of tenure under the protection of the royal court. A tenant could demand a writ of right from Henry I's court to recover his lost land. The writ system played a decisive role in the transformation of local customs to the Common Law. Therefore, the legal reforms of Henry II were not an innovation, but a restoration of the legal procedures of his grandfather.

論文提要：

十二世紀英格蘭的法律轉變：由習慣法至普通法

提交者：李維儉
日期：一九九九年六月
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本研究主要是探討以下三個問題：(1)在諾曼英倫時代，佃戶對其土地的租佃保障；(2)英王亨利一世 (r.1100-1135) 在位期間，中央王室法院司法權的成長；(3)從法律觀念及法律程序上，對亨利一世法 (*Leges Henrici Primi*) 及被稱爲在亨利二世 (r.1154-1189)時期所制定的法律習慣彙編 (*The Treatise on the Laws and Customs of the realm of England Commonly called Glanvill*，以下簡稱 *Glanvill*)作比較分析。

這項研究的目的是要重申評價諾曼英倫時代 (1066-1154) 對英國法律發展的歷史意義，並對傳統法制史學界認爲英國普通法的形成是安茹時代 (1154-1399)帝王亨利二世的法律改革的結果，作出批判。一般認爲諾曼英倫時代，土地領主擁有無上的司法權威，對其土地及佃戶有司法裁判權，因此支配了英倫社會。

過去，英國法制史學家從封建主義概念分析諾曼英倫時期法制發展的主要特色，認爲這時代的封建佃戶在各方面，例如財產繼承、轉讓，均受到來自地方封建領主的控制，使佃戶土地財產權不能健全成長。他們確信，諾曼英倫時代的英格蘭正是封建制度的「黃金時代」，各地封建地主占據封土，築堡稱王，而形成各地不同的封建領主法。帝王法令未能在各地通行的情況下，諾曼英倫社會只是由各地領主組成的封建社會。

但是從諾曼英倫遺留下來的王室文獻，如帝王詔令、王室財政紀錄 (*The Pipe Roll of 1130*)、十二世紀有關王室法律傳統的文獻 (*Leges Henrici Primi and Glanvill*) 及其他當時編年史家的著述，我們發現十二世紀初諾曼英倫社會的風俗習慣，特別是與土地佔有及擁有關係的習慣法 (Customary Law)裡，已尊重及承認佃戶的土地租佃權，使其與地方領主的租佃關係，並不是領主單向的對其佃戶的支配，而是相互影響、互相牽制的。

該等史料亦說明，在十二世紀早期英格蘭已体現了高度的中央行政及司法集權，使王室法律傳統的司法程序廣泛地施行各地。帝王亨利一世便是諾曼英倫時代最成功的統治者，不但多次派遣王室司法官員， 如地方法官、巡迴法官及郡官員，以監察地方的司法事務，使王室成功地推行於各地，形成統一的司法程序，又據王室受理地方複雜難判案件的特權、佃戶直接向王室申訴的慣例，把地方領主司法權成功地收歸王室統領之下。

諾曼英倫的另一特徵便是王室法院經常干涉各地土地繼承等糾紛，這在十二世紀初的王室詔令裡得到充分的引証。這些資料顯示，王室法院在當時擔當了最高司法權力機關的角色。在亨利一世統治時，一般佃戶在王室法院的保護下，獲得對其佔用土地的擁有權，使他們的租佃權得到保障。當時的王室詔令已証明，佃戶能夠向王室法院申訴，獲帝王發給保障其擁有權的詔令，使其得以在土地糾紛上援引帝王口令，而取回其聲稱擁有的土地。因此，地方社會所尊重的習慣法轉變成各地普遍奉行的法律原則的過程中，帝王詔令起了關鍵作

用。所以，亨利二世的法律改革，對普通法 (Common Law)形成的歷史意義，

不在於創新，而是承繼及重建其祖父亨利一世的基業而已。

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Introduction

I

The control of land was an important matter in medieval times, and in medieval England the conflict over land-holding was catalytic to the development of its legal institution. The conflict was accelerated by the introduction of new aristocracy into England by the Norman Conquerors. The Hampshire folios of *Domesday Book* records a detailed description of a plea between William de Chernet and Picot the Sheriff:

> Picot holds two and a half virgates from the king. TRE Vitalis held them as a manor in alod from King Edward.....William de Chernet claims this land, saying that it belongs to the manor of Charford in the fee of Hugh de Port, through the inheritance of his antecessor. He brought his testimony for this from the better and old men from all the county and hundred. Picot contradicted this with his testimony from the villeins, common people, and reeves, who wished to defend this through an oath or the judgment of God, that he who held the land was a free man and could go where he wished with the land. But William's witnesses would not accept any law but the law of King Edward, until it is determined by the King.[1]

The entry shows that the Norman Conquest brought about a large-scale transfer of land in the upper level of the English society immediately after 1066. The transfer has long been regarded as the tenurial revolution that overwhelmingly changed the structure of land-holding into a new hierarchy system based on lord-vassal relationship. Past researches about the Norman Conquest and ruling policies of the conquerors concentrated mainly on the introduction of feudal institution by the Norman Kings, thereby discussing the impact of the Conquest on the development of

1. *Domesday Book*, F. 622, cited from, and translated by, R. Fleming, in her *Domesday Book and the*

kingship. As a result, Anglo-Norman England was treated as in a feudal age.

In the legal history of medieval England, one of the most controversial issues is how to assess the historical significance of Anglo-Norman age in the formation of the English Common Law. Likewise, some legal historians stress that Anglo-Norman England was a seigniorial society in which feudal lord exercised jurisdiction over all his vassals within his domination, and the royal house was merely one of the feudal lords without a wide judicial right over the state. Anglo-Norman age was, thus, not so important for the development of the Common Law. In the reign of Henry II, a centralized judicial system was set up in expense of the feudal lord that royal law was thus available to the whole country. Therefore, legal historians, such as F. M. Maitland, S. F. C. Milsom, and P. Brand, point out that Angevin England, not Norman England, was the crucial period for the formation of the English Common Law system.

However, recent researches find that the role of Henry II in the establishment of a strong judicial institutions should not be over-exaggerated. H. A. Cronne's research on the reign of Stephen (r.1135-1154) insists that royal judicial right over the country was maintained, at least for the first five years of the reign.[2] Kenji Yoshitake also argues that the Exchequer functioned in eastern England under Stephen and in

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Law (Cambridge: Cambridge University Press, 1998), p.1.

2. H. A. Cronne, *The Reign of Stephen, Anarchy in England 1135-54* (London, 1970), p.271.

western England under Empress Matilda. Kenji complains that historians should not oversimplify the issue of whether or not the Exchequer worked in the time of King Stephen.[3] G. White comes to the same conclusion of Cronne and Kenji that the reign of Stephen was crucial for the maintenance of governmental methods.[4] In this sense, the development of centralized administration of justice was a continuous process form Norman England to Angevin England, and thus Henry II's achievement should be re-assessed.

It is a fact that the royal administration during the reign of Henry I greatly influenced the development of English law in the twelfth century. Professor C. W. Hollister reminded us that Henry I was among the strongest Kings in the Anglo-Norman age. Even before the time of Henry II, medieval England had already been ruled by a strong centralized administration.[5] Therefore, to study the formation of the Common Law system in the second half of the twelfth century, we should not put aside the achievement of Henry I in establishing a solid foundation for his grandson.

In theory, change in judicial institution is intimately related with the political transformation in medieval world. The legal system of the ancient Western world was altered greatly, and ultimately Germanized, after the collapse of the Western Roman

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3. Kenji Yoshitake, "The Exchequer in the Reign of Stephen", *English Historical Review,* Vol. CIII (1988), pp.950-959.
4. G. White, "Continuity in Government", in *The Anarchy of King Stephen's Reign*, ed. E. King, (Oxford: Clarendon Press, 1994), pp.117-143.
5. C. W. Hollister and J. B. Baldwin, "The Rise of Administrative Kingship: Henry I and Philip

Empire in A. D. 476. Based on the Roman heritage, early medieval Kings developed new legal institutions of their own to legitimate their rule. Professor W. Ullmann sums up the ruling policies of medieval rulers into two main principles: the ascending and the descending theme of government and law. The former is that the "law creative power is located in the people", whereas the latter is that the power is located "in one supreme being was distribute downward."[6]

In the case of medieval England, the governance of the state revealed a mixture of both themes. On the one hand, the King was the fountain or sources of the law. On the other hand, the King would consult the people, or at least the barons, if he wanted to change the law or custom. There was a consultative council, for example, the Witan in the Anglo-Saxon age, the King's court or *Curia Regis* in Norman England, and the King's court or common bench in Angevin England, that assisted the Kings in settling legal matters. More importantly, however, Ullmann's idea gives us new insight into the intimate association between law and politics in medieval age. According to this assumption, we need to ask a particular issue: what about the legal systems of medieval England in wake of political alterations after the Norman Conquest and the restoration of centralized rule under Henry II?

Another issue needs to be discussed is how did legal procedures change in

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Augustus", *American Historical Review*, Vol.83 (1978), pp.865-905.

6. W. Ullmann, *Law and Politics in the Middle Age* (Cambridge: Cambridge University Press, 1975),

medieval England during the twelfth century. In the first half of the twelfth century, oral testimonies and sworn inquests constituted the main parts of legal proceeding. As the Hampshire folios reveal that William de Chernet "brought his testimony for this from the better and old men from all the county and hundred." Picot also brought "his testimony from the villeins, common people, and reeves, who wished to defend this through an oath or the judgment of God." Perhaps we may suggest that these legal procedures of Norman England were the precedent case for the development of jury of presentment after 1154.

In terms of social history, another main argument for the legal innovation of Angevin England is that the notion of tenure's right was developed by the introduction of Grand Assize and other petty assizes during the reign of Henry II. Tenure's right included the right to own, to inherit, and to alienate a piece of land held by the tenants. It is said that tenant had no right to own his land under the customary law of Norman England, because he only holds the land from his lord. Milsom and S. Thorne point out that the concept of inheritance did not exist before the latter twelfth century.[7] However, the Hampshire folios provide a useful evidence for the investigation of the concept of inheritance in Norman England. William de Chernet

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pp.30-31.

7. S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge: Cambridge University Press, 1976); S. F. Thorne, "English Feudalism and Estates of Land", in *Essays in English Legal History* (London and Ronceverte: Hambledon Press, 1985), pp.13-29.

claimed that a piece of land was "the inheritance of his antecessor." As early as 1086, idea of inheritance was employed to claim the disputed land. To explain the origins of the concept of inheritance in the Common Law, it is thus necessary to take customary law of Norman England into consideration.

II

The argument that stands behind this thesis is that the formation of the English Common Law is, if it is not an innovation of Henry II, it is at least a neutral result of long-term legal transformations starting from the Norman Conquest to Angevin England. Therefore, this thesis is to explore the legal transformations of medieval England, roughly from 1066 to 1189.

I weave into my analysis three main historiographical strands. Firstly, in Chapter One, there are analyses of the structure of land-holding in Norman England, and the homage relationship between lord and tenant. I will discuss in detail the main characteristics of land tenure before 1154 whereby tracing the origins of the Common Law property. This Chapter will demonstrate that the tenants in Norman England had the right of property in the age of customary law. Attention is placed on three main aspects: (1) the security of tenure; (2) the inheritability; and (3) the alienability. My concern is with the upper and middle levels of the medieval English society, and thus the relationships between lords and peasants within the manor will not be included.

In Chapter Two, there is an investigation of judicial administration before the time of Henry II. The explanation will be concentrated mainly on the central and local administration of justice during the reign of Henry I. I will discuss the authority of *Curia Regis* (King's court), the role of the writ system, the activities of the itinerant justices, and the judicial functions of local courts. The concept of seigniorial society, employed by F. M. Stenton in describing Norman England, will also be discussed.

Chapter Three will embark on a detail comparison of two important legal texts, *Leges Henrici Primi* and *Glanvill*. The aim of this Chapter is to explicate the features of the legal systems of the twelfth century, including the transformations of legal procedures from Norman England to Angevin England, the notions of King's plea and of King's peace, the idea of crime, and the importance of royal authority in Common Law procedures. As *Leges Henrici Primi* was a collection of Anglo-Saxon customs, thus our discussion includes the development of legal institution during the Anglo-Saxon period.

III

The primary sources about the twelfth century land law and the King's court are scarce. Of these, the royal writs from William the Conqueror (r.1066-1087) to Henry I, known as *Regesta Regum Anglo-Normannorum*,[8] is one of the most important

8. *Regesta Regum Anglo-Normannorum 1066-1100*, ed. Davis, H. W. C. (Oxford: Clarendon Press, 1913) (hereinafter cited as *Regesta I*); and *Regesta Regum Anglo-Normannorum 1100-1135*, ed.

sources for the subject. These writs reveal the activities of the King's court in settling land dispute after the Conquest, and the tenurial relationship between the King and his magnates. The legal documents of the twelfth century, *Leges Henrici Primi*[9] and *Glanvill*,[10] are also crucial for our explanation of the growth of the royal law. Richard FitzNigel's *Dialogus de Scaccario* is to supplement *Glanvill* to explain the development of Angevin kingship.[11] Another important material of Norman England is the financial record of the royal house, the *Pipe Roll* of 1130-31,[12] the only one surviving information of fiscal records of Norman England. It records receipts from the sheriffs and their shires, and other fiscal affairs, such as royal revenue, penalty, and monetary patronage.

Sources of Anglo-Saxon England will also be employed to reveal the legal changes before and after the Conquest. *Anglo-Saxon Wills* records the custom of inheritance in pre-Conquest England,[13] which was very distinctive from that of Norman England. *Anglo-Saxon Writs*, on the other hand, show that before 1066

Cronne, H. A., and Johnson, C. J., (Oxford: Clarendon Press, 1956), (hereinafter cited as *Regesta II*)

9. *Leges Henrici Primi*, ed. and tr. Downer, L. J., (Oxford: Clarendon Press, 1996). (hereinafter cited as *Leges*)
10. *The Treatise on the Laws and Customs of the realm of England Commonly called Glanvill,* ed. and tr. Hall, G. D. G. (Holmes Beach, Fla., USA: W. W. Gaunt, 1983). (hereinafter cited as *Glanvill*)
11. Richard FitzNigel, *Dialogus de Scaccario*, ed. and tr. Johnson, C., rev. Carter, F. E. L. and Greenway, D. E., (Oxford: Clarendon Press, 1983). (hereinafter cited as *Dialogus*).
12. *The Pipe Roll of 31 Henry I, Michaelmas 1130*, facsimile of Joseph Hunter's 1833 edition (London, 1929).
13. *Anglo-Saxon Wills*, ed. and tr. D. Whitelock, reprint, (Cambridge: Cambridge University Press, 1986).

English Kings have already issued royal writs for land transaction.[14] F. L. Attenborough's *The Laws of Earliest English Kings*,[15] and other fragmentary materials from *English Historical Documents I*[16], provide the important information about the legislative activities of Anglo-Saxon Kings.

Other sources are the writing of chroniclers, including the *Anglo-Saxon Chronicle*,[17] *Historia Anglorum*,[18] and the *Chronicle of Battle Abbey*.[19] These chroniclers assist us to make sense of the activities of royal officers, like itinerant justice and justiciarship in Norman England. *The Ecclesiastical History of Orderic Vitalis* records a good many charters of pre-Normandy's abbey, and early history of the Norman Duke.[20] Therefore, it is a valuable source material about the land law and the royal court in Normandy before 1066.

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14. *Anglo-Saxon Writs*, ed by Harmer, Second Edition, (Paul Watkins: Stamford, 1989).
15. *The Laws of Earliest English Kings,* ed. and tr. F. L. Attenborough, (Cambridge: Cambridge University Press, 1922).
16. *English Historical Documents I 500-1042*, ed. Whitelock, D., (London: Eyre and Spottiswoode, 1968); for other related documents for the twelfth and thirteen centuries, *English Historical Documents II 1042-1189,* ed. Douglas, D. C., and Greenway, G. W.,(London: Eyre and Spottiswoode, 1968) and *English Historical Documents III 1089- 1327*, ed. Harry Rothwell, (London: Eyre and Spottiswoode, 1968).
17. *The Anglo-Saxon Chronicle*, ed. and tr. Whitelock, D., Douglas, D. C., and Tucker, S. I., (London: Eyre and Spottiswoode, 1965).
18. Henry of Huntingdon, *Historia Anglorum*, ed and tran. Greenway, D., (Oxford: Clarendon Press, 1996).
19. *The Chronicle of Battle Abbey*, ed. and tr. Searle, E.,(Oxford: Clarendon Press, 1980).
20. Orderic Vitalis, *The Ecclesiastical History of Orderic Vitalis,* Vol. II ed. and tr. M. Chibnall (Oxford: Clarendon Press, 1990).

The Structure of Land Tenure in English Customary Law:

The Origins of Common Law Property

I

In his *Ecclesiastical History*, Orderic Vitalis, a contemporary Norman monk and historian, records the story of a Norman lord who donated estates to the ecclesiastical house for the building of a monastery:

> And many other Norman lords founded monasteries and nunneries in various places according to their means. Fired by their example Hugh and Robert of Grandmesnil vowed that they too would endow a monastery out of their *hereditary estates* (*hareditario*), for the salvation of their souls and the souls of their ancestor.[1]

It is one of the evidences used by Professor James C. Holt for his explanation of the growth of hereditary patrimony in Normandy before the Conquest of England.[2] If land was generally heritable by the heir of the Norman landholders, then can we suggest that this hereditary custom spread from Normandy to England as a result of the Conquest, and thus enjoyed by the tenant's heir who inherited his ancestor's estate by his hereditary right? As for the problem of heritability of land in post-Conquest England, F. W. Maitland asserted that the land held in fee established by William the Conqueror after the Conquest were heritable.[3]

In a classical paper entitled "English Feudalism and Estates in Land", S. E.

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1. Orderic Vitalis, *The Ecclesiastical History of Orderic Vitalis,* Vol.II, pp.13-14.
2. J. C. Holt, "Feudal Society and the Family in Early Medieval England: II Notions of Patrimony", *Transactions of the Royal Historical Society*, 5th Ser. 33 (1983), p211.
3. F. Pollock and F. W. Maitland, *The History of English Law before the time of Edward I*, Vol.II, second edition, (Cambridge: Cambridge University Press, 1968), p.264.

Thorne criticized Maitland's idea on the ground that tenants in twelfth century England was not the "true owner" of the land (*verus dominus*).[4] The fact that tenement passing from father to son is not necessarily equal to inheritance, but merely a succession by lord's gift. For example, as Thorne pointed out, if I hire my gardener's son after his father's death, and my son hires his son after him, the place as gardener has descended through three generations of the same family. But it cannot be said that the gardener's son inherited his father's tenure in job, because it is the goodwill, or gift, of the employer.[5] The heir could not succeed his father's land until the lord accepted his homage, which constituted an essential element in the personal relationship between the lord and his tenants.[6] Moreover, the consents of both the heir and the lord were necessary for any alienation of land by a tenant, because the term ownership is antithetic to twelfth century feudalism.[7]

Thorne's distinction between customary succession and inheritance provides a framework for our understanding of the twelfth century custom of descent. His thesis receives support from S. F. C. Milsom who stresses the importance of seignorial jurisdiction in twelfth century England. According to Milsom, the lord's authority was composed of both "disciplinary jurisdiction" and "proprietary jurisdiction", that

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4. Thorne, "English Feudalism and Estates of Land", pp.13-29.
5. Ibid. p.16.
6. Ibid. pp.16-17.
7. Ibid. pp.24-29.

means the lord's distrain of tenements of his tenant who fails to fulfill his service, and the lord's decision of who should inherit the tenement respectively.

Like Thorne, Milsom also emphasizes that the tenurial relationship was established on reciprocal obligations between the lord and his men. The lord should be regarded as the buyer who buys services and pays directly in land: "the basic purchase is of a life's service for a life tenure." The tenant could hold his tenement so long as he lives, but when he died the lord and his court would arrange a new man.[8] Then Milsom puts forward his definition of inheritance to reinforce his argument:

> Inheritance becomes an automatic succession to what is clearly the ancestor's property. When the ancestor dies, the heir is at once entitled under abstract rules of law and enters without anyone's authority.[9]

By the same token, Milsom agrees with Thorne's distinction between succession by the lord's gift and inheritance, and points out that there was no abstract rule of law for inheritance in the Anglo-Norman society. Therefore, within the tenurial relationship between the lord and his men, "proprietary language is out of place."[10]

In her study of the origins of merchet in medieval England, E.Searle believes that it was closely related to the seignorial "disciplinary jurisdiction", and has proposed a hypothesis that through merchet lords attempted to make a strict control of women's marriages at all levels of the society in the late eleventh and twelfth centuries.[11] In

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8. Milsom, *The Legal Framework of English Feudalism*, p.39.
9. Ibid. p.154.
10. Ibid. pp.39 and 185.
11. E. Searle, "Seigniorial Control of Women's Marriage: The Antecedents and Function of Merchet in England", *Past and Present*, no.82 (1979), pp.3-43.

order to control the female inheritance that led to the devolution of land outside the lord's manor, lord's intervention was necessary in the seignorial world at any level of the medieval English society. This seignorial's control survived the Angevin legal reforms, and became "the most sensitive test of unfreedom of tenures." Obviously, her explanation depends heavily upon Milsom's conception about the proprietary assumptions of the seignorial society: it is the lord who buys a man to perform certain services and pays him in land.[12]

R. C. Palmer also considers the analytical framework of Milsom about the process of the formation of the English Common Law both acceptable and rightful.[13] During the Anglo-Norman period, the rule of inheritance was dominated by the customary discretion of lord because the "truly feudal world" was characterized by "obligations, legal simplicity of title to land, discretion, and almost absolute seignorial control."[14]

Nevertheless, Palmer revises Milsom's thesis, and suggests a provocative hypothesis that the property right stemmed from the Compromise of 1153, and progressively strengthened by the assize of mort d'ancestor and then by the royal

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12. Ibid. pp.3-9. But Searle's paper ignores the fundamental differences between the two types of seigniorial control in medieval society, that is the relationship between lord and vassal within the honour, and that between lord and peasant within a manor. See P. Brand and P. Hyams, "Debate: Seigneurial Control of Women's Marriage", *Past and Present*, no.99 (1983), p.125.
13. R. C. Palmer, "The Feudal Framework of English Law", *Michigan Law Review*, 79 (1981), pp.1130-1164.
14. Ibid. pp.1134-1135.

centralization of the law. The contents of the Compromise, embodied in the Treaty of Westminster, is that King Stephen would remain the king of England for the rest of his life; Henry of Anjou (later Henry II) would ascend the throne after Stephen's death, excluding Stephen's son and heir, was applied as a model for the restoration of the disinherited.[15]

R. H. C. Davis regards the civil war of Stephen's reign and the Treaty of Westminster as an important milestone in the growth of inheritance.[16] According to Davis, in the early twelfth century the inheritance system of Anglo-Norman barons was often interfered by discretion of the King by means of forfeiture, escheats, and disinherit. Anglo-Norman nobility struggled successfully for the King's recognition of their hereditary right during and after the civil war. "That was what the barons fought for in Stephen's reign, and that is what they won", wrote Davis at the conclusion of his article.[17]

These researches argue unanimously a viewpoint that in the first half of the twelfth century customary descent from ancestor to heir did not imply necessarily the right of inheritance, because the Anglo-Norman age was a feudal society dominated

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15. Ibid. pp.1149-1153; idem, "The Origins of Property in England", *Law and History Review,* 3 (1985), pp.1-50; but J. C. Holt disagrees with Palmer's theory, for there is no ground to consider Westminster and Winchester as "two components". Holt believes that Palmer's theory "is hypothetical and much of it has proved contentious", see his "1153: The Treaty of Winchester", in *The Anarchy of King Stephen's Reign*, ed. E. King, (Oxford: Clarendon Press, 1994), pp.291-316, at 293 and 295.
16. R. H. C. Davis, "What Happened in Stephen's Reign 1135-54", *History*, 49 (1964), pp.1-12.
17. Ibid. p.12.

by seigniorial lord. They also stress a close association between the development of proprietary ideas and the Angevin's bureaucratization of the law in the second half of the century. All in all, before 1200, in terms of the personal bond between lord and his men, ownership and property right were meaningless.

II

In fact, the assumption that the English Common Law of property was a legal innovation of Henry II is closely linked with the prevailing concepts of medieval "feudalism" or "feudal age", which is believed to be antithetic to the ideas of ownership and property. A nineteenth century legal historian, F. Pollock, wrote: "freedom of alienation is always regarded as one of the natural incidents of full ownership; but there was no place for it in the doctrine of feudal tenancy."[18] Modern scholars, such as Joseph R. Strayer and C.Stephenson, established that the rule of inheritance was in itself alien to feudal age because it was the lord who could control the transfer of tenement of his vassal.[19]

Very closely bound up with seignorial jurisdiction is the concept of feudal land law. According to the works of M. Bloch and F. L. Ganshof, the concept implies a hierarchy of landholding established by the superior's grant of a piece of land to his subordinate. In the feudal age, as Bloch maintained, the word "ownership" (*propriete*)

18. Pollock, *The Land Laws* (London: MacMillan, 1883), p.54.
19. J. R. Strayer, *Feudalism* (Princeton: D. Van Nostrand, 1965), pp.24-25; C. Stephenson, *Medieval*

would have been almost meaningless.[20] Ganshof, in his classical book *Feudalism*, described feudalism as a general and universal phenomenon in medieval Europe. As for landholding system in medieval England, he concluded that the heritability of fiefs was not yet established in the period after the Norman Conquest.[21] Influenced by prevailing interpretation of medieval feudalism, thus, Thorne and Milsom tend to defy the existence of property right in the feudal England.[22]

Recently, many scholars in Europe and America appraise the utility of the concept of feudalism as an analytical device in understanding medieval European history.[23] They observe that the word "feudalism" is a less precise and an unclear term by reason of various definitions used by scholars when they apply the term to explicate their framework. In fact, the diversity of definitions of the term is a source of confusion. As lengthy discussion about the meaning of feudalism clarify that feudalism is no more than a vague term invented by historians.

For example, M. Bloch's definition of European feudalism encompasses a wide range of medieval social life that includes a subject peasantry; widespread use of the

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Feudalism (New York: Cornell University Press, 1942), p.24.

20. M. Bloch, *Feudal Society*, Vol.I, tr. L. A. Manyon, (London: Routledge and Kegan Paul, 1961), p.115.
21. F. L. Ganshof, *Feudalism*, tr. P. Grierson, Third edition, (Toronto: Toronto University Press, 1996), p.135.
22. Another legal historians, H. J. Berman, also concludes that in a ladder of feudal tenure land was held, if not owned, by anyone. See his *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Massachusetts: Harvard University Press, 1983), p.312.
23. E. A. R. Brown, "The Tyranny of a Construct: Feudalism and Historians of Medieval Europe", *American Historical Review*, 79 (1974), pp.1063-1088.

service tenement; the domination of a specialized warriors class; the growth of ties of dependence between lord and vassal; the fragmentation of political organization. Feudalism, thus, is defined as a form of society.[24] However, Ganshof defines feudalism in a narrow sense. That is "a body of institutions creating and regulating the obligations of obedience and service-mainly military service-on the part of a free man (vassal) towards another free man (the lord), and the obligations of protection and maintenance on the part of the lord with regard to his vassal."[25] He excludes manor lordship (between lord and peasant) from his characterization of medieval feudalism.

On the other hand, scholars also disagree with each other over what constitute the most important characteristics of feudalism. Ganshof also regards "fief" as the most important element in feudal land tenure.[26] Private jurisdiction, at the same time, is also conceived to be the most essential component in Strayer's definition of feudalism. Briefly, Strayer asserts that feudalism should involve three features:

(1) a fragmentation of political power;

(2) the fragmented political power is treated as a private possession; and

(3) a military force is established on private contracts.[27]

As "a method of government", feudalism was in itself a political phenomenon devised

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24. Bloch, *Feudal Society*, Vol.II, pp.244-249.
25. Ganshof, *Feudalism*, p.xvi.
26. Ibid.
27. Strayer, *Feudalism*, pp.12-13.

to maintain social order after the dissolution of the Roman Empire. Similarly, Stephenson also insists that feudalism was formed for the purpose of ruling, and thus it was essentially political in nature.[28]

After a brief summary of the development of the concept of feudalism since the middle of the nineteenth century, E. A. R. Brown concludes that the study of medieval social history has been "conceptualized" and "oversimplified" by the idea of feudalism.[29] Another comprehensive reappraisal of the term "feudalism" is the study of S. Reynolds. She observes that the concept of feudo-vassalic institutions was not the phenomena of medieval age, but was the product of professional law of the thirteenth century along with the study of the Roman law in medieval universities. The idea that the Middle Ages was also the time of feudal age, feudal society, or feudal law derived from the accumulated glosses and commentaries of the *Libri Feudorum*, a composite treatise compiled in Lombardy in the twelfth and early thirteenth centuries, by the academic and professional lawyers of the thirteenth century. The university-trained lawyers introduced the terminology of fiefs and vassals to explicate legal documents and sources of the early Middle Ages.[30]

Furthermore, a large part of the principals of the so-called "feudal law", or

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28. Stephenson, *Medieval Feudalism,* p.14.
29. Brown, "The Tyranny of a Construct: Feudalism and Historians of Medieval Europe", p.1065.
30. S. Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford: Oxford University Press, 1994), pp.68, 73-74.

"feudal tenure", as Reynolds argues, fail to reflect the norms and customs of lay society in the earlier medieval age. It is because that such principals derived, not from social norms of lay society, but from the practices of the clergy to protect the property of the ecclesiastic establishment. A great deal of early medieval sources, in fact, come from the church's documents.[31]

More importantly, Reynolds strongly believes that the verb *tenere* used in the sources does not donate a kind of limited and subordinate right in land law that the English word "tenant" does today. In the case of medieval England, the concept of graded system of landholding was the result of the commentary of *Domesday Book* in 1086 by William the Conqueror. But the hierarchy of political authority, embodied in Salisbury Oath, should separate from that of landholding. Thus, to say that a man "held" a tenement from other (lord) does not mean that this man could not own his property.[32]

As the perspectives of Thorne and Milsom depend on a less precise concept of what many medievalists called "feudalism", their ideas about the formation of the Common Law inheritance in about 1200 are flawed. In this Chapter, instead of employing these less concrete concept to study social customs of inheritance, I will investigate the tenant's right and lord's obligation within the tenurial structure, mainly

31. Ibid. pp.62-63.
32. Ibid. p.337.

from the Norman Conquest to the reign of Henry I, in order to argue that the idea of property right existed in Anglo-Norman England.

III

People in Anglo-Norman England, or even before, was familiar with the concept of law. In the *Leges Henrici Primi*, I observe such phrases as "in accordance with the law" and "obliged by the law".[33] One of thirty-nine Anglo-Saxon wills, edited by D. Whitelock, records that certain land was "held lawfully under king Harold."[34] I, thus, argue that, at least, in the late eleventh and early twelfth centuries, English could classify a category of affairs that can be described as legal.[35] Therefore, the idea that, as Thorne and Milsom maintain, the customary succession of the Anglo-Norman age was not the law because it did not obligate the lord to respect tenant's right of property should be examined in detail. Before exploring the tenant's property right within the tenurial structure, the definitions of law and property should be clarified.

Today the word "law" is usually defined as a "body of rules" that derives from statutes and from law court where judicial decision is made. Nevertheless, such a definition of law is too narrow for the study of medieval legal history. H. J. Berman,

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33. *Leges*, clauses 7.7 and 43.1.
34. *Anglo-Saxon Wills*, ed. and tr.D. Whitelock, No.XXVI
35. J. Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta* (London: Longman, 1996), pp.2-4; Based on the evidence from Domesday Book, Fleming observes that people in Anglo-Norman England were familiar with the penalties of sin and breach of peace. This, without doubt, was grounded in practical experience. In fact, they "lived in the shadow of legal custom.", see her *Domesday Book and the Law*, pp. 36-45.

in his masterpiece *Law and Revolution*, adds the concept of "law in action" to his definition of law. Law in action encompass, to cite Berman, "legal institutions and procedures, legal values, and legal concepts and ways of thought, as well as legal rules", and more importantly "it is a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation."[36]

Moreover, law is also closely related with custom, practices, or rules as it is developed out of, and deeply influenced by, social custom. Law, on the one hand, is considered a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority; on the other hand, it can also be treated as the whole body of social custom.[37] Berman also stresses that law is composed of four essential sources that are legislation, precedent, equity, and custom. As for the custom, he wrote: "The bulk of law was derived from custom, which was viewed in the light of equity (defined as reason and conscience). It is necessary to recognize that custom and equity are as much law as statutes and decisions".[38] As Professor F. Kern concluded that the two main attributes of medieval law was old and good. It is because that law in the mind of medieval people were both social custom and

36. Berman, *Law and Revolution*, pp.4-5.
37. *Merrian Webster's Collegiate Dictionary*, tenth edition, (Springfield, Massachusetts, 1997), p.659; people in medieval England, in fact, considered that written law and custom were the two parts of law, see *Leges*, 4.3a.
38. Berman, *Law and Revolution*, p.11.

rightness.[39]

If law involves allocation of rights and duties, and if social custom carry binding authority influencing people's behavior and determining whether certain behavior is proper or not, then I am sure that people in post –Conquest England was familiar not only with law, but also influenced and dominated by law. Before the development of the inheritance elements of the Common Law in Angevin England, tenant's ownership was secured, if not by statutes, at least, by a body of social practices or customary law. Custom, which are prescriptions of established and proper action thereby carry authority, can be regarded as unwritten law.[40] All in all, such social life as inheritance and alienation of land were prescribed by a variety of customary laws.

Such definition of law implies that the distinction between customary succession and Common Law inheritance should not be exaggerated. Another analytical device for the discussion of the tenant's right is the definition of property. General speaking, property is something that constitute "the difference mine and thine", and also implies "the ultimate right".[41] A. M. Honore wrote that property is "the greatest possible interest in a thing which a mature system of law recognizes."[42] Based on the ideas of

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39. F. Kern, *Kingship and Law in the Middle Ages,* tr. S. B. Chrimes, (Oxford: Basil Blackwell, 1968), pp.149-156; also see *Leges*, 4.4.
40. Hudson, *The Formation of the English Common Law,* p.6.
41. B. Nicholas, *An Introduction to Roman Law* (Oxford: Claredon Press, 1969), p.153.
42. A. M. Honore, "Ownership", in Oxford Essays in Jurisprudence, ed. A.G. Guest (London: Oxford

Brunner and Gierke, Rudolph Huebner said, "the concept of ownership as the fullest right that one can have in a thing" as " a right directed to the dominion over a thing as an entirety."[43] Property and ownership were thus described as the concepts that are associated with each other.

Palmer comes to similar conclusion that property is a legal phenomenon that is "protected by a bureaucratic authority according to set rule."[44] Thus, they believe that the origins of property are connected with the formation of the state. As Anglo-Norman England was not yet in a type of state, Palmer insists that the idea of property did not exist in the first generation after the Conquest. It is only in the thirteenth century that property right was promoted in the process of state-building.[45]

However, the contention that early medieval kingdom was not a kind of state is inaccurate. Almost each medieval kingdom was a social organization within which a fixed territory was controlled, if not dominated, by the legitimate rulers.[46] Within this organization, the public authority was clearly separable from private jurisdiction.[47] The prolong process of English state-building, starting from the

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University Press, 1961), p.140.

43. Rudolph Huebner, A History of Germanic Private Law, p.227.
44. Palmer, "The Origins of Property", p.7.
45. Ibid. For a comment on Palmer, see Hudson, "Anglo-Norman Land Law and the Origins of Property", in *Law and Government in Medieval England and Normandy: Essays in honour of Sir James Holt*, ed. G. Garnett and J. Hudson, (Cambridge: Cambridge University Press, 1994), pp.198-222.
46. Reynolds, *Fiefs and Vassals*, p.27.
47. W. Davies and P. Fouracre ed., *The Settlement of Disputes in Early Medieval Europe* (Cambridge: Cambridge University Press, 1992), p.229.

Anglo-Saxon age and culminating in the Norman Conquest, was one of typical example. The royal judicial centralization under Henry I laid down the foundations of the English state that was inherited and expanded by his grandson, Henry II. As for the judicial administration of Henry I, I will discuss in detail in the next chapter. What I want to point out is that Palmer's ideas about the origins of property in the thirteenth century can also be applied to the history of post-Conquest England.

On the other hand, the right of property is the right to use and manage the land concerned, the right to pass it on to anyone, for example heirs, and the right to transfer it to others.[48] The right of property can conveniently be divided into three main aspects: (1) the security of tenure; (2) the inheritability; and (3) the alienability.[49] Through these three aspects, I affirm that the tenant possessed the property right in the first half of the twelfth century.

IV

The tenant's property right at the upper layer of the English society after the Conquest was less secure than that of mesne tenant. As barons were the vassals (tenants-in-chief's) of the Norman kings, their security of tenure was often linked up with the political circumstances. Maitland said that the Norman Conquest added an

48. Reynolds, *Fiefs and Vassals*, p.55.
49. This is an analytical framework employed by Hudson, in his *Land, Law, and Lordship in Anglo-Norman England* (Oxford: Clarendon Press, 1994); also see, P. Dalton, Conquest, Anarchy and Lordship: Yorkshire, 1066-1154 (Cambridge: Cambridge University Press, 1994), pp.257-297.

"element of precariousness" into the structure of land holding. There was no strict rule about reliefs in the first generation of the Norman rule.[50] The Anglo-Saxon chronicler's complaint of William the Conqueror, who "sold his land on very hard terms as hard as he could"[51], explicated Maitland's observation.

The seriousness of arbitrary reliefs was shown in the Coronation Charter of Henry I, that remarks, in Clause Two, the heirs of his barons or his tenants could redeem his land "by means of a just and lawful relief."[52] But Henry I never kept his promises toward his tenants-in-chiefs. Professor C. W. Hollister, in his researches about the baronial tenure in the reign of Henry I, concluded that "never again would the succession of estates be so fluid or the wealth and power of great landed families so ephemeral."[53] Henry I punished and disseised many disloyal barons, especially after the civil war of 1101.[54]

Professor Holt puts forward an inspiring idea in his article on custom of inheritance that there was a tenurial crisis of the early twelfth century at the top of the

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50. Pollock and Maitland, *The History of English Law*, Vol.II, p.264.
51. *The Anglo-Saxon Chronicle*, ed. and tr. D. Whitelock, D. C. Douglas, and S. I. Tucker, pp.162-163; *Regesta I,* no.387.
52. *English Historical Documents II 1042-1189*, p.401; General speaking, the so called just and lawful relief was 100 shilling, see *Dialogus*, pp. 96-7, 120-1(hereinafter cited as *Dialogus*); *Glanvill,* IX 4, p.107 (hereinafter cited as *Glanvill*) ; Magna Carta, C.2 , see *English Historical Documents III 1189-1327*, p.317.
53. C. W. Hollister, "The Misfortunes of the Mandevilles", in *Monarchy, Magnates and Institutions in the Anglo-Norman World* (London and Ronceverte: Hambledon Press,1986), pp.117-128, at p.117.
54. Ibid.; and idem "Henry I and Robert Malet", and "The Taming of a Turbulent Earl: Henry I and William of Warenne", in *Monarchy, Magnates and Institutions in the Anglo-Norman World,* pp.129-136, and 137-144 respectively.

society.[55] The crisis was brought out due to "rule of succession were applied in political circumstances quite unsuited to them."[56] After the Norman Conquest, the cross-Channel magnates generally divided their estates into inherited land (patrimony in Normandy) and acquired land (conquered land in England). The eldest son of the magnate could inherit his father's estates in Normandy, while younger sons were given lands in England. This principle of inheritance also influenced the rule of crown succession in 1087 and 1100. Since no vassal could serve two different lords, these cross-Channel magnates underwent great difficulties whenever the rule was divided between England and Normandy. Professor John Le Patourel also agrees that the succession dispute during the Anglo-Norman age was a dilemma for those cross-Channel barons who held estates on both sides of the Channel, despite he refutes that there was a distinction between ancestral land and acquired land.[57]

Whether or not the trouble aroused by the crown succession can be treated as "tenurial crisis" at the upper layer of society is a separate question. Nevertheless, both Holt and Le Patourel agree that the family interests of barons were bound up with

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55. Holt, "Politics and Property in Early Medieval England", *Past and Prèsent*, no.57 (1972), pp.3-52.
56. Ibid. p.19.
57. John Le Patourel, *The Norman Empire* (Oxford: Clarendon Press, 1976), pp.179-201. The problem whether or not there was a custom of separating ancestral land from acquired land is controversial. See E. Z. Tabuteau, "The Role of Law in the Succession to Normandy and England,1087", in *Haskins Society Journal*, Vol. 3 (1991), pp.141-169; S. D. White, "Succession to Fiefs in Early Medieval England", in *Past and Present*, no.65 (1974), pp.118-127; G. Garnett, " 'Ducal' Succession in Early Normandy", in *Law and Government in Medieval England and Normandy*, pp.80-110. However, the distinction between inherited land and acquired land is supported by the text of the early twelfth century. See *Leges*, 40.10 and 48.11.

dynastic interests of the crown in post-Conquest England. Their discussion also reminds us of the intimate relationship between property and reality of politics. By means of such devices as forfeiture, relief, political patronage, escheat, the Norman Kings intruded into the tenurial structure of the tenants-in-chief.[58]

However, it is also unwise to over-exaggerate the insecurity of the magnate's tenure as R. H. C. Davis had suggested. Davis, based on 193 baronies listed by I. J. Sanders, calculated that there were only 102 baronies, less than 52.9 per cent, had descended in the male line since 1086.[59] Indeed, from 1086 to 1154 there were fifty baronies passed their lands to heiresses. A woman is the next legitimate heir after the eldest son of the deceased tenant. But Davis categorized these cases as forfeitures and escheats. Moreover, all well known examples of forfeiture can be dated to within two set periods: (1) from 1086 to 1113-4; (2) from 1136 to 1154.

Taking these information into account, we can observe that the descent of estates within baronial families was not uncommon, and then the baron's tenure was secure so long as he remained loyal to the King. Therefore, between the years 1113 and 1135, that was the last two decades of Henry I, was the most crucial years for the consolidation of tenure' continuity for the barons.[60] It is, thus, obvious that at the

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58. Holt, "Politics and Property in Early Medieval England", p.22.
59. Davis, "What Happened in Stephen's Reign 1135-54", p.9.
60. R. C. DeAragon, "The Growth of secure Inheritance in Norman England", in his *Studies in Anglo-Norman Family History*, Ph.D Thesis (UCSB, 1982), pp.4-25; T. F. T. Plucknett, *A Concise History of the Common Law* (London: Butterworth, 1956), p.524; R. W. Southern, "Henry I", in

highest level the structure of tenure was intervened and influenced by the Norman rulers.

However, can we suggest that the lordship, or in some sense kingship, was the predominated factor, determining the pattern of inheritance, within the structure of landholding? Searle asks an interesting question in her article about the authority of lord: "how far did inheritance custom operate independently of a lord"?[61] Her answer is absolutely no. Nevertheless, it is inaccurate to play down the importance of family relations as one of the crucial factors in the pattern of landholding.[62] There are a few references in *Leges Henrici Primi* concerning the influence of family or kinship in the pattern of inheritance:

> If anyone dies without children his father or mother shall succeed to the inheritance, or his brother or sister, if neither father nor mother is living.[63]
>
> If he does not possess these relatives, then his father's or mother's sister, and thereafter relatives up to the fifth "joint", whoever are the nearest in relationship, shall succeed by the law of inheritance.[64]
>
> If however he himself dies or is slain, his inheritance or wergeld shall lawfully accrue to his sons or his lords.[65]
>
> No one may alienate his inheritance outside his kindred by gift or sale, as we have said, especially if the kindred rejects this and wishes to apply its own money to its acquisition.[66]

These statements point out the effects of family relationships in the distribution of

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Medieval Humanism and Other Studies (Basil Blackwell, 1984), pp.206-233, at 223.

61. Searle, "Seigniorial Control of Women's Marriage", p.8.
62. Edmund King wrote: "The law existed within, and not outside, the framework of lordship. The exercise of lordship was a necessary part of the development of the law of inheritance." See his "The Tenurial Crisis of the Early Twelfth Century", in *Past and Present*, no.65 (1974), pp.110-117, at p.112.
63. *Leges*, 70.20.
64. Ibid. 70.20a.
65. Ibid. 88.13a.
66. Ibid. 88.14a.

property and pattern of inheritance. Indeed, in many human societies the family has been the vital factor in cooperative alliances between individuals. The most intimate personal relationship, at least in theory, have been bound by ties of blood.[67] Therefore, along with the effects of lordship, family groups have been the dominant force in the customary law of inheritance, despite in many aspects lordship and kinship struggled with each other over the control of land resources.[68]

V

Before the rising of professional academic law in the thirteenth century, the patterns of tenure were governed by unwritten customary law. The significance of the customary law is that no studies of legal development and transformation in medieval Europe can be complete without investigating a variety of regional customs. With the growth of written court records a good deal of social customs were converted into the legal tradition of the society.[69] Even in the reign of Edward I, the Common Law in its courts have interacted with the regional customs that the traditional usage had been recognized, affirmed and modified in the Year Books.[70] Social customs of medieval

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67. S. Painter, "The Family and the Feudal System in Twelfth Century England", in *Speculum*, Vol.XXXV (1960), pp.1-16. But Holt asserts that the importance of family in the formation of political alliance should not be over-emphasized. See his "Feudal Society and the Family in Early Medieval England: III Patronage and Politics", in *Transactions of the Royal Historical Society* , 5th Ser. 33 (1984), pp.1-26.
68. R. J. Faith, "Peasant Families and Inheritance Customs in Medieval England", in *Agricultural History Review*, 14 (1966), pp.77-95, at p.85.
69. A. Kiralfy, "Custom in Medieval English Law", in *The Journal of Legal History*, Vol.9 (1988), pp.26-39.
70. N. Neilson, "Custom and the Common Law in Kent", in *Harvard Law Review*, (1924), pp.482-498.

England could be classified into varied categories: feudal, manorial, mercantile, urban, and royal, despite the distinction was in fact less strict.[71]

Customary Laws was complex, such as those in Kent and in East Anglia, as their details varied from place to place, and from time to time.[72] The basic characteristics of the customary laws were both flexible and rational, but not rigid and irrational.[73] Without keeping written record, the customary law could not be rigid and systemized. They were conducted by people who applied human intelligence to the solution of problems, including various types of temporal and secular affairs, in the light of reason and conscience.[74] Customary law was, thus, one "natural sort of law" which was an undifferentiated accumulation of principles about whether certain action was proper or not.[75]

Another essence of the customary law was its procedure of judgement. Despite the local variations, the usual practice used by medieval people for settling disputes was collective judgement. As the evidence of law suits in the twelfth century

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71. Berman, *Law and Revolution*; Kiralfy, "Custom in Medieval English Law"; for a different opinions, see Reynolds, *Kingdoms and Communities in Western Europe 900-1300*, second edition, (Oxford: Clardndon Press, 1997), p.20
72. G. C. Homan, *English Villagers of the Thirteenth Century* (New York: Norton, 1975), pp.109-132; Faith, "Peasant Families and Inheritance Customs in Medieval England".
73. For a discussion of both rational and irrational elements in the methods of proof during the medieval age, see R. C. V. Caenegem, "Methods of Proof in Western Medieval Law", in *Legal History: A European Perspective* (London: Hambledon Press, 1991), pp.71-111. Ceanegem said that "What is most striking about the methods of proof of this 'first Middle Age' is their irrational character.", p.73.
74. Berman, *Law and Revolution,* p.275; Reynolds, *Kingdoms and Communities in Western Europe 900-1300*, p.14.
75. Reynolds, *Kingdoms and Communities in Western Europe 900-1300*, p.19.

demonstrates, this kind of judgement involved a mass of local people, such as the so called "good man" and "lawful man" listed in royal charters and writs, making a judgement at a local assembly.[76] In medieval England the local administrative units, like Shire court and Hundred court, assumed the role of the local assembly under the controls of both great landowners and the Kings.[77]

The peculiarity of medieval English customary law was attributed to the consequence of the Norman Conquest. Before the Conquest there was a tendency toward the growth of crystallization of custom on the both sides of the Channel. Normandy in the eleventh century witnessed this crystallization. The well-known phenomenon was a sharp distinction between life-grant pattern of tenure and heritable tenure due to the social movement of monastic endowment. A monastery received a gift under the hereditary language used by the lay donors, as Hugh and Robert of Grandmesnil had endowed their hereditary estates to certain monastic establishment. This helped to spread and strengthen the notion of secular inheritance which strengthened donor's capacity to give.[78] E. Z. Tabuteau, in her pioneer work on the property law of Normandy, has investigated the crystallization of property law through a detailed study of charter. Her conclusion is that the Normans could classify

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76. Ibid. pp.23-34; Davies and Fouracre, *The Settlement of Disputes in Early Medieval Europe*, pp.214-227.
77. As for the local judicial administrations of Anglo-Norman England, see chapter 2.
78. Holt, "Notion of Patrimony" and "Politics and Property in Early Medieval England".

varied types of transactions expressed in the terminology of alienation.[79] The custom of Normandy was "both a conscious concept and a distinct, territorialized body of rules."[80]

In pre-Conquest England people possessed an elaborate notion about the distinction between land and moveable wealth. In the complex social relationships such distinction implied multiple functions of exchange of wealth.[81] The introduction of book land charter brought about a new element into the structure of landholding system. The land and service was thereby linked together, along with the growth of lordship.[82] The formulae about the dependent tenure used in *Domesday Book* demonstrates that there was an elaborate concept of tenurial relationship before and after 1066. The two formulae "X *tenuit de* Y" and "X *tenuit sub* Y" imply a lord possessing a control over land, while another formulae "X *homo* Y *tenuit*" stresses the lordship over the man rather than over the land.[83]

On the other hand, the Anglo-Saxon Wills, which is the written evidence about the conveyance of estates, show that there was an abstract notion of land transfer in

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79. E. Z. Tabuteau, *Transfers of Property in Eleventh-Century Norman Law* (Chapel Hill and London: North Carolina University Press, 1988), pp.14-91.
80. Ibid. p.226.
81. T. M. Charles-Edwards, "The Distinction between Land and Moveable Wealth in Anglo-Saxon England", in *Medieval Settlement: Continuity and Change*, ed. P. H. Sawyer, (Edward Arnold, 1976), pp.180-187.
82. R. Abels, *Lordship and Military Obligation in Anglo-Saxon England* (London: California University Press, 1988).
83. P. A. Clarke, *The English Nobility under Edward the Confessor* (Oxford: Clarendon Press, 1994), p.74.

terms of the grantor and the grantee. The Anglo-Saxon Will, in fact, was a bilateral contracts agreement concluded orally by lay donor and ecclesiastical donee, thereby the rights in property was exchanged for rights in the heavenly mansions.[84]

At the same time, there were many obvious differences in the custom of descend on both sides of the Channel before the Conquest. In general the principle of primogeniture was applied in pre-Conquest Normandy.[85] Tancred of Hauteville had twelve sons and several daughters by his two lawful wives. He gave his primordial estate to his son Geoffrey, and "advised the others to seek their living by their strength and wits outside their native land."[86] As for the situation in pre-Conquest England, our discussion starts form the will of Aelfhelm:

> And I grant to my son Aelfgar the estate at Whepstead and that at Walton for his lifetime, and after his death they are to go wherever he pleases, for the souls of both of us. And I declare what I gave to my wife as a marriage-gift, namely, Baddow and Burstead and Stratford and the three hides at Enhale. And when we first came together, I gave her the two hides at Wilbraham, and Rayne and whatever pertains to it. And I grant her Carlton and I grant her the chief messuage at Gestingthorpe, and all the possessions that are on it, including produce and men; but I grant to Godric and my daughter half the woodland and open land, except that which I grant to my priest. And I grant to my wife and my daughter half the estate at Conington, to divide between them, except the four hides which I grant to Aethelric and Aelfwold, and the half hide which I grant to my servant Osmaer.
>
> And I grant to Aelfmaer and his brother Aelfstan, to divide between them the two estates, Hatley and Potton, except what I grant to Osgar. And I grant to Godhere what I bought from Wimund. And I grant Littlebury to Leofsige after my death, on condition that the agreement which we concluded before the ealdorman shall hold good. And I grant to him and his wife the estate at Stockton for a hundred mancuses of gold, and I wish that the gold be given to my lord in payment of my heriot.

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84. H. D. Hazeltine, "General Preface", in *Anglo-Saxon Wills*, pp.xix - xx.
85. Holt, "Feudal Society and the Family in Early Medieval England: I The Revolution of 1066", *Transactions of the Royal Historical Society* , 5th Ser. 32 (1982) and "The Notion of Patrimony".
86. Orderic Vitalis, *The Ecclesiastical History of Orderic Vitalis,* Vol. II, pp.98-101.

> And I grant to be divided among my three brothers the estate at Troston, except that I grant to Aelfwold that which Aethelric had. And I grant Aelfhelm the hide at Ickleton and the property at Maworth. And I grant Wulfmaer what I had at Barnham.[87]

The will shows a division of ancestral estates among the members of the family or kin in Anglo-Saxon England, in sharp contract with the hereditary custom of Normandy. The examples of the division within the family in Anglo-Saxon Wills were abundant to suggest that this type of division was a deep-rooted practice during the Anglo-Saxon period.[88]

The sharp distinction in the customary laws between England and Normandy before 1066, and the confrontation between them after the Conquest, was very important for the formation of the distinct custom in Anglo-Norman England. It was because that the sudden confrontation with a set of rules greatly different from the other set would lead people to perceive more clearly their own practices and custom.

The confrontation was accentuated by the fact that the aristocrats who followed the Conqueror to settle in England came from a number of French provinces each of which had its own customary law. For example, the Breton custom was to divide the

87. *Anglo-Saxon Wills*, no.XIII.

88. Ibid, nos. IX, XXXI, XXIV, XXXIII. For the discussion of land succession among the kinsman in Anglo-Saxon England, see Maitland, *Domesday Book and Beyond,* Second Edition, (Cambridge: Cambridge University Press, 1987) pp.145-6. Professor Katherine F. Drew, in her investigations of the codes of the Germanic kingdoms (Visisgoths, Burgundians, Lombards, Anglo-Saxons, Alamanni, Bavarians, and Franks) between the fifth and eighth centuries, encloses that the property of family were both alienable and inheritable. See her "The Law of the Family in the Germanic Barbarians Kingdoms: A Synthesis", in *Law and Society in Early Medieval Europe* (London: Variorum Print, 1988), pp.17-26; Rubolf Huebner regarded the division of land within the family in Germanic land law was "merely a community succession in the collective property." See his *A History of Germanic Private Law*, p.695.

family property evenly among sons.[89] In Clause Six of the "Law of William the Conqueror", the Conqueror tried to clarify the difference between Frenchman and Englishman in the pattern of punishment.[90] In terms of land tenure, this confrontation also evoked a process of crystallization contributed to the formation of a set of abstract notion of property right. The Conquest was catalysis for the evolution of a widely recognized custom of inheritance that will be discussed in some detail below.

The primary function of customary law, in the case of Anglo-Norman litigation, was to promote compromise and to regulate relationships in a community. In terms of homage relationships, the Anglo-Norman customary law was well known for its preservation of intimate bond, and promotion of good lordship and royal service.[91] The dispute between the bishop of Chichester and the abbot of Battle was an interesting case for the preservation of mutual relationships. The origins of the dispute was in William the Conqueror's charter which granted the abbot of Battle certain exemptions form the authority of the bishop of Chichester. The case was settled by an agreement between the abbot and the bishop, under "a spirit of goodwill" among the King, his assembled men, and the parties.[92]

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89. Painter, "The Family and the Feudal System in Twelfth Century England", p.2.
90. *English Historical Documents II 1042-1189*, p.399.
91. Cary L. Dier, "The Proper Relationship Between Lord and Vassal: Toward a Rationale for Anglo-Norman Litigation", in *Haskins Society Journal*, Vol.6 (1994), pp.1-12.
92. *The Chronicle of Battle Abbey*, ed. and tr. E. Searle, p.185.

In relationships with his tenants, the lord was influenced by an important custom: the concept of "Good Lordship". This concept required the lord to respect the rights of his tenants, such as the security of tenure and the inheritance right of dead man's heir. Taking these customs into consideration, one can observe that the tenurial pattern in post-Conquest England was greatly different from the pattern conceived by Milsom and Thorne.

VI

Interpersonal relationships between the lord and his tenants were, to a great extent, bound by the ritual of commendation, known as homage. It is believed that the relationship between homage and landholding was very close in medieval age.[93] The author of *Leges Henrici Primi* stresses that:

> But if anyone holds his farm in fee and has done homage for it, whether he is residing on it or not, and considers it of value, he shall render satisfaction to his lord in that lord's court or in the court of the lord whose fee it is.[94]

Likewise, in the second half of the twelfth century, *Glanvill* said that: "Homages are only done about lands and free tenements, services and rent precisely fixed in cash or in other things."[95] After a man had done homage to another, this man, accordance to Glanvill, "shall become the man of his lord, swearing to bear him faith about that tenement for which he does his homage."[96] Based on this concept, the lord could get

93. For a different opinion, see Reynolds, *Fiefs and Vassals*, pp.17-47.
94. *Leges*, 56.2.
95. *Glanvill,* ix. 2, p.106.
96. Ibid, ix. 1, p.104.

back the tenement of his tenant if the latter failed to fulfil his service, as Milsom had stressed on the disciplinary jurisdiction of the lord.

In a precept, King Henry I ordered Absolon of Sandwich "to do full right to the Abbot of St.Augustine's in the abbot's court and according to the judgement of the court, respecting the fee which he holds of St.Augustine and the abbot". If Absolon failed to do so, the abbot may recover the fee (*recognoscat se ad feodum suum*).[97] The Battle Abbey also lost a tenement at Barnhorn for alleged failure of service.[98]

But the customary law of private property right checked the lord's disciplinary jurisdiction. Firstly, the lord should act "according to the consideration of their court and reasonable custom" before distrainting his man's fee.[99] The recognition of his court for his action was of vital importance to the lord because he needed supports from his other tenants. It was very difficult for a weak lord to recover the fee from a strong tenant who had received supports from other lords or the King. The tenant was not always in a weak position in his relationships with the lord.[100] Moreover, the fee recovered by the lord should have been returned as the distraint was aimed mainly at exacting immediate performance of service and at forcing the man to appear in his

97. *Regesta II*, no.1314.
98. *The Chronicle of Battle Abbey*, pp.118, 210-218.
99. *Glanvill*, ix. 8, p.112.
100. R. V. Lennard said that under the Norman rule every landlord had the right to hold a court for his man, whether they were humble peasants or feudal sub-tenants. See his *Rural England 1086-1135: A Study of Social and Agrarian Conditions* (Oxford: Clarendon Press,1959), p.24.

lord's court.[101]

In the meantime, the security of tenure was promoted by another "reasonable custom" called the concepts of Good Lordship and Warranty. The origins of the concept were related to authority and protection of a superior to his inferior.[102] In pre-Conquest Normandy, the clause of warranty in the charter was an effective device for assuring the permanence of alienation. If it failed, the warrantee could at least be indemnified for the loss.[103] The legal texts of the twelfth century also show that the Norman Conqueror and his followers were familiar with the idea of warranty when they took over the governance of the Conquest England. As *Leges Henrici Primi* puts that:

> Every lord must bear in mind that whether he has soke and sake or not he shall so support his man everywhere that he shall suffer no injury as a result of his protection nor any dishonour as a result of his abandonment.[104]

In *Glanvill* the concept of warranty is precisely expressed and elaborated:

> .....if anyone gives to anther a tenement in return for service and homage, and a third party afterwards proved his right to it against the tenant, the lord will be bound to warrant him that tenement or give him equivalent land in exchange.[105]

Paul R. Hyams, by studying the twelfth century charters, discloses that the clause of warranty had a dual nature.[106] Generally, a warrantor made two, positive and negative, commitments. In the positive promise the lord (and his family) would

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101. Hudson, *Land, law, and Lordship in Anglo-Norman England*, pp.16-51.
102. Milsom, *The Legal Framework of English Feudalism*, p.42.
103. Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, p.204.
104. *Leges*, 57.8.
105. *Glanvill*, ix. 4, p.107.
106. Paul R. Hyams, "Warranty and Good Lordship in Twelfth Century England", in *Law and History Review*, Vol.5 (1987), pp.437-503.

maintain the gift against outside challenge, while the negative promise stressed that neither the lord nor his family were to recover the land conveyed. A good lord was expected to guarantee his men's tenure.[107] The warranty promise eventually became customary tenant's right. This was as close to full right as a free man could hope to approach before the new judicial procedures set up by Henry II. By the time of Glanvill, as noted above, the clause of warranty contained an idea of exchange, thereby the lord's guarantee approximated tenant-right (*ius*).[108] The tenants, like the magnates at the top of the society, enjoyed a great degree of security of tenure so long as he did not turn against his lord.[109]

VII

The law of Cnut II 13.1 remarks that: "And if he has bookland, it is to be forfeited into the king's possession, no matter whose man he be."[110] It implied that bookland was a special type of landholding in pre-Conquest England as no one could deprive of the right of bookland holder, except the King. Under the direction of the holder the bookland could be "justly divided among the wife, the children and the close kinsmen, each in the proportion which belongs to him."[111] Chapter 41 of Alfred's code mentions that "the man who has bookland left to him by his family

107. Ibid. pp.440 and 457.
108. Ibid. p.453.
109. Hudson, *Land, law, and Lordship in Anglo-Norman England*, p.59.
110. *English Historical Documents I 500-1042*, p.420.
111. The laws of Cnut, 70.1, ibid. p.428.

must not let it go out of the family if the original owners made express provision against this."[112] Obviously, the laws of Anglo-Saxon England considered bookland a type of property, and the holder could use testamentary powers to choose the heir of his land.[113]

Before the Conquest, the Norman aristocracy was also accustomed to inheritance. The inheritance of property was "part of the natural order of things in Norman England."[114] The custom of inheritance was embodied in the widespread of the hereditary terminology in the written sources of the period. A well-known example is the charters issued by Nigel d'Aubigny, lord of Thirsk, who had "disinherited" several of his tenants. However, he considered his actions to be offences.[115]

Nevertheless, the hereditary custom was a complex problem in medieval society. The thorny problem is that who should inherit the ancestral land. It is suggested that the first-born son should have the father's ancestral fee, or that "relatives up to the fifth joint whoever are the nearest in relationships" should succeed by the hereditary right.[116] Hereditary dispute arises, however, if the first-born son dies. *Glanvill* points out the complexity of the hereditary custom:

> when......anyone dies leaving a young son or daughter, and a grandson born of an eldest son already dead, a great legal problem arises as to which is to

112. The laws of Alfred, 41, ibid. p.379.
113. Faith, "Peasant Families and Inheritance Customs in Medieval England", pp.79-80.
114. Holt, "Politics and Property in Early Medieval England", pp.3-9.
115. Holt, "The Revolution of 1066", pp.211-212; P. Dalton, *Conquest, Anarchy and Lordship: Yorkshire*, p.275; Hudson, *Land, law, and Lordship in Anglo-Norman England*, p.40.
116. *Leges,* 70.20a and 70.21.

be preferred to the other in that succession.....[117]

On the other hand, it was not impossible for a division of the ancestral land between two sons.[118] In general, as the charter shows, the nearer parentelic group precedes the more remote, or the elder line precedes the younger.[119]

The Norman rulers often employed the variety of hereditary languages in extent royal documents. Immediately after the Conquest, the Conqueror instructed the Londoners the "every child be his father's heir after his father's day."[120] Henry I on his Coronation Charter once again upheld this principle.[121] I am impressed by the Norman King's familiarity of hereditary custom in the royal charters and writs. In order to consolidate his throne the Conqueror emphasized that he was the King of England "by hereditary right".[122] However, it was in the reign of Henry I that witnessed the increasing rate of hereditary languages used in royal documents. These hereditary languages could generally be categorized into three main formulae: (1) "by hereditary right" (*hereditario iure*); (2) in fee and inheritance (*in feodo et hereditate*); and (3) in fee to him and his heirs (*in feodo sibi et heredibus suis*).

These formulae strengthened and confirmed the principle of heritability within the structure of land tenure. In a notification Henry I granted certain holdings to his

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117. *Glanvill*, vill.3, pp.77-78.
118. *Regesta II*, no.843.
119. Hudson, *Land, law, and Lordship in Anglo-Norman England*, p.148.
120. *English Historical Documents II*, p.945.
121. Ibid. p.401.
122. *Regesta I*, nos.21, 231, 272.

chaplain, William, Archdeacon of Ely, that "to be held by hereditary right".[123] In other documents the phrase "in fee and hereditary" denotes that land held in fee was conceived as inheritable. Whether the fee was a special pattern of landholding distinct from other types of holding needs a separate monograph. At very least, the King recognized the principle of heritability above the lowest level.[124] Likewise, the third formula reinforced the position of the heir of a dead tenant to inherit the land, thereby promoting the idea that the fee was a part of ancestral estates.[125] The rate of employing these languages in royal charter increased in the last five years, from 1130 to 1135, of the reign.[126] Therefore the heir possessed an abstract right, that can be termed as legal right, towards his father's lands. These usage stimulated the growth of an abstract thinking of the people about land property and ownership.

The discussion of hereditary custom is not complete without the interpretations of women's legal position, such as the eldest daughter or the widow of the landholder, as the legitimate heir next to the eldest son. The decent in the female line was not uncommon, especially whenever the male line failed.[127]

In the second half of the twelfth century, as *Glanvill* remarks, the practice was

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123. *Regesta II*, no.1502.
124. Ibid. nos.1314, 1326, 1719, 1778, 1872, 1984.
125. As Lennard remarks that a gift to a man and his heir may have created "fully hereditary tenure" if the phrases *feodo et hereditate* was used. See his *Rural England*, pp.173-174.
126. Hudson, *Land, law, and Lordship in Anglo-Norman England*, p.79.
127. Holt, "Feudal Society and the family in Early Medieval England: IV. The Heiress and the Alien", *Transactions of the Royal Historical Society*, 5th Ser. 35 (1985), pp.1-28; S. L. Waugh, "Women's Inheritance and the Growth of Bureaucratic Monarchy in Twelfth and Thirteenth Century

that the inheritance was divided among daughters, and then the eldest daughter retain the chief messuage.[128] A *statutum decretum*, mentions in a charter of Roger de Valognes, refers that "where there is no son, the daughters divide their father's land by spindles, and the elder cannot take from the younger her half of the land without violent and injury."[129] However, inheritance by women was more complex than the decent in the male line, because this involved conflicting interests between the family, the husband, and the lord.[130] The compromise was that the husband of the eldest daughter performed the service to the lord, and other sisters and their husbands should not perform homage to the eldest sister until after three generations. The devices ensured that the lord received services form his tenants (the husband), while the inheritance was operated within the family, and the eldest sister would not be at once lord and heir of the entire inheritance in violation of custom.[131]

Nevertheless, the practice seems to be less complex in the early twelfth century than in the second half of the century. The eldest daughter was the only heir of the entire inheritance. Henry I said that if Robert, Count of Meulan had no sons or heir,

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England", in *Nottingham Medieval Studies*, 34 (1990), pp.71-92.

128. *Glanvill,* vii. 3, p.76.
129. Holt, "The Heiress and the Alien", pp.9-10.
130. Milsom, "Inheritance by Women in the Twelfth and Early Thirteenth Centuries", in *Studies in the History of the Common Law* (London and Ronceverte: the Hambledon Press, 1985), pp.231-260; Searle, "Seigniorial Control of Women's Marriage"
131. *Glanvill,* vii. 3, p.76; Milsom, "Inheritance by Women in the Twelfth and Early Thirteenth Centuries"; Waugh, "Women's Inheritance and the Growth of Bureaucratic Monarchy in Twelfth and Thirteenth Century England", pp.72-74.

then the Count's daughter shall succeed if she married with the King's consent.[132] As the author of *Leges Henrici Primi* implies that if the male line did not subsists, then a woman shall succeed.[133] To contain the destabilizing tendencies about inheritance by women, Henry I clarified that

> .....on the death of one of my barons or of one of my tenants, a daughter should be his heir, I will dispose of her in marriage and of her lands according to the counsel given me by my barons.[134]

Professor Holt's thesis shows that the example of the eldest daughter's inheritance, introduced from Normandy to England by means of the Conquest, increased in number with the passing of time in post-Conqueror England. By 1130 more than twenty baronies had descended in their daughters. The number had increased to thirty by 1150.[135] To conclude, the norm that the legitimated heir, whether the male line or not, of the landholder should possess the right to succeed the land automatically.

Social significance of marriage and women were the reallocation of property right among the families.[136] Traditionally, it was the obligation of a landholder to secure the lifetime of his daughter and his widow after his death. Before the Conquest Ethelric left some properties to his wife, and hoped that Bishop Elfstan "will help to

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132. *Regesta II,* no.843.
133. *Leges,* 70.20b.
134. *English Historical Documents II*, p.401.
135. Holt, "The Heiress and the Alien", p.5.
136. For an anthropological research about the importance of women's inheritance in human society, see J. Goody, "Inheritance, Property and Women: Some Comparative Considerations", in *Family and Inheritance: Rural Society in Western Europe 1200-1800,* ed.J. Goody, J. Thirsk, and E. P. Thompson, (Cambridge: Cambridge University Press, 1976), pp.10-36.

secure that each of the bequests [to Ethelric's wife] which I [Ethelric] have made may stand."[137] Widow's right of inheritance was confirmed on the Coronation Charter of Henry I.[138] No wonder that King Henry I was obligated to arrange the dower for his tenants-in-chief's widows.[139] As for customary law of widow's entitlement, Clause 70.22 of *Leges Henrici Primi* precisely mentions that:

> If a wife survives her husband she shall have in permanent ownership her dowry and her *maritagium* which had been settled on her by written documents or in the presence of witnesses and her morning-gift and a third part of all their jointly acquired property in addition to her clothing and her bed.[140]

Given that the importance of marriage, the marriage contract between families was an agreement in a sense between bride and groom, and between families for the devolution of land in the lay society. In the early twelfth century the marriage ceremony was officiated by a priest at the church door. The priest, the couple, their families, friends, and other, thus, assumed the role of the witnesses in the process of property transfer. Moreover, it was the custom for the widow to acquire one-third of her husband's property as her dower.[141] A famous dower charter quoted by J. Biancalana explains the point in detail. The groom, Adelard, read this charter at the marriage ceremony:

> Know all present and future that I Adelard gave in dower to my wife Isolde three and a half hides of land in fee and one half hide that I held in fee farm

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137. *Anglo-Saxon Wills*, no.xvi.
138. *English Historical Documents II*, p.401.
139. *Regesta II,* nos.729, 1224, 1255, 1280, 1284.
140. *Leges,* 70.22.
141. J. Biancalana, "Widows at Common Law: The Development of Common Law Dower", in *Irish Jurist*, no.23 (1988), pp.255-329, at p.262-263. In the chapter Seven of Magna Carta, the principle was affirmed, see *English Historical Documents III 1189-1327*, p.318.

> with my message and all other houses that I have at Houghton. And if I will be able to acquire more land, all that also I concede to her in *augmentation of dower*. And if the Lord should give me from this wife of mine a child I will and concede that the child have by hereditary right the aforesaid three hides, which are of *my acquisition and which my father never had*, together with the aforesaid augmentation. I have made this gift both of dower and of all above said with the consent of Hilary, Bishop of Chichester, and of John dean, and of the whole chapter of Chichester.[142]

Adelard said that he not only gave "three and a half hides of land" to his wife but also future acquired land "in augmentation of dower". Indeed the customary law entitled a widow to receive one-third of his husband's holding, and a right to share of acquisition. The charter was one of typical cases in medieval England.[143] In this sense the widow's entitlement paralleled the heir's right to inheritance.[144] An heir was obliged to guarantee the hereditary right of widow in the way that the lord's obligation toward his tenants.[145] Both entitlements were recognized and protected by the Norman Kings in the royal court. Customary law of inheritance, thus, secured the tenants and his heir's rights in Anglo-Norman England.

VIII

As for the alienation of property among thegns in pre-Conquest England, *Domesday Book* records some valuable information for our discussion. The evidences often show that a man could sell or alienate his land without the permission of his lord. In the tenurial structure of the Anglo-Saxon society, thus, a man had a considerable

142. Biancalana, "Widows at Common Law: The Development of Common Law Dower", p.267.
143. Ibid. pp.255-280.
144. Goody, "Inheritance, Property and Women: Some Comparative Considerations", p.15; Biancalana, "Widows at Common Law".
145. Milsom, "Inheritance by Women in the Twelfth and Early Thirteenth Centuries", p.43.

right of property over his lord.[146] After 1066 the situation had not changed in terms of land alienation. Nevertheless, the patrimony could not be alienated easily than the acquired land. The kindred could reject the alienation of ancestral land outside the family.[147] *Glanvill*'s statements about the alienation of inherited land and acquired land help to substantiate the viewpoint.

> For he (a man) can give a certain part of his free tenement to whom he pleases in recompense of his service, or to a religious place in alms.[148]

This statement stresses that a man could transfer his property to whom he pleases, but his inherited land was subject to the control of his kindred. The author intended to secure the interest of the legitimate descendants against other challengers.

> If he has only inherited land, he can, as has been said, give a certain part of that inheritance to any stranger he chooses. However, if he has several legitimate sons, he can hardly give any part of the inheritance to a younger son without the heir's consent.[149]
>
> If he has only acquired land, and wishes to give part of this land, then he can do so; but he cannot give all his acquired land, because he must not disinherit his son.[150]
>
> If he has both inherited and acquired land, then it is beyond question that he can give in perpetuity any part or all of his acquired land to whom he please.[151]

In fact, the consent of the members of family was desirable for the confirmation of the gift. Osbert de Wanci granted an estate to Biddlesden in the reign of King Stephen, and said that:

> I made and grant this gift by the counsel of Alice my wife and Robert my son and heir and my other sons and friends.....to be defended maintained free and quit of all secular custom and exaction for me and my heirs against

146. Clarke, *The English Nobility under Edward the Confessor*, pp.85-86.
147. *Leges,* 88.14a
148. *Glanvill*, vii, 1,p.69.
149. Ibid. p.70.
150. Ibid. p.71.
151. Ibid.

all who try to bring any claim against the said church.[152]

However, it is not to say that the consent of kindred was mandatory for the alienation. Before the Conquest, the Normans could alienate his property more freely despite his relatives refused to consent.[153] In Anglo-Norman England, in order to secure the gift the layman increased the *laudatio parentum* (the consent of other members of the family) in their charters. The *laudatio parentum* was indeed one of important methods of ensuring the grant. In many Oxfordshire charters the *laudatio parentum* records the assent of the kinship, such as the wife, the heir, other sons, all daughters, and all brothers. But it was the beneficiary, mainly the religious houses, required the benefactor to write down the *laudatio parentum*.[154]

In the process of alienation the lord's consent should not ignored, particularly at the highest level of the society. Some cases demonstrate that the lord King's assent in advance to all future gifts was not uncommon.[155] Likewise, the consent of lord was also desirable by the draftsman attempted to protect the interest of the church. Nevertheless, the alienation of land by the tenants without the recognition of the lord was reflected in 1217 Great Charter C.39 that the baron complained the movement of alienation among their tenants:

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152. F. M. Stenton, *The First Century of England Feudalism*, second edition, (Oxford: Clarendon Press, 1932), No.46; also see No.37;the translation, see Hudson, *Land, law, and Lordship in Anglo-Norman England*, pp.191-192.
153. Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, p.172.
154. D. Postles, "Securing the Gift in Oxfordshire Charters in the Twelfth and Early Thirteenth Centuries", *Archives*, Vol.XIX (1990), pp.183-191; also see Hudson, *Land, law, and Lordship in Anglo-Norman England*, p.190.

> No free man shall henceforth give or sell so much of his land as that out of the residue he may not sufficiently do to the lord of the fee the service which pertains to the fee.[156]

The clause implies that the land held by the tenants from his lord could be freely transferred before receiving his lord's permission. In pre-Conquest Normandy lords could not block alienation by refusing assent. Many charters point to the fact that the lord gave his permission only long after his tenants has alienated the tenement.[157] After the Conquest, the tenants could alienate his lands more freely and easily because almost all lands in Anglo-Norman England were acquisitions.[158] Therefore, the Norman Conquest provided an important factor in reinforcing the tenant's private right of property towards his lord.

When the conveyance was effected, the donor and the donee had an interest in ensuring that no subsequent claim disturb the alienation. If, for example, the church lost the gift it had been alienated, the spiritual benefits to the alienator might be endangered. The customary law of the Anglo-Norman society provided a number of modes of assurance ensuring the integrity of gifts and the permanence of conveyance. These modes of assurance included the seising ceremony (livery of seisin), witnessing, penalties clause in the charter. These methods enabled the parties enjoying the secure of transfer in the century after the Conquest.

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155. *Regesta II,* nos.1327, 1428.
156. *English Historical Documents III 1189-1327*, p.336.
157. Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, pp.171-172.
158. Hudson, *Land, law, and Lordship in Anglo-Norman England*, p.205; see also Dalton, *Conquest, Anarchy and Lordship,* pp.266-272.

In early medieval Europe the customary law of conveyance required that the transactions was capable of being heard and seen. The requirement was influenced deeply by the ancient Germanic custom of land transfer. It was divided into two main elements: the *sala* and the *gewerida*. The former was a public and oral declaration by the alienator of his intention to alienate; the latter the ritualistic transaction by the alienator to the recipient of the gift, and the formal entrance of the recipient into the land.[159] In the ceremony, objects were used, such as knife, turf, twig, and gospel book. These objects were regarded as symbolic of the transaction aimed at impressing the event on the memory of all those present.[160] Although Thorne insisted that such ritualistic conveyance of seisin was not necessary in Anglo-Norman England, the seising ceremony was often performed in land conveyance throughout the period.[161]

The transaction of object during the ceremony was conducted in the presence of witnesses. It was a useful device for obtaining publicity in the transaction. The presence of witnesses was a primitive form of corroboration before the development of written charter. All those witnesses who saw the symbolic liveries of seisin would attested that the transaction had been taken place.[162] With the widespread of the

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159. Thorne, "Livery of Seisin", in *Essays in English Legal History*, pp.33-50, at p.34.
160. Ibid.; M. T. Clanchy, *From Memory to Written Record England 1066-1307*, second edition, (Oxford: Blackwell, 1993), pp.254-260; Hudson, *Land, law, and Lordship in Anglo-Norman England*, pp.162-163; for the Norman custom see Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, pp.113-141.
161. Thorne, "Livery of Seisin", pp.40-42; *Regesta I*, nos.1, 29, 384, and *Regesta II*, no.1319.
162. Postles, "Choosing Witnesses in Twelfth Century England", *Irish Jurist*, Vol.23 (1988), pp.330-346.

charter, the witnesses clause became an essential feature of it. The introduction of charter into the seising ceremony strengthened the permanence of the conveyance. The charter was read out loud in the ceremony, while the witnesses heard the word of the charter and saw the transaction.[163] Witnesses were usually listed in the end of the charter, and the closest relatives, like the heir, was chosen as one of witnesses in the ceremony.[164] In Normandy the potential challengers, except the participants, were also invited to corroborate the transaction.[165] In some charters penalties clause was used against infringement, and by far the most common penalty was anathema.[166] These modes strengthened the security of gift-giving in medieval England.

To conclude, private property right was not an innovation of the Angevin legal systems, but there was an evolution from the customary law of ownership to the Common Law of property. Customary law was real law in the sense that it governed the people what should be acted and how to act properly. The security of tenure, heritability, and alienability were three main aspects for our explanation of the property right in Anglo-Norman England. All these were enjoyed by the tenant, and protected by the unwritten custom before the formation of the Common Law systems in the late twelfth century.

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163. Clanchy, *From Memory to Written Record*, pp.254-255.
164. Postles, "Choosing Witnesses in Twelfth Century England", p.336.
165. Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, p.146.
166. Ibid., pp.205-210; Hudson, *Land, law, and Lordship in Anglo-Norman England*, pp.167-172; *The Battle Chronicle*, pp.252-4; for King's employment of spiritual penalty see, *Regesta I*, no.361, and

Customary law was the social practice exercising real normative force within the structure of tenurial relationship. Lords and tenants were influenced by reasonable custom. A good lord should respect the property of his tenants so as to maintain the loyalty of his men. Both heir and widow have the right to inherit the land after a tenant's death. A man could dispose his land freely without the intervention of his lord. No wonder that free men expected to hold their land as what can be called property right, irrespective of any obligations they owed to their lords.[167]

In the meantime, the King's court in the Anglo-Norman period, particularly in the reign of Henry I, absorbed and accepted these social norms, and gradually transformed them into rules. The royal judicial administration of King Henry I stimulated the transformation from customary law to Common Law of ownership, which will be the theme of the next chapter.

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for worldly penalty see, *Regesta II,* nos. 1591 and 1173.

167. Reynolds, *Fiefs and Vassals*, pp.58-59.

The Institutional Foundations of English Law: the Administration of Justice under Henry I

I

The significance of medieval Common Law in the development of the modern English and American legal systems is widely acknowledged. Historians, however, disagree with each other the timing of the emergence of the Common Law, although most believe that the second half of the twelfth century was the crucial stage for its formation. As for this problem, our starting point remains on Pollock and Maitland's *The History of English Law before the Time of Edward I* published in 1895.

Maitland ascribed the formation of the Common Law to the reign of Henry II, and asserted that "its [the legal reforms of Henry II] importance is due to the action of the central power, to reforms ordained by the King."[1] In his *Constitutional History of England*, he remarked that:

> From his [Henry II] time onwards the importance of the local tribunals began to wane; the king's own court become ever more and more a court of first instance for all men and all causes. The consequence of this was a rapid development of law common to the whole land; local variations are gradually suppressed; we come to have a common law.[2]

The introduction of legal reforms, such as grand assize and petty assize, as Maitland noted, strengthened the royal judicial power, and thus weakened the private

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1. Pollock and Maitland, *The History of English Law before the Time of Edward I*, p.136.
2. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1968),p.13

jurisdiction of feudal lords.[3] Following Maitland, legal historians agree that the legal "innovations" of the Angevin age were of vital importance for the development of English law. One notable scholar, Doris M. Stenton, in the *Jayne Lectures of the American Philosophical Society* presented in 1963, designated the achievements of Angevin legal reform as the "Angevin leap forward".[4] Examining the issue from another angle, from the perspective of the tenurial relationship between lord and tenant, S. F. C. Milsom, remarks the great contribution to royal centralization made during the reign of Henry II, and concludes that

> Until a generation before 1200, [the lord's] own was indeed the only relevant legal system, and there was no outside authority to which the tenant could regularly look for help.[5]

In short, the formulations can be briefly summarized under three headings:(1)Norman rulers were all less concerned with the enactment of code;[6] (2)from the Conquest to 1154, medieval England was a seigniorial society wherein lord exercised a full range of jurisdiction over all the men who held land from him. The royal court's judicial power, in comparison with that of the lord court, was minimal in scope; and (3) the Angevin era was a golden age for the making of English law, because the growth of king's court overwhelmed the private jurisdiction of lord, so the King's court became a supreme court open to all the English people for appeal.

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3. Pollock and Maitland, *The History of English Law*, pp.136-173.
4. D.M.Stenton, *English Justice between the Norman Conquest and the Great Charter 1066-1215* (Philadelphia, 1964), pp.22-53.
5. Milsom, *The Legal Framework of English Feudalism*, p.11.
6. Pollock and Maitland, *The History of English Law*, pp.79-80; H.G. Richardson and G.O.Sayles,

These historians have contributed considerably to our understanding of the development of English law. But at the same time, they also underestimate the legal achievements of the Anglo-Norman period, and over-emphasize the rivalry between king and lords. Recent researches demonstrate that in many respects lords co-operated with the Kings, with a view to gaining royal patronage. C. W. Hollister suggested that royal favor was one of the most important factors for the elevation of magnates.[7] As early as the time of William the Conqueror, the profitability of royal patronage was widely acknowledged both by the Norman followers and even by the English survivors.[8]

In investigating the historical foundations of English Common Law, one must go beyond the legal reforms of Angevin England. The aims of this Chapter are twofold: firstly, by explaining whether or not the lord's court exercised a full range of discretionary power over its tenants, thereby reassessing the concept that seigniorial lordship was a closed unit isolating from outside intervention, including royal jurisdiction and its local agents. That is related to the transformation of lordship system before the advent of legal "innovation" of Henry II. Secondly, I shall discuss the roles of centralized justice of Henry I in the formation of a Common Law system.

Law and Legislation from Aethelbert to Magna Carta (Edinburgh, 1966), pp.30-53.

7. See his "Henry I and the Anglo-Norman Magnates", in *Anglo-Norman Studies*, (1979), pp.93-107, and " Magnates and Curiales in Early Norman England" *Viator*, Vol.8 (1977), pp.63-81.
8. See Hugh M.Thomas's unpublished article, "Lordship and English Survivors of the Norman Conquest". I am grateful to Hugh M. Thomas for giving me a copy of his article.

II

The Norman Conquest of England was no doubt one of the most profound events in the history of England. William the Conqueror, immediately after the battle of Hastings, introduced into England a new land-holding institution, known as "honourial system". This was a personal bond between lord and tenant based on fief holding in return for military service. The introduction of fief-holding by the Norman Kings has generated controversy among historians over the origins of English "feudalism".[9]

As the term feudalism itself is controversial because of its vagueness, thus, I prefer a much more specific and concrete term "honour" to feudalism.[10] The classic description of the honorial system appears in F. M. Stenton's *The First Century of English Feudalism*. Stenton portrayed medieval English society as a "seigniorial world". The honorial system, according to Stenton, created a self-sufficient unit absolutely isolated from royal intervention. Thus seigniorial lordship was "a feudal

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9. The controversy arising from Round's "The Introduction of Feudal Service", in his *Feudal England*, 2nd ed,(London : Allen and Unwin ,1964), pp.182-245; Stenton's *The First Century of English Feudalism*; other contentions relating the debate, see ,C.W. Hollister *The Anglo-Saxon Military Institution on the Eve of Norman Conquest* (Oxford : Clarendon Press,1962), and idem, *Military Organization of Norman England* (Oxford : Clarendon press,1965); J.C. Holt, "Anglo-Norman Feudalism", *Economic History Review*,Vol.16 (1963), pp.114-118; J. Gillingham, "The Introduction of Knight Service into England", *Anglo-Norman Studies*, Vol.4(1982), pp.53-64 ; R.A. Brown, *Origins of English Feudalism* (London : Allen and Unwin,1973).
10. See his *Vassals, Heiresses, Crusaders, and Thugs The Gentry of Angevin Yorkshire, 1154-1216* (Philadelphia : Philadelphia Press,1993), p.14 ; Brown, "The Tyranny of a Constract Feudalism and Historians of Medieval Europe",pp.1063-1088.

state in miniature" with tenants subject to the latitude of lord.[11] Stenton's portrayal of a closed honorial unit has been widely accepted.[12]

Therefore before we assess the traditional view of seigniorial lordship, it is useful to review the relevant literatures discussing the military function of the honorial system. The prevalent view is that the honor seems not to have played an active role in military mobilization, The honorial system does not appear to have been effective in providing the Conqueror with military resources so urgently needed to suppress the local English and maintain order.[13]

Marjorie Chibnall and J. O. Prestwich produce compelling arguments to assert that the feudal army was absolutely unimportant in the whole military organization of medieval England.[14] Information as to the mobilization of the feudal army is surprisingly scanty. The dearth of such evidence leads historians to suspect, reasonably, the military value of the honor.[15]

The deficiency of honorial lordship as an efficient military recruiting unit can be deduced from its internal structure. As a consequence of subinfeudation, tenurial

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11. Stenton's *The First Century of English Feudalism*, pp.37-42, 51-52 and 54.
12. Milsom *The Legal Framework of English Feudalism*; P. R. Coss, "Bastard Feudalism Revised", *Past and Present*, no.125 (1989), pp.27-64.
13. Hollister, *Military Organization of Norman England,* pp.72-135.
14. M. Chibnall, "Mercenaries and the *Familia Regis* under Henry I", *History*,Vol.62 (1977), pp.15-23 ; J.O.Prestwich, "War and Finance in the Anglo-Norman State", *Anglo-Norman Warfare : Studies in Late Anglo-Saxon and Anglo-Norman Military Organization and Warfare*, ed. M. Strickland, (Woodbridge : Boydell Press ,1992), pp.59-83.
15. The only one evidence about the summon of feudal host is the writ issued in 1072 by William the Conqueror, see, *English Historical Documents II 1042-1189*, p.895, but its value

relations tended to develop into a complex hierarchy of the lord - the mesne tenant - the tenants. The control and influence of the lord over his tenants was relatively attenuated. The fragmentation of military tenure can be viewed as a main cause of the breakdown of the bond between the tenants-in-chief and his tenants. Thus, the greatest difficulty confronting tenant-in-chief was how to extract services from his men.

The loose structure of the honor is intelligible also in peculiar characteristic of landholding in England that took root in time of the Norman Conquest. The estates, which comprised the knights' fees granted to tenants-in-chief by the Conqueror, were seldom concentrated but usually scattered throughout the country. To a considerable degree, the fragmentation of land ownership weakened the personal ties between lords and tenants. The author of *Leges Henrici Primi* noticed the serious problems created by loose personal ties within the honour, and regulated that:

> If he [the tenant] is resident at a very distant manor of the honour [honoris] of which he holds, he shall go to the court if his lord summons him.[16]

But the author did not prescribe what action a lord could take if his tenants failed to attend the court. Instead the author offered an excuse for the tenant's absence in its lord's court by saying that:

> If his lord holds several fees, a person who is the vassal of one honour is not *lawfully* obliged to go to court in another, unless the matter concerns a cause in the other honour court to which his lord has summon him.[17]

The statement points to two interesting phenomena: first, it is very common for a lord to

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is suspected by Gillingham, "The Introduction of Knight Service into England"

16. *Leges*, 55.1a, p.173.
17. Ibid.55.1b, p.173.

hold several fees, with each fee managed by an independent court; and second, not all tenants could attend simultaneously the lord's court when a lord summoned them.

Taking the evidence into account, we can come to the conclusion that the personal ties and bonds between a lord and his men were both loose and weak. Another clause of *Leges Henrici Primi* supports this conclusion:

> if a person holds several fees of different lords and is impleaded by any one of them, he should receive the summons at the fee or whatever it is that he holds of that, wherever it might be, not at another lord's fee.[18]

How did a tenant, who "holds several fees of different lord", perform services to different lords simultaneously? Of course the tenant did not do so. This evidence can be used as a firm counter-argument to the traditional conception of seigniorial world as an extremely closed unit, as Stenton proposed. Moreover, the system was sufficiently open that tenants could seek counsel and aid outside the honor reasonably and lawfully when accused by their lord. As the author of *Leges Henrici Primi* points out that:

> In other cases an accused person may seek counsel and obtain it from his friends and relatives. (no law should forbid this), in particular the advice of those whom he brings with him or invites to attend his plea.....[19]

A recent debate about bastard feudalism strengthens my assertion. The debate was generated by Peter Coss's article entitled "Bastard Feudalism Revised", and the vigorous objections made by both David Crouch and David Carpenter.[20] The main

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18. Ibid. 41.3, p.147.
19. Ibid. 46.4, p.157.
20. Coss, "Bastard Feudalism Revised"; D.Crouch, "Debate: Bastard Feudalism Revised", *Past and Present*, vol.131 (1991), pp.166-177; D.Carpenter, "Debate: Bastard Feudalism Revised", *Past and Present,* vol.131 (1991), pp.177-189.

aim of Coss's article is to convince his readers that twelfth century England was an honorial society in which the relationship between a lord and his followers was intimate. In many ways, Coss repeats the ideas of Stenton.[21]

Disagreeing with Coss's dating of the decline of the honour between 1180 and 1230, D. Crouch argues persuasively that as early as the beginning of the twelfth century, the honour was already in a process of decay as a result of the drying up of land resources. As land become scarce, tenants tended to look for new patrons outside the honour, while lords also created affinity with other men outside the restriction of the honourial frontier. His conclusion is that "honorial integrity was never absolute in England."[22] D. Carpenter also remarks the internal problem of the honour, and contends that the lord was willing to break the "honourial strait-jacket" in order to get good services from other men.[23]

Another work which strongly challenges Stenton's model of honourial society is the statistical illustration of Mowbray and Percy charters by Hugh M. Thomas. His study shows that retinues of both the Mowbray and Percy families were fluid, and this fluidity was accompanied by a "steady decline in the participation of established tenants" in both lordships.[24] Indeed, both lord and tenant welcomed the fluidity,

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21. Coss, "Bastard Feudalism Revised", pp.27-64.
22. Crouch, "Debate: Bastard Feudalism Revised", p.170.
23. Carpenter, "Debate: Bastard Feudalism Revised", pp.185-187.
24. Thomas, *Vassals, Heiresses, Crusaders, and Thugs*, pp.20-24.

according to him, as it allowed them to search out new links outside the wall of the honour.[25] As the heir's right of inheritance was well secured over the course of generations,[26] the personal ties between lord and tenant inevitably were weakened. Therefore, the internal contradictions of the honour, namely "the permanence of landholding and the impermanence of human ties", already was contributing to the transformation of honourial lordship well before the inception of Angevin legal reforms.[27]

Although it may seem over-pessimistic to suggest that the honour was in a state of absolute dissolution in the first half of the twelfth century,[28] Stenton's picture of seigniorial lordship cannot be accepted without a detailed reexamination of the cross-honorial ties. On the other hand, in discussions of the complex relationship between lord and tenant, we should not ignore royal intervention in the fossilized skeleton of the honour. The *Pipe Roll* of 1130 is one important source for our discussion of royal influences in tenurial relation. It records many cases of the settlement of disputes between a lord and his tenants under the direction of the King. For example, William, son of Alured demanded that his lord should keep the agreements that he had made with his men; Robert of chelsing complained that his lord might not bestow his

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25. Ibid. pp.29-32.
26. See Chapter 1.
27. Ibid. pp.33-58.
28. As the author of *Leges Henrici Primi* said: "Every lord may summon his man so that he may impose his justice on him in his court.", 55.1, pp.171-173.

service without his consent.[29]

The evidence of royal intervention in internal disputes over of the honour offers a clue to some crucial issues. For example, can we conclude that the loose structure of the honour offered an opening for the growth of royal jurisdiction? First, I stress that the relations between the honour's court and the royal court should not be oversimplified into a kind of rivalry and competition. Nor can we regard the weaknesses of the honour system as the sole reason for the growth of royal jurisdiction. To answer this problem, and thereby illustrating the historical roots of the Common Law, it is useful to investigate public authority in the early twelfth century.

III

The first half of the twelfth century was remarkable for the prodigious enlargement of the administration of justice in Anglo-Norman England. The expansion went well beyond Capetian France where royal administration was not in a position to compete with the vigorous private jurisdiction. The stimulus for the growth of the royal judicial administration was a natural consequence of a combination of Anglo-Saxon kingship with the growing authority of the Norman duke. The process was accelerated enormously by the conquest and colonization of

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29. *The Pipe Roll*, p.68.62; J. A. Green, *The Government of England under Henry I* (Cambridge: Cambridge University Press, 1986), p.104; for detail, see. S. L. Mooers, "A Reevaluation of Royal Justice under Henry I of England", *American History Review*, Vol.93 (1988), pp.340-358.

England.[30] The Conquest increased considerably the authority and landed properties of the Norman duke and his followers. Profound consequences of the Norman military victory at the highest level of society included the substitution of the Norman aristocracy for Anglo-Saxon magnates, and the growth of a strong king exerting a wide range of rights over the conquered realm.

The royal writs and charters issued by William the Conqueror and his sons are among the valuable first-hand resources for our investigation into royal activities after the Conquest. For the most part royal writs record the grants and confirmation of land authenticated by the Norman Kings. The process of dissolution of old English society and the reorganization of the upper layer by the Conqueror inevitably engendered an unprecedented confiscation and redistribution of landed wealth lasting for a few generations. The frequency of land transactions among laymen, including secular endowments of certain religious houses and the exchange of land between parties would have provoked unmanageable unrest had it been conducted without the control of the Norman Kings. A most interesting point is that the approval of King seems to have been necessary for the transfer of land, reinforcing the legitimacy of such actions. People at all levels hold land, directly or indirectly, of the king as his vassal in a sense.

The power of the King in relation to other magnates was greatly increased

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30. W. L. Warren, *The Governance of Norman and Angevin England 1086-1272* (Edward Arnold, 1987), pp.15-22.

because of the Conquest. R. Fleming's study of both Scandinavian settlement and the Norman Conquest illustrates in detail the changing relation between Kings and magnates. She points out that the great magnates, created after Danish settlement and possessed numerous compact estates, were driven out by the Norman Conqueror. The Norman Kings was the greatest landowner in the realm.[31] If people held land of the crown, then it was the Kings to whom they turned to settle disputes as to land possession.

The surviving royal writs reveal active role played by the Kings in dealing with land disputes. A considerable proportion of these writs contain the King's mandate to restore land due to illegal occupation.[32] These writs demonstrate that as early as the late eleventh century, the Norman Kings was the fountain of justice as a result of the growth of the King's authority. This contributed to the development of the Common Law in the twelfth century.

It has been argued that the Norman rulers left no mark in the field of legislation, as "[t]he Norman were without learning, without literature, without written law."[33]

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31. R. Fleming, *Kings and Lords in Conquest England* (Cambridge: Cambridge University Press, 1991).
32. *Regesta I* nos. 50, 88, 98, 156, 157, 177, 186, 194, 284, 297, 312, 330, 351, 383, 395, 396, 399, 407, 413, 426, 427, 447, 449, 464, 468, 469, 481; *Regesta II* nos. 508, 511, 521, 530, 543, 545, 546, 556, 560, 561, 562, 564, 574, 575, 581, 582, 587, 589, 590, 597, 598, 603, 614, 622, 633, 670, 688, 699, 723, 731, 756, 899, 997, 1001, 1002, 1032, 1087, 1131, 1142, 1144, 1147, 1181, 1186, 1188, 1235, 1254, 1262, 1262a, 1263, 1346, 1416, 1509, 1510, 1552, 1566, 1610, 1612, 1637, 1662, 1710, 1754, 1878, 1881, 1915, 1934.
33. Richardson and Sayles, *Law and Legislation from Ethelberht to Magna Carta,* p.30, esp. Chapter II, pp.30-53.

But the Norman period in many respects was of vital importance in the development of constitutional and legal norms. Based on the institutional legacy of Anglo-Saxon England, Norman rulers inaugurated an integrated administration of justice, linking up the central law court with local administration of justice.

The alteration from Witen to *Curia Regis* (King's court) after 1066 had significant implications for the growth of royal judicial power. *Curia Regis*, composed chiefly of members of the royal household, assisted the King in settling disputes amongst tenants-in-chief, and to set about other judicial matters. Anglo-Saxon Kings were accustomed to employ their relatives and members of their entourages as advisers, who formed Witan. Likewise, in the Norman era, a group of prominent men gathered around the monarch. Odo of Bayeux, Archbishop Lanfranc and Bishop Geoffrey of Coutances, William Fitz Osbern were among the important figures in the *Curia Regis* of the Conqueror.

Odo, half-brother of William I, witnessed more than fifty royal writs, acting as a justiciar with a large range of judicial power in the King's absence. For instance, in 1080 King William authorized Odo to embark upon an inquiry into the liberties of the Ely monastery.[34] Other writs issued directly by Odo attests to his eminent position as a chief justiciar in the reign of the Conqueror. A notification by him to Bishop Wulfstan,

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34. *Regesta I,* no.122.

and to Urse, Durand and Walter, the sheriffs of Worcestershire and Gloucestershire and warwickshire required them enforce William I's order to restore to the Church of Evesham and to Abbot W[alter] a large amount of land scattered over seven shires.[35] Odo, thus, assumed responsibility for handling land disputes in king's name. It is no wonder that he is regarded as "the best potential justiciar-figure in the Conqueror's England."[36] After the death of William Fitz Osbern in 1071, who is believed to have been left behind with Odo to maintain the Conquest, rose to single pre-eminence.[37]

The written evidence for Lanfranc's governmental activities in post-Conquest England is also impressive. There are six extant letters, dealing with the rebellion of the three earls in 1075, that describe him as "justiciar of England".[38] His chief duty was to transmit royal orders.[39] His importance as a royal justice is shown by a plea respecting the land of Ely, in which he, together with Geoffrey of Coutances, was appointed ad hoc as a judge to try the plea. Further evidence appears in the words of King William who specifically said:

> if Remigius [Bishop of Lincoln] wishes to go to law about this, let him plead as he would have done in the days of king Edward, and let the plea take place in your presence.[40]

Bishop Geoffrey of Coutances was treated as a legal expert.[41] A judgement was

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35. Ibid. no.186; also see, nos.75, 99, 101, 169.
36. D.Bates, "The Origins of the Justiciarship", *Anglo-Norman Studies* IV (1981), p.2
37. Ibid.
38. *Regesta I,* nos.78, 79, 80, 81, 82, 83.
39. Bates, "The Origins of the Justiciarship",p.5.
40. *Regesta I,* no.154; also see nos.155, 156, 157.
41. F.West, *The Justiciarship in England 1066-1232* (Cambridge: Cambridge University Press, 1966),p.7

given in the Curia Regis of King William in 1076 under the presidency of Geoffrey of Coutances concerning a mill which was adjusted to belong to the Abbey of Mont Saint Michel.[42] He was one of the pre-eminent figures in the King's court actively participating in the cases before the Curia Regis.[43]

In the reign of William II (r.1087-1100), the most important royal justice was no doubt Ranulf Flambard, who dominated the royal administration with the support of the King. Henry of Huntingdon describes Ranulf as "all England the judge, but the perverter [of justice], and the tax-collector, but despoiler."[44] Ranulf's role in exploiting the various sources of revenue for royal advantage is widely known.[45] Information from royal writs addressed to Ranulf reveals that the justice of the realm, and other relevant administrative tasks were within his control.[46] R. W. Southern argues that Flambard was the friend of King William II. If so, then their partnership can almost be considered "among the great partnership of history between a king and his minister."[47] It was the reign of William Rufus, as Southern puts it, that witnessed the emergence of a small group of officials acting together in royal administration under the leadership of Ranulf Flambard. He was "the first outstanding successful

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42. *Regesta I,* no.92.
43. Ibid. no.132.
44. Henry of Huntingdon, *Historia Anglorum*, ed and tran. D. Greenway, pp.446-447.
45. R. W. Southern, "Ranulf Flambard", in *Medieval Humanism and other studies* (Basil Blackwell, 1984), pp.183-205.
46. *Regesta I,* nos.389, 399, 419, 422.
47. Southern, "Ranulf Flambard",p.187.

administrator in English history."[48]

The growing domination of a very small group of ruling families with the King standing at the head of the ruling class was of vital importance in the formation of a strong administrative structure. One should not, however, exaggerate the constitutional achievements of eleventh-century England. The extant evidence does not reveal an elaborate and routine administrative system of justice in the reigns of the first two Norman Kings.

A basic question should be answered before we attempt to assess the significance of the Norman period in the development of the judicial administration: to what extent was the King's court a supreme court of appeal available to a large proportion of population, including not only tenants-in-chief but also subtenant. A great deal of evidence demonstrates that the King played a decisive role in settling disputes of all kinds among all ranks of people. From time to time a royal chancellor records that it was "in the presence of the king or his justiciar" that a final agreement was reached between the parties concerned. An interesting case is the prolonged dispute between Archbishop William of Rouen and Abbot Gilbert of St.Wandrille over the possession of ordeal iron. The case was ultimately settled only before the King.[49]

Nevertheless, the evidence available shows that the King's court in the late

48. Ibid. pp.188-199; *Regesta I,* nos.337, 387, 416, 418, 422.
49. *Regesta I,* no.146a; also see, nos. 64, 65, 78, 92, 118, 120, 123, 132, 207, 220, 341, 342, 349, 423.

eleventh century was a court of appeal, accessible only to the important tenants-in-chief.[50] There is no example of the transfer of a case from a lord's court to a higher court, or the King's court, as a result of a complaint of defective justice made against lords until 1100.

Crucial alterations occurred in the administrative structure of the realm during the reign of Henry I, especially after the " English Conquest of Normandy" in 1106.[51] The most characteristic innovation of the reign was the appearance and development of the Exchequer that chiefly dealt with financial and judicial matters, and operated under the supervision of a definite group of officials or barons under the leadership of Roger of Salibury. There were three writs issued by Henry I to the barons of the Exchequer and Roger.[52] The acquisition of Normandy enormously increased the business of the royal administration, prompting Henry I to delegate a regent to rule the realm when he was abroad. Roger of Salisbury, who witnessed considerably more royal writs more than Queen Matilda had, assumed the role of handling royal administration, and was given the title of in royal writs "procurator of Henry I" and "regent".[53] Royal writs issued directly by him are numerous.[54]

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50. Pollock and Maitland, *The History of English Law*, p.108.
51. Richardson and Sayles, *The Governance of Medieval England from the Conquest to Magna Carta* (Edinburgh, 1963), pp.152-172; Hollister and Baldwin, "The Rise of Administrative Kingship: Henry I and Philip Augustus", pp.865-905; Stenton, *English Justice between the Norman Conquest and the Great Charter 1066-1215,* p.59.
52. *Regesta II,* nos. 963 lists Roger as witness; also see, nos.1514, 1741.
53. Ibid. nos.1471,1472.
54. Ibid. nos.1042, 1324, 1471, 1472, 1614, 1682, 1977, 1989 ; also see, Hollister, "The Viceregal

About Roger's influence in Norman England, Anglo-Saxon Chroniclers said: ".....the bishop of Salisbury was strong and controlled all England.....",[55] and again ".....he (Henry I) went over to Normandy and committed all England to the care and government of Bishop of Salisbury."[56] Henry of Huntingdon also describes him as "justice of all England and second to the king".[57] Richardson and Sayles even argue that Roger was the first man in Norman England holding the formal office of justiciar.[58]

Nevertheless, it must indeed be wrong to think of Roger holding any such official title, as there is no evidence to support this argument.[59] Whether Roger was, in fact, the first justiciar or not, he and the barons of the Exchequer were intimately connected with the initial process of the centralization in administration of justice during the years of Henry I. The 1130 *Pipe Roll*, recording litigation of various kinds and judgements given at the Exchequer court, shed light on a growing tendency towards specialization in financial and judicial matters within the Exchequer.[60]

J. Campbell has put forward the provocative idea that pre-Conquest England was

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Court of Henry I", in *Law, Custom, and the Social Fabric in Medieval Europe : Essays in Honor of Bryce Lyon,* ed. Bernard S. Bachrach and David Nicholas, (Western Michigan University, 1990), pp.131-144.

55. *The Anglo-Saxon Chronicle*, ed. D. Whitelock and D. C. Douglas, p.189.
56. Ibid.p.190.
57. Henry of Huntingdon, *Historia Anglorum*, p.471.
58. Richardson and Sayles, *The Governance of Medieval England from the Conquest to Magna Carta,* pp.156-172.
59. West, *The Justiciarship in England*, p.13-23; Hollister and Baldwin, "The Rise of Administrative Kingship: Henry I and Philip Augustus"; Le Patourel, *The Norman Empire*, pp.121-172; Green, *The Government of England under Henry I,* pp.38-50.

a well-governed state, possessing a comprehensive system of administration, which enabled the Anglo-Saxon monarchs to manage the realm more regularly. Twelfth-century England made significant steps along the path of centralization and institutionalization. The Exchequer, which had its origin in the pre-Conquest period, was one of the administrative achievements.[61]

The *Curia Regis* sitting at the Exchequer was still variable in composition, but the editors of *Regesta Regum Anglo-Normanorum* show us some signs of professionalization among the personnel of the Exchequer. Personnel of the Exchequer included the Archbishops of Canterbury and York; the Bishops of Chester, Exeter, Lincoln, Salisbury, and Winchester; the Chancellor; the Count of Meulan; the Earls of Gloucester and Warwick; William Bigod, Geoffrey de Clinton, Ralph Basset, Alfred of Lincoln, William de Pont de l'Arche, Geoffrey Ridel, and others.[62]

Of these, Ralph Basset, Ralf Basset, and Geoffrey de Clinton can be treated as permanent officers at the Exchequer court. They were from time to time appointed as *ad hoc* judges to hear pleas, or along with other barons, to give judgement in the king's court.[63] If there was a routine administrative structure, operated by a small group of officials under Ranulf Flambard, this was even more true of the emerging of

60. Mooers, "A Reevaluation of Royal Justice under Henry I of England", pp.340-358.
61. J. Campbell, "The Significance of the Anglo-Norman State in the Administration History of Western History", in *Essays in Anglo-Saxon History* (London: Hambledon Press, 1986), pp.171-189.
62. *Regesta II,* xviii.

"quasi-professional justices" at the Exchequer court in which Roger of Salisbury acted in somewhat the same role as the officer who later would be designated justiciar.

The extent of judicial centralization under Henry I is still, however, a focal point of controversy, though ample evidence supports the assertion that the reign of Henry I witnesses the increasing importance of the King's court as a supreme tribunal exercising a wide range of judicial power over many parts of the realm. The Exchequer was still an *ad hoc* body, not a regular, arrangement, and it was not until the late twelfth and early thirteenth centuries that it developed into a regular institution with a group of professional justices.[64]

There are more than one thousand five hundred royal writs that have come down to us, but only three writs, two in England and one in Normandy, can be used as an illustration of the Exchequer hearing litigation unconnected with its financial functions during the reign. The first one is a royal precept of 1108 that orders the Bishop of London to "do full right" to the Abbot of Westminster concerning the men who had intruded into his church of Wennington with arms at night. This writ orders the "barons of the Exchequer" (*barones mei de Scaccario*) to do justice if the Bishop

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63. Ibid. nos.769, 1000, 1032.
64. P.Brand, " '*Multis Vigiliis Excogitatam et Inventam*': Henry II and the creation of the English Common Law", *Haskins Society Journal*, Vol.2 (1990), pp.206-209. The development of the Common Bench gradually out of the Exchequer court is still controversial, see R. Turner, "Origins of Common Pleas and king's Bench", in *Judges, Administrators and The Common Law in*

fails to do so.[65] A suit before the Barons of the Exchequer records that Herbert Abbot of Westminster proved his title to the lands of Parham [co. Sussex] and Mapelford against Herbert fitz Herbert with [Roger] Bishop of Salisbury as a witness.[66]

There can be no doubt that the centralized administration of justice, and the development of the Exchequer as a general court of law still stood at preliminary stages of their history. It would be equally inaccurate, therefore, to play down the growing specialization and formalization of the judicature in Henry I's time, which present a striking contrast to the achievements of royal judicial centralization of medieval France.

In a seminal comparative study of royal justice and public order in medieval England and France, Richard W. Kaeuper points to the fact that public authority was bankrupt in France after the wave of invasion and civil war that led to the rise of political fragmentation. In contrast, late eleventh-century England was still "a relatively united realm ruled by a functioning Germanic monarchy of a Carolingian type."[67] The development of the Exchequer court under a strong King and his barons supports the observation of Kaeuper.

Angevin England (London: Hambledon Press, 1994), pp.17-34.

65. *Regesta II,* no.1538.
66. Ibid. no1879.
67. *Regesta II,* no.152; also see J. R. Strayer, *On the Medieval Origins of the Modern State* (Princeton: Princeton University Press, 1970), pp.12-56.

In the early twelfth century, Exchequer was in some sense a general court accessible to obscure individuals, and for the settlement of dispute of minor importance. In a precept, Henry I ordered Nicholas the Sheriff of Staffordshire "to be at the King's court on the first day of Lent, if he wishes to claim the land of Coton-in-the Elms against the Abbot of Burton."[68] In another case, the church of Ghent, Abbot Ansbold and the monks were to have full possession of their land of Lewisham, as the abbot had proved his title in the King's court and in the King's presence against Robert of Bampton, who claimed it.[69] Henry I also was involved in another dispute between St.Martin of troarn and Roger de Gratapanchia respecting a marsh [i.e. Le Marais-Sur-Dive] which the latter claimed. The King and his Curia gave judgement in favor of the monks of Troarn in accordance with the count's evidence.[70]

Henry I also dealt with conflicts between lords and their tenants. In 1105, Wichenoc, a monk of St. Horent, appealed to King Henry I, complaining that Alvric the reeve of Andover had done many wrongs to the monks of St. Florent.[71] In the same year, Henry I accepted a solicitation from Abbot Faritius against Robert Mauduit, who had failed to do service to the Abbot.[72]

The accessibility of the King's court in the Norman period was indeed closely

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68. *Regesta II,* no.766.
69. Ibid. no.934.
70. Ibid. no.1570; for other writs in which the involvement of the king's court in the land actions, also see, nos. 875, 934, 944, 1283, 1451, 1509, 1629, 1689, 1938.
71. Ibid. no.687.

related to the mode of governing by the Norman rulers, who ruled the realm by itinerary. Thank to a detailed study of Henry I's itinerant movement by W. Farrer, our knowledge of royal itinerancy has been greatly increased.[73] *Curia Regis* was itself an integral part of the itinerant government. No doubt much of the work of Henry I's government was done by members of his household and his court who accompanied him on his travels.[74] The widespread reach of royal judicial power in the early twelfth century can be explained, in large part, by the practice of rule by itinerary.

IV

In the local administration of justice, Norman Kings inherited from the Anglo-Saxon rulers a sound network of local institutions, and improved it into an elaborate and strong system, in the localities, thus extending the judicial power of the King and diminishing the diversity of local customs. As a result, the century of Norman rule was the milestone in the formation of a set of county customs common to the realm.

Twenty year after the Conquest, England was already a well-organized medieval state based on a local administrative unit, known as the shire and, its subdivision, the hundred, or the wapentake in the Danish districts. Shiring was a remarkable feature of the extension of West Saxon rule, beginning in the tenth century.

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72. Ibid. no.697; for other examples, also see, nos.576, 586, 789, 979,1065, 1234, 1438a, 1543, 1731.
73. W. Farrer, "An Outline Itinerancy of King Henry the First", *English Historical Review*, Vol.XXXIV,(1919), pp.303-82, 505-79.
74. Le Patourel, *The Norman Empire*, pp.121-172.

Under Norman rule, the shire and hundred was transformed into a subordinate administrative unit of royal judicature. Courts in the shire and hundred, met twice a year and once a month, respectively,[75] alongside the seigniorial courts and manor courts held by landlords. This was the indispensable machinery on which the king relied to mediate conflicts as to proprietary action.

Generally speaking, the sheriff [shire reeve], the local agent of the Kings in shire, was entrusted with responsibility for convening the shire court to hear land pleas. The case of Abbot Ailsi [of Ramsey], who claimed the tenement of Northampton and proved his right in the shire court, is a typical example of these kinds of cases in the reign of the Conqueror. In this case, William [of Cahaignes], sheriff of Northampton, was called for to cause the abbot to have Isham (as his tenement).[76] On occasion, the shire court was charged by the King's entourage, or by leading men in the locality, to try a land action. Gosfrid Bishop of Coutances, at the King's command, was delegated as itinerant justice to hear a suit between Bishop Wulfstan [of Worcester] and [Walter] Abbot of Evesham over three hides in Bengeworth and houses in the city [of Worcester].[77]

By the reign of Henry I, however, the fabric of local administration was coming

75. *Leges*, 7,4, p.101.
76. *Regesta I, no.*288b; for examples of shire court functioning as law court charged by sheriff for the settlement of land dispute, see, nos. 321, 383, 448; *Regesta* II, nos. 651,1539; for the same function by hundred, see, *Regesta* I nos.213, 464, 449.
77. *Regesta* I no.221.

apart.[78] In an Ordinance, Henry I expressed his concern about the enlargement of the sheriffs' power in the shires:

> know that I grant and order that henceforth my shire courts and hundred courts shall meet in the same places and at the same terms as they met in the time of king Edward, and not otherwise. And I do not wish that my sheriff should make them assemble in different fashion because of his own needs or interests. For I myself, if ever I should wish it, will cause them to be summoned at my own pleasure, if it be necessary for my royal interests.[79]

Further, Henry I sought to clarify the relationship of various law courts in order to maintain royal judicial control in the same Ordinance:

> And if in the future there should arise a dispute concerning the allotment of land, or concerning its seizure, let this be tried in my own court if it be between my tenants-in-chief [*dominicos barones meos*]. But if the dispute be between the vassals of any baron of my honour, let it be held in the court of their common lord. But if the dispute be between the vassals of two different lords let the plea be held in the shire court ...... And I will and order that the men of the shire so attend the meetings of the shire courts and hundred courts as they did in the time of King Edward.[80]

Indeed, Henry I even intended to strengthen the influence of the county court in the community, as a subordinated royal court, "competent in various classes of land cases".[81] On the other hand, the King tried to strengthen central control over the district by dispatching royal justices to supervise the judicial administration, and by establishing a central financial institution – the Exchequer, to manipulate the revenues of the sheriffs. Both were closely related to the centralization of Henry I's government that will be discussed below.

Another distinctive feature of the local administration of justice in the reign of Henry I, was the joint-county assembly. *Leges Henrici Primi*, 7.5, prescribes that:

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78. Warren, *The Governance of Norman and Angevin England 1086-1272*, pp.69-71.
79. *English Historical Documents II*, pp.433-4.
80. Ibid.

> if any proceeding in the individual hundred court have, through shortage of judges or for any other reason, to be transferred to a court of two or three or more hundreds, they shall be so adjourned for settlement by a just determination.[82]

A report of a trial concerning the liberties of the abbey of Ely, held at Kentford, Suffolk, indicates that the plea was investigated at an assembly consisting of "the shire courts of the three adjacent shires."[83] Another suit, between Abbot Faritius and the monks of Abingdon, involved seven other counties and the men of three counties [Oxford, Berks., and Buck.?] attended the assembly. R. Fleming, in her survey of Domesday inquest, asserts that the practice of joint-assemblies predated 1086 by a century or more, and was central in maintaining order and settling disputes. It was under the Norman rulers, however, that the practice was effectively used as a means of intensifying their judicial control over the localities.[84]

Before 1066 local courts were merely assemblies of great magnates and thegns, quarrelling and bargaining among themselves, rather than public courts administrating public law. The Norman settlement, according to Fleming's analysis, can be understood as a stimulus for the amplification of the King's power within local communities. The tenurial crisis engendered by the Conquest prompted William the Conqueror to take actions to prevent land disputes from burgeoning into nation-wide turbulence. The county courts served as institutions assisting the Conqueror to solve

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81. *Regesta* II, no.892.
82. *Leges*, p.101.
83. *English Historical Documents II*, p.452.
84. R.Fleming, *Domesday Book and the Law*, pp.11-34.

pressing problems. The King's deepening involvement in local courts can also attributed to the Domesday inquest of 1086, which required the hasty assembling of every public court in England.[85]

Leges Henrici Primi, 7.1, decrees: "the general courts of the counties should meet at fixed places and terms and at an appointed time.....", and stresses that they can be called at any time for further meetings, as demanded by "the king's own need or the common advantage of the kingdom".[86] The pervasiveness of royal influence within local communities confirms my belief that Anglo-Norman England was not a state comprised of self-contained seigniorial lordships. The county court in the locality reinforced the tendency for cross-honorial ties, and became the prime focus of social and political life. The author of *Leges Henrici Primi* points out that

> the [county court] meeting shall be attended by the bishop, earls, sheriffs, deputies, hundredmen, aldermen, stewards, reeves, barons, vavassors, village reeves, and the other lord.....[87]

While seigniorial honour remained one of the important bonds of society by the time of the Norman Conquest, it was no longer the only one, exerting predominated influence in English society.

Among the institutional innovations, the introduction of the systematic prosecution of suspected criminals by royal officials in the King's name was of the utmost importance. In the twelfth century, England witnessed a gradual

85. Ibid.
86. *Leges*, p.99.

transformation of the archaic procedure of appeal undertaken by a private plaintiff, and the communal duty of accusation, to a modernized procedure of indictment *ex officio* by royal justices. This can be regarded as the product of a centralizing government a process underway from the twelfth century onward.[88]

Leges Henrici Primi contains some information about this new device of prosecution initiated by the Norman Kings. 6.4:

> .....to the greater confusion of all a new method of impleading is sought out, a new trick for inflicting injury is devised, as if too little damage follows from most harm to most people is valued the most highly.[89]

The phrase "a new method of impleading" refers to the new procedure for the prosecution of criminals. 53.1 asserts that:

> Anyone who, on being summoned by a justice of the king (*iustitia Regis*) in accordance with the law, has failed to come to the county court shall be quality of *ouerseunesse* toward the king, that is, liable to a fine of 20 mancuses in Wessex.[90]

The statement bring a problem needed to be solve: was the *iustitia Regis*, mentioned in the clause, a local official independent of other royal agents such as sheriff? Another passage provides a clue to the problem:

> if anyone is lawfully impleaded by the sheriff or a royal justice in respect of theft, arson, robbery, or similar offences, he is to be subjected by law to a threefold oath to clear himself.[91]

The passage points to the likelihood that there was a local official, who was appointed by the King in the localities, worked at the side of the sheriff.

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87. Ibid.p.99; also see, *Regesta* II, no.1034.
88. R. C. Van Caenegem, "Public Prosecution of Crime in Twelfth Century England", in *Legal History : A European Perspective* (London: Hambledon Press, 1991), pp.1-36
89. *Leges*, p.99.
90. Ibid.p.169.
91. Ibid. 6.6, p.213.

One of the questions invariably posed about the system of public prosecution *ex officio* in Norman England is that whether or not it was intimately connected with the existence of a jury of presentment. N. D. Hurnard believes strongly that there is no ground to assume the introduction of a jury of presentment in Angevin England at the assize of Clarendon in 1166, as F. W. Maitland suggested. Based on the Code of Wantage of Aethelred II (978-1016) C.3, she argues a continuous use of the jury of presentment from late Anglo-Saxon times to Angevin England. The Code decrees:

> And that a meeting is to be held in each wapentake, and the twelve leading thegns, and with them the reeve, are to come forward and swear on the relics which are put into their hands that they will accuse no innocent man nor conceal any guilty one.[92]

This clause is similar to the twelve presenting jurors of the Assize of Claredon. On this basis, she tries to convince her readers, in accordance with the *Pipe Roll of 1130* and *Leges Henrici Primi*, that it is likely that a jury of presentment existed in Norman England as an institution of the communal duty of accusation. Numerous references to juratores in the 1130 *pipe roll*,[93] as she argues, can be considered to refer to members of a presenting jury. In addition, *Leges Henrici Primi* 7.7 and 8 mention the attendance of the reeve, the priest, and four men from each villa in hundred and county courts. She continues to speculate that "it is difficult to understand this requirement except on the assumption that village representatives were to make

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92. *English Historical Documents I* 500-1042, p.403.
93. *Pipe Roll*, pp.28, 34, 69, 103.

presentment."[94]

Nevertheless, her evidence is not strong enough to justify an assumption that the Norman Kings used a jury of presentment, except one reference in *Leges Henrici Primi* 92.11 that decrees which an accusation must made on the oath of twelve men, such as accusing jury. Not only do the statements of Chroniclers, but also legal treatises fail to mention the accusating jury.[95] Her thesis rests on a wrong interpretation of the meaning of *Leges Henrici Primi*. The theory of a continuous development of the jury of presentment, from Aethelred II to Henry II, is not convincing.[96]

The Norman Kings, mindful of public order, employed a local justiciar, if not an accusing jury, to undertake the new procedure of public indictment.[97] Substantial research into the history of the local justiciar was a carried out by H. A. Cronne, who describes the office as part and parcel of the Anglo-Norman legal systems.[98] The increase of legal bushiness, brought about by the Norman Conquest, made it necessary to employ a variety of expedients, to overcome the problems of local administration.

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94. N. D. Hurnard, "The Jury of Presentment and the Assize of Clarendon", *English Historical Review*, Vol. LVI (1941), p.383.
95. *Leges*, p.291.
96. Caenegem, "Public Prosecution of Crime in Twelfth Century England", p.5.
97. Ibid. pp.1-36.
98. H. A. Cronne, "The Office of Local Justiciar in England under the Norman Kings", *University of Birmingham Historical Journal*, VI (1957), pp.1-23, esp.18-38.

The introduction of the local justiciar as the main agent of royal government alongside the sheriff, occurred in the time of the Conqueror and had become a well-established institution by the end of William Rufus's reign. It proved to be a most effective and successful innovation. It was only during the reigns of Henry I and Stephen that the local justiciar was established as a regular institution. The earliest specific reference to a local justiciar occur in the reign of Henry I, in a notification to M[aurice] Bishop of London and Roger de Valognes and his justiciars, barons, citizens, and lieges of London for confirmation of lands given to the church and the canons of St. Martin le Grand in perpetuity.[99]

Ralf and Ralph Basset, two of the permanent members of the *Curia Regis*, were appointed time after time by Henry I as local justicars in shires.[100] The employment of royal justice in the local administration of justice was not confined to England. The phrase "the justices of Normandy" appearing in the royal writs, provides proof of the existence of the duke's justiciars in the duchy.[101] The authority of the English Kings in Normandy is beyond the scope of this article, but the widespread use of royal justices on either side of Channel was a fundamental element of centralized government under Henry I.

It was probably to remedy an unsatisfactory situation in the districts, and to

99. *Regesta II,* no.556.
100. Ibid. nos.769, 1032, 1094, 1129.

supplement the local justiciars that itinerant justices were commissioned from the *Curia Regis* by the King to hear a range of pleas in several different counties. The evidence about the activities of these itinerant commissions is scanty, and surviving information fails to distinguish shire justiciars from itinerant justices. The practice of dispatching royal justices from the central administration to the shires is not novel. *Domesday book* is itself a product of the work of travelling justices who were mandated to investigate disputes over land ownership in order to raise revenue more effectively. However, these were only established on a firm foundation during the time of Henry I. As R.C. Van Caenegem said:

> we are well informed about the rise of the body of central justices. It really began under Henry I when from the *Curia Regis* some curiales were sent on occasional eyres (=*itinera*, journeys) through a certain number of counties to hold pleas – mainly crown and forest pleas – and to supervise and supplement the work of the local courts.[102]

Nevertheless, the visiting justices of Henry were not comparable to sessions of the general eyre under Henry II which served as part of a countrywide scheme of visitations extending central control over the whole county on a shire by shire basis, within a particular defined period of time.[103] The travelling justices of Henry I acted only as presiding officers, and did not pass judgement at the sessions, as the general

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101. Ibid. nos.1216, 1155, 1695, 1696,1897.
102. Caenegem, *The Birth of the English Common Law*, reprint, (Cambridge: Cambridge University Press, 1989), p.20; also Mooers, "A Reevaluation of Royal Justice under Henry I of England"; Hollister and Baldwin, "The Rise of Administrative Kingship: Henry I and Philip Augustus".
103. W. L. Reedy, "The Origins of the General Eyre in the Reign of Henry I", *Speculum* Vol, 41 (1966), pp.688-724.

eyre of the later twelfth and the thirteenth centuries did.[104]

There can be no doubt, however, that the itinerant justices of Henry I broadened royal control of judicial matters in the shire. Henry of Huntingdon describes a group of *Curia Regis*'s members, namely, Ralph Basset and his son Richard, Geoffrey Ridel, and Geoffrey de Clinton, as "justices of all England."[105] The Anglo-Saxon Chroniclers were impressed by the wide activities of Ralph Basset in Leicestershire: "[Ralph Basset] hanged there more thieves then ever had been hanged before; that was in all forty-four men in that little time; and six men were blinded and castrated."[106]

The 1130 Pipe Roll also records the activities of these justices of Henry I: Geoffrey de Clinton took charge of eighteenth counties;[107] Ralf Basset of ten counties,[108] while the activities of Aubrey de Vere reveal the complex relationships between sheriff, local justiciar, and itinerant justice in the localities. Vere, with Richard Basset, was the sheriff of Norfolk,[109] and they were addressed in royal writs

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104. Brand, " '*Multis Vigiliis Excogitatam et Inventam*': Henry II and the creation of the English Common Law", pp.197-222.
105. Henry of Huntingdon, *Historia Anglorum*, p.615.
106. *The Anglo-Saxon Chronicle*, 1124, p.191.
107. *Pipe Roll*, pp.8-10 (Nottingham, Durby); p.17 (wilts) ; p.26-31 (Northumber, York) ; p.50 (Surrey) ; pp.55-56, 59 (Essex) ; p.65 (Kent) ; p.69 (Sussex) ; pp.73-4 (Stafford) ; p.83 (Northants) ; pp.92-3, 99 (Norfolk); p.101(Bucks); p.103(Bedford); p.106 (Warwick); p.112(Lincoln); pp.123-4 (Berks) ; p.47 (Huntingdon)
108. *Pipe Roll*, p.9 (Nottingham, Derby); pp.18-9 (Wilts); p.31(York); p.49(Huntingdon); p.92 (Norfolk); p.96 (Suffolk); pp.110-114 (Lincoln); p.123-4 (Berks); p.145(London) ;
109. J. A. Green, *English Sheriff to 1154* (HMSO: London, 1990), p.61.

as the "justices of Norfolk".[110] It was not impossible for a sheriff to function as the local justiciar of the same shire. More interesting is the fact that he also administered eleventh counties.[111] Professor C. W. Hollister, thus, calls him "shire-in-eyre".[112] A man could be employed simultaneously as the local justiciar, the itinerant justiciar, and the sheriff if the king thought fit. The dispatching of itinerant justices by the Kings, *ad hoc* though it was, represented the increasing links being made by the central government with the local administration.

V

The extension of royal judicial control over criminal and civil pleas after 1066 stemmed from the concern of William the Conqueror and his sons for the maintenance of peace and order. The amplification of royal judicature contributed to the fusion of a variety of local customs into the Common Law system. Le Patoural, in his *The Norman Empire,* affirms that the idea of an administration of justice, which developed in England after the Conquest was a Norman importation.[113] He considers the growth of the "royal authority" of the Norman duke an important element in the extension of his control over the justice of the duchy before the Conquest.[114]

Whether or not the duke's authority was "royal" is controversial, but the record

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110. *Regesta II,* nos.1714, 1772, 1988.
111. *Pipe Roll,* pp.31, 43, 52, 81, 90, 100.
112. Hollister and Baldwin, "The Rise of Administrative Kingship: Henry I and Philip Augustus", p.885.
113. Le Patourel, *The Norman Empire,* p.266.

of an inquest carried out by Robert duke of Normandy and William II, King of England into the rights of jurisdiction which William I had in Normandy deserves attention. The record demonstrates how extensive the duke's control was over the pleas of the duchy in both criminal and civil cases. Clauses 6.7 and 8 of *Leges Henrici Primi* offer a starting point for our discussion of the extensive judicial control of the Norman Kings:

> He [William the Conqueror] might punish these who harried or plundered, or committed a breach of the peace in the duke's forests, or made war on an enemy, or mutilated a vassal except by lawful judgement.[115]

As for the jurisdiction of William the Conqueror in Normandy, Orderic Vitalis remarks that:

> Meanwhile king William remained in Normandy, giving all his throughts to establishing an enduring peace in the country. With the advice of discerning men he laid down just laws, gave fair judgements to rich and poor alike, and appointed the best possible men as judges and officials in the provinces of Normandy. He took holy monasteries and their endowments under his protection, granting them royal charters of exemption from unjust exactions. He sent out heralds to proclaim peace for all men, denizens and foreigners alike, and threatened thieves, rebels, and all disturbers of the peace with severe but just punishment.[116]

A breach of the peace was in itself regarded as an offence to the duke, who had the right of jurisdiction to punish those who commit it. The notion of "the breach of the peace" tended to merge with the illegal occupation or deprivation of land after the Conquest of England. As noted earlier, the Conquest dispossessed Anglo-Saxon aristocracies at the top of society, and thus provoked endless disputes as to the

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114. Ibid. pp.266-268.
115. *Leges*, p.316.
116. Orderic Vitalis, *The Ecclesiastical History of Orderic Vitalis,* Vol.II, p.208-209; also see, Le Patourel, *The Norman Empire,* p.239.

ownership of property, rights, liberties, and privileges. Worse still, property disputes were accelerated by a series of succession disputes over the throne throughout the Norman period.

As a result, the maintenance of peace and the mediation of land action were within the jurisdiction of the English Kings, as an arbiter of disputes, an enactor and enforcer of laws. The common phrase used in royal writs to emphasize the King's anxiety for peace of the country is the "king may hear no further complaint", or the "king hears no complaint of default of justice". To suppress the plundering of a great number of religious houses, the King brought many monasteries under his protection, and regarded the robbery of monastery property as "a breach of the king's peace".[117] The King's right of jurisdiction, of course, was not only applicable to the property of religious establishments. It also extended to a variety of criminal and civil pleas. As *Leges Henrici Primi* 10.1 announces:

> These are the jurisdictional rights which the king of England has in his land solely and over all men, reserved through a proper ordering of peace and security: breach of the king's peace given by his hand or writ; Danegeld; the plea of contempt of his writs or commands; the death or injury o his servants wherever occurring; breach of fealty and treason; any contempt or slander of him; fortifications consisting of three walls; outlawry; theft punishable by death; *murdrum*; counterfeiting his coinage ; arson ; *hamsocn* ; *forestel* ; *fyrding* ; *flymenfyrm* ; premeditated assault ; robbery ; *stretbreche* ; unlawful appropriation of the king's land or money ; treasure-trove ; wreck of the sea ; things cast up by the sea ; rape ; abduction ; forests ; the reliefs of his barons ; fighting in the king's troop ; failure to perform burgbot or brigbot or firdfare ; receiving and maintaining an excommunicated person or an outlaw ; violation of the king's protection ; flight in a military or naval battle ; false judgement (*iniustum iudicium*); failure of justice (*defectus iustitie*) ; violation of the king's law.[118]

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117. *Regesta II,* nos.767, 768.
118. *Leges*, p.109.

This statement, together with the record of an inquest discussed above, highlights the proliferation of royal jurisdiction on both sides of Channel. The author stresses that these cases are "the crown pleas of the king", and "do not belong to the sheriffs or his officials or bailiffs in their farms except by definite arrangement beforehand."[119]

Two of the King's pleas, false judgement and failure of justice, mentioned in the clause of 10.1 are important for our understanding of the twelfth century legal procedures in regard to the transfer of cases. The late twelfth century legal procedures stressed the accessibility of the King's courts, *Curia Regis* and county courts alike, in cases of a "default of justice". As *Glanvill* remarks:

> Certain pleas which concern the right, and do not come into the court of the lord king in the first instance, are removed there when the courts of different lords are proved to have made default of right: in such a case they pass to the county court, from which they can be transferred to the chief court of the lord king for various reasons.[120]

The procedure for the transfer of cases from a lord's court to the county court (*tolt*), and from the county court to the King's court (*pone*) was established on a regular basis in the reign of Henry II. Nevertheless, the practice of transfering pleas was not a grand innovation of King Henry II and his advisers, but was a part of the legal tradition from at least the early twelfth century onward.[121] *Leges Henrici Primi*, 33.1a, decrees that

> failure of justice and violent denial to litigants of their right are matters which cause the transfer of cases to the royal jurisdiction or to the judicial authority

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119. Ibid.10.4, p.109.
120. *Glanvill*, xii 1, p.136.
121. Hudson, *Land, Law, and Lordship in Anglo-Norman England*, pp.253-281.

of higher lords.[122]

Mary Cheney affirms that the author of *Leges Henrici Primi* was familiar with the notion of the transfer of cases, as the author uses such technical terms as *transire, pertransire* to explicate the procedure without any other explanation. Thus, even before the accession of Henry II, there existed an ancient procedure of *tolt.*[123]

The procedure of transfer reinforced the legal administrative integration of the country under a common law procedure in which the King's court became the supreme court available to all within the realm. This integration was in turn strengthened by an effective writs system which assumed that royal commands reached down into the local administration and social strata. The Chancery and royal writs, manifesting the remarkable strength and viability of Anglo-Saxon institutions, survived the Norman Conquest, and became secretarial instruments within the administrative machinery of Anglo-Norman England.

After 1066, the office of chancellor was established to handle the business of chancery, which issued royal writs to remedy social evils, such as "defaults of justice".[124] During the Anglo-Norman period, royal writ was no more than an

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122. *Leges*, p.137.

123.M.Cheney, "A Decree of King Henry II on Defect of Justice", in *Tradition and Change: Essays in Honour of Marjorie Chibnall Presented by her Friends on the Occasion of her Seventieth Birthday*, ed. D. Greenway, C. Holdsworth, and J. Sayers, (Cambridge: Cambridge University Press, 1985), pp.183-193, esp.189-190; also see, Hyams, "Warranty and Good Lordship in Twelfth Century England", p. 466.

124.G. Barraclough, "The Anglo-Saxon Writ" *History,* Vol. 39(1954), pp.191-215.

executive writ employed by the king as a swift means of settling disputes.[125] Only in Henry II's reign, could a plaintiff, who alleged that a defendant had acted unjustly and without judgement, obtain a writ of right:

> The king to N., greeting. I command you to do full right without delay to R. in respect of one hundred shillings of rent in such-and-such a vill which he claims to hold of you by the free service, etc. (or by the free service, etc) If you do not do it the sheriff will, that I may hear no further complaint for default of right in this matter. Witness, etc.[126]

There are twelve primitive writs of right which date to Henry I's reign. The earliest one, issued in 1102 by the King, ordered William Malet to restore to the canons of St.Paul's whatever he had taken from them, and decreed that Hugh de Boclande was to do justice in the county court if William Malet failed to do so.[127] The other extant writs also indicate that a sheriff or other royal justice will be delegated to do justice if the addressees fail to do so.[128] The similar formulation of writs of right between Henry I and Henry II is clear evidence that Henry II restored and adopted the old form of writ used by his grandfather, after the civil war during the reign of King Stephen.

On occasion, royal writs regulars ordered that disputes about tenure of land, right, and liberties be settled in accordance with the testimony of "good men" or "lawful men" of one or a few shire within the purview of the sheriff or royal justice.[129] The

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125. Caenegem, *The Birth of the English Common Law*, pp.35-39.
126. *Glanvill*, xii 4 p.138.
127. *Regesta II,* no.572.
128. Ibid. nos.993, 1033, 1115, 1166, 1458, 1495, 1520, 1541.
129. *Fleming, Domesday Book and the Law*, p.34.

process whereby a body of neighbors, often but not always twelve in number, gave a true answer under oath to a question put to them by the royal agent in the community who had summoned them is known as recognition (*recognitum*).

As noted above, N. D. Hurnard's thesis about juries of presentment is not very convincing, but her assertion that oath inquest was fundamental to the procedure of communal accusation in Anglo-Norman England is provable.[130] The evidence for cases of sworn inquest after the Conquest is sufficient. The writ issued by the Conqueror in 1080 ordering Odo of Bayeux, who acted as justiciar in the King's absence, to investigate the liberties of Ely monastery by "the oath of the three neighboring shires" is probably the earliest example of the employment of oath inquest.[131]

Susan Reynolds points out that decision by oath inquest were very common to medieval law in many regions, but the peculiarity of England is that the inquest was undertaken in response to the royal command.[132] The writs of Henry I testify to the validity of her arguments. The hallmark of that reign was royal centralization and formalization, in which the summons of lawful men of the district was an available technique used in settling disputes at the King's disposal.[133]

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130. Hurnard, "The Jury of Presentment and the Assize of Clarendon", pp.396-396.
131. *Regesta I* no.122; also see, nos.129, 284, 288b.
132. Reynolds, *Kingdoms and Communities in Western European 900-1300*, pp.33-34.
133. *Regesta II*, nos. 501, 528, 660, 687, 747, 803, 969, 1049, 1112, 1116, 1166, 1192, 1229, 1341, 1423, 1487, 1505, 1511, 1561.

R. C. Van Caenegem, who argues that the jury of presentment was an important breakthrough in the legal procedure of Angevin England, nonetheless admits that none of the elements in the accusing jury of Henry II (the sworn inquest, with a sheriff empanelling local juries to answer questions of interest to the crown) was new.[134] Obviously, the procedure of transfer *tolt* and *pone*, and the use of oath inquest under the supervision of royal officials stimulated a process of fusion of a variety of legal procedures, and the unification of local administration with central judicature under a common law administration, during Henry I's rule.

None the less, the notion of the King's court as a common law court, overriding local customs and privileges, should not be exaggerated. Henry I's reign was also remarkable as a stage in the extension of ecclesiastical franchise. The religious patronage of the Conqueror and his successors established many privileged lands and religious houses in the country into which no sheriff or other King's official was admitted. There are numerous references in writs and charters to lands granted to monasteries, and often, if not always, these included judicial and financial immunity. Some religious houses, such Battle, St.Edmund, Abingdon, and so on, possessed judicial privileges allowing them to try pleas in their own courts without the intervention of royal officials.

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134. Caenegem, "Public Prosecution of Crime in Twelfth Century England", pp.32-33.

The granting of jurisdiction over various offences (Sake and Soke, infangentheof, and team and toll) by the Norman rulers to Anglo-Norman magnates, laymen and ecclesiastics alike, evidence the continuity of the judicial franchise common to both pre-Conquest thegnage and post-Conquest barony.[135] After the Conquest, William I intended to separate ecclesiastical courts from secular courts in an ordinance issued in 1072:

> no bishop or archdeacon shall henceforth hold plea relating to the Episcopal laws in the hundred court; nor shall they bring to the judgment of secular men any case which concerns the rule of souls. But anyone cited under the Episcopal laws in respect of any case or wrong shall come to the place which the bishop chooses and names, and there he shall answer concerning his case or wrong. Let him do what is just for God and his bishop not according to the law of the hundred, but according to the canons and Episcopal laws.[136]

The conveyance of judicial franchises to monasteries did not necessarily mean that the King lost right of jurisdiction over criminal pleas in these privileged areas. On the one hand, the grant of these privilege and immunities was a royal prerogative. On the other hand, the royal writ reminded privileges houses that as the arbiter of the law the King reserved the right of trying such criminal cases as murder, larceny, and homicide as the pleas of the crown.[137]

Likewise, the principal of "failure of justice" could be applied to remove cases

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135.D. Roffe, "From Thegnage to Barony: Sake and Soke, Title, and Tenants-In-Chief", in *Anglo-Norman Studies*, Vol.12 (1990), pp.157-176.

136.*English Historical Documents II*, pp.604-605; C. Morris asserted that there is no separate spiritual courts found by the ordinance in England, nor can be suggested that the ecclesiastical cause was abruptly removed from the shire court. The establishment of the church court was indeed the work of the twelfth century, see his "William I and the Church Courts", *English Historical Review*, Vol. CCCXXIV (1967), pp.449-463.

137. *Regesta I,* no. 208; *Regesta II,* nos. 593, 687, 738, 986, 1165, 1384, 1434, 1453, 1537, 1636, 1726, 1785, 1789, 1956.

from ecclesiastical courts to the royal court. Henry I announced that if the plea couldn't be decided in the court of St. Martin of Battle, to which Henry I granted judicial franchise, it could be transferred by the abbot to the royal court, where it would be settled in the presence of the abbot and the justiciar.[138] In another writ, the King decrees that if the abbot of Thorny could show that he had not failed to do justice (*defecisse de recto*) to his men, the plea as to the land and corn of Charwelton would be held in the abbot's court.[139]

These evidences reveal that before the time of Henry II royal administration of justice had already been developed and expanded into locality, and, as a result, this largely influenced the jurisdiction of seigniorial lords. Nevertheless, the administrative changes in the reign of Henry II were merely an initial stages in the long-term development of royal administrative system. Therefore, it is necessary to explain the process of this transformation from Henry I to Henry II. As *Leges Henrici Primi* and *Glanvill* provide much useful information about the topic, our discussion will concentrate on a detail comparison between two legal documents.

138. *Regesta II,* no.529.
139. Ibid. no.975; *English Historical Documents II* , pp.454-455.

The Royal Jurisdiction and the Transformation of Legal Procedure from *Leges Henrici Primi* to *Glanvill*

I

The formation of English Common Law was a continuous process starting, at least, from the reign of Henry I, and developing into a permanent legal system through a series of legal reforms by his grandson, Henry II of the Angevin era. In Chapter Two, I have shown how Henry I and his barons consolidated the central government, and strengthened the administration of justice by employing local and itinerant justice on the basis of pre-Conquest local administration. However, the investigation is not completed without an explanation of the legal transformation during the second half of the twelfth century.

The origins and achievements of legal reforms by Henry II have been discussed frequently, and thus the Chapter does not attempt to repeat these researches.[1] Instead, I try to explain the legal transformation from Henry I to Henry II by a detail comparison of two important legal documents, *Leges Henrici Primi* and *Glanvill*. In many respects, they reflected some important characteristics of legal institutions of both Norman and Angevin ages respectively. Of course, there are so many differences

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1. Pollock and Mailtland, *The History of English Law*, pp.136-173; J. E. A. Jolliffe, *Angevin Kingship*, reprint, (London: Adam and Charles Black, 1970), pp.32-49 and 139-165; Warren, *Henry II*, pp.317-362; Husdon, *Land, Law, and Lordship in Anglo-Saxon England*, 253-281; Biancalana, "For Want of Justice: Legal Reforms of Henry II", *Columbia Law Review*, 88 (1988), pp.433-536; Caenegem, "Criminal Law in England and Flanders under King II and Count Philip

in structure and in character between the two documents. *Leges Henrici Primi*, despite the fact that it was compiled in the time of Henry I, is not a legal code or enactment of the reign. It was not compiled by the order of Henry I, but merely a collection of customary law during and before the Norman age by a man acquainted with legal matters of the period. The main sources of the book are the laws of the Anglo-Saxon Kings.[2] As a result, *Leges Henrici Primi* mentions the legal conditions both before and after the Norman Conquest. Its content is both complicated and confused with various types of legal matters. Roughly speaking, it comprises of the nature and classification of causes, royal judicial power, compensation, and legal procedure of various areas.

On the other hand, *Glanvill* is treated as "the first textbook of the English Common Law",[3] and its main materials is royal writs of Henry II. Nevertheless, *Glanvill* cannot be regarded as a lawbook, for its author did not attempt to collect the legislative acts of Henry II, despite the fact that it is the first treatise on the English law.[4] The book is divided into fourteenth chapters, each of them concerns with various subject-matters, ranging from royal jurisdiction, criminal and civil case, warranty, advowson, villeinage, dower, inheritance, final concord, homage, debts, appointment

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of Alsace", in *Legal History: A European Perspective,* pp.37-60.

2. Downer, "Introduction", in *Leges*, pp.28-30.
3. Richardson and Sayles, *Law and Legislation from Aethelbert to Magna Carta*, p.105; Hall, "Introduction", in *Glanvill*, p.xi; Caenegem, *The Birth of the English Common Law*, p.30.
4. Turner, "Who was the Author of Glanvill? Reflections on the Education of Henry II's Common

of attorneys, varied types of writs, a set of standard legal procedures, to the plea of the crown.

Most importantly, two documents concentrate on royal jurisdiction, and provide a detail explanation and describe of legal procedures in Norman and Angevin England.[5] The compilers of *Leges Henrici Primi* stress that the formidable authority of the royal majesty which had dominated over the laws,[6] while *Glanvill* said ".....I am considering only the custom and law of the chief court of the lord King."[7] They are the main materials for, firstly, our understanding the importance of royal authority in the field of law, and for, secondly, the investigation of the transformation and innovation of legal procedures during the twelfth century. From *Leges Henrici Primi* to the age of *Glanvill*, medieval England witnessed a far-reaching change in legal institution and procedure. The aims of the chapter is threefold: (1) to analyze the growth of royal judicial power; (2) to compare the legal procedures between the two documents; and (3) to discuss the importance of royal authority in the development of the Common Law procedures.

II

Professor Walter Ullman said, "law in the Middle Ages is one of the

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Lawyers", in *Judges, Administrators and The Common Law in Angevin England*, p.75.

5. Stubbs, *Lectures on Early English History* (London: Longman, 1906), pp.143-165.
6. *Leges*, pp.97-99.
7. *Glanvill*, XII 23.

indispensable gateways to the recognition of governmental principles and ideology."[8] His statement points to the fact that law and medieval politics was intimately related. Law, in many aspects, reflects the governing principles of medieval state, while a ruler's control of his land depended largely on the codification of law. Modern political theory about the governing principles during the Middle Age emphasizes the reciprocal relationship between monarchy and community in terms of rights and duties. All the individuals in the community stood in legal relationship to the ruler, whereas the latter's task is to promote common weal, peace, and justice.[9] Before the thirteenth century, political and legal institutions of England were not yet developed into such ideal model. However, the maintenance of peace and justice was regarded as the main obligation of English rulers long before the Conquest.

In medieval England, kingship was the most important political factor, at least started from late Anglo-Saxon period, influencing the formation of state and legal system. In the process of state-making, kingship as an institution extended over a wide areas, and thus keeping of peace and justice become the main business of the royal house. In the *Prooemium* I and II of *Leges Henrici Primi*, the author stresses the royal dignity and Henry I's concern for peace of the realm.

> There are the blessed joys of longed-for peace and liberty with which the glorious Caesar Henry, moderate, wise, just, and valiant, shed radiance over all his kingdom in ecclesiastical laws and secular ordinances, in writings and

8. Ullmann, *Law and Politics in the Middle Ages*, p.28.
9. O.Gierke, *Political Theories of the Middle Age*, (Boston: Beacon Press, 1988), p.34.

displays of good works.

We pray that God may cause him to rule with happy omens and benign well-being of body and mind, together with his illustrious wife Matilda the Second and their children, for ever without end and with the eternal peace of our nation.[10]

Likewise, *Glanvill* in the Prologue also highlights the royal house's achievements in suppressing civil instability, and mentions the restoration of peace for the people under a vigorous and excellent King, Henry II:

Not only must royal power be furnished with arms against rebels and nations which rise up against the king and the realm, but it is also fitting that it should be adorned with laws for the governance of subject and peaceful peoples; so that in time of peace and war our glorious king may so successfully perform his office that, crushing the pride of the unbridled and ungovernable with the right hand of strength and tempering justice for the humble and meek with the rod of equity, he may both be always victorious in wars with his enemies and also show himself continually impartial in dealing with his subjects.[11]

No-one doubts how finely, how vigorously, how skillfully our most excellent king has practiced armed warfare against the malice of his enemies in time of hostilities, for now his praise has gone out to all the earth and his mighty works to all the borders of the world. Nor is there any dispute how justly and how mercifully, how prudently he, who is the author and lover of peace, has behaved towards his subjects in time of peace, for his Highness's court is so important that no judges there is so shameless or audacious as to presume to turn aside at all from the path of justice or to digress in any respect from the way of truth. For there, indeed, a poor man is not oppressed by the power of his adversary, nor does favour or partiality drive any man away from the threshold of judgment. For truly he does not scorn to be guided by the laws and customs of the realm which had their origin in reason and have long prevailed; and, what is more, he is even guided by those of his subjects most learned in the laws and customs of the realm whom he knows to excel all others in sobriety, wisdom and eloquence, and whom he has found to be most prompt and clear-sighted in deciding cases on the basis of justice and in settling disputes, acting now with severity and now with leniency as seems expedient to them.[12]

Even before the complication of *Glanvill*, the author of *Dialogue de Scaccario* had written for Henry II's achievements in crushing rebellion and disorder:

The noble King of the England, Henry is styled the second of that name, but is considered to have been "second to none" in dealing with a crisis. (the crisis of 1173-1175) For from the very beginning of his rule he gave his whole mind to crushing by all possible means those who rebelled against peace and were "froward" and sealing up in men's hearts the treasure of peace and good

10. *Leges,* p.81.
11. *Glanvill*, p.1.
12. Ibid. pp.1-2.

faith.[13]

The reigns of Henry I and Henry II were well known for the keeping of peace in medieval England, as they accessed to the throne after crushing prolonged civil strife, namely the succession dispute between Henry I and his brothers, and the civil war during the time of King Stephen. Thereafter, they successfully established a central royal government in their times, and royal house became the fountain of justice. Moreover, this practice of acting as the lawgiver was the important heritage of Anglo-Saxon England, that laid the solid foundations for the development of royal judicial power in the twelfth century.

The legislative achievements of the "barbarian Kings" since the dissolution of ancient bureaucratic administration is widely known, in which the role of Anglo-Saxon Kings as law-creators was among the most typical examples in contrast to the political conditions of early medieval Europe. The extant dooms of Ins, Offa, Alfred the Great, Edward the Elder, Athelstan, Edmund, Edgar, Aetherled the Unready and Canute form a voluminous collection of law texts in medieval world.[14] Before the unification of England under West Saxon Kings, rulers have already made law for their dominion. As early as the seventh century, Ethelbert, King of Kent, announced the earliest written law of Anglo-Saxon England.

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13. *Dialogue*, p.75.
14. For a general describe of the conditions in early medieval Europe, see K. F. Drew, "The Barbarian King as Lawgivers and Judges", in *Law and Society in Early Medieval Europe*, pp.7-29; Caenegem, "Government, Law and Society", in *The Cambridge History of Medieval Political*

The process of reducing of custom to written law was closely associated with the conversion of England to Christianity. As to the relationship between religion and law, W. A. Chaney's study of the cult of Anglo-Saxon Kingship deserves attention. Anglo-Saxon Kings was royal priests, whether pagan or Christian. Divine descent from the God bound the King with temporal and cosmic matters. Under the influence of religion, Anglo-Saxon Kings uphold peace and justice as the governing principle for their rule. The concept of Christian kingship, embodied in law, exercised a profound effect on the role of Anglo-Saxon Kings as the law-giver.[15]

In the ninth and tenth centuries, the activities of law-making was accelerated by the growing tendency of political unification during the wave of Danish invasion in the ninth century. The state grew more definite, and the law became larger and more complex.[16] In this aspect, the law of Alfred the Great represented a great age of law-making in early Anglo-Saxon England. As he himself said,

> Then I, King Alfred, collected these together and ordered to be written many of them which our forefathers observed, those which I liked; and many of those which I did not like, I rejected with the advice of my councillors, and ordered them to be differently observed.[17]

To a great extent, the law of Alfred the Great was based on the law of Ine, and

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Thought, ed. J. H. Burns, (Cambridge: Cambridge University Press, 1988),p.184.

15. W. A. Chaney, *The Cult of Kingship in Anglo-Saxon England: the Transition from Paganism to Christianity* (Berkeley and Los Angeles: California University Press, 1970).
16. G.B. Adams, *Constitutional History of England* (New York: Henry Holt and Company, 1934), p.11; C. Brooke, *From Alfred to Henry III 871-1272* (Edinburgh: Thomas Nelson and Sons, 1961), pp.31-42; J. E. A. Jolliffe, *The Constitutional History of Medieval England from the English Settlement to 1485*, Second Edition, (New York: Norton, 1967),p.55; H. R. Loyn, *The Governance of Anglo-Saxon England 500-1087* (London: Edward Arnold, 1984), pp.61-78.
17. The laws of Alfred, Int 49.9,*English Historical document I*, p.373.

provided a model for the law of other West-Saxon Kings. After King Alfred, the process of unification was gradually achieved under his successors. In time of King Edgar, the political control of West-Saxon king grew rapidly. He announced that "in every borough and in every shire the rights belonging to my royal dignity, as my father had…."[18] The extension of West-Saxon Kings was manifested in the numerous laws of King Athelstan and Edgar, bringing about the growth of King's law available to wide areas and to various classes at the expense of others. In the laws of King Edgar, I enclose some clauses stressing the availability of the king's laws as the common law:

> Namely, then, that it is my will that every man, whether poor or rich, is to be entitled to the benefit of the common law, and just judgements are to be judged for him.[19]
>
> It is my will that secular rights be in force in every province, as good as they can best be devised, to the satisfaction of God, and for my full royal dignity and for the benefit and security of poor and rich.[20]
>
> Nevertheless, this measure is to be common to all the nation, whether Englishmen, Danes or Britons, in every province of my dominion, to the end that poor man and rich may posses what they rightly acquire, and a thief may not know where to dispose of stolen goods, although he steal anything, and against their will they be so guarded against, that few of them shall escape.[21]

Even the law of King Ethelred, in clause 1.1, also mentions that:

> And it is the decree of our lord and his councillors that just practices be established and all illegal practices abolished, and that every man is to be permitted the benefit of law.[22]

After the settlement of Danish invaders under King Canute, the notion of availability of King's law was continued and extended. King Canute ordered his edicts to be

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18. Edgar'code at Wihtbordesstan, 2a, Ibid., p.399.
19. Edgar's Code at Andover, section B, secular, 1.1, Ibid., p.396.
20. Edgar's Code at Wintbordesstan, 2, Ibid., p.399.
21. Edgar's Code at Wintbordesstan, 2.2, Ibid.

observed "over all England".[23] In a letter of 1027, he claimed that:

> I command also all the sheriffs and reeves over my whole kingdom, as they wish to retain my friendship and their own safety, that they employ no unjust force against any man, neither rich nor poor, but that all men, of noble or humble birth, rich or poor, shall have the right to enjoy just law; from which there is to be no deviation in any way, neither on account of the royal favour nor out of respect for any powerful man, nor in order to amass money for me; for I have no need that money should be amassed for me by unjust exaction.[24]

The statement reveals that King Canute concerned the royal dignity, and implies that just law should be uphold in order to legitimate his ruler of whole kingdom. Although it is doubtful that Anglo-Saxon Kings could efficiently enforce the law, these laws contributed to the rise of notion of royal law available to the whole kingdom.

During the years between 900 and 1066, the concept of office of kingship was developed and strengthened by the extension of West-Saxon dynasty, and during the reign of King Canute, the concept of Christian kingship reached a climax.[25] These centuries also witnessed the process of union of the laws of various elements into a set of English law.[26] After all, the royal dignity in both *Leges Henrici Primi* and *Glanvill* was the result of the continuing development of king's law in pre-Conquest England.

Nevertheless, the achievement of law-making in the Anglo-Saxon period should not be over-exaggerated. As I have mentioned, the law before the second half of the

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22. The laws of Ethelred, Ibid., pp.405-406.
23. II Canute, Prologue, Ibid, p.419.
24. Cnut's letter of 1027, Ibid., p.418.
25. M. K. Lawson, *Cnut* (London: Longman, 1993); B. Lyon, *A constitutional and Legal History of Medieval England*, second edition, (New York and London: Norton, 1960), p.41.
26. Jolliffe, *The Constitutional History of Medieval England from the English Settlement to 1485*, p.104.

twelfth century was in essence undifferentiated from social custom[27]. In Anglo-Saxon age, there was no attempt on the part of royal house to construct a body of law, and no enactment of law in the period at all.[28] All legislation was conceived of "as the restoration of good old law which has been violated".[29] As noted above, the significance of the law of Alfred the Great was no more than a collection of law and custom of previous dynasties.

Furthermore, given that the coalescence of religion and law in Anglo-Saxon age, the main business of the King was to act as the representative linking God and people, if not to provide justice in the state. The law was to defend the ideal of Christianity against any offence threading Christ, as the law of King Canute declares that: "It Belongs very rightly to a Christian king to avenge very zealously offences against God, in proportion to the deed."[30] To sum up, before the Conquest, the idea of King law as the Common law was in initial stage of evolution. The Norman Conquest and the accession of Henry II further accelerated the formation of the royal common law in the twelfth century.

As an essential part of the state, the judicial administration could not remain

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27. See chapter 1.
28. Pollock and Maitland, *The History of English Law*, p.26.
29. Kern, *Kingship and Law in Middle Ages,* p.151; D. Whitelock, *The Beginnings of English Society* (Baltimore Md: Penguin Book, 1966), pp.134-154; C. H. Mcilwain, *The Growth of Political Thought in the West,* (New York: Macmillan, 1932),p.171; Berman, *Law and Revolution,* p.419.
30. The laws of Canute II, in *English Historical Document I*, p.423; Chaney, *The Cult of Kingship in Anglo-Saxon England,* p.186.

behind in the wake of unification and centralization. The origins of royal judicial official upholding the interest of royal house traced back, at least, to the times of Kings Ine and Alfred. In their laws, the role of the official is clearly mentioned:

> If anyone asks for justice in the presence of any official or other judge, and can not obtain it, and [the accused] will not give him a pledge, he [the accused] is to pay 30 shillings compensated, and within seven days make him entitled to justice.[31]

> If anyone brings up a charge in a public meeting before the king's reeve, and afterwards wishes to withdraw it, he is to make the accusation against a more likely person, if he can; if he cannot, he is to forfeit his compensation.[32]

Likewise, the compiler of *Leges Henrici Primi* also said:

> Anyone who, on being summoned by a justice of the king in accordance with the law, has failed to come to the county court shall be quality of *ouerseunesse* towards the king, that is, liable to a fine of 20 mancuses in Wesses.[33]

In fact, after the Norman Conquest, particularly in the reign of Henry I, the judicial administration was further developed, as mentioned in Chapter II. What I want to point out in this part is that the Norman age was in fact a new phrase of law-making. This activity was not developed by enacting legislation, but by issuing of royal writs, or executive writ. In a sense, the writ was royal law.

The clause 10.1 of *Leges Henrici Primi,* discussed above, lists that "contempt of his writs or commands" and "violation of the king's law" were among the plea belonging to royal jurisdiction.[34] In clause 13, the author once again insists that a man who contempt of royal writs was in the king's mercy.[35] King's agent in the

31. The laws of Ine, c.8, Ibid., p.365.
32. The laws of Alfred, c.22, Ibid., p.377.
33. *Leges*, c.53.1,p.169.
34. Ibid., p.109.
35. Ibid., p.117.

locality was to enforce the royal order issued in the writs.[36] Therefore, each writ was a part and parcel of royal law, thereby linking up royal house with the local judicial administration. In time of *Glanvill,* Henry II announced the first legal enactment, namely the Assize of Clarendon and Assize of Northampthon, in 1166 and 1176 respectively. Throughout this legislation, the relationship between central court and local courts was strengthened by the appointment of general eyre, the returnable writs, and trial by jury. Based on the ideas of royal dignity, both Henry I and Henry II established the legal system of their own.

III

As for the growth of concept of royal law in the twelfth century, there were two related ideas about the royal jurisdiction that should not be ignored: the King's peace and the King's plea. The former was the protection given by the King to the state; the latter was about a type of pleas that placed wrong-doers in the mercy of the King. In *Leges Henrici Primi* and *Glanvill,* these two concepts were often employed by the authors to promote the royal jurisdiction.

The legal history of medieval Europe was mainly the effort of the Kings to bring about a common peace in a state, providing King's protection to every man against disorder and various offences. In general, the public peace and order was a result of

36. See Chapter II.

extension of the notion of King's peace, bringing about the unification of legal system under the principle of the King's law. The expansion of the King's law at the expense of other jurisdictions in the state prompted the formation of a common legal tradition. The provision of King's peace was available to those who were on their way to or returning from an audience with the King. Gradually, the peace covered any community.[37] This process went hand by hand with the growth of the ideas of public duties in the laws of Anglo-Saxon England. In the laws of Ine, if a *gesith*-born man with land neglected military service, he was to give 120 shilling and to forfeit his land.[38] Besides military service, public duties also included the repair of fortresses or bridges, and if anyone neglected these duties, he was to "pay 120 shillings compensation to the king in the area under English law", according to the laws of Cnut.[39] The provision also repeated in the clause 66.6 of *Leges Henrici Primi*.[40] Therefore, neglect of public duties was in fact a definite offence in legal texts of medieval England.[41]

In time of King Henry I, the idea of King's peace was widely enlarging over the state. Like other English Kings, Henry I also concerned with the establishment of long-term peace in his Coronation Oath of 1101: "I establish a firm peace in all my

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37. Draw, "The Personal Element in the Laws", in *Law and Society in Early Medieval Europe,* pp.34-35.
38. The laws of Ine, c.51, in *English Historical Document I,* p.370.
39. The laws of Cnut II, c.65, Ibid., p.428.
40. *Leges,* p.211.

kingdom, and I order that this peace shall henceforth be kept."[42] "This peace" was necessarily connected with the royal protection granted by the King to anyone. As *Leges Henrici Primi* remarks that:

> Every man shall have the peace which the king shall give him.[43]
>
> A person who breaks the King's peace which he confers on anyone with his own hand shall, if he is seized, suffer the loss of his limbs.[44]
>
> If anyone has the King's peace given by the sheriff or other official and a breach of it is committed against him, then this is a case of *grithbreche* and compensation of one hundred shillings shall be paid, if settlement can be effected by payment of compensation.[45]

The widespread of the King's peace in the reign of Henry I was a result of the enlargement of the King's special protection during pre-Conquest England. Indeed, the peace of the King was an outstanding feature of Anglo-Saxon Laws.[46] The earliest evidence about the concept is in the laws of Ethelbert, King of Kent:

> If the King calls his people to him, and anyone does them injury there, [he is to pay] a two-fold compensation and 50 shillings to the King.[47]
>
> If the King is drinking at a man's home, and anyone commits any evil deed there, he is to pay two-fold compensation.[48]
>
> If anyone kills a man in the King's estate, he is to pay 50 shillings compensation.[49]
>
> The [breach of the] King's protection, 50 shillings.[50]

These passages clearly point out that the breach of peace in the presence of the King is a attempt to threat the King's peace, and thus 50 shillings is compensated for

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41. W. Holdsworth, *A History of English Law*, Vol. II, (London: Sweet and Maxwell, 1971), p.49.
42. *English Historical Document I,* p.402.
43. *Leges,* c.52.3,p.169.
44. Ibid., c.79.3, p.247.
45. Ibid., c.79.4.
46. Chancy, *The Cult of Kingship in Anglo-Saxon England,* p.205-206; Richardson and Sayles, *Law and Legislation,* p.5.
47. The laws of Ethelbert, c.2, in *English Historical Document I,* p.357.
48. Ibid. c.3.
49. Ibid., c.5.
50. Ibid., c.8.

the action. The penalties for the breach of peace in the King's residence is even higher in the laws of Ine and of Alfred the Great, that included the loss of life, personal injury, or loss of property:

> If anyone fights in the King's house, he is to forfeit all his possession, and it is to be at the King's judgment whether he is to keep his life or not.[51]

> If anyone fights or draws his weapon in the King's hall, and he is captured, it is to be at the King's judgment, whether he will grant him death or life.[52]

The King's peace was extended beyond the King's immediate vicinity to larger areas of jurisdiction, spreading over the whole realm in the laws of Alfred, and this was strengthened in the laws of Edmund and of Aethelred:

> If anyone plots against the life of the king, either on his own account, or by harboring outlaws, or men belonging to [the King] himself, he shall forfeit his life and all he possesses.[53]

> Prol.1. First, then, it seemed to us all most necessary that we should keep most firmly our peace and concord among ourselves through my dominion.[54]

However, the King's guarantee was not the sole safeguard of the peace in the Anglo-Saxon age, and the hundred, for example, had also its peace.[55] Furthermore, as B. Lyon suggests, in no sense did the Anglo-Saxon Kings reserve certain offences for their special jurisdiction. This is to say that the concept of King's peace was still separated from that of King's plea.[56] Without doubt, the concept of the King's plea

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51. The laws of Ine, c.6, Ibid., p.365.
52. The laws of Alfred, c.7, Ibid., p.375.
53. Ibid., c.4.
54. Edmund's code concerning the blood-feud, Ibid., p.391.
55. Stubbs, *The Constitutional History of England in its Origin and Development* Vol. I, Sixth Edition, (New York: Barnes and Noble, 1967), p.199.
56. Lyon, *A Constitutional and Legal History of Medieval England*, pp.42-43. But D. Stenton insisted that "the more serious crimes, at least in theory, were preserved for the King's judgement" in Anglo-Saxon period, and this "formed the basis on which a national criminal law would in later centuries be built." See her *English Justice between the Norman Conquest and the Great Charter 1066-1215*, p.54.

was not yet developed before Danish settlement in the eleventh century. King Canute retained the pleas of serious offences, included breach of the King's protection (*griobryce*), house-breaking, fighting, *mundbryce, hamsocn*, harboring of fugitives, assault, neglect of the *fyrd*, and outlawry, under his jurisdiction.[57] As a result of the growth of royal house extending power and influence over the state, bring about a new relation between the King and the law.

Nevertheless, it was after the Norman Conquest that the King's peace, and its link with the idea of the King's plea were consolidated.[58] The long list of various offences within the royal plea in 10.1 of *Leges Henrici Primi* has already been discussed,[59] and the concern of the King was extended over all highways.[60] As a plea with the royal jurisdiction, homicide (*murdrum*) was one of the serious offences in the twelfth century. And that I try to explain the extension of royal jurisdiction in crushing this serious offence in *Leges Henrici Primi* and *Glanvill,* thereby investigating the growth of the concept of the King's plea from *Leges Henrici Primi* to the age of *Glanvill.*

Before the twelfth century, there were so many clauses concerning the penalties

57. See the Laws of Canute, II, c.12 and 15, in *English Historical Document I,* pp.420-421; Stubbs, *The Constitutional History of England in its Origin and Development,* pp.205-206; Jolliffe, *The Constitutional History of Medieval England from the English Settlement to 1485*, p.111; A. Harding, *The Law Courts of Medieval England* (London: George Allen and Unwin, 1973), pp.22-29.
58. Holdsworth, *A History of English Law*, p.48; Harding, *The Law Courts of Medieval England*, p.15.
59. See Chapter II.
60. *Leges,* p.109.

for a number of serious offences, such as robbery, coining, theft, arson, aggravated, assault, and forcible entry, in the Anglo-Saxon laws.[61] With regard to the case of homicide, the laws of Canute mentions that:

> If manifest murder occur, so that a man is murdered, the murderer is to be given up to the kinsmen.[62]

Nevertheless, it was only in the second half of the twelfth century that the offence was classified as a criminal case in *Glanvill*. However, it was not a new concept in the classification of cases, but less and more influenced by *Leges Henrici Primi*. In fact, the latter even more concerned the offence, and indeed a great deal of clauses in the book discusses about it. In brief, there were, at least, twelve clauses about the case: (No. 66) concerning the slaying of a minister of the altar;[63] (No. 68) concerning payment for a freeman or a slave;[64] (No. 69) concerning the slaying of an Englishmen;[65] (No. 70) concerning the offence in the customary law of Wessex;[66] (No. 71) concerning homicide caused by magicians;[67] (No. 72) concerning the definition of homicide;[68] (No. 73) concerning ordained persons who commit a homicide;[69] (No. 75) concerning the killing of lord;[70] (No. 76) concerning the price to be paid in respect of

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61. For robbery, see the laws of Athelstan IV, c.6, in *The Laws of Earliest English Kings,* ed. and tr. F. L. Attenborough, p.149; the laws of Canute was one of the most comprehensive laws before the Norman Conquest. It contains many clauses concerning the penalties for a variety of offences, see II c.8, 21, 53, 58, 65, 75, in *English Historical Document I,* pp.420-429.
62. The laws of Canute II, c.56, in *English Historical Document I*, p.247.
63. *Leges,* pp.209-213.
64. Ibid., pp.215-219.
65. Ibid., p.219.
66. Ibid., pp.219-225.
67. Ibid., p.227.
68. Ibid., pp.227-229.
69. Ibid., pp.229-231.
70. Ibid., pp.233-237.

any person;[71] (No. 77) concerning payment for the slaying of a freeman or a serf;[72] (No. 79) concerning the compensation to be paid for a godson or godfather;[73] (No. 80) concerning homicide in the King's court, army, fortress, or castle;[74]

In many aspects, the compiler considered the offence not to be a crime against the society and state, but the family. And it was mainly the family or kin group that took the responsibility for the protection of its members, but not mainly the King. "If the slain man has no relatives the king shall apply his justice to the case."[75] Indeed, only those who had no relatives acting as his protector could ask for the King's protection:

> The King must act as kinsman and protector to all Frenchmen and foreigner if they have no one else at all to take care of them.[76]
>
> If anyone in this position is slain, that is, if he has no kindred, then according to the ancient law half the wergeld shall be paid to the king, and half to the deceased's associates.[77]

while the King's peace was available for special conditions only. The clause insists that:

> If a person goes on a mission for the King and bears his writ, then anyone who slays him when he is guiltless of any offence shall be in the King's mercy; and if the King had promised to confer any benefit, the offender shall pay compensation for this.[78]
>
> A person who breaks the King's peace which he confers on anyone with his own hand shall, if he is seized, suffer the loss of his limbs.[79]

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71. Ibid., pp.237-243.
72. Ibid., p.243.
73. Ibid., pp.247-249.
74. Ibid., pp.249-253.
75. Ibid., c.92.15, p.291.
76. Ibid., c.75.7a, p.237.
77. Ibid., c.75.10b, p.237.
78. Ibid., c.79.2, p.247.
79. Ibid., c.79.3, p.247.

Obviously, the King's protection was only a special gift gave by the King to anyone who had his favour. However, the limits of the King's protection did not mean that the roles of the royal authority in the suppression of various offences were less important in the early twelfth century. The growing intervention of royal judicial power in the procedure of trial should deserve attention. Generally speaking, Norman Kings reserved the more serious offences, whether clerical or lay, for their judgement:

> In the case of the more serious matters the King has rights of soke over individual barons and great men, whether clerical or lay, whether they hold their land, and whether within the King's jurisdiction or not, according as, by virtue of the laws of Edmund, Canute, and Edward, this hereditary privilege has been passed successively on, unless because of kinship or some distinctive worthiness the King, whose admirable goodwill promotes rather than subverts freedom, in his benevolence honours anyone with the grant of soke.[80]

Henry I also stressed that he had a share in the penalties of compensation for some serious offences in both ecclesiastical and secular matters:

> There are also, as we have said, certain kinds of causes which are more lawfully settled by the exclusive jurisdiction described above, but in the penalties of compensation arising from which the King has only a share, wherever they are held, in both ecclesiastical and secular matters, over men of the King and of ecclesiastics and of baron and over men who are without lords or are poor, and whether he exercises jurisdiction which is exclusive or shared; among these are adultery, homicide committed in a church, breach of the peace, or an offence against a person in holy orders or against the rights of the Christian faith or against law and order, if compulsion must be supplied by the secular authority so that justice may be done.[81]

The royal officials in the locality was responsibility for the maintenance of order against the offences listed in the clause 10.1 of *Leges Henrici Primi*:

> If anyone is lawfully impleaded by the sheriff or a royal justice in respect of theft, arson, robbery, or similar offences, he is to be subjected by law to a threefold oath to the clear himself.[82]

The accused was also required to answer the charge according to the customary law of

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80. Ibid., c.20.3, pp.123-125.
81. Ibid., c.21.1, p.123.
82. Ibid., c.66.9, p.213.

royal house:

> If anyone is impleaded on a matter within the King's jurisdiction by his justice, whosoever man he may be, he must not refuse to give to the justice security for his appearance to answer the charge.[83]

In case of homicide, it was the duty of the hundred to hand-over the accused to the royal justice for judgement, despite the case was regarded as the crime against the interest of the family:

> If a person who has committed *murdrum* is captured, he must be handed over to a royal justice, if he is a person with respect to whom justice may be carried out...[84]
>
> If it is known who committed the *murdrum*, and he has fled, the hundred shall take his property; and if any accomplice of this is captured, he shall be handed over to the justice.[85]
>
> If the offender can be captured within the appointed time and handed over to a justice, the hundred shall be relieved of liability.[86]

These evidences explain the precedent of royal role in crushing serious crimes, and of its effort in trialing these cases in accordance with a set of customary procedure of judgment. The standard regulation of procedure of trial enforced by the itinerant justice in the reign of Henry II was no more than a restoration and reorganization of the legal procedures of his grandfather.

Another approach for the explanation of the growing strength of royal judicial power from *Leges Henrici Primi* to *Glanvill* is the classification and elaboration of various crime in both books. The clause of 10.1 of *Leges Henrici Primi* and the books I and XIV of *Glanvill* are the focal point of comparisons. The long list of 10.1 in

83. Ibid., c.52.1, p.169.
84. Ibid., c.92.3, p.287.
85. Ibid., c.92.4, p.289.
86. Ibid., c.92.9, p.289.

Leges Henrici Primi was in fact a collection of some main offences from the Anglo-Saxon laws, that were treason, homicide, wounding and assault and theft.[87] Before the time of *Leges Henric Primi,* crime was merely a very personal thing, that is the idea of a crime against society had not yet appeared.[88] The concept of wergild occupied a vital place in the laws of Anglo-Saxon, and it largely influenced the compilers of *Leges Henrici Primi* in the concept of crime. The concept was the value set upon human life in accordance with rank and paid as compensation to the kindred or lord of the victim.

Based on the materials of Anglo-Saxon period, however, the compiler of *Leges Henrici Primi* inherited not only the concept of crime, but also summed up these crimes into the clause of 10.1 under the idea of royal jurisdiction. As already mentioned, the case of homicide was also in the province of crown's plea. Moreover, the elaboration of crime was shown in the classification of a diversity of causes in *Leges Henrici Primi:*

> Causes are of many kinds: those which can be compensated for by payment and those which cannot, an these which belong solely to the royal jurisdiction[89]
>
> There is a great of diversity of causes: those punishable by death or amendable by a money payment, those which are transferred to a higher court or remain in the original court or are cognizable by two jurisdiction, and those which

87. Pollock and Maitland, *The History of English Law*, p.51; Whitelock, *The Beginnings of English Society,* pp.134-154.
88. Pollock and Maitland, *The History of English Law*, p.46; Drew, "The Personal Element in the Law", p.24; Caenegem, "Criminal Law in England and Flanders under King II and Count Philip of Alsace", pp.42-43.
89. *Leges*, c.9.1, p.105.

> belong solely to the royal jurisdiction.[90]

The kinds of compensation and of legal procedure rested on the diversity of causes. With regard to those cases which could not be compensated for with money were mainly some serious crimes:

> Some pleas cannot be compensated for with money; there are *husbreche*, arson, manifest theft, palpable murder, treachery towards one's lord, and violation of the peace of the church or the protection of the King through the commission of homicide.[91]

Compared with *Glanvill*, the classification of cases in *Leges Henrici Primi* was still less elaborated. The most important distinction in the concept of crime between *Leges Henrici Primi* and *Glanvill* is that the division of cases into criminal and civil cases by the author of *Glanvill*. As for the division, he wrote:

> Pleas are either criminal or civil. Some criminal pleas belong to the crown of the lord King, and some to the sheriffs of counties.[92]

He insisted that some criminal cases were reserved for the royal jurisdiction, and these criminal cases was:

> The crime which civil lawyers call lese-majeste, namely the killing of the lord King or the betrayal of the realm or the army; fraudulent concealment of treasure trove; the plea of breach of the lord King's peace; homicide; arson; robbery; rape; the crime of falsifying and other similar crimes: all these are punished by death or cutting off of limbs.[93]

From the statement, it is not hard to enclose that some of main serious crimes listed in the clause of 10.1 of *Leges Henrici Primi* were classified into criminal cases within the mercy of lord King, Henry II. The crime of theft was excluded from the criminal cases for the reason unknown, as the author said:

> The crime of theft is not included because this belongs to the sheriffs, and is

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90. Ibid., c.9.5, p.107.
91. Ibid, c.12.1a, p.115; Whitelock, *The Beginnings of English Society,* p.143.
92. *Glanvill,* 1.1, p.3.
93. Ibid., 1.2, p.3.

> pleaded and determined in the counties. If lords fail to do justice, then sheriffs also have jurisdiction over brawling, beatings, and even wounding, unless, the accuser states in his claim that there has been a breach of the peace of the lord King.[94]

Sheriffs were thus to charge the crime of theft in the locality, and the judicial power of seigniorial lord was recognized that sheriffs have jurisdiction over some minor cases only in case of the failure of justice in the court of lord.

Likewise, civil cases were also divided between royal and sheriff jurisdictions in the same way as criminal cases:

> Some civil pleas are to be pleaded and determined only in the court of the lord King; other belong to the sheriffs of counties.[95]

The civil cases tried in the King's court were:

> Pleas concerning baronies; pleas concerning advowsons of churches; the question of status; pleas of dower, when the woman has so far received none; complaints that fines made in the lord King's court have not been observed; pleas concerning the doing of homage and the receiving of relief; purprestures; debts of laymen. All these pleas concern solely claims to the property in the disputed subject-matter: those pleas in which the claim is based on possession, and which are determined by recognition, will be discussed later in their proper place.[96]

While the right to free tenements, and default of right in the lord's court belonged to the sheriffs of counties.[97] To sum up, the cases, that involved in the province of the crown increased in the reign of Henry II, can be grouped under three heads: (1) the proprietary rights of the crown; (2) the misdoing and negligence of official and communities; and (3) serious crimes.[98]

In short, in time of *Glanvill*, customary law of landholding, such as inheritance

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94. Ibid., 1.2, p.4.
95. Ibid., 1.3, p.4.
96. Ibid.
97. Ibid., 1.4, pp.4-5.
98. Holdsworth, *A History of English Law,* p.197.

and woman's dower, and of seigniorial relationship between lords and tenants, such as homage and relief, were regulated and arranged within a standard legal structure of Angevin England.[99] The disputes concerning landholding and seigniorial relationship were settled by the regulated legal procedures.[100]

IV

The transformation in legal procedures during the twelfth century was profound in the context of high-medieval civilization. In medieval England, as in contemporary Europe, the legal reforms were marked by the transformation from customary law to written law. Nevertheless, scholars disagree with each other over the question concerning whether the process was a revolution or an evolution. According to Berman, the papal revolution gave birth to the new conception of kingship in western Christendom, that involved the recognition of the lawmaking role of the King for the first time in the twelfth and thirteen centuries.[101] Prior to the reign of Henry II, as he suggests, there was absence of the concept of kingship as a regular legislative agency, and thus the reign was in itself institutional innovation discontinued with the past.[102] In short, legal history of the twelfth century can be, in accordance with idea of Berman, divided into two periods without any continuity between them. Professor

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99. Hyams, "Warranty and Good Lordship in Twelfth Century England"; Biancalana, "Widows at Common Law: The Development of Common Law", and her "For Want of Justice: Legal Reforms of Henry II".
100. See below.
101. Berman, *Law and Revolution*, p.404.

Caenegem, in contrast, stresses that the reign of Henry II were both innovational and continual. The rise of Roman law did not at once lead to the replacement of existing procedure of law, because the traditional customary law and new legal systems existed and operated side by side.[103]

The accession of Henry II brought about a far-reaching reorganization of judicial administration in medieval England, introducing a new concept of legal procedure into the state. On the other hand, in terms of legal procedures, Henry II's reforms was largely based on the traditional customary law, while the latter did not abolish after the reforms but existed within the legal structure of the reign. Moreover, one should not confine the investigation of legal transformation to the twelfth century. To explain the main characteristics of legal systems of Angevin England, the essence of Anglo-Saxon laws, and its influences on Norman England should take into consideration.

The main essences of legal procedures in medieval England before the reign of Henry II were ordeal, compurgation (oath-helper), charter, royal writs, evidence by witness, and, after the Norman Conquest, feud.[104] In legal terms, the litigation is a legal contest between plaintiff and defendant, and legal procedure is the judicial process aimed at settling the differences between them. In the age of customary law,

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102. Ibid., pp.441-442.
103. Caenegem, "Law in Medieval World", and "Methods of Proof in Western Medieval Law" in *Legal History: A European Perspective*, p.117 and pp.71-111.
104. For a general discussion of legal procedure of proof in medieval law, see Caenegem, "Methods of Proof in Western Medieval Law".

there were a variety of customary procedures for settling dispute among people in different community. Gradually, people followed a body of procedures for varied causes:

> All case shall have suitable methods of legal procedure, provided appropriately for places, times, and persons.[105]

> The methods of legal proceeding change in accordance with the accidental circumstances of the places concerned, the time, the persons, and the kind of accusation.[106]

In Anglo-Norman England, the plaintiff first was to summon the defendant to answer the charge. Between them an agreement was reached setting the time for meeting in court, and the defendant had to appear at the scheduled time. If the defendant could not supply an excuse (*essoin*) for not coming, he would lose his case. Both plaintiff and defendant needed to support their claims by finding out oath-helpers in their residence. If these methods failed to settle the differences, the judgement of God (ordeal) was invited to intervene the case.

In litigation, the defendant could find the advice of his friends and relatives, but he was requested to state the truth:

> In other cases an accused person may seek counsel and obtain it from his friends and relative (no law should forbid this), in particular the advice of those whom he brings with him or invites to attend his plea; and in taking counsel he shall faithfully state the truth of the matters so that circumstances may appear to the best advantages with respect to the plea or its peaceful settlement.[107]

First, he also should reply the charge before finding out counsel and support:

> For if a person who is impleaded before a justice of the King withdraws in order to take counsel without replying to the accusation immediately, he shall

105. *Leges*, c.9.3, p.105.
106. Ibid., c.9.7, p.107.
107. Ibid., c.46.4, p.157.

be liable to a fine of twenty *mancuses*, which is the penalty for *ouerseunesse* in respect of the King.[108]

For it is laid down that anyone who goes out to take counsel without making a denial or preliminary objection with respect to the action against him commits himself formally to the plea; and he is taken to have admitted the things to which he has not answer immediately.[109]

The accused person could postpone and adjourn for various reasons (*essoins*), and it shall be effected in the following manner:

Before sunset on the day before, the adjournment shall be made known to him at his house, if the opposing party is residing there ......it is permissible for either party three times, whether consecutively or with interruptions.[110]

If anyone wishes to a adjourn a plea when the day for hearing has been appointed by a justice he shall give notice of the adjournment to both parties concerned that is, the accused and the justice.[111]

The most important part of legal procedure was, of course, the oath-taking by both plaintiff and defendant, and the methods of taking were different according to the kinds of accusations:

If anyone is proceeded against on a charge of theft or on a charge, which may put him in jeopardy, of serious offences of this kind, he shall have, in accordance with the law of Wessex, a foreoath from the accuser, and the accused shall be cleaned by making an oath along with five others of his tithing in the manner in which the accuser has done first, in accordance with the standing of the parties and the nature of the case.[112]

Every accusation shall proceed by way of a fore-oath, either simple or in strict form, performed once only or more often, as the custom of the particular place allows, and [the accused shall clear himself by oath in the manner in which] the accuser has done first, in accordance with the importance of the matter and the nature of the case.[113]

The compiler of *Leges Henrici Primi* also implied that the procedures were different from place to place, subject to customary procedures of the community, despite this is

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108. Ibid., c.48.1a, p.159.
109. Ibid., c.48.1c, p.159.
110. Ibid., c.59.2a, p.181.
111. Ibid., c.60.1, p.193.
112. Ibid., c.66.8, p.213.
113. Ibid., c.64.1, p.203.

specified that the accused should swear with five oathhelpers in all actions:[114]

> In Mercia thirty-five oathhelpers are to be produced in the case of a threefold oath of exculpation, in the Danelaw forty-eight are to be nominated, and those who are to swear the oath shall be determined by lot rather than by selection.[115]

Another clause specifies that the oath-taking by defendant was accompanied by the oath of his helpers who have "a value equal to that of their peers."

> These persons, in respect of any accusation, whether it concerns a more serious or less serious matter, shall swear a simple oath, accompanied by the proper number of oath-helpers, and shall secure oaths of a value equal to that of their peers.[116]

The social status was an essential element in legal procedure both before and after the Conquest. The earliest clause concerning the status in the process of oath-taking in Anglo-Saxon laws is the laws of Wihtred:

> A cleric is to purge himself with three of the same order, and he alone is to have his hand on the altar; the others are to stand by and discharge the oath.[117]
>
> A stranger is to purge himself with his own oath on the altar; similarly a King's thegn.[118]
>
> A cerol with three of the same class on the altar; and the oath of all these is to be incontrovertible.[119]
>
> If anyone accuses a bishop's servant or a King's he is to clear himself by the hand of the reeve: the reeve is ether to clear him to deliver him to be flogged.[120]
>
> If anyone accuses an unfree servant of a community in their midst, his lord is to clear him with his oath alone, if he is a communicant; if he is not a communicant he is to have in the oath another good oath-helper, or pay for him or deliver him to be flogged.[121]
>
> If the servant of a layman accuses the servant of an ecclesiastic or the servant of an ecclesiastic accuses the servant of a layman, his lord is to clear him with his oath alone.[122]

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114. Ibid., c.67.1b, p.213.
115. Ibid., c.66.10, p.213.
116. Ibid., c.64.2a, p.205.
117. The laws of Wihtred, c.19, in *English Historical Documents I*, p.363.
118. Ibid., c.20.
119. Ibid., c.21.
120. Ibid., c.22.
121. Ibid., c.23.
122. Ibid., c.24.

The oath-helpers were the same class as the defendant, and, in some cases, his lord was even to take his oath to clear his man. Since then, oath-taking was connected with the social status in Anglo-Saxon laws[123] and in *Leges Henrici Primi*:

> When a person should swear alone or when he should swear with several oatherhelpers depends always on the kind of case, and party involved, according, that is, to the credibility and status of the parties in every rank of society and according to the value of the property in dispute and the amount of the wite concerned.[124]

> In case of everyday occurrence, a party shall swear with his own oath alone against his equal, a person of lesser rank against one of higher rank with the oath of either one or two others, a man against his lord with either two or five others; in case of a challenge to a judgement two oathhelpers are necessary when swearing against one person who is of the same rank.[125]

Besides status and rank of society, accusation by oath also depended heavily on reputation:

> Every trustworthy man who is not of ill repute through frequent accusations and whose oath or submission to the ordeal has not failed shall enjoy the right to the simple exculpation in the hundred.[126]

> In the case of an untrustworthy person the oathhelpers for a simple oath of exculpation shall be selected from within three hundreds and for a threefold oath of exculpation from within an area as wide as the jurisdiction of the court itself, or alternatively he shall go the ordeal.[127]

In an agrarian society people knew each other's business extremely well, and thus reputation had been taken into account in the accusation. If the accused person was ill-reputed, it would be difficult for him to find out the number of compurgators. The body of judges in local assemblies, in fact, were composed of neighbors and local magnates:

The King's judges shall be the barons of the county and those who hold free

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123. The laws of Ine, c. 14-17, 19, 21, 25, 28, 30, 35, 45, 46, 48, 49, 52-54, 57, 71, in *English Historical Documents I,* pp.366-371; also see Whitelock, *The Beginnings of English Society.*
124. *Leges,* c.64.7, p.207.
125. Ibid., c.67.2, p.215.
126. Ibid., c.64.9, p.207.
127. Ibid., c.64.9a, p.207.

lands in the counties, by whom the causes of individuals must be dealt with by the presentation in turn of complaint or defense.[128]

> If anyone has a plea which is to be tried in his own court or in any judicial assemblies, he shall summon his peers and neighbors so that, with the establishment of a body of judges, he may provide justice which is freely given and cannot be challenged.[129]

Moreover, these judges have been chosen only by the accused person, as the above passage suggests that "he [the defendant] shall summon his peers and neighbors" in any plea.[130] Therefore, all pleas in age of customary law were settled by the mediation of local members:

> A man must suffer his lord, if the lord affronts him or does him an injury of that kind, for a period of thirty days in war, or a year and a day in peace; and meanwhile in accordance with the law he shall privately seek justice from him through the mediation of his peers, neighbors, member of his household, or strangers.[131]

Some of these judges were required to be those who were involved in the case:

> In some places the body of judges is chosen by the parties, that is a half each by those who are involved in the case; and there oathhelpers who are first nominated, some of these being then selected, are to be produced, unless hostility or some other lawfully sufficient reason is adduced with respect to the nomination to explain why they cannot be produced.[132]

Given that the defendant had rights to select the member of judges and witnesses, he could turn down any judgement given by those judges who have not been chosen by others, because the judgement was considered to be void:

> It is to be observed whether he has been satisfied with respect to the witnesses and judge and the persons [of the accusers], whether he submits to the judges; [if he has judges; [if he has judges suspected of partiality], he shall affirm or impugn the judgement.[133]
>
> Whether legal proceeding are taken, in any place or matter, against persons who are absent, or before judges who have not been chosen by them, they shall be utterly void.[134]

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128. Ibid., c.29.1, p.131.
129. Ibid., c.33.1, p.137.
130. Ibid., c.33.5, p.137.
131. Ibid., c.43.9, p.153.
132. Ibid., c.31.8, p.135.
133. Ibid., c.5.3a, p.85.
134. Ibid., c.31.7b, p.135.

In *Leges Henrici Primi,* there are many special clauses for customary procedures concerning homicide and robbery.

With respect to homicide, the King and his justice have jurisdictions over the offence, and the accused person would be brought under the mercy of the King. Moreover, the accused person was also subjected to the judgement of customary law. However, *Leges Henrici Primi* fails to mention the relationship between local custom and royal jurisdiction. Probably, the procedures were conducted in the locality by the royal agents.

> Homicide shall be denied by an oath of exculpation equal in value to the value of the wergeld; this suffices for the purpose of clearing the accused or making an answer in the case of charges of this kind; the accusation of the slain man's relatives shall be by way of offer of battle or by a fore-oath; and inquiry shall be made as to whether the deceased and the accused had an appointed time for meeting together or something of the kind, and when and where they were together or departed again, and whether anger or hatred or threats intruded.[135]

For the slain of the lord:

> If the plea (slain of the lord) is proceeding by way of formal accusation he shall clear himself of the charge by an oath of exculpation equal in value to the lord's own wergeld.[136]

In case of anyone being accused of a thief, then the accused person shall:

> .....choose which of the two he wishes, either the simple ordeal or an oath of the value of one pound with oath-helpers taken from three hundreds, ...[137]
> If the oath-helpers do not dare to swear an oath with him, he shall go to the threefold ordeal.[138]

If one of members in the family is accused of theft, then:

> ......the head of the household alone way, if he wishes, clear him of the charge by means of an oath in strict form, in cases where a foreoath is not sworn by the accuser.[139]

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135. Ibid., c.92.14, p.291.
136. Ibid., c.75.2a, p.235.
137. Ibid., c.65.3a, p.209.
138. Ibid., c.65.3b, p.209.
139. Ibid., c.66.7, p.213.

If one was impleaded by the sheriff or a royal justice in respect of such serious cases as theft, arson, robbery, or similar offences, the procedures for oath-taking were different from that of other cases:

> Then on a suitable day he shall produce thirty oathhelpers, none of them is to be challenged in any respect, and with fifteen of these, whom the justice has chosen, he shall swear on oath (being himself the sixteenth) according as the case requires.[140]

As noted above, there was a continuity in legal procedures from Anglo-Saxon England to Norman England. The compiler of *Leges Henrici Primi* was not to innovate new procedures, but to write down the customary law of pre-Conquest England. Nevertheless, the Normans also introduced new elements in legal procedures into England without abolishing old methods of judgement. The trial by battle or feud was one of available methods for settling disputes after the Norman Conquest:

> Anyone who commits a theft, who betrays his lord, who deserts him in a hostile encounter or military engagement, who is defeated in trial by battle or who commits a breach of the feudal bond shall forfeit his land.[141]

> Trial by battle shall not take place unless the property in dispute is at least ten shilling in value, or unless the charge is one of theft or of a misdeed of this kind or concern a breach of the King's peace or the dispute is over matters which may involve a penalty of death or mutilation.[142]

In the first chapter, I have discussed the function of customary law in Anglo-Norman litigation, and pointed out that it was to promote compromise and reconciliation in a social dominated by network of homage relationship.[143] In legal text of the twelfth century, the principle of reconciliation constitutes the most essential

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140. Ibid., c.66.9a, p.213.
141. Ibid., c.43.7, p.153.
142. Ibid., c.59.16a, p.189.
143. See chapter I.

part of legal procedures. *Leges Henrici Primi* was one of typical examples:

> But if an oath of reconciliation is demanded, the offender shall swear [according as the instant case will require in the circumstances, taking into account poverty or any other reasons which are present], that if the accuser were in the same position because of a misdeed of this kind, he would accept the offer of compensation or renounce any amends in this way.[144]

After all, law before the second half of the twelfth century was "not primarily a matter of making and applying rules in order to determine guilt and fix judgement".[145] Rather, it was to re-establish a friendly relationship between the plaintiff and the defendant:

> If anyone makes amends to another for his misdeed or makes good the injury he has caused, and afterwards for the purpose of effecting a friendly accord with him offers him something along with an oath of reconciliation, it is commendable of him to whom the offer is made if he gives back the whole thing and does not retain any suggestion of the affront to himself.[146]
>
> For it ought to be sufficient, if the offender has made amends for his misdeed in accordance with a judgement and, for the purpose of establishing relations of friendship, has in measure offered himself to his accuser, that the latter, to whom it is fitting that justice be done, should be shown to be a person to be feared and that the renunciation should be shown to be a creditable act on the part of him whose goodwill may be an advantage and whose ill may be damaging.[147]

The compiler of *Leges Henrici Primi* encouraged both parties to accept the way of reconciliation, rather than bringing about another litigation:

> If it happens that something is received by way of compensation and satisfaction, it ought to be accepted and may be retained in whole or in part, according as the circumstance demands.[148]

In general, the main constitutes of customary legal procedures in early twelfth century England were compurgation, witnesses, royal writs, ordeal and feud. Norman Kings and aristocracies inherited and employed these procedures from their Anglo-

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144. Ibid., c.36.1d, p.143.
145. Berman, *Law and Revolution*, p.78.
146. Ibid., c.36.2, p.143.
147. Ibid., c.36.2a, p.143.
148. Ibid., c.36.2b, p.145.

Saxon counterpart. Professor Whitelock suggested that the procedure of Anglo-Saxon England was strictly formal, that it was operated in accordance with a set of formal procedures. Any departure form these procedures might cause the loss of a suit.[149] Based on the passages of *Leges Henrici Primi* mentioned above, I draw the same conclusion about the legal procedures of Norman England as that of Whitelock about Anglo-Saxon. Customary legal procedures, despite without issuing enactment, provided a binding method for the settlement of disputes among people.

In terms of legal procedures, at all levels of society, there was a remarkable continuity from pre-Conquest England to Norman England. It was under the Norman Kings, however, that royal writs become an indispensable constitute in legal procedures. Therefore, it seems permissible to assume that the period from late-Anglo-Saxon England to Norman England can be treated as an important phrase in the developments of judicial administration and legal procedures. During this period the landmark was the growth of royal authority, culminated in the Conquest, that laid down the foundation for the formation of royal common laws in Angevin England, as shall be discussed below.

IV

King Henry II reestablished a more efficient judicial administration in medieval

149. Whitelock, *The Beginnings of English Society*, pp.134-140.

England on the basis of that of Henry I after the civil war between 1135 and 1154. The chronicler of Battle Abbey and the author of *Dialogus de Scaccario* stressed that the main task of the reign was to restore the "golden days of his grandfathers."[150] As a result, a more powerful central government was set up under a strong king. The legal systems in the age of *Glanvill* were characterized by routinzation, specialization, professional, and centralization.[151]

In this reign, the Assize of Clarendon (1166), the first of the great legislative enactment of the reign of Henry II, was announced, and it was strengthened by the Assize of Northampton (1176). From Clarendon to Northampton, medieval England witnessed the development of a set of standard procedural rules. Behind the growth of specialization and professionalzation laid the centralization of judicial administration. In Assize of Clarendon, the sheriffs and justices assumed the responsibility of maintaining the order in community.[152] But the Assize of Northampton, clause 7, announced that:

> Let the justices determine all suits and rights pertaining to the lord king and to his crown through the writ of the lord king, or of those who shall be acting for him, of half a knight's fee or under, unless the dispute is so great that it cannot be determined without the lord king, or is such as his justices shall refer to him, or to those who are acting for him by reason of their uncertainty in the case. Let them, nevertheless, apply themselves to he utmost to act in the interest of the lord king. Let them also hold the assize of wicked robbers and evildoers throughout the counties they are about to traverse, for this assize is enacted in accordance with the advice of the king, his sons, and his vassals.[153]

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150. *Dialogus*, p.77; *The Chronicle of Battle Abbey*, ed and tr. Searle, p.213.
151. But Hudson does not regard centralization as the hallmark of the reign, see his, *The Formation of the English Common Law*, pp.188-155.
152. C.1, 6, 9, 11, 17, see *English Historical Documents II*, pp.408-410.
153. *English Historical Documents II*, p.412.

Therefore, in 1176 the judicial authority of sheriffs were exploited in favour of king's justices.[154]

A detail research on the evolution of a professional judiciary in twelfth and thirteenth centuries done by Ralph V. Turner. He investigates the growth of specialization in the judiciary through forty-nine justices from late Henry II to Henry III. It was in the reign of Henry II that the process of specialization was started. In the royal court, there were two justices, Godfrey de Lucy and Robert of Wheatfield, that have concentrated on the work of courts.[155] Professor Paul Brand draws a distinction between unspecialized judiciary in Anglo-Norman England and the growth of professionalzation in Angevin England.[156] But Brand's explanation mainly concentrates on the use of lawyers and attorneys. To understand the legal transformation, it is necessary to explain the routinzation and professionalzation in the *Glanvill*.

In order to claim down the strife, and settle the disputes concerning land-holding, *Glanvill* proclaimed that the King's court was open to those who complaints for the default of right concerning free tenement in the lower court:

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154. See, J Boorman, "The Sheriffs of Henry II and the Significance of 1170", in *Law and Government in Medieval England and Normandy*, pp.255-275.
155. R. V. Turner, *The English Judiciary in the Age of Glanvill and Bracton*, c.1176-1239 (Cambridge: Cambridge University Press, 1985), pp.17-39; but he stresses that the extent of specialization in the time of Henry II should not be over-exaggerated. In fact, many justices in the reign was composed mainly of unspecialized royal household, and it was until the time of King John that the professionalzation and specialization is easier to see, pp.126-171, and 290-298.
156. P. Brand, *The Origins of the English Legal Profession*, (Oxford: Blackwell, 1992), pp.1-14.

> When anyone complains to the lord King or his justices concerning his fee or free tenement, and the case is such that it ought to be, or the lord King is willing that it should be tried in the King's court.....[157]

By this way, Henry II routinized customary procedures of transfer of cases into a standard procedure.[158] The complainer could get the support of royal court by having a writ of summons, which ordered the sheriff to do justice to the people concerned. The sample of the writ is listed below:

> The king to the sheriff, greeting. Command N. to render R., justly and without delay, one hide of land in such-and-such a vill, which the said R. complains that the aforesaid N. is withholding from him. If he does not do so, summon him by good summoners to be before me or my justices on the day after the octave of Easter, to show why he has not done so. And have there the summoners and this writ. Witness Rannulf Glanvill, at Claredon[159]

The main task confronting the central government after 1154 was how to tackle the land disputes without provoking a large-scale disorder as in the years immediately after the Norman Conquest. William the Conqueror and his sons handled this thorny problem by strengthening the central control over the locality. Through the executive writs, the Norman Kings ordered their local agents to settle the social disputes. After 1154, King Henry II routinized legal procedures to manage the crisis. In case of land dispute, the demandant could claims the disputed tenement from the tenant, while the latter could ask for a view of the land by getting the writ for holding a view of the land:[160]

> The king to the sheriff, greeting. I command you to send without delay free and lawful men from the neighbored of such-and such a vill to view one hide of land in that vill, which N. claims against R. and concerning which there is a

157. *Glanvill,* I.5, p.5.
158. Biancalana, "For Want of Justice: Legal Reforms of Henry II"; Cheney, "A Decree of Henry II on Defect of justice".
159. *Glanvill*, I.6, p.5.
160. Ibid., II. 1, p.22.

plea between them in my court. And you are to have four of them before me or my justices on a certain day, to attest the view. Witness, etc.[161]

The most efficient way of claming down disorder, however, was the innovation of the Grand Assize. Battle or feud was regarded to be legally action against enemy in Norman England. In *Leges Henrici Primi*, homicide could be defined as "a self-defense or a just cause".[162] Therefore, vendetta was a common way of settling dispute among people before the time of Henry II. During the reign of Stephen, blood feud accelerated the social strife. The Assize aimed at suppressing the feud by bringing the dispute under royal control:

> When the plaint and claim of the demandant have been heard, it is for the tenant to choose whether he will defend himself against the demandant by battle, or will put himself upon the assize of the lord king and seek a recognition to determine which of the parties has the greater right in the land.[163]

Tenant who put himself upon the assize should first purchase a writ of peace, to prevent the order party from proceeding further with the case by means of the original writ.[164] *Glanvill* prescribed:

> Prohibit N., unless battle has already been waged, from holding in his court the plea between R. and M. concerning one hide of land in such-and such a vill, which the said R. is claming against the aforesaid M. by my writ; because M., who is tenant, puts himself upon my assize, and seeks a recognition to determine which of them has the greater right in the land.[165]

Anyone could put himself upon the assize in pleas concerning land, or service, or excessive demands for services, or the right to the advowson of a church.[166] First, it was to summon four knights to select twelve knights, and they were to declare on oath

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161. Ibid., II.2, p.22.
162. *Leges*, c.72.1b, p.227.
163. *Glanvill,* II.3, p.23.
164. Ibid., II.7, p.28.
165. Ibid., II.8, p.29.

that whether plaintiff or defendant has the greater right in his claim.[167] The tenant might essoin himself for three times, that will be explained below. And then *Glanvill* mentions that:

> If some (knight) know the truth of the matter and some do not, those who do not shall be rejected and others summoned to court until at least twelve can be found to agree on it. If some of them declare in favour of one party and some in favour of other, then further jurors are to be added until at least twelve agree together in favour of one party.[168]

When all knights come to agree, then the assize shall proceed to declare which of the parties had the greater right in the land claimed. Moreover, suits decided in due form by the Assize of the lord King shall on no account be revised again in future.[169]

The Grand Assize was a royal protection of possession. No one could be disseised of his free tenement unjustly and without a judgement. Therefore, the principle of inheritance and notion of seisin, formed in Norman age, were upheld and developed by the Assize. It also ensured that on one could be forced to defend his seisin of a free tenement by battle.[170] But fuel was not abolished immediately after the introduction of Grand Assize. Instead, *Glanvill* allowed that:

> [one] will defend himself against the demandant by battle, or will put himself upon the assize of the lord king and seek a recognition to determine which of the parties has the greater right in the land.[171]

The transfer of cases has long been regarded as an advice used by royal government to suppress the seigniorial jurisdiction whereby creating a strong central

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166. Ibid., II.13, p.32.
167. Ibid., II. 11 and 14, pp.30-31 and 33.
168. Ibid., II. 17, p.34.
169. Ibid., II. 18, p.35.
170. Pollock and Maitland, *The History of English Law*, p.147; Lyon, *A Constitutional and Legal History of Medieval England,* p.296.

government.[172] Without doubt, this procedure was a great blow to disciplinary jurisdiction of lordship. But royal court also respected and even cooperated with seigniorial court. Some pleas did not come into the court of the royal court in the first instance, and was removed there when the courts of different lords were proved to have made default of right. *Glanvill* insisted that in such a case they should pass to the county court first, from which they could be transferred to the king's court.[173] If the lords found difficulty in trying a plea, he could adjourn his court into the court of the lord King, and asked for the advice of the King's learned men.[174] This admitted the seigniorial jurisdiction in the locality, and stressed the cooperation between the King and lords in some thorny cases.

The writs of right enabled the plaintiff to try its plea in lord court. *Glanvill* mentioned that when the tenant claimed to hold of another by free service any free tenement or service, he might not implead the tenant about it without a writ from the King or his justices. Then he shall have a writ of right, directed to the lord of whom he claimed to hold.[175] There were varieties of writs of right, covering many aspects of homage relationships: (1) the plea for services;[176] (2) the writ forbidding a lord

171. *Glanvill*, II.3, p.23.
172. Turner, "Henry II's Aims in Reforming England's Land Law: Feudal or Royalist?, in *Judges, Administrators and the Common Law in Angevin England,* pp.1-15; Biancalana, "For Want of Justice: Legal Reforms of Henry II"
173. *Glanvill,* XII, p.136.
174. Ibid., VIII. 11, pp.102-103.
175. Ibid., XII. 2, p137.
176. Ibid., XII.4-5, p.138.

unjustly to vex his tenant;[177] (3) the writ of naifty;[178] (4) the writs for replevying cattle;[179] (5) the writ for measuring pasture;[180] (6) the writs for having easements in free tenements;[181] (7) the writ for prohibiting a chief lord from vexing his tenant's tenant;[182] (8) the writ for perambulating reasonable boundaries between different tenements;[183] (9) the writ for upholding divisions made by those deceased;[184] (10) the writ for restoring chattels;[185] (11) those appointed by the lord king or his justices to transact certain business may not on their own authority appointed others to transact that business;[186] (12) the writ for woman to have her reasonable dower;[187] (13) the writ for prohibiting a plea concerning lay fee in an ecclesiastical court ;[188] and (14) the writ prohibiting anyone from prosecuting a plea of this kind in such a court.[189] As a result, the writ of right routinzed the homage relationships between lords and tenants, and a hierarchy of court system was thus set up.

Other two innovations of the reign were the writ of *mort d'ancestor* and the writ of novel diseisin. Both of them were advised to solve the dispute arising from land-holding. The writ of *mort d'ancestor* concerned the inheritance of land. The Assize of

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177. Ibid., XII .10, p.141.
178. Ibid.,XII.11, p140-141.
179. Ibid.,XII.12, p.142.
180. Ibid.,XII.13, p.142.
181. Ibid.,XII.14, pp.142-143.
182. Ibid.,XII.15, p.143.
183. Ibid.,XII.16, 143-144.
184. Ibid.,XII.17, p.144.
185. Ibid.,XII.18, p.144.
186. Ibid.,XII.19, p.145.
187. Ibid.,XII.20, pp.145-146.
188. Ibid.,XII.21, pp.146.

Northampthon, 1176 announced that:

> If any freeholder has died, let his heirs remain possessed of such 'seisin' as their father had of his fief on the day of his death; and let them have his chattels from which they may execute the dead man's will. And afterwards let them seek out his lord and pay him a relief and the other things which they ought to pay him from the fief. And if the heir be under age, let the lord of the fief receive his homage and keep him in ward so long as he ought. Let the other lords, if there are several, likewise receive his homage; and let him render them what is due. And let the widow of the deceased has her dowry and that portion of his chattels which belongs to her.[190]

In *Glanvill,* when a tenant dies seised of a free tenement, if he was seised in his demesne as of fee, then his successor could lawfully claim the seisin which his ancestor had, and if he was of full age, he shall have the writ of *mort d'ancestor.*[191] The writ concerned with merely those cases that the strongest and clearest claim for inheritance, a plaintiff's ancestor had died seised in demesne and fee. When the claim was not clear, then the plaintiff was forced to his writ of right in his lord's court.[192]

D. W. Sutherland insists that the writ of *noval disseisin* was the most successful reforms of the reign.[193] The writ of novel disseisin was associated with claims based on a plaintiff's own prior seisin. The writ of right concerned also with seisin, but it did not distinguish between those defendants who took possession as a result of the anarchy and those defendants who otherwise gained possession.[194] In the Assize of Northampton, the writ of *noval disseisin* was announced:

> Let the justices of the lord king cause an inquisition to be made concerning dispossessions (Assize of *noval disseisin*) carried out contrary to the assize,

189. Ibid.,XII.22, p.146-147.
190. *English Historical Documents II*, p.412.
191. *Glanvill,* XIII.2, p.149.
192. Biancalana, "For Want of Justice: Legal Reforms of Henry II", pp.507-508.
193. D. W. Sutherland, *The Assize of Novel Disseisin* (Oxford: Clarendon Press, 1973), p.2.
194. Biancalana, "For Want of Justice: Legal Reforms of Henry II", pp.503-504.

> sine the lord king's coming into England immediately following upon the peace made between him and the king, his son.[195]

The legal procedures of both writs were mainly jury of recognition. Firstly, twelve free and lawful men from the locality were to be elected in the presence of both demandant and tenant. The tenement was viewed by these twelve men, and their names endorsed on this writ. Twelve lawfully men made an inquisition, and decided who was the right holder of the tenement.[196] Indeed, the practice of inquiry through twelve lawful men was not an innovation of Angeivn England, but a restoration of legal tradition of Norman age. The practice of inquiry by twelve lawfully men and oath-taking by four lawful men of each vill become one of passages in the first enactment, the Assize of Clarendon, of medieval England.[197] Of course, there were obvious different between the compurgators (oath-helper) and the jurors, and between verdict and judgement, as Maitland reminded us.[198] However, the continuity of legal procedures from Norman England to Angevin England should deserve attention.

Furthermore, the rising of the new way of conducting litigation does not mean that traditional procedures were thus abolished at once. The Assize of Clarendon and of Northampton admitted the use of ordeal in trying some plea:

> And let anyone, who shall be found on the oath of the aforesaid, accused or

195. *English Historical Documents II*, p.412.
196. *Glanvill,* XIII 7, XIII 9-13, XIII 33, XIII 38, pp.151-170; and see the Assize of Northampton, c.4, in *English Historical Documents II,* p.412.
197. *English Historical Documents II*, p.408; Sutherland also points out that English tradition contained all the principal elements of the Assize of novel disseisin: the complaint of a wrong, the recognition by a jury, the limitation of relief to a certain fixed time in the past, see his *The Assize of Novel Disseisin*, p.26.
198. Pollock and Mailtland, *The History of English Law,* pp.139-140; also see M. M. Bigelow, *Placito Anglo-Normannica* (Boston: Soule and Bugbee, 1881), pp.xxi-xxxii

> notoriously suspect of having been a robber or murder or thief, or a receiver of them, since the lord king had been king, be taken and put to the ordeal of water.....[199]
>
> And if anyone shall be taken in possession of the spoils of robbery or theft, if he be of evil repute and bears an evil testimony from the public and has no warrant, let him have no law. And if he had not been notoriously suspect on account of the goods in his possession, let him go to the ordeal of water.[200]

In the Assize of Northampton, clause 1 mentions that:

> Murder, theft, robbery, forgery, arson go to the ordeal of water, and if he fail, let him lose one foot.[201]

Glanvill also included the ordeal as legal procedure in trying the criminal plea:

> Then the truth of the matter (for criminal plea) shall be investigated by many and varied inquests and interrogations before the justices, and arrived at by considering the probable facts and possible conjectures both for and against the accused, who must as a result be either absolved entirely or made so purge himself by the ordeal..... [202]

Other characteristic of professionalzation in legal procedures was the appointment of attorney. *Glanvill* supposed that the defendant could *essoin* himself three times, and had been directed by the court to come in person or send an attorney.[203] He continued to say that in pleas concerning the right and property, and anyone might prosecute them, and all civil pleas, either in person or by an attorney put in his place to gain or to lose.[204]

The imputes for the growth of use of representatives were the changes in the process of litigation after 1154. The development of royal courts as the supreme court brought about a series of changes in the ways of conducting litigation. In time of *Glanvill*, litigation was normally initiated by a royal writ returnable into the royal

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199. *English Historical Documents II,* p.411.
200. Ibid., p.413.
201. Ibid., p.411.
202. *Glanvill*, XIV, 1, pp.171-173; for the use of ordeal in plea of homicide, see XIV, 3, pp.174-175.
203. Ibid., III.6, p.39.

courts. It made much more difficult for litigants to know which writ mentioned in *Glanvill* was best suited to their cases. Moreover, the introduction of petty assizes made procedural rules more and more complex. It was, therefore, necessary for the parties to take expert advice.[205]

The appointment of representatives in age of *Glanvill* was greatly different from that of *Leges Henrici Primi.* In the clause 46.4 of *Leges Henrici Primi*, as mentioned above, said that an accused might seek counsel and obtain it from his friends and relatives. But the passage failed to mention the employment of attorney or professional lawyers at any stage in the proceedings.[206] After all, the transformation from customary law to common law was marked by the growth of specialization in the litigation.

Other reason for the use of attorney was the regulation of procedure of *essoins* in the second half of the twelfth century. All the actions in the royal court described in the first twelve books of *Glanvill* admitted three *essoins.* It was used as a delaying tactic.[207] Anyone who could not attend the court might apply the writ for saving a return day by royal warrant.[208]

At the last stage of the proceeding a final concord made in royal court for

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204. Ibid., XI. 1, pp.132-133.
205. Brand, *The Origins of the English Legal Profession,* pp.33-36.
206. Ibid., pp.1-13
207. But in Book XIII *Glanvill* wrote that the petty assizes, namely mort d'ancestor and five others, allowed two essoins, while Novel disseisin allowed no essoin at all.

recording the result of the litigation. Generally, a concord was, by common consent of the parties, written down in a chirograph, and the written terms read over to the King's justices sitting on the bench.[209] A simple of the final concord (chirograph) is as follow:

> This is the final concord made in the court of the lord king at Westminster on the vigil of the blessed Andrew the Apostle in the thirty-third year of the reign of King Henry the Second, in the presence of Rannulf Glanvill, justiciar of the lord king, and H. and R. and Robert and O. and other faithful subjects of the lord king who were present there at that time, between the prior and brethren of the Hospital of Jerusalem and William son of Norman, acting by Alan his son, whom he appointed in the court of the lord king as his attorney to win or to lose, concerning all the land and its appurtenances which the said William held (except one bovate of land and three tofts); concerning all which land (except the said bovate and the three tofts) there was a plea between them in the court of the lord king; namely that the aforesaid William and Alan concede and attest the gift which Norman father of the said William made to them, and they quit-claim all that land perpetually from themselves and their heirs to the Hospital and the aforesaid prior and brethren (except for the aforesaid bovate of land and three tofts which remain to the said William and Alan and their heirs, to be held perpetually of the Hospital and the aforesaid prior and brethren by the free service of fourpence a year for all service). And for this concession, attestation and quit-claim the aforesaid prior and brethren of the Hospital have given to the said William and Alan one hundred shillings sterling.[210]

As in the age of customary law, the written record was made in the presence of witnesses, including the king, his justices, and "other faithful subjects". Likewise, the presence of witnesses strengthened the permanence of the concord. If anyone did not keep the concord, or anyone complained of this, the sheriff would be ordered to put him under safe sureties to be before the justices of the King to answer for his failure to keep the fine.[211] The record-keeping was conducted also in county court. The

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208. *Glanvill,* I, 8 and 18, pp.6-7 and 11.
209. Ibid., VIII.1, pp.69-74.
210. Ibid., VIII.2 pp.94-95.
211. Ibid., VIII.3, pp.76-78.

sheriffs were ordered to record the litigation in the vills they were in charge.[212]

In short, twelfth century England witnessed the evolution of new ways of conducting litigation from customary law to Common Law. The catalyst for the transformation was the growth of royal judicial authority. King Henry II regulated the legal procedure of Norman England into the Common Law. The importance of the reign was the transition of form of writs from indefiniteness to a standard form.[213] The Norman writs were the important part of the King's law. In time of *Glanvill,* royal writs become an essential element in the legal proceeding. No litigation could be initiated without a royal writ. The main difference between the Norman writs and the Angevin writs is that the latter contains a limitation clause, provided for security, and mentioned the number of jurors.[214]

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212. Ibid., VIII.7, p.99.
213. Bigelow, *Placito Anglo-Normannica*, p.xxvi
214. Ibid.

Conclusion

I

The aim of this thesis is to examine the historical continuity of legal transformations in twelfth century England, that is, how English Common Law evolved out of customary law of Norman England. The thesis started with some doubts about the myth of the "Angevin leap forward" and considerable skepticism about the analytical methods of some legal historians, that stressed strict distinction between unwritten custom and the written law. I have found more evidences to criticize the traditional picture of the origins of the English Common Law.

The first affirmation of the thesis is that the tenants had rights to own his holdings, and enjoyed the security of tenure without his lord's intervention in the first half of the twelfth century. Orthodox legal historians will find it difficult to accept this conclusion. Past researches of English legal history were greatly influenced by prevailing concepts of medieval feudalism, or feudal law. According to this feudal interpretation, Norman England was a feudal state, and, as a result, political unification was obstructed by the introduction of the fief-holding pattern. Adherents of the feudal theory looked down the historical significance of the Norman age in making royal law available to the whole country.

Indeed, the concept of feudal age contradicts with the fact that medieval England

was governed by a strong royal administration. Instead of political fragmentation, Norman England was among the strongest state in contemporary Europe. It is unwise, therefore, to argue that the concept of state was the phenomenon of the second half of the twelfth century. If the idea of feudalism is so problematic, then analytical frameworks of Milsom, Thorne, and Palmer should be reexamined critically.

In this thesis, I have stressed that the explanation of customary law was crucially important for the study of the origins of the English Common Law. Unwritten custom were, in fact, the main sources of the Common Law system. Many historians believe that customary law was irrational, formalistic, and rigid, and thus, they ignore the study of the Anglo-Norman customs. Generally, I define law as an allocation of rights and duties, and suggest that Anglo-Norman customs about land-tenure can be viewed as a kind of law, despite the fact that it was unwritten in nature.

Customary law performed the social function of influencing people's decision, for instance, the arrangement of the family's land after the death of the landholder. In case of inheritance, it seems that the nearer parentelic group precedes the more remote, while the lord had not right to oppose this arrangement. On the other hand, the tenants also could alienate the land to anyone he wanted to transfer. The lord did not often exercise disciplinary and proprietary jurisdictions, and even was obligated to respect the property right of his tenants. Therefore, before the legal reforms of Henry II, the

tenants in Norman England enjoyed the security of tenure.

As I argued in Chapter II, there is less evidence to support that the medieval English society, after the Norman Conquest and before the Angevin age, was a seigniorial society. It is, of course, inaccurate to suggest that seigniorial jurisdiction did not exist at all. However, the first century of the Norman rule was coincided with the growth of a strong kingship, paving the way for the establishment of an effective administration of justice in the reign of Henry II. After 1066, the Anglo-Norman society witnessed a radical reorganization imposed by the Norman conqueror. A new structure of landholding was introduced, and consolidated, by the making of *Domesday Book* in 1086. Thereafter, at least, in theory, the relationship between lord and tenant was built on a complex hierarchy of landholdings.

Nevertheless, this structure of land tenure, known as honorial system, was loose in itself, as magnates' fees were seldom concentrated but usually fragmented over the state. Evidences, drawn from *Leges Henrici Primi* and royal writs, show that it was not uncommon for the tenants who resided at a very distant manor of the honour. As a result, the personal relationship between lord and his tenants was not close, and lord could not impose strict jurisdiction over all his tenants. On the other hand, Norman Kings owned a great deal of estates as the Crown Land, that mean that he was the greatest landlord of the state; and in name, all the magnates and their tenants were the

vassals of the King. I strongly believe that it was the main reason for the rising of an administrative kingship.

The reign of Henry I served as a typical example of the rise of administrative kingship in Norman England. Evidence also proves that Henry I, like his father and brother, often intervened in internal disputes of the honour. *Leges Henrici Primi* stresses the availability of royal jurisdiction, rather than seigniorial jurisdiction, over varied types of cases. Henry I also employed royal writ as a kind of royal law to settle the disputes arising from landholdings. The King's court, in a sense, could be viewed as the supreme court of the state, because the procedures of transfer of case, tolt and pone, from the county court to the King's court were also available. The greatest innovation of the reign, in my opinion, was the formation of the Exchequer after the "English Conquest of Normandy" in 1106.

In the time of Henry I, the Exchequer was still not very professional, but at least it included some permanent officers, or royal household, such as Roger of Salisbury, Ralf Basset, and Geoffrey de Clinton. This was the precedent of King's court in Angevin England. Moreover, before the introduction of the Assize of Clarendon and Assize of Northampthon, Henry I had already dispatched itinerant justice to handle some special cases, often involving a few counties. The county courts, like shires and hundreds, become the subordinate courts of the *Curia Regis*. To sum up, the

significance of Henry I in the legal history of medieval England should deserve attention.

My approach to trace the legal transformations in chapter III is a comparison between *Leges Henrici Primi* and *Glanvill*. What I have pointed out in this part is the intimate association between law and governmental principle in the Middle Ages. No ruler could rule the state without enacting a body of law. As conquerors, the Norman Kings attempted to strengthen its control over the conquered state by preserving the legal institutions of Anglo-Saxon. In many aspects, the Norman conquerors also respected, and even was influenced by, the legal custom of the Saxon people. *Leges Henrici Primi* is nothing more than a complication of the ancient customary laws. The Norman Kings ruled the conquered state by adopting the English customary laws.

As a result, the Norman Conquest did not bring about the political fragmentation of the kingdom into "feudal" duchy, like medieval France after the collapse of Carolingian Empire. Instead, Norman England was ruled by a strong centralized government. W. L. Warren singles out three ways in which medieval government could be carried on: (1)the royal authority was delegated by prominent landholders; (2) the employment of removable officials; and (3) the entrusting of local government to the popular institutions of local communities.[1] It was obvious that all three were

1. Warren, *The Governance of Norman and Angevin England 1086-1272*, pp.245-246.

operated simultaneously in Anglo-Norman England.

Furthermore, Norman England and the age of *Glanvill* were two important periods for the development of administrative kingship. I have already explained the point by discussing two related concepts about royal jurisdiction: the King's peace and the King's plea. To suppress serious offences, like homicide, the compiler of *Leges Henrici Primi* treated the offence as province of royal jurisdiction, namely the King had the judicial right to try the plea. In the time of *Glanvill*, the offence was classified as a criminal case, witnessing the elaboration of the concept of crime.

Of course, I do not try to deny that the legal reforms of Henry II stimulated the development of a regularized judicial administration after the prolonged civil war of King Stephen. By means of Grand Assize and other Assizes, Henry II regularized the way of conducting litigation, while archaic procedures, like ordeal and feud, were preserved. Berman lists five major achievements of Henry II's reforms, that are: (1) the "judicialized" old executive writs; (2) the community participation in the forms of a sworn inquest of neighbor; (3) the oath-taking and sworn inquests presented to the King's justice; (4) the new judicial writs categorized various types of wrong in terms of legal remedies available to redress them; and (5) the legal doctrine of seisin.[2] But, in conclusion, I insist that to a large extent Henry II only restored the legal custom of

2. Berman, *Law and Revolution*, p.466.

his grandfather, and thus there was no Angevin legal revolution at all. In terms of legal procedures, there was much resemblance between the two ages. Oath sworn, that was the oath-taking by both the plaintiff and the defendant, was the main procedure in the twelfth century. The procedural change in the second half of the twelfth century was that oath sworn was enforced by a jury of presentment.

II

In conclusion, I want to summarize my viewpoint to answer a question: what is the foremost impetus for the legal transformations in the twelfth century? It was, I believe, the uniqueness of medieval English kingship. A regularized legal system could only be set up and consolidated within a unified England under a powerful ruler. In the twelfth century, except during the reign of King Stephen, medieval England was a unified realm with a strong central court and an efficient local administration. Thus, she was the first state in medieval Western Europe that developed an effective and available system of law.

In his research about the governing principles in medieval Europe, W. Ullmann tried to solve an interesting question: how did medieval European government formulate what was wishes to be a binding rule?[3] The Norman Kings depended heavily on writ system, an important heritage from Anglo-Saxon England, as an

3. Ullmann, *Law and Politics in the Middle Ages*, p.198.

effective means of exercising government. The system enabled the King's will to express in a formal manner, and made the royal will concrete and manifest. As a formal document, royal writ conferred rights and duties on individuals, groups of persons, and institution. As a vehicle by which royal administration was exercised within a firmly fixed framework, it was also a source of ruling conceptions that cannot be underestimated. The royal writ, therefore, was the most important institution for the successes of the Norman and Angevin Kings.

The employment of the writ as an administrative instrument was of high antiquity, starting from, at least, according to F. E. Harmer, the time of Alfred the Great.[4] However, in the Anglo-Saxon age, the royal writ was merely a record of the transfer of land and privilege granted by the Kings. Obviously, royal writ was not used for judicial administration and other legal matters. Generally, Anglo-Saxon writ records that the King granted certain land, with sake and with soke, to religious house. King Edward gave land to Westminster Abbey is one of good examples:

> King Edward sends friendly greetings to Bishop Leofwine and Earl Edwin and all my thegns in Staffordshire. And I inform you that I have griven to Westminster, to Christ and to St. Peter, the land at Perton, and everything belonging thereto, in woodland and in open country, with sake and with soke, as fully and as completely as I myself possessed it in all things, for the sustenance of the abbot and the brethren who dwell in the monastery. And I will not permit anyone to alienate there any of the things that belong to that foundation.[5]

After the Conquest, particularly in the time of Henry I, royal writ was often used

4. *Anglo-Saxon Writs*, ed. Harmer, pp.1-3.
5. Ibid., p.361.

for executive and judicial purposes. The King ordered his agents, like sheriffs or local justices, to deal with land disputes in the local community, and even among the magnates. The writ became the keystone of the system of centralized justice. As the Kings were aware of the importance of writ as the effective method of governance, this was thus necessary to embark on the uniformity of writ. This task of uniformity was started, and then completed, by the work of Henry II's justices.

The main contribution of *Glanvill*, as the first textbook of the English Common Law, was to standardize the form of royal writ, making it as an important element in legal proceedings. Each step of litigation was guided by a variety of writs. As a result, the medieval English society became better and better organized. It is, therefore, clear that the formation of the English Common Law was the consequence of the enlargement of the royal law.

III

Finally, it is my intention to present a new periodization of legal history of medieval England. As has already been remarked in the general description of legal achievements of Henry I, the traditional dichotomy between the Norman customary law and the Angevin Common Law requires drastic modification. The formation of the English legal system was rather a product of prolonged legal transformations from Anglo-Norman to Angevin England, or, at least, from the year 1100 to the age of

Glanvill. Norman England can be regarded as the formative stage, while Angevin England as the developmental stage.[6] The development of writ system points to institutional continuity from pre-Conquested England to Angevin England.

I do not mean that there was no legal change at all between Anglo-Saxon England and Angevin England. Anglo-Saxon institution was in itself different from that of thirteenth century England. What I insist is that the years between 1050 and 1154 was also one of the crucial period of legal transformations. Berman sees the period as an important stage for the development of the first modern Western legal system, as the papal revolution in the period gave birth to the new conception of legal system in Western Christendom. This was the first time that the lawmaking role of the King was recognized in the twelfth and thirteenth centuries.[7] His idea is very inspiring, but overestimates the importance of the Henry II in this "secular legal revolution", as he points out that "the hallmark of Henry[II]'s reign was institutional innovation, not continuity with the past.[8]

In his reperiodization of European history, C. W. Hollister, based on evidence from social, economic, institutional, intellectual, art, and legal history, as well as literature, philosophy, psychology, archaeology, and anthropology, suggested that the

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6. In terms of political thought, this periodization is widely recognized, see J. H. Burns, ed. *The Cambridge History of Medieval Political Thought. C350-1450* (Cambridge: Cambridge Univeristy, Press, 1988).
7. Berman, *Law and Revolution*, p.404.
8. Ibid., p.422.

Ancient-Medieval-Modern paradigm should be critically reviewed. Instead of using medieval Europe, Hollister divided roughly the periods between the collapse of Western Roman Empire and the mid-eighteenth century into two ages: (1) late Antiquity (from about the late second century A. D. to mid-eleventh century); and (2) traditional Europe (from mid-eleventh century to mid eighteenth century)[9] Obviously, Hollister stressed the mid-eleventh century as a watershed of European history. I agree with Hollister's re-periodization, and believe that it can provide a framework for the study of legal transformations in medieval England.

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9. Hollister, "The Decline and Fall of the Middle Ages: Reperiodizing European History", *Wei Lun Lecture Series VI*, (1996), pp.26-38.

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