

Copyright: Alan Macfarlane, King's College, Cambridge. 2002

From: Alan Macfarlane, **The Making of the Modern World: Visions from the West and East** (Palgrave, London, 2002).

F.W.MAITLAND AND THE MAKING OF THE MODERN WORLD

In his attempt to win a Trinity College Fellowship, Maitland submitted a dissertation entitled 'A Historical Sketch of Liberty and Equality as Ideals of English Political Philosophy from the Time of Hobbes to the Time of Coleridge'. He published it at his own expense when he was twenty-five.¹ In this long and scholarly piece, he summarized and analyzed much of the greatest thought on 'liberty' in the two hundred years before his own work, including the work of Hobbes, Locke, Hume, Adam Smith, Rousseau, Kant, Coleridge, Mill and others. The central theme is the way in which the individual is embedded in wider groupings. Having sketched out the philosophical problems in this early work, I believe that his later life's work on English historical records allowed him to re-examine how the modern liberty had emerged. He examined the relations of the state and the citizen from the feudal period onwards, the relations of community and individual from Anglo-Saxon origins, and of the family and the individual.

Maitland tried to show that from very early on there had been a peculiar liberty of the individual in England, particularly in relation to property and power. In opposition to most of his contemporaries, including Sir Henry Maine, he disliked the idea of movement of all societies from Community to Association. He saw a basic liberty and individualism in England from Anglo-Saxon times onwards. Thus freedom and liberty of action, he argued, is indeed a key feature of the curious English structure which, in his day, was spreading all over the world. Yet if the individual is not embedded in the wider group in the usual ways, what about the second great unifying force, hierarchy?

Basically Maitland takes up De Tocqueville's central theme, namely the nature and implications of equality and inequality. What he shows is that the nature of English law and social structure is such, and has always been such, that there are few, if any, inherited differences based on birth. All differences, whether of social rank, of parental power or of gender are the result of contract, or as modern sociologists might say, of achievement rather than ascription. Thus he presents a picture of a competitive and fluid social structure as far back as the records take us. All this, he is aware, is very unusual and very important.

Yet, having spent much of his life analysing in detail how the development of liberty and equality had worked, and having shown that most of the famous theories of the movement from status to contract were seriously over-simplified descriptions of what had happened, Maitland was faced in his last years

¹ It is re-published as the first work in Maitland, **Collected Papers**.

with a serious difficulty. If, as Tocqueville realized, people are not held together by birth status (in a community, social rank or family), what will make them cohere? How can they act together to effect things and to protect themselves against the State? This was also the problem for Montesquieu and Adam Smith, but none of the three thinkers were able to devise a solution. Yet I believe that Maitland did find an answer in his arguments, up to now practically ignored, concerning corporations and trusts.²

Another problem which he addresses concerns the reasons why England became different from most of its continental neighbours. Here he amplifies, expands and documents the insights of Tocqueville and his predecessors, namely that being an island was the crucial fact. Islandhood had many consequences, some of which Maitland explores in relation to the tension within the balance of power, as with the unusual form of feudalism and the development of the parliamentary system. One manifestation that particularly interests him is the divergent development of law, English Common Law and Equity, as opposed to the restoration of Roman Law over the continent. Another major feature which intrigues him is the way in which there can be a 'changing same', that is to say both continuities and change at the same time. His delicate account of change with continuity, avoiding most of the usual pitfalls, provides the possibility of a non-evolutionary and non-revolutionary approach to history.

So, by the time of his untimely death at the age of fifty six, Maitland had made a lightning sketch of what the essence of English (and hence American) civilization was and how it could balance liberty, equality and fraternity. What is curious is that his findings and vision, though preserved among technical legal historians, have become almost forgotten among wider historians and the general public. I myself do not remember ever encountering him in six years of historical training at Oxford University between 1960-6. This amnesia is a good example of what is not usually considered by those who discuss paradigm shifts, namely the way in which earlier knowledge of a high quality is quietly forgotten.³

* * *

If it is indeed the case that Maitland was part of a long Enlightenment tradition and asking the large questions concerning the nature and origins of liberty, equality and fraternity which concerned them, we need to know more about his ancestors before we assess his contribution. I wrote this account of

² The one exception, which I discovered after this book was completed, is the excellent work by David Runciman on **Pluralism and the Personality of the State** (Cambridge, 1997), chapter 5 and pp.66-70 which provides a detailed account of the legal background to parts of Maitland's work and a discussion of trusts and corporations.

³ Though he is not quite forgotten. On 4th January 2001 he became the first professional historian to have a memorial placed in Poet's Corner in Westminster Abbey and thus become immortal.

Copyright: Alan Macfarlane, King's College, Cambridge. 2002

Maitland originally as the last section of a longer work considering the ideas of three of these thinkers, Montesquieu, Adam Smith and De Tocqueville. The account of those three became a book in its own right, but it makes sense to summarize some of the ideas of these three and their cumulative findings in order to see the background to Maitland's quest and my treatment of him.⁴

What these three thinkers did, on the basis of intuition and limited archival research, was to outline a strong hypothesis as to how the change from the **ancien regime** world might have occurred. In so far as the sources were available, their search took them back to the history of the Roman Empire. A study of Roman civilization showed clearly that it had abandoned its democratic ideals and moved into the usual hierarchical and absolutist trap. They believed that the roots of modern liberty and equality must lie elsewhere. Montesquieu famously found them in the 'German woods' where the wandering tribes who overran the Roman Empire returned western Europe to its democratic origins. They were warlike, individualistic, egalitarian. With a surprisingly developed money-consciousness and judicial system, they set up small, balanced kingdoms throughout the old Roman lands.

They suggested that by the twelfth century western Europe was uniformly 'feudal', that is to say the basis of society was an 'artificial' feudal contract, an act of will, an agreement to concede certain economic and political rights. There were no strong birth-based differences. The centre was not too strong, kinship was secondary to politics and religion was significant but not too powerful. In other words, European states had achieved that unlikely balance between institutional forces, between centre and periphery, between the ambitions of rulers, priests and people, so that none became supremely dominant.

It was during this period of balanced tension that there was rapid technological, artistic and intellectual growth. This was the era of the extension of horse and plough agriculture, the spread of water and wind power, the reception of Greek, Indian and Chinese science by way of Islam, the founding of universities, and the growth of towns and trade.

Although structurally very similar to the rest, England was the extreme example of a propitious balance of forces. In England, largely because it was an island, the Crown became unusually powerful and centralized, but not too centralized, monarchy emerged under the later Anglo-Saxon kings. The genius of the Normans and Angevins consolidated and homogenized this structure so that by the thirteenth century England was a wealthy, powerful, well governed land, with a rapidly growing technology, trade links, strong armies and booming towns. It was basically, like the rest of Europe, a Germanic kingdom with an engrafting of a more developed centralized feudalism.

This phase of 'feudal' civilization, the five or so centuries between the eighth and thirteenth centuries,

⁴ The rest of this chapter is taken from pages 277-284 of Macfarlane, **Riddle of the Modern World**. Readers who have recently read the conclusion of that work may wish to skip the rest of this chapter.

provided the possible gateway to a kind of civilization never before envisaged in the world. A large, diverse, agrarian civilization was broken into small, competing quasi-states, unified under Christianity, yet preserving their differences. The system was based on contractual ties and not birth differences, on achievement rather than ascription. There was an antagonism yet balance between the growing power of the Church and the State, but neither was dominant and they had not yet formed a close alliance. Most of whatever power kinship had once held had been destroyed. Commerce and towns were encouraged, as was technological innovation in the saving of labour in the difficult and population-scarce environment. Thought and recovered knowledge were relatively free of the jealousies of a powerful clergy.

However, they argued that the next five hundred years saw the balance destroyed throughout much of continental Europe. The normal tendencies and traps of agrarian structures, the temptations and tools which growing knowledge and wealth provide, worked their usual consequences through time. The threat of war, the threat of 'heresy' (the Crusades, the Albigensian heresy), the desire to predate on the wealth-creators, all these were forces which tipped the balance.

The institutional mechanisms for the emergence of the absolutist state and church are well known. The Catholic inquisition, the reception of an authoritarian and centralizing Roman law, the emergence of caste-like birth privileges for the 'nobility', the destruction of the 'liberties' of all intermediary bodies such as trade guilds and town governments, the rising size of standing armies and the central bureaucracy, all these were catalogued by our informants. In essence, European civilization moved away from a 'feudal' one based on the flexibility of 'contract', to an **ancien regime** one based on 'status'. The tensions and separations of spheres were lost. A centripetal force seemed to be at work - everything gravitated upwards and towards the centre.

However there were exceptions, both at the national or local level - the rise of free cities in northern Italy or Germany being good examples. But they were soon crushed and the tendency continued. By the eighteenth century, the usual barriers - war, famine, disease, an increasingly impoverished peasantry, a parasitic nobility, a conservative clergy, an arbitrary and despotic law, a large and enervating bureaucracy and the heavy taxes to sustain it, increasing predation on merchants and producers, all were widespread.

By the late seventeenth century there were only two apparent exceptions to this. One was the richest (**per capita**) country in the world, namely Holland, the other was England. Holland exemplified the advantages of a balance between competing forces. It had discovered that a liberal course - separating and balancing, encouraging political and religious liberty, de-centralizing power, avoiding extreme stratification, all encouraged a rapid growth of wealth so that a tiny country with such a virtuous structure could defeat the greatest Empire in the West. Yet Holland, for various reasons, was unable to develop beyond this high-level commercial economy.

* * *

These three writers believed that England was the exception that somehow solved the riddle. In 1200 England was a centralized and reasonably well governed example of the western European

pattern. From this we might have expected that, combined with its rapid technological and productive development, it would have been moved by the normal tendencies evident over Europe towards a precocious form of the trap - heavily absolutist, stratified, and caught in the grip of an intolerant inquisitorial religion. Yet by the time that Montesquieu visited England in 1739 he believed it hardly resembled the rest of Europe.

What had happened in those five hundred years to make the trajectories so different, and why had it happened? In essence the easiest way to explain the difference is negatively. The three great tendencies which had swept most of Europe had not occurred. Political absolutism and centralization, with a ruler above the law and no countervailing forces, had not become established. There had been times when the tendency asserted itself, famously under King John, Henry VIII, Charles I and James II. But, in each attempt at monarchical aggrandisement, it had failed and a short period of absolutist rule had led to a reaction; **Magna Carta**, the rise of the Elizabethan parliament and sale of Crown lands, the beheading of the King and the Whig restoration. As most European states saw the vestiges of democracy swept away, the power of the Commons grew until by Montesquieu's time the contrast was overwhelming.

The trappings and mechanisms of absolutism which had arisen over much of the Continent failed to develop. There was no large central bureaucracy, but rather the devolution of power through a complex of often voluntary and honorary power holders such as constables and the Justices of the Peace. There was relatively easy taxation, an arrangement jealously guarded by the Commons. There was no standing army and few hired mercenaries. The legal system bequeathed by the Germanic invaders, the English customary law, was retained and no formal reception of inquisitorial and despotic late Roman law occurred. All these are both signs and associated features of the absence of the normal tendency for power to corrupt. Amazingly the country grew steadily wealthier, yet the wealth was spread, property was secure, people had rights, and the King remained below the law. It was a miracle, often at risk, but it happened.

Secondly, the tendency for the ecclesiastical power to increase and to enter into a pact with the lay authorities never occurred. There remained a deep conflict between state and church. Neither was strong enough to subdue the other. From Becket to the destruction of the monasteries, the Crown kept the church in check. Both conspired to ward off the sweeping resurgence of clerical power in the fourteenth century rise of the Inquisition or the sixteenth century Counter-Reformation on the continent of Europe. Instead of coalescing into a fervent and conservative force, England saw the rise of pre-Reformation independent sects such as the Lollards, then the Reformation itself which placed the individual at the heart of his religion and reduced the mediation of the theocracy, and finally the growth of sectarianism and a balanced toleration whereby religion became a private matter. The final separation of religion and politics, rather than their coalescing, had been achieved, and religion also withdrew from economic life - or left such a life to the private conscience.

The third great absence was the tendency towards internal social predation, taking the normal form of increasingly rigid, caste-like, barriers between birth-given orders. As Tocqueville in particular brilliantly argued, it looked as if the normal division into a high nobility, inferior bourgeoisie and crushed peasantry,

did not occur. A hitherto unprecedented social structure emerged which was based on wealth and achieved status rather than blood. It was still very inegalitarian **de-facto**, but the possibility of movement within it was great. Furthermore, the bulk of the population were placed at the middle level rather than there being a few immensely privileged, and a great mass of illiterate agrarian producers. The peculiar rank of the English gentleman, the exceptional status of 'yeoman', the high position of merchants and craftsmen, the prosperity of country dwellers, all these were signs of something unusual, a proto-class rather than proto-caste or estate system. Such a wide spread of wealth, power and liberty obviously both reflected and affected the possibilities of political absolutism. It was only matched, in a slightly different form, in Holland.

The question still remains, though, of why, starting from a fairly similar origin in Anglo-Saxon civilization, England had gone against the normal tendencies. Here our informants developed two interlinked theories. One, developed by Montesquieu and expanded by Smith, concerned the hidden effects of material wealth and in particular trade and consumerism. In its crudest form, the theory was that, all else being equal, if a country could move into a long period of material growth, the tendency of the lords and the church to gain power would be deflected by greed. The lords would prefer consumer goods rather than retainers, and hence lose their military bargaining power. Likewise the church through greed would lose the love of the people as it assembled treasures upon earth and end up like the monastic orders, stripped of almost all influence. The difficulty, of course, was to sustain growth at such a level and for long enough that this conversion of the powerful to the preferability of modified predation, or even dabbling in production, could be achieved. Often it happened for short periods and in limited areas, as in the environs of a city such as Florence or Siena. But such a haven was soon exposed to marauders from outside and would revert to the usual predatory dominance of lords and priests.

Thus this theory was linked to the one unique feature of England, that it was a large enough island, just far enough away from a sophisticated continent. It was large enough to defend itself and to generate a great deal of internal diversity and trade. It was far enough away to make it difficult to attack or even threaten as long as it was defended by a good fleet. Yet it was not too far away, twenty miles rather than the hundred miles which made Japan so much more isolated. Its major weakness was that it was contiguous with other, more warlike, peoples to the north, namely the Highland Scots. Fortunately for it, there were few highlanders and they usually only constituted a raiding nuisance. Nevertheless, the unification of the Crown in 1603 eased the threat of land-based invasion, and the events of 1715 and 1745 showed how relaxed the English had become about their land defences.

The advantages of not having large warlike land neighbours were immense. Basically it decreased the temptations to, and possibilities of, predation. Most obviously, a country like England never suffered the kind of levelling catastrophe afflicted by the Mongols, thus avoided a dismantling of its infrastructure. The devastating effects of being fought over by warring armies, which brought northern Italy and southern Germany toppling from their heights, never occurred. The Norman invasion, the Wars of the Roses or English Civil War were as nothing compared to the normal experience of continental countries.

Secondly, the balance of ruler and ruled was altered. A people could not be held to ransom by the

threat of foreign invaders, whose continued hostility gave rulers a weapon with which to extract taxation and obedience from their people. They did not have to suffer from that most powerful tool of political absolutism, a standing army whose presence in England in the 1640s might well have ushered in a continental-style absolutism. An unarmed populace can stand up to an unarmed ruler - or rather one who provides defence only through a strong navy.

A third consequence is on the temptation to external expansion. Such predation, which the English engaged in with some zeal in France and Scotland during the twelfth to fourteenth centuries, had a different nature from that which attracted the Hapsburgs or Louis XIV or had been a major factor in the destruction of the Roman democracy. In the case of Scotland the target was finite and the aim to eliminate a particular threat. In the case of France, the dynastic claims encouraged adventure, were clearly a luxury not a necessity. If the King wanted to adventure in that way, just as when he wanted to gain merit in the Crusades, he would have to pay for it - by acceding to the desires of the lords and commons. Instead of such wars leading to the increase of royal power, as taxation was raised and the people threatened, it was often the warlike adventurer Kings who conceded most to the people. Every concession tipped the balance and though temporary reprieves of a financial kind could be achieved, for instance by the confiscation of monastic lands, a ruler wishing to be adventurous or loved, like Elizabeth, was too firmly circumscribed to be able to do anything other than sell off the family silver (the demesne lands) and put her successors further at the mercy of a powerful third estate. At a certain point, probably after about 1650, the process was more or less irreversible. Each new gain in production now fed into increased production, rather than internal predation.

The other hypothesis to account for England's peculiar history overlaps, but adds depth to this account. There were certain initial differences in England before the Norman invasion. Then for a century after the Norman invasion this already different island world came close to the rest of north west European models of feudalism, except that there was no 'dissolution of the State'. A powerful monarchy maintained its control of the legal system, but delegated power downwards through the feudal links. Thus England reached a balance of centralization and de-centralization.

From a basic similarity by about 1200, 'Europe' increasingly gravitated towards other forms, with the reception of Roman Law and the growth of a blood nobility and a widespread peasantry. England, after incorporating some of the organizational features of Roman Law, rejected almost all the substantive content of the revived late Roman legal system. This meant that England's economic, social and political structure became more and more at variance with much of the continent. Montesquieu and Tocqueville guessed that England largely avoided the apparently inevitable tendency to 'caste' and 'political centralization'.

This unusual situation could not have happened if England had not been protected by the sea. It was possible to be a small replica of England, for a while, without a sea boundary, as in the Italian city states or Holland, but to sustain such a balance over hundreds of years as a land-bounded nation was probably impossible. There was nothing inevitable about the process. Many islands have existed without any dramatic developments. It was only England's good fortune to be close to, but not too close, to a dynamic Continent which enabled it to achieve anything. That something which has changed the world

happened, was remarkable, unpredictable, and the result of an unique combination of forces.

For what happened was that at a certain point the feed-back loop had altered. That strange alchemy whereby military strength was fuelled by high level production, rather than feeding off it, had begun. The rich became the powerful, rather than the powerful becoming the rich. Extra production led to increased power and England was able to suck in the wealth of inventions and goods of not only Europe, but increasingly of America and Asia, to fuel its attempt to escape for the first time from the agrarian trap. It had, from another viewpoint, become the most powerful predator.

This then was the riddle and the hypothesis. Something strange had developed in western Europe and by the time of Tocqueville's death had clearly also been transferred to America. It consisted of a particular set of relationships to which we give general terms such as 'liberty', 'equality', 'wealth' and so on. Its roots were very deep, going back to Rome and earlier. All three of the great analysts guessed that it had developed in its essence in England. Yet they were unable to take the historical part of their surmises further for lack of a systematic survey of the historical records. It was only in the generation after Tocqueville's death that the rise of professional historiography in Europe would make it possible to confirm or refute their suggestions. These chapters on Maitland, then, are a brief overview of the man I believe to be the greatest of their successors.

As is clear from his Trinity dissertation, Maitland was well aware of their work. His questions at a deeper level were shaped by their obsessions, also mediated to him through the work of J.S. Mill. He was also influenced by nearer contemporaries, those in the generation above him. One of the most notable of these was Sir Henry Maine, like Maitland a world-level thinker who combined legal history and wider anthropological and philosophical concerns. It is worth briefly outlining some of Maine's ideas in order to understand better the wide context within which Maitland's ideas emerged.