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### **THE DIVERGENCE OF LEGAL SYSTEMS**

If we gather together all his discussions, Maitland's picture of what happened is, in essence, as follows. The legal, political and social systems of much of north-western Europe were alike in the long period between the collapse of the Roman Empire and about the twelfth century. There was nothing special about England except that, having been over-run by three waves of Teutonic peoples (Anglo-Saxons, Vikings, Normans) and having been less deeply Romanized than much of continental Europe, it was an extreme example, with northern Germany and Scandinavia, of the Germanic system. It was only in the twelfth century that the divergence between England and the Continent became clear, consisting largely in the fact that in England the relations between king, lords and people remained balanced, property was held by contract and the rights of kin were not re-established. In other words, while much of the continent began to move towards a 'peasant' and 'caste', that is highly stratified, system, England developed towards an individualized and open social structure. The similarity to Tocqueville's account is striking.

The question, of course, is why England did not follow the course of most continental countries. Ultimately, Maitland's answer seems to lie in the field of politics and law. At the heart of this was the issue of royal power. On the one hand it was the powerful, highly centralized, legal system focusing on the Crown which began to differentiate England. Yet Maitland also documents in great detail the numerous 'intermediary bodies' and checks and balances which prevented the judicial centralization from turning into the administrative centralization and political absolutism which Montesquieu and Tocqueville had seen emerge on the Continent. The Crown in England was both immensely powerful, yet not absolutist. Following Stubbs, Maitland characterized its position on a number of occasions, in a series of paradoxical remarks which capture the essence of the fact that the Crown is both the font of power and law, yet not absolute. 'The king can do wrong; he can break the law; he is below the law, though he is below no man and below no court of law.'<sup>1</sup> Thus the 'rights of the king are conceived as differing from the rights of other men rather in degree than in kind.'<sup>2</sup> Magna Carta merely confirmed what was long the case, that 'the king is ... below God and the law ... the king is bound to obey the law', a view which Fortescue excellently elaborated in the fifteenth century, but had earlier been exemplified

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<sup>1</sup>Maitland, **History**, I, 515-6

<sup>2</sup>Maitland, **History**, I, 512

by Bracton.<sup>3</sup>

Thus there is a contradiction. England is the most centralized, rule bound and highly governed country in Europe, with royal power penetrating right down to the level of every citizen, just as every citizen holds his property of the Crown. On the other hand, there is no large bureaucracy, no standing army, an enormous amount of delegated power and delight in powerful intermediary liberties. Maitland filled in the picture which Montesquieu and Tocqueville had sketched out, showing how it worked and evolved. Although he occasionally alludes to 'some cause deep-seated in our national character'<sup>4</sup>, he pays little attention to such nebulous concepts. Instead he focuses on a set of historical 'accidents'. The accident of islandhood, of the Norman Conquest, of the genius of the Angevin rulers and so on. Nothing was to do with 'race', nothing was determined by Germanic origins. Yet origins and customs, and language and many other things were parts of that unusual chemistry which produced an increasingly odd situation on this small island.

In a sense, to understand why and how the peculiarity emerged through a mixture of structural and accidental causes, one would have to write a detailed history of England. Briefly, however, we can approach part of Maitland's answer to this question by looking at two themes that he pursued with increasing interest, that is the relations between English and Roman law, and the development of corporations and trusts. Both provide keys to his solution.

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Maitland's remarks on the growing divergence between English and Roman law are scattered through his works. Although he had read deeply on continental law, carried on a correspondence with a number of leading Roman law scholars and even edited part of the work of one of the greatest comparative philosophers of law, Otto Gierke, Maitland's references are usually allusive and brief. It would have grossly inflated his work to have undertaken as detailed a survey of the legal traditions of each country as he did of England. His comparative remarks therefore have to be set in the context of the numerous other studies of the comparison of continental and English law which were available at the time and have been published since.<sup>5</sup> He looked at the English side of the differences, and took the continental side as given. Some may wonder whether he has thereby exaggerated or distorted the differences and it is for this reason that I later provide an assessment from the French side by the greatest of the later comparative historians, Marc Bloch. Maitland's work should also, obviously, be read in the context of

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<sup>3</sup>Maitland, **Constitutional**, 100, 198-9

<sup>4</sup>Maitland, **History**, I, 344

<sup>5</sup> For example, Vinogradoff **Roman Law**, Stein and Shand et al.

the previous detailed comparative accounts by Montesquieu, Smith and Tocqueville with whom his analysis is essentially in agreement.

Maitland noted that during the twelfth to sixteenth centuries much of northern Europe was reconquered by a renovated Roman law. As he put it, 'Englishmen should abandon their traditional belief that from all time the continental nations have been ruled by the "civil [i.e. Roman] law", they should learn how slowly the renovated Roman doctrine worked its way into the jurisprudence of the parliament of Paris, how long deferred was the "practical reception" of Roman law in Germany, how exceedingly like our common law once was to a French **coutume**.'<sup>6</sup>

By the thirteenth century, England was beginning to look distinctly different from the rest of Europe, not because England had changed, but because Roman law had made no conquest there: 'English law was by this time recognized as distinctly English.' This feeling of contrast was heightened because, although 'Roman jurisprudence was but slowly penetrating into northern France and had hardly touched Germany' by the thirteenth century, many Englishmen thought that the whole of Europe now had written Roman law, which 'served to make a great contrast more emphatic.'<sup>7</sup> Certainly, by the sixteenth century England was an island carrying an old Germanic legal system, and lying off a land mass dominated by Roman law.

Examples of the growing divergence abound. For instance, in relation to the law of contract 'it is plain that at latest in the thirteenth century our English law was taking a course of its own.'<sup>8</sup> In relation to inheritance, over much of Europe there was a partial 'reception' of Roman ideas, but 'during the middle ages the Roman system was not observed in England.'<sup>9</sup> The claims of wider kindred to family land, were 'finding a formal recognition in the new jurisprudence' over much of Europe, but not in England.<sup>10</sup> When Normans and Angevins came to England, they re-enforced, modified and developed a system which was different from that which grew up in their homeland. 'Not upon the Normans as Normans can we throw the burden of our amazing law of inheritance, nor can we accuse the Angevin as an Angevin.'<sup>11</sup>

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<sup>6</sup>Maitland, **History**, I, xxxvi

<sup>7</sup>Maitland, **History**, I, 188

<sup>8</sup>Maitland, **History**, II, 185

<sup>9</sup>Maitland, **History**, II, 361

<sup>10</sup>Maitland, **History**, I, 344

<sup>11</sup>Maitland, **History**, I, 266

Thus 'In dealing with any century later than the thirteenth, the historian of English law could afford to be silent about Roman and Canon law, for...these laws appear in a strictly subordinate position, are administered by special courts, and exercise very little, if any, influence on the common law of England.'<sup>12</sup>

The effects of this difference were immense and among them, Maitland believed, was the reason why political absolutism did not develop in England. 'The English common law was tough, one of the toughest things ever made. And well for England was it in the days of Tudors and Stuarts that this was so. A simpler, a more rational, a more elegant system would have been an apt instrument of despotic rule. At times the judges were subservient enough: the king could dismiss them from their offices at a moment's notice; but the clumsy, cumbrous system, though it might bend, would never break. It was ever awkwardly rebounding and confounding the statecraft which had tried to control it. The strongest king, the ablest minister, the rudest Lord-Protector could make little of this "ungodly jumble".'<sup>13</sup> Or again, Maitland writes 'our old law maintained its continuity...it passed scathless through the critical sixteenth century, and was ready to stand up against tyranny in the seventeenth...if we look abroad we shall find good reason for thinking that but for these institutions our old-fashioned national law...would have utterly broken down, and the "ungodly jumble" would have made way for Roman jurisprudence and for despotism.'<sup>14</sup> Instead, the common law with its vague but strong assumption that the king was under no man, but **was** under the law, was maintained.

Clearly the maintenance and development of an alternative legal system to Roman law was a key to England's peculiarity. How did this happen? Here we can only summarize a few of Maitland's widely spread hints. The first thing to look at, as Tocqueville would have said, was the 'point of origin'. Before the Norman invasion the differences were already marked. This was partly due to the fact that the effects of the Germanic invasions were different. In England the Roman civilization was swept away. But 'in the kingdoms founded by Goths and Burgundians the intruding Germans were only a small part of a population, the bulk of which was Gallo-Roman, and the barbarians...had made their entry as subjects or allies of the emperor...'<sup>15</sup> This partly helps to explain why Roman civilization, in the shape of law and religion and language, came back into France, Spain and Italy, whereas it did not do so in England. In England 'there was no mass of Romani, of people who all along had been living Roman law of a degenerate and vulgar sort and who would in course of time be taught to look for their law to Code and

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<sup>12</sup>Maitland, **Collected Papers**, II, 30-1

<sup>13</sup>Maitland, **Collected Papers**, II, 484-5

<sup>14</sup>Maitland, **Collected Papers**, II, 495-6

<sup>15</sup>Maitland, **History**, I, 13-14

Digest.<sup>16</sup>

The difference becomes clear if we contrast the continental and English situations. 'On the continent of Europe Roman law had never perished. After the barbarian invasions it was still the "personal law" of the conquered provincials. The Franks, Lombards, and other victorious tribes lived under their old Germanic customs, while the vanquished lived under the Roman law. In course of time the personal law of the bulk of the inhabitants became the territorial law of the country where they lived. The Roman law became once more the general law of Italy and of Southern France; but in so doing it lost its purity, it became a debased and vulgarised Roman law, to be found rather in traditional custom than in the classical texts, of which very little was known. Then, at the beginning of the twelfth century, came a great change. A law-school at Bologna began to study and to teach that Digest in which Justinian had preserved the wisdom of the great jurists of the golden age. A new science spread outwards from Bologna.'<sup>17</sup>

In England the situation was different during the Anglo-Saxon period. 'Eyes, carefully trained, have minutely scrutinised the Anglo-Saxon legal texts without finding the least trace of a Roman rule outside the ecclesiastical sphere. Even within that sphere modern research is showing that the church-property-law of the Middle Ages, the law of the ecclesiastical "benefice", is permeated by Germanic ideas. This is true of Gaul and Italy, and yet truer of an England in which Christianity was for a while extinguished. Moreover, the laws that were written in England were, from the first, written in the English tongue; and this gives them a unique value in the eyes of students of Germanic folk-law, for even the very ancient and barbarous **Lex Salica** is a Latin document, though many old Frankish words are enshrined in it. Also we notice - and this is of grave importance - that in England there are no vestiges of any "Romani" who are being suffered to live under their own law by their Teutonic rulers.'<sup>18</sup>

Thus, by the time of the Norman invasion there was a significant difference, already, between say France and England. This difference was made the greater by the fact of the size and geography of England. Thus Maitland writes that in accounting for the unusually coherent legal and political system in England, 'we should have to remember the small size, the plain surface, the definite boundary of our country.' This continues as a very powerful background factor: 'This thought indeed must often recur to us in the course of our work: England is small: it can be governed by uniform law: it seems to invite general legislation.' Again, we should note that 'the kingship of England, when once it exists, preserves its unity: it is not partitioned among brothers and cousins.' Furthermore, 'a close and confused union

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<sup>16</sup> Maitland, **History**, I, 24

<sup>17</sup> Maitland, **Collected Papers**, II, 439-40

<sup>18</sup> Maitland, **Selected Essays**, 100; for a similar description, see also Maitland, **Collected Papers**, II, 428-9

between church and state prevented the development of a body of distinctively ecclesiastical law which would stand in contrast with, if not in opposition to, the law of the land.<sup>19</sup>

The fact of geography meant that England became one nation and one state. Referring to the twelfth and thirteenth century, Maitland wrote that 'there was no need in England for that **reconstitution de l'unite nationale** which fills a large space in schemes of French history, and in which, for good and ill, the Roman texts give their powerful aid to the centripetal and monarchical forces. In England the new learning found a small, homogeneous, well conquered, much governed kingdom, a strong, a legislating kingship. It came to us soon; it taught us much; and then there was healthy resistance to foreign dogma.<sup>20</sup>

The reference to the 'much governed kingdom' takes us onto his last two major theories. The effects of the Norman Conquest and subsequent development of Angevin kingship were to make England even more homogeneous and united. For instance, in terms of law, 'The custom of the king's court is the custom of England and becomes the common law.'<sup>21</sup> Or even more graphically, 'our system is a single system and revolves around Westminster Hall.'<sup>22</sup> In England the 'nation is not a system of federated communities; the king is above all and has a direct hold on every individual.'<sup>23</sup> Yet this direct hold is also a protection, for instance against the oppressions of the lords. By the statute of novel disseisin [new dispossession] of 1166, for example, the 'seisin of a free tenement, no matter of what lord it be holden, is protected by the king.'<sup>24</sup>

Thus part of the answer is that the Crown was so powerful that it 'protected' the individual, not only against his superiors, but against the strong claims of the Church, or of his family. 'Here in England old family arrangements have been shattered by seignorial claims.'<sup>25</sup> There is no overlap of family and law,

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<sup>19</sup>Maitland, **History**, I, 20-1

<sup>20</sup>Maitland, **History**, I, 24

<sup>21</sup>Maitland, **History**, I, 184

<sup>22</sup>Maitland, **Collected Papers**, I, 483

<sup>23</sup>Maitland, **History**, I, 688

<sup>24</sup>Maitland, **History**, I, 146

<sup>25</sup>Maitland, **History**, II, 445

just as the absence of defined kin groups broke any possible link between family and religion. This is reinforced by the religious system for 'the Christianity which the Germans have adopted...is not a religion which finds its centre at the family hearth...the heir could not offer the expiatory sacrifice, nor would it be offered in his house; no priesthood had descended upon him.'<sup>26</sup>

What then of the growing interest in Roman law that was spreading all over Europe in the twelfth century onwards? Here Maitland develops a very subtle argument which we might term the 'vaccination' theory. England did absorb some elements of Roman law, that it to say some systematization and clarity, enough to make its own law better. Yet it was enough to prevent the full version of Roman law being accepted at a later date

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Maitland was well aware that Roman Law had a considerable influence on English law in the twelfth and particularly the thirteenth centuries. All over Europe in the thirteenth century onwards Roman Law swept all before it. 'In the thirteenth century the Parliament of Paris began the work of harmonising and rationalising the provincial customs of Northern France, and this it did by Romanising them. In the sixteenth century, after "the revival of letters," the Italian jurisprudence took hold of Germany, and swept large portions of the old national law before it. Wherever it finds a weak, because an uncentralised, system of justice, it wins an easy triumph.'<sup>27</sup>

To England 'it came early' so that 'very few are the universities which can boast of a school of Roman Law so old as that of Oxford.'<sup>28</sup> Thus 'for a short while, from the middle of the twelfth to the middle of the thirteenth century' the influence of Roman Law 'was powerful'. 'Some great maxims and a few more concrete rules were appropriated, but on the whole what was taken was logic, method, spirit rather than matter.'<sup>29</sup> The extent and limits of the influence can be seen in the work of the greatest of medieval English lawyers, Bracton. 'He was an ecclesiastic, an archdeacon, but for many years he was one of the king's justices. He had read a great deal of the Italian jurisprudence, chiefly in the works of that famous doctor, Azo of Bologna. Thence he had obtained his idea of what a law-book should be, of how law should be arranged and stated; thence also he borrowed maxims and some concrete rules; with these he can fill up the gaps in our English system. But he lets us see that not much more can now be done in the

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<sup>26</sup>Maitland, **History**, II, 257-8

<sup>27</sup>Maitland, **Collected Papers**, II, 441

<sup>28</sup>Maitland, **Collected Papers**, II, 441

<sup>29</sup>Maitland, **Collected Papers**, II, 443

way of Romanisation.<sup>30</sup>

Bracton mainly drew on English common law, for he found that the numerous writs and precedents there showed a system where 'the king's court of professional justices - the like of which was hardly to be found in any foreign land, in any unconquered land - had been rapidly evolving a common law for England, establishing a strict and formal routine of procedure, and tying the hands of all subsequent judges.'<sup>31</sup> Consequently his work, rather than ushering in Roman Law, had the opposite effect. 'From Bracton's day onwards Roman law exercises but the slightest influence on the English common law, and such influence as it exercises is rather by way of repulsion than by way of attraction. English law at this early period had absorbed so much Romanism that it could withstand all future attacks, and pass scathless even through the critical sixteenth century.'<sup>32</sup> It was shortly after he wrote his treatise that Edward I's (1272-1307) reign saw 'English institutions finally take the forms that they are to keep through coming centuries.'<sup>33</sup>

Bracton's work and the unusual failure of Roman Law to gain more than a small foothold in England were due to many other factors. One of them was the legislative ability of the Angevin kings and the expansion of royal justice. In his characteristically graphic way Maitland describes what happened. If the Anglo-Saxon laws had been maintained unaltered, the English legal system might have 'split into a myriad local customs, and then at some future time Englishmen must have found relief from intolerable confusion in the eternal law of Rome.' This did not happen because, among other things, 'under Henry II the king's own court flung open its doors to all manner of people, ceased to be for judicial purposes an occasional assembly of warlike barons, became a bench of professional justices, appeared periodically in all the counties of England under the guise of the Justices in Eyre. Then begins the process which makes the custom of the king's court the common law of England.'<sup>34</sup> Thus 'in the middle of the twelfth' Henry II 'concentrated the whole system of English justice round a court of judges professionally expert in the law. He could thus win money - in the Middle Ages no one did justice for nothing - and he could thus win power; he could control, and he could starve, the courts of the feudatories. In offering the nation his royal justice, he offered a strong and sound commodity. Very soon we find very small people - yeomen, peasants - giving the go-by to the old local courts and making their way to Westminster Hall,

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<sup>30</sup>Maitland, **Collected Papers**, II, 444

<sup>31</sup>Maitland, **Collected Papers**, II, 444

<sup>32</sup>Maitland, **Collected Papers**, II, 444-5

<sup>33</sup>Maitland, **Selected Essays**, 105

<sup>34</sup>Maitland, **Collected Papers**, II, 434

to plead there about their petty affairs.<sup>35</sup> Maitland believed that 'King Henry and his able ministers came just in time - a little later would have been too late: English law would have been unified, but it would have been Romanised.'<sup>36</sup> There were disadvantages to the English system, 'But to say nothing of the political side of the matter, of the absolute monarchy which Roman law has been apt to bring in its train, it is probably well for us and for the world at large that we have stumbled forwards in our empirical fashion, blundering into wisdom.'<sup>37</sup>

For Maitland the story did not quite finish here. Impressed by the resurgence and spread of Roman Law in the sixteenth century, particularly in Germany, he suggested that England narrowly avoided becoming Romanized again in that century.<sup>38</sup> It appears that his anxiety was exaggerated since numerous subsequent historians have examined the matter and have suggested that, short of actual conquest by Philip II, there was no real likelihood of such a reception taking place.<sup>39</sup> Thus by the end of the thirteenth century, he argued, the trajectories of England and much of continental Europe were decisively diverging.

The absence of the reception of Roman law had many implications in every sphere of life; it altered political relations, social relations, religion. In a late essay on 'The Body Politic' Maitland mused on some of the reasons for the divergence between England and the continent. He made a few further suggestions. Speaking of Italy, Spain, Germany, the Low Countries, France and England he wrote that 'Of all these countries at the critical time, say between 1150 and 1300, Britain was the only one in which there was no persecution of heretics, in which there were no heretics to persecute.' This influenced the law deeply. 'Everywhere else the inquisitory process fashioned by Innocent III for the trial of heretics becomes a model for the temporal courts.' He admitted that this was not the only reason for divergence. 'If I were to say more I should have to speak of the causes which made the England of the twelfth century the most governable and the most governed of all European countries, for if a Tocqueville had visited us in 1200 he would have gone home to talk to his fellow-countrymen of English civilization and English bureaucracy.' Nevertheless, he continued that 'there can I think be no doubt that we have laid our finger on one extremely important cause of divergence when we have mentioned the Catharan heresy.' He notes that the Cathar or Albigensian heresies became 'endemic in the south of France' and

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<sup>35</sup>Maitland, **Collected Papers**, II, 438

<sup>36</sup>Maitland, **Collected Papers**, II, 438

<sup>37</sup>Maitland, **Collected Papers**, II, 439

<sup>38</sup> Maitland, **Selected Essays**, ch.vii

<sup>39</sup> Elton, **Maitland**, 79-88 summarizes some of the arguments.

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in particular in Languedoc. Yet he decides to turn away from this and ends by asserting that the English history, though diverging, is as 'normal' as any other.

Nevertheless in considering the wider causes of the growing divergence, Maitland's mind did not rest with Roman law and religion or even islandhood. Rather, he began to see that it was possible to investigate a largely overlooked but enormously significant reason for the divergence.