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The seventeenth century and the first discovery of modern society

In his **Ancient Constitution and the Feudal Law** Pocock has excellently summarized the way in which it was only in the middle of the seventeenth century that it began to be realized that there had been a 'feudal period' in England. His book is an extended description of Maitland's famous remark that 'were an examiner to ask who introduced the feudal system into England one very good answer, if properly explained, would be Henry Spelman (a C17 antiquary), and if there followed the question, what was the feudal system a good answer to that would be an early essay in comparative jurisprudence. Spelman reading continental books saw that English law, for all its insularity, was a member of a great European family, a family between all the members of which there are strong family likenesses. This was for Englishmen a grand and a striking discovery...The new learning was propagated among English lawyers by Sir Martin Wright; it was popularized and made orthodox by Blackstone in his easy attractive manner. If my examiner went on with his questions and asked me, when did the feudal system attain its most perfect development? I should answer about the middle of the last (i.e. C18) century. It was then, I should add, that the notion of one grand idea and a few simple principles underlying the mass of medieval law, English and continental, was firmly grasped and used as a means of explaining all that seemed to need explanation in the old English law. Now this was an important step...Most undoubtedly there was much in our old law which could be explained only by reference to ideas which had found a completer development beyond seas, and to Blackstone and to Wright, and above all to Spelman, we owe a heavy debt...'¹

Pocock, basing his work mainly on the learned treatises of Sir Edward Coke, points out that up to the middle of the seventeenth century the English were not aware that there had been a radical break between a 'feudal' period and a 'modern' one. Despite the fact that Coke, it could be argued, 'knew all there was to know about feudal law in England', since he was an erudite and extensive scholar, he missed the one glaring 'fact that it was feudal'², in other words, of European origin and different from the law of his own age. Although Coke's main task was to revitalize the law so that principles laid down in 'a feudal society' could be used in the totally different 'freeholding and mercantile England of James I', he was unaware that he was dealing with two basically different systems. He believed in the continuity of English law and society, seeing no gap between himself and, say, the people of the thirteenth century. There was not even room for argument. We are told that 'Coke's thought does not read like that of a man on the defensive; he does not insist or argue that the common law is the only system that has ever

¹Constit. Hist. 142-3

²p. 66

prevailed in England, but takes it as much for granted as the air he breathes.³ Just as Chief Justice Fortescue in the fifteenth century had believed that the laws of England were ancient, and had been unaware that he was living in the time when the great transition between 'medieval' and 'modern' was occurring, so Edward Coke, whose mind was 'as nearly insular as a human being could be'⁴ shared this delusion. He 'had no conception that in the early common law he was dealing with the law of a society organized upon feudal principles...he was able to identify the law of his own day with the law of the earliest records...'⁵

Edward Coke and Fortescue were not alone in this illusion, for 'As a key to their past the English knew of one law alone. It was possible for them to believe that the common law of the king's court was the only system of law which had grown up and been of force within the realm; for the records and histories of England did not reveal that any other law had been of comparable importance.'⁶ This naturally meant that they assumed that people in the past had been much like them, moved by the same emotions, operating within a roughly similar social and economic system. Lawyers, royalists and parliamentarians all agreed in this myth of the English past.⁷ No amount of study of the historical records of England could help the English out of this myth of continuity. Coke was enormously learned in legal history, and 'as learned a man as Selden' could not imagine that the English had imported their legal system from abroad, a feudal system which had then been destroyed.⁸ The historical documents for England seemed to show that the England of the thirteenth century was basically similar to that of the seventeenth. Yet, as Pocock says, 'There should have been a growing realization that the affairs of the eleventh to thirteenth centuries were the affairs of a remote period with a social structure all its own.' It should have been realized that that distant past could only be understood 'by constant reference to the main principles of that structure, which now belonged to the past and corresponded to nothing in Stuart England.'⁹

The way in which this revolution in historiography took place is interesting. Pocock states that it was

³p. 32

⁴p. 31

⁵p. 45

⁶p. 30

⁷p. 32

⁸p. 89

⁹p. 20

foreshadowed in the work of a Scotsman, Craig, whose **Jus Feudale** anticipates by twenty-three years most of the main conclusions in Sir Henry Spelman's **Archaeologus** (1626). Craig made the great discovery that England had once been feudal by an indirect method. Trained on the continent and in Roman law, he 'preferred to rely on recent European historians, rather than wrestle with the interpretations of medieval chroniclers.'¹⁰ Admittedly concerning Anglo-Saxon England 'the proof he somewhat sketchily employs' is drawn from a very general view. Furthermore his arguments 'are not very full or uniformly happy' in relation to the Conquest, but 'he regarded them with sufficient confidence to ignore the numerous assertions, ancient and modern, of the Conqueror's confirming the laws of King Edward, and to insist that the law had become wholly Norman and feudal at William's century and had remained substantially so ever since.'¹¹ Admittedly, in relation to Scotland, he 'made use of the apocryphal early laws' and it was 'a defect' of his thought 'that he regards feudalism not as a dissolution of the state.'¹² It is also unfortunate that he was 'possessed of little more than a reasonable acquaintance with **Libri Feudaorum** for we now know that this description of Lombard laws is very atypical of European 'feudalism', as Ganshof has shown.¹³ It is therefore something of a miracle that someone whose arguments were by analogy and based on false models and far less learned than the English common lawyers should have seen the truth which was staring at them in the documents, but they missed.

The major reason, Pocock believes, is that only when it became common to put English law into comparative perspective that its similarity to medieval Europe could be observed. It is as if only by going away from England, by bringing in French and German analogies, could people realize that what they had taken to be continuity of society was not continuity at all. Only by realizing that England in the seventeenth century had once been what much of Europe still was, a 'feudal' society, could Englishmen realize the break between the 'medieval' and 'modern' periods. The fact that the basis of the Common law was 'feudal' had 'been forgotten and could only be rediscovered by comparing English laws with those continental laws which were avowedly feudal - since even the meaning of the word had been largely forgotten in England...'¹⁴ The great revolution in seventeenth century historiography was that 'by comparative study it had been discovered that English law had a great deal in common with the laws of other Western nations.'¹⁵ It was the growing realization that 'the common law was above all a law

¹⁰p. 85

¹¹ p. 86

¹²p. 87

¹³p. 70

¹⁴p. 64

¹⁵p. 102

regulating the tenure of land, and the rules of tenure it contained presupposed the existence of those military and feudal tenures which had been imported by the Normans...¹⁶

One of the major architects of this great change was Henry Spelman, for his work **Archaeologus** (1627) was 'the first book in which an Englishman recognized and analysed in something like fullness the feudal element in his country's history.'¹⁷ From a wide correspondence with continental scholars¹⁸ and a perusal of the same somewhat misleading **Libri Feudaorum**, Spelman and others managed to impose 'upon English history the division into pre-feudal, feudal and post-feudal periods which has ever since characterized it.'¹⁹ Brady was then able to build on this in the later seventeenth century to show 'that the laws and liberties of a feudal society were neither those of Anglo-Saxon nor those of post-feudal England.'²⁰ Since this revolution, we have had 'no alternative to feudalism as the starting-point of all thought about Anglo-Norman society.'²¹ Spelman was able to see this because he had used continental sources.

It might have been expected that once this truth had been realized, it would have been widely accepted. Yet there was a curious reluctance on the part of Spelman's contemporaries to accept his views. 'The reason must be found primarily in the extraordinary persistence of the common-law tradition which...was the natural way for all Englishmen, of whatever part, to think of their history until they had been brought perform the complex and unfamiliar intellectual operations which we have studied in Spelman.'²² In fact there was, we are told, a resurgence of the old views, the heirs of Spelman 'died beaten and broken men, perishing among the spears of triumphant Whiggery. With their defeat ended the first serious attempt to give feudalism its proper place in English history.'²³ Pocock argues that there was no further serious attempt to give successfully accomplished by historians whom we may feel to be

¹⁶p. 53

¹⁷p. 88

¹⁸p. 93

¹⁹p. 119

²⁰p. 208

²¹p. 198

²²p. 123

²³p. 228

still our own contemporaries' (presumably Stubbs/Maitland).²⁴

This chronology does not fit exactly with Maitland's, with which we began, for as we saw, he saw the high point of the 'feudal' view to be the C18, with Blackstone and Wright. On another occasion Maitland makes the same point, 'For a while in the last century the writings of Spelman, Wright, Gilbert and Blackstone had almost succeeded in bringing about what the Germans would call an academic 'reception' of the Lombard **Libri Feudorum**; and this progress went much further in Scotland. The Lombard law of feud was regarded at this time as the model and orthodox law of feuds.'²⁵ Pocock describes this period, but seems to believe that nothing much of importance was added to the ideas of the seventeenth century, 'Compared with the times of Spelman, Brady or Madox (d.1727), the high eighteenth century appears to have seen the exploration of feudal society at a standstill.'²⁶ In fact Pocock believes that the English and Scottish writers were making an 'ism' of feudal, and 'In so doing they committed and perpetuated many great fallacies'²⁷, and thus the 'eighteenth century historians failed to continue, to appreciate as they should, or to learn as they might from the work of the seventeenth century legal historians.'²⁸ For example, they never cleared up one of the mysteries left by the seventeenth century, namely how and when 'feudalism' ended in England. At the one extreme, we are told that 'James Harrington...imagined that feudal society had remained more or less intact until the legislation of the first Tudors...'²⁹ At the other extreme, 'Spelman's account of the social processes which brought feudal society to an end is never specific; he knows only that such processes must have occurred and that they must have been very gradual...'³⁰

Pocock constantly cites Maitland's remarks that in order to understand English law, it is necessary to look at it in comparative perspective with other nations. He seems to believe that it was mere insularity that prevented the English from realizing the huge feudal/modern distinction. Yet were they so insular? Fortescue, for example, wrote his great treatise in France and the whole thing was a conscious comparison with France and Davies was comparing England with Ireland (see Pocock). Have a look at

²⁴p. 228

²⁵History of Law, ii, 289

²⁶p. 244

²⁷p. 249

²⁸p. 249

²⁹p. 114

³⁰p. 114

Bracton/Littleton/Bacon/Coke and others to see how insular they were. As Maitland says, it would be silly to minimize the achievement of the C17 antiquarians, but it would also, now be equally foolish not to realize that they over-did the similarities between England and Europe. This over-stress had been absorbed and put into perspective by Maitland and co. They were aware of both the continuity which Coke and co. were stressing and also the family resemblances to French law. But what seems to have happened is that since Maitland the pendulum has swung back very far towards the idea of Medieval England as identical to Europe and a very different age. This time it is not the result of a 'Reception' of Roman law, but of Sociology. But again, the basis of the re-discovery of the 'great break' theory is the belief that England must have gone through the same 'stages' as the rest of Europe.