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# Conflict or Co-operation?

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# CONFLICT OR CO-OPERATION?

## A Task for Legal Statesmanship

THE opening Session of the Commonwealth and Empire Law Conference has been most fittingly held in the presence of the Lord Chancellor and the Queen's Judges in the Great Hall that William Rufus built at Westminster. Among the lawyers who assembled there were delegates from all the organized legal bodies of the Commonwealth and Empire; from Europe and Africa and Asia and Australasia, and from the Americas also: the largest delegation came from Canada. It was in a real sense a home-coming, for Westminster Hall was for many centuries the forge and radiant centre of the system of law that spread with the expansion of English civilization and is known throughout the world as the Common Law of England.

The formulation of the principles of the Common Law belongs to what Pollock and Maitland call "the luminous age" that lies between 1154 and 1272:

> "It was the critical moment in English legal history, and therefore in the innermost history of our land and race. It was the moment when old custom was brought into contact with new science. Much in our national life and character depended on the result of that contact. . . . It was for the good of the whole world that one race stood apart from its neighbours, turned away its eyes at an early time from the fascinating pages of the *Corpus Juris Civilis*, and, more Roman than the Romanists, made the grand experiment of a new (legal) system. . . . Those few men who were gathered at Westminster round Patteshull and Raleigh and Bracton, were penning writs that would run in the name of kingless commonwealths on the other shore of the Atlantic Ocean; they were making right and wrong for us and for our children."

The reference to kingless commonwealths is a reminder that beyond the existing limits of Commonwealth and Empire, in all the States save

one of the American Union (as well as in Ireland, North and South) the minds of men are formed and their moral and political action guided by the principles and traditions of the Common Law.

A system of law which had its origin in the England of the twelfth and the thirteenth centuries was necessarily Christian in inspiration and character. In fact, each of the men who is named on the final page of Pollock and Maitland was a prelate of the Christian Church. Martin of Patteshull was Archdeacon of Norfolk and Dean of St. Paul's, William of Raleigh was Bishop of Norwich and, at a later time, of Winchester; Henry of Bracton was Archdeacon of Barnstaple and at his death in 1268 was Chancellor of Exeter Cathedral. The greatest, the most lasting triumph of Henry II, says Maitland, is that he made the prelates of the Church his Justices:

> "During the whole of the twelfth and thirteenth centuries English law was administered by the ablest, the best educated men in the realm, by the self-same men who were the Judges Ordinary of the Church's Courts. . . . It is by popish clergymen that our old common law is converted from a rude mass of customs into an articulate system, and when the popish clergymen, yielding at length to the Pope's commands, no longer sit as the principal Justices of the King's Court, the creative age of our medieval law is over."[1]

The makers of the common law had, according to the testimony of one who became a member of the Supreme Court of the United States, Justice Oliver Wendell Holmes, brought into existence a "more logical, more developed and a mightier body of law than the Roman"; "a far more civilized system than the Roman Civil Law."

Though one may never forget that the Christian Emperor, Justinian, compiled and published "in the name of Our Lord Jesus Christ" the Institutes, the Code and the Digest which constitute the *Corpus Juris Civilis,* one may also recall that the constitutive principles of the Roman Civil Law are not always easy to reconcile with Christian ideas.[2] The Roman Civil Law was in its origin a pagan system, and had little regard for the sanctity of human life, born or unborn, slave or free; or for the sanctity of marriage as it is understood in Christendom, or for the limitations that must be put on absolute power in the State. The Emperor or *Princeps* was above the law. His will was law; *quod principi placuit legis habet vigorem.* He ruled Church and State. "The first lesson that we learn if we open the Code," says Maitland, "is that an Emperor can legislate, *De episcopis et clericis, De sacrosanctis ecclesiis,* nay, for the matter of that, *De summa trinitate et fide catholica.*"

The concepts and principles of the Common Law were from the beginning in line with Christian ideas. In England (it was not so in Rome) the Church was a more venerable institution than the State. In English law, human life—even the life of the unborn child—had its proper sanctity, its proper title to freedom. The law of Christian marriage was administered by the Canonists in the Courts Christian. As for the Prince (whom we call King), *Rex est sub deo et sub lege.* "The King," says Bracton, "is

[1] Pollock and Maitland, Vol. I., pp. 132-4.

[2] In the dedication of his work, *Les Moines de l'Occident* to Pope Pius IX, Montalembert spoke his mind about the myth of the Roman Civil Law; and in his little work *La Philosophie des Lois* (1946) the late Père Sertillanges, O.P., spoke of "le semi-empirisme du droit romain, droit rationnel dans sa structure, dans sa contexture, mais dominé par un impérialisme du dedans et du dehors, par une sorte de *volonté de puissance* à la facon de Nietzsche: domination de soi-même et d'autrui sans justification rationnelle suffisante."

under God and the law, because the law makes the King, There is no King where Will and not Law is the principle of his rule." The argument of Bracton (which is seldom printed) is most revealing. That the King ought to be under the law, he says, "is clearly shown by the example of Our Lord Jesus Christ":

> "For although there were available to God, in his design for the salvation of the human race, ways and means beyond our telling, His divine mercy chose this way (of the Incarnation of Our Lord) for undoing the work of the devil. He used not the Might of His Power, but the Counsel of His Justice. He was willing to be under the law in order that He might redeem those who were under the law. In preference to the use of Power, He chose the way of Judgment. So also the Blessed Mother of God, the Virgin Mary who, by a unique privilege, was above the law, as an example of humility condescended to follow the ordinances of the law. *Sic ergo rex:* the king also should act in like manner, nor should his power lack a bridle."

In medieval England the idea of a World State governed by the Roman Emperor (or according to some theorists, like Dante, by the *populus Romanus*) had little meaning in the minds of reasonable men. The common lawyers of the Inns of Court did not take sides or greatly interest themselves in the constant struggle between Emperor and Pope which was waged on the mainland of Europe between Roman Civilians on the one side and Roman Canonists on the other side, with arguments and analogies drawn from the Two Swords and the Sun and the Moon.

At the turn of the Reformation, by the Statute of Appeals in 1534, Henry VIII (now being advised by Thomas Cromwell, a disciple of Machiavelli and of Marsilio of Padua) declared himself an Emperor and England an Empire, and claimed, as Emperor, to exercise jurisdiction over Church and State. The Act of Supremacy made it high treason for any subject to dispute the King's title to be, and to be reputed, Head of the Church in England.

In face of the pretensions of the King-Emperor and his Imperial Parliament, the most illustrious of the common lawyers (he had resigned the office of Lord Chancellor) chose death rather than deny the Papal Supremacy for, as he said, with terrible concision, in answer to Antonio Bonvisi: "That holdeth up all." In the speech he made after the verdict in Westminster Hall Sir Thomas More told his judges that an Indictment "grounded upon an Act of Parliament directly repugnant to the law of God and His Holy Church was in law, among Christian men, insufficient to charge any Christian man." And, after the manner of the common lawyers, the rhythm of whose thought was always "the law of God, the law of reason (or of nature) and the law of the land," he went on to declare in point of reason, that this realm, being but one member and small part of the Church, might not make a particular law disagreeable with the general law of Christendom, no more than the City of London, being but one poor member in respect of the whole realm, might make a law against an Act of Parliament to bind the whole realm. And he added that the new Act was contrary to the law and Statutes of England as they might see in Magna Carta: "that the Church in England shall be free and have all its laws in their integrity and its liberties unimpaired"; and contrary also to the sacred oath which the King with great solemnity received at his Coronation.

The rejection of his argument and the execution of Sir Thomas More marked a revolution in the English law. In his recent book on *The Tudor Revolution in Government,*[3] Mr. G. R. Elton writes:

> "It is enough if one man knows what he is about, and Thomas Cromwell at least knew that. The establishment of the Royal Supremacy over the Church, the expulsion of the Pope and the assertion of the unlimited sovereignty of Statute, destroyed the foundations of medieval polity and society and put something new in their place. Thomas More knew well why he opposed the voice of Christendom to an Act of Parliament, and Thomas Cromwell knew equally well what his assertion of the omnicompetence of Parliament meant. They both knew that they were witnessing a revolution. The general intellectual and spiritual effects of the revolution came later – as effects not causes – but that does not make it any less of a revolution."

In the reign of Henry VIII, says Professor Holdsworth:

> "It was *realized* (our italics) that Acts of Parliament, whether public or private, were legislative in character; and the judges were obliged to admit that these Acts, however morally unjust, must be obeyed. The legislation which had deposed the Pope and made the Church an integral part of the State, had made it clear that the morality of the provisions of the law or the reasons which induced the legislature to pass it, could not be regarded by the Courts. . . . There was no need therefore for the Courts of Common Law to be anything but useful servants of the Crown."[4]

[3] Cambridge University Press, 1953, pp. 246-7. The judgment of Mr. Elton coincides with that of Dr. James Gairdner in his *History of the English Church in the Sixteenth Century*, p. 240: "The revolution effected by Henry VIII was a thing without a parallel in history, and it is hard to realize it all at the present day."

[4] Holdsworth, *H.E.L.*, Vol. IV., pp. 185, 188.

In the course of time a heavy price had to be paid for the luxury of a Parliament that was at one and the same time Imperial and Omnipotent. One part of the price was paid in the loss of Ireland and of the American Colonies. Another part of the price was the slow decline in the language of the law and in the idea of law which lost the memory of its divine origin. More than half a century ago Professor Heinrich Brunner remarked that there had been since the Tudor time a progressive deterioriation in the language of the English Statutes. In our own time judges—even in the highest tribunal—have been known to protest against the unintelligibility of the statutes and statutory instruments they are called upon to interpret. Only the other day, at Birmingham, a distinguished law lord denounced as *para law* and *sub law* the sort of thing that now passes under the name of law.

And for the Omnipotence of Parliament, it is true enough that in the sixteenth and seventeenth centuries Parliament undertook not only to depose the Pope but also to define the doctrines of the Christian faith and the prayers that are proper to be said by Christian people. Even after 1857, apropos the debates on the Matrimonial Causes (i.e. Divorce) Bill, the *Encyclopædia Britannica* declared that "the textual controversy was nowhere carried on with greater acuteness or under more critical conditions than within the walls of the British Parliament." During the debates on the A. P. Herbert Bill of 1937, there was little talk of the Scriptures. Does anyone nowadays believe in the ability of the Imperial Parliament to define the doctrines of the Christian faith? or to impose its will on the peoples of the Commonwealth?

The lawyers of Commonwealth and Em-

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pire and their English colleagues who assembled in Westminster Hall are no longer united in obedience to an Imperial and Omnipotent Parliament on the Reformation model. The bonds that unite them are the older and more enduring principles and traditions of the Common Law. And the true heirs of the Common Law are prepared with Henry of Bracton to acknowledge the Papal Supremacy in spiritual things:

> "Our Lord the Pope is pre-eminent in matters spiritual which relate to the priesthood, and under him are archbishops, bishops, and other inferior prelates. Also in matters temporal there are Emperors, kings and rulers in matters relating to the kingdom, and under them are dukes, barons and knights."

Outside Moscow, the Roman Emperors are indeed no more. The Roman Civil Law is at an end. In the years to come, in the West, the task of legal statesmanship will no longer be to subdue a constant and bitter conflict between Civilian and Canonist; but to effect an adjustment and reconciliation between the Christian principles and traditions of the Canon and the Common Law.