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JUDICIAL INDEPENDENCE: THE ENGLISH EXPERIENCE*

MARTIN SHAPIRO†

I. INTRODUCTION

Both lawyers and political scientists have labored long and hard to establish a distinct institutional character for courts differentiating them from other institutions. This effort generally has revolved about a prototype of courts involving (1) an independent judge (2) applying pre-existing legal rules (3) after adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong.¹ In examination of what would commonly be called courts across the full range of contemporary and historical societies, however, very little correspondence to this prototype can be found. Or rather, in examining actual courts one discovers a great many internal tensions and contradictions within this prototype. The whole phenomenon of courts is far more problematic and unstable than the prototype suggests.

The basic socio-logic of courts, the reason courts appear in almost every society, is the logic of a triad. Cutting across the various cultures of the world, there is a basic common sense appeal to the notion that if two persons find themselves in conflict, and they cannot resolve it themselves, they should resort to a third person. If they can reach mutual agreement on who the third should be, the triad is a stable structure at the moment it is created. But the triadic conflict resolution structure contains within itself a basic contradiction or destabilizing factor. The moment the third person resolves the conflict in favor of one of the two conflictors, the structure, in eyes of the loser, no longer appears to be a socio-logical, balanced triad. Instead it appears to be that universally unjust phenomenon—two against one.

Because courts draw their basic legitimacy from the socio-logic of the triad, their principal problem in maintaining that legitimacy is

* Professor Strong has written often and persuasively about the nature of courts and their role in the Anglo-American legal system. While I suspect he will disagree with many of my conclusions, it is my hope that this article will contribute positively to the ongoing debate about the role of the judiciary in which he has been a major participant.

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1. The general argument outlined here is developed at greater length in Shapiro, *Courts*, in 5 HANDBOOK OF POLITICAL SCIENCE 321-71 (F. Greenstein & N. Polsby eds. 1975).

somehow to avoid the perception by the loser of two against one. There are various modes of doing so. For example, a mediator rather than a judge may be the prototypic triadic conflict resolver. A mediator avoids the shift from balanced triad to two against one by avoiding dichotomous decisions. Mediation entails the facilitation of agreement by the two parties to a mutually satisfactory resolution of their conflict. Since there is no loser, there is no perception of two against one. The mediation solution is the most powerful of all solutions to the problem of the instability of the triad.

One would expect that actual courts, as triadic conflict resolvers, would not satisfy element four of the conventional prototype of courts. And indeed they do not. In reality we find the courts of various societies maintaining as high a component of mediated settlement as possible. In the English court system, the focus of this article, mutual agreement under the authority of a court initially was the preferred mode of judicial proceeding. Imperial Chinese courts operated for centuries in a basically mediatory mode. In Western societies one encounters an incredibly wide range of mediatory phenomena from standard contract mediation clauses through civil settlement to plea bargaining and marriage counselling. It would be the height of obscurantism to label all these phenomena "out of court" settlements somehow divorced from what courts do since they are an integral part of judicially administered legal regimes, indeed so integral that without them most court systems would either break down or have to abandon much of their jurisdiction. A major share of what most courts do is to provide strong incentives for and register the results of mediatory solutions.

Courts in most societies actively seek non-dichotomous solutions: judges urge parties to settle, impose mediation upon them or seek to shape remedies that will make one party whole with the least damage to the other. The long insistence of common law courts on providing money damages as the sole remedy is also an attempt to keep in touch with mediation. Money damages are mediatory in the sense that the dollar amount of damages can always be fixed at a figure somewhere between what the injured party claims and the nothing that the injurer wants to pay. But money damages are mediatory in an even more important way: they say to the "loser," you need not perform on the contract, or return the horse or whatever, if you are willing to pay for the privilege of not doing so.

The conventional prototype of courts drives an artificial wedge between judging and mediation that is not found in the real world. The

pure mediator has a second technique, however, for maintaining the stability of the triad that, like mediatory settlement, is not as fully available to the judge—the technique of consent. The mediator has been chosen by both parties. If he operates under a pre-existing rule of decision, it is typically one that has also been chosen by both parties, as in contract mediation where the contract written by the two parties is the rule of decision. Thus even if the solution arrived at by mediation leaves one of the parties with a greater sense of loss than the other, any tendency to perceive the situation as two against one can be countered by pointing out that the loser consented to the mediation, consented to the person of the mediator and consented to the rule of decision.

Courts seek to cling as closely to this consent technique as they can. In the ancient Roman formulary procedure, two disputants had to agree on a legal rule and upon a judge. The judge then reached an independent decision binding on both parties. Something like this occurs in the early stages of many legal systems. Vestiges of this reliance on consent to bolster the legitimacy of the triad remain even in advanced legal systems. Courts do not usually impose their resolution services on conflictors unless at least one of them wishes to come to court. If the plaintiff loses, consent continues to operate to bolster the triad. Anglo-American procedure is notorious for the delays courts will tolerate and the devices they will invent to get both parties before them and achieve at least a facade of consent, a facade that would be totally absent if the court decided against a party in his absence. It is not so much that courts are anxious to get adversaries face to face with one another. Rather, courts are anxious to get both parties face to face with the judge because the chances of persuading an absent loser that he has been triadically resolved rather than ganged up on are practically nil. Nevertheless what tends partially to differentiate judges from mediators is the substitution of office and law for consent. The parties are no longer allowed to pick their own judge or their own law. If they choose to go to court they must use the official judge imposed upon them by the government, and he will decide on the basis of the government's law, not a law chosen by the parties. Moreover, only one of the two parties may have chosen to come to court at all.

Because consent is a central tool for maintaining the perception of the triad, and because to a greater or lesser degree law and office have been substituted for consent in most court systems, law and office must be translated from pure coercion to legitimizing forces if the

socio-logic of the triad is to be maintained. Thus results the yearning to equate law and justice or law and reason and the endless search for neutral principles of law among lawyers and judges. If prospective litigants cannot use a right to consent to or withhold consent from the rule of decision in their case to avoid two against one situations, they must be persuaded that the law imposed upon them is neutral, that it favors neither one nor the other. If the loser is not to perceive his loss as two against one, he must be told that his loss was dictated by the logical application of a fair, just and equal rule even if not one to which he personally consented. Moreover, he must be told that the just and impartial law has been applied by a fair and just judge. A judicial official chosen by government is substituted for a triadic figure selected by the two conflicting parties. The losing party can no longer be persuaded that the trial did not break down into two against one simply by reminding him that he himself chose the third person. Consequently, the legal system will find it useful to endow the third party with some special attributes designed to content the loser.

In this sense the notion of an "independent judiciary," so central to the conventional prototype of courts, is simply an elaborate rationalization for the substitution of coercion for consent. The state now imposes a judge on the parties. The judge is openly and admittedly a state official. It is repeatedly asserted, nonetheless, that he is "independent." The myth of judicial independence is designed to mollify the loser, who is told that he must not see two against one because, by the very nature of judicial office, the third person is neutral and independent of both the parties and debarred from forming a coalition with either one. When the government does not appear to be the ally of either party, judicial office will appear to be a fairly persuasive guarantee of judicial impartiality between the two parties. If the judge is truly the servant of the government, party A can be assured that the judge is not the servant of party B and vice versa. It is precisely in those situations where the government does favor one of the parties or is itself a party, however, that the judicial independence of the conventional prototype is most relevant. The judge must persuasively assert his independence from the government that appointed him in order to maintain the stability of the triad.

It is at this crucial point that various aspects of the conventional prototype begin to contradict one another or at least add a political dimension to the problematic quality of courts. The principal touchstone of judicial independence under the conventional view is that the judge

shall arrive at the decision most consonant with pre-existing legal rules no matter what outcome the government desires in the particular case. Yet the pre-existing law may have been created by the government and designed to advance the interests of the class to which one of the parties belongs. In short unless both parties belong to the same legally defined class, it may not be entirely satisfactory to the losing party to argue that the judge is asserting his judicial independence by applying pre-existing legal norms. Whether it is satisfactory will depend less on the formal independence of the judge from case-by-case government interference than on the perceived political legitimacy of the law-making regime. Thus, except when judges make their own legal rules, items one and two of the conventional prototype, that is, judicial independence and decision according to pre-existing legal rules, are not as mutually supporting as they might seem. Nevertheless judges and lawyers are expected continuously to bolster the stability of the court triad by (1) incorporating high levels of mediatory solution, (2) emphasizing consensual elements and (3) rationalizing the coercive dimensions of court activity through belief in the neutrality and justice of legal rules and the independence of judges.

The functional utility of the myth of judicial independence is so great that it is wide spread among various past and present legal systems of the world. It is particularly associated, however, with the evolution of Anglo-American judiciaries. It is also an important element in continental jurisprudence, but assertions of judicial independence have never been as clear or simple-minded there as they have been in the English-speaking world. Particularly among American and English authorities, "judicial independence" has been less a rigorously defined concept than a generalization of Anglo-American experience.² Consequently an examination of the actual institutional development of Anglo-American courts should tell a good deal about the reality of judicial independence, which is one of the four essential features of the conventional prototype of a court.

II. JUDICIAL INDEPENDENCE AND POLITICAL CENTRALIZATION

Before turning to the details of the British data, some preliminary definitional remarks are in order. One will not discover that there is

2. On the difficulty of defining the concept *see* T. BECKER, *COMPARATIVE JUDICIAL POLITICS* 141-45 (1970).

no such thing as English judicial independence. Rather, one will find that using the notion of judicial independence as a central category for understanding English historical experience leads to overemphasis and misinterpretation of some facets of historical experience and an almost conscious refusal to deal directly with others. Above all, viewing the historical evolution of British judicial institutions as a kind of teleological and ultimately successful quest for judicial independence is too simple. It leads one to neglect the key fact that most of the phenomena that have come to be called judicial independence, or seen as the roots of judicial independence, are closely associated historically with a long term English tendency toward extreme political centralization that is at least potentially antithetical to meaningful judicial independence. This interplay between judicial independence and political centralization is the central theme of this article. Observation of this interplay will teach one major thing. Whatever conventional observers have meant by an independent judiciary in the Anglo-American context, they could not have meant some simple, clearly delineated sphere of pure or complete independence for judges; such spheres have existed only fleetingly in Anglo-American experience. Instead, what is customarily labelled judicial independence has typically involved paradox, conflict, ambiguity and unresolved tensions.

Whatever judicial independence might mean in the English context, it certainly could not mean political independence. The theory of the British Constitution has always been one of complete, absolute and unified sovereignty.³ No one has ever suggested that judges were exempted from this sovereignty. In practice unified sovereignty was initially softened by the conception that it was the King in Council or in Parliament rather than the King alone who wielded sovereignty. Later the system of popular elections and two party competition limited the theoretically unlimited political power of Parliament. The belief that Englishmen have certain fundamental rights and rule of law notions also placed some limits on political authority. But none of these deviations from the strict theory of sovereignty ever amounted to more than momentary assertions that the courts wielded independent political authority unsubordinated to the King in Parliament. In theory, in practice and in constitutional structure and procedure, the British courts have always been firmly placed under the King in Parliament. Their power and jurisdiction, indeed their very existence, have been determined by

3. See L. AMERY, *THOUGHTS ON THE CONSTITUTION* (2d ed. 1953); J. JENNINGS, *THE BRITISH CONSTITUTION* (5th ed. 1966).

the King's commission or parliamentary statute. The Parliament is the ultimate and unchallengeable maker of the law the courts apply. Yet those who stress judicial independence as a basic characteristic of courts rarely point out that British judges are in theory and practice firmly subordinated to their political masters who wield the sovereign authority of Parliament.

It may be, of course, that the notion of judicial independence involved in the conventional prototype does not really involve political independence but only independence *vis à vis* the two conflicting parties, or impartiality. It might be argued that so long as the English judge was not dependent on either of the two parties, it would be irrelevant to his triadic role that he was a political dependent of the sovereign. As has already been seen, however, such an argument is valid only in particular circumstances, namely when the judge is applying a rule of law created solely by the parties or when the two parties belong to the same legal class so that the applicable legal rule appears to be equally favorable to each.

While the historical English experience may show the growth of an independent judiciary in the sense of an impartial judiciary protected from the direct fear or favor of litigating parties, such a finding will not resolve the ambiguities inherent in calling a politically dependent judiciary "independent." Even viewing independence as a synonym for impartiality, the English judiciary may be impartial in particular but not in general; it may be immune from the threats or blandishments of particular litigants, but partial in general to those classes of litigants favored by the law it applies.

A. *The Rule of Law*

Closely related to this kind of impartiality in particular is the English notion of rule of law. The doctrine that the sovereign, although the sole source of law, is bound by the law once it is enacted and until it is modified or repealed is deeply embedded in English experience. Thus, while the sovereign could intervene at any time to change the general law that courts were applying, he ought not interfere in particular cases to compel results contrary to existing law.⁴ Here

4. The classic exposition of the English concept of the rule of law is to be found in A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 181-414 (10th ed. 1959). Rule of law notions, of course, cover much broader ground than non-intervention by the political regime in the day to day workings of the courts.

again courts are totally dependent on the sovereign for their legal authority, but independent of him for decision of particular cases. But this is only to say they are independent at retail and dependent at wholesale.

B. Functional Specialization

One of the central building blocks of conventional notions of English judicial independence is the functional specialization of courts. England possesses distinct institutions and personnel devoted almost exclusively to the job of judging. The historical data make clear, however, that this functional specialization was slow in coming to English law, was never completed and is now probably receding. Moreover, functional specialization per se ought not to be confused with independence. Many tightly controlled, hierarchical organizations contain highly specialized subordinate components. For instance, the artillery and engineering units of an army may be highly specialized while nevertheless strictly subordinated to its high command. Functional specialization is not a sufficient and perhaps not even a necessary condition to judicial independence, but it is easily mistaken for such independence.

C. Common Law and Common Lawyers

More important than functional specialization for the growth of English notions of judicial independence was the growth of a special body of judicially made law and a legal profession in sole possession of the mysteries of that law. The historical data show that the law of England is not quite so exclusively judge-made as is conventionally supposed nor the legal profession quite so monopolistic in its possession of knowledge of that law. Nevertheless, much of the law applied by English courts was created by them rather than passed to them by the sovereign, and that is an important practical deviation from the theory of exclusive and unified sovereignty vested in the King in Parliament. The data show that, at certain times and in certain substantive areas, courts were substantially free to make their own law and, to an extent, were politically independent. The data also show, however, that this political independence existed at the sufferance of and in between massive interventions by the sovereign lawmaking authorities. Nevertheless, judge-applied common law obscured the fundamental subordination of English courts to the sovereign. It became easier for Englishmen

than for continental Europeans to think of their courts as independent. Europeans saw their courts as taking the law they applied exclusively from the statutes made by emperors, kings and legislatures.

The common law's encouragement of the growth of an independent legal profession was perhaps a more important direct contribution to the perception of judicial independence.⁵ That profession grew as an essentially private guild, but one to which judges were at times more intimately connected than they were to the government. Both the growth of the profession and this intimate connection were fostered by the fact that common lawyers built a body of law so complex and illogical that no one but its creators could understand it. As that law grew, it became essential that judges be appointed from and maintain close contacts with practitioners, for only such judges could even pretend to understand the law they were supposed to apply. Again, it was easier for the English than for continentals to see their courts as independent because their judges appeared to be members of a private and autonomous professional guild rather than officers of a hierarchical governmental bureaucracy.

III. LAISSEZ FAIRE AND JUDICIAL INDEPENDENCE

The English notion of judicial independence is, then, contrary to the basic theory of sovereignty espoused in the British Constitution and incompatible with the reality that English judges apply law made by the King in Parliament. The notion of judicial independence has been greatly fostered, however, by the fact that over long periods of English history judges have appeared to apply law made by themselves rather than by the sovereign. English judicial independence is essentially composed of three motifs: the rule of law, the functional specialization of the judiciary and the autonomy of the legal profession. These motifs represent important realities of English history, and they yield a model of judicial independence that is roughly true for eighteenth and nineteenth century English and American courts. Indeed, when one speaks of judicial independence, one is basically writing large and treating this eighteenth and nineteenth century experience as final culmination or eternal verity.

That experience was, however, somewhat peculiar particularly in its tendency to separate "private" from "public" law. By the nineteenth

5. See sources cited note 55 *infra*.

century most legal thinkers had concluded that, in the limited sphere in which the state had direct interests of its own, it should pass statutes favorable to itself that judges would enforce as loyal servants of the state. In other spheres, particularly commercial activity, the state would serve only as the referee and protector of private enterprise. Private law would be derived from and reflect the actual practices of the business community and provide a neutral channel for the regularization and enforcement of customary commercial relations. Thus, in this laissez-faire moment of legal history, the irresolvable conflict between judge as applier of law made by the state in its own interest and judge as "independent" resolver of bilateral conflict was bridged. The moment did not last, and the bridge has not lasted. In the twentieth century the state is again concerned with imposing its interests upon private and economic activity and thus with the embodiment of state interests in all facets of the law. Consequently judges must again act as enforcers of public policy in the course of refereeing private disputes.⁶

Judicial independence is not only a rationalization of the substitution of judicial office for the choice of the judge by the parties; the concept also reflects some important historical realities. But the erection of judicial independence as a touchstone for true "courtiness" causes an oversimplification of the complex and ambiguous role of courts and an underestimation of the difficulty of maintaining their basic social logic and legitimacy. Those motifs commonly labelled judicial independence actually developed as part of a very highly centralized legal and political system at the apex of which is a Parliament wielding absolute legal power. The historical experience that breeds our notion of judicial independence is one of increasing centralization of political and legal authority in institutions other than the judiciary, institutions to which the judiciary has always been subordinated.⁷

6. For instance, compare Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976), with Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

7. The account of English legal history that follows makes no claim of presenting original data. It is drawn from the standard sources, most prominently: 1 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* (7th ed. 1956); A. KIRALFY, *POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW* (4th ed. 1958); S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* (1969); T. PLUCKNETT, *CONCISE HISTORY OF THE COMMON LAW* (5th ed. 1956); F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1898) [hereinafter cited as POLLOCK & MAITLAND]; G. RADCLIFFE & G. CROSS, *THE ENGLISH LEGAL SYSTEM* (4th ed. 1964) [hereinafter cited as RADCLIFFE & CROSS]; A. SIMPSON, *AN INTRODUCTION TO THE HISTORY OF THE LAND LAW* (1963); D. STENTON, *ENGLISH JUSTICE 1066-1215* (1964); W. STUBBS, *SELECT CHARTERS OF ENGLISH*

IV. THE LAW OF THE IMPERIAL CONQUEROR

Anglo-Saxon England enjoyed a fairly well developed legal and judicial system apparently derived from the Germanic tradition of the "folk moot," in which trials were held before the assembled tribesmen who gave judgment. The English had hundred and shire courts attended by "suitors," the men of the district, who judged largely according to the local customary law. Whatever its origin, the hundred court had become simply the lowest level territorial trial court and the shire court a somewhat higher court in terms of importance of the cases and social status of the suitors.

When the Norman Duke William conquered England in 1066, he acquired an ongoing legal system. The Norman conquest was not a great movement of people into a new land but a gloriously successful foray by a small body of armed adventurers and their soldiery. The conqueror was glad to preserve the English legal system along with most of England's other basic economic, social and political arrangements. Indeed he had little choice, for he did not have the Norman manpower to do much more than impose his followers at the top of whatever authority structures already existed. Normans displaced Saxons as tenants in chief to the King, that is, as the largest landholders of the realm in a quasi-feudal system in which Normans held land directly of the King and Saxons held land of the Normans. Normans served as household officials to the King. Initially the only changes in the legal system were a few special laws designed to protect the conquering cadres, such as that providing a special procedure of investigation, trial and punishment when a Norman had been killed.⁸

The truly imperial nature of this regime must be underlined because these early Norman monarchs who established the basic common law system are usually viewed as English kings. But both in reality and in the eyes of the participants, these kings were monarchs of considerable territories on both sides of the channel, ruling a number of populations—English, Norman, Breton and assorted French. This was an era before the dynastic monarchies had settled into a rough correspondence with what later became national states. Kings were roving entrepreneurs who picked up, lost and traded territories as the fates

CONSTITUTIONAL HISTORY (9th ed. 1913); R. VAN CAENEGEM, *THE BIRTH OF ENGLISH COMMON LAW* (1973). The interpretation placed on this data is, of course, entirely my responsibility and not that of these noted historians.

8. See Yntema, *The Lex Murdrorum*, 36 HARV. L. REV. 146 (1922).

and their family interests demanded. Indeed, a number of the strands that provide the English notion of judicial independence began because the King was abroad on military adventures so much of the time that arrangements had to be made for courts to function in his absence.⁹

William and his successors may have been roving adventurers, but they had ceased to be mere freebooters. They fiercely and single-mindedly fought to centralize political power in the English realm even as they pursued continental adventures that ended in the loss of their French territories and in their quite unwilling conversion into English monarchs. Their first approach is precisely the one expected of imperial conquerors: the appointment of all purpose district officers, each one doing all the administrative and judicial business of his own territory. Shires and sheriffs existed before the conquest. Normans were now appointed to the posts, and there were many signs that they would turn into all powerful provincial governors reporting to the capital.¹⁰

In the judicial sphere, however, the sheriff was limited by the inherited court system. Either because of its origin as a folk moot or because it was imbedded in a quasi-feudal system, or both, judgment in the shire court was rendered by suitors—local landholders and town representatives. The sheriff only presided. The Normans accepted this tradition. The extent to which sheriffs turned their presiding powers into domination of the shire courts' decisions is not known and probably varied greatly from time to time and shire to shire.¹¹ This slight check upon the sheriff's power was of relatively little significance. The sheriff was the King's delegate wielding the full sovereignty of the Crown at the local level.

The little band of Norman adventurers did not bear up well under success, however. Quarreling broke out between the royal successors of William and his lieutenants. With the land granted them by William, they converted themselves from military subordinates into the barons of the realm. Although the landholdings of the English nobility were never highly concentrated, each of the barons tended to dominate some portion of the countryside, which became a local geographic base against the central power of the King. As the barons became more powerful, they tended to garner the position of sheriff in their locale for themselves or their friends. From the King's viewpoint the sheriffs

9. See D. STENTON, *supra* note 7, at 54-87.

10. See W. MORRIS, *THE MEDIEVAL ENGLISH SHERIFF* (1927).

11. See W. MORRIS, *THE EARLY ENGLISH COUNTY COURT* (1926).

ceased to be a mode of extending royal power into the countryside and instead became an element in the centrifugal powers of the barons. Accordingly, after a period in which some sheriffs came close to the status of autonomous provincial governors, their powers were sharply reduced.¹² They continued to preside over the shire courts and undertake important responsibilities in connection with some of the King's writs, but they became specialized local officials rather than all purpose local governors.¹³ William the Conqueror's initial solution to the problem of holding the conquered territories, that of parcelling them out to his friends and lieutenants as landholders and sheriffs, had failed. From being the King's local governing delegates, the barons had become his locally based rivals. Judicial institutions had played a part in this failure.

Whether Norman England is to be characterized accurately as "feudal," or only containing elements of feudalism, is an issue to be avoided by non-specialists. It is clear, however, that in granting lands to Norman conquerors and their successors, the Crown often granted, among many other franchises, rights, powers and sources of income, the capacity to hold a court for the landholder's tenants. These were feudal courts in the sense that they typically "belonged" to the landholder in connection with and by virtue of his landholding, that the landholder or his steward presided in them, that the landholder took their profits, that they had jurisdiction over the tenants, and that they dealt principally with disputes between tenant and tenant or between landholder and tenant. Whether in theory the landholding magnates were granted complete judicial powers by the Crown or only the profits, that is, fees and fines levied by the courts, is uncertain. It probably made no practical difference. The lord's court applied local customary law. Tenants acted as both witnesses testifying to and judges applying the custom. The extent to which a given lord or his bailiff dominated his attending tenants and manipulated their judgments no doubt depended on numerous factors, the least of which was the exact nature of his judicial grant from the King.¹⁴ The existence of these local feudal courts controlled by the barons, together with local hundred and shire courts also largely dominated by local magistrates, was one element in the complex of centrifugal forces in the struggle between the local magnates and the Crown.

12. 1 W. HOLDSWORTH, *supra* note 7, at 66-67.

13. Compare R. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL* (1959) with D. STENTON, *supra* note 7, at 80.

14. See 1 W. HOLDSWORTH, *supra* note 7, at 17-32.

V. THE EYRE SYSTEM

The royal problem was to exercise royal control over the various local areas of England by some means other than delegating authority to local "subordinates," for those subordinates had turned into the baronial enemies of the King. The royal solution was the "eyre" system.¹⁵ Instead of long term delegation of royal authority to a lord permanently connected to a single territory, there would be a temporary delegation to an officer who normally resided with the King, travelled once through the designated territory exercising his delegated authority, and then surrendered his authority upon his return to the King's household. Even though granted sweeping powers, the royal delegate could not become an independent territorial magnate and rival to the King because his only real base was in the King's household, from which he came and to which he had to return. While it had its inevitable historical forerunners, the eyre system reached its peak in the reigns of Henry II and Henry III. Its adoption meant that the conquered English empire would not be ruled on the district officer model, but along more centralized lines. This decision had an enormous impact on the development of English judicial institutions.

The Justice in Eyre, as he came to be called, was reminiscent of the district officer in a number of ways, however. He was at first a single, all purpose and, thus, extremely cheap instrument of imperial rule. As he travelled from town to town within the designated shire or shires, he exercised the King's commission to collect taxes, collect fines, audit local accounts, inspect public works, keep the peace, suppress crimes, resolve disputes and in general insure that everyone performed the services and paid the monies owed the King. The eyre developed such a wide scope that after a time a number of commissioners were sent in a body because one was not enough to do all the work. Indeed the eyre was such a pervasive incursion of royal power that local interests often lobbied the King to limit them to one every so many years.

In a sense the Justice in Eyre was conceived as a surrogate for the King's own progress through his domains. On such progresses the King exercised the full judicial powers that were a component of his sovereignty. The Justice in Eyre did the same. Thus, he could hold the King's court at each stopping place along his circuit. He presided

15. See W. BOLAND, *THE GENERAL EYRE* (1922); 1 W. HOLDSWORTH, *supra* note 7, at 264-85; T. PLUCKNETT, *supra* note 7, at 144-46.

over sittings of the shire court. Armed directly with the King's justice, he probably took a more active part in its decisions than the sheriff typically did. Indeed, when he presided it is not clear whether the court remained the shire court or became a King's court in which the King's judge had full decisional powers. At first the Justice in Eyre heard whatever cases coincidentally were ready for trial at the time of his visit. As the eyre settled into regular visits to a particular shire every two to eight years, local authorities and litigants began to save up cases for its decision.

As the business of the eyre grew and holders of eyre commissions began to be sent out in groups, there probably arose some division of function, with some commissioners specializing more or less in tax and accounting matters and others in litigation. But in general and at its height the eyre constituted essentially an administrative solution to an administrative problem. It brilliantly resolved the crucial problem of all conquest based empires, how to bring central political authority to bear on the countryside cheaply and without creating local centers of power capable of resisting central authority. Most empires solve this problem by spreading administrative cadres thinly over the countryside, rotating them frequently or otherwise insuring that they do not develop strong local ties, and subjecting them to rigorous hierarchical discipline. The English solution was to send members of the central authority itself, that is, the King's own household, on quick tours through the countryside in the course of which they gathered the information needed by the central regime, imposed its power on the local authority and then returned to the bosom of the central authority. The King did not have to finance a corps of territorial administrators separate from his household staff. More importantly, he did not have to worry about such administrators becoming locally independent because they went from under his thumb temporarily to do their field administration and then quickly came back under his thumb again.

Of course, this brilliant solution depended in large part on the small size of the English portion of the Norman emperor's domains. And it also depended on the existence of traditional hundred and shire institutions and the feudal authority of local landholders and sheriffs to do the day to day business of government between visitations. Yet whatever its prerequisites, the eyre system was one of the key building blocks in a highly centralized English political and administrative system. The eyre system meant that the most powerful judges in the realm appeared as travelling representatives of a central judicial authority.

They were not local subordinates of a central judicial authority tied to it by lines of hierarchical control, that is, appeals procedures. Instead, they were literally pieces of a central judiciary on temporary orbit through the countryside.

VI. CENTRALIZED ADMINISTRATIVE-JUDICIAL BODIES

The eyre system was not the only means of putting concentrated central authority in orbit through the countryside, instead of dispersing it through a district officer. The King himself took his government, that is, his household, on tour. Medieval monarchs customarily progressed through the countryside; it was easier to go to the food and drink and the game than to have them brought to a permanent court. As the sovereign, the King was the font of justice obligated to hear all complaints and right all wrongs. At the same time, the theoretically absolute sovereignty of medieval monarchs was usually hedged by the custom that the King act in Council after receiving the advice of his great men. The Norman kings of England heard cases personally but usually in Council.¹⁶ Moreover, among the King's administrative officers and councillors were several, most particularly the Chancellor and the Justiciar, who acquired special responsibility for legal matters.

It cannot be said exactly when England had a royal judge *per se*. The councillors assisting the King when he heard his subjects' pleas for redress of injuries were judges in a sense. When the King was out of the realm, the Council began to hear such pleas in his absence. The Justiciar and the Chancellor seemed to play particularly important parts in the judicial aspects of the Council's business. So even in the twelfth century one can speak of a King's court or Curia, though the Curia was the forerunner of legislative and administrative as well as judicial institutions.

A. *The Bench*

The first really distinctly judicial court arose out of the King's habit of doing personal justice as he travelled through the countryside. It became quite inconvenient for suitors to troop along after the King on his progress and wait for him to settle their cases. One of the provisions of Magna Carta, that great bill of complaints against King John, was that a permanent place be designated for the hearing of "common

16. On the personal justice of King John *see* D. STENTON, *supra* note 7, at 88-114.

pleas." Common pleas were disputes between private persons not touching directly on the interests of the King. (Not even the rebellious barons would have suggested that the King be required to allow crown pleas directly involving his own interests to be heard outside his presence.)

The provision of Magna Carta appears designed to make permanent an arrangement that had already been used sporadically. In response to the inconvenience of carrying a bevy of law suits and suitors along with them as they made their progresses, the early Norman kings sometimes left some of their officers home to hear cases when setting off on their travels. Commissioned to hear cases at Westminster in the King's absence, these officers were referred to as the Bench and were considered a branch of the Curia, the rest of which was traveling with the King.¹⁷ When the King was out of England, the whole Curia tended to stay at Westminster, where most of their number would join in hearing cases. When the King was present he would hear cases too. But the very existence of the Bench settled very early that the King's court could decide cases without the King's presence. The personal justice of the King had become the institutional justice of the King's court.

B. The Curia and the Major Crown Officers

By the end of the fourteenth century the eyre system had virtually disappeared, displaced by the growth of a centralized institutionalized bureaucracy at the capital. The Justices in Eyre had at first been quite literally whichever of the King's friends and lieutenants he commissioned to tour the countryside, usually the same noblemen who sat by right in the Curia. In the course of the Crown's struggle with the barons, the Norman kings found that in choosing officers for the central government they would be better served by elevating lesser noblemen and commoners than by seeking crown officers from among the very barons who were opposing the Crown. The later Justices in Eyre were more and more often men of relatively humble origins who were making careers as servants of the King. The large Curia in which the great nobles sat by right continued to exist. The business of government, however, was increasingly done by a smaller version of the Curia, a kind of inner cabinet. It was largely staffed by men who had been made great as a result of their having been chosen by the King to hold

17. 1 W. HOLDSWORTH, *supra* note 7, at 51-56.

public office rather than men who held public office because they were great hereditary landowners.¹⁸ The result was a quasi-professional group of government officials sitting permanently at the capital and building up professional bureaucracies of clerks and lesser officials maintaining centralized pools of information, such as tax rolls. During the fifteenth century all of England could be ruled from London. What is striking about this developing centralized bureaucracy of the fifteenth and sixteenth centuries is that nearly every part of it wielded judicial authority.

First, the Curia, both in its larger and smaller versions, heard cases both in the presence and absence of the King. The greatest administrative officer of the realm was the Chancellor, who was keeper of the King's seal. Petitions for the King's favor passed into Chancery, and orders by the King under his seal passed out of Chancery. Thus, Chancery was the center of most of the Crown's business. Chancery was the source of the writs that initiated and defined the nature of actions in the common law courts. But the Chancellor also maintained separate jurisdiction to right wrongs for which the common law writs were not suitable.¹⁹ The Exchequer, which was the King's tax collection and accounting agency, had become a separate department from Chancery, and it too heard cases.²⁰ It had become cumbersome to do all government business under the King's great seal held by the Chancellor, so the King developed a second and personal or privy seal for the dispatch of lesser government business. The keeper of that seal, the Lord Privy Seal, quickly developed judicial functions.²¹

C. *Common Pleas and King's Bench*

At the same time as these administrative-judicial agencies emerged, two functionally specialized courts unattached to administrative offices grew out of the older Bench and the court that followed the King. One was Common Pleas; the other, King's Bench. As the names

18. See J. BALDWIN, *THE KING'S COUNCIL IN ENGLAND DURING THE MIDDLE AGES* (1913). On the constitutional evolution of the Council, see generally G. ADAMS, *CONSTITUTIONAL HISTORY OF ENGLAND* (1934); G. ADAMS, *COUNCIL AND COURTS IN ANGLO-NORMAN ENGLAND* (1926).

19. The early history of the Chancery remains a subject of historical debate. See W. JONES, *THE ELIZABETHAN COURT OF CHANCERY 1-24* (1967); T. TOUT, *PLACE OF THE REIGN OF EDWARD II IN ENGLISH HISTORY* 58 (1914); B. WILKINSON, *CHANCERY UNDER EDWARD III* (1929).

20. See 1 W. HOLDSWORTH, *supra* note 7, at 231-42; T. PLUCKNETT, *supra* note 7, at 155; R. POOLE, *THE EXCHEQUER IN THE 12TH CENTURY* (1955).

21. 1 W. HOLDSWORTH, *supra* note 7, at 407, 412-13.

imply, the former principally devoted itself to litigation between private parties and the latter to matters in which the Crown had an interest. In reality, however, each court heard a wide range of causes that, had strict jurisdictional theory been followed, would have belonged to the other.²²

D. *Centralized Collegiality*

At first, there was little concern for establishing jurisdictional boundaries among all these "courts." In this early period an essentially collegial stamp was placed on British government that it wears to this day in the form of cabinet rule. Even at a very early period some of these courts had some judges who held no other office, but many crown officers sat on many courts. The Chancellor, for instance, heard Chancery cases personally, almost invariably attended Curia sessions devoted to settling litigation and appeared at King's Bench and Common Pleas when he had a mind. Common Pleas separated only gradually from the court that followed the King, which consisted of his general advisors.²³ When King's Bench was first created it was hardly differentiated from the Council and was "expressly subordinated to the magnates and wiser men to whom difficult cases were to be referred."²⁴

The generally collegial character of English administration left a strong mark on English courts. The high courts were typically multi-judge courts. Their personnel shifted somewhat from day to day as various administrative-judicial officers shifted from job to job to meet the changing press of government business. Moreover, judges of one court would customarily call in judges of another when they needed help on a problem that seemed to require outside expertise. Both Chancery and Exchequer freely called in Common Pleas and King's Bench judges to assist when some troublesome point of common law arose in one of their cases.

This collegiality and the extreme centralization of courts also created a rather peculiar English appellate structure. Appeal from Common Pleas lay to King's Bench although in other respects both

22. F. HASTINGS, *COURT OF COMMON PLEAS IN FIFTEENTH CENTURY ENGLAND* (1947); T. PLUCKNETT, *supra* note 7, at 147-51, 155; G. SAYLES, *SELECT CASES IN KING'S BENCH* (Selden Soc'y vols. 55 (1936), 57 (1938), 58 (1939), 74 (1955), 76 (1957), 82 (1965)); Neilson, *Court of Common Pleas*, in 3 *THE ENGLISH GOVERNMENT AT WORK 1327-36* (1950).

23. 1 W. HOLDSWORTH, *supra* note 7, at 195-96.

24. T. PLUCKNETT, *supra* note 7, at 149-50.

were original jurisdiction, national trial courts sitting at the capital, and many of the same judges sat in both. Appeal from King's Bench and a number of other courts lay to the Court of Exchequer Chamber, which was essentially a meeting of all the judges who sat in the central courts.²⁵ Thus, the English system of appeal substituted a centralized college of judges for a hierarchy of appeals courts. There was no need for a hierarchy of appeals courts to facilitate centralized control over dispersed trial courts because the trial courts were themselves centralized.

E. *Juries and Centralization*

The London bureaucracy of which the judges were an integral part had largely replaced the eyre system of administration during the fourteenth century, but the judicial aspects of the eyre were retained and transferred to a new group of circuit riding judges. The Assize of Clarendon of 1166 provided a royal procedure for protecting the property interests of those in possession of land. A local jury was the essential feature of this new procedure, so in these land cases judges had to travel to the juries. The King began to commission persons to travel in the shires and conduct the new procedures. Typically it was judges of King's Bench and Common Pleas who held these assize commissions, but sometimes the commissions were granted to other King's officers as well. With the usual economy of the Crown, the Assize Justices soon began to be empowered to hear other sorts of cases, particularly criminal cases that had earlier been heard by Justices in Eyre under commissions of gaol delivery.²⁶

The jury procedure proved extremely popular and gradually was extended to many kinds of litigation. This development posed a serious threat to judicial centralization because the essential virtue of the jury was its localness, that is, its personal knowledge of local events and conditions. Local jurors could hardly be compelled to travel to London to assist King's Bench and Common Pleas; therefore, the successful use of juries seemed to require creation of territorial trial courts. The central courts protected their jurisdiction by devising the system of *nisi prius*. Suits initiated in Westminster at King's Bench, Common Pleas,

25. See M. HEMMANT, SELECT CASES IN THE EXCHEQUER CHAMBER BEFORE ALL THE JUSTICES OF ENGLAND, *Introduction* (1933); Johnson, *The Exchequer Chamber Under Edward II*, 21 ENG. HIST. REV. 726 (1906).

26. See T. BARNES, SOMERSET ASSIZE ORDERS 1629-1640, at xviii-xxvi (1959) (emphasizing the mixed administrative and judicial functions of the assizes and thus their continuity with the eyre even as late as the 17th century); J. COCKBURN, A HISTORY OF ENGLISH ASSIZES 1558-1714 (1972) (particularly at 15-23 on the medieval origins).

or Exchequer were pleaded until the issue emerged that was ultimately to go to the jury. At that point instead of summoning a jury to London from the locale where the case arose, the case was turned over to the Justice of Assize traveling in that locale, and he presided over the jury portion of the trial. Ultimate control by courts in the capital was assured by a provision that only assize judges who were King's Bench or Common Pleas judges, King's sergeants or Barons of the Exchequer learned in law could hear cases at *nisi prius*. The *nisi prius* system was begun in the latter part of the thirteenth century and was extended to a very wide range of cases in the fourteenth.²⁷

The creation of circuit riding Justices of Assize exercising *nisi prius* as well as other jurisdiction both criminal and civil allowed England to develop and maintain probably the most centralized trial court system of any major nation in history.²⁸ The Justices of Assize/*nisi prius* judges were largely drawn from the central court judges or the sergeants, the elite corps of legal professionals intimately linked to the central courts. The eyes of all litigants remained fixed on Westminster, which dictated the procedural and substantive aspects of law, because *nisi prius* cases had to be initially brought in a central court; a judge sitting *nisi prius* was considered to be representing that central court. King's Bench and Common Pleas defined the extent of *nisi prius* jurisdiction and in difficult cases the *nisi prius* judge might adjourn the case back to the court from which it came. Since the *nisi prius* judge was taken to be a representative of the court where the case was initiated, appeal lay to whatever court heard appeals from the initiating court. We find, too, that universal clue to centralizing motives: Justices of Assize could not hear cases in the counties where they were born or where they resided.

Thus, assize-*nisi prius* was a way of getting central court services out into the countryside without creating local judicial institutions and without inspiring the local clamor for such institutions that would have resulted if all litigants and jurors had had to travel to London.

VII. CENTRALIZED LAW

The creation of a body of powerful central courts with tentacles running into the countryside was one side of the development of English

27. 1 W. HOLDSWORTH, *supra* note 7, at 276-85; T. PLUCKNETT, *supra* note 7, at 165-67.

28. Professor Milsom entitles his sketch of the development of English courts *The Centralization of Justice*. S. MILSOM, *supra* note 7, at 1-25.

judicial centralization. The other was the development of a highly centralized body of law, centralized in the sense that it was made in the capital and applied uniformly over the whole countryside. Just as the Norman conquerors had acquired an ongoing court system, the hundred and shire courts, they also had acquired an ongoing body of law. While the Anglo-Saxon kings had imposed some measure of uniformity, that law was essentially local and customary and, thus, fragmented. The northern and eastern portions of England, which had been conquered earlier by the Danes, engaged in many legal practices substantially different from those in the south and west. Moreover, every town, borough, shire, hundred, estate, manor, port and fair might have its own legal customs on matters ranging from proof of land transfer to adoption of children.²⁹

Conquerors usually find such localized legal diversity inconvenient. Diversity obviously complicates the lives of central governors who find it far easier to administer uniform national rules than to keep track of local peculiarities. Moreover, following a conquest, customary law that lies largely in the memories of the conquered local inhabitants has a strange way of always favoring the old tenant against the new landlord, the taxpayer against the tax collector and so on. In England, local law was often the vehicle for local "liberties," that is, claims of customary barriers to the complete sovereignty of the Crown.

To put the matter negatively, the conquerors wished to sweep away Anglo-Saxon restraints on Norman rule. But there is a positive side as well. One of the most important aspects of the social control practiced by courts is wedding the populace to the regime—strengthening the people's perception of the regime's legitimacy and their sense of loyalty to it. A major mode of exercising such control is the provision of official dispute settlement procedures and other legal services better than those available elsewhere. The conquerors of England set out to show that the justice of the new King could be superior to that of the hundred and shire courts. As more and more hundred courts came into the possession of private landholders, as the feudal courts of landholders flourished and as shire courts came to be dominated by local magnates, the King's justice became not only an alternative to Anglo-Saxon custom but a refuge from the landlords' courts.

29. See F. ATTENBOROUGH, *THE LAWS OF THE EARLIEST ENGLISH KINGS* (1922); M. BATESON, *BOROUGH CUSTOMS* (Selden Soc'y vols. 18, 21, 1904-1906); T. PLUCKNETT, *supra* note 7, at 307-14; D. STENTON, *A PREPARATORY TO ANGLO-SAXON ENGLAND* (2d ed. 1947); de Montmorency, *Danish Influence on English Law and Character*, 40 *LAW Q. REV.* 324 (1924).

There were a number of advantages that the King's courts could offer simply because they were central courts. Those individuals and classes of persons who found themselves disadvantaged by local customary law or the constellation of local political forces would naturally prefer a court located as far as possible from the local scene. Tenants involved in disputes with their landlords might well prefer to have their cases decided in courts other than those presided over or dominated by the landlord. Persons who were officers of or had special ties to the central government might prefer its justice. Normans would prefer a Norman king's justice to that of an Anglo-Saxon local court.

In addition to these natural advantages, the Norman kings quickly provided a very important series of artificial ones. The first and most important of these was that the King's courts used a new body of law, the common law. The hundred, shire and feudal courts applied a law that, because it was customary, local and unwritten, was highly uncertain and difficult to learn for any but long time local residents. And because it was customary, the sanction behind it was essentially local opinion. In contrast the common law developed as a uniform, national law, partially written and partly resident in the minds of a few hundred easily consulted lawyers in the capital and directly backed by the authority of the Crown. For many litigants such a law was simpler, more certain and more easily enforceable than the web of local customs. Moreover, in contrast to the customary law, the common law could be rapidly changed to meet the changing needs of litigants.

A. *The Writs*

The common law developed as a series of writs.³⁰ Initially a writ was simply a written order by the King to some person or persons. A prospective litigant desiring the King's justice requested an order from the King directed to the person who had injured him. It directed that person either to provide a remedy for the injury he had done or to appear before the King or some officer designated by the King to explain why he had not done so. The writ began as a request from a subject that the King personally intervene to right a wrong the subject had suffered. The potential of such a device for recruiting political support and loyalty to the regime is obvious.

30. On the development of the writs see F. MAITLAND, *EQUITY AND FORMS OF ACTION* (1909); T. PLUCKNETT, *supra* note 7, at 353-78; 2 POLLOCK & MAITLAND, *supra* note 7; H. RICHARDSON & G. SAYLES, *SELECT CASES OF PROCEDURES WITHOUT WRIT* (Selden Soc'y vol. 60, 1941); G. TURNER & T. PLUCKNETT, *BREVIA PLACITATA* (Selden Soc'y vol. 66, 1951); R. VAN CAENEGEN, *supra* note 13.

Requests for writs were channeled through the Chancellor who, as keeper of the King's seal, was the supervisor of most of the paperwork that flowed in and out of the royal household. What began as a series of personal and particularized requests soon settled into a kind of catalogue of standard forms.³¹ At first all writs were requests for special intervention by the Crown, and a special fee had to be paid. Repetition of a particular type of request led to the establishment of a standard form, and eventually that form of writ issued "as of course," that is, routinely without a special fee. Writs that began as special interventions of the King, as a kind of extraordinary royal justice, became the common law as they became standardized forms of action through which persons who met certain legal criteria could routinely bring their cases into the King's court. This shift from extraordinary to ordinary justice comes when a writ begins to issue "as of course." The second major aspect of routinization occurred when the writ became "returnable." Nearly all of the standard writs came to contain a final sentence commanding that, if the defendant were not willing immediately to grant the plaintiff the remedy described in the writ, the defendant must appear before a certain court of the King on a certain date and bring the writ with him. The writ became not only a description of what legal rights the King would protect under what circumstances but the means by which the plaintiff got the defendant into court.

At first the Chancellor invented new writs, that is, standard forms, as he saw fit. But by the fourteenth century new writs were usually the product of the King in Parliament. As the common law courts developed, they began to develop new forms of action by extending or relaxing the wording of existing writs to cover a wider range of fact situations. For instance since the writ of trespass contained the words "*vi et armis*," strictly speaking, it was applicable only to injuries to persons or property when an intentional breach of the peace also occurred. Common law courts began to allow trespass actions without allegations of breach of the peace, for example, when an injury was the result of negligence rather than deliberate injury. These actions were called trespass on the case.³²

The common law makers could and did create new law in response to and in the hope of attracting requests from prospective

31. S. MILSOM, *supra* note 7, at 26-27.

32. See generally A. KIRALFY, *THE ACTION ON THE CASE* (1951); S. MILSOM, *supra* note 7, at 256-70.

litigants. The common law courts directed the attention and the loyalty of the litigants more and more toward the capital. They provided new forms of action that suited litigants better than those of the local courts.³³ In that day there were two common types of conflict. The first was conflict over land ownership. The second was conflict arising over the injury of one man's person or property by another. The writ of trespass dealt with the latter problem, and through constant extension and modification of trespass on the case that writ became a relatively complete law of torts. The writ of right handled land problems. It was designed quite specifically to attract litigants who had either failed or anticipated failing to get their land back through litigation in the local lord's feudal court, for it directed the lord to return the land to the plaintiff and ordered the sheriff to act if the lord did not.

1. Novel Disseisin

The principal contribution of royal courts to the resolution of land conflicts, however, was the Assize of Novel Disseisin.³⁴ The potential for dispute over land ownership was very great in England because under the tenurial system A might have a better claim than B and B a better claim than C, but no one had an absolute claim against the world.³⁵ Anyone living on a given piece of land might be confronted at any moment by a claimant with a better right or at least one who claimed to have a better right. This situation was even further aggravated by the unsettled conditions of twelfth and thirteenth century England in which many barons had private armies. Might tended to make right in the countryside; many persons were ejected from their land by brute force. Because of the complexity of feudal tenures, seisin became a crucial concept of land law.³⁶ The person in actual physical possession of the land was seised of it. Given the uncertainty of the times, there was a strong desire on the part of those seised to be protected in peaceful possession, a desire that seemed to correspond with the needs of public policy and those of a conqueror anxious to stabilize his domains.

33. See F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 111-14 (1955).

34. Novel disseisin is the most important of the real actions, which include the writs of right and writs of entry discussed in this section. On the real actions and their relation to one another see F. MAITLAND, *supra* note 30; A. SIMPSON, *supra* note 7, at 24-43.

35. On tenures see S. MILSOM, *supra* note 7, at 88-102; A. SIMPSON, *supra* note 7, at 1-23.

36. On the nature of seisin see sources cited in S. MILSOM, *supra* note 7, at 386 n.103.

The Assize of Novel Disseisin is customarily traced to the Assize of Clarendon of 1166; that is, it is one of the statutory writs made by the King in Parliament. An action under the assize was reduced to two simple questions. First, had the bringer of the assize (the demandant) been in possession (had seisin) of the land in question as of a certain recent date (usually fixed by the last progress of the King through the shire in which the land was located)? Second, had the current possessor ejected the demandant from the land since that date (committed novel disseisin)? If the answer to both questions was yes, the demandant got a royal order putting him back in possession. Novel disseisin was a simple way of protecting peaceful and continuous possession. The possessor did not have to go through the time consuming complex tracings and proofs of elaborate chains of tenurial relations establishing that he had the better right while someone who had grabbed his land got the enjoyment of it. If he had been in possession on the significant date, he got it back immediately. Any subsequent challenge to the ultimate legitimacy of his tenure, which might well take years, was fought out while he remained in possession and enjoyed the profits.

Through novel disseisin the Crown pursued its own policy of stabilizing a conquered countryside, while also providing an enormously desirable service to landholders. Novel disseisin largely displaced the protection to tenants previously offered by lord's courts. It protected immediate possession. The writs of right protected the ultimate feudal tenure behind possession. Another set of crown writs, the writs of entry, protected inheritance. Land was the central concern of medieval England, and these writs tended to transfer most land disputes from legal to central courts, basically to Common Pleas.

Novel disseisin and the writs of entry illustrate the creation of new substantive law as a means of attracting the loyalty of the countryside. They are even more important as illustrations of a new and more rational procedure. There had been four traditional modes of proof in English law suits.³⁷ Proof by witnesses involved both sides bringing in witnesses who swore their claims under oath; whoever had the most witnesses won. Trial by compurgation or oath involved the defendant taking an oath denying the charges; he won if he used the proper verbal formula and brought in enough persons to swear that they believed that he swore truly. The Normans brought with them to England trial

37. On the older modes of trial see 1 W. HOLDSWORTH, *supra* note 7, at 299-312.

by battle, in which the litigants or their champions fought, the winner winning the law suit. Finally there was trial by ordeal, in which one of the parties carried red hot irons or put his hand in boiling water or was submerged in water; if he was not burned or if he sank in the water, he won. All of these forms of proof reflected what "trial" itself originally meant in England. To put one's factual claims to trial meant submitting them to God. Oaths, ordeals and combats all brought divine intervention to bear. No one would risk his soul by swearing falsely, and God would insure that the just man won the battle or passed the ordeal.

The need for divine intervention existed because factfinding was too hard for humans. For instance, the maze of grants, regrants, leases, inheritances and so on that could establish whether A or B had the better ultimate title to Greenacre would have to be proven out of numerous documents that were not centrally registered, were in the possession of many different persons (most of them not party to the suit), were often lost or damaged and were easily forged. Ultimately title rested on events that had occurred years earlier among persons often long deceased, of failing memory or under great incentive to lie. Only God could know the facts.

The Assize of Novel Disseisin revolutionized trial in England. Instead of courting divine intervention, it simply called twelve men of the vicinity together and asked them to decide. It could adopt such a simple solution because it asked simple factual questions: was A in possession as of a certain recent date, and had B subsequently taken possession? This writ combined with the writs of entry enabled "one with recent and known facts on his side to recover the land without putting the right in issue and so without giving the wrongful holder the option of battle."³⁸

The assize, that is the jury, specified as the mode of trial in the Assize of Novel Disseisin, was such a popular conflict resolution service that it soon became the typical mode of proof in the King's courts.³⁹ The assize had only to decide the two questions central to novel disseisin. If other questions of fact arose in the same case, they were subjected to the older methods of proof. Soon, however, there grew

38. S. MILSOM, *supra* note 7, at 120.

39. The development of the jury is summarized in 1 W. HOLDSWORTH, *supra* note 7, at 298-350; T. PLUCKNETT, *supra* note 7, at 106-38. See also 1 J. STEPHENS, A HISTORY OF THE CRIMINAL LAW IN ENGLAND (1883); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE (1898).

a tendency to submit the whole case to the body of twelve men, which began to be called a jury. The new writs of the thirteenth century such as trespass and its many offshoots required jury trials. And the custom grew in the King's courts of litigants "putting themselves upon the country," that is, submitting the issue to a jury, whenever a factual issue arose.

In the twelfth century it was possible for a defendant to buy the privilege of a jury trial in criminal cases, although only in cases when the complaint was brought by a private person rather than the King. If he made no such investment he would have trial by battle, compurgation or ordeal. But the King would not accept compurgation when he was the complainant, nor could one have battle against the King. In 1215 the Lateran Council of the Catholic Church abolished ordeal. By the middle of the fourteenth century the twelve man jury had established itself as the basic method of criminal trial. By the fifteenth century the jury had become the standard judicial instrument for finding facts on both the criminal and civil sides.

The use of juries by the King's courts not only provided a far more rational and predictable mode of resolving factual issues than was available in the older courts, but it also allowed the King's courts to compete with local courts in the one area in which the local courts seemed to enjoy a great advantage. That advantage was, of course, that local institutions always have better access to facts than central institutions. Such an advantage would seem to be crucial in judicial rivalries because in litigation facts are more often at issue than law. Against the local knowledge of the suitors, witnesses and oathtakers of the hundred, shire and feudal courts, the Crown now counterpoised the trial jury. And as has already been noted, the system of sending judges who administered the Assize of Novel Disseisin on circuit and the *nisi prius* system meant that a local jury could be used conveniently by a central court.

2. Supplements to the Writs

The writ system was, of course, an incomplete system of justice. The writs originated as special and personal interventions of the King into an essentially customary legal realm that was in the hands of a relatively complete system of hundred and shire courts. There was no occasion to develop a "code" of writs covering all legal disputes. But as part of its drive for centralization, the Norman regime did seek to

offer a complete line of judicial services through institutions other than the writ bound common law courts. The best known of these is the system of equity. We have already seen that the Chancellor, as keeper of the Great Seal, was the principal administrative officer of the realm. In the Norman period he was usually a churchman. He came to be thought of as "the conscience of the King" in some sense. As the writs became fixed, persons continued to direct requests for special crown justice to the Chancellor. Out of this combination of circumstances arose the Chancellor's equity jurisdiction.⁴⁰

Because the Chancellor and his subordinates were churchmen and basically employed in controlling and storing crown documents, Chancery courts developed written procedures, as opposed to the essentially oral procedures of common law. Documents at issue were filed with the court. This was one reason that Chancery tended to be more successful with commercial matters than common law courts until at least the seventeenth century. Chancery would take both oral and written evidence of contracts that were not under seal, evidence that would have been barred from common law proceedings. It actually looked at ledgers and documents that common law courts tended to distrust. Decision was in the hands of the Chancellor after examination of the entire written record. Chancery did not normally use juries; thus, decisions were not made by laymen relying on personal knowledge of local affairs but by an expert administrator relying on evidence gained through systematic presentation of evidence by the two parties. When an issue of common law was involved the Chancellor could call on the common law judges for their advice. Thus, Chancery offered a mode of procedure, a mode of inquiring into facts and a final judge very different from those in the common law courts. It also provided a different body of remedies and relief from the occasional injustices that would result from strict application of the letter of the law. It proved to be a highly popular court. It need hardly be argued at length that it was a highly centralized one. Its subordinate personnel were firmly anchored in the capital. Equity actions could only be undertaken there. Its judge was one of the most important administrative and political figures of the central government. Its legitimacy rested on the status of the Chancellor as a direct conduit of the King's justice.

40. On the growth of the Chancellor's jurisdiction see G. ADAMS, *supra* note 18, at 95; B. WILKINSON, *STUDIES IN THE CONSTITUTIONAL HISTORY OF THE THIRTEENTH AND FOURTEENTH CENTURIES* 196-215 (2d ed. 1952) and works cited therein. Holdsworth's account is often questioned in points of detail and particularly on the issue of the origin of equitable doctrines, but it is surely correct in institutional outline. 1 W. HOLDSWORTH, *supra* note 7, at 395-477. See W. JONES, *supra* note 19, at 78.

Even more intimately related to the person of the King and perhaps equally important in the scheme of judicial centralization was what became known as the Court of Star Chamber. The Curia Regis, that is, the King's Council of William the Conqueror's time, is the parent body of many of the political institutions of later English government including the Privy Council, Parliament and the Cabinet.⁴¹ The Curia Regis was not a fixed body but a constitutional idea of advice. On those occasions when all the lords of the realm plus representatives from the towns and shires were called together to advise the King, the Council was the medieval Parliament. On occasions when the King was traveling, the Council was the handful of advisors who travelled with him. When the King was in the capital the Council would consist of all the important administrative and judicial officers of the government.

As the business of the government increased, the Council tended to split in different ways. A smaller council of direct advisors to the King, which was in effect the policymaking executive committee of the government, tended to break off from the larger council that now contained too many lesser officers actually to govern. This smaller council became the Privy Council; Privy Counsellor became a rank or office awarded by the King to those he wished to be central policymakers. On the other hand, the administrative establishment sitting in London was growing, and its major administrative officers needed a device for coordinating the work of the departments, offices, councils, courts and boards that made up the central government. Their meetings came to be known as King's Council in the Star Chamber.⁴² Thus, although a strict formal separation never occurred, the King had two councils, one a small body of high policymakers who travelled with him, the other a larger body of London based administrative officers who met together to do the regular business of the central government machinery.

Some or all of the Privy Counsellors, and indeed the King himself, often sat in Star Chamber, but so did many lesser government officials who did not hold the rank of Privy Counsellor, including many of the

41. On the general evolution of the Council *see* authorities cited note 18 *supra*.

42. On the general history of Star Chamber *see* G. ELTON, *STAR CHAMBER STORIES* (1958); G. ELTON, *THE TUDOR CONSTITUTION* (1960); 1 W. HOLDSWORTH, *supra* note 7, at 477-516; W. JONES, *POLITICS AND THE BENCH* 103-08 (1971); C. SCOFIELD, *A STUDY OF THE COURT OF STAR CHAMBER* (1900); Barnes, *Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber*, 6 AM. J. LEGAL HIST. 221, 315 (1962); Barnes, *Star Chamber Mythology*, 5 AM. J. LEGAL HIST. 1 (1961).

judges of King's Bench and Common Pleas. Of course the Chancellor and the Barons of Exchequer, who were themselves high judges, sat, as did other administrative officials with judicial functions such as the Lord Privy Seal.

In what was probably a quite unanticipated development, as Star Chamber became institutionalized in the sixteenth century, its judicial business tended to overshadow its work of administrative coordination. No clear distinction was ever drawn between the two, just as no clear distinction was drawn between the Privy Council and Star Chamber. But Star Chamber became increasingly a court that heard cases at regular, publicly attended judicial sessions at the same terms as the other courts. In civil cases it used a Norman procedure similar to that in Chancery involving the filing and evaluation of documents. On the criminal side it heard complaints from the Attorney General and then proceeded by the ordinary rules of procedure used in King's Bench. However, Star Chamber tended to act in a more summary and expeditious way than the equity and common law courts. It frequently summoned and directly questioned parties, using torture when appropriate. Because the judges held high positions, it could deal more easily than could ordinary courts with powerful persons. Star Chamber inherited the sweeping jurisdiction of the medieval King's Council. It could not deal with freehold, treason or felony. Much of the earlier equitable jurisdiction of the Council was now handled by Chancery and by the Court of Requests, which in theory was a committee of the Privy Council. And it tended to leave to the common law courts those cases that it felt they could handle routinely. Otherwise Star Chamber felt free to handle what cases it pleased.

Star Chamber took special responsibility for cases that concerned the state, and there were many varieties of these. For instance, common law courts had generally declared themselves incompetent to inquire into matters that had occurred outside of England; they had not developed writs to handle commercial transactions well; and they were reluctant to deal with documentary evidence crucial to most commercial cases. At the same time the Crown had major policy interests in foreign trade, and the Council always considered foreign trade matters. Thus, Star Chamber heard many cases involving international trade, although it sent many others to the Court of Admiralty.

Star Chamber was especially concerned with matters, short of treason, having to do with the security of the realm, and so it heard riot and conspiracy cases. It also heard libel cases because libel was

initially conceived of in terms of seditious libel, that is, words spoken against the King and his government. In part because of the incapacities of common law courts and in part because its concern for sedition and conspiracy broadened into what was believed to be a special competence to deal with secret and nefarious doings, it heard many cases of fraud, forgery and the like. And for roughly the same reasons, it, along with the Court of High Commission, became the tribunal for cases of religious deviation.

Quite aside from these cases of clearly state concern, Star Chamber heard a great many purely private litigations. Jurisdiction over some of these could be rationalized on the grounds that they presented anomalies difficult for regular courts to handle or involved parties particularly linked to the King, such as holders of royal charters. But most were in Star Chamber simply because one of the parties wanted them there and the court was willing to hear them.

In the sixteenth century the Star Chamber was a "court" staffed by a mixed body of central administrators and judges exercising broad, general judicial power as part of its general administrative task of keeping the machinery of the government running and its broadly political task of insuring the peace and prosperity of the realm. It appears to have been a highly popular and successful court. An independent judiciary it certainly was not.

The absence of independent judicial functions in Star Chamber considered as an aspect of the Council is emphasized by the two great sixteenth century branches of the Council.⁴³ These were the Council of the North and the Council of Wales. Each was staffed with a mixture of great political magnates and administrative officers of the next lower rank. Each wielded full administrative and judicial powers over particularly troublesome or distant regions of the country. Neither differentiated its administrative from its judicial functions or personnel. Like imperial district officers each council held the county, collected the taxes, kept the peace and resolved private conflicts, all as integral parts of governing.

At this point, clearly centralization not independence is the major theme emerging from English experience. The King's court was replacing the suitors' and the lords' courts. The basic authority of the courts that came to be most important in England was the personal judicial authority of the King. The judges of King's Bench and Common

43. F. BROOKS, *THE COUNCIL OF THE NORTH* (1963).

Pleas were the King's officers, wielding the King's judicial powers, serving at the King's pleasure and participating as subordinate officials in the general administrative and policymaking instruments of the regime, such as Chancery and Star Chamber. The writs that were the road to the King's Bench and Common Pleas were, in form, petitions to and orders from the King. The basic writs were created either by royal statute or the practice of his chief administrative officer, the Chancellor. This was not exceptional since much of the central judicial power of the Crown was wielded by administrators as part of an undifferentiated mass of governing power. Chancery, Exchequer, Star Chamber, Request, Wards, Admiralty, the Stannaries, the Councils of Wales and of the North all show a pattern that is the most typical when office is substituted for consent—triadic conflict resolution by administrators.

Other tendencies must be noted as well. They ought not, however, to be noted, as they customarily have been, as the seeds from which developed that judicial independence that was the true destiny of British courts. They ought to be considered for what they were at the time, without teleological blessing.

VIII. FUNCTIONAL SPECIALIZATION

As noted earlier functional specialization is often confused with judicial independence. A regime may be encountered that developed specialized tax collectors, soldiers, recordkeepers, diplomats and judges without allowing any particular autonomy to any of these subsets of the bureaucracy. The English regime of the thirteenth century through the sixteenth century was developing judicial specialization along two interlocking paths. First, there was the emergence of persons whose primary task was the handling of litigation.⁴⁴ Most prominent, of course, were the judges of King's Bench and Common Pleas. From the point in the thirteenth century at which it was provided that a Court of Common Pleas was to sit permanently at Westminster, judges of that court are encountered who are no longer all purpose administrators or magnates who occasionally do judging. King's Bench follows soon after. Certainly in the fifteenth and sixteenth centuries the judges of Common Pleas and King's Bench are called and conceived of as judges and are principally involved in triadic conflict resolution. Moreover, most appeals from the decisions of these judges would end up being

44. T. PLUCKNETT, *supra* note 7, at 158 is particularly interesting on 14th century developments.

heard by the judges themselves, either as King's Bench hearing appeals from Common Pleas or all the judges together sitting as the Court of Exchequer Chamber. Yet final appeal lay to the House of Lords, which was, of course, not a specialized judicial but a general political body. Even the House, however, normally called in the judges to give their advice on appeals.

While the Justices in Eyre and those holding assize, gaol delivery and *nisi prius* commissions had initially been drawn from the whole spectrum of the governing elite, such commissions were increasingly issued only to the judges of the common law courts. Yet these judges were King's officers, appointed by him and serving at his pleasure. Particularly when on assize circuit, they were often assigned secondary administrative duties. They were summoned by the Chancellor to assist him, and they sat in that great mixed administrative-judicial board, Star Chamber. As assize judges they continued to be charged with overseeing the general good governance of the countryside, serving as a key link between the central government and the local justices of the peace.

Moreover, much of what appeared in form to be litigation or conflict resolution in the central common law courts was not so in reality. There is not space here even to sketch the development of English land law, but that development had some peculiar results for common law courts. The tendency of judges (as distinguished from mediators) to preserve strong elements of consensual mediation even within the litigational process has been noted. From the earliest times English judges viewed a mutually agreed settlement under the supervision of and recorded by the court as an ideal resolution of conflict. The formal record of such a settlement was called a fine.⁴⁵ One copy was retained by the court, the other copies (called "feet") went to the parties. England had no general system of land registry, so one good way of formally recording a transfer of land was to pretend a dispute about it, and then settle the dispute by fine. The fine would leave a permanent written record of the transfer authenticated by a court.

Due to various rules of English land law, the conclusion of certain kinds of suits in certain ways would allow landholders to give, sell, lease or devise interests in land to persons and under conditions that were legally forbidden if done directly by gift, sale or will. The practice

45. D. STENTON, *supra* note 7, at 7-8 traces the Anglo-Saxon origin of this preference for agreed solutions.

grew up of entering into purely fictional land suits, shaped to yield a court decree that was in fact a judicially authorized and recorded land transfer that would be invalid without the decree.⁴⁶ Even when engaged in what appeared to be the judicially specialized task of deciding land litigation, the common law judges were frequently doing the essentially administrative task of maintaining land records.

Specialization was clearest in, but not limited to, the great common law courts of King's Bench and Common Pleas. As has been seen, the most important departments of royal administration, Exchequer and Chancery, both acquired significant capacities for handling litigation. In theory, and initially in fact, final decisions in such litigation were rendered by the heads of these departments, the Treasurer and the Chancellor. In practice the Chancellor continued to make final decisions in equity cases throughout this period. But both Exchequer and Chancery quickly developed relatively distinct branches with special staffs to handle their litigation business. In the fourteenth century the judicial side of Exchequer had become relatively distinct and the Barons of Exchequer had become a special set of officers in charge of litigation, no longer simply general subordinates of the Treasurer. Indeed, after a period of specializing in revenue cases, in the sixteenth century the Court of Exchequer had developed fairly ambitious equity and common law jurisdictions and its Barons were ranked with common law judges.⁴⁷

The judicial functions of the Chancellor were at first inseparable from his functions as a chief officer of the Crown and a major participant in the Council. His decisions were usually viewed either as decisions of the Council or common law decisions rendered by him in conjunction with the common law judges and in his capacity as a key administrator of the common law system of writs. Only beginning in the fifteenth century did a distinct Court of Chancery in which the Chancellor made his own decisions on his own authority emerge, and only in the sixteenth is its equitable business clearly defined.

This development of a distinctly judicial character for Chancery corresponds to its decline as an administrative center. Well into the seventeenth century some Chancellors were powerful politicians and leaders of the government. Chancery never ceased to have a major administrative component, but major administrative power shifted to

46. This highly complex set of developments is traced by S. MILSOM, *supra* note 7, at 140-211 and A. SIMPSON, *supra* note 7, at 44-224.

47. See A. KIRALFY, *supra* note 7, at 117-20.

other officers and other departments. As it did, Chancery became more primarily a court. Its major functionaries, the masters and the clerks, were chiefly concerned with litigation. Finally the Chancellor himself became primarily a judge. In the sixteenth century it became common for the Crown to appoint leading common lawyers as Chancellors. The last Chancellor who was a major political leader rather than principally a judge was Lord Shaftesburg who served in 1672 and 1673, and his appointment was viewed as a dubious anomaly. From the sixteenth century on the Chancellor was assisted in his judicial functions by a Master of the Rolls appointed by the Crown. Originally an administrative officer, he subsequently became a second judge of the court. There were eleven other chancery masters who gradually shifted from primarily administrative to primarily judicial duties, particularly hearing preliminary stages of cases and preparing the huge files of documents eventually submitted to the Chancellor or Master of Rolls for final decision.⁴⁸

Chancery was a great department of government that inextricably mixed political, administrative and judicial business well into the sixteenth and even the seventeenth century, until it eventually became primarily a court. Star Chamber, of course, retained its mixed administrative and judicial functions throughout this period. The only hint of judicial specialization is that some of the common law judges invariably attended Star Chamber proceedings that involved issues of common law. Along this narrow dimension of specialized judicial offices or institutions, the picture is not terribly clear at the beginning of the seventeenth century. Those who sat on King's Bench and Common Pleas were clearly seen as judges. Chancery and Star Chamber did so much judicial business that they were usually conceived of as courts. But even to the extent that judging was viewed as a special function, there was as yet little notion that judging should be done by persons or in institutions that devoted themselves exclusively to that function.

IX. THE AUTONOMY OF COMMON LAW AND COMMON LAWYERS

There are, however, other dimensions beside the narrowly institutional one. The most important of these is the interlocking autonomies of the law and the legal profession that developed in pre-seventeenth century English legal history. The foundation of English law as a

48. 1 W. HOLDSWORTH, *supra* note 7, at 408-12; W. JONES, *supra* note 19.

bundle of special writs, each limited to special fact situations and legal issues and each with its own procedures, almost inevitably meant that common law was complex law. In attempts to get the narrowly drawn writs to cover new fact and law situations, they were extended by judicially created analogies, fictions and liberal interpretations. Moreover, the writs were basically procedural in character, and substantive legal rules had to be worked out for each in the course of litigation.⁴⁹ Such substantive rules were tied to the particular writ for which they were developed; therefore no general body of legal rules or legal theory emerged. The writ system meant that English law was a series of discrete causes of action each surrounded by its own judicial lore, statutory interventions and customary modes of professional practice. Thus, the common law was a complex body of traditional practices that no one pretended could be reduced to a set of rational principles comprehensible to those not steeped in the tradition.

At least until the eighteenth century the central concern of English law was land. And English land law became so complex that no one truly understood it, not even the lawyers and judges who employed it.⁵⁰ English land law was always a battleground between the interests of the Crown, which in theory owned the land, and the interests of the "tenants," the actual landholders. In medieval England the King drew much of his revenue from various feudal rights over the land. The greatest revenues came from the death of a tenant in chief, particularly if he was without direct heirs or the heir was a minor. Many land transactions would have either the deliberate or incidental effect of evading these royal rights. The great Statute of Uses of 1536 was an attempt by the Crown to protect its interests against many such transactions. The Statute had a tremendous effect on land law until the nineteenth century, but that effect was to render the land law even more complex as landholders worked out legal means of evading it or turning it to their own purposes.⁵¹

Beyond the direct interest of the government, English land law was a battleground for a number of conflicting private interests. Throughout English history there seems to have been a strong desire

49. See Milsom, *Law and Fact in Legal Development*, 17 U. TORONTO L.J. 1, 3 (1967).

50. A. SIMPSON, *supra* note 7, is liberally sprinkled with confessions that for various land rules either no reasonable explanation is possible, or the origin of the rule is unknown, or the rationale behind the rule is in dispute or the true meaning of the rule was not realized at some time in the past or is unknown at present.

51. See R. MEGARRY & H. WADE, *THE LAW OF REAL PROPERTY* 155-67 (4th ed. 1975).

on the part of large landholders to keep their land intact and in the family so that in each generation there would be a head of the family residing in the great house in the midst of the rolling family acres. This desire led to constant pressure for legal devices that would insure that the whole of the land would pass to a single heir rather than being divided among several. It was also desirable that the inheritance be under legal conditions that would make it impossible for that heir to sell all or part of the land. Legal covenants were invented that would require him to preserve the whole intact and pass it on to someone in the next generation of the family and so on forever.

On the other hand many individual landholders who had succeeded to land bound by such legal provisions wished to sell the land, divide it among several of their children or dispose of parts of it in such a way as to provide income for their widows or unmarried daughters. Whole categories of persons, such as the developing merchant class of the towns, who wished to buy land, saw themselves as shut off from the land by legal devices that kept the old landed families from selling to them. Typically a successful merchant would break through the legal barriers to buy a large estate from some old family fallen upon hard times and then himself would seek to reestablish the barriers so that his sons and grandsons could not split up or sell the land.

Even when the King, the Parliament and the judges were united in making legal rules that favored free alienation of land, lawyers would be busy inventing new devices to tie up the land. And other lawyers would be busy trying to get around those devices for clients who wished to sell the land or leave it to persons other than a single legal heir.

Out of all of this sprang a body of land law that consisted of a set of complex verbal formulae full of evasions, fictions, frauds and purposeful ambiguities, designed to create such complexity that no one could penetrate it to upset the intentions of the landholder.⁵² This body of law owed something to statutory and judge-made law, but it consisted largely of evasions of such law created by "conveyancers," that is, specialized lawyers who drew up wills and land transfer documents.⁵³ The conveyancers were so successful that soon only they understood the law they had made, and later no one, including them, understood the whole of it.

English law in general and particularly its core, land law, became highly complex and riddled with strange words and formulae that only

52. S. MILSOM, *supra* note 7, at 140-69.

53. RADCLIFFE & CROSS, *supra* note 7, at 384-85.

law men could understand. It was not as a matter of courtesy that the common law judges were invited to Chancery, Exchequer and Star Chamber when common law issues arose, but because they were often the only ones of the King's officers who could understand them. The growth of a functional specialization of judging was in part the result of a growth in the complexity of law so great that only those initiated by a lifetime of practice could deal with it. One interesting clue to this developing autonomy of law is the provision that only a Baron of Exchequer who was "a Man of the Law" could sit on assize and at *nisi prius*.⁵⁴ At first, assize commissions had been held by all sorts of King's officers, later only by judges and lawyers. The provision on Exchequer barons indicates both the development, albeit an incomplete one, of a judicial specialty in Exchequer and the growth of a law so complex that even a high officer of the Crown could not administer it unless he was also a legal specialist.

Closely connected with the growing autonomy of law was the growing autonomy of the English legal profession.⁵⁵ In an important sense judicial independence in England meant that judges were more closely linked to lawyers than to the government. By the reign of Edward I, a legal profession was being formed and, because the courts from which it drew its business were highly centralized, it was highly centralized too. Those who pleaded cases in court were the sergeants. They had the character of a guild, living and doing business in a cluster of inns that became the "inns of court." Apparently as early as the fourteenth century, law students began to frequent the courts and the inns. If English law had been civil or Roman law, it would have been taught as an academic subject in the universities. But a system of law that was essentially a series of special procedures, that is the writs, could only be learned where the procedures were conducted and constantly modified, in the courts and the offices of the lawyers. The inns became corporate instructional institutions for the sergeants' guild,⁵⁶ although eventually the title "sergeant" was reserved for the more distinguished of the pleaders, the rest being called barristers.

The connection of the barristers to the courts is crucial. In the fourteenth century appointment to King's Bench and Common Pleas

54. 14 Edw. 3, c. 16 (1340).

55. On the legal profession see H. COHEN, *HISTORY OF THE ENGLISH BAR* (1929); T. PLUCKNETT, *supra* note 7, at 215-30.

56. On English legal education see H. HANBURY, *THE VINERIAN CHAIR AND LEGAL EDUCATION* (1958); Lucas, *Blackstone and the Reform of the Legal Profession*, 77 *ENG. HIST. REV.* 456 (1962).

was limited to sergeants who by then constituted a special order, promotion to which was in the hands of the Crown. There was a melding of the top of the legal profession with the royal administration. The sergeants were private practitioners but also crown officers. Assize commissions, too, came to be reserved for judges and sergeants. In the sixteenth century the Court of Exchequer came to draw its judges only from among the sergeants. On difficult questions of law the Crown might consult the whole body of judges and sergeants. The judges and sergeants as a body were the corporate keepers of the common law.

By the sixteenth century the Crown had acknowledged that it must appoint all common law judges from the ranks of the sergeants. It somewhat evaded this rule by simply promoting to sergeant any barrister that the King contemplated appointing to a judgeship. But nonetheless the practice became firmly anchored that all judges would be drawn from among the barristers.⁵⁷ Judges were both officers of the Crown and leaders of an independent profession that saw itself as the maker and guardian of the law—a law so complex that no non-lawyer could understand it.

It must be added that these developments occurred on the equity as well as the common law side. It has already been noted that the Chancellors were increasingly chosen from among the common lawyers. Moreover, in the sixteenth and seventeenth centuries equity developed its own highly artificial, complex and rigid rules and practices that could be mastered only by specialists at equity pleading. So again the law became less the general province of government officials and more the preserve of the legal profession.

By the time of the Stuarts, 1605-1702, a constellation of factors existed that in some peculiar sense could be called judicial independence. It consisted of the development of a highly complex body of law, an independent legal profession and a degree of judicial specialization. Interlocked and mutually supporting, these factors provided some degree of judicial autonomy. How weak that autonomy was, however, came to be seen in the early part of the seventeenth century as the Stuart monarchs brought the nation to civil war.

X. THE SEVENTEENTH CENTURY

The English Civil War and the Revolution of 1688 are crucial events in the growth of the idea of English judicial independence. The

57. 1 W. HOLDSWORTH, *supra* note 7, at 197.

conventional wisdom is that it was the English revolution that firmly established judicial independence by breaking the subordination of the judges to the Crown. For this reason it is necessary to take a fairly careful look at actual developments in the seventeenth century.

A. Royal Financial Policy

The Tudor predecessors of the Stuarts had been busily engaged in strengthening the monarchy throughout the sixteenth century.⁵⁸ They recognized that wealth was a key to political power. English monarchs had three basic sources of revenue. The first was to call Parliament and ask for a supply; but once called, the Parliament might make all sorts of political demands. The second was the acquisition, management and sale of crown lands. The third source of crown revenues was a large, complex and often obscure set of payments, fines, taxes and duties owed the King either in his capacity of feudal overlord or as part of his prerogative powers. The King's prerogatives were an odd assortment of personal privileges, powers and authorities that he was free to wield personally without the consent of Parliament.

The feudal and prerogative revenues rested on ancient law and custom. They were not seen as arbitrary exactions but as the exercise of the legal rights of the Crown. For instance, one of the chief sources of royal revenue was wardship. Under feudal tenurial rules, when a tenant in chief of the King died leaving a minor child as his heir, the child became the King's ward, and the King received all the revenues of his ward's estates until the child reached adulthood. These wardships and their revenues were administered by the Court of Wards and Liveries⁵⁹ because they were essentially matters of feudal land law.

The Stuarts sought to follow the lead of the Tudors in building the financial strength of the monarchy on the prerogative revenues. Indeed they attempted to govern independently of Parliament by developing those revenues sufficiently that they could manage without Parliamentary supply.

*B. The Crisis in the Socio-Logic of Stuart Courts*⁶⁰

Along dozens of paths the Stuart monarchs sought to extend and reactivate their ancient financial rights, often by rediscovering financial

58. See G. ELTON, *TUDOR REVOLUTION IN GOVERNMENT* (1953).

59. See H. BELL, *AN INTRODUCTION TO THE HISTORY AND RECORDS OF THE COURT OF WARDS AND LIVERIES* 46-86 (1953).

60. The developments of this period are summarized in W. JONES, *POLITICS AND*

prerogatives that had lain dormant for hundreds of years or extending their claims to persons and property that previously had been ignored. From the King's point of view, these were matters of thorough legal research. The King's lawyers looked at the ancient law to discover what was legally owed to the King even though, through the obscurity of the law and the oversight of previous monarchs, the royal due might have long remained uncollected. From the point of view of much of the population the Crown appeared to be attempting to collect new taxes without parliamentary consent. Stuart financial policy was of enormous significance to the status of English courts precisely because it took the form of the assertion of old legal rights rather than the imposition of new taxes. This form brought to the fore almost all of those factors that tend to undercut the basic socio-logic of courts as triadic conflict resolvers.

First, the typical political conflict between a Stuart monarch and the opponents of royal power took the form of a lawsuit in which the King as one party asserted an ancient legal right and the prospective taxpayers as the other party asserted that the King's legal claims were incorrect. But this dispute went to a King's judge for resolution. The tension created by the substitution of office for consent came clearly to the surface. Englishmen had always known that the King's judges were the *King's* judges, administrative officers of the Crown. But now all of the "two against one" potential of that fact suddenly came to the surface. The subject was challenging the King in the King's own court. How could he expect a truly triadic structure there?

Secondly, the King's legal claims were researched and established by the administrative institutions of the Crown, particularly the financial ones. Yet these very administrative bodies that asserted the King's claims then became the courts that declared that they were legally correct. Exchequer as tax collector would one day levy a new tax and then, when the legality of the tax was challenged, sit as a court and uphold its own levy. Thus, because the judges were officers of the King, and administrative officers at that, the undercutting of the socio-logic of the triad that occurs when office is substituted for consent came to the foreground of political consciousness in the Stuart period.

The tension created by the substitution of law for consent also

THE BENCH: THE JUDGES AND THE ORIGINS OF THE ENGLISH CIVIL WAR (1971). See also Havighurst, *James II and the Twelve Men in Scarlet*, 69 LAW Q. REV. 522 (1953); Havighurst, *The Judiciary and Politics in the Reign of Charles II* (pts. 1-2), 66 LAW Q. REV. 62, 229 (1950).

came to fore, for the King clothed his revenue claims in ancient crown rights, that is, in pre-existing legal rules. Challenges to the King's exactions had to be brought in courts that announced themselves bound by pre-existing rules that favored the King. For instance, the Court of Exchequer Chamber, that is, all the judges meeting together, often sat to announce, even in advance of litigation, that a new assertion of prerogative by the Crown was in accord with ancient law. Under such circumstances challengers of royal claims could hardly see the judges as truly triadic figures. The judges were servants of the law that they asserted favored the King.

The Stuart period was a dramatic illustration of the extent to which the policymaking role of courts can undercut their legitimacy as conflict resolvers. To Stuart subjects the courts were part of the Crown's apparatus for making and implementing its policies of independent revenue maximization and independence from Parliament. Stuart subjects could hardly be expected to trust the courts to resolve conflicts that arose out of the very policies that the judges were participating in making. Moreover, the social control and conflict resolution functions of courts openly came into conflict. Since the King's prerogative claims were assertions of legal rights, the opponents of those claims were brought into court and found in violation of the law. The punishment was usually a fine. The revenue policy and social control functions of the courts could be neatly combined since the royal treasury got the fine. For example, by 1640 Star Chamber had clearly become a revenue court, but its name was then and has always since been associated with one of the severest kinds of social control, the repression of political dissent. Clearly such a court had lost much of the sociologic of courts.

In short the period from 1603 to 1640 was a sort of vast morality play in which the inherent contradiction between the English theory of sovereignty on the one hand and the notion of judicial independence on the other was dramatically presented. The general response of those Englishmen who opposed the Stuarts was not, at least initially, to attack the institution of courts, or even the concept of the judges as King's officers. At first, they attacked individual judges as corrupt or as giving the King bad legal advice. Then they moved on to attack certain courts. Such courts were accused of having invaded the law-making powers of Parliament, or having become cat's-paws of the King's financial policies, or having become hopelessly oppressive, corrupt and inefficient. By the time the Revolution broke out in 1641,

almost all of the principal King's judges then living had been indicted for treason by the parliamentary forces. During the course of the Protectorate, Star Chamber, Requests, the Councils of the North and of Wales and the Court of Wards were abolished. There were also serious proposals to abolish Chancery, but it survived.

C. *Changing Masters*

Because the period immediately preceding the revolution pitted the King and his judges on one side and Parliament on the other, and because the revolutionaries abolished some courts and attacked others, it is often assumed that the revolution must have broken the tie between the King and the judges and thus been the crucial step in the creation of an independent judiciary. The actual historical picture is more complex.

It is always dangerous to allege that any category of Englishmen was on one side or the other in the civil war. Nearly every variety of Englishman was to be found on both the royal and parliamentary sides. Yet by and large the common lawyers sided with the Parliament,⁶¹ among whose most vigorous leaders were barristers and former judges, such as Coke. The revolution broke that autonomous bundle of common law-common lawyer-common law judge that had created a species of judicial autonomy in sixteenth century England. It left the judges exposed in their roles as King's servants. The revolution also brought to the fore a set of radicals who wished to abolish the common law itself and substitute for it a simple set of Biblically based laws.

The result was considerable ambiguity. The common law segment of Parliament certainly did not want to abolish the common law and had to defend the common law courts against the radicals.⁶² The rivals of the common law courts, Star Chamber and Chancery, were most widely denounced in Parliament. The fundamental relation of the courts to the sovereign was not altered, nor was the theory of a unitary sovereignty to which the judges were subordinated altered. The bundle of common law-common lawyer-common law judge was firmly reestablished. From the seventeenth century on it is extremely unusual to find any but a prominent common lawyer appointed to any important judgeship including the post of Chancellor.

61. W. JONES, *supra* note 19, at 45-48.

62. On the relation of the radical law reform movement of the Revolutionary period to the longer term, moderate reform movement see B. Shapiro, *Law Reform in 17th Century England*, 19 AM. J. LEGAL HIST. 280 (1975); B. Shapiro, *Codification of the Laws in Seventeenth Century England*, 1974 WIS. L. REV. 428.

The end of the Protectorate and the return of the Stuart monarchy in 1660 saw the King's judges still indubitably the *King's* judges. They were still conceived to be administrative officers of the Crown, and they were often employed as direct social controllers and policymakers for the Crown. Until Queen Ann's reign all the judges resigned at the death of the monarch. Charles II reinstituted the long abandoned practice of appointing judges at his pleasure rather than for good behavior, and this practice was not forbidden until the Act of Settlement of 1702.⁶³

Nevertheless, the seventeenth century did contribute to the growth of a certain species of judicial independence. It demonstrated that judges too closely implicated in the day to day policies of an unpopular government would suffer. More importantly, it had emphasized the rule of law—that the government must live by the existing law, not influence the judges to change the law day by day to decide each case in a way favorable to government policy. This very concept of the rule of law, which is so important a building block in most theories of judicial independence, is at the root of the fundamental ambiguity of the revolution insofar as judicial independence is concerned. The revolution did not alter the theory of a single and complete sovereignty vested in the King in Parliament. It only made Parliament the potentially dominant voice in the sovereign partnership. The sovereign was the lawmaker. The rule of law meant that the government must undertake new policies in accordance with new laws, not by breaking existing ones. The sum of parliamentary sovereignty plus rule of law is not judicial independence but judicial subordination to Parliament. That great father of American constitutionalism John Locke, writing in the latter part of the seventeenth century, placed the judges firmly in the executive branch bound to carry out the commands of the legislative branch.⁶⁴

If there is one single case crucial to the whole problem of English judicial independence, it is that of *Dr. Bonham*, decided by Lord Coke in 1610.⁶⁵ In the reign of James I, Coke and company had firmly rejected the claim that the King acting alone could make law. In *Bonham's Case* Coke insisted that a statute contrary to common right and

63. T. PLUCKNETT, *supra* note 7, at 248.

64. See SOCIAL CONTRACT xxi-xxii (E. Barker ed. 1946).

65. On *Bonham's Case* see J. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 30 (1955). Compare MacKay, *Coke—Parliamentary Sovereignty or the Supremacy of the Law?*, 22 MICH. L. REV. 215 (1923), with Thorne, *Dr. Bonham's Case*, 54 LAW Q. REV. 543 (1938).

reason would be invalid at common law or, as he put it, be "controuled" by common law. In effect this was a claim that when the common law as proclaimed by judges was in conflict with parliamentary statute, the statute would be void. If Coke's view had been accepted, the contradiction between judicial independence and judicial decision by pre-existing legal rule and the contradiction between the English theory of sovereignty and judicial independence would have been partially eliminated. The courts would have been independently providing pre-existing rules to themselves. And unitary sovereignty would have been replaced by a divided sovereignty in which both courts and Parliament independently wielded lawmaking authority, albeit with the courts clearly superior to the Parliament in the event of conflict. Although accepted as late as 1701, Coke's view was fundamentally rejected in the longer run. With its rejection any claim to an unambivalent judicial independence for English courts failed. That independence must again rest on the practical inability of Parliament to penetrate the complexities of common law, for Parliament retained its constitutional authority to do what it pleased with the common law and thus with the common law courts.

In short the English revolution did not clearly and immediately liberate judges from their master, the King. And its long term effect was simply to transfer the courts from one master to another, from the King to Parliament. Signs of this transfer of ownership were readily apparent even during the seventeenth century. It has been noted that the Court of Exchequer Chamber had become unpopular because of its quasi-lawmaking activities. The seventeenth century clearly established the House of Lords as the ultimate appeals court for cases arising in England.⁶⁶ This direct hierarchical control by the Parliament itself over the English courts is a clear enough statement that the courts remain the servant of the sovereign. Only the nature of the sovereign has changed.

In the longer run a more important factor is that the change in the balance of political power between King and Parliament that occurred during the seventeenth century meant that Parliament had to be called frequently and for relatively long sessions. As a result it could become a more vigorous and efficient lawmaking body, and as it made more law it increased its mastery over the courts that were bound by that law.

66. A. KIRALFY, *supra* note 7, at 178.

XI. THE EIGHTEENTH CENTURY

The eighteenth century is in many ways the high point of English judicial independence. The growth of judicial functional specialization that was observed in the sixteenth century and that continued during the seventeenth was based more on the growing complexity of common law than upon conscious administrative choice. On the one hand the complexity compelled administrative officers faced with occasional legal problems to call upon judges for specialized advice. On the other it compelled administrative officers faced with streams of litigation (*e.g.*, the Chancellor) to devote ever increasing time and energy to judging and thus gradually to become primarily judicial officers. The eighteenth century was the period of final culmination of the unchallenged, self-congratulating, bizarre complexity of the common law. The best known eighteenth century legal commentator, Blackstone, spoke of the mysterious science of the law.⁶⁷ This complexity compelled a very high level of judicial specialization even though the specialists barely understood what they were doing much of the time.

In the seventeenth, eighteenth and early nineteenth centuries equity, which was supposed to do simple justice when the common law was inadequate, was taken over by common law trained Chancellors and turned into a highly technical set of rules. This complexity, combined with the fact that there were only two equity judges, the Chancellor and the Master of the Rolls, resulted in equity cases spinning on for years, typically either reaching no conclusion or concluding after the deaths of the original parties.⁶⁸ The sixteenth century Statute of Uses had sought to reform and simplify real property law. In the seventeenth and eighteenth centuries the conveyancers reached such heights of elegant indirection and fictional transaction that the uncertain titles of the medieval period had become far more uncertain. Security of possession rested more on the time and expense that would have been incurred by a challenger seeking to unravel the complex and multiple estates burdening any given piece of land than upon any clear title secured by basic law.⁶⁹

67. See D. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* (1941); Shapiro, *Blackstone*, in 2 INT'L ENCYCLOPEDIA OF THE SOC. SCIENCES 81 (1968).

68. See S. MILSOM, *supra* note 7, at 86-87; RADCLIFFE & CROSS, *supra* note 7, at 127-55.

69. See 1 *THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND* 162-201 (H. Fisher ed. 1911); S. MILSOM, *supra* note 7, at 140-210, 391-406; A. SIMPSON, *supra* note 7, at 163-225. See also K. DIGBY, *AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY* (5th ed. 1897); Ames, *The Origin of Uses and Trusts*, in 2 SELECT

In the course of the seventeenth and eighteenth centuries the common law courts also finally managed to manipulate some of their older writs, particularly *assumpsit*, so that they were able to deal more or less adequately with commercial contracts and other "merchantile specialties." Much of this capacity resulted from Lord Mansfield's borrowings from equity, Roman law and the law merchant. But Mansfield's innovations were only partially accepted by his fellow judges and their successors.⁷⁰ As a result English commercial law remained something of a patchwork, often to be explained in terms of its historical evolution from the medieval writs rather than in terms of consistent legal principles.⁷¹ Most of the smaller specialized courts, such as the admiralty courts and the successors to the church courts, had also sunk into an antiquarian maze of colorful formulae and empty but expensive ritual.

The disorderly nature and *ad hoc*, antiquarian quality of English law in this period were aggravated by tendencies in English legal education. The educational aspects of that great "university" of English law, the inns of court, while subject to occasional revival, largely had been reduced to ritual dinners. English lawyers were trained largely by the apprenticeship method.⁷² With rare exceptions they learned nothing of general principles or even rationales for the rules they applied. Instead they simply learned to apply the formulae that their seniors applied to whatever they applied them to.

That bundle of (1) complex common law, (2) guild of common lawyers and (3) common law judges that was at the core of what commentators choose to call judicial independence reached its tightest and most resistant condition in the eighteenth century. No one could understand the law except the lawyers who constituted a closed guild that co-opted new members by apprenticeship. Judges were chosen from and led the guild. The growing theory of parliamentary sovereignty meant little in the face of this reality. Judges were independent because they operated a system of law that was essential to the well-being of the nation but that no one but lawyers could understand.

ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 737 (1908). References to the impact of these complex developments on modern real property law are scattered through R. MEGARRY & H. WADE, *supra* note 51.

70. See C. FIFOOT, LORD MANSFIELD (1936); 1 W. HOLDSWORTH, *supra* note 7, at 568-73; T. PLUCKNETT, *supra* note 7, at 637-70.

71. See, e.g., the last sentence of Milsom's chapter on contracts: "If so, then consideration is a coherent theory of contract mutilated by its passage through tort." S. MILSOM, *supra* note 7, at 315.

72. See sources cited note 56 *supra*.

It would be a gross oversimplification to say that English judicial independence was solely a matter of functional specialization transposed into autonomy by the complexity of the law and the power of the legal profession. Other factors were at work as well. The constitutional developments of the seventeenth century were clearly aimed at reduction of the powers of the Crown and most particularly the prerogative powers that had been largely eliminated by the Act of Settlement of 1702. This treaty between Parliament and the Crown defined the constitutional position of the eighteenth century monarchy. The prerogative and other personal powers of the King had always been closely connected with his control over the judiciary. With their reduction, the King's judges remained the King's judges, but it was expected that he would wield little authority over them. The seventeenth and eighteenth centuries increasingly conceived of them as servants of the law rather than of the King, particularly as the King was seen as having increasingly less independent governmental power. The Georgian monarchs enjoyed the services of a number of judges who were notorious cat's-paws of royal interest and authority, but even in their own day such judges were more infamous than famous.

After the abolition of Star Chamber, the Privy Council had retained appeals from overseas courts as its only judicial function. As noted the Chancellor had become primarily a judicial officer. The Barons of Exchequer had become functionally specialized judges separated from the financial side of Exchequer. Moreover, in the eighteenth century the chief ministers of the King were gradually shaping themselves into what later became the cabinet, that is, an executive committee that wielded the lawmaking and administrative powers of the government and did so as leaders of the Parliament rather than servants of the King. Unlike the situation in the sixteenth century, judges did not participate freely and ubiquitously in this new multi-member executive body. They had ceased to give advisory opinions and to participate in meetings of the executive, which now got legal advice from its own law officers rather than from judges.⁷³ Thus, as the King grew weaker and the cabinet emerged, judges lost most of their direct connection with the executive segment of government.

Moreover, beginning in the sixteenth century and flourishing in the seventeenth was a school of thought that saw trials as a weighing of uncertain evidence to arrive at the most probably correct version of the

73. T. PLUCKNETT, *supra* note 7, at 248.

facts. The word trial itself shifted from its medieval meaning of a device for ascertaining facts without rational inquiry. Trial came to have exactly the opposite meaning, a scientific inquiry into the probable truth of various factual allegations or hypotheses. Such a mode of thought, of course, emphasized the nature of the judge as detached investigator, although his importance in this connection was substantially reduced because the jury remained the principal factfinder. The jury was now seen, however, not as finding facts from its own personal knowledge, but as using its common sense and knowledge of human character to decide which of the rival versions of the facts presented by the two parties was more probably correct. To assist the jury in focusing clearly on the factual issues, the courts developed rules of evidence presided over by a judge who thus became in a sense the master investigator.⁷⁴

All of these factors, from the impenetrable complexity of the law through the reduction of the prerogative powers and the growth of institutions of parliamentary government to the notion of a trial as a scientific inquiry fostered allegiance to the ideal of rule of law. In the eighteenth century, it was surely not unknown for the King or Parliament to interfere in the outcome of a particular lawsuit. Indeed through the appeals jurisdiction of the House of Lords, Parliament was specifically authorized to do so. But most eighteenth century Englishmen would have viewed it not only as wrong but contrary to the constitution for the government to dictate to judges the outcome of cases or to act outside the legal authority given it by statute.

When one combines this theoretical commitment to the rule of law with the practical complexities of the common law in the eighteenth century, one can see why eighteenth century Englishmen and Americans could assert a simple theory of judicial independence without noting the contradictions that lay behind it. The constitutional authority of the King had been cut back so far that the judges were no longer his servants. New notions of executive leadership resting in the leaders of Parliament rather than the King's servants were only gradually emerging. As a result judges who were not parliamentary leaders ceased to participate in executive decisionmaking. Judges became separated from the executive institutions of government. And once separated, rule of law notions urged that judges not be subordinated to the day to day desires of the political executive. At the same time efforts at parliamentary law reform were as unsuccessful in the eighteenth

74. 1 W. HOLDSWORTH, *supra* note 7, at 333-37, 341; T. PLUCKNETT, *supra* note 7, at 138.

as they had been in the sixteenth and seventeenth centuries.⁷⁵ It proved impossible to unravel the legal tangle created by, and thus the autonomy of, the bundle of common law-common lawyer-common law judge. Eighteenth century developments did not make clear what had really happened in the seventeenth century, namely that the courts had changed masters from King to Parliament rather than becoming politically independent, because the eighteenth century Parliament was unwilling or unable to assert its mastery. The nineteenth century tells a different story.

XII. THE NINETEENTH CENTURY

In the nineteenth century two movements combined to destroy much of the autonomy that the English courts had enjoyed in the eighteenth century. Jeremy Bentham is the legal philosopher most centrally associated with the first movement. He argued that the common law was a mass of contradictions and illogics whose complexities were designed to enrich lawyers. For Bentham the goal was a simple yet complete body of law that could be understood by laymen without the need for employing lawyers. Law was not a set of external principles or hallowed rights. It was an instrument that, through the assignment of pleasures and pains, would move people to engage in socially desirable activity.⁷⁶

The second major movement was one toward the creation of democratic, representative government. Beginning with the great Reform Act of 1832,⁷⁷ suffrage was broadened and the electoral system reformed so that Parliament came more closely to reflect the views and interests of the English population. At the same time the Parliament reorganized and clarified its own lawmaking powers and procedures. The result was a Parliament capable of passing substantial new legislation that reflected dominant opinion in the population, or at least in the politically active middle and upper classes.⁷⁸

The Benthamite urge to create a new and rational body of law and the parliamentary capacity to do so led to an enormous body of law reform. It will be remembered that demands for law reform had been fairly constant since at least the sixteenth century but that the

75. See Shapiro, 1974 WIS. L. REV., *supra* note 62, at 462.

76. See C. ALLEN, LAW IN THE MAKING 426-27 (6th ed. 1958); W. FRIEDMANN, LEGAL THEORY 312-20 (5th ed. 1967).

77. 2 & 3 Will. 4, c. 64, 65 (1832).

78. See W. JENNINGS, PARLIAMENT 382 (2d ed. 1957).

common law-common lawyer-common law judge nexus had proven largely immune to such demands through the eighteenth century. In the nineteenth century reform succeeded. In the area of substantive law, the most dramatic reform was in the central area of common law obscurantism, land law. The reform of land law was embodied in dozens of piecemeal, patchwork statutes each designed to overcome one or a few of the absurdities and inconveniences of the received body of common law without altering its fundamental practices. Yet their cumulative effect was to simplify the law greatly and render much of the ancient learning inapplicable.⁷⁹ There were many other areas of substantive law reform, but that of land law clearly shows the new dominance of Parliament over the judges in the creation of substantive law.

That dominance is shown even more clearly in procedure. In a series of statutes beginning in 1854 and culminating in the Judicature Act of 1873, Parliament completed a fundamental reorganization of the courts and a simplification of procedures.⁸⁰ Chancery, King's Bench, Common Pleas, Exchequer and the courts of Probate, Admiralty and Divorce were merged into one Supreme Court of Judicature, which was divided into the High Court of Justice and the Court of Appeal. The High Court received all the jurisdiction of its former components as well as the former jurisdiction of those holding commissions of assize and gaol delivery. Equity and common law jurisdictions, procedures and remedies were merged. All the judges of the High Court could sit in any of its divisions. There were Chancery, King's Bench and Probate, Divorce and Admiralty Divisions that reflected the historical streams of equity, common law and Roman law, but this compromise with the past only partially undercut the fundamental consolidation achieved.

The new Court of Appeal consisted of five judges appointed by the Crown: the Lord Chancellor, Master of the Rolls, Lord Chief Justice of England (*i.e.*, chief judge of the King's Bench Division) and the President (*i.e.*, chief judge) of the Probate, Admiralty and Divorce Division. It received the old equity appellate jurisdiction of the Chancellor, the appellate jurisdiction of Exchequer Chamber and various other miscellaneous appellate jurisdiction. The King's Bench Division retained its old appellate jurisdiction over various minor local courts.

79. A. SIMPSON, *supra* note 7, at 252-61.

80. 1 W. HOLDSWORTH, *supra* note 7, at 633-50, provides a detailed account of the reforms.

The House of Lords continued as a court of final appeal from decisions of the Court of Appeal, and the Privy Council as the final appeals body for overseas cases. But in both instances the appeals mechanisms were specialized and professionalized. Only those lords who had held high judicial offices or were barristers might sit to hear appeals, and they were bolstered by two Lords of Appeal in Ordinary appointed to the House of Lords for life by the Crown. It was envisioned that these "Law Lords" would also constitute the "Judicial Committee" for the Privy Council that wielded its appeals powers. A new simplified code of procedure was adopted for the entire Supreme Court that provided procedural rules for all actions as opposed to the old law that contained a special set of procedures for each of the writs. In the process much of the old learning of special pleading was rendered obsolete.

The nineteenth century elucidated the real developments of the seventeenth. Parliament had belatedly asserted the mastery over the judges that it had gained from the Crown in the course of the revolution. It now determined the structure of the courts, their procedures and the substantive law that they were to apply. The impenetrability of the common law that had been the true foundation of the autonomy of the judges had been breached by parliamentary statutes. Parliament had finally demonstrated that it had the real authority to change the pre-existing legal rules of the courts by actually carrying out a successful program of law reform.

Parliament did not achieve, or even attempt, the Benthamite program, however. The reforms of procedural and substantive law took the form of editing the common law materials rather than replacing them with a short, simple, rational code. Even after a severe pruning of obsolete learning, historical curiosity and meaningless form, the common law definitely remained the domain of common lawyers and a quite complex domain at that. The relapse of the High Court into three divisions reflecting the older structure of the courts indicated the tenacity of tradition. Most importantly, in the midst of the parliamentary victories, the common lawyers managed to infiltrate the final defenses of their master and seize control of the very top of the appeals hierarchy, for the Law Lords and the Judicial Committee of the Privy Council became functionally specialized judicial units of the legislative and executive exercising their final appeals jurisdiction. And these specialized units were staffed exclusively with lawyers and bolstered by a new input of judges, the Lords of Appeal in Ordinary.⁸¹ Thus, while

81. *Id.* at 377, 644.

the Parliament wielded ultimate authority over the courts through its unlimited lawmaking powers, the day to day operation of the courts had finally become totally insulated from the intervention of general government. The rule of law, in the sense of the inability of the government to influence the outcome of any individual case, had now reached its high point in English experience.

The nineteenth century was the formative period for the orthodoxy of both English and American legal thought. Englishmen and Americans thought they saw the final culmination of judicial independence in that century. If judicial independence means the functional specialization of courts plus the rule of law, they were correct. But that usage of the term tended to obscure certain developments, or rather the obscurity of certain developments led to a complacency about judicial independence that was reflected in the definition offered.

After all Parliament had broken into the main body of common law—the land law. By the end of the nineteenth century Parliament had begun to pour out volumes of new statutes in many areas of law and was indeed creating whole new areas of statutory law where the common law had no place. Why was legal consciousness attracted to those factors highlighted by the conventional use of the phrase judicial independence rather than to this wholesale overthrow of judicial autonomy?

First, because the common lawyers were used to statutes, which had always been recognized as an element of the law of England, they were not immediately alarmed by the new statutes. Late nineteenth century and early twentieth century academic commentators desperately tried to downgrade statutes into “sources of law” rather than law itself, which they pretended to see only in the decisions of the courts.⁸² But the common lawyers had little need of such sophisms. They had encountered statutes and successfully cocooned them within the common law for centuries. The new land statutes and many others were incremental changes rather than fundamental disruptions of common law. They too could be absorbed. It was not until well into the twentieth century that legal observers came to realize that an inabsorbable change had occurred in the activity of legislatures late in the nineteenth century, a change that would eventually lead to the dominance of statutory over common law in both England and America.

82. See J. GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1927). Note the interesting comment in Kiralfy's edition of POTTER, long a standard work: “It was perhaps typical of Professor Potter's approach that there was . . . no reference to statutes as a source of law . . .” A. KIRALFY, *supra* note 7, at vii.

Secondly, as noted earlier, laissez-faire ideology blinded contemporary observers to much of the change. Because in theory the government was supposed to remain neutral *vis à vis* competing economic interests, even statutory reform of such private law areas as land law was not seen as turning the judge into an imposer of state interests over the interests of the two conflicting private parties. The judge indeed humbly obeyed the laws of the Parliament, but those laws required only that he act in a neutral and benevolent way toward the private disputants. Of course, observers occasionally encountered statutes, such as the factory and mine safety acts, that clearly did try to place the weight of state interests on the side of one class of persons and in opposition to another. They busily placed those statutes in some special category, such as business regulation, and continued to perceive neutrality in the vast central bodies of private law.

Thirdly, the political stability of nineteenth century England and its general success on the world scene led, both in England and America, to a worship of its basic institutions as the final evolutionary product of the freest and most enlightened society in the world. When one sees functionally specialized courts, the rule of law *and* an essentially enlightened, benevolent and democratic government, one is not very conscious of the potential conflict that exists between notions of parliamentary sovereignty and notions of judicial independence. Surely the greatest and wisest representative assembly in the whole history of the world would not threaten the independence of the judiciary.

XIII. THE TWENTIETH CENTURY

The basic organization of the courts created by the nineteenth century parliamentary reforms has persisted in the twentieth century with some minor changes.⁸³ The one great historical exception to the centralizing trend of the British courts was the establishment of the Justices of the Peace (J.P.'s) with their petty and quarter sessions. These were and basically remain criminal courts and, in spite of repeated demands from the seventeenth century on, only the assize courts brought civil jurisdiction to the countryside. Beginning with legislation in 1846 county courts were established to take over much of the civil business of assize. The county courts are limited by statute to cases involving relatively small amounts of money; serious cases remain centralized in the High Court.⁸⁴ On the criminal side the

83. The current organization of the English courts may be found in R. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* (6th ed. 1972).

84. RADCLIFFE & CROSS, *supra* note 7, at 277-86.

basic trial courts for low level offenses remain J.P.'s sitting without a jury. In larger cities J.P.'s have been replaced by Stipendiary Magistrates. In 1971 a statute created the new Crown Court that took over the criminal jurisdiction of the traditional Courts of Quarter Session and the assizes, that is, jurisdiction over serious criminal cases. It is staffed by High Court judges, circuit (county court) judges and "recorders," that is, barristers appointed to parttime judicial duties. The judges of this court may sit singly or en banc and in certain instances J.P.'s are added to the bench. The Crown Court hears cases with a jury.⁸⁵

With these minor twentieth century modifications, the reformed courts of the nineteenth century have flourished and are generally held to be among the most independent in the world. They are functionally specialized, performing none but judicial tasks and almost entirely separated from the "government," that is from the Cabinet and Parliament. Only in the figure of the Lord Chancellor who is legal advisor to the government, judge of the highest courts and possessor of wide judicial appointing and disciplinary powers does one encounter a strong reminder that the King's judges are servants of the government. In practice, however, the Lord Chancellor rarely sits in the courts of which he is a member, and when he does, he rarely appears directly to espouse the government's interests.

While there may be the same kind of backroom jockeying for judgeships as there often is for university professorships and other posts in the hands of the government, partisan political considerations have played little part in the appointment of judges during this century. Judges serve at good behavior, and those of the High Court may only be removed by action of both houses of Parliament. Circuit court judges, recorders and J.P.'s may be removed for cause by the Lord Chancellor. In fact only one judge has been removed by government action since 1701. There is little or no evidence that the government has approached judges for the purpose of influencing the outcome of particular cases.⁸⁶

The connection with an autonomous legal profession that is a principal component of judicial "independence" remains. All but the lowest rung of judicial appointments can be made only from barristers and many of the highest rungs require many years service as a barrister or judge. Except that the whole system of courts and its staffing depend upon parliamentary statute and, thus, parliamentary favor, one might well be justified in concluding that the English courts had

85. H. ABRAHAM, *THE JUDICIAL PROCESS* 246 (3d ed. 1975).

86. *Id.* at 46-47.

reached the teleological goal of pure independence that a conventional reading of English legal history seeks. The ambivalent and paradoxical aspect of that independence, however, becomes clear if one looks at the growth of administrative law that is the truly central phenomenon of twentieth century English legal development.

A. Administrative Law in Twentieth Century England

In one sense the acceleration of parliamentary activity in the middle and late nineteenth century was a response to the Benthamite urge toward law reform and rationalization. Along other dimensions, however, it was a foreshadowing of the greatly expanded sphere of law and government in the twentieth century English welfare and socialist state. By the turn of the century, and certainly by World War I, the accelerating rate of lawmaking was taking on a quite distinctive character. Most of the new laws were arming the British executive with increasing authority and discretion. Just as the British Constitution in general was being altered by a massive shift of political authority from Parliament to Cabinet,⁸⁷ so the whole legal structure was shifting from one of law made in Parliament and enforced in court to one of law made by administrators and enforced by administrators. Quite clearly at least since World War II English administrators have made far more law than English legislators and resolved far more legal conflicts than English judges.

Of central importance in the growth of English administrative power have been the phenomena known as "delegated legislation" and "administrative tribunals." A very high proportion of parliamentary legislation does little more than state the purposes to be achieved in rather sweeping language and then state with some precision the jurisdictional boundaries of the various government agencies involved. Most of Parliament's authority to legislate the actual provisions of the statutory scheme is delegated to specified agencies that legislate in the form of orders, circulars, plans and policy statements, the most prominent of which are Orders in Council.⁸⁸

Parliamentary statutes are also the source of the over two thousand administrative tribunals that handle both the bulk of the disputes that arise between the administrative agencies and private citizens and an

87. The classic authority is W. JENNINGS, *CABINET GOVERNMENT* (1936). For an incisive but sympathetic contemporary commentary see S. BEER, *BRITISH POLITICS IN A COLLECTIVIST AGE* (1965).

88. See generally H. WADE, *ADMINISTRATIVE LAW* 291-322 (2d ed. 1967).

increasingly high proportion of disputes between one citizen and another, for instance, rent disputes between landlord and tenant. England is, of course, a welfare state with the government taking a direct hand in most facets of the feeding, housing, medical care, education, recreation and basic income levels of its citizens. It is a socialist state in which the government owns or directly controls most of the major means of production and strictly regulates the secondary economic activities it does not directly control. Thus, a very high proportion of the disputes in which any Englishman may find himself involved are resolved by administrative tribunals rather than courts.⁸⁹

These developments have presented an enormous challenge to the English courts and indeed to the whole notion of rule of law. In a famous, but even then anachronistic passage of *Introduction to the Study of the Law of the Constitution*,⁹⁰ Dicey argued that the rule of law required that government officers be answerable for their actions in the regular courts under the regular procedures just as a private person would be. He denounced administrative law and administrative courts as continental manifestations forever foreign to English law. The opinion that Dicey represented was sufficiently dominant to prevent the creation in England of an explicit hierarchy of administrative courts charged with insuring the legality of administrative actions.

1. Remedies

Following Dicey's prescription, government officers have been held personally accountable in the regular courts for their actions in law suits.⁹¹ Although the government itself is not subject to the standard civil remedies of injunction and civil damages, officers of the Crown and other administrative officers are. An injunction will not issue against an officer of the Crown, however, if the effect is to give a remedy against the Crown itself that would not be allowed in proceedings directed against it. In addition the special prerogative remedies of habeas corpus, certiorari, prohibition and mandamus are available

89. For the growth of administrative tribunals see COMMITTEE OF ADMINISTRATIVE TRIBUNALS AND ENQUIRIES, REPORT, No. 218 (1957).

90. A. DICEY, *supra* note 4, at 326-27.

91. This discussion of English administrative law is derived from the two principal contemporary authorities: S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (1959); H. WADE, *supra* note 88. See also J. GARNER, ADMINISTRATIVE LAW (3d ed. 1970); J. GRIFFITH & H. STREET, PRINCIPLES OF ADMINISTRATIVE LAW (4th ed. 1967); W. ROBSON, JUSTICE AND ADMINISTRATIVE LAW (3d ed. 1951). I have cited the first edition of DE SMITH rather than the second (1968) and the second edition of WADE rather than the third (1971) for reasons explained in the text accompanying notes 120-121. On remedies see S. DE SMITH, *supra* at 253-458; H. WADE, *supra* at 96-152.

in the regular courts. Habeas corpus plays only a minor role in administrative law. Certiorari is used for moving certain actions of administrative tribunals to the Divisional Court of the Queen's Bench Division from which further review lies to the Court of Appeal and ultimately to the House of Lords. Certiorari extended normal private law remedies because it could be employed as the vehicle for attacking the legality of a decision or order even by a person who had suffered no actionable wrong and thus was debarred from damage or injunction actions. Prohibition is the handmaiden of certiorari, prohibiting a tribunal from future illegal decisions.

Mandamus compels a public officer to perform his legally required public duties. It is a discretionary remedy and is rarely employed. It will only be invoked for the benefit of a party showing a substantial interest, although the English demands for such a showing have always been far less strict than conventional American standing requirements.

Under the conventional common law doctrine of sovereign immunity, damage actions and injunctions would lie only against government officers personally and not against the Crown itself. The custom has arisen, however, of public authorities standing behind their officers and paying the damage claims. The prerogative remedies will not lie against the Crown. Indeed, in form they are suits of the Crown against erring servants. Certiorari and prohibition lie against ministers of the Crown and other public authorities exercising statutory powers when they are acting "judicially." Mandamus will issue against a servant of the Crown acting on behalf of the Crown but only when a particular duty is imposed by statute upon a particular officeholder. Mandamus will not issue against a servant of the Crown who is merely doing the Crown's business and to whom no distinctly separable duty has been assigned by statute. The distinction is metaphysical, and courts concentrate on the language of the relevant statute. Since many statutes impose specific duties on particular ministers or departments, mandamus is available more often than it would appear from the rule that mandamus will not lie against the Crown.

Beginning in the 1880's and firmly established in the twentieth century is the most sweeping remedy against illegal government action—the declaration. Courts will make binding declarations of the legal rights of a person "whether or not any consequential relief is or could be claimed"⁹² Declaratory judgments will issue against the

92. SUP. CT. ORDER 25, RULE 5 (1883), now replaced by SUP. CT. ORDER 15, RULE 17 (1965).

Crown or servants of the Crown acting in capacities that would exempt them from mandamus. They will issue against public authorities and statutory tribunals. They will, however, issue only to declare the legal rights of the plaintiff and so will not be granted at the behest of a party without legal standing. Moreover, unlike certiorari, a declaratory judgment will not quash an order because of legal error on its face.⁹³

Finally, sovereign immunity has been largely eliminated by the Crown Proceedings Act of 1947.⁹⁴ Previous to that time the Crown had normally given permission for suits on a breach of contract. The Act imposed the same liability on the Crown for tort as is imposed on a private person, except when statutes specifically limit liability. Enforcement is by declaratory order rather than by normal civil remedies.

While there are some fairly large holes in this scheme of remedies, it would appear to provide extensive judicial control over administrative acts. In a certain sense it does, but the full picture can be seen only after examination of both the specific statutory limitations on these remedies and the general principles under which they are applied. Many parliamentary statutes provide a statutory remedy such as appeal to the Minister. Such a provision may substantially reduce the availability of the courts to persons involved in disputes with administrative agencies.⁹⁵ Modern statutes typically contain finality clauses of various degrees of severity. The mildest of these provides that an administrative decision made under the act shall be final. Others provide that after a brief period, often six weeks, a government action "shall not be questioned in any legal proceedings whatsoever."⁹⁶ Moreover, a great many statutes provide that the government may act "if the Minister is satisfied" or "if it appears to the Minister" that a particular fact situation exists. This subjective standard will generally prohibit judicial challenge to administrative factfinding since the question is not whether the administrative authorities made a wrong finding of fact or drew the wrong inferences from the primary facts but only whether they could have had reason to believe that their conclusions of fact were correct.⁹⁷ The courts have frequently provided the narrowest possible interpretations of these statutory limitations on their

93. See text accompanying note 145 *infra*.

94. H. WADE, *supra* note 88, at 258-64.

95. *Id.* at 134-35, 149.

96. See Alder, *Time Limit Clauses and Judicial Review—Smith v. East Elloe Revisited*, 38 MOD. L. REV. 274 (1975).

97. S. DE SMITH, *supra* note 91, at 83-91; H. WADE, *supra* note 88, at 76-83.

powers.⁹⁸ Governed as they are, however, by the theory of parliamentary sovereignty, they have never denied the authority of Parliament to limit their jurisdiction by such provisions.

It is when one turns to the general principles of English administrative law that one can see most clearly that, despite the temporary victories of the nineteenth century, the English courts did not become independent in the seventeenth but merely exchanged a royal master for a parliamentary one. Indeed, they have fundamentally returned to the pre-seventeenth century position, for the judges are again the faithful servants of the Crown although the Crown is now the cabinet and the bureaucracy, rather than the King.

2. The Power To Govern Wrongly

The first principle of English administrative law is that the power to govern includes the power to make mistakes. So long as an administrative officer or tribunal is acting within the scope of its statutory authority or within its jurisdiction, the correctness or incorrectness of its decisions may not normally be brought into question in judicial proceedings. The proper remedy for misgovernment is ministerial responsibility. The cabinet member ultimately responsible for the government program or decision is answerable to his fellow cabinet members and to Parliament and so need not be answerable to the courts unless appeal is provided by statute.⁹⁹

3. Review and Appeal

Because relatively few statutes provide for appeal, most of whatever judicial supervision of administration there is takes place in the form of review rather than appeal. A reviewing court may not look to the merits of the decision and even should it reverse the administrative authority, it merely returns the matter to that authority for further consideration rather than substituting its own judgment, although by injunction or declaratory order it may preclude some specific course of action.¹⁰⁰ Thus in theory, with one major exception to be noted later, judicial review of administrative acts goes to only two questions: *ultra vires* and natural justice.

98. See text accompanying note 108 *infra*.

99. See S. DE SMITH, *supra* note 91, at 248-49; H. WADE, *supra* note 88, at 64, 84-85.

100. H. WADE, *supra* note 88, at 47-48.

a. *Natural Justice*

The concept of natural justice is composed of two principles of English administrative law. The first is that a person should not be judge in his own case. The second is that a decision affecting the rights or interests of an individual should not be made until he has been given an opportunity to be heard.¹⁰¹

i. Judge in His Own Case

The principle of a disinterested decisionmaker can have only a very limited meaning in the contemporary English context. The typical situation is one in which a ministry proposes a certain program or policy, hears complaints directed to that policy and then proceeds to carry it out with such modifications as it sees fit to make on the basis of the complaints. Everywhere in the world including England, a central feature of administrative rule is that administrators serve as the initial resolvers of conflicts that are engendered by their programs. Indeed the typical English statutory scheme provides that the Minister is the ultimate appellate authority for complaints against his administrative subordinates and his ministry's programs. English courts have never attempted to challenge such arrangements on the basis that the Minister is acting as the "judge in his own case." At most they have created a rather shaky and unsure requirement that when the Minister is acting "quasi-judicially," he must obey the second principle of natural justice, that of granting a fair hearing.¹⁰²

The English have sought to alleviate the problem of administrative bias by the creation of a large number of administrative tribunals imbedded within the agencies and largely staffed with agency personnel. Just as in the United States, where hearing officers have become administrative law judges, in England there has been pressure to isolate these tribunals more completely from their agencies. But, as has been true here as well, these pressures have been resisted by those who insist that as repositories of both the technical knowledge and ultimate operating responsibilities, the agencies must not be crippled by excessive judicialization of their decisionmaking processes. The English compromise has been to leave the tribunals well within the ministries but to create a Council on Administrative Tribunals to

101. On natural justice see S. DE SMITH, *supra* note 91, at 101-65; H. WADE, *supra* note 88, at 153-98.

102. Compare *Franklin v. Minister of Town & Country Planning*, [1948] A.C. 87, with *Ridge v. Baldwin*, [1964] A.C. 40.

monitor their operation.¹⁰³ While the courts exercise some supervision over the tribunals, they do not hold that this massive structure of administrative judging violates natural justice. In practice, the first principle of natural justice is reduced to an insistence that the ministries and local government authorities follow the procedures for hearing and appeal established by statute and by their own regulations.

ii. Fair Hearing

The second principle, that of fair hearing, has a bit more teeth. With a fairly high degree of consistency English courts have held that a person has a right to a hearing before an administrative decision is taken that is potentially adverse to his interests. Normally that hearing will be oral, and the parties will be entitled to legal representation and may present witnesses and cross-examine. The principle of fair hearing requires that the party know the case he is required to meet and therefore implies that parties must be informed of all evidence the government proposes to consider in making its decision. The government must consider all evidence submitted by the party including his comments on potentially adverse evidence and on the case as a whole.

The principle of fair hearing severely restricts *ex parte* contacts, particularly in instances when a Minister must review the decisions of local authorities and particularly after a proposed policy or rule has been announced and hearings initiated. Under such circumstances the Minister will normally be forbidden to consult confidentially with his own subordinates or other government agencies because to allow him to do so would permit his receipt of evidence not known to and thus not challengeable by adversely affected parties.

The English courts, however, never succeeded in establishing that the requirement of fair hearing applies to "legislative" as opposed to "judicial" decisions, that administrative authorities must give reasons for the decision they ultimately reach, that they must give any particular weight to the evidence presented to them at hearings, or even that the reports of hearing officers or tribunals must be made public. The Minister is the ultimate arbiter of policy and is answerable to the Parliament not to the courts for his policy judgments. And what weight he gives to various evidence and arguments will invariably be held to be a matter of policy. Only after long struggle was it finally required that the reports of hearing officers or tribunals to the Minister be made pub-

103. Tribunals and Inquiries Act, 1958, 6 & 7 Eliz. 2, c. 66.

lic, and this development came by statute not court decision. Many statutes including the Tribunals and Enquiries Act now require that the Minister give reasons for his decision, although the courts have never made that demand independent of a statutory duty to do so. Thus, the principle of natural justice may require the Minister to go through the motions, but courts will not quash his decision even when it appears to the judges that he has decided against the whole weight of the evidence.

b. Ultra Vires

While the doctrine of natural justice has been presented separately for purposes of clarity of exposition, it is typically treated by the English as a facet of the cornerstone of English administrative law, *ultra vires*.¹⁰⁴ That *ultra vires* is the central doctrine, and indeed with one exception the only basis for court intervention in administration, is the clearest of all signs of the ambiguity of the notion of judicial independence in England. The doctrine holds that, so long as an administrator is acting within the authority granted him by Parliament, his acts are totally beyond the reach of the courts. Bearing in mind the extent of administrative delegation without fixed guidelines or standards, the doctrine not only announces the theoretical total subordination of both judges and administrators to Parliament, but the real freedom of administrators from most judicial supervision.

As a practical matter the extent of judicial supervision of administrative action under the doctrine of *ultra vires* will depend on the judges' techniques of statutory interpretation. The ability of the American courts to interpret statutes to confirm their own policy preferences and to block the ill advised schemes of administrators is well known. It is typical of the English authorities on administrative law that they make much of those instances of judicial statutory interpretation running against administrators that they can find. It is also typical that they can find very few, and many of those they do find are very old and probably would not be followed today.

i. Procedure

As in the United States there are two central areas of statutory interpretation: the first is whether the agency has followed the procedures

104. On *ultra vires* see generally S. DE SMITH, *supra* note 91, at 55-100; H. WADE, *supra* note 88, at 45-95.

specified in the statute, and the second is whether their actions are in accord with the purposes of the statute. Except for the proceedings of administrative tribunals, there is no general procedural statute in England comparable to the Administrative Procedures Act in the United States.¹⁰⁵ Most statutes, however, contain their own often quite rigorous procedural requirements. Particularly when local authorities, such as county governments, act as agents for the central government, or when private property must be taken for public use, procedural requirements are typically quite demanding in terms of notice, hearing, record and appeal. After some years of skirmishing over such issues as whether a Minister may delegate to subordinates duties imposed on him by statute, the courts have settled into an extremely low keyed procedural review that occasionally catches some local authority in a minor error. There is no suggestion, as there frequently is in the United States, that courts are using procedural review to interject an independent voice into bureaucratic policymaking. Indeed, few procedural cases reach the highest courts, and almost none of those involve the central government ministries.

One explanation is, of course, that the English administrative tradition is so oriented to meticulous procedures that it is self-policing. Clearly the ministries do exercise very close supervision of the procedures of their agents and subordinates. The more cynical and probably more correct view is that, given their sweeping administrative discretion, English administrators can always get their way in the end if they are patient, so they follow procedures to the letter, which will in the final analysis always yield the decision they want.

ii. Legislative Purpose

When one turns to legislative purpose the same low judicial profile is evident. In theory the exercise of powers granted by a statute for purposes other than those mandated by the statute is *ultra vires*.¹⁰⁶ In reality, aside from a few classic cases in which the administrator flatly contravened the clear wording of the statute and a few remnants of clashes between conservative judges and socialist local governments in the 1920's,¹⁰⁷ there is no sign that English courts will use the doctrine of legislative purpose beyond the narrowest scope of preventing open breaches of the clearest statutory commands.

105. H. WADE, *supra* note 88, at 219-21, 227-29.

106. S. DE SMITH, *supra* note 91, at 190-203; H. WADE, *supra* note 88, at 71-74.

107. *E.g.*, *White & Collins v. Minister of Health*, [1939] 2 K.B. 838; *see* Robertshaw, *Unreasonableness and Judicial Control of Administrative Discretion: The Geology of the Chertsey Caravans Case*, 1975 PUB. LAW 113.

There is only one significant exception. With only slight waverings courts have engaged in an extremely forced statutory interpretation, amounting almost to rejection, of statutory provisions designed to cut off totally judicial review of administrative proceedings.¹⁰⁸ In that area attempts of English judges to show that Parliament could not really have meant what it said would strike a familiar note to students of American statutory interpretation.

Beyond procedure and legislative purpose there are a number of other *ultra vires* areas of importance. Failure to perform statutory duties is *ultra vires*, but the courts take a rather narrow view of standing in such matters,¹⁰⁹ and the statutes mandating central government action usually vest too much policy discretion in the Minister to support actions against him or her. Typically mandamus actions or declaratory actions comparable to mandamus are brought as relator suits in which the Attorney General acts for the complainant against a local government unit.¹¹⁰ Such actions are essentially a form of central government discipline over local authorities. Negligent acts are acts *ultra vires*, and since the Crown Proceedings Act negligence actions can be pursued against all levels of government.¹¹¹ But neither the relator nor negligence avenues seem to have been used by courts to establish an independent voice in government administration.

iii. Abuse of Discretion

The most promising avenue for establishing such a voice, beyond the more vigorous use of legislative purpose, may be along an "abuse of discretion" route. Administrative action so unreasonable or arbitrary as to constitute an abuse of discretion is *ultra vires*.¹¹² A number of factors, however, inhibit the judicial employment of this doctrine. First, English courts have long held that when a statute vests discretion it is discretion to decide wrongly as well as rightly. That in retrospect a decision was wrong does not render it *ultra vires*.¹¹³ Moreover, should the issue be one involving an element of "policy," and most important ones do, the Minister is answerable only to Parliament for the

108. See Alder, *supra* note 96.

109. See H. WADE, *supra* note 88, at 145.

110. *Id.* at 113-15.

111. *Id.* at 51-54, 258-59; see Home Office v. Dorset Yacht Co., [1970] A.C. 1004.

112. S. DE SMITH, *supra* note 91, at 24-25, 188-221; H. WADE, *supra* note 88, at 47-48, 67-71.

113. See text accompanying notes 99, 104 *supra*.

reasonableness of policy decisions. Secondly, English courts will review administrative findings of law but not of fact.¹¹⁴ As in the United States there are, of course, gray areas, but as a whole English courts are extremely reluctant to dispute administrative factfinding. As a practical matter it is extremely difficult to show that a decision was arbitrary when it is supported by an unchallengeable set of factfindings. Thirdly, except when a statute provides for appeal, in contradistinction to review, the standard of reasonableness is the most permissive standard employed in American administrative law, that is, whether reasons can be offered for the decision.¹¹⁵ English authorities constantly reiterate that the administrative law standard of reasonableness is not the common law standard or any kind of standard that will allow the courts to strike a balance between the reasons for and against the decision. To challenge successfully, "[i]t must be proved to be a decision that no reasonable body could have come to."¹¹⁶ Fourthly, many key statutes use such subjective language as "if the Minister was satisfied that." In such instances a mere showing that the facts on which the Minister relied were not as the Minister thought them to be is not a showing of arbitrariness constituting *ultra vires*.¹¹⁷

While English courts have recently flirted with a "no evidence" rule similar to that used in the United States, such a rule is considered a bit daring in the English context.¹¹⁸ A "no evidence" rule would, of course, only hold unreasonable those administrative decisions for which there was no supportive factfinding at all. On the whole English courts have not used the abuse of discretion doctrine expansively to extend judicial control over the vast discretionary powers of British government. It is indicative that the few recent cases involve local not central authorities or policy issues in which the central government has not stated a firm position, or they involve a ratepayer trust fund theory that is obsolescent and will probably disappear in the future.¹¹⁹

114. S. DE SMITH, *supra* note 91, at 17-19, 41-45, 116-18, 128-30, 284-86; H. WADE, *supra* note 88, at 192.

115. S. DE SMITH, *supra* note 91, at 83-87; H. WADE, *supra* note 88, at 88-90.

116. Associated Provincial Picture House Ltd. v. Wednesbury Corp., [1948] 1 K.B.

223. See Wharam, *Judicial Control of Delegated Legislation: The Test of Reasonableness*, 36 MOD. L. REV. 611 (1973).

117. See text accompanying note 145 *infra*.

118. H. WADE, *supra* note 88, at 89-91.

119. See, e.g., Mixnam's Props. Ltd. v. Chertsey Urban Dist. Council, [1965] A.C. 735; Hall & Co. v. Shoreham-by-Sea Urban Dist. Council, [1964] 1 W.L.R. 240 (C.A.); Smith v. East Elloe Rural Dist. Council, [1956] A.C. 736; Taylor v. Munrow, [1960] 1 W.L.R. 151 (Q.B.); Prescott v. Birmingham Corp., [1955] 1 Ch. 210.

In summary, then, the ultra vires doctrine begins with a declaration of absolute judicial subordination to Parliament—the only measure of illegal administrative conduct being its failure to live within the Parliamentary law—and ends in practice with a judiciary that occasionally intervenes against the most openly illegal conduct of local authorities but exercises little or no independent supervision over the massive discretionary powers of the central government.

B. The Dialectic of the 1950's and 1960's

The discussions of natural justice and ultra vires have so far been conducted in a rather ahistorical way. In fairness to those who continue to see considerable vigor in English administrative law some more specific comments on the 1950's and 1960's must be made. This is all the more necessary because the two authoritative works on English administrative law, S. A. de Smith's *Judicial Review of Administrative Action*¹²⁰ and H. W. R. Wade's second edition of *Administrative Law*,¹²¹ are markedly different in tone and conclusion in part because one is a work of the 1950's and the other of the 1960's.

De Smith's book is the first and only work specifically devoted to judicial control of administration to have appeared in England. While the author meticulously catalogues the cases, he is very pessimistic about the overall power of the courts to restrain administrative conduct and finds what little control there is to be rapidly diminishing. His conclusions about the general position of the courts *vis à vis* the agencies are based on general doctrines of English administrative law and long term developments in British politics and administration and seem sound. His particular pessimism about the rapid decline of the power of the courts is based on a series of post war cases.

The first of these cases had to do with a narrowing of legal remedies. It will be recalled that a declaration could be sought only by a person with legal standing. Certiorari and prohibition could be sought, however, by a person who had suffered no actionable wrong. But certiorari and prohibition could only be had against wrongful exercise of a "judicial" function. For reasons that should be abundantly clear by now, judicial and administrative functions have always been confused in English law, so that this limitation on certiorari and prohibition was not as serious as it otherwise might be. A great deal of

120. S. DE SMITH, *supra* note 91.

121. H. WADE, *supra* note 88.

administrative action that affected the interests of individuals had always been subject to the writs without much examination of the distinction between judging and administering. In the 1950's English judges began to distinguish more sharply between administrative decisions exercising "discretion" and based on "policy" and those in which administrators had a "duty to act judicially."¹²² This tendency threatened severe cutbacks in the scope of certiorari and prohibition and thus of access to the courts by most citizens who believed that the government had acted illegally.

The distinction could also have extremely serious consequences for the scope of "natural justice" as a limitation on administrative authority. It will be recalled that the doctrine that no man shall be a judge in his own case is in the literal sense nearly always broken in the administrative sphere and in practice is reduced to the question of whether the responsible Minister acted with bias, that is, decided without giving an impartial hearing to interested parties. In the *Stevenage Case*¹²³ the House of Lords ruled that charges of bias against a Minister who had selected the site for a new town were beside the point because "no judicial, or quasi-judicial, duty was imposed" on the Minister.¹²⁴ This approach soon spread to the other branch of natural justice, the right to a hearing. In two major cases,¹²⁵ the Privy Council (that is, the Law Lords) and Queen's Bench held that a hearing was unnecessary before the withdrawal of a license because the licensing authorities involved were acting in a disciplinary rather than a judicial capacity. Finally, in the 1950's judges were beginning to express uncertainty over whether decisions not based on a fair hearing were void or only voidable at the discretion of the court. Given all this, it is little wonder that de Smith's prognosis for the courts was guarded.

The second edition of Professor Wade's *Administrative Law*¹²⁶ appeared in 1967. While making proper obeisance to parliamentary sovereignty and the other conventional doctrines of administrative law that so severely circumscribe judicial authority, Professor Wade is a devoted proponent of judicial review. Indeed his whole book has the tone of a morality play in which, though sometimes battered and sometimes losing their way down evil paths, the judicial champions of the

122. Compare *The King v. Electricity Comm'rs*, [1924] 1 K.B. 171, with *The Queen v. Manchester Legal Aid Comm.*, [1952] 2 Q.B. 413.

123. *Franklin v. Minister of Town & Country Planning*, [1948] A.C. 87.

124. *Id.* at 102.

125. *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66; *The Queen v. Metropolitan Police Comm'r*, [1953] 1 W.L.R. 1150 (Q.B.).

126. H. WADE, *supra* note 88.

rule of law win through, and the legal virtues of old England are preserved. Thus, Professor Wade treats the developments of the 1950's that so discouraged de Smith as a temporary aberration that fortunately has been cured by events of the 1960's immediately previous to publication of his book.¹²⁷ Professor Wade is far too honest a scholar, however, to assert flatly a complete cure, and his announcements of a return to health of judicial review are a touching mixture of triumph and pious but slightly worried hope.

In the final analysis that hope is pinned entirely on a single case, *Ridge v. Baldwin*.¹²⁸ There, local police authorities in Brighton had dismissed a local police official without a hearing. The House of Lords found this to be a breach of natural justice, subject to certiorari and prohibition. In the course of its opinions it largely recanted what it had said in the 1950's about "the duty to act judicially." Wade saw what the courts had said in the 1950's about the duty to act judicially as a fundamental misreading of the legal tradition and the key to a potentially disastrous narrowing of judicial authority. He saw the Brighton police case as a decisive return to judicial review. Certainly *Ridge* does run counter to the tendency of *Stevenage* to narrow the category of administrative acts subject to review by emphasizing the extent to which non-reviewable policy judgments are crucial to most administrative decisions.

Wade's book appeared just after a flurry of judicial activism in the period of 1963 to 1965 of which *Ridge* was a part. There are various explanations of this flurry including changes in judicial personnel and a particularly bitter clash between the government and the Law Lords about compensation for undersea oil claims. Whatever the reasons, the flurry has not continued.¹²⁹ Since *Ridge* there has been only one major flourishing of judicial authority in the administrative sphere, the famous *Anisminic* case.¹³⁰ That case, however, is part of the one strain of bold statutory interpretation in which the English courts have always engaged. Thus, it is hardly a symptom of a general renewal of judicial remedies. It managed to interpret out of existence parliamentary language that flatly forbade judicial review of certain findings of a statutory tribunal.

127. Wade's optimism is seconded in Yardley, *The Abuse of Powers and Its Control in English Administrative Law*, 18 AM. J. COMP. LAW 565 (1970).

128. [1964] A.C. 40.

129. See Robertshaw, *supra* note 107.

130. *Anisminic v. Foreign Compensation Comm'n*, [1969] 2 A.C. 147. But see *Routh v. Reading Corp.*, 217 E.G. 1337 (1971). Cf. *Jeary v. Chailey Rural Dist. Council*, 26 Plan. & Comp. 280 (1973).

The extent to which faith in *Ridge* may be misplaced is suggested not only by the subsequent decline in judicial activity but by a number of other factors as well. In *Ridge* the Court is bold, but bold against a very minor local government authority that was deciding what was clearly a personnel rather than a policy matter. Moreover, it was a local authority whose discretion was very clearly limited both by statute and by central government regulation. Thus, *Ridge* is not very clear evidence that English judges have abandoned the extreme deference to the policy discretion of central government ministries exhibited in *Stevenage*. Since *Ridge* English courts have characterized certiorari and prohibition as reaching "quasi-judicial" administrative duties in order to register that they are somehow following *Ridge*, not *Stevenage*. But this very usage is a two-edged sword keeping firmly to the fore the notion that policy judgments of ministries are not reviewable. As Wade candidly admits, even the Brighton case says "that natural justice has no part to play where ministers have to attach importance to their policy."¹³¹ Moreover even in the Brighton case the House of Lords divided three to two on the question of whether failure to give a fair hearing rendered an administrative decision void or voidable, and the Privy Council has subsequently given support to the minority's views.¹³²

The third edition of Professor Wade's book appeared in 1971, and in its introduction he adopts a jubilant tone about the revived self-confidence of the English courts. In the body of the text he is able to cite five cases following *Ridge*.¹³³ The most important of these, *R. v. Gaming Board*,¹³⁴ disapproved the *London Taxi Drivers Case*,¹³⁵ but it also found that the Gaming Board had acted fairly, even though it would not reveal the sources of its information or give reasons for its decision. Professor Wade is also able to point to a number of minor judicial interventions against administrative illegality¹³⁶ and to a number

131. H. WADE, *supra* note 88, at 208.

132. See *Durayappah v. Fernando*, [1967] 2 A.C. 337. See also *F. Hoffmann-La Roche A.G. v. Secretary of State for Trade & Indus.*, [1975] A.C. 295.

133. H. WADE, *ADMINISTRATIVE LAW*, 137, 203 (3d ed. 1971). But cf. *Furnell v. Whangarei High Schools Bd.*, [1973] A.C. 600 (suspended teacher has no right to pre-suspension hearing); *Pearlberg v. Varty*, [1972] 2 All E.R. 6 (tax inspector not required to give taxpayer a hearing before making assessment for back taxes owed) and particularly the comments on *Furnell* in Seepersad, *Fairness and Audi Alteram Partem*, 1975 PUB. LAW 242, 255.

134. [1970] 2 Q.B. 417.

135. *The Queen v. Metropolitan Police Comm'r*, [1953] 1 W.L.R. 1150 (Q.B.) (revocation of cabdriver's license was disciplinary rather than judicial; order for certiorari would not issue).

136. *McEldowney v. Forde*, [1971] A.C. 632; *Hotel & Catering Indus. Training Bd.*

of cases in which the duty to act fairly is extended even to persons not acting "quasi-judicially." For example, courts have held that immigration officers must act fairly. But these holdings have been counterbalanced by judicial holdings that no hearing at all is necessary in refusals of admission from abroad or non-renewal of limited entry permits.¹³⁷ *In re Pergamon Press*¹³⁸ requires fairness of certain Board of Trade inspectors but only of a very limited kind. It is also true, however, that since 1971, there has been a discernable trend toward casting the net of this very limited fairness doctrine somewhat more widely.¹³⁹

Aside from the continued support for *Ridge*, the most significant case of recent years has been *Padfield v. Minister of Agriculture*.¹⁴⁰ It interpreted a statutory clause requiring that complaints be investigated "if the Minister in any case so directs"¹⁴¹ as not creating in the Minister an unfettered power to refuse to investigate. The case is particularly important because the Law Lords actually examined the reasons given for the Minister's refusal and found them inadequate. This is the boldest adventure the courts have taken against a central ministry in many years, but no instances of comparable magnitude have appeared since.

Against these straws in the wind Professor Wade is forced to confess to six cases judicially supporting the policy discretion of the central ministries¹⁴² and three that more or less defer to administrative proceedings.¹⁴³ Since 1971 this general pattern seems to have persisted with no major judicial interventions coming to light.¹⁴⁴ It must be

v. Automobile Proprietary Ltd., [1969] 1 W.L.R. 697 (H.L.); Lavender & Son Ltd. v. Minister of Hous. & Local Gov't, [1970] 1 W.L.R. 1231 (Q.B.); Metropolitan Props. Ltd. v. Lannon, [1969] 1 Q.B. 577.

137. Compare *In re H.K.*, [1967] 2 Q.B. 617, with *Schmidt v. Secretary of State for Home Affairs*, [1969] 2 Ch. 149.

138. [1971] Ch. 388.

139. See Seepersad, *supra* note 133.

140. [1968] A.C. 997.

141. *Id.* at 1005.

142. *British Oxygen Co. v. Minister of Technology*, [1971] A.C. 610; *Westminster Bank Ltd. v. Minister of Hous. & Local Gov't*, [1971] A.C. 508; *Prestatyn Urban Dist. Council v. Prestatyn Raceway, Ltd.*, [1970] 1 W.L.R. 33 (Ch.); *Hampshire County Council v. Shonleigh Nominees, Ltd.*, [1970] 1 W.L.R. 865 (Ch.); *Luke v. Minister of Hous. & Local Gov't*, [1968] 1 Q.B. 172; *Schmidt v. Secretary of State for Home Affairs*, [1969] 2 Ch. 149.

143. *Wiseman v. Borneman*, [1969] 3 W.L.R. 706 (H.L.); *C. Maurice & Co. v. Ministry of Labour*, [1969] 2 A.C. 346; *Chapman v. Earl*, [1968] 1 W.L.R. 1315 (Q.B.).

144. See Guest, *The Executive and the Judiciary*, 18 JUR. REV. (n.s.) 113 (1973). Note particularly Clark, *Natural Justice: Substance and Shadow*, 1975 PUB. LAW 27, who concludes: "While natural justice casts a lengthening shadow, the shade serves only to conceal the decline in its substance." *Id.* at 63.

concluded that *Ridge* may have postponed or prevented a final and total surrender of English courts to administrative power, but it hardly marks a grand revival or even major assertion of independent judicial authority.

C. Error on the Face of the Record

It remains to examine one area where the courts do seem to have been genuinely resurgent. It has been noted that the very foundation of English administrative law is the notion of *ultra vires*, that the courts act against administrative agencies not on their own independent authority but only to keep them within the bounds set by Parliament. The general rule is that within those bounds the courts may not interfere with the agencies even when they act wrongly. To this general rule the English courts have created one exception. They will quash even *intra vires* administrative judgments when an error of law appears "on the face of the record." This doctrine appears to be an activist judicial response to the enormous growth of statutory tribunals. Initially it was probably little more than a response to the felt absurdity of allowing tribunals that usually enjoy statutory immunity from appeal flatly to announce egregious errors of law without correction. Subsequently, however, it has appeared equally absurd that a tribunal may make all of the "secret" errors of law it wants so long as none of them appear on the face of the record. Since 1951 when the doctrine was first announced, courts have gradually expanded the meaning of "record" until it includes not only the opinion or statement of reasons given by the tribunal but the documents that are the basis for the decision and even oral statements of reasons for the decision made by the tribunal.¹⁴⁵

Yet even this seeming assertion of independent judicial authority is far less independent than it seems and far more an exercise of parliamentary authority. The rule that tribunals are subject to judicial review for error on the face of the record means little if tribunals need not give any reasons of law on the record for the decisions they reach. And until 1958 tribunals generally were not required to make "speaking orders," that is, orders giving reasons. It was the Tribunals and Enquiries Act of that year that required most tribunals and ministers

145. S. DE SMITH, *supra* note 91, at 89; H. WADE, *supra* note 88, at 85-89. The *Anisminic* case, [1969] 2 A.C. 147, while proclaiming the opposite, seems to apply the doctrine even to decisions that enjoy the protection of a statutory clause barring judicial review.

exercising a duty to hold statutory inquiries to give reasons and to incorporate those reasons in the record. The Act was, of course, framed with the knowledge that the courts had already asserted the power to review speaking orders for errors of law and thus constituted direct parliamentary authorization and expansion of such review. Indeed, the court decision that oral reasons were reviewable flowed directly from the Act's provision on oral reasons. What has occurred here is a relatively minor judicial initiative that Parliament has chosen to strengthen and expand as part of an overall scheme to bring the proliferating tribunals under control. The overall effect, however, is to bring these "lower courts" back into some kind of subordination to the regular judicial hierarchy and thus partially to counteract one of the most serious erosions of judicial institutions that occurred in twentieth century England.

D. Administrative Law in an Administrative State

Nevertheless, the overall pattern of English administrative law gives little comfort to the proponents of judicial independence. In the twentieth century England has become an executive state, an administrative state, a welfare state and a socialist state. In such a state the very center of law and politics is the apparatus of central government. Yet the very foundation doctrine that the courts have proclaimed for dealing with that administrative apparatus is that it is essentially immune from judicial scrutiny so long as it stays within the jurisdictional bounds set by Parliament.

This judicial surrender is all the more complete when it is acknowledged, as it must be, that the parliamentary power to which the courts pretend to be subordinating themselves has long since disappeared. In the last analysis *ultra vires* is a circular doctrine of surrender to administrative government. It proclaims that the courts will insure that the executive obeys Parliament. Parliament, however, has long since transferred all of its authority over day to day policy making and most of its ultimate authority as well to the Cabinet and the ministries. Ultimately *ultra vires* means only that the executive must obey itself. As to natural justice, it means no more than the ministries must grant hearings before deciding whatever they please. The process of both parliamentary and judicial abdication has gone so far that there are serious doubts about whether the rule of law survives

in England at all.¹⁴⁶ And if it does, it must do so in the ideological commitments of the executive elite itself rather than in the constraining powers of law.

Nothing could be more touching than the way in which, in the face of this overwhelming political reality, English authorities on administrative law continue to cite and recite a handful of cases that preserve the doctrines of judicial review. Those cases, however, are not only very few and far between but almost invariably result in the chastisement of some minor local authority for firing a policeman or harassing the owner of a mobile home site. To the extent that judicial review remains an active force at all, it serves largely as a handmaiden of central administration in its attempts to rationalize and control the mass of local authorities and subordinate tribunals ultimately responsible to the central ministries.

XIV. CONCLUSION

Insistence on judicial independence as an essential element in the conventional prototype of courts is largely derived from English experience. But it is largely derived from rather casual impressions of what the English courts appeared to be like in the eighteenth and nineteenth centuries. When the entire history of English judicial experience is reviewed, a far less clear picture of judicial independence emerges.

The common law courts began and flourished as faithful servants of a monarchical regime of conquest bent upon centralizing political authority. In the seventeenth century they transferred their allegiance from King to Parliament without ever abandoning the theory of unified sovereignty of which the Parliament had become the principal beneficiary. In the seventeenth and eighteenth centuries the courts succeeded in building a substantial autonomy based on the institutional incapacities of Parliament and the marvelously impenetrable lump of lore-ridden common law, common lawyers and common law courts. By the nineteenth century that lump was being broken up by a more effective Parliament. Only laissez-faire concepts of the proper scope of legislation obscured the reality that once Parliament became the dominant lawmaker, judges would return to a faithful subordination. The twentieth century English courts have created a body of administrative law that almost totally subordinates judges to the discipline of an administrative state.

146. See Corry, *The Prospect for the Rule of Law*, in *CRISIS IN BRITISH GOVERNMENT* (W. Stankiewicz ed. 1967).

All of this is not to deny that English courts have a considerable degree of judicial independence in the sense of freedom from day to day interference by the government in particular cases, although even here the government has not hesitated to reverse particular court decisions by legislation, sometimes retroactive legislation. Still less is it to deny that English courts are courts. Quite the contrary, it is to assert that the notion of judicial independence is so ambiguous and misleading that it cannot serve as a touchstone of courtiness.

As a general principle it would appear wrong to seize upon the judicial institutions of any one nation, write them large and then insist that the institutions of other nations are truly judicial only to the extent that they correspond to the model thus derived. As a matter of particular historical analysis it is even more foolish to erect judicial independence as the *sine qua non* of courtiness on the basis of a national experience that is actually a curiously subtle blend of judicial dependence and independence, a blend in which dependence is ultimately the dominant motif.