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## Natural Law & Tribal Societies

In Part III of this study we shall be setting out the kind of legislation which is needed to bring our economic system more into line with Natural Law. There are important precedents to be cited so as to ensure that the modern solution remains faithful to an anthropological history that is timeless.

As one writes about the long and slow development of England, one is struck by how similar it was, although in slow motion, to the swift development of more recently discovered countries; especially North America and Australia. This similarity was observed by Sir John Clapham in his lectures at Cambridge. He describes the early Saxon settlers as "a mobile, colonizing, frontier sort of population".<sup>14</sup> Trevelyan too:<sup>15</sup>

In certain respects the conditions of pioneer life in the shires of Saxon England and the Danelaw were not unlike those of North America and Australia in the nineteenth century: the lumberman with his axe, the log shanty in the clearing, the draught oxen, the horses to ride to the nearest farm five miles across the wilderness, the weapon ever laid close to hand beside the axe and plough, the rough word and ready blow, and the good comradeship of the

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frontiersman. And in Saxon England, as in later America, there were the larger, older, and more settled townships, constantly catching up and assimilating the pioneers who had first started human life in some 'deep den' of the woodlands. Every one of the sleepy, leisurely, garden-like villages of rural England was once a pioneer settlement, an outpost of man planted and battled for in the midst of nature's primeval realm.

One also gets a strong impression of how much nearer to Nature and to God - pagan or Christian - they lived. This is true of all tribal peoples. The American Indians, the Australian aborigines, the Maoris of New Zealand, the African Negroes, all felt their dependence on their environment of land, sea, and sky; animal and vegetable life; and the resources yielded to them by the earth. They worshipped the Great Spirit no less than did the Christian, the Hindu, or the Muslim; and felt Him in everything around them. Today, by contrast, these blessings of our environment are treated as a source of profit, and are so abused that they have to be guarded by militant preservation and protection societies and 'green' groups trying to stop the plunder and despoliation of nature. Their zeal may sometimes cause damage. But underlying it is a vague feeling that these things belong to the Nation (etymologically 'born of the same stock': cf. 'clan' below). But few, if any, seem to appreciate that this is precisely where, by Natural and by Divine Law, the property in them lies.

Aboriginal peoples, so near to nature, had a deep affinity with their natural surroundings. They realized they were land creatures. They had to have land to live on,

and land to live from. They worshipped the spirits of wood and stream, hill and dale, and had no conception of a landowner charging his fellow human beings for access to them. This gave them an intuitive feeling for Natural Law, which is observable in the clash between the white man and the men of other colours in Africa, America, and New Zealand, in whose territories they settled.

Title to land is obtained either by discovery of virgin land, or (as Scripture reminds us) by conquest of prior settlers. Both can usefully be called 'colonization'. In this sense England was colonized sporadically by Celts, Romans, Saxons, Danes, and Vikings in succession. Subsequently William the Conqueror took over the country as a whole, and present title to English land stems from his conquest; most of the land, of course, being left in possession of its former Saxon occupants, under Norman overlords. This pattern is surprisingly similar to the history of aboriginal peoples.

*The Coming of the Maori*<sup>16</sup> describes three waves of settlement of New Zealand. The first arrivals found no-one to oppose their settlement. During the second settlement there were some changes of ownership through conquest, but there was more than enough land to allow the developing tribes to find new areas for peaceful occupation. The third settlers established themselves on different parts of the coast, built their houses and villages, and cleared the land for their cultivation. They came into conflict with the earlier inhabitants and extended their territory by conquest and occupation. This description almost tallies with that of The English Settlements by the Angles, Saxons, Jutes and Frisians. It is indeed the process of colonization all

over the world. But the subsequent history, in the nations which have become highly developed through trade, industry, commerce, and finance is different indeed from that of the aboriginal peoples.

[The Maori] system of community co-operation in cultivation and sharing the natural resources of their territory inhibited any trend towards individualism and the individual ownership of land. The land belonged to the sub-tribe and the tribe ... The individual had his share of the common ownership, but he could not be said to own any particular portion of it in perpetuity. He had the use of particular portions and his neighbours respected his allotment as he respected theirs. He had the use of it during his lifetime, and his heirs had the use of it during their lifetime ... Maori lands occupied the same position as entailed estates and could not be alienated by individuals. Thus they formed a fluid asset which could be adjusted to meet the varying needs of succeeding generations ....

The early chiefs bemused by the rattle of hoop iron and tin pannikins, sold large areas of tribal land for the cheap products of English factories. It has been said that the chiefs and people thought they were merely giving the newcomers the right to use the land, not realizing that they were parting with their tribal heritage for ever. Probably this is true of the early sales.<sup>17</sup>

The story of the meeting of the white and the black cultures in Africa is not so clear as to the origins of the tribes, but the same "fundamental difference in the European and African attitudes to land-tenure is apparent. Amongst the African Negro communities land is held to

be inalienable and incapable of transfer by purchase ... Unfortunately this difference was not appreciated by white settlers or by colonial governments until after some of the best land had passed out of native title and occupation. This more than anything else probably accounts for the detribalization of native society throughout Africa south of the Sahara".<sup>18</sup>

African land-tenure laws seem to fall into a general pattern of which the Lozi tribe who dwell in the great flood plain of the Upper Zambezi River are strikingly representative. ... Ultimately the Lozi consider that all the land, and its products, belong to the nation through the King. Though one right of Lozi citizenship, to which all men who are accepted as subjects are entitled, is a right to building and to arable land and a right to use public lands for grazing and fishing, it is by the King's bounty that his subjects live on and by the land. Commoners think of themselves as permanently indebted to the King for the land on which they live and its wild and domesticated products which sustain them. The Lozi say this is why they gave tribute and service to him and still give gifts ...<sup>19</sup>

(p 38) To balance his rights and powers, the King is under a duty to do certain things with the land. He is obliged to give every subject land to live on and land to cultivate ... Should he [himself] desire land he must ask for it: 'The King is also a beggar'. - [Cf. Eccl. 5: 9. 'Moreover the profit of the earth is for all: the King himself is served by the field']

(p 40) The King may be called 'owner of the land' only as trustee or steward for the nation. He granted a primary

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estate of rights of administration to all titles of heads of villages, including himself in his capacity as head of many villages. Each head of a village then broke his estate into secondary estates with rights of administration which he allotted to heads of households in the village including himself. These holders of secondary estates might allocate tertiary estates of this kind to dependent heads of household, but usually broken up and allocated in parcels of land to be worked as arable, or as fishing sites by the holders ... Landholding in these tribes is thus an inherent attribute not only of citizenship, but also of each social position in the political and kinship hierarchy.

**The American Red Indians had the same kind of attitude to land:**

In America, the land within the tribal boundaries was regarded as belonging to the tribe. Neither the Indian individual nor the family possessed vested rights in land, although each family might appropriate or have assigned to it, for cultivation or gathering, that required for its own needs. Thus it was impossible for any chief, family, or any section of a tribe legally to sell or give away any part of the tribal holdings. Naturally any such treaties and transfers of rights had no significance to the early Indians. The first white settlers either were not aware of this fact or found it convenient to ignore it.<sup>20</sup>

The difference between the two cultures arises from the modern assumption that society is a collection of individuals. Tribal society by contrast was a collection of families. An aggregation of families formed an extended

family (or *gens* to use the Roman word). The aggregation of *gentes* formed the Tribe. The aggregation of Tribes constituted the Commonwealth. The consanguinity was real in the family, but in the extension to *gens* and tribe, included a number of incomers who, by a legal fiction, feigned themselves to be descended from the same stock as the people on whom they were grafted.<sup>21</sup>

The feeling for land, and their relationship to it as a family, can be illustrated closer to home and to our own time. Members of the Gaelic clan (*clann* or *clanna*, meaning children) were regarded as descended from a common ancestor, actual or mythical. The Chief was parent, ruler, and landowner on behalf of the clan. Chief is a territorial title. It was the duty of the chief to ensure all the clan were possessed of land enough to live on and from. The succession to the chiefship was hereditary, the successor being appointed from among nine of the dying chief's nearest kinsmen. There were also chieftains each representing a branch of the clan.<sup>22</sup> This close cohesion and provision of a livelihood for all is a long way from present-day social organisation and practice.

There is a remarkable similarity in English Land law. In Alfred's time *folc* land was land held on customary tenure, and *boc* land was land allotted on terms contained in a charter or 'book'. The first tended to be held by the common people, the second by thegns and other nobility. But the essence of both was that the land was held in return for services or payment which had to be made to the King. After the conquest the land was held of a Lord, who himself held, sometimes through other Lords, but in any case ultimately of the King, and always in return for rent

in the form of services or money - "no land without a Lord". The modern law *in theory* forbids any private person from owning more than a freehold tenancy from the Crown. This is in great contrast to absolute ownership (*dominium*) under continental European systems.

In practice, however, land is bought and sold exactly as if the possessor had *dominium*. This fundamental change came about gradually as the law over the years released all the common law inhibitions on alienation of land out of the family. The result was a disaster to the Exchequer. The loss of the land-rents forced the Crown into peacetime taxation as we shall see in Part II, and when that proved insufficient, into more and more borrowing. The cost in interest exacerbated the situation into a vicious circle. Moreover the state had ultimately to take over the care of the large number of families who were made landless, and so deprived of a place to live and a place from which to draw on the earth's resources for a living.

#### **Anglo-Saxon England**

England before the Conquest presents a very different picture. The Germanic tribes who succeeded the Romans in occupying Britain had one thing in common. They were regarded by the Romans as outer barbarians. They had not been affected by contact with Rome, as had the Franks who had fought both for and against the Roman Emperors. This accounts for a good deal of the difference between France and England today. Angles, Saxons, Jutes, and Frisians were imbued with the traditional freedom of primitive German society. They were loyal to their leader, but recognised no authority between the leader and



themselves. Once settled in Britain their leader was king. In the 6th to 8th centuries the large number of such kings had gradually reduced to the Heptarchy: Mercia, Anglia, Kent, Wessex and so on. The *ceorl*, or free peasant, formed the basis of society. He was the independent master of a peasant household, whose position was protected by the King's law. He had no claim to nobility, but was subject to no lord below the king.<sup>23</sup>

In the laws of Ine (689-726), which is our earliest document that throws light on agricultural practice, there is no mention of any lord having control of country life below the king. The *ceorl* was a free man amongst freemen with whom he co-operated in farming the land, and sharing the available woods, springs, marshes, rough ground and other feedings as well as fisheries. Any disputes between them were subject to adjudication only by or on behalf of the king. It is almost certain that by law and custom the 'family land' could not be alienated so as to bypass expectant heirs. Slavery was part of the early English law, and the *ceorl* was usually a slave owner. But his slaves were probably not of his own race, and certainly not of his own tribe.

There is no trace of nobility amongst these invading tribes, except the nobility of the kingly family. But round the king were gathered his *gesiths* - companions: the bond between lord and man - the duty of defending and avenging a lord, the disgrace of surviving him - was a well-known feature of Germanic tradition, and this they brought to Britain. There was a line of demarcation between the *gesiths* and the *ceorls* evidenced by their worth in terms of the *wergild* to be paid in a case of manslaughter. In the

laws of Ine the *gesithcund* man's wergild was 1,200 shillings, as against the 200 shilling wergild of the ceorl.

This was an age of freedom such as is beyond the comprehension of our own time. Again, how did it come about? Some light can be thrown upon the remarkable loss of freedom by examining the slow introduction in Anglo-Saxon England of customs which were precipitated by the Norman Conquest into a virtual replica of the continental feudal system.

Those gathered round the king in Saxon times had to be supported, and this was achieved by grants of newly conquered or unoccupied land. But by the late 7th century, grants were being made to the king's companions, not of land, but of the rents and services properly due to the king. At first it mattered not to the ceorl whether he paid his dues to a thegn or to the king. But as this custom grew, there were soon men of the higher class who were lords over large numbers of small villages. After such a grant the duty to repair bridges easily passed into a duty to repair the buildings of the new lord's farmstead. The king's dues were brought to him there. This was the origin of the Manor which features so persistently in Domesday.

Subsequently, the idea grew that the landlord needed written evidence of his rights, and this by Alfred's time (871-899) had become familiar as 'book'- (viz. charter-) land. Boc-land could be granted exempt from the common law dues in support of the king, save the *trimoda necessitas*, by which the land nearly always remained bound. It stands distinguished from folc-land, which means either common land (*ager publicus*), or more probably ordinary land, that is to say land held under ordinary custom or common law.

Ine's laws also contain passages which suggest that something like leases of land were being made between a lord and a tenant of a 'yard', viz, a quarter of a hide, of land. This was the measure of land held in medieval times by the *gebur*. Thus the Normans after the conquest found a system of land tenure by different classes which in part at least resembled the feudal system which covered continental Europe. A pre-conquest description of an estate (the *rectitudines singularum personarum*) describes the classes which had by then evolved, namely: Thegn, Geneat, Cottar, and Gebur. Of these the gebur is the only one the freedom of whose position is in doubt. He was a "peasant trembling on the edge of serfdom" ... "there were innumerable men of free descent, cultivating on unalterable terms family lands which they or their ancestors had been compelled to surrender into the hands of a lord in return for relief from present necessities and in the hope of future security".<sup>24</sup> It seems therefore that the initial freedom of the whole tribe had already been compromised before the Conquest.

Of course those who received grants of the dues which ought to have been rendered to the king, were given them in return for service. They were very much part of the kingdom's fighting force, or its administration; of the judicial system, or of the royal household. The trouble begins, many centuries later, when through centralisation of government functions, and the employment of professionals, these underlords were relieved of their duties, but left in receipt of the dues, for which many of them did nothing in return.

One of the very clear trends which emerges from this

backward look is that the direction of the flow of money has to a very large extent over some eight or nine centuries been reversed. Six centuries ago in peacetime it was to the exchequer that money still flowed naturally. War taxes were for ever being raised, and their deficiency made up for by borrowing. It was war that emptied the public purse. But apart from customary levies on goods imported by foreign merchants (later called the customs) peacetime taxation hardly existed. The King (who was the government) was expected to "live of his own": and this meant that he had to pay the cost of central government in peacetime out of the revenue flowing naturally into his exchequer as feudal overlord. This can only be seen by taking a long view of the history of the Crown's revenues. An even longer view reveals in Saxon times a greater freedom from the oppression of central government, greater independence and self reliance, greater cohesion of local society, and dependence on central government confined principally to defence. Common Law was the crystallization of Custom; and laws promulgated by the King advised by the Witan ('wise men' - viz. his Council) were mostly only declaratory of the Common Law. Today by contrast, the exchequer in peacetime pays out more than it gets in, and the deficit has to be made up by borrowing. After over fifty years without a major war, government debt has reached an alarming level, and may yet have to increase. There are numerous families totally reliant on government support in all aspects of their lives; and with the outlook that 'they' - the 'social' or the 'council' - will put right anything that goes wrong. The natural independence and self-reliance of British peoples has been undermined.

All this has substantive implications for social policies today, upon which it would be as well to reflect before proceeding to the detailed consideration of how the “freeborn” Englishman came to be rootless in his own land. The way in which the loss of natural rights to land penetrates deep into the fabric of society must be borne in mind, for otherwise the “remedies” for social problems may be adopted that are not appropriate. To illustrate the point, in Ch. 3 we will analyse the historical background to crime and punishment, which is a controversial issue of our time. There are lessons to be learned from the Saxon system of criminal law, and the more modern system that replaced it. Looking back to early times does not solve the problem, but it identifies the origins of the problem, and this assists in formulating appropriate solutions by throwing up new ideas and new ways of looking at it. Imprisonment, in particular has been condemned for its cost, and its soul-destroying effect on nominally ‘free’ men and women. Capital punishment also is a recurring subject of debates, which result in nothing. But there has been little examination of history to discover how imprisonment and the death penalty came to be used in the first place as a regular punishment in criminal courts for serious crime; or how these punishments were extended far beyond what public opinion could stomach. A review of that history illuminates the underlying problem which makes itself felt in so many other spheres of our lives. That problem, in short, is the increasing erosion of our social and individual liberties as a result of losing the traditional rights of equal access to land.

# 3

## Criminal Law since Saxon Times

The Common Law owes a great deal to its Saxon origins. One of the great virtues of the Saxon state was the judicial system of local courts. These continued long after the conquest until from the twelfth century onwards the reorganised royal courts took over more and more of the judicial work. Saxon legal remedies were by no means perfect. Some punishments we would now regard as barbarous, and things got worse after the Conquest with the introduction of the cruel Norman Forest Laws and Trial by Battle. But the concept underlying punishment in Saxon England is remarkable, and might well teach a lesson for today. The idea seems to have been: 'If you don't keep the rules of the club, then you lose the right to its benefits; and if the matter is serious enough you must be asked to leave, or expelled'. It is interesting that this same philosophy in modern times has inspired the trade unions' rule books in their treatment of discipline - fines, loss of benefit, and expulsion. In Old English law except for High and Petty treason, the usual punishments for serious crime were banishment, outlawry, abjuration of the realm, or monetary penalties, even for manslaughter and murder<sup>25</sup>. "Imprisonment would have been regarded in these old times as a useless punishment;