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I. Introduction: The Political Milieu out of which Bracton's Theory of Kingship Arose

The English historian G.B. Adams has stated that "in very simple terms, the problem of English constitutional history is to show how the absolute government of the eleventh century, which centered all power in the king...was gradually transformed into the democracy of today...."¹ The English constitutional history of the twelfth and thirteenth centuries certainly substantiates this thesis. The eleventh century absolute government was, of course, that of William the Conqueror, Duke of Normandy. Upon conquering mainland England in 1066, the Norman Duke had instituted in that Anglo-Saxon society a form of royal control that served not only as the crowning piece of the feudal social pyramid, but also served as the cement to hold the blocks of that social feudal infrastructure together. For, both in theory and practice, William was lord and owner of all England after 1066, and both the Normans who had come with him and the Anglo-Saxons alike were but his fiefholders and vassals. Thus every line of allegiance, of temporal homage and fealty, ultimately converged on William, King of England. Yet, whereas the reigns of William II (1087-1100) and Henry I (1100-1135) more or less reinforced this new form of English monarchy, the anarchical reign of Stephen (1135-1154) did much to undermine it. Hence, when the powerful Henry II (1154-1189) mounted the throne, his initial task was the stabilization of a vexed English society--a task which could not perforce entail the reassertion of the feudal overlordship of the earlier Norman kings. England had seen enough of such a feudal rule. Thus Henry II had to make certain concessions to the disgruntled people, expanding the royal courts and royal administrative offices to accommodate the pressures for reform. Unfortunately, Henry II and the later Angevins used such governmental expansion to enhance their own royal power, and the popular discontent went unabated. The constitutional crisis that led to the granting of the Magna Carta of 1215 under King John (1199-1216) gives evidence that the English people, under the leadership of the barons, were

determined to have a greater share in the government and to offset the, by now, familiar abuses of the kings and their administrative officers.² The granting of the Magna Carta, however, did not stifle these aspirations; it merely heightened them. The continued growth of the king's government in the dawning decades of the thirteenth century drove the barons to pose still more urgently the question of the limit of royal powers.³ Many popular eleventh and twelfth century political theories of kingship, however, were but apologies and rationalizations of the Norman ideal of absolute monarchy. Inevitably, then, the thirteenth century was to bring forth the theoreticians who would redefine scientifically the place of the English king in society and thereby dissolve earlier political theories and provide further impetus to the popular drive for the limiting of kings. Given such a background, the reader will no doubt understand why the ensuing political and legal developments of the thirteenth century prompted the English historian Sir William Holdsworth to write of the century: "If the memory of this period had been lost, it may well be doubted whether the medieval common law, as developed by the lawyers of the fourteenth and fifteenth centuries, would have been sufficient to guide the development of a modern state."⁴

One needs to discuss the constitutional history of thirteenth century England only a short while before he encounters Henrici de Bratton (c. 1210-1268), more popularly known as Bracton. Bracton was a legal scholar par excellence. What Thomas Aquinas (1225-1274) meant to thirteenth century Scholasticism, Bracton meant to thirteenth century English common law. Thirteenth century England bears the title 'The Bractonian Age' for good reason. Not only did the practical Bracton serve admirably as the King's chancellor, judge in eyre, judge of assize, and judge of the Bench in his lifetime, the theoretical Bracton devoted much of his time to the development of the political theory and constitutional alterations necessary for a constructive redefinition of the English king's power. It is the latter Bractonian contribution that concerns us. For the burning issue of kingship in thirteenth century England

(and in much of the rest of Europe⁵) plagued scholars of common law, of canon law, and of Roman law alike. As an expert in all these areas of law, Bracton was well-equipped to tackle the problem, as he did in his acclaimed Tractatus de Legibus et Consuetudinibus Angliae (c. 1240-1256). In the De Legibus, Bracton meticulously outlines the position of the king as judge and legislator, emphasizing the king's relation to God, to the law, and to his subjects while serving in these twin royal capacities. Bracton's seemingly paradoxical presentation of this thesis has invited a variety of interpretations which we shall selectively review below.

II. The King as Judge in Bracton's De Legibus

A.J. and R.W. Carlyle⁶ (as well as the later Bertie Wilkinson⁷) have pointed out that Bracton found an important source for his conception of kingship in the coronation oaths of the English kings. These scholars state that at the coronation the king swore to maintain the peace and stability of the Christian society and of the Christian church, to prevent evil deeds in the realm, and to ordain justice, mercy, and equity.⁸ Bracton's king is accordingly the highest supporter, stabilizer, and dispenser of justice. As Bracton puts it: "For this, then, the king is made and elected, that he might do justice to everyone, that the Lord might be in him, that he might make judgements of his own will, that he might sustain and defend what he has justly judged, because if it is not he who does justice, peace can be easily brought to an end."⁹ Obviously, Bracton's just king would follow the English oath of coronation to the letter.

Bracton's king is more than a judge, however. In Bracton's view, the king is the vicar of God; he holds the same place as Jesus Christ, and hence he is the dispenser of the Lord's justice.¹⁰ Naturally, then, he is the most powerful man in the land. "The king has no equal in his realm," says Bracton.¹¹ The king and his appointed delegates always have the final word in matters of temporal justice; there is no higher court to which a man can appeal than that of the king.

Since Bracton's king is the Lord's vicar and wields omnipotent judicial power in the land, Bracton emphatically states that the king perforce shoulders a heavy burden of responsibility as well. For, while the king who judges justly is a servant of the Kingdom of God, the king who abuses his judicial role and perpetrates injustice is no longer the vicar of God, but the agent of the Kingdom of Darkness.¹² The latter king, of course, faces eternal damnation. In Bracton's own strong words:

And let him [the king] judge justly lest he feel on that day of the Lord's wrath the judgement of him who said 'vengeance is mine and I shall repay'; on that day when kings and princes of the earth shall weep and wail when they see the son of man, for fear of his torments in a place where gold and silver will not avail to free them. Who would not fear the examination in which the Lord will be plaintiff, defendant and judge? From his sentence there will be no appeal because the Father has given all judgement to his son, who closes and none can open."¹³

Clearly, the judicial function of Bracton's king is intrinsically tied to his religious situation before God.

Like most legal scholars, Bracton recognized that the church canon law, as recently codified by Gratian, was a legal code mutually exclusive from the system of civil jurisprudence. The line of demarcation between ecclesiastical law and civil law was well-known in thirteenth century England, since it had been formally drawn by William I some two centuries earlier and been continually upheld by legal scholars in successive decades. Perhaps in rejection of Henry II's earlier encroachment upon the sovereignty of the ecclesiastical courts and the church, Bracton states that the pope dispenses the Lord's justice in all spiritual matters of the church property, the clergy, and the like via an hierarchy of subordinate courts which emanate from the papal court in Rome. The king, on the other hand, adjudicates all temporal matters through an hierarchy of secular courts.¹⁴ The medieval principle of duae auctoritates (two equal powers) is thus affirmed. The king is God's temporal vicar; the pope is God's spiritual vicar, and each must respect the distinct judicial authority of the other.

III. The King as Legislator in Bracton's De Legibus

While Bracton's discussion of the king as vicar in his judicial capacity is well-attuned to other medieval discussions of judges and justice, and thus rather straight forward, his discussion of the relation of the king to the law as legislator presents more serious difficulties. And here, then, we must turn to a lengthier discussion of Bracton's king as legislator.

In espousing his view of the king as legislator, Bracton presents a liberal series of references to ancient Roman law. Bracton's ostensibly large appetite for the study of Roman law was hardly an idiosyncrasy. For many men of the high Middle Ages were readily snatched up by the euphoria of the Medieval legal renaissance, the intensive study of the newly discovered Roman law codes. The Roman law codes most attractive to these legal scholars were those of the late Roman Empire, particularly Ulpian's The Digest, and its summary in The Justinian Code. Although the study of these texts was more extensive in such centers as Bologna and Paris, the results of this study found channels into English legal scholarship as well. Since the Norman kings of England maintained intrinsic ties to France, they often sent their best legal scholars to Paris for further education. There, the heightened interest in later Roman law left its mark on the English scholars, who utilized their knowledge of Roman law in interpreting and developing common law. In the century before Bracton, Richard, bishop of London, had published his Dialogus de Scaccario and Glanvill had penned his own erudite De Legibus, both works of which reveal a thorough acquaintance with the aforementioned Roman law codes. Being much influenced by these writings of his two English predecessors and having himself studied the Roman texts, Bracton also divulges an explicit affinity for The Justinian Code and The Digest in his De Legibus.

The major question facing contemporary Bractonian scholars is precisely how much Bracton was dependent upon and influenced by the Roman law which he so freely quotes. Was Bracton attempting to integrate the medieval common law and Roman law in a higher synthesis, as scholars following the nineteenth century

commentator, Carl Guterbock, suggest,¹⁵ or did Bracton ignore the theoretical foundations of the Roman law and simply borrow certain Roman law formulae to fill gaps in the common law, as proponents of F.W. Maitland's interpretation believe?¹⁶ Needless to say, this is not a superficial inquiry into what percentage of the De Legibus is Roman law and what percentage is English common law. Rather it inquires into how compatible the substantive Roman legal theory underlying specific Roman laws is with the substantive English legal theory underlying the common laws.¹⁷ For it is upon this question that the central debate over Bracton's theory of king as legislator turns.

Although I may be guilty of too simplistic a reduction, I believe that we may find the essential Bractonian problem by quoting two passages from the De Legibus. These we shall name Text A and Text B. Text A reads as follows:

Nihil enim aliud potest rex in terris, cum sit dei minister et vecarius, nisi id solum quod de iure potest, nec obstat quod principi placet legis habet vigorem, quia sequitur in fine legis cum lege regia quae de imperio eius lata est, id est non quidquid de voluntate regis temere praesumptum est, sed quod magnatum suorum consilio, rege auctoritatem praestante et habita super hoc deliberatione et tractatu, recte fuerit definitum.¹⁸

Woodbine has translated this passage thus:

Indeed the king can do nothing on earth, since he is the minister and vicar of God, except that alone which he can do of right; nor does that which is said to stand in the way, viz., 'What pleases the prince has the force of law', for there follows at the end of the law the Lex Regia which is passed concerning his imperium; that is to say, that has the force of law which is not presumed rashly from the king's will, but that which shall have been defined rightly, the king having given the authority and there having been deliberation and consideration about it.¹⁹

It would appear from this passage that Bracton's king stands

above the law, that his rule is absolute like that of the previous Roman emperors and that he is bridled only by modesty and morality in exercising his will in the land. But this is only one teaching of the De Legibus. For in another passage, which we shall call Text B, Bracton says what appears to be quite the opposite:

Moreover, the king himself ought not to be under man but under God and the law because the law makes the king. Therefore let the king attribute to the law what the law attributes to him, namely, domination and power. For, indeed, he is not the king when he allows his will to dominate and not the law. That he ought to be under the law, since he is the vicar of God, appears evident because of his likeness to Jesus Christ whose vice-gerent he is on earth. For the true mercy of God [lies in this] : that He... elected to be under the law...and so, therefore, the king ought to do likewise.²⁰

It would appear from this passage that the king stands under the law. Just as Christ submitted himself to the law, so the king ought to be subservient and humble under the law, since he is Christ's vice-gerent.

Given such a paradoxical teaching in the De Legibus, the reader can doubtless understand why a conception of the relation of Bracton's king to the law as legislator has engendered a hotbed of exegetical controversy among Bractonian scholars. It has put such eminent scholars as C.H. McIlwain, F. Schulz, and E.H. Kantorowicz at loggerheads. Though a chronicling of all the arguments of these and other men is beyond our interest here, a selective review of what are considered to be the best interpretations of Bracton's text will allow us to formulate a tentative definition of the Bractonian king as legislator.

Although the underlined words in Text A are clearly a quotation ad verbatim from Ulpian's The Digest, Bracton's text is a truncated version of the original. The original Roman text reads: "...cum lege regia quae de imperio eius lata est populus ei et in eum omne suum imperium et potestatem conferat." The last clause of this passage does not appear in the De Legibus. Thus while the Ulpian version reads that the

prince's will has the force of law because (cum) the people have conceded all power to him in the law of the king (lex regia), Bracton's truncated version, reads that the will of the prince has the force of law in accordance with (cum) the law of the king which made him king. The Ulpian text uses the 'cum' as a particle in conjunction with the subjunctive 'conferat' in a subordinate cum-clause; the Bractonian text uses 'cum' as a preposition and assumes that 'leges regia' are ablatives of means of the prepositional phrase, which are in turn further modified by 'quae de imperio eius lata est'.²¹ Syntactically, the omission of the last clause of the Roman text in the Bractonian quotation significantly alters the meaning of the previous clauses. The questions that arise are: why did Bracton omit the last clause of Ulpian's text in Text A, and how are we to accommodate the resulting meaning of Text A to Text B?

According to McIlwain, the Romans recognized both a private law of the emperor and a public law. Though theoretically the Roman people control the Republic via the public law of the Senate, this control is actually held by an emperor whose actions are in turn bound by a private moral law.²² After Augustus' constitutional reforms, the Romans still maintained the traditional institutions of government simply because of their characteristic devotion to the mos maiorum. McIlwain suggests that Bracton twists the meanings of these two Roman laws by distinguishing between a substantive customary law of the king (the lex regia), which sets the bounds to his given royal powers, and a procedural law which guides the king in his use of royal power. The king is superior to the latter law, since it is essentially his creation, but is subordinate to the former law, since it is essentially the people's creation. The king's relation to these two kinds of laws, suggests McIlwain, are classified under the two categories: the king's iurisdictio--his absolute power above the law--and the king's gubernaculum--his restrained and limited power under the law.²³ Thus Bracton repudiates Ulpian's understanding of the lex regia as the simple public bestowment of absolute power on the king, whose actions thereafter are controlled only by a self-imposed and self-enforced private law. Bracton's (public) lex regia

is both the bestowment of control of the realm as well as the set of strictures which limit his exercise of royal power. The (private) laws of royal procedure are clearly a secondary offshoot of the lex regia. This understanding of the lex regia, says McIlwain, is implicit in the king's coronation oath. Says McIlwain:

Bracton considered the coronation oath...in some ways to be analogous to the lex regia.... The coronation oath is, in fact, Bracton's English lex regia....It limits any authority the prince may have to act in conformity with its solemn promises, and within little more than a half century after the appearance of Bracton's book these promises included an engagement to govern according to the laws which the people have chosen (quas vulgus elegerit).²⁴

In such a way, suggests McIlwain, one can understand how the king is both above and below the law.

McIlwain's intricate analysis is problematic, however. Doubtless, the lex regia is intrinsically tied to the coronation oath, for the coronation oath always spells out the legal position of the king. Yet Bracton's De Legibus itself elsewhere contains a lengthy coronation oath, no clause of which would indicate that the lex regia is both the bestowment of royal power and the limitations of the use of this power. Furthermore, McIlwain's distinction between iurisdictio and gubernaculum, which he uses to support his interpretation of Bracton's understanding of lex regia, is a rather liberal exegesis of Text A. McIlwain's exegesis has invited the severe criticism of a number of prominent scholars.²⁵ Still further, it would appear that McIlwain equates the lex regia of Text A with the law "which makes the king" used by Bracton in the first sentence of Text B. Yet Text B goes on to say that Christ, too, was under this latter law. Now if the king is under the lex regia because it makes him the king, and, if Christ, whose relation to the law is analogous to the king's, was also under the law, one can logically infer that McIlwain believes that Christ is Christ because he has bowed under the law. Surely, McIlwain does not mean to suggest this. And that

McIlwain dismisses the last five sentences of Text B as a difficulty "introduced into Bracton's statements by the addiciones of later hands in the manuscripts of his great work,"²⁶ simply does not coincide with most modern scholars' opinions of the authenticity of the sentences in Text B.

F. Schulz offers a radically different interpretation of the Bractonian texts in question. Schulz suggests that Bracton's omission of the last clause of the statement: "...quod principi placet habet vigorem quia sequitur in fine legis cum lege regia quae de imperio eius lata est, populus ei hanc potestatem conferat" was a matter of practicality rather than a pre-meditated "twist" of Ulpian's words. Schulz states that Bracton had written the word 'etcetera' after the 'lata est', having assumed that anyone dealing with the common law would be conversant enough with the Roman text that it would be unnecessary to include the last clause. The textual problem of Bracton's version of Ulpian's words has arisen because the redactor to whom Bracton dictated the text omitted the 'etcetera'.

With such a thesis, Schulz goes on to explain what meaning Bracton gives to Ulpian's words.²⁷ The problem, Schulz contends, gyrates about the word 'placet' (from placeo--to please). In legal writing, this word has a technical meaning, and only refers to the prince's legislative decision that some thing is, or ought to be, law.²⁸ Thus the lex regia does not confer upon the ruler an absolute power in all areas, as Ulpian had suggested, but only grants absolute power to the king in making laws. As Schulz puts it: "The prince is not entitled to do whatever he likes, as a non-professional reader might assume, but he has the legal power to make laws."²⁹ Thus, unlike McIlwain, Schulz asserts that Bracton accepts the Roman understanding of lex regia--the bestowment of absolute power upon the king, via the public law. Yet the king is above the law only in so far as he has the legal power to make certain laws. In all non-legislative matters, the king is subordinate to the laws of the realm. And though he has the power to make laws which will excuse him from this latter

subordination to the laws of the realm, he, like Christ, must maintain himself under the law.

Schulz's emphasis upon the technical meaning of the verb 'placet' is well-taken. Many authors have pointed out that although the verb has a rather broad spectrum of meanings in medieval literature, it always has the specific restricted meaning in medieval legal jargon.³⁰ His separation of the meanings of the word 'law' in Texts A and B is also an analytical advance from the confusion of McIlwain. Yet we may take Schulz to task in his analysis of Bracton's truncated version of Ulpian's text. Why would Bracton truncate this quotation from Ulpian's The Digest while in every other quotation from The Digest and from other law codes the full text is quoted? It is highly unlikely that Bracton, the exact legal scientist, would dare to make the crass assumption that everyone knew this quotation of Ulpian by heart, especially in view of the fact that this quotation is not found in other extant legal texts of medieval England. Surely, Schulz's thesis is far-fetched. I would side with S. Miller's comment on Schulz's position which reads thus: "Roman law was fairly well-known in England... [but] does this mean that it was so widely known that every clerk and every judge in England could rattle off whole passages at the simple suggestion of an introductory word? I find an affirmative answer to this question difficult to give."³¹

The minute, analytical dissection of the De Legibus as exemplified by McIlwain and Schulz (and many other who uphold some remodelled remnant of their arguments) has its limitations. Not only is there a tendency among such scholars to ignore the text of the De Legibus as a gestalt, there is also a prevalent inclination to disregard the medieval milieu in which Bracton composed the De Legibus, and thus to read the texts with twentieth century spectacles. Fortunately, there exists among Bractonian scholars a more holistic, historically conscious interpretation of Bracton's De Legibus. Its chief proponent is E.H. Kantorowicz.³²

Kantorowicz is convinced that any reader of Bracton's De Legibus must begin by projecting himself into the Scholastic

mind-set of the Middle Ages. If he does this, the reader will quickly recognize that the many theological and philosophical dualities (and dualisms) of the time are manifest in the conceptions of the legal theorists as well.³³ The medieval man recognized both a divine law of nature and a codified positive law of the state. It is with such an understanding, says Kantorowicz, that Bracton can say that the king is both above and below the law. As Kantorowicz himself puts it: "The very belief in a divine Law of Nature as opposed to Positive Law, a belief then shared by every thinker, almost necessitated the ruler's position both above and below the law."³⁴ The difficulty with the Bractonian text occurs because of Bracton's equivocal use of the word 'law'. That he uses it to cover both the divine natural law and positive codified law lends to considerable confusion.³⁵

Kantorowicz draws this two-fold understanding of medieval law into his analysis of Texts A and B. Bracton's statement in Text B that the "king is under the law" presents less difficulty to the reader if he is aware of Bracton's assumption of the distinction between natural law and positive law. Bracton's king is bound by natural law, says Kantorowicz. But for Bracton this natural law is not merely in its transcendental and/or metalegal abstraction; the natural law also has concrete temporal manifestations. These manifestations include the people who are subject to the king as well as the laws of the realm by which they are governed. The author quotes Aegidius Romanus to explicate this understanding further: "When it is said that some Positive Law is above the Prince, such language does not refer to the positive law as such, but to the fact that in the positive law there has been preserved some strength of the Natural Law."³⁶ The institutional preserve of the natural law, which is guaranteed by the positive common law, is the magna curia, the body of advisors to the English medieval king. In a very real sense, the magna curia binds and limits the legislative power of the king by continually enforcing the customs and precedents of the English people. Hence, like Schulz, Kantorowicz emphasizes the restricted meaning of the term 'placet' in the clause 'quod principi placuit (placet)'.

Kantorowicz summarizes his understanding of Bracton's king under the law as follows:

...he [Bracton] inserted a qualification of the maxim 'quod principi placuit' by qualifying the word 'placuit', 'pleases'...Bracton gave Ulpian's words a most significant twist to fit constitutionalism; he deduced from the word 'placuit' not an uncontrolled and God-inspired personal rule of the prince, but a council-controlled and council-inspired, almost impersonal, or suprapersonal, rule of the king. What pleased the prince was law; but what pleased him had, first of all, to please the council of the magnates.³⁷

Given this understanding of Bracton's discussion of the king under law, Kantorowicz proceeds to analyze Bracton's use of the term 'lex regia' in Text A. Unfortunately, Kantorowicz sides with Schulz's argument regarding the truncated version of Bracton's quotation from Ulpian. Yet, the quotation from Kantorowicz immediately above (footnote 37) reveals the author's distaste for Ulpian's conception of the lex regia which Schulz accepted. Kantorowicz's argument for his understanding of the lex regia in Bracton is essentially a curious syllogism. On the one hand, the king legislates in accordance with the will of the magna curia, and thus in accordance with the natural law (as Kantorowicz has defined it). On the other hand, the lex regia is indeniably a positive law. Thus Kantorowicz concludes that the lex regia is a promulgation of the king, which, via the approval of the magna curia, is ultimately an emanation from the natural law. Kantorowicz offers a fine summation of his conclusion when he states:

In short, the king's power to legislate derived from the Natural Law itself, more precisely from the lex regia which made the king a king. Thus king-making law and law-making king mutually conditioned each other, and therewith the well-known relations between the king and law reappear in Bracton: the king, law's son, becomes law's father. It is this kind of reciprocity and interdependence of law and prince which may be found in practically all politico-legal theories of that period.³⁸

Kantorowicz's emphasis upon the king under the magna curia as the institutional preserve and representation of

Kantorowicz's emphasis upon the king under the magna curia as the institutional preserve and representation of the natural law is a far better expression of Bracton's conception of the king under law. There is, however, another dimension to Bracton's king under the positive law to which Kantorowicz may have given more attention. We have already seen that the king, as the Lord's vice-gerent, is responsible to dispense the Lord's justice. Yet his vicarate also requires him to bow under the positive law of the state for the sake of Jesus Christ, whom he represents and who himself willed to suffer under the laws of Judah and Rome in order to redeem man from the curse of the law.³⁹ Text B states that the king should do likewise, lest his authority remain unrestrained. Bracton further explicates this dimension of kingship when he states: "Nevertheless he [the King] ought to be compared...to the lowliest one in his kingdom and although he excels all in power, nevertheless, since the heart of the king ought be in the hands of God, for fear his power be unbridled, let him assume the bridle of temperance, and the reins of moderation under the law, lest unbridled, he might be led into doing injury."⁴⁰ This Bractonian teaching of the king's subordination to even the positive law of the state goes hand in hand with Kantorowicz's stress upon the intrinsic relation between the natural law and the positive law.

All discussion of the king's subordination to the law in the particular ways which we have thus far illustrated, however, is not to belittle the clear Bractonian teaching that the king is also above the law. And here Kantorowicz drives us back to our previous discussion of the king as judge. The king both makes the positive law of the state in collaboration with the magna curia, and he also stands above the law in judgement of those under the law. Just as Christ, the ultimate judge, stands above the law and judges in accordance with the law under which he once was crucified, so the king, the highest temporal judge, stands above the positive law which he has made and adjudicates the actions of his subjects and himself.

Kantorowicz's interpretation of the De Legibus is, I

believe, better attuned to the philosophical assumptions and implications in the text. Yet certain scholars have pointed out that Kantorowicz's exegesis, too, is rather liberal. Ewart Lewis, for example, argues that a king who is bound by the wills of the magnates, which Kantorowicz suggests, certainly does not rule by the principle 'quod principi placuit'. He suggests further that Kantorowicz's rendering of the technical 'placet' is simply 'bewildering' and hardly true to the meaning connoted by Bracton. Such criticisms are not without basis.⁴¹

IV. Conclusion: The Historically Ubiquitous Bracton

The question of Bracton's view on kingship has plagued scholars throughout English history, and it has had many constitutional ramifications. Because certain texts in the De Legibus seem unequivocally to support a constitutionalism and certain other paradoxically advocate an absolutism, quotations from Bracton's De Legibus have served as tools for both constitutionalists and absolutists throughout English constitutional history. This is most evident in the great state trials under the Stuarts involving apparent royal infringement on the subjects' ancient rights and liberties. In the Darnell Case of 1627, for example, which led to the Petition of Right of 1628, there was considerable debate on the question whether a subject who had been imprisoned by royal decree without a specific cause for arrest could be released on bail. In the debate, Calthrop, a defender of one of the prisoners, quoted Bracton's statement that the king may do nothing that is not done in accordance with the law. Attorney General Heath, on the other hand, adapting Bracton's words, stated: "If a judgement is attested by the king, since no writ runs against the king there was no opportunity of supplication that he might correct and amend his action."⁴² And obviously the list of Bractonian quotations in the speeches and writings of both constitutionalists and absolutists could go on ad infinitum. Unfortunately, the problems of such contradictory passages in Bracton have not yet been solved adequately. Thus we remain with only a tentative understanding of Bracton on kingship.

Footnotes

- ¹G.B. Adams, Class Notes, Feb. 8, 1981, History 351, Calvin College.
- ²William Holdsworth, Some Makers of English Law (Cambridge: Cambridge University Press, 1966), p. 15.
- ³Bertie Wilkinson, Constitutional History of Medieval England 1216-1399 (London: Longmans, Green, and Co., Ltd., 1958), Vol. III, p. 85.
- ⁴Holdsworth, op. cit., p. 23.
- ⁵See a fine analysis of the general problem of kinship in the thirteenth century in Otto von Gierke, Political Theories of the Middle Ages, trans. F.W. Maitland (Cambridge: Cambridge University Press, 1927).
- ⁶A.J. and R.W. Carlyle, A History of Medieval Political Theory in the West (New York: Barnes and Noble, Inc., 1928), Vol. III, pp. 30-40.
- ⁷Wilkinson, op. cit., pp. 72-111; see also H.G. Richardson, "Early Coronation Records," Speculum, 24 (1949), p. 13.
- ⁸Carlyle and Carlyle, op. cit., p. 34.
- ⁹Henrici de Bratton, De Legibus et Consuetudinibus Angliae, ed. G.E. Woodbine (New Haven: Yale University Press, 1915-1942), Vol. II, p. 305.
- ¹⁰Ibid., Vol. II, p. 20. Notice that Bracton's assertion that the king and Christ are equal before God is built upon an Arian Trinitarian assumption.
- ¹¹Ibid., Vol. II, p. 33.
- ¹²"Therefore, while he does justice he belongs to the eternal king; when he turns toward injustice, he is the minister of the devil. Indeed, it is said that he is king from ruling well and not from reigning, because he is king while he rules well, and he is a tyrant when he opposes with violent damnation the people under his charge." Ibid., Vol. II, pp. 305-306.
- ¹³Ibid., Vol. II, p. 21.
- ¹⁴J.H. Baker, An Introduction to English Legal History (London: Butterworths and Co., Ltd., 1971), p. 56.
- ¹⁵"The De Legibus is an homogeneous whole, in which the Roman elements are no longer merely Roman law, but have become integral parts of the leges et consuetudines Anglicanae." Carl Guterbock, Bracton and His Relation to the Roman Law, trans. Brinton Coxé (Philadelphia, 1866).

¹⁶Henrici de Bratton, Bracton's Notebook, ed. F.W. Maitland (London: C.J. Clay and Sons, 1887), Vol. I, pp. 30-32.

¹⁷S.T.J. Miller, "The Position of the King in Bracton and Beaumanior," Speculum, 31 (1956), p. 271.

¹⁸Cited by Ewart Lewis, "King Above Law? Quod Principi Placuit in Bracton," Speculum, 39 (1964), p. 240.

¹⁹Bracton, De Legibus, Vol. II, p. 305.

²⁰Ibid., Vol. II, p. 33.

²¹Charles H. McIlwain, Constitutionalism: Ancient and Modern, rev. ed. (Ithaca: Cornell University Press, 1947), pp. 70-71.

²²Ibid., p. 49. McIlwain offers a fine summary of his view in his "The Present Status of the Problem of the Bractonian Text," Harvard Law Review, 42 (1943), pp. 220-240.

²³McIlwain, Constitutionalism: Ancient and Modern, pp. 71-72.

²⁵See especially F. Chéyette, Custom, Case Law, and Medieval 'Constitutionalism': A Re-Examination," Political Science Quarterly, 78 (1963), p. 362ff.; Brian Tierney, "Bracton on Government," Speculum, 38 (1963), pp. 295-317.

²⁴Ibid., p. 72.

²⁶C.H. McIlwain, The Growth of Political Thought in the West (New York: The McMillan Co., 1932), p. 371.

²⁷F. Schulz, "Bracton on Kingship," English Historical Review, 40 (1945), pp. 136-176. Schulz's thesis is much the same as that forwarded by Ludwik Ehrlich, "Proceedings Against the Crown, 1216-1377," Oxford Studies in Social and Legal History, ed. Paul Vinogradoff (London: Oxford University Press, 1921), Vol. VI, pp. 9-39.

²⁸Lewis, op. cit., p. 242.

²⁹Schulz, op. cit., p. 154.

³⁰Lewis, op. cit., p. 243, f.n. 14.

³¹Miller, op. cit., p. 271.

³²Ernst Kantorowicz, The King's Two Bodies: A Study in Medieval Political Theory (Princeton: Princeton University Press, 1957), pp. 143-192. The reader should be aware that Kantorowicz's theses in the above volume are not always comparable to those in his Bractonian Problems (Glasgow: 1941). Apparently further research has prompted Kantorowicz to alter his interpretation of Bracton.

³³John Bowle, Western Political Thought (New York: Barnes and Noble, Inc., 1947), pp. 211-213.

³⁴Kantorowicz, The King's Two Bodies, p. 144.

³⁵Ibid., pp. 147-148.

³⁶Aegidius Romanus, De Regimine Principum, cited by Ibid., p. 148.

³⁷Ibid., pp. 151-152. Kantorowicz grounds this statement in the following quotation from Bracton: "...what has pleased the prince is law--that is, not what has been presumed by the will of the king, but what has been rightly defined by the consilium of his magnates, by the king's authorization, and after deliberation and conference concerning it...." From Bracton, De Legibus, Vol. II, p. 305.

³⁸Kantorowicz, The King's Two Bodies, p. 155.

³⁹Carlyle and Carlyle, op. cit., Vol. III, p. 38.

⁴⁰Bracton, De Legibus, Vol. II, p. 407.

⁴¹Lewis, op. cit., p. 246.

⁴²Cited by McIlwain, Constitutionalism: Ancient and Modern, p. 73.

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