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I

PRIVATE PROPERTY *VERSUS* COMMUNAL RIGHTS: THE CONFLICT OF TWO LAWS

INTRODUCTION: DEFINITIONS AND PROBLEMS

‘Since all things are common by God’s law and by law of nature, how may any man be lord of anything more than another?’¹ mused Dives, the rich man, in the early fifteenth-century treatise *Dives and Pauper*. The question was not a new one, and this chapter will examine various answers which were suggested, either by groups or individuals, to the disagreement between divine-natural law and human law. By the law of God and nature all things were given to everyone in common; by human law things were owned individually and divided unequally. Was it possible to reconcile these two extreme positions – to find a mean between them? Some solutions to be examined here were purely theoretical; others, from late medieval England, were both theoretical and practical. Before investigating them, however, property, the origin and basis of all economic life and attitudes, needs to be defined.

Property can be seen as the means to sustain life and as something to be enjoyed and shared. It can also be seen as the object of human greed, and its possession as a title to riches and to power over others. Medieval thinkers considered that both property and the subjection of one person to another were the result of sin. In Paradise there was no private property, for everything was held in common, and the fruits of the earth were naturally shared. But after the Fall, when human nature became corrupted by sin, human institutions such as government and property became necessary. They were seen as a divinely ordained remedy for sin, which would help to order human life in its degraded state.

¹ *Dives and Pauper*, pt. 2, Commandment vii, v, p. 138, lines 1–3.

In Roman law property was 'things', and the law of 'things' featured prominently in Justinian's textbook, the *Institutes*, although the law students were left to work out for themselves just what 'things' were. In its simplest form, property was any 'thing', material or immaterial, that was owned or possessed and had some economic value. The most obvious and important thing was immovable: it was land, the chief source of wealth, and, in a primitive economy, the means of production. But 'things' also included the immovable buildings erected on that land, the movable animals which grazed on it, the crops which grew on it, and an infinite variety of movable chattels. These might be natural raw materials or manufactured goods. A 'thing' might even be intangible, such as the labour of one's own body. It might be a legal right, such as a right of way. It might involve rights over someone, a master's rights over a slave, a husband's rights over a wife, a manorial lord's over a serf or villein. The possession of property was therefore inseparable from both political and legal rights.

We shall explore the problem of the two laws, divine-natural law and human law, as applied to the question of property. Law is the expression of the society which fashions it. Medieval society was permeated at every level by the dichotomy between the secular and the spiritual – empire and papacy, kingship and priesthood, laity and clergy, all reflecting the division into body and soul of man himself. Translated into terms of law, the duality was that between the law of God and of nature, and human positive law, both written and customary. In a Christian society the laws of God and of nature tended to be identified, if only because God was the author of nature – hence divine-natural law. Yet they might be approached differently, the one through scriptural revelation, the other through natural human reason. Not surprisingly, this divine-natural law took precedence over all human law, and it was immutable. As Gratian, summing up earlier views in his *Decretum*, explained: 'Whatever is accepted as customary or committed to writing, if it is contrary to natural law is to be considered null and void.'² That at least seemed unequivocal, until it was applied to property. 'The law of nature differs from custom and statute', Gratian observed, 'for by the law of nature all things are common to all men . . . by the law of custom or statute, this belongs to me, that belongs to someone else'.³ It was human law that created the problem. It was human law that had sanctioned the unequal possession described by Dives.

The issue attracted attention from the twelfth century. This is the century which has been credited with the 'discovery of the individual',

² Gratian, *Decretum Gratiani*, in Ae. Friedberg, ed., *Corpus iuris canonici*, 1 (Leipzig, 1879), D. 8, ante c. 2, col. 13.

³ Ibid., D. 8, ante c. 1, col. 12.

when people developed a new sense of self-awareness and of their individual abilities and rights. The explanations range from the heightened spirituality of the age, the growing popularity of natural law ideas, and the intellectual developments of the twelfth-century Renaissance to the development of a European commercial economy.⁴ The resulting consciousness of 'self' led to an awareness of individual rights, political, social, and legal, of which the growing importance of personal status, family descent, and possession, especially of land, were indicative. In economic and social terms the rise in population led to land hunger, a growing sense of acquisitiveness, and disputes about property – a situation exacerbated in England by the anarchy of Stephen's reign (1135–54). In the towns, propertied people, *nouveaux riches*, started to emerge in the shape of merchants, whose urban resources were their own. The fact that money was circulating in the market-place as a medium of exchange was an indication that the goods for which that money was exchanged were privately owned. In legal terms twelfth-century England saw the development of the common law of real property, which gradually transformed the relationship of lords and their tenants, giving the tenants something like private ownership of the lands they occupied. Later a dramatic fall in population, occasioned largely by the pestilence of 1348 and subsequent years, led to shortages of both tenants and labourers, giving the survivors unprecedented bargaining power and opportunities for both social and geographical mobility. Lords had to adopt a more flexible attitude to them. By the end of the period not only was land let on terms which amounted to private ownership, but it was also tenanted by a wider spectrum of people than previously. A growing sense of individual rights and possession provided a fertile background for the debate about conflicting legal ideas on property.

ST AUGUSTINE'S SOLUTION: GOD AS AUTHOR OF HUMAN LAW

In the early fifth century St Augustine had recognized the problem of the conflicting laws. Rights of possession were firmly grounded on human law, whereas divine law had decreed that 'the earth and the fullness thereof' were the Lord's. God had fashioned rich and poor out of the same dust,

⁴ For a summary of views, see Antony Black, 'The individual and society', in *The Cambridge History of Medieval Political Thought*, ed. J. H. Burns (Cambridge, 1991), pp. 588–9. See also Colin Morris, *The Discovery of the Individual, 1050–1200* (London, 1972); Swanson, *Twelfth-century Renaissance*, pp. 141–50; Caroline Walker Bynum, 'Did the twelfth century discover the individual?', *JEH*, 31 (1980), pp. 1–17, repr. in expanded form in *Jesus as Mother: Studies in the Spirituality of the High Middle Ages* (Berkeley, Los Angeles, and London, 1982), pp. 82–109; Walter Ullmann, *The Individual and Society in the Middle Ages* (London, 1967), pt. 3, pp. 101–51.

and the same earth supported both.⁵ In other words, divine law indicated equality and the sharing of the earth. Augustine contrasted the state of man's innocence with the state of fallen man. Human institutions, in particular the rule of kings and the subjection of slaves, had not existed in the state of innocence: sin was the cause of subjection. The first just men were shepherds of flocks rather than kings of men, 'so that in this way God might convey the message of what was required by the order of nature, and what was demanded by the deserts of sinners'.⁶ God was the source of all power, and he granted rulership to men entirely at his pleasure: 'We must ascribe to the true God alone the power to grant kingdoms and empires. He . . . grants earthly kingdoms both to the good and to the evil, in accordance with his pleasure.'⁷ Despite earthly rulers, God's providence continued to rule humanity: 'It is beyond anything incredible that he should have willed the kingdoms of men, their dominations and their servitudes, to be outside the range of the laws of his providence.'⁸ It was not difficult for Augustine and later medieval thinkers to justify the existence of earthly rulers by reference to divine law, even if they had not existed in the state of innocence. But property was another matter. Yet Augustine implied that God had sanctioned private property as well, at least indirectly, for human law was the law of emperors and kings, and it was through them that God had distributed things to the human race: 'By the law of kings are possessions possessed', he declared.⁹ God instituted rulers, and rulers legitimated private property in a world which continued to be ruled by God's providence. But that did not make it either 'right' or 'wrong' in a moral sense. For Augustine, earthly institutions and possessions were merely useful to man on his pilgrimage through this life, and were to be used accordingly. They must not be valued, far less loved or desired, for their own sake. He spelt out carefully that there were two distinct types of possessions, temporal and eternal, of which the temporal were merely fleeting:

The temporal ones are health, wealth, honour, friends, houses, sons, a wife, and the rest of the things of this life where we travel as pilgrims. Let us place ourselves in the stopping-places of this life as passing pilgrims, not as permanent possessors.¹⁰

The pilgrim who made use of earthly and temporal things did not allow himself to become obsessed by them or distracted from his journey

⁵ Augustine, *In Ioannis Evangelium Tractatus*, 6, 25–6: *CChr. SL*, 36, p. 66, lines 18–20.

⁶ Augustine, *City of God*, trans. H. Bettenson, ed. D. Knowles, *Augustine: City of God* (Harmondsworth, 1972), bk. 19, ch. 16, pp. 874–5.

⁷ *Ibid.*, bk. 5, ch. 21, p. 215.

⁸ *Ibid.*, bk. 5, ch. 11, p. 196.

⁹ *Ibid.*: Gratian D. 8, c. 1.

¹⁰ Augustine, *Sermo* 80.7, *PL*, 38, col. 497.

towards God. They had to support him, rather than add to his burdens.¹¹ Augustine's reasoning is clear, even if his view of family and friends as temporal possessions seems strange. He had gone some way to solving the problem of the two laws by making God, at least indirectly, the author of human law. What he had not done was to explain how God had come to contradict himself by authorizing two apparently conflicting laws.

TOWARDS A SOLUTION: CHANGING NATURAL LAW

One way to solve the conflict was to remove it altogether by altering, or at least adjusting, natural law to the changed circumstances of human life after the Fall. It could then be brought into line with human law. Given that natural law was really divine-natural law, the law of God, attempting to change it was a daunting prospect, and both canonists and scholastics were cautious. But natural law was a flexible concept, which could be understood on different levels, from basic animal instinct to the sophisticated rules which made up the law of nations, international law. It was once described as a wheelbarrow into which anything could be dumped and which could be wheeled in any direction. Medieval thought was tidier, but it did exploit the flexibility of natural law in trying to resolve its contradiction with human law.

The twelfth-century canonist Rufinus arrived at a clumsy three-fold definition of natural law. The first two categories were based on Scripture: commands which ordered the performance of good acts, and prohibitions, which forbade the performance of bad ones. The third, known as demonstrations, was vaguer and more general, and included advice like 'Let all goods be held in common.'¹² It was this third category which was to present the most potential for change. With the Fall, human understanding of natural law, that is, of good and evil, had become clouded, but it had been restored through the 'commands' and 'prohibitions' of the Bible, which laid down principles of right and wrong. But these needed to be 'adorned' or supplemented by custom. They needed to be applied in specific situations. This was especially true of the 'liberty of all men and the common possession of things, for now, by civil law, this is my slave, that is your field'.¹³ As Rufinus explained, although these things might seem contrary to natural law, they were necessary to restrain people and to prevent crime. They were a way of disciplining fallen humanity into following the commands and prohibitions of natural law, and so were not contrary

¹¹ Augustine, *City of God*, bk. 19, ch. 17, p. 877.

¹² Rufinus, *Summa Decretorum*, ed. Heinrich Singer (Paderborn, 1902), pp. 4-7, trans. Ewart Lewis, *Medieval Political Ideas*, 1 (New York, 1974), p. 38.

¹³ *Ibid.*

to it.¹⁴ This more flexible approach, governed by altered circumstances, would be followed later.

Thinkers soon abandoned the awkward three-fold classification of natural law and drew simply on the implication that there could be a difference between its strict letter and its application. One of the first was Alexander of Hales (d. 1245), a Gloucestershire born Franciscan who had been Archdeacon of Coventry before moving to Paris. In the *Summa* attributed to him¹⁵ he suggested that the application of natural law should be flexible, although this did nothing to change its content. Although doctors might think drinking wine was healthy, they would hardly give it to a sick man. Man's sinful nature after the Fall was, in effect, sick, and while natural law decreed community of property for his 'healthy', innocent state of nature, it allowed private property in his fallen and diseased state. The basic natural law principle had not changed, merely its application in a particular situation.¹⁶

Thomas Aquinas pushed this a little further. For him, all law, including natural law and human law, if it derived from 'right reason', was derived from the eternal law of God.¹⁷ If something followed 'right reason' it meant that it was for the common good, and anything for the common good therefore agreed with natural law. Aquinas was cautious about changing natural law. The first principles were unalterable, but on some 'particular and rare occasions' the 'secondary precepts', the particular conclusions from these first principles, might vary.¹⁸ So far he had not gone much beyond Alexander. But he did go on to admit that natural law could be changed (and Aquinas actually uses the Latin verb *mutare*, to change) in two ways, either by additions to it or subtractions from it.¹⁹ 'The individual holding of possessions is not... contrary to the natural law; it is what rational beings conclude as an addition to the natural law', he declared.²⁰

One of the most colourful expressions of natural law adapting to circumstances was provided by the English Lancastrian lawyer Sir John Fortescue (c. 1394–c. 1476):

It is the same sun which condenses liquid mud into brick and melts frozen into flowing water; and the wind which kindles the lighted torch into flame is no other than that which cools the hot barley-porridge; for in these cases the qualities of

¹⁴ Ibid., p. 39.

¹⁵ For a summary of arguments on its authenticity, and for literature, see Langholm, *Economics*, pp. 118–20.

¹⁶ Alexander of Hales, *Summa theologica*, 4 vols. (Quaracchi, 1924–48), 4, pt. 2, inq. 2, q. 3, 246, p. 348. Cf. Langholm, *Economics*, p. 124.

¹⁷ Thomas Aquinas, *Summa theologiae: Latin text and English translation*, 61 vols., ed. T. Gilby et al. (London, 1964–80), 122ae, 93, 3, vol. 28, p. 59.

¹⁸ Ibid., 94, 5, p. 93. ¹⁹ Ibid. ²⁰ Ibid., 222ae, 66, 2, vol. 38, p. 69.

the objects cause the mutations which the objects themselves undergo; but the efficient cause . . . is not changed. Even so the equity of natural justice which once assigned to innocent man the common ownership of all things is none other than that equity which now, because of his sin, takes away from man . . . the good of common ownership.²¹

Fortescue, like others before him, implied that the first principles of natural law do not change, any more than the sun or the wind, but its effect in changed circumstances does. In theory at least the contradiction between natural and human law seemed to have been solved.

PRIVATE RIGHTS AND THE COMMON GOOD

The common possession laid down by divine-natural law benefited everyone; private possession benefited only the few. Could common and private possession be harmonized? One way to do this was to show that private possession was really for the common good. This is what Aquinas and others attempted.

Aquinas combined patristic and Aristotelian ideas. In book 2 of the *Politics*, Aristotle had supported private property against the community of wives and property recommended by Plato in his *Republic*. 'When everyone has his own sphere of interest there will not be the same ground for quarrels', he advised, 'And the amount of interest will increase, because each man will feel he is applying himself to what is his own.'²² In other words, life will be harmonious and efficient. Aquinas also reckoned that it would be more peaceful under a system of private property. Combining Aristotle with patristic ideas, he explained that in the state of innocence men's wills were such that they could use things in common without danger of conflict. But now 'when owners multiply there has to be a division of possessions, because possession in common is fraught with discord, as the Philosopher says'.²³ Individual possession was necessary for human life:

First because each person takes more trouble to care for something that is his sole responsibility than what is held in common or by man – for in such a case each individual shirks the work and leaves the responsibility to somebody else . . . Second, because human affairs are more efficiently organized if each person

²¹ Sir John Fortescue, *De natura legis naturae*, trans. Lewis, *Medieval Political Ideas*, 1, p. 134. For discussion and further examples see Richard Schlatter, *Private Property: the History of an Idea* (London, 1951), ch. 3.

²² Aristotle, *The Politics*, trans. E. Barker (Oxford, 1946), II, v, 5, 1263a, p. 49.

²³ Thomas Aquinas, *Summa theologiae*, Ia, 98, I ad 3, vol. 13, p. 153.

has his own responsibility to discharge; there would be chaos if everybody cared for everything. Third, because men live together in greater peace where everyone is content with his task.²⁴

Hard work, efficiency, and peace – on this basis private possession could be reconciled with the common good and with natural law.

PROPERTY AS NATURAL TO MAN

The next solution was to turn the possession of private property into a positive natural right by showing that its acquisition was the result of man's own labour. This bypassed the problem of the conflicting laws because it suggested that divine–natural law had sanctioned private property even in the state of innocence, so that the problem did not arise.

In justifying individual ownership, Aquinas had linked property and labour – common possession would lead to skiving. John of Paris (d. 1306), supporter of Philip IV in his dispute with Boniface VIII, was more specific about the connection in his *On Royal and Papal Power*. He was writing in order to distinguish the different spheres of authority of lay rulers and priests. Unlike Augustinian thinkers, he did not see civil society and institutions as the penalty for sin imposed by God. On the contrary, secular society and government were natural.²⁵ They were instituted before the priesthood, but even before this, lay property had been established as something natural to man. It was the result of his own labour.

lay property is not granted to the community as a whole . . . but is acquired by individual people through their own skill, labour and diligence, and individuals, as individuals, have right and power over it and valid lordship . . . Thus neither prince nor pope has lordship or administration of such properties.²⁶

This is a very radical viewpoint, as Janet Coleman has demonstrated, especially considering that John was writing as early as 1302.²⁷ It is a prelude to later ideas on the dignity and value of human labour.²⁸ It also enshrines the idea of privately owned property, for there is no sense of a lord and tenant relationship: on the contrary, it is the individual who has 'right and power . . . and valid lordship'.

Fortescue, too, saw the origin of individual property rights in labour, and regarded it as in a sense natural, although he followed the tradition

²⁴ Ibid., 222ae, 66, 2, vol. 38, p. 67.

²⁵ John of Paris, *On Royal and Papal Power*, ed. and trans. J. A. Watt (Toronto, 1971), ch. 1, p. 79.

²⁶ Ibid., ch. 7, p. 103.

²⁷ Janet Coleman, 'Medieval discussions of property: *Ratio* and *Dominium* according to John of Paris and Marsilius of Padua', *HPT*, 4 (1983), pp. 209–28, esp. 216–19.

²⁸ See ch. 2, pp. 52–3 below.

that property originated after the Fall. Natural law decreed one thing for man in his state of innocence, community of property, and another, private property, for his fallen state. He did not, however, separate the secular from the spiritual. All private property came to man through his own labour, and seemed to be blessed by God. He quoted God's words to Adam (Genesis 3.39): 'In the sweat of thy countenance shalt thou eat thy bread':

in which words there was granted to man property in the things which he *by his own sweat* [my italics] could obtain . . . For since the bread which man would acquire in sweat would be his own, and since no one could eat bread without the sweat of his own countenance, every man who did not sweat was forbidden to eat the bread which another had acquired by his sweat . . . And thus the inheritable ownership of things first broke forth. For by the words *bread* our elders teach us, we are to understand not only what is eaten and drunk but everything by which man is sustained; and by the word *sweat*, all the industry of man.²⁹

Both John of Paris and Fortescue anticipated John Locke's idea that man by joining the labour of his body to something made it his property. John of Paris, like Locke, saw the origins of property in the state of innocence and therefore as natural, whereas Fortescue placed it after the Fall but gave it divine sanction.

THE MONASTIC SOLUTION: IMITATING JERUSALEM

The justification of private property was a way of sanctioning a life that was less than perfect. Life for the perfect was another matter entirely: it meant total renunciation of property and living a communal life. The Augustinian Giles of Rome (d. 1316), opponent of John of Paris, recognized that 'things being as they were', it was to the advantage of a city for the citizens to delight in private possessions. Since men were far from perfect they were content to live such a life. Those who decided to live without worldly possessions chose to live not as men but above men, living a Heavenly life. Such people, being so much better than others were not part of the State.³⁰ Nevertheless, for those who would be perfect, imitation of the apparently communal life of the first Christians at Jerusalem seemed to be the answer, despite the fact that the interpretation of the relevant biblical texts is disputed: community of property may not actually have been the rule at Jerusalem.³¹ Gratian preserved a text, dubiously ascribed

²⁹ Fortescue, *De natura legis naturae*, trans. Lewis, *Medieval Political Ideas*, p. 135.

³⁰ Giles of Rome, *De regimine principum* (Rome, 1556), bk. II, pt. III, ch. 6, p. 114r-v; *ibid.*, ch. 5, p. 213v. For discussion see Langholm, *Economics*, p. 384; Schlatter, *Property*, pp. 56-65.

³¹ A. J. and R. W. Carlyle, *A History of Mediaeval Political Theory in the West*, I, *The Second Century to the Ninth* (Edinburgh and London, 1930), pp. 99-100, 135.

to Clement I, which recommended communal living for all who wanted to serve God and to imitate the apostolic life. The use of everything in the world ought to be common to all men, 'Clement' recommended. It was only through sin that individual possession, and the resulting conflict, had arisen. 'Just as the air cannot be divided nor the splendour of the sun, so the things given to all men in common should not be divided', he advised.³² Counsel of perfection indeed, and it was followed, with varying degrees of success, by the monastic orders based on the Rule of St Benedict. In his Rule the saint ordered: 'Let no one presume to give or receive anything without the abbot's leave, or to have anything as his own... for monks should not have even their bodies and wills at their own disposal'; and he followed this with a reference to the Jerusalem community.³³

Until the twelfth century, monasticism was regarded, in the words of a chronicler, as 'the surest road to Heaven'.³⁴ Then it became rather less sure. It was becoming obvious that while monks individually might be poor, the same could not be said of their institutions. The monasteries, especially the Benedictine ones, were becoming large property-owning corporations. Monks were able to renounce private possession, but they could not and did not renounce corporate possession. The consequence of wealth, much of it landed, as Barbara Harvey has observed, was that 'Benedictines were able to live like the nobility or gentry and... were almost obliged to do so'.³⁵ At the end of the medieval period, in 1535, the net income of Westminster, the second richest house in England, was a cool £2,800 a year, 17 per cent higher than in 1400.³⁶

Benedictines paid the price, almost literally, of being too popular and well endowed in an age of heightened spirituality. The new devotional atmosphere was partly a reaction against the manifest wealth of the institutional Church and the increasing administrative efficiency of the papacy. But it was also the product of the quickening of the economy, of thriving trade and industry, urbanization, developing commerce, and with it the rise of a new merchant elite, all of which seemed to question traditional religious values. The whole of society appeared to be changing, and at such a time of upheaval, in some cases suffering, some preferred to concentrate on the next world rather than this. These reactions against materialism were at first channelled into Benedictine monasticism, but soon found expression in attempts to recreate the apostolic life of poverty and evangelization of the primitive Church. It was demonstrated both in the foundation of

³² Gratian, *Decretum*, C. 12, q. 1, c. 2.

³³ *The Rule of St Benedict*, trans. Justin McCann (London, 1976), ch. 33, p. 40.

³⁴ William of Malmesbury, *Deeds of the Kings of the English*, EHD, 2, no. 118, p. 694.

³⁵ Barbara Harvey, *Living and Dying in England 1100–1540: the Monastic Experience* (Oxford, 1995), p. 1.

³⁶ Barbara Harvey, *Westminster Abbey and its Estates in the Middle Ages* (Oxford, 1977), p. 63.

the new and stricter monastic orders of the twelfth century, but also in alternative radical groups, such as the Waldensians, or Poor Men of Lyons (an instructive name – sometimes the groups were referred to generically as the ‘Poor of Christ’), the Cathars, and the Humiliati.³⁷ Perhaps the most radical of all were the later Taborites, the extremist Hussite sect in Bohemia in the early fifteenth century. At the fortress of Tabor they lived a strict communal life. Their ‘Articles’ claimed: ‘nothing is mine and nothing thine, but all is common, so everything shall be common to all forever and no one shall have anything of his own; because whoever owns anything himself commits a mortal sin’.³⁸ Even by the thirteenth century, however, the mantle of the ‘Poor of Christ’ was being assumed by the new mendicant orders, especially the Franciscans. Originally individual laymen, rather than monks cushioned by a property-owning institution, they have been regarded as the true heirs of the heretical Humiliati.³⁹

THE MENDICANT SOLUTION: TOTAL POVERTY

The mendicant solution was to renounce all property, both individually and corporately. Implementing this, however, was not without problems, because in order to survive everyone needs a modicum of ‘things’.

St Francis, whose life more than any other came to epitomize absolute poverty, arose from precisely the new mercantile elite against which religious movements were reacting. He was the son of a wealthy cloth merchant of Assisi. Francis himself was an extremist, totally dedicated to imitating not so much the poverty of the Apostles, but what he saw as that of Christ himself. In the Rule of 1223 he ordered his followers to renounce all property: ‘The friars are to appropriate nothing for themselves, neither a house, nor a place, nor anything else. As “strangers and pilgrims [1 Peter 2.11]” in this world, who serve God in poverty and humility, they should beg alms trustingly.’⁴⁰ Above all, the Franciscans were to shun money. Brothers who worked were not to seek reward in coins or any

³⁷ Brenda Bolton, *The Medieval Reformation* (London, 1983), pp. 21–6.

³⁸ Josef Macěk, *The Hussite Movement in Bohemia* (London and Prague, 1965), p. 114. John Wyclif, on whose ideas those of John Hus and his followers were ultimately based, did put forward the idea of property held in common, but it was not one of his main convictions and was not widely adopted by his followers: Anne Hudson, *Lollards and Their Books* (London and Ronceverte, 1985), p. 126.

³⁹ Brenda Bolton, ‘The poverty of the Humiliati’, in D. Flood, ed., *Poverty in the Middle Ages*, Franziskanische Forschungen, 27 (Werl, Westfalia, 1975), pp. 52–9; M. D. Lambert, *Franciscan Poverty: the Doctrine of the Absolute Poverty of Christ and the Apostles in the Franciscan Order: 1210–1323* (London, 1961), pp. 40–1.

⁴⁰ Francis of Assisi, *Rule of 1223*, ch. 6, ed. Marion A. Habig, *St Francis of Assisi: Writings and Early Biographies: English Omnibus of the Sources for the Life of St Francis*, 3rd edn rev. (London, 1979), p. 61.

substitute for coins – ‘*pecuniam aut denarios*’ is the expression used.⁴¹ They were not so much as to touch money: ‘If ever we find money somewhere, we should think no more of it than of the dust we trample under our feet.’⁴² The saint wanted his friars to be completely divorced from the commercial world of his childhood. Material life would deprive them of the love of Christ and of eternity and would drag them down with it to Hell.⁴³

Total poverty may have been all very well when Francis had a mere handful of followers, but it was totally impractical when numbers expanded, even during the lifetime of the saint, to create a world-wide missionary order. The situation was not helped by the fact that his views on poverty were ambiguous. Francis himself was neither a legislator nor an organizer. When, in 1219, he sailed away to Damietta to join forces with the crusading army there (in his case the battle was spiritual rather than physical), he wisely left the direction of the Order in other hands – notably those of Ugolino, later Gregory IX, who became its Cardinal-Protector. While retaining a natural authority, Francis never resumed official control.

Even during the founder’s lifetime a number of related problems had started to emerge. How could the Order survive as a world-wide preaching organization if it could ‘own’ nothing? Was it possible to separate the ownership – dominion – of something, from its use? What exactly was meant by renunciation? Did the friars renounce property both individually and corporately? Overriding these questions was that of the exact nature of the poverty of Christ and the Apostles. Had they really been absolutely poor, and, if so, did they renounce both ‘use’ and dominion, in the sense of ownership? A variety of acrobatic legal solutions was worked out by both the Order and the papacy during the century following 1223, the Second Rule of St Francis.

Almost certainly the Cardinal-Protector Ugolino influenced Francis in drawing up the Second Rule.⁴⁴ The Rule was of great significance as being the thin end of the wedge between ownership, or dominion, and use. It introduced an intermediary, a financial agent or ‘spiritual friend’, who would stand between the friars and the world in order to provide clothes for the brethren and necessities for the sick.⁴⁵ Ugolino’s views may have been coloured by an earlier incident which had prompted him to

⁴¹ Francis, *Rule of 1221*, ed. Habig, *St Francis*, ch. 8, p. 38; for discussion see Lambert, *Franciscan Poverty*, pp. 38–40; Janet Coleman, ‘Property and poverty’, in Burns, ed., *Cambridge History of Medieval Political Thought*, pp. 607–48, at pp. 631–3.

⁴² Francis, *Rule of 1221*, ch. 8, p. 38. ⁴³ *Ibid.*, ch. 22, pp. 47–8.

⁴⁴ Habig, *St Francis*, p. 55, n. 7 for evidence. For discussion see pp. 54–7 and Lambert, *Franciscan Poverty*, pp. 1–30.

⁴⁵ Francis, *Rule of 1223*, ch. 4, p. 60.

distinguish between 'dominion' and 'use'. Francis had been furious when a house at Bologna had been referred to as the 'house of the brethren' – so furious that he had evicted the friars, allowing them to return only when Ugolino claimed that the house was 'his', and that they 'used' it only with his permission.⁴⁶ As pope, Gregory continued to reduce the impracticalities of total poverty. The real compromise, or mean solution, came with Innocent IV's *Ordinem vestram* (1245), which vested ownership of Franciscan property in the papacy, but allowed the brothers to retain its use. Compromises rarely satisfy, and this one led to both internal conflict and external attack, especially at Paris, leading to further compromises. The minister general, Bonaventure, in his *Apologia pauperum* tried to synthesize opposing viewpoints. Poverty was reaffirmed in that friars renounced all dominion (lordship) over property, both individually and collectively, and its possession. On the other hand, they were allowed to retain a limited 'use' of it – what became known as simple use – enough to sustain their lives. This was similar to the idea that by divine law all men were equal and shared the earth. In his bull *Exiit qui seminat* (1279), Nicholas III, drawing on Bonaventure, also tried to achieve a mean. He maintained the fiction that the pope was the owner of Franciscan property, but he also declared that 'apostolic poverty' was in accordance with the example of the life of Christ. He was giving official sanction to the poverty doctrine and extending direct papal protection to its practitioners. At least this warded off external attack, but it did nothing to soothe internal discord. Indeed, so serious did this become that in 1322 Pope John XXII renounced papal ownership of Franciscan property, and the next year, in *Cum inter nonnullos*, declared it heresy to say that Christ and the Apostles had owned nothing. He also beatified the Dominican Thomas Aquinas, whose moderate views on poverty had influenced him.⁴⁷

Ideas about poverty and dominion, possession and use, were to be taken up by Richard Fitzralph, Archbishop of Armagh (c. 1295–1360) in his *De pauperie salvatoris*, written against the mendicant orders, in which he opposed the poverty doctrine. In England, especially, debates about poverty and dominion widened to embrace all the clergy. John Wyclif's fundamental idea on the connection between dominion and the state of grace

⁴⁶ Lambert, *Franciscan Poverty*, pp. 45, 87.

⁴⁷ On all this see C. H. Lawrence, *The Friars: the Impact of the Early Mendicant Movement on Western Society* (London, 1994), pp. 43–64; Lambert, *Franciscan Poverty*, esp. pp. 68–102, 126–48, 208–46; John Moorman, *A History of the Franciscan Order from its Origins to the Year 1517* (Oxford, 1968), pp. 140–54, 307–19; David Flood, 'Franciscan poverty: a brief survey', Introduction to Gedeon Gál and David Flood, eds., *Nicolaus Minorita: Chronica. Documentation on Pope John XXII, Michael of Cesena and The Poverty of Christ, with Summaries in English* (St Bonaventure, New York, 1996), pp. 31–53. For Aquinas's attitude to poverty see ch. 2, pp. 45–6, 55 below.

formed the basis for his, and others', demands for clerical poverty and the disendowment of the Church.⁴⁸ The far-reaching consequences of an apparently simple idea – total renunciation of property – espoused by a few friars to resolve the dichotomy between communal and private possession could hardly have been foreseen.

THE STEWARDSHIP SOLUTION: THE POPE AS STEWARD

In arriving at the legal fiction of owning all Franciscan property the papacy was echoing another solution to the opposition of common and private rights: the earth, and its resources, was owned perpetually by God, and Christians were merely stewards of it on God's behalf. The origins of the idea lie in the Old Testament conception of economic activity.⁴⁹ The People of Israel administered the earth on behalf of the Lord. They belonged to him, and everything they had was his. 'The Lord God took the man and put him into the garden to dress it and care for it' (Genesis 2.15). God's plan was that man should be the agent of economic growth. Under God, man was given dominion over the earth and encouraged to increase: 'Be fruitful and multiply, and replenish the earth and subdue it' (Genesis 1.28). Man's dominion over the earth was similar to that of God over man.⁵⁰ With the Fall, however, nature as well as man was changed, becoming less productive and less attractive: 'Thorns also and thistles shall it [the earth] bring forth to thee; and thou shalt eat the herb of the field; In the sweat of thy face shalt thou eat bread...' (Genesis 3.18–19). Scarcity had entered the world, acting as a catalyst to economic development. Adam was sent from the Garden of Eden 'to till the ground' (Genesis 4.23), and he and his descendants became farmers and shepherds. The accursed Cain and his progeny, unable to till the earth, diversified their economic activity, building cities, becoming herdsmen and manufacturers. The New Testament concentrated more on the kingdom which is 'not of this world', but even here the idea of stewardship was perpetuated in the parable of the talents (Matthew 25.14–30).

God retained lordship of property, but for practical purposes Christians administered it, or had the use of it. It belonged to the whole Christian society, the Church. All Christians were baptized into the Church; they became united within the mystical body of Christ. They were, in terms of Roman law, part of a legal corporation. And one of the hallmarks of

⁴⁸ On this see pp. 32–3 below.

⁴⁹ For what follows see Barry Gordon, *Economic Analysis before Adam Smith: Hesiod to Lessius* (London, 1975), ch. 4, pp. 70–82.

⁵⁰ *Ibid.*, p. 73.

a corporation was that it could own property. The Bolognese canonist Johannes Andreae (d. 1348), who was probably only the second married layman to be a professor of canon law, pronounced that Christ himself had *dominium* of the goods of the Church.⁵¹ The Christian corporation, however, differed from other corporations because their *personae* were simply legal fictions, whereas to Christians, Christ was no fiction. But the practical effect was the same, because Christ was not present on earth in physical terms any more than a fictitious legal person was. He therefore had to be re-presented, given physical embodiment, by an earthly vicar, in this case the pope. This meant that for practical purposes the pope had dominion of the property of the Church on behalf of Christ. As a fourteenth-century thinker, William of Sarzano (fl. 1316–33), writing for John XXII observed:

Although the possession, right, and dominion of ecclesiastical possessions can belong to various people, either singly or living communally . . . as secondary administrators, primarily and principally, all possession, right, and dominion is seen to belong to the person of the supreme pontiff . . . he is seen to be the *dominus* and principal steward of all ecclesiastical property . . .⁵²

Some thinkers, like John of Paris, ascribed dominion of church property to the pope, and of secular property to the lay ruler.⁵³ A more extreme version of the idea awarded ownership of all property, both ecclesiastical and lay, to the Church. Giles of Rome declared:

there may be no lordship with justice over temporal things or lay persons or anything else which is not under the Church and through the Church: for example, this man or that cannot with justice possess a farm or a vineyard or anything else which he has unless he holds it under the Church and through the Church.⁵⁴

The theory which left all property in the hands of an abstract body, the Church, the mystical body of Christ, was the perfect answer to the opposition between natural-divine law and human law, because it deprived individual Christians of dominion. All property was ‘held’, rather than ‘owned’, by them on behalf of the whole Christian society. Once the embarrassing right of ultimate ownership had been shed, Christians could truly claim to be ‘the poor of Christ’.

⁵¹ Johannes Andreae, *Commentaria ad Decretales* (Venice, 1581), II, xii, 4, p. 67vb.

⁵² William of Sarzano, *Tractatus de Summi Pontificis*, ed. R. del Ponte, *Studi medievali*, ser. 3, 12 (1971), ch. 7, pp. 1044–5.

⁵³ John of Paris, *On Royal and Papal Power*, ch. 7, p. 104.

⁵⁴ Giles of Rome, *De ecclesiastica potestate*, trans. R. W. Dyson (Woodbridge, and Dover, NH, 1986), pt. 2, ch. 7, 8, p. 68.

JOHN WYCLIF'S SOLUTION: THE KING AS STEWARD

John Wyclif had his own way of removing the tension between the two laws. Well aware as he was of the niceties of papal theory, he simply adapted it in favour of the national English monarchy, so that the king became the vicar of God on earth.⁵⁵ Like Augustine, he thought that private property and other human institutions were the result of the Fall of man, introduced as a remedy for sin, and that they were contrary to man's ideal nature.⁵⁶ Unlike Augustine, he considered that kings existed before priests. Property had developed with kingship and was therefore part of secular lordship, which meant priests had no right to it: Christ's condemnations of riches, coupled with the exemplary communal life of the early Christians [Acts 4] amply demonstrated that. Any property that priests, or indeed laymen, held was the result of a royal grant, and was held from the king, on condition that it would be used for the good of the realm, and on the understanding that the grant was revokable.⁵⁷

The problem of revoking the grant to the priests was an urgent one in the late fourteenth century. England was at war with France, and clerical wealth was clearly not being used for the good of the realm. Wyclif castigated the greedy and avaricious clergy for preying on the wealth of England during the national emergency. They were the worms in the 'stomach' of the body politic, which would ruin its health.⁵⁸ If they would not voluntarily renounce their wealth, and return to their former state of apostolic poverty, then the king, as the vicar of God, would have to confiscate it for the common good.⁵⁹ Disendowment of the English Church was discussed at the Parliament of 1371, and reported on by Wyclif. A 'certain peer, more skilled than the others' had argued that 'when war breaks out we must take from the endowed clergy a portion of their temporal possessions, as property which belongs to us and the kingdom in common, and so wisely defend the country with property which exists among us in superfluity'.⁶⁰

Wyclif's followers, known as the Lollards, had absorbed his idea that Christ had dominion over property and that priests had no right to temporal possessions beyond what was needed for subsistence. In 1395 a document known as the 'Twelve Conclusions', which purported to be written

⁵⁵ In general see Michael Wilks, 'Predestination, property, and power: Wyclif's theory of dominion and grace', in Anne Hudson, ed., *Wyclif: Political Ideas and Practice: Papers by Michael Wilks* (Oxford, 2000), pp. 16–32, at pp. 25–31; and '*Thesaurus ecclesiae*', pp. 147–77, in *ibid.*

⁵⁶ Wilks, '*Thesaurus ecclesiae*', p. 156, n. 33.

⁵⁷ Wilks, 'Predestination', pp. 30–1.

⁵⁸ Wilks, '*Thesaurus ecclesiae*', p. 166, n. 77.

⁵⁹ *Ibid.*, p. 164.

⁶⁰ Herbert B. Workman, *John Wyclif: a Study of the English Medieval Church*, 2 vols. (Oxford, 1926, repr. Hamden, CT, 1966), I, pp. 210–11.

by them, was nailed to the doors of Westminster Hall and St Paul's. It began, 'We, poor men, treasurers of Christ and his apostles . . .'.⁶¹ This direct challenge to the pope's claims to be Christ's treasurer was not lost on Boniface IX, who wrote to Richard II and his bishops demanding that they suppress 'the crafty and daring sect who call themselves the poor men of Christ's treasury and of his apostles'.⁶² The Conclusions were followed, probably in 1410, by a comprehensive bill for the disendowment of the Church, and the reallocation of its resources to the laity, from the king down to the beggars.⁶³

The theory of dominion used by ecclesiastical writers, whether in support of the papacy, like Giles of Rome, or the king, like Wyclif, was ultimately dependent upon the lordship of God. Pope or king administered God's property as stewards, and Christian subjects held property from the steward. Since no one had strictly 'private' rights to dominion over property, the conflict between divine-natural and human law simply did not arise.

A SECULAR SOLUTION

In practice, there was a period in England, before the twelfth century, when the tension between the two laws did not arise, because there was no private ownership. Land was said to be held 'of' or 'from' a superior lord under certain conditions. It was only during the twelfth century that this started to change, and in practice, if not in strict theory, something like private ownership emerged.

In late Anglo-Saxon England aristocrats – earls or thegns – held land from the king in return for certain services, especially military ones. Less powerful aristocrats and freeman could enter into any one of a variety of dependent relationships with a lord, or perhaps more than one lord, a feature which has been termed 'serial lordship'. The lord might offer protection, both legal and physical, and exercise judicial rights over his dependant. Where land was involved, which it was not always, it might be held of the lord in return for services or rent rendered in kind, in money, or in labour.⁶⁴ No one actually owned land outright. The Norman Conquest resulted in a radical redistribution of land to William's followers, who also occupied it conditionally and not in full ownership under a system known

⁶¹ *EHD* 4, no. 502, p. 848. ⁶² Workman, *John Wyclif*, 2, p. 400.

⁶³ Anne Hudson, *The Premature Reformation* (Oxford, 1988), pp. 114–16; 334–44, esp. 339–40; Margaret Aston, "'Caim's Castles": poverty, politics, and disendowment', in Aston, *Faith and Fire: Popular and Unpopular Religion 1350–1600* (London and Rio Grande, 1993), pp. 95–131, esp. pp. 111–13.

⁶⁴ Robin Fleming, *Kings and Lords in Conquest England* (Cambridge, 1991), pp. 126–7. For further description of lordship and land tenure on the eve of the Conquest, see Ann Williams, *The English and the Norman Conquest* (Woodbridge, 1995), pp. 73–6, 191–2.

as feudal tenure.⁶⁵ The main features of this were vassalage and the fief, and both seem to have emerged more clearly in England than in France, where royal control was less centralized. Vassalage was the relationship between a freeman, the vassal, and his lord, which was sealed by an oath of fidelity. The lord offered protection and maintenance, and often the grant of a unit of land known as a fief, in return for service, largely military. The king's immediate tenants, his tenants-in-chief, endowed their own followers with portions of that land on similar terms, and these in their turn might also grant it to lesser men, thus making the lordship chain very complicated. At the base of society peasants held parcels of land from the lord of the manor in return for payment in kind and for labour services performed on the lord's demesne land, his home farm. The manor was not only the lord's house or hall at the centre of the estate, but also the smallest economic and social unit in the landholding chain and a unit of lordly jurisdiction. The existence of the manor pre-dated the Conquest, but increasingly it became assimilated with the system of feudal tenure, the ideas and language of which came to be applied at manorial level.⁶⁶

The main division of the peasant tenants of the manor was into those who were free and those who were servile, known as villeins. The villeins were dependent and of low status, but were not legally defined as unfree and of servile status until the late twelfth century. The villein came to be regarded as no more than his lord's chattel, tied to both lord and landholding, bound to perform labour services on the lord's demesne, owning nothing himself, and ultimately himself saleable, usually with the land he occupied. His only recourse to justice was to that of his lord's court.⁶⁷ The lord was sovereign over his villeins, and his authority was the direct result of his dominion over land.

It is less clear how sovereign he was over his free tenants. The free tenants held their land in return for fixed charges and minimal services. They owned their goods and their labour and they had freedom of movement. The lord would have his own seigneurial court, to which the tenants, both free and unfree, were answerable, but the extent to which the king could and did intervene to protect free tenants is a matter of controversy. It is

⁶⁵ See E. A. R. Brown, 'The tyranny of a construct: feudalism and historians of medieval Europe', *American Historical Review*, 79 (1974), pp. 1063–88; Susan Reynolds, *Fiefs and Vassals: the Medieval Evidence Reinterpreted* (Oxford, 1994). For reviews of Reynolds's book, summarizing some aspects of the controversy see Frederick L. Cheyette in *Speculum*, 71 (1996), pp. 998–1006; Paul R. Hyams, 'The end of feudalism?', *Journal of Interdisciplinary History*, 27 (1996–7), pp. 655–62.

⁶⁶ See Rosamond Faith, *The English Peasantry and the Growth of Lordship* (Leicester, 1997), pp. 220–3, 255, on this assimilation.

⁶⁷ Paul R. Hyams, *King, Lords, and Peasants in Medieval England: the Common Law of Villeinage in the Twelfth and Thirteenth Centuries* (Oxford, 1980), pp. 3–65.

an aspect of the wider disagreement surrounding the 'birth of the English Common Law', a fixed body of law administered by the king's courts. Did it evolve gradually, building on pre-Conquest precedent,⁶⁸ or was it the deliberate creation of Henry II, or even Henry III or Edward I?⁶⁹ Most historians now attribute its beginnings to the introduction of property measures by Henry II, in particular the writ of right and the assizes of *novel disseisin* and *mort d'ancestor*. The effect of these was to diminish seignorial jurisdiction over free men by making royal justice available to them in property litigation. The treatise on the English common law known as Glanvill, attributed to Ranulf de Glanvill (d. 1190), Henry II's Chief Justice, stated that no action could be brought against a free tenant by his lord in connection with the tenement unless the lord had a writ from the king or his justices.⁷⁰ Whether Henry really intended to undermine lordly jurisdiction or simply to develop it by making it more formal and bureaucratic is open to question.⁷¹

Whatever the intention, the effects on the concept of private ownership were profound. Feudal tenure has been described as the 'antithesis of private ownership'.⁷² A tenant could not sell his holding without the consent of his lord, he could not leave it by will, nor did his family have any legal right to succeed to it. All that he had was 'seisin', or possession. The lord had lordship, or dominion, but unless he was the king, he was himself a tenant. The advent of the common law gave free tenants access to the royal courts and enabled them to assert hereditary claims to land if these had not been honoured and to recover land of which they had been unjustly dispossessed. This loss of lordly authority, and at the end of the period the substitution of the cash nexus for the personal bond of mutual contract and loyalty between lord and man, led to a distancing in the relationship between them. The law came to recognize that the tenant who had the immediate possession and use of land had 'dominion

⁶⁸ See, for example, J. H. Baker, *An Introduction to English Legal History*, 3rd edn (London, 1990), pp. 10–16; Paul Brand, 'The origins of English land law: Milsom and after', in *The Making of the Common Law* (London, 1992), p. 219, criticizing the views of S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge, 1976).

⁶⁹ Brand, 'Multis vigiliis excogitam et inventam': Henry II and the creation of the English Common Law', in *Common Law*, pp. 77–102.

⁷⁰ Glanvill, *The Treatise on the Laws and Customs of the Realm of England commonly called Glanvill*, ed. and trans. G. D. H. Hall, Oxford Medieval Texts (Oxford, 1993), xii, 2, p. 137.

⁷¹ Reynolds, *Fiefs and Vassals*, p. 379, considers that the new writs encouraged the development of seignorial courts, against Milsom, *Legal Framework*, p. 36, who considers that the erosion of seignorial jurisdiction was a 'juristic accident'. Brand, 'The origins of English land law', pp. 214–19, thinks that Henry II deliberately tried to enhance his own prestige and authority against the barons. See also Coleman, 'Property and poverty', esp. pp. 615–16.

⁷² Baker, *English Legal History*, p. 262.

of use', as opposed to the ultimate and often distant dominion of the lord. Such a situation reflected the division of *dominium* arrived at by the Roman jurists in the thirteenth century – *dominium directum*, the lord's ultimate legal ownership of the land, and *dominium utilis*, the dominion of use of the tenant, which involved the right to 'use, have, and enjoy'. The lord's dominion was in practice reduced to no more than an economic right to exact dues. The tenant had become virtually a private owner: land in effect became freehold, and therefore saleable, and could be willed to heirs.

The villeins' position changed too, though more slowly. In addition to the commutation of labour services for money payments, a peasant land-market developed from the thirteenth century, which enabled villeins to buy and sell with the licence of the manorial court.⁷³ The richer ones could start to consolidate their arable holdings. In Warwickshire, Dyer has found examples of post-Black Death enclosure, where villeins started to enclose land for their own exclusive use.⁷⁴ The economic changes and social mobility of the fourteenth and fifteenth centuries led to a change in the concept of villeinage. As former villein lands were often let to substantial free tenants, villeinage became a matter of birth and personal status rather than landholding. Manorial tenants were increasingly given protection by copyhold tenure, by which they were given a copy of the entry in the manorial court roll which recorded their admission to the tenement. They may not have had the full protection of the common law, but they were moving towards it.

The growth of what amounted to private ownership, starting in the reign of Henry II, meant that the 'secular solution' of feudal tenure no longer applied. The problem of reconciling what amounted to private possession with what was demanded by divine-natural law had returned. One answer, at least in England, lay in property taxation.

TAXATION

The development of private property and national taxation in England are closely linked, if only because taxation was levied on property, whether land, movables, or income. Both were indicative of the gradual transition from a society dominated by feudal tenure to a national sovereign state ruled by king and Parliament. As part of this transition, customary feudal dues were gradually replaced by national levies.

⁷³ For discussion on aspects of this see P. D. A. Harvey, ed., *The Peasant Land Market in Medieval England* (Oxford, 1984).

⁷⁴ Christopher Dyer, *Warwickshire Farming, c. 1349–1530: Preparations for Agricultural Revolution*, Dugdale Society Occasional Papers, 27 (Oxford, 1981), pp. 7, 25–7.