Anglo-Saxon Culture's Contribution to Britain's Constitutionalism

By

YUSI CHEN

Research Fellow

One Belt One Road Research Institute,

Chu Hai College of Higher Education

Abstract

Britain's constitutionalism is the natural result of her distinct constitutional culture. The origin of this culture rooted in one of the basic assumptions of Anglo-Saxons, or of Germanic nations, that all public rights and duties are derived from land possession. Land possession was thus the symbol that distinguished free and unfree, with freemen entitled to be self-government, to be protected by customary law, and to attend the local courts. Holding and attending local courts by freemen was another important Germanic tradition. The limited kingship was the consensus by the early English society, for it was on the one hand limited by local court which governed almost all the local affairs towards people's common lives, and on the other hand restricted by customary law and Roman church. This limited kingship set the pattern for the future constitutional monarchy.

The land possession was gradually evolving into the feudal land tenure with the course of feudalization in England, which differentiated the British social classes into two groups: the one with political rights and the other without. Parliament is the result of land tenure, with House of Lords the great landowners, and House of Commons the 'petty bourgeoisie'. The paper would further argue that feudalism and anti-feudalism played important roles in shaping these two chambers respectively. The legal tradition of Anglo-Saxons revolved basically around people's right and duty in the land and tended to protect landed property and rights. And when that right was injured, there was a quantified compensation scheme making people fully aware of their individual right. The common law legal system which draws its legal sources largely from the Anglo-Saxon legal traditions therefore acts as the bulwark protecting individual rights since the rights and duties of different social classes are engraved in it.

Britan’s constitutionalism is therefore the art of check and balance, a moderate political system between absolutism and republicanism, with different social powers correlative dependent but mutually restricted at the same time. Because the rights and duties of each social class are there, if anyone claims more rights from the others, he needs to seek for consent.

Keywords

Anglo-Saxon culture, constitutionalism, land possession, feudalism

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I. Introduction

People may ironically find that Britain, as the forerunner of the world's constitutional state, has no written constitution, nor even sort of code of constitutional law. As the Cambridge Historian Maitland points that, the term 'constitutional law' has never been used in the statute book nor been defined by any judge in England (Maitland, 1908). Then why we still recognize Britain as constitutional? What does Anglo-Saxon culture matter with it?

To figure out these issues, we may firstly refer to the concept of constitutionalism. According to Canadian philosopher Waluchow, constitutionalism denotes the idea that "government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations" (Waluchow, 2001). Since constitutionalism is associated with power limitation, is it necessary for these limitations to be written laws?

Many scholars hold that constitutionalism could be subject to unwritten constitution. Besides the real case of the United Kingdom, the argument of them is obvious: most of the states have written constitutions. However, possessing a written constitution does not necessarily guarantee a state to commit itself to certain constitutional conducts.

Dicey elaborates this issue by raising the distinction between the "law of the constitution" and the "conventions of the constitution". The former refers to "rules enforced or recognized by the Courts", whereas the latter is about "customs, practices,

maxims, or precepts which are not enforced or recognized by the Courts" but "make up a body not of laws, but of constitutional or political ethics" (1914). Mainland also presents that in Britain there are many rules dealing with public affair which are not rule of law, but "rules which are sometimes called rules of constitutional morality, or constitutional practice, the customs of the constitution, the conventions of the constitution, or again constitutional understandings" (Maitland, 1908, P527). If one man broke these rules, he would not be punished by the court. But still he has broken the rules which are embraced and kept by people not to be broken.

At first glance, people may think that unwritten rules are vague and easier to be changed or interpretated than that of written laws. However, as Waluchow argues, "long standing social rules and conventions are often clear and precise, as well as more rigid and entrenched than written ones, if only because their elimination, alteration or re-interpretation typically requires widespread changes in traditional attitudes, beliefs and behaviour. And these can be very difficult to bring about" (2001).

This is the power of the culture. Britain is a constitutional country not because she possesses a written constitution, nor a series of constitutional law codes, but because of her constitutional culture.

Edgar Schein is brilliant for his culture theory. Although he mainly focuses on organizational culture studies, his culture model can be widely applied to other fields as well. According to Schein's model, culture contains three layers, namely artefacts, espoused belief and values, and basic assumptions (1997). Culture is like an iceberg (Hodges, 2016). We can see only part of it, which is above the water. Artefacts belong to this visible part. They are the visible language, behaviour and material symbols, which is tangible. We may regard British Parliament as artefact, a symbol of Britain's

constitutionalism. Espoused belief and values are the shared principle and rules that govern the attitudes and behaviours of the people, making some modes of conduct more socially and personally accepted than others. In this sense, Britain's constitutional rules could be put into this middle layer. Then, the downmost layer, the layer submerged into water, which is non-tangible and invisible, is the basic assumptions. According to Schein, they are "taken-for granted beliefs". Basic assumptions formulate values shared by a certain community, and guide how people in that community interact with one another.

Therefore, if we want to know what the Britain's constitutional culture is and why it leads to Britain's constitutionalism, we need to dig into Britain's constitutional history deeply to find out that "constitutional gene", the "basic assumptions" of the nation. And that "gene" is buried in the core and origin of the nation—the Anglo-Saxon culture.

Before conquering tribes' occupation, Britain was one of Roman's provinces called Britannia. As a remote colony at the periphery of western Christendom, Britannia was far less important to Roman even before the Empire was beset by Germanic tribes. The governance of Roman towards Britannia rested with military control rather than cultural administration (Thomas, 1984). This situation went worse when the Roman legions withdrew Britannia to rescue their continental motherland during the fifth century, leaving Britannia totally vulnerable against barbaric invaders. As Historian Stenton indicates that, "Britain was lost to the Roman Empire, and its fortunes were of little interest to men whose own civilization was at stake" (1971, P1).

This may explain why the Anglo-Saxons could eliminate what before them and overwhelmingly built their own kingdoms and culture from scratch. As the 'Father of English History', the great Historian Bede wrote in his *Ecclesiastical History of the*

English People in the eighth century that, after the invasion, "little or no trace of any preceding British culture remained. The British, or Brythonic, language and Romano-Christian religion disappeared. So-called Romano British villas and towns fell into decay or were burned" (Jenkins, 2011, P12). Other scholars hold similar opinions. Whitelock argues that there is "little indication that the invaders' civilization was affected to any appreciable extent by the outlook and institutions of the pre-English inhabitants" (1952, P18). Besides the relatively weak Celtic culture mixed with marginal Roman influence, the Anglo-Saxons are "barbarian from outside the (Roman) Empire who achieved political mastery proved unreceptive to or even completely untouched by the inner motive forces of Rome and of the Christian faith which Rome had adopted late in its western imperial life" (Lyon, 1984, p1). They are purely Germanic nations with distinct Germanic culture, social order, and legal tradition. As Stenton indicates, "throughout England the essential fabric of social order, the fundamental technicalities of law, and the organization by which they were administered, are all of obvious Germanic origin" (1971, p315). It is upon on this distinct Germanic culture that Anglo-Saxon kingdoms were built.

Therefore, it is the aim of this paper to elaborate the culture of these specific branches of Germans, and to find out the "basic assumptions" of the nations that contributed to Britain's constitutionalism.

If we use a hindsight view, Britain from the fifth century was on a path distinct from that in the Continental Europe, where regime changed and power was extremely dispersed among a great number of feudal lordly domains, leaving the new state-formers a very difficult landscape to cope with. In Britain, on the contrary, several Germanic tribes constituted mainly by free peasants and tribe leaders were expanding, fighting, and merging on a relatively 'virgin land', with much less hinders from local

entrenched power. These newcomers lived a life of self-government and brought their own distinct cultural traditions and local institutions to England which were extremely crucial for the future constitutional development. As indicated by Creighton, "the invaders were free to develop their own ideas of government with all the vigor and energy of a young people, and to this the peculiar character of our English constitution is largely due" (1884, P2).

The invaders, according to Bede, included Angles, Saxons, and Jutes, the so-called Anglo-Saxons. Angles came from the 'angle' of Germany in Schleswig Holstein. They built their kingdom known as East Anglia in the east England during the seventh century. Saxons came from the north Germany and settled in the south England and part of the Thames basin and estuary, building three kingdoms known as Wessex, Sussex, and Essex. Jutes are distinct with Angles and Saxons (the latter two nations bear similar culture and customs). According to Stenton, they lived in or on the fringe of the Frankish territory for some time before migrating to Britain (1971). They formed a kingdom known as Kent with thus obvious Frankish character, contrasting with Saxon and Anglian culture in laws and in many other social institutions. Besides the nations, this term also implies language. Weigall indicates that the Anglo-Saxon means a combination of the dialects of the Saxon language spoken in Lowlands, as distinct from the German (High German) and Old Saxon language spoken on the Continent (1925). Anyway, they are the leading actors of this paper. And I am going to elaborate and summarize the Anglo-Saxon culture's contributions to Britain's constitutionalism from four aspects, namely: counsel and consent, feudalism, legal traditions, and common law in the following chapters.

II. Literature Review

2.1 Introduction

Britain's constitutionalism is an evolutionary process, rather than an ambitious project designed by Lords or Commons from the Middle Ages. In order to know how it evolves to where it is today, we need to trace back to the beginning of the nation.

There is scarce literature that directly summarizes the connections of the Anglo-Saxon culture to today's constitutionalism. Most of the studies of the mediaeval England or the British constitutional history were written in a chronological way. The classic includes but not rests with those of William Stubbs, the English Historian and Anglican Bishop, his '*The constitutional History of England', Anglo-Saxon England* by Sir Frank Merry Stenton, the leading British Historian specialized in Anglo-Saxon history, and *The Constitutional History of England* by Frederic William Maitland, 'the modern father of English legal history'. Although these scholars did not devote themselves to looking for the connections of the nation's past to today's institution and system, which is not the focus of them, they provided us with so many details from which many points could be further studied and concluded. Besides, there do exist many clues and evidence scattered in those historical materials. They are like the gold in the desert, waiting to be discovered and collected.

However, there are certain institutions and traditions belonged to the Anglo-Saxons' which have been recognized by some scholars as laid the foundation for the future constitutional development. Therefore, in this chapter, I am trying to review and

summarize these existing mainstream ideas and knowledges towards this culture's specific contributions to Britain's constitutionalism.

2.2 Self-government

According to the great Roman Historians Tacitus, the forefather of the English nation, those Germanic tribes already cherished the principle of 'self-government' before they migrated to England. Tacitus described a scene where those tribes lived a life in kindred group, engaged in agriculture, managed their own affairs, and only to settle more important or common issues, did these freemen meet together on a fixed time period basis. Many scholars accepted Tacitus' argument. Jenkins renamed this tradition as "Saxon autonomy of 'kith and kin'" (2011, p8). Creighton further reinforced that 'self-government' is a typical feature of British institutions (1884).

Self-government implies a social status of autonomy, decentralization, and discretion upon one's own life rather than compliance, which is, in a sense, crucial for constitutionalism. Self-government also indicates a flat social structure, where people are more or less equal. It seems very possibly that the Anglo-Saxons' local courts, the shire-moot and hundred-moot, were derived from and represented the ideology of self-government. As the English leading Historian, the Bishop Stubbs indicates, "judicature is among the Anglo-Saxons purely a matter of local or self-government" (1906, p243). Stenton expressed similar view by raising that the judgements given by these local courts came from the freemen who learned the legal traditions. These freemen "might be guided but could never be controlled by the intervention of the king's reeve, their president" (1971, p299). It can further be convinced by Creighton's conclusion. When the Norman king Henry I sent justice of assize to the country, in order to bring the

county courts under king's jurisdiction, they seated in these old Anglo-Saxon local moots. It is, as Creighton argues, "the old English principle of local self-government was combined with the Norman desire for a strong central government" (1884, p15).

The concept of kingship was vague in a self-government society. According to Stenton, Unlike Gaul, Spain, and Italy, Britain was invaded, not by tribal kings, but by bodies of adventurers, who according to their own traditions were drawn from three distinct Germanic peoples. Most of them came from the remoter parts of the Germanic world, where kingship was less a matter of political authority than of descent from ancient gods" (1971, p37).

The nations bear this attribute will naturally consider freedom as the taken for granted beliefs. Since freedom, independence, and equality are people's normal life, when this status is broken, there will be strong resilience for that imbalance to be recovered. Self-government therefore constitutes one of the important national characteristic contributing to Britain's constitutionalism.

2.3 Shire-moot and Hundred-moot

There are many literatures taking about the shire-moot and hundred-moot, perhaps the most important institutions of the Anglo-Saxon England. Shire and hundred are the administrative units during the Anglo-Saxon period and were kept after the Noman Conquest. Shire is larger unit. According to Loyn, a shire is equal to around 120-hundreds (1984). As for the hundred, Creighton (1884) indicates it was probable a certain portion of land allotted to each hundred warriors. Stenton (1971), on the other

hand, argues that a hundred approximated to one hundred hides for basic administrative purposes, like tax assessment and peace maintenance.

Shire-moot and hundred-moot are local courts, political assembly, and local government as well. In the medieval England, judiciary and administration were usually combined. Shire-moot and hundred-moot tried both civil and criminal suits. They were also the places where the kings sent writs to the localities delivering his will or order. And many transactions like land transfer would also be hold there in order to obtain adequate witnesses (Whitelock, 1952 & Loyn, 1984).

The shire-moot was presided by ealdorman, a secular noble residing in that region, together with a bishop. Because of this exalted official position, ealdorman was regarded as the greatest aristocracy of the shire who received a third part of the profits from doing justice in the shire-moot, the so called 'the third penny' (Stenton, 1971 & Maitland, 1908). And this position tended to be hereditary. After the Norman Conquest, a new officer, sheriff, was appointed by the kings to preside the local shire-moot. The mainly duty of him is to guard the royal interests, and to check the emerging feudal lords in England from occupying important public office and from obtaining too much judicial resources to become too powerful.

Shire-moot and hundred-moot were folk-moot, attended by all the freemen, among which, hundred, or *wapen-take* called in the northern Danish administrative unit, was held once a month, while shire-moot, at a higher level, was held twice in the year (during Easter and Michaelmas). Besides, what need to be mentioned is attending these folk-moots was burdensome obligation rather than political right for the early Englishmen (Maitland, 1908 & Loyn, 1984). It was just gradually that the right to attend and to be represented in these courts became a longing social privilege.

But why did these local courts matter with constitutionalism? In fact, they are the exact places where the precursors of the House of Commons were elected, the knights. As Maitland argues, the retention of the Anglo-Saxon courts based on legal equality is significant to the history of parliament (1908). If we investigate the Britain's constitutional history, we will find that already in the thirteenth century, there were elected representatives to form part of the membership of the Parliament (*Parliamentum*) (Stubbs, 1875 & Maitland, 1908). They were primarily knights elected in the shire-moot or county court (shire-moot became county court after the Norman Conquest). Although for the exact means of election we barely know from historical materials, besides Maitland's account that the sheriff may exert some influence towards the election. The significance of this practice is obvious-- the locality was for the first time represented by these country gentlemen in the national assembly. Before that, only the tenants in chief of the king were summoned to the national council.

During the last stage of the Anglo-Saxon period, the feudal courts were emerging with the course of feudalization. They took away much of the jurisdictions from the ancient local courts because under the feudal principle, a tenant was required to attend the court held by his lord. And after the Norman Conquest, shire-moot and hundred-moot were becoming even less important in terms of judicial tribunals, they could only deal with petty civil cases involving claims no more than forty shillings, as judicial power was more and more concentrated to the king' courts. With the fallen function of local shire moot and hundred moot was the lowered power of the sheriffs. According to Maitland:

"A very noticeable feature in English history is the decline and fall of the sheriff, a decline and fall which goes on continuously for centuries. In the 12th century he is little less than a provincial viceroy. All the affairs of the county: justice, police, fiscal matters,

military matters, are under his control. Gradually he loses power. As to justice: first the king's itinerant judges, then the justice of peace deprives him of judicial work: his county court becomes a court for petty debts. The control over the constabulary has slowly slipped from his fingers and is grasped by the JP. He is even losing his powers as a tax collector; parliament makes other provisions for this matter. Lastly, he is no longer head of the county force. Under the Tudors the practice begins of appointing a permanent Lord-Lieutenant to command the military force, the militia of the shire. But the sheriff is responsible for his conduct and must pay for his mistakes. As he falls lower and lower in real power, his ceremonial dignity retains. He is the greatest man in the county and should go to dinner before the Lord-Lieutenant" (1908, P233).

However, with the declining importance of the local courts in other functions, their political significance was raising. They became the political base camp where the local representatives were elected. As Maitland indicates, "as a political assembly the county court is still of first-rate importance, it is this that is represented in parliament by the knights of the shire. The memory of this association survived all the changes of the Conqueror's reign." (1908, p132).

2.4 The Witenagemot

Witenagemot, or witan, is a political institution of Anglo-Saxon England where many controversies existed. Sometimes, it is generally regarded as the rudiment of the British Parliament. However, different with Parliament as representing all the British people, witan is definitely not a folk-moot. Rather, it is a royal council, the meeting of the wise (Creighton, 1889 & Maitland, 1908 & Loyn, 1984). In fact, witan is an assembly of nobility, ecclesiastical and secular in composition. Besides the kings and the royal

family, it was made up by archbishops, bishops, abbots, ealdormen, *gesiths*, and thegns, the most powerful and wealthy figures in the realm. Its main function is to advise the kings in terms of national importance.

Besides its certain consultative nature, it seems that the witan lacked determinate composition and fixed periodicity. The kings decided when and where this assembly meet (Chadwick, 1905 & Liebermann, 1961). Moreover, because the witan could neither legislate like the modern Parliament nor could prevent a mighty king from doing what he wanted, some scholars considered it as less important in terms of constitutionalism. As Loyn argues, "the essence of the witan's work was deliberative and consultative, and in the field of constitutional development and executive government its part was relatively small" (1984, p105).

However, Loyn may neglect witan's significance towards power relations in a still inchoate age. Even though witan was consultative and blue-blooded in nature, it could still be seen as an evidence that the Anglo-Saxon kings already recognized a kind of reciprocal power relations between the kings and their tenants in chief in the state building process. As Stenton indicates, "the effective use of the king's power depended on the co-operation, not only of earls and bishops, but of the wealthy, unofficial aristocracy which led opinion in the shires" (1971, p550). In this reciprocal power relations, besides granting lands to his warlords in reward of their military support in war, the king recognized and respected their rising political position and rights by summoning them to his council. In return, these lords swore fealty for the king, fight for him and assisted him in the daily operation of the kingdom, like legal implementation and peace maintenance. In this sense, witan could be seen as a political integration machinery for the kings to absorb as much as political energy, to learn the local opinions towards royal policy, and to take precautions against local betrayal. From

Whitelock's account it is impressive to learn that the king called together his great vassals from national-wide. The recurrent witan of Æthelstan (924 to 927) included "Celtic princes, Danish earls, and the thegns and ealdormen of all England" (1930, p351-2).

Moreover, during the consultative process of witan, the king was essentially not ruling alone, nor ruling in an absolutist way. Rather, his behavior was bound to these wise men's opinions and interests. As argued by Stenton, "historically, the *witena gemot* is important because it kept alive the principle that the king must govern under advice. The existence of the council made it impossible for any king to rule as an autocrat…. it gave the character of a constitutional monarchy to the Old English state" (1971, p554).

Besides, witan could elect kings from royal families, and even depose unpopular kings (Chadwick *et al*. 1905). Although the so-called election may rest with taking initiative in selection of the successor or formal recognition of the heir only, and there were probably only two cases of deposition during the Anglo-Saxon period (Sigeberht of Wessex and Alhred of Northumbria respectively), it could not ignore witan's great influence towards Anglo-Saxon kingship.

Witan did bear its limitations in certain. Because the number of king's tenants in chief was too large, it depended on king's will to decide whom he would like to summon to the witan, and whom he would like to take their counsel. There was no institution for the representation of king's tenants in chief.

Witan was developed into the Great Council after the Norman Conquest (Creighton, 1884 & Stenton, 1971). Although they are equivalent for the term Great Council only

included tenants in chief of the king at the beginning, huge progress was made already in the early thirteenth century. According to Mainland:

"On 7 Nov. 1213, John had summoned to a council at Oxford, four lawful men of every shire, *ad loquendum nobiscum de negotiis regni nostri*. These are the first recorded examples of the appearance of local representatives in the national assembly. Eighty years were yet to pass however before a representation of the commons or the communities of the realm would become for good and all a constituent element of that great council of the realm which had meanwhile gotten the name a *Parliamentum*" (1908, P68).

Witenagemot in Anglo-Saxon England, or the Great Council in later days was not the Parliament, but the predecessor of the modern House of Lords of the Parliament.

2.5 Conclusion

In this chapter, the paper tried to review and summarize the existing knowledge and ideas towards the certain aspects of Anglo-Saxon culture which more or less contributed to the Britain's constitutional development in the later days.

The ideology of self-government set an independent, autonomous, and freedom-loving national character for the British people. The territorially based representatives elected from the shire moot were people in this kind and with great local loyalty. They would become the backbone force to guard the local interest against the royal encroachment. Besides the constitutional aspect, the spirit of self-government may be embodied in the

later centuries when the Tudor king broke with the Roman Church and even of the Brixit.

The Anglo-Saxon institutions of shire-moot and hundred-moot laid the foundation for the Britain's constitutionalism not only because they served as ancient popular assemblies which acquainted English people traditionally with public debate and political life, but also for their cultivation of local territorially based elites to the national assembly—the future parliament. Even the new Noman rulers recognized their merits in managing local business well and in checking the emerging feudal lords, retaining and utilizing them by inserting royal officers in them. As indicated by Stenton, "it was the outstanding merit of this aristocracy that it set itself to use the institutions which it found in England. The chief administrative divisions of the country—shires, hundreds, and wapentakes—were accepted as a matter of course by its new lords…. The framework of the Old English state survived the Conquest" (1971, p683).

Although the primary function of *Witenagemot*, or witan, is to advise the kings, without any legal means to check king's power, especially a strong one, still it was a symbol of recognition by the king towards these magnets' rights and political status, because they would on the one hand exert great influence over their territories and could on the other hand provide kings with aids, armies, and information which he could acquire from nowhere else. Witan was certainly a proper opportunity for the king to draw these men over his side, to secure their allegiance and input. Moreover, the constitutional significance of witan is that it was impossible for a king to rule at his will. He must rule with counsel and consent of his witan. As Stenton indicated, "in late Old English history there are a number of periods during which the government of England must have rested with the council" (1971, p554). To call over the magnates in the country to discuss

national importance had been the necessary procedure or rite for the English kings to proclaim laws or to launch a war.

Distinct with king's permanent council (*concilium Regis*) which mainly included official members of the kings, witan or subsequent Great Council (concilium regni) were national assemblies, attended by both official and unofficial members. It is this diverse nature of the witan that was significant to constitutionalism. This is because unofficial members tended to be more independently to express their suggestions and dissatisfactions and were more willing to oppose royal will than official members, who owed the positions from the king and whose interests were more or less same with that of the kings. By contrast, unofficial members came from national wide, whose interests varied. As Stenton argues "it is the range of their interests rather than their composition which entitles them to be regarded as national assemblies" (1971, p551). The national assembly composed of these nobilities, secular and ecclesiastical, were the precursors of the House of Lords in the modern Parliament.

Self-government, local courts (shire-moot and hundred moot), and national assembly (witan) are the typical Anglo-Saxon institutions which, especially the latter two areas, have been studied by most of the scholars in the fields of medieval England or constitutional history of Britain.

However, if use Schein's culture model, local courts and witan should belong to the surface layer of Anglo-Saxon culture—the artefacts. They did bear some constitutional functions, and they did play those functions in leading the country to the right direction. However, they are not the fundamental force or reason in shaping a constitutional regime. We still need to find the espoused belief and values, and basic assumptions of Anglo-Saxon culture which connected the nation's past to today's system.

III. Finding and Analysis

3.1 Introduction

In the literature review chapter, the paper reviewed and analysed the existing studies towards the Anglo-Saxon culture and summarized three mainstream institutions or traditions which are explicit and could be said directly contributing to the Britain's constitutionalism. In this chapter, the paper is going to present the author's own finding and analysis towards the espoused belief and values, and basic assumptions of Anglo-Saxon culture from historical materials of both Anglo-Saxon period and medieval England. I am going to elaborate them from four aspects, namely counsel and consent, feudalism, legal traditions, and common law.

Britain is a constitutional country because of her constitutional culture, which, according to Maitland, further includes constitutional morality, constitutional practice, constitutional customs, constitutional conventions, or constitutional understandings (1908). In this chapter, I am firstly going to elaborate one of the constitutional practice or constitutional conventions: counsel and consent. I would argue that the British Parliament already existed in the late thirteenth century was based on the ideology of counsel and consent, to take the counsel of 'the wise': the fighting warlords, the highest prelates and the richest earls, and to obtain the consent of the commons: the knights, the forty shillings freeholders, and finally, the people. As for the reason why did the Anglo-Saxon kings rule by counsel and consent, it may be explained by a distinct Germanic tradition of 'good-lordship'. Therefore, 'counsel and consent' and 'good-lordship', in my opinion, are some very important espoused beliefs and values of the Anglo-Saxon culture which contributed to Britain's constitutionalism.

Next, I am going to trace the feudal process of Britain. One of the basic assumptions of the Anglo-Saxon's culture which leads the country towards a constitutional one, I would argue, is that all public rights and duties are derived from land possession. Therefore, with the course of feudalization coupled with other stimulating factors like warfare, the changing status of land possession was gradually creating two groups of people, with one group the great landowners, the other group small landholders basically serving in knight tenure. With different level of land possession, these people were qualified to enjoy relevant political rights (and to fulfill relevant duties as well). They were the forerunners of the future House of Lords and House of Commons respectively.

Like what happened in the European continent, Britain was also experiencing feudalism long before the Norman Conquest. It began when the warlords were grant more and more land in reward for their military service by the kings during the period of struggling for over-lordship in the seventh century. With their rising amount of land possession, their political rights were raising at the same time. The king began to summon them to his own council—the witan. These warlords, together with high prelates, constituted the precursors of the modern House of Lords.

The creation of House of Common, on the other hand, was a far more winding process. But this process was also along with the transition of land possession situation. At the dawn of Anglo-Saxons' massive migration in the fifth and sixth century, all the freemen possessed their shares in land. They enjoyed many rights out of this foundation, like court attendance to debate issues regarding their common lives and to give their judicial judgements based on customary law and tradition. They were independent, subject to no lords but remote king. However, with more and more land concentrated to the lords'

hands, these freemen were gradually losing much of their independence and were required to work in the lord's land. Instead of suing at the local folk moot, they were required to go to the feudal manorial court held by their lords. This feudalization process, especially the privatization of jurisdiction out of feudalization climbed to its climax on the eve of the Norman Conquest. However, thanks to the Norman conquerors who braked this dangerous process of English feudalism, the ancient local courts were retained and used as the mainstay in checking the emerging feudal lords with mixed Anglo-Norman lineage. Moreover, these local courts became the base camp where the future 'commons', the knights, were elected to treat with taxes as the independent stakeholders when the king was lacking money for wars. Based on the assumption that public rights were derived from land possession, I would argue that the feudalism created the House of Lords, whereas the anti-feudalism accomplished the House of Commons. This distinct two-chamber parliamentary system largely put an end to the absolutist monarchy in the British history.

In the following section, I am going to elaborate the positive contributions of Anglo-Saxon's legal tradition to the Britain's constitutionalism through three aspects: the protection of landed right, quantification of individual right, and the practice of the rule of law.

Britain's constitutionalism is the result of land tenure. It was the great landowners, the warlords and high prelates who formed the House of lords in the first place. Thereafter, the knights serving in military tenure together with inferior prelates were made up of the House of Commons. Therefore, at least two questions seem very crucial during this dual- evolutionary process: firstly, who were those original members in the Parliament? And secondly, who were qualified to elect those representatives to the House of Commons? The answer of both two questions can be found in the history, which

indicates a group of people who shared one common characteristic—they are the freeholder. And the legal tradition of the Anglo-Saxons from the beginning protected the people with freehold land and relevant landed right arising from land possession.

The second aspect of the section of legal tradition deals with one of the most important concepts of constitutionalism—individual right. The quantification of individual right denotes the sophisticate system of wergild and weight of oath in the Anglo-Saxon legal tradition. Because personal right is clearly priced, it is more difficult to muddle through if that right is impaired. Moreover, people were fully aware of their individual rights from the beginning, making them more willingly defend that right and give a veto when unreasonable claims were raised by the people in power.

The last aspect I am going to elaborate of the Anglo-Saxon legal tradition is about the rule of law. The principle of the rule of law is usually associated with constitutionalism. It is fortunately that most of the Anglo-Saxon kings put themselves below the law. However, how much distance is it from the purely moral constraint to the legal restriction, and what is the connection between the Anglo-Saxon kings' self-discipline and the very letters of the law? Full details and explanation will be given in the later chapter.

The last section of finding chapter is about common law. The distinct common law legal system originated in Britain is generally regarded as the fortress against absolutism. This may be explained that the common law, as contrasting with civil law or Roman law legal system, was not ordered or issued by the kings or emperors for the public good in the first place. Rather, it is a traditional law based on Germanic customary law, obeyed and practiced by people and kings alike. It profoundly shifts the authority in making laws from the kings' legislative power to the judge's interpretation

towards law, therefore the mechanism of common law legal system limits the royal power. Moreover, the legal sources of common law came from Anglo-Saxon. The Germanic tradition of landed rights and duties were preserved by Anglo-Saxons and these specific rights were engraved in the common law making it more difficult for encroachment.

3.2 Counsel and Consent

As Jenkins argues, “England was a nation forged between the hammer of kingship and the anvil of popular consent” (2012, p8).

From historical materials, we could see many occasions when the Anglo-Saxon kings proclaimed law or grant lands with the counsel and consent of his council, the witan. King Ine (King of Wessex from 689 to 726) published a series of law in around 690, with the counsel and consent of his wisemen for the salvation of people’s souls and the kingdom (Attenborough, 1922 & Maitland, 1908 & Loyn, 1971). In a charter issued by King Æthelwulf (King of Wessex from 839 to 858) in the year of 855, it states “with the advice and permission of his bishops and nobles” the king granted twenty hides to himself so as to leave it to whomever he wishes in the future (Stenton, 1971, p). When the king Alfred compiled a series of legal codes based on the Saxon precedents and those law codes of Æthelberht of Kent, Ine of Wessex, and Offa of Mercia, he approved “those laws which our forefathers observed which I liked…many which I did not like I rejected with the advice of my councilors” (Jenkins, 2012, p27). In another charter King Edgar (Anglo-Saxon King of England from 959 to 975) grant ten hides to his loyal vassal Ælfwald as an eternal inheritance “with the consent of his advisers Dunstan,

archbishop of Canterbury, six bishops, six abbots, six ealdormen and twelve king's thegns" (Loyn, 1971, P111).

This term appeared so frequently in the official documents of the Anglo-Saxon kings that Maitland argues "no English king takes on himself to legislate without the counsel and consent of his wise men" (1908, p6). Stenton expressed similar ideas that "there are very few matters of importance to the state on which an Anglo-Saxon king cannot be shown to have consulted his council" (1971, p552). The only dispute between these two scholars lies in that Stenton believes that the line between counsel and consent is always blur, whereas Mainland argues that it is the lords' responsibilities to give their counsel, while the knights, citizens and burgesses consent to what have been determined by the high-rise.

Why were the Anglo-Saxon kings so obsessed with counsel and consent? Loyn (1971) argues that the earliest English kings, often the leaders of the tribal groups, had to build their legitimacy to rule on the acquiescence of the free kindreds groups, including their own kindreds and other unrelated kinship groups. Jenkins (2012) held similar view that "the oaths Saxon swore bound them to those whose lineage they shared and with whom they tilled the earth". He further argues that "this contractual 'consent to power', as distinct from ancient British tribalism and Norman ducal authority, was described by later law-givers as habitual 'since time out of mind'. It found its apogee in the representation of leading citizens on the king's *witengemot* or witan, most primitive precursor of parliament. To Victorian romantics all this was a dim Saxon echo of what the Greeks called democracy" (p17).

They were right for the bond between a man and his lord in the early Germanic races was personal rather than tribal. A glamorous lord could attract his men from different

tribes. And when the personal loyalty towards one's lord conflicted with that of one's kindred, the lord was the priority (Whitelock, 1952). Thomas (1985) also points out that "in early Germanic societies, well-born young men would often leave their kindred to join the retinue of a chieftain, forming the nucleus of a war band. Once the kindreds were abandoned, the duty to protect the lord became paramount" (p470).

The bond between a lord and a man was treated as the most sacred relation in the Germanic tradition. While the tradition of counsel and consent, I would argue, probably is in the same strain with another Germanic institution: good lordship.

According to Stenton, "everywhere in the Germanic world the ruler, whether king or chief, was attended by a body-guard of well-born companions. No Germanic institution has a longer history" (1971, p302). These companions, or *gesith*, swore fealty and fought for their lords. Kirby (1967), with similar idea, argues that "the kindred group may be defined as the basic unit of Germanic society, the relationship between lord and man the fundamental bond" (p140). "The strength of the bond between a man and his lord in the Germanic races impressed Tacitus in the first century, causing him to write some famous words that find an echo throughout Anglo-Saxon literature":

"It is a lifelong infamy and reproach to survive the chief and withdraw from the battle. To defend him, to protect him, even to ascribe to his glory their own exploits, is the essence of their sworn allegiance. The chiefs fight for victory, the followers for their chief (Whitelock, 1952, p29)."

The men swear fealty to their lord and fight for their lord. In return, the lord rewards horses, weapons, lands, and protection to his retainers. This reciprocal relation between

a man and his lord is termed ‘good lordship’, one of the most sacred faiths of the early Germanic nations. And the relation between the Anglo-Saxon kings and their warlords was the same type.

Wulfstan, archbishop of York in the late Anglo-Saxon period, who devoted himself to the art of regnal governance, summed up the theory of three pillars upon which the framework of Christian society was built: *oratores*, those who pray; *bellatores*, those who fight; and *laboratories*, those who work. Obviously, the fighting warriors, those great companions of the king in war attributed to this second category: *oratores*, those who pray. Together with the high prelates who pray, those archbishops and bishops, they constituted the tenants in chief of the king, the great nobilities of the kingdom, the core of king’s council. As argued by Stenton, “noblemen under direct allegiance to the king form the one element which runs through every known council between the reign of Hlothhere of Kent and the eve of the Conquest” (pp551).

Therefore, if an Anglo-Saxon king wished to be invincible, he needed to be surrounded by more loyal and capable companions who were willing to fight and even die for him. To achieve this, he needed to be a good lord in the first place. But how to be a good lord? As argued by Loades (1973), “the political life of the country was principally a question of personal relationships between the kings and the most powerful of his subjects…. It is a willingness to acknowledge the special position of those great men who had originally been the monarch’s companions in arms; to arbitrate in their quarrels, to listen to their opinions, to employ (and reward) their services. In turn, these great men raised their powers to aid the king in war, enforced his laws in time of peace, and even acknowledged an obligation to obey those laws themselves” (pp.14). Kelly expressed similar view by raising that the core of the early English political system lay in the “good lordship between the king and the nobility” (1986). Good lordship is but

more than a feudal contract between a lord and his vassal, a pure exchange of resources. It is the willingness of the lord to recognize the rights of his men, and to protect those rights consciously rather than ignoring them or even trampling them in pursuit of his own will (Hyams, 1987).

Therefore, it seems that an Anglo-Saxon king found a way to be a good lord-- to rule with the counsel and consent: to consult his great vassal's opinions before making decisions, and to acquire their consent before moving on. The closer this personal bond between the king and his *gesith*, the easier for the king to conquer and to govern his kingdom.

Coincidently, the merit of counsel and consent was also endorsed by catholic doctrine. Wulfstan suggested that a good king should always consult the wise so as to be subject to the God (ed. Jost, 1959). Lyon (1971), however, argues that Wulfstan's theory came from an earlier source, Coelius Sedulius's, a Christian poet of the fifth century. In his "eight virtues expected in a kingdom ruled strongly by a just king", Sedulius summarized "truth, patience, generosity, correction of evil-doers, fostering of the good, light taxation, equity in judgement, and good counsel" (p87). For the exact connections between the Christian sermon and the old Germanic tradition towards counsel and consent we may barely know. But the significance of this term in the early English society is obvious through evidences not only of secular kings, but also from ecclesiastical church.

Why did counsel and consent matter with constitutionalism? Although it is just an old routine for the Anglo-Saxon kings to consult their wise men before taking real actions, not yet institutionalized and without any legal consequences in case of inobservance, it did embed the idea into the early Englishmen's mind that the king could neither rule

alone, nor to rule recklessly. If his conduct repeatedly hurt his magnates' interests and they lost faith to him, there would be severe prices he had to pay. It was the case when the Magana Carter was forced to sign by John against his barons. In the Clause 12 of charter (1215) it stated that "no scutage or aid (save the three feudal aids) is to be imposed without the counsel of the prelates and tenants in chief", the early version of no tax is levied without the consent of Parliament.

This tradition was so deeply rooted in the Anglo-Saxon culture that the Norman kings preserved and obeyed it until it was evolving into a formal constitutional practice stipulated by the very letter of the law that is still in use. Thanks to the Historian Maitland's chronological account (1907), we can trace the development of the counsel and consent in an intuitive way:

When the Norman king Henry I (1100-35) inherited the throne, in his oath the wording 'common counsel' showed up. According to Maitland, he took "that by the mercy of God and the common counsel of the barons of the whole realm of England I have been crowned king of the same realm.' At the same time, he confirmed the Anglo-Saxon law by "I give you back king Edward's law with those improvements whereby my father improved it by the counsel of his barons." Again, the term 'counsel' was there (p59-60).

During the Henry II' reign (1154-89), the development of common law accelerated. Henry II is a great legislator who centralized the jurisdiction to the royal court. From his day, the importance of the previous local shire moot and hundred moot as local tribunals began to fall (p13). He frequently summoned his council, and legislated "by the counsel and consent of the archbishops, bishops, barons, earls and nobles of England" (p67).

Under Edward I's reign (1272-1307), many improvements were made. The council was swearing to give good counsel to the king (p91). Up to then, "the king could not by himself or by the advice of a few chosen advisers to make general laws for the whole realm seems an admitted principle" (p92).

If counsel and consent in the Anglo-Saxon era was merely a royal routine or moral principle, in the end of thirteenth century, it had already evolved into the legal restraint when it tackled with tax. According to Maitland, "after 1295 the imposition of any direct tax without the common consent of the realm was against the very letter of the law" (p96). These letters were confirmed by Edward I in *Confirmatio Cartarum.* The year 1295 is a significant timing in the British history that the House of Commons could be said was born in this year. According to Stubbs (1875), after 1295 the practice of summoning the representatives of the commons and of the inferior clergy began. It is because of this epoch-making practice, the meeting of Great Council in 1295 is dubbed as the Model Parliament because it set the precedent and pattern for the later Parliaments. The consent of parliament thereafter was more and more close to the popular consent, rather than limited consent of the nobility only. To counsel the wise is a traditional practice, but to obtain the common consent of realm is a significant breakthrough. The old Anglo-Saxon tradition was reforming itself into the modern constitutional practice.

The development was going on. According to Maitland, "in 1297 the principle has been announced that the common consent of the realm is necessary to the imposition of aids, prises, customs: saving the king's right to the ancient aids, prises and customs" (p179).

During Edward III's reign (1327-77), there was already statute (14 Edw. III, stat.2, c. I) in 1340 precisely declares that "the people shall be no more charged or grieved to make any aid or sustain any charge, if it be not by the common consent of the prelates, earls, barons and other great men and commons of the realm and that in the parliament" (p179). A huge progress could be seen from these wording that besides the nobility, it specifically added the "commons of the of the realm and that in the parliament". It is impressing to find that it even distinguished the commons in parliament and those outside it, which implies common people at least those who were entitled to vote. The mandate of the realm is more and more close to the modern idea of mandate of people. As Maitland argues, "on the whole, before the middle of the fourteenth century it was definitely illegal for the king to impose a direct tax without the consent of parliament" (p180).

During the reign of Charles I (1625-49), the procedure of imposing tax was mature. The ancient principle of counsel and consent was finally developed into a Parliamentary formula which is still in use. According to Maitland, the formula works like this: "the commons have granted a tax, and then it is enacted by the king, by and with the advice and consent of the lords spiritual and temporal in parliament assembled and by the authority of the same, that the tax be imposed" (p247).

From the above account and evidence, the ancient practice of ruling with counsel and consent by the Anglo-Saxon kings contributed to one of the most important functions of the parliament—granting tax. As for legislation, of course, the counsel and consent of lords and commons are equally important. However, in this area, it is not until the fifteenth century was the consent of commons becoming more and more popular. Overall, the significance of counsel and consent towards Britain's constitutionalism is that it is the core ideology upon which the parliament was founded. It was traditionally

to rule with the counsel of the wise men, of those fighting lords, and of those praying prelates. They formed the quasi-House of Lords from the beginning. It was for the purpose of tackling with taxation that the knights and inferior prelates were firstly summoned to the national assembly in 1295. To this end, the House of Commons was born. It is upon the ideology of counsel and consent that the distinct two-chamber British parliament was built. In the modern time, the parliament still plays this principle. The government receives counsel of parliament in terms of legal act and public policy and obtains consent from parliament towards financial budget plan. From the counsel of the wise men in the Anglo-Saxon witans, to the consent of the Parliament represented by all the British people, counsel and consent forges this nation into a constitutional monarchy subject to parliamentary democracy.

3.3 Feudalism

Britain was never so feudalized as those countries in the Continent, for example, France. However, feudalism is still an important factor in shaping Britain's constitutionalism. Since parliament was founded upon the ideology of counsel and consent, as discussed in the previous chapter, then how were these two chambers of parliament created? I would argue that we have to owe the assembly of the wise, those fighting lords and high prelates, the future House of Lords to the feudalism, while because this feudalism was checked in many aspects after the Norman Conquest, the House of Common got the chance to be born. During this dual-process, the civil war during the state-building process (firstly the struggling for over-lordship during the seventh century and then fighting with north Wales and Scotland under the reign of Edward I) was the facilitating condition. It may sound weird by saying that feudalism made the House of Lords while anti-feudalism accomplished the House of Commons. But if we associate them with the evolution of land possession statue in the medieval England, it stands to reason.

3.3.1 Feudalism in Four Stages

First of all, let us borrow a definition raised by Professor Maitland towards feudalism: "A state of society in which all or a great part of public rights and duties are inextricably interwoven with the tenure of land, in which the whole governmental system-financial, military, judicial- is part of the law of private property" (p23, 1908). Maitland associated feudalism with land tenure, which is of great significance.

As we know, as one of the social systems, feudalism for certain comprises many complicated elements, like the relation between lords and vassals, the role and duty of them, the relation between central government and localities, and so on. But in any case, the issue of land is the fundamental one. The possession of lands, the grant of lands, the services upon land tenure, and the legal dispute towards land ownership, land transfer, and land inheritance are those indispensable subjects when we talk about feudalism.

In ancient Britain, all the public rights and duties were derived from land possession (Stubbs 1875 & Maitland, 1908). This is one of the basic assumptions of Anglo-Saxon culture which leads to Britain's constitutionalism. If we trace the historical evolution of Britain's constitutionalism before the nineteenth century, we could find four main stages of development:

In the first stage, all the freemen possessed their shares in land. According to Stenton, the Germanic tribes came from the Continent were not conquerors but massive migrators, subject to no lords but remote king, who represented their ancient pagan God. From the most primitive records, those law codes of Æthelberht of Kent dating to the beginning of seventh century, illustrating the social order of early English society where

free peasant landholders were the basic unit. They were personally and economically independent, enjoying many civil rights. Attending folkmoot was obviously one of these rights. As Stenton further points that, "throughout early English history society in every kingdom rested on men of this type" (Stenton, p278). Jenkins (2012) expressed similar view that "Saxons were rooted in loyalty to family, settlement and clan, embodied in the Anglo-Saxon phrase 'kith and kin'…Their focus was not a distant king and court but a communal hall in the center of each settlement, where communities of free farmers (ceorls) would swear allegiance to their chiefs" (p17). Stubbs summarizes this stage as follows, "in the primitive German constitution the free man of pure blood is the fully qualified political unit; the king is the king of the race; the host is the people in arms; the peace is the national peace; the courts are the people in council; the land is the property of the race, and the free man has a right to his share" (1875, p69).

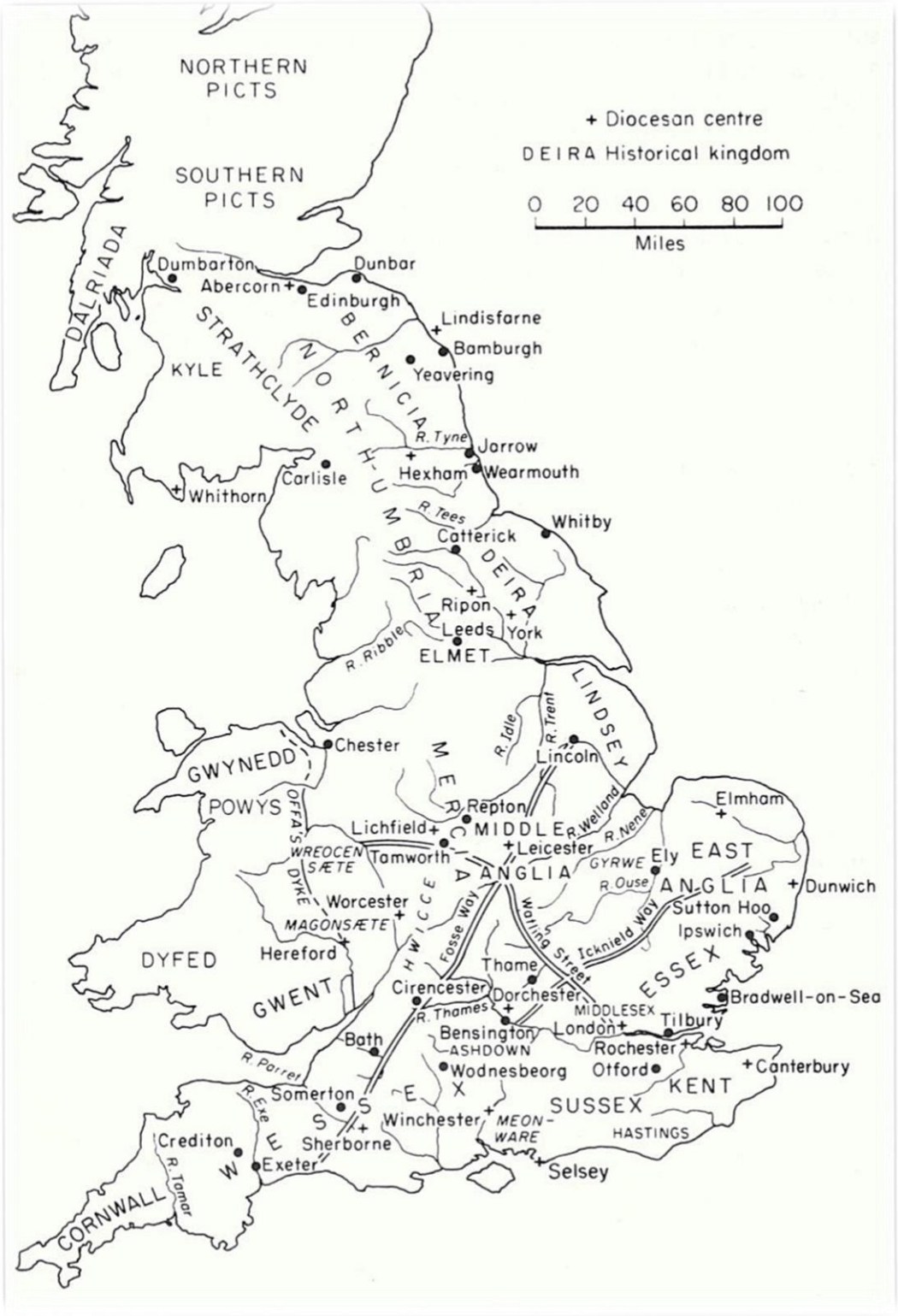
This opening prospect provided a favorable condition for Britain's state-building process compared to those in Latin Europe and Germany, where rural landed nobilities of mixed Roman and Germanic origin were becoming autonomous lordly domains appropriating evermore public resources and power during the fallen of Roman Empire and collapse of later large-scale polities, may it be Carolingian, Lombard, Visigothic, or Ottonian-Salian Holy Roman Empire. The failure of these dark age politics left the new state-formers like Capetians of France, Italy, and Portugal, and hundreds of German noble families with "an extremely fragmented regional and local political landscape, much lay under the direct control of noble lords large and small and hence beyond the direct influence of the new central authorities" (Ertman, 1997, p24). In the early Britain, by contrast, the mission to build new kingdoms for the Anglo-Saxons was relatively easy. And most importantly, there was a Germanic tradition of holding and attending local courts by those free men. These courts are people's councils based on legal equality, where free peasants took part in debating issues of collective concerns, and in offering judicial jugement with common sense and customary law. People during

that ages would never imagine how significant these practices would matter with constitutionalism in the future.

But what I really want to raise during this first stage is that this kind of beginning set a crucial prerequisite for the later constitutional development—the land possession. In other words, a freeman was free because he possessed his share in land. Because of this condition, he was entitled to enjoy many civil rights, like to be fully independent, and to attend local court, although it seems more of duty than right for the early Englishmen to do so. The land possession is so important for Britain's constitutionalism because there was another kind of men in the Anglo-Saxon history: the slave. Slaves had no land. They were treated as their master's private property. Therefore, the slaves had no right to attend folkmoot nor even to be protected by customary law. Besides the slaves, there were still other kinds of men who were not qualified to attend local courts with the course of feudalization, such as villein. After the Norman Conquest, the lease holders (one possesses land in a fixed term) were also not qualified to attend the county court. I will talk about them later.

The second stage is the time of warlords. As Thomas Malory's famous quotes in his *Le Morte d'Arthur*, "Every lord that was mighty of men made him strong, and many weened to have been king." The Anglo-Saxons were emerging into larger groupings under early kings or overlords, the so-called British Heptarchy (Northumbria, Kent, Mercia, Wessex, Sussex, Essex, and East Anglia). The first kingdom was Jutish Kent, under the reign of Æthelberht (580/93-616/18). He was also the first king under whose reign the Christianity was officially introduced in Britain through St. Augustine, the first archbishop of Canterbury. Other powerful kingdoms ensuing include Northumbria founded by Æthelfrith (593-616); Mercia under powerful king Offa (758-96), the first English king whose authority was recognized across Europe; Wessex under king Egbert

(802-39), a period of Saxon peace and supremacy before Danish occupation; and Wessex under king Alfred (871-99) who defeated the Danish commander Guthrum and saved England from becoming part of a Scandinavian confederacy. The center of English power was shifting during these two centuries' flocking and fighting from Northumbria in the north, to the Mercia in the middle, and finally to the Wessex in the south.



"The early kingdoms"

Map from H.R.Loyn, *The Governance of Anglo-Saxon England 500-1087*, p11

During the process of struggling for overlordship, the king's companions in war, those fighting *gesiths* were granted more and more land in return for their military service, since "the most admired virtue of an early king was generosity to his followers" (Stenton, p306). These men became the tenants in chief of the kings. Moreover, together with the land, the dues and services, the so-called tribute which had previously rendered to the king himself, flowed into those fighting lords' pockets (Stenton, 1971). Gradually, the freemen were losing their independent statue because of economic hardship. They had to work for their lords of a definite number of days every week, living in their lords' manors and cultivating on their lands. As argued by Stenton, "the central course of Old English social development may be described as the process by which a peasantry, at first composed essentially of free men, acknowledging no lord below the king, gradually lost economic and personal independence (P470). By the early tenth century, all men were supposed to have a lord (Attenborough, 1922). The hard times would drive increasing numbers of peasants into a lord's protection. In extreme cases, the miserable free peasants sold themselves into slavery for food (Fisher & Pollock & Maitland). However, it is worth mentioning that, as indicated by Thomas (1985), "in England, a person could be economically dependent (unfree), but still be personally free, especially in legal standing" (p499). In other words, if a person still possessed a freehold of land, even if he was subject to a lord, he was legally independent. He was still entitled to attend the local court and was protected by customary law. And after 1430, if his freehold land was worth at least forty shillings, he was even qualified to vote.

As the lands were more and more concentrated to these lords' hands, their political rights were enlarging at the same time. By this time, they attended not only the folkmoot, those shire-moot and hundred-moot where they usually presided, but were also summoned to the king's council, the witan, "the assembly of the wise men". The number of nobilities during this time were proliferating. Their nature varied as well. Besides the *gesith* who originally gained their position by companioning kings in war, there were also *thegn,* who owned the statute by serving others, and their rank depended

on the person's statute who they served. The highest positions belonged of course to those who served the king. The most exalted *thegn* worked in the king's household, attended his court periodically, and acted as mediators between the king and the shires. To reward their service, the king also grand *bocland* (bookland) to these thegns. Distinct with the term folkland, bookland denotes the land exempted from public burdens, like food rent, by a royal charter, except for the traditional reservation of the king to exact fyrd-service and labor service of building bridges (*brycg-bot*) and fortifications (*burh bot*). Typically, they possessed an estate assessed at five hides of land (Stenton, 1971). As Creighton (1884) and Maitland (1908) indicate, as the power of these thegns grew with the king's power, long before the Norman Conquest, the old nobility by birth had been superseded by the nobility of tenure and office. It was the time when the feudal seeds began to sprout in the medieval England.

The kings also granted lands to the church. The tenure of land by church was not owed to the earthly toil, but spiritual service, the tenure of *frankalmoign*. "They were bound to pray for the soul of the donor who has given them this land" (Maitland, p25). Together with those fighting *gesith*, or *ealdorman*, by then who had been great landowners, they enjoyed exalted political rights. They were the king's tenants in chief. Those who were entitled a special summon by a writ to the witan and to later Great Council were the predecessors of the future House of Lords.

What remained unchanged in this stage is that the public right was still closely connected with land possession. The more land one possessed, the more public power one gained from it. Therefore, the House of Lords was in this sense created by feudalism. The feudalism began when these lords, secular and ecclesiastical, were granted lands. Morever, with their social position and public right rising with enlarged land possession, their existence aggravated the feudal process. This is because these tenants in chief

would create new tenancies by sub-granting their lands to their tenants to make profits. And then these sub-tenants may again create smaller tenancies. The feudal ladder was thus created with one side the king and his tenants in chief who formed the House of Lords, the other side the villein and slave who had no political right at all. Moreover, the House of Lords was not only created by feudal land tenure, but their social positions were also further reinforced by the feudal contract between the king and his great vassals. Although this contract was more of personal relation at the beginning as the most sacred bond between lord and his great companions in war of the Germanic tradition, it was gradually evolving into a social contract of right and duty.

Maitland's account of feudalism could not better to describe this process: "a state of society in which the main social bond is the relation between lord and man, a relation implying on the lord's part protection and defense; on the man's part protection, service and reverence, the service including service in arms. This personal relation is inseparably involved in a proprietary relation, the tenure of land, the lord has important rights in the land, and the full ownership of the land is split up between man and lord…. The national organization is a system of these relationship: at the head there stands the king as lord of all, below him are his immediate vassals, or tenants in chief, who again are lords of tenants, who again may be lords of tenants, and so on, down to the lowest possessor of land. Lastly, as every other court consists of the lord's tenants, so the king's court consists of his tenants in chief, and so far as there is any constitutional control over the king it is exercised by the body of these tenants" (1908, p144).

The king's tenants in chief, the House of Lords without doubt checked the power of the English monarchy, especially during the early stage of state-building process. The constitutional restrictions exerted by these lords to the king was along with the tradition of ruling with counsel and consent and culminated with the Magna Carta. Feudalism in

a controlled degree worked well to limit royal power. However, over-feudalism would often be counterproductive. If feudal lords appropriated too much land and power so as to be strong enough as quasi-independent, they would become centrifugal rather than constructive force. The contributions of them would no longer be constitutional, rather than self-protection, non-cooperation, and even rebellion. To cope with this, a king would often seek coercive power, like to tax through illegal ways so as to bypass the national council or just to dissolve it, especially during the times when the king was in urgent need of money for wars. The opposed relation between a king and his great vassals in the medieval Europe usually tended to result in an absolutist monarchy.

In the third stage, a potential crisis was to come. During the last phrase of the Anglo-Saxon period, the feudalism in England rapidly developed into a dangerous kind. The central power became weaker, and the local lords were growing stronger. Coupled with constant Viking raids, Æthelred 'the Unready' (979-1016) was unable to resist the Danes anymore and fled to Normandy, resulted in the first and also the last Danish king Cnut (1016-35) crown in London. England became part of the Viking Empire extended from Wessex in England to the north of Norway. Although the regime was finally secured to Anglo-Norman king Edward 'the Confessor' (1042-66), the son of Æthelred and his wife Emma of Normandy, the sister of the Duke of Normandy, after Cnut's death, the political power of Anglo-Saxon was crumbling, on the verge of collapse.

Under the feudal principle, like a king could hold a court attended by his tenants in chief, a lord had this legal right to do so. And usually, this right was granted together with the land by the king. As Maitland indicates, the jurisdiction was treated as the king's property and could be alienated by him as he wished. And "nothing is more the essence of all that we mean when we talk of feudalism than the private court—a court which can be inherited and sold along with land" (p151, 1908). The right for a lord to

hold a manorial court or feudal court where his tenants were required to attend was called ‘sake and soke’ (*sacu* and *socn*), which means ‘cause and suit’ (Stenton, 1971, p494-498). As the feudal course aggravated, the jurisdictions of the public courts, of those local hundred-moot and shire-moot were taking away by those private courts hold by the emerging feudal lords. And a great deal of the hundred courts had just fallen into the private hands. As Stenton indicates, “for more than a century before the Conquest, the accumulation of estates by a small number of powerful families is one of the salient features of the time. The business of the shire courts was everywhere falling into the hands of a few great men” (P490). This phenomenon of privatization of jurisdiction in England was same with that in the falling Frank Empire, which happened earlier, with “the central authority became little more than a name—the effective courts were the courts of the great proprietors” (Maitland, p153).

In the dark age Europe, the most feudalized states usually tended to be absolutist ones, typically like France, Spain, Portugal, Naples, and Austria. Here, the criterion of absolutism is borrowed from Fortescue (1476) and Bodin (1576) who defined that the exclusive possession of legislative prerogative by a sovereign was the feature of absolutism. It may be explained by those long-established and well-entrenched local aristocratic families in these newly formed states had already existed in their former large-scale polities (like Carolingian, Lombard, and Ottonian-Salian), who had appropriated too much land, power, and public resources, the so-called “means of administration” by Max Weber, to become principality within their own domains, hostile to the royal authority. In these states, the patrimonial infrastructure dominated by proprietary office holding and tax farming were prevailing, which further impaired the central government’s administrative ability. In France, the feudal lord could even raise his own troops. The knights did homage to his immediately lord. Whereas in England, private war was never legal. The knights swear fealty to no lords but the king (Maitland, p162). Therefore, under the constant geopolitical and military threat on the

Continent, and in struggling for administrative and financial authority with local elites, the monarchs of these states must secure as much as power in their hands to cope with foreign aggression and local subversion at any time.

Had there been no tradition of holding and attending local courts by the Anglo-Saxon freemen, and had those courts not been retained by the Noman conquerors as their means to check feudal lords, Britain may become an absolutist one, like those states of Latin Europe and German territorial states on the Continent before the eighteenth century (until the eve of the French revolution at 1789).

Why was the retention of these old local courts significant to the creation of parliament? Because the local territorial based representatives, the knights, were elected from these local courts to the Great Council. Because of their participation, the Great Council was no longer the council of the great nobility, but Parliament made up of two chambers. Moreover, these old local courts represented the ancient cultural tradition of equal right and equal legality by the Anglo-Saxon freemen. As Maitland raises:

"A court formed by all the freeholders of a shire is not a court formed upon feudal lines. In such an assembly the tenants in chief of the crown have to meet their own vassals on a footing of legal equality; a tenant may find himself sitting as the peer of his own lord. This retention of the old courts is of vast importance in the history of parliament" (p42, 1908).

However, the retention of Anglo-Saxon local courts may be some of the reasons for the birth of parliament. Fundamentally, it was the result of the Norman kings' effort in checking feudalism. The new rulers coming from France may have learned the lessons

from over-feudalized Continent. They made up their mind to avoid same tragedy in England again. They assigned the sheriffs to preside the local court side by side with ealdormen. Acted as guardians of royal interests, these sheriffs were directly accountable to the kings for administrative, financial, and judicial matters of the shire. As Stenton argues, "the historical importance if the Old English sheriff is due to the fact that he was the servant of the king. Within the territory of even the greatest earls he stood for the executive power of the Crown. His presence in the shire is a useful warning against the temptation to regard the pre-Conquest earldoms as autonomous units of government" (P549, 1971). Creighton (1884) and Maitland (1908) expressed similar views that the function of sheriff was to "prevent great jurisdiction falling into the hands of powerful nobles", and to "prevent the manorial courts from growing too important".

Besides the sheriff, the Conqueror also used other strategies to counter feudal lords with both English and Norman lineage. First and foremost, Willian required that all the land holders to make oath of allegiance to him, not only of his tenants in chief under the feudal principle. In 1086, William came to Salisbury, "and there came to him his witan and all the landowning men that were worth aught from all over England, whosesoever men they were, and all bowed themselves down to him and became his men, and swore oaths of fealty to him that they would be faithful to him against all other men" (Creighton, 1884 & Maitland, 1908). By this mean, all landowning men of the country were to be faithful to the king against others thereafter, even against their lords. Secondly, if he granted lands to one lord, he granted those lands scattered in different parts of the kingdom, so the lord could not hold too much land together as to become a great local power. Moreover, in 1290, the great statute *Quia Emptores Terrarum* puts a final stop to subinfeudation. The statute stipulates that if tenant B holds of his lord A (A must not be the king) a land by feudal tenure, and if B wants to alienate that land to C, he can do it without A's consent, but C will not become B's tenant by holding that

land. On the contrary, C will automatically become A's tenant. In other word, "a tenant may substitute another person in his place, but the creation of a new tenure is impossible" (Maitland, p29).

If the Anglo-Saxon's local courts offered the traditional practice that the free land holders were entitled to participate in political life, and the Norman kings' conduct of checking feudalism saved these courts and therefore created some political space for the local activists to survive, then it still lacks a motivator for these local representatives to be really summoned to the national council. This motivator is taxation. As early as 1254, in urgent need of money for war, Henry III's brother summoned a Great Council to the Westminster, and each sheriff was required to call for four knights from each county to attend that national assembly to treat with a tax, which is the first record in the history that the non-nobles were ever summoned to the national council. But this was an isolate incident. It was not until 1295, the regular summons of knights and inferior prelates began. During this period, Edward I was in great need of money because his furious wars with north Wales and then with Scotland. Because of his combativeness and victories in these wars, he was also named 'Hammer of the Scots'. According to Jenkins (2011), Edward consumed some £250,000 a year in his military spending. In the face of such a great amount of money, if the lords were not willing to aid and exerted a restraint upon royal power by Magna Carter, the commons seemed to be the last resort.

But most importantly, because Britain was not that feudalized, the taxation was not feudalized as well. The king could tax the mass of the people directly without the intervention of their immediately lord. And the English king demanded that the lords could not tax their tenants without his consent (Maitland, 1908). Traditionally, the king could deal with smaller landowners through the local courts. Therefore, after 1295, as

a matter of course, the king dealt with the representatives of the shire in Westminster. In this sense, anti-feudalism again contributed to the creation of House of Commons. If England was an ideal feudal state, the king under feudal principle could not tax the people directly, but through his tenants in chief. If that was the case, there would not be any motivation and possibility for the king to summon the knights of shire to the national council, to negotiate and to treat with them as 'autonomous donors.'

Because of these historical causal relations, the tradition of Anglo-Saxon freemen to attend local courts and to debate in terms of public concerns finally became the constitutional practice of the local representatives to debate in the Great Council in terms of national affairs. Moreover, these territorial-based representatives from each shire or borough were mixed together and formed only one chamber. Together with those tenants in chief who were summoned by personal writs, they were forming into the distinct two-chamber national assembly-the English Parliament.

This type of national assembly, to many scholars, is significant for Britain to become a constitutional state. Since it is widely recognized that to decide a political regime is constitutional or absolutist largely depends on if there is a representative institution and its ability to resist monarchs' constant autocratic behavior, it is important to estimate whether a certain representative institution is strong enough to do so. Otto Hintze, a Germanic scholar who was interested in state building process of medieval and early modern Europe for the first time raised a theory that national assembly across the medieval and early modern West could be divided into two basic types, the "two-chamber" or territorially based bodies like the English Parliament, and the "tricurial" with three or more chambers assemblies found in Latin Europe and German territories (1930). His argument is that compared with the status-based or estate-based assemblies, the territorially based assemblies were structurally stronger, and therefore better able to

prevent ambitious kings from monopolizing legislative power. He did not further explain his contention. But Ertman (1997) raised two reasons explaining for Hintze's argument. Firstly, the interests of status-based or estate-based assemblies were diverse. Each chamber focused more on or protected more of their group's specific privileges. They were more willing to sacrifice other groups' interest as long as their own social and economic privileges were guaranteed, which caused structurally vulnerable position for this assembly as a whole to defend its holistic rights. Moreover, the separate interests of this kind of assembly facilitated rulers to negotiate, beguile or even bribe with the individual chamber and to strike collective wills and solidarity of them, so as to weaken its overall strength to counter royal power. By contrast, the representatives of the territorially based assembly were mixed together with higher prelates and lords into upper chamber and lower prelates and knights into lower house. It was easier for this type of assembly to form a consistent will to defend their collective interests and to resist temptation of rulers. As Ertman argues, "the structure of the territorially based parliaments encouraged cooperation at the level of the entire assembly, whereas in the status-based Estates such cooperation took place at the level of the individual chamber, with detrimental consequences for the future of the assembly as a whole" (p22-24).

The second reason given by Ertman for Hintze's theory is that the territorially based assemblies were "inextricably linked to and rooted in organs of local government". As mentioned earlier, the local representatives, at first the knights, of England in the thirteenth century were elected from shire-moot, the local court and local government of Anglo-Saxons and their Norman successors. These representatives were either non-noble elites active in participating politics and public affairs in the first place, or noble lords who had been possessed large amounts of local resources or were just the host of local government (ealdormen). The territorially based assemblies were thus "came to be seen both as an extension of and as an agency for protecting the interests of organs of local government", which in turn provided them with financial resources (local taxes)

and even armed forces (local militia) to resist the unreasonable claims from central authority. In comparison, the members of status-based or estate-based assemblies were individual landed nobles and ecclesiastics. And instead of orderly and participatory local government of shires and boroughs found in Britain, the local landscape in Latin Europe and German states were extremely fragmented with "overlapping and ill-defined catchment" (p25). Therefore, the members in those estate-based chambers could not fully represent the local interests and they also lacked the local back-up so as to be structurally weak.

Thanks to those Anglo-Saxon local courts and Norman Conquerors who retained them and used them as a check on the emerging feudal lords in England, the territorially based representatives got the chance to appear on the historical stage. Together with the House of Lords, the structurally strong two-chamber parliament was formed to which the Britain's constitutionalism is largely due. To this point, the argument of this paper that feudalism created the House of Lords while the anti-feudalism accomplished the House of Commons seems to justify itself. Still, this dual process was associating with land possession. As mentioned earlier, feudalism created the House of Lords because the lords held feudal tenure by providing military service or ecclesiastical service. With more and more land possessed by them, their political rights rose at the same time, since all the public rights and duties were stemmed from land possession. With this ideology, people who were not noble but still possessed land, like servicing in knight tenure, should also be entitled with their relevant political right as smaller land holders. Anti-feudalism thus provided these non-noble with opportunities to fulfill their due rights. Because of anti-feudalism, the ancient local courts based on legal equality survived at the peril. As the ancient forum for public debate and public assembly, they continued to play this function along with other functions like local administration and local jurisdiction. The political activists holding land tenure, whose ancestors were already so familiar with these political forums within their residence, were naturally aware of

their rights and duties to have a say towards their common lives. And if their common interests were impaired or threatened by others, they would definitely stand out to defend it. Besides, anti-feudalism provided kings with other options to find an aid. If lords were uncooperative, the territorially based representatives of freeholders could be treated as autonomous taxpayers with whom the king could negotiate.

In the fourth stage, a quasi-franchise appeared in England, the franchise limited with land possession. Before this, at the Model Parliament in 1295, the knights were elected to represent the shire. However, for the means of election we barely know from historical materials. From Maitland's account, the sheriff's influence towards this election was huge. But besides that, nothing seems clear. But from 1430 onward, there was an important act (8 Hen. VI, c. 7) which stipulated the county franchise for the next four centuries: "the electors are to be persons resident in the county, each of whom shall have freehold to the value of 40 shillings per annum at the least above all charges". This is a significant step for Britain's constitutionalism since it was the first time that the political right endowed with land possession was so clearly endorsed by law. And this right was not exclusive to nobility, non-nobles with certain land possession were also entitled to exercise their political rights. It is also a milestone that the privilege of being represented were gradually recognized by the medieval English men. To attend the council, now a higher council, was no longer a burdensome duty, rather it was becoming a coveted honor, although the kings generally stipulated that the person to be chosen from each shire should be "two knights girt with swords". According to Maitland, "in 1445 it is considered sufficient that they should be knights of shire or notable squires, gentlemen of birth, capable of becoming knights; no man of the degree of yeoman or below it is to be elected" (P173).

Forty shillings freehold as the qualification to vote was a fairly high requirement at first. However, with the changing value of money, it was becoming very low, which means the voter base could become bigger since more and more people could afford to be electors. However, it is worth mentioning that it was the forty shillings freeholder who had a vote, not a forty shillings copyholder, nor leaseholder, no matter how valuable their land might be. And this regulation had been kept for four centuries until the First Reform Act in 1832.

Besides the county franchise, there was also franchise in the *boroughs*. In the Model Parliament 1295, every sheriff was required to send two knights of each shire, two citizens form each city, and two burgesses of each borough (Creighton 1884 & Maitland, 1908). Borough is a number of communities which obtained a charter from the king so as to own a higher administrative position and some privileges than that of normal township. As indicated by Loyn, "the borough was in nine cases out of ten a royal creation" (p149). The privilege and liberty of that charter depended on how much money the burgesses within that borough were willing to pay for it. For example, some rich and large borough could hold its own court so as to be exempted of the jurisdiction of the county court. And some borough could purchase the rights to elect its own officers, the *ballivi* or *praepositi*, so as to autonomously collect their own tax without the charge of sheriff. And generally, the constitutions of boroughs were associated with merchant guild. By obtaining a charter the borough has privilege of regulating trade. However, according to Maitland, the franchise of borough varied greatly. The franchise in some borough was extremely democratic, where "people who has a hearth of his own may vote", whereas in others it was limited to just a small number of oligarchies. But one thing is for sure that the older the borough is, the more democratic is it. The constitutional history of boroughs also varied form one another. As Maitland argues, "there hardly can be a history of the English borough, for each borough has its own

history" (p52-90). Cities (*civitates*) are borough with bishop's sees, the only difference between city and borough.

3.3.2 Conclusion

Along with the feudal process of Britain in the medieval and early modern period, the paper briefly reviewed her constitutional development in four stages. This course is winding and much more complicated than what have been summarized, infused with different nations, customs, and practices. Each of these stages could be expanded to much more details, and many terminologies could be studied alone since it bears its own distinct history, like borough, and Danelaw. But the focus of this paper is towards Anglo-Saxons and their culture and tradition that contributed to Britain's constitutional development. Although the English nation was conquered twice, by Danes and by Normans, they did not change her mainstream culture and tradition. On the contrary, the invaders' customs, governance art, and even languages supplemented and enriched the English culture, endowing her with a more powerful central government and a common law legal system which brought those autonomous shires, boroughs, and towns together.

But from the previous account, one may already feel that there is an intangible thread throughout these four stages from the beginning when the Anglo-Saxon freemen bearing many civil rights to the stage when some of them were deprived much of those rights and even lost their person freedom, until the last stage when they were gradually redeemed that political rights bit by bit. That thread came from the Anglo-Saxon tradition that all the public rights and duties were derived from land possession. As Stubbs argues, "the general tendency of the movement (of feudalism) may be described as a movement from the personal to the territorial organization, from a state of things in which personal freedom and political right were the leading ideas, to one in which

personal freedom and political right had become so much bound up with the relations created by the possession of land, as to be actually subservient to it…" (1875, p69).

Stubbs associated political right with land possession of Englishmen at later stages and regarded these rights as the natural born rights of Anglo-Saxons. However, he may neglect the fact that these rights may not be unconditional rights even at the beginning. Apparently, there were slaves throughout the Anglo-Saxon period. They were not protected by law and had no political rights at all. The man who was entitled with this right was at least a *ceorl*, a typical Anglo-Saxon freeman who possessed a 'hide' of land which could support a normal peasant's household. It was this equal land possession by the freemen that the equal legal right embodied in the local courts came from. And some of them were gradually losing this right because more and more land was grant by the king to his tenants in chief. Thus, the feudal tenure was created. With the lords' political rights rising with their land possession, they were entitled to be summoned to the king's council, the witan or later Great Council. They were the forerunners of the future House of Lords. If those ancient local courts based on legal equality than feudal line disappeared along with the process of feudalization, the House of Common may not even appear in the English history. The previous self-governing towns and hundreds would become local lords' domain, and the once master of the land would become slave of the land.

However, anti-feudalism may save Britain from sharing similar fate with those states in the Continent until the French Revolution. Thanks to the Norman conquerors who slammed the brakes on the Britain's rapid feudal process. The feudalism in Britain was but remained a limited degree. The men must swear fealty to their kings rather than to their immediate lords only. The men were bound to fight for their kings rather than for their lords. Taxation was not feudalized. The lord could not tax their tenants without

king’s permission. The king relying on the nation was strong enough to resist the uncooperative lords. Judiciary was also not that feudalized as well. The local courts based on legal equality were still there. Besides, since the reign of Henry II, the freeholders’ rights were protected by the king’s court against their immediate lord’s court. Because of anti-feudalism, the lands were not entirely concentrated to several powerful families. There were still autonomous knights who possessed their shares in land by knight tenure representing local shire. They were treated by the king as independent taxpayers. And the people who possessed forty shillings freehold finally redeemed their ancient political right to elect their representatives to the House of Commons.

If we observe the British institutions, we may find that the art of check and balance pervade in them. The sheriffs were appointed by the king in the local courts to check the feudal lords. It seems also that the king, the House of Lords, and the House of Commons were in a delicate system of check and balance. The House of Commons were summoned by the king to check the lords. In turn, the House of Commons together with the House of Lords checked the king. The House of Lords and the king share the judiciary authority while the House of Commons bears the legislative power. The typical feature of the British political system is that it never allows any power to grow too big—each power is checked at the same time by another power. Halifax (1688) described that the spirit of compromise characterized the progress of the English church and constitution— “between Catholicism and Puritanism, absolutism and republicanism”. This quality of compromise and moderation is argued by Groom as “Gothic balance”, the quality of ‘trimming’ between extremes. In this sense, it seems that the “Gothic balance” is a kind similar with our Chinese philosophy of “Golden Mean” (中庸), a kind of moderate, limited, and stable way of development.

3.4 Legal Tradition

The medieval England is the period when many well-known legal terminology and legal practice were created, like the trial by jury, justice of peace, and habeas corpus, although not all of them owed their inventions to the Anglo-Saxon period. There is no question that rule of law and protection of civil right are the indispensable elements of constitutionalism. It is fortunately that these elements could all be found from the Anglo-Saxon culture. Besides the ancient local courts mentioned earlier which contributed directly to the Britain's constitutionalism by electing territorial based representatives to the parliament, there are also other legal traditions of Anglo-Saxon culture which from the origin favored the constitutionalism. The spirit of law was not only fulfilled by majority of the Anglo-Saxon kings, but also practiced by ordinary freeman in their daily life.

3.4.1The Protection of Landed Right

Universal suffrage is actually a very modern concept for the British. At least until the First Reform Act in 1832, there was no universal suffrage. If constitutionalism means there is a strong national assembly which will check and supervise the royal government so that it could not monopolize all the powers at its will to become an absolutist, then the questions arising here are at least who is the representative in that assembly, who are qualified to be represented in that assembly, and how large that representativeness is? Based on the elaboration of the feudalism in the last chapter, the answer for these questions implies a group of people who possessed freehold land. In the first place, it was the honorable warlords together with the high prelates, "the wise", who were summoned to the Anglo-Saxon witan and subsequent Norman Great Council. They were great landowners representing the aristocratic class. In the second place, the knights were elected from the shire moot to represent the locality who possessed feudal knight tenure. Then, since 1430, the forty shillings freeholders were qualified to vote

their representatives to the lower chamber of parliament, and this qualification was maintained all the way for four centuries until the First Reform Act. Suffrage, if it could be called, was limited to propertied class only. Therefore, to guarantee the constitutionalism in Britain means to protect the landed property of those people, at least the law should protect those who possess the forty shillings freehold. And such is the fact.

Therefore, first of all, it is utmost important to define what is freeholder (*liberum tenementum*). Still, this term originates from feudalism and is associated closely with land tenure. And no one explained this issue better than Historian Maitland did. According to him, "all land is held of the king. The person who has the right to live on the land and to cultivate it, is a tenant" (p24). For example, A holds of B who holds of C who holds immediately of the king, then B is the lord of A, and C is the lord of B, but the tenant in chief or tenants in *capite* of the king.

In the medieval England, there were six forms of land tenures: '*frankalmoign*', the ecclesiastical persons who held land by providing spiritual service to the land donors (usually the kings); the 'knight service', the land is held of the king by military service. And those tenants in chief, if they did not hold land by *frankalmoign*, they held it through knight service. They had been warlords, the great companions of the kings in war; 'grand serjeanty', the land is held not through direct knight service in war but bound to fight in the king's army (without knight's equipment), or to provide material means of warfare; 'petty serjeanty', like grand serjeanty, they were kinds of military services. But the land is held by providing the kings with warlike implements, weapons like swords; 'socage', the land is held not by military service, but through paying fixed rent to the king or to the lord, either in money or in agricultural products. The majority part of England is held by socage. The tenants in chief held land through *frankalmoign*

or knight service, and those who held of the tenants in chief, held land in socage; and lastly, the 'villeinage', the land is ultimately held in villeinage, the bottom layer of the feudal ladder. The person who held land in villeinage is personally unfree. They must not leave their lords. They have no right even to attend the local courts. The king's court will not protect their rights in land against their lords, unless their life and limb were injured by their lords.

Therefore, if a person held land by *frankalmoign*, by knight's service, by grand or petty serjeanty, or by free socage, he is a freeholder; The person holding land in villeinage (*villanum tenementum*) is not a freeholder. The person who holds land limited to some fixed term of years by lease, no matter how long the term is, how expensive the land is, is not a freeholder (Maitland, 1908).

After defining who is freeholder, then what right did a freeholder enjoy and how it was protected by law? First of all, a freeholder could attend local court. A lease holder has no place in that court, nor does the person who serve in villeinage. It is interesting to find that this practice echoes with Anglo-Saxon tradition that all the freemen were required to attend the local courts. They were free because they possessed at least a hide of land for their household. The landless person even at the beginning was not free. Therefore, they had no right to attend local courts, and their rights were not protected by law. As argued by Stenton, "the institution of slavery was part of the earliest English law, and in view of later evidence there can be no doubt that the primitive English ceorl (freeman) was usually a slave-owner" (p314). The law from the beginning protected those who possessed land.

In the second place, the forty shillings freeholder enjoyed a vote. With more and more local representatives summoned to the national assembly after 1295, it needed to invent

a mechanism to produce these candidates. Then an epochal reward was made for the propertied class. The previous freemen, if they did not fall into a villeinage holder along with the course of feudalization, their descendants may have this opportunity to vote. The question then depends on how valuable their land is. The law stipulated forty shillings freehold as the basic qualification for election. A forty shillings freeholder has a vote, a lease holder has not, no matter how valuable his lease is. From this point, it seems that the thorough land possession was treated as a very sacred right in the Anglo-Saxon tradition. From the beginning of Anglo-Saxon era, this absolute ownership in land was the badge of personal freedom, the badge which distinguished a ceorl (free peasant) from a slave. With time goes on, it became the symbol of political right, the symbol which split the society into two parts, with one part qualified to vote (with same qualification) and the other part unrepresented all the way until the modern age. In this sense, the parliamentary system is influenced by land tenure. The House of Lords constitutes of members holding *Frankalmoign* and knight tenure. The House of Commons was made up of representatives elected by the forty shillings freeholders who held different tenures except the villeinage.

In the third place, a freeholder bears many financial rights and duties based on land tenure. If that freeholder be a lord, these financial rights could bring him a big fortune. Firstly, there were three ancient aids (*auxilium*) a lord could legitimately demand from his tenants: the aid for knighting the lord's son, marrying the lord's daughter, and redeeming him from captivity. Secondly, if a tenant died leaving a full age heir, the heir needed to pay a relief (*relevat hereditatem*) to the lord so as to retain that land. In other word, the land is not inheritable for free. The inheritance fee was a profitable income for a lord. According to Maitland, the relief of knight tenure was 100 shillings, but if one held land of barony he needed to pay £100. The tenure of socage paid a year's rent. Thirdly, a lord enjoyed wardship if his tenant held military tenure, which means if his tenant died leaving a male heir under the age of 21 or female heir under age of 14, then

the lord enjoy wardship of the children and the land. He could do whatever he likes in that land and make profits from it. And this right of wardship was even a vendible commodity-he could sell his wardship right to make profit. Fourthly, accompanying the right of wardship is the right of disposing the ward's marriage, which was also vendible. Lastly, a lord could escheat the land if his tenant died without heir or committed felonies.

In a word, lordly rights were numerous and were perfectly protected by customary law. The more land one possessed, the more rights one was entitled from owning them. And these rights in turn would bring a person more wealth. The most beneficial lord is no doubt the king, the supreme and ultimate landlord who enjoys many prerogatives towards his tenants in chief. The public rights and duties were in tradition closely intertwined with land possession. As Maitland argues, "in the Middle Ages land law is the basis of all public law" (p38). Through knight tenure, a knight possessed land by providing military service to the king. He paid aids, reliefs to his lord and his children may even subject to wardship from his lord out of this knight tenure, but at the same time he enjoyed the political right of voting and being voted to the parliament. He owed a relatively prestigious social status to this land tenure. Through tenure of frankalmoign, a church possessed land by providing religious service to the king. At the same time, the bishop could be summoned to the parliament as lord spiritual. In both cases, they fulfill their duties of the tenure, and they acquire their due rights arising from that tenure as well. If feudalism created land tenure, legal tradition protected that tenure and relevant rights originated from it.

In the fourth place, a freeholder possessed many judicial rights. In the Anglo-Saxon tradition, a freeholder is expected to attend the local court and to give their judicial judgement there. And many scholars hold the view that the jury system were already found in the wapentake (Danish occupied administrative unit) during the Anglo-Saxon

period, where twelve leading thegns were appointed by a court to give a collective verdict on oath (Stenton, p651). Moreover, a freeholder be a lord could hold his own private court where his tenants were bound to attend and to suit there. With the deepen of feudalization, the jurisdiction of a lord was enlarging since the jurisdiction originally belonged to the local courts was flowing into a feudal lord's hands. This feudal court in later times is known as 'the court baron of the manor'. Besides, the lord also held a court for his tenants in villeinage, the so-called 'customary court', where the lord's steward was the only judge. It is interesting to observe that the rights of tenants in villeinage were in every aspect different with that of the freehold tenants. The tenants in villeinage had no rights to attend the local shire-moot or hundred-moot. Even in the feudal court, they were separated from the freeholders. In the later days, a new institution was created with a number of country gentlemen appointed by the king to administrate justice-the justices of peace. They were by all means freeholders who held quarter sessions to try almost all kinds of offenders. This is of course beyond the Anglo-Saxon period and our scope of study, but as reference to the judicial power and right of the freeholders.

Lastly, the freeholder's right was protected by king's court. "Ever since the days of Henry II the king's own courts have afforded protection to both the possession and the property which any one has in a *liberum tenementum*" (Maitland, p35). Under the feudal principle, the king's court was the court for the king's tenants in chief, but it was also the court of final appeal, where freemen would seek for last resort if their justice was defaulted at feudal or local court. In the case of freeholder, Henry II ordained that no action for the freeholder's lawsuit shall began in the manorial court without a royal writ, a writ of mandate directing the lord to do justice towards his tenants. It was the first time that the royal protection extended to the common freemen against their lord, implying the Norman ruler's resolution in checking the power of feudal lords. However, royal protection never covered the rights of tenants in villeinage or slave, except the

life and limb of them. In other words, if a villein was maimed or slayed by his lord, the lord would be sentenced to felony by the king's court. But besides this, all would be treated as the pure relation between a lord and his men. The king would not meddle in. If a villein escaped, the law would even aid the lord to recapture them.

In conclusion, Britain's constitutionalism is the result of land tenure. The parliament before the nineteenth century was made up of freeholders of both great landlords and petty bourgeoisies. The warlord holding knight service and lord spiritual holding *Frankalmoign* constituted the House of Lords, while the local representatives holding other tenures except the villeinage made up the House of Commons. But this is not enough. Their land tenure and the rights associated with that tenure were perfectly protected by the customary law. Therefore, the legal tradition of Anglo-Saxons also favored the constitutionalism. The degree of rights had already been defined by the amount of land possession. The different social classes and relevant rights and duties of specific classes were there. If one demanded extra rights, like to raise extra tax, it avoided the law, or legal tradition. It therefore needed the consent of others. That is the essence of constitutionalism. The constitutionalism without written law but the tradition of rights engraved in land.

Political institution is derived from cultural tradition. The legal tradition of Anglo-Saxons was derived from people's relations on land and favored the freemen's folk right by virtue of land possession. With this folk right they were entitled to enjoy freedom, to administrate by self-government, to attend local courts, and to be protected by customary law. As Loyn argues, "the division between free and unfree was essential to the social structure, and that therefore full enjoyment of the law and full right to exercise government rested only with the fully free" (p4). This folk right originated from conditional land possession evolved all the way into a kind of modern political

right associated with conditional feudal land tenure. The condition was at least forty shillings freehold. But the core idea was not changed.

It could not be better to end this section by borrowing Professor Maitland's words:

"If we examine our notion of feudalism, does it not seem this, that land law is not private law, that public law is land law, that public and political rights and duties of all sorts and kinds are intimately and quite inextricably blended with rights in land?

Such rights carry with them the right to attend the common council or court of the realm; jurisdiction, military duties, fiscal burdens are consequences of tenure; the constitution of parliament, of the law courts, of the army, all seems as it were a sort of appendix to the law of real property" (1908, P155).

3.4.2 Quantification of Individual Right

It is interesting to find that during the Anglo-Saxon period the English society was graded by bloodprice—the *wergeld* (wergild). Wergild is the sum of money compensation in case of homicide. Among all the Germanic societies, this wergild system was applied with only small variations (Loyn,1984). In the Germanic tradition, it is the kindred's responsibility to conduct blood feud if one of their family members was murdered. The family bond was so strong that the revenge would often incur a private war. To mitigate blood feud and to maintain peace, the law forced the injured party's kinsfolk to accept composition— a value to be paid in money or goods based on the victim's wergild and the seriousness of the offense instead of retaliating. Since "the idea of law is from the first very closely connected with the idea of peace, he who breaks the peace, puts himself outside the law, he is outlaw". That is why the early law code, those dooms often took the form of tariffs (Maitland, 1908), the schedules of

payments for particular injuries. In terms of peace, it is worth mentioning that in the Germanic legal tradition, half of the fines of offenses were paid to the "state" in the name of breaking of king's peace (Thomas, 1985). That is to say, the offenders had not only to pay compensations to the plaintiff, but also to pay a fine to the king because such offenses were not only affronted the victim and his kindred, but also disturbed the order of the society and therefore threat the king's rule. After the Norman Conquest, the king still used the 'breach of the king's peace' as means to make money as far as in the criminal cases. Anyway, judicial work in the medieval England was a profitable business that the judges in different courts were keen to attract cases to their own courts, may it be a lord's feudal court, or a king's court.

Because of this tradition, the right of a person was so clear priced, making it difficult to muddle through if that right was impaired. A normal *ceorl's* (freeman) wergild was 200 shillings, whereas a *gesith'*s (noble) wergild was six times of that of a *ceorl*, amounted to 1200 shillings. In Wessex, the wergild of the king was twelve times than that of a nobleman. However, according to Stenton, the Kentish system is unique in England because the Jutes before migrating to England lived in the Frankish lands (the wergild system in Anglia and Saxon kingdoms were similar). In the kingdom of Kent, the wergild of a *ceorl* was one hundred golden shillings, with the noble's wergild only three times as large. The church demanded much higher compensation upon any damage of the ecclesiastical property. According to Loyn (1984), "a twelve-fold compensation for the property of God and the Church, eleven-fold for the property of a bishop, nine-fold of a priest, six-fold of a deacon, and three-fold of a cleric" (P44). The slave had no wergild (Whitelock, 1952 & Loyn, 1984). He was treated as an absolute property of his lord rather than a human by the early English law. He could be physically punished or even killed without compensation. It is worth mentioning that although many offences may it be murder or theft could be compounded with money compensation, treason against one's lord or against one's king was considered as the

heaviest crime deserving definitely a death penalty in the Anglo-Saxon legal tradition (Maitland, 1908).

Accompanying different grade of wergild is the different weight of oath. In the Anglo-Saxon legal tradition, it was the proof coming after the judgment, which means the judge decides who is to prove, the plaintiff or defendant, and what proof the specified party is to offer. The known means of proof are usually oaths and ordeals (Maitland, 1908). There are Anglo-Saxon legal collection of the oaths to be sworn on different occasions. In the still remote day lacking scientific means, the appeal to the God makes all the difference. The oath swearing was treated as a very formal and sacred rite. Usually, a defendant was required to produce the proof, and he was required to swear with twelve compurgators or oath-helpers. The compurgators were generally the freemen with good reputations and could be chosen by the defendant himself. The judicial process began with the defendant swearing in denial of the charge, then his compurgators or oath-helpers would swear that they believed the defendant's oath, rather than swear that the defendant does not commit the charged crime. Like the wergild of a noble is worth six times of that of a ceorl, the oath of a thane is worth of six ceorls' oath. In theory a defendant could prove his sinlessness by a proper oath plus two noble men's oath swearing to believe his oath. According to Stenton (1971), the Wessex king Ine ordered that every person no matter what social status is, accused of homicide must find at least one man of high social rank among his oath-helpers. If a defendant met his oath requirement, the suit ended; if he failed to meet, the ordeal would be invoked, which is to appeal to the supernatural force, the judgement of the God. If guilty, the defendant would suffer the relevant penalty, ranging from fine to execution.

The elaborate scheme of compensation and weight of oath were so quantified by the legal tradition that people were fully aware of their own rights and duties, making it

easier to protect that right and call to account if that right is impaired by anyone, including lords or kings by raising unreasonable claims. The quantification of individual right makes it not easy for a suspect to be judged in a summary way or to make unreasonable atonement. Everything is clear, and the result of committing crimes could be expected. Besides the wergild and oath system of the freeholder, it is impressing to find that even the duty and right of villeins were explicitly stipulated. According to Maitland, the person who held in villeinage was bound to provide some services to his lord, which were perfectly defined: "e.g. he is bond to work three days a week on the lord's land, and five days a week in autumn; what is to be deemed a day's work is often minutely defined—thus, if he be set to thrash, he must thrash such and such a quantity; if he be set to ditch, he must ditch so many yards in a day—in general everything is very definitely expressed" (p33). Even if people holding in villeinage is personally unfree with few civil rights, he could not be ordered by his lord at will. His duties were quantized by customary tradition. Although whether there would be any legal consequences if the lord asked him to do extra duties we may barely know, since the king's court did not protect his right against his lord, and he could only sue in his lord's customary court. It is at least a kind of constraint to the lord's behavior for the duty to be explicitly listed than vague. Moreover, if it was the common practice of clearly defining the serf's duty in every lord's manor, it did bear a powerful constraint towards the lord-villein relations. That is the strength of the customary law, which is not enacted by person in power, but is made by conventional practice of all the people, so as to exert constraining force to everyone in that community.

The quantification of individual right and duty by the legal tradition embedded the early English people with the idea that personal rights are there which is explicit and should be protected. This is significant to the constitutionalism. If royal government claims unreasonable tax which adds more burdens to the individual beyond one's due duty, he should stand up and give a veto. That is the case of Peasants' Revolt in the British

history. And these elaborate schemes of wergild and weight of oath echoes with landed right that the lord's social price was higher than that of a ceorl. Therefore, if lordly interests were harmed, they would ask more for compensation. That is also the case of the creation of Magna Carta and Baronial War in the British history. The constitutionalism is on the root deriving from the awareness of individual right, and that right is from the beginning quantifiably defined by the legal tradition.

3.4.3 The Practice of the Rule of Law

The term rule of law usually intertwines with constitutionalism, indicating that a constitutional monarchy is below the law and is bound by law. As the leading medieval English judge Henry de Bracton during the reign of Henry III argues, "the king is below no man, but he is below God and the law; law makes the king; the king is bound to obey the law, though if he breaks it, his punishment must be left to God" (1235). Coincidently, Bracton's argument echoes with that of Hobbes' theory of sovereignty four centuries' later. In Hobbes' mind, the most glorious feat of God's Omnipotence is to obey the law, and so is the king. Although the king is below no man, and no man can punish the king if he breaks the law, the king must expect God's vengeance.

The Norman judge did not form this understanding of the relation between the king and the law groundlessly. The principle of the rule of law had already been practiced by the Anglo-Saxon kings. According to Tacitus, the Germanic tribal kings had definite limitation in power. Although they were commander in the battlefield, in other important affairs, they relied on tribal assembly to settle with (Church & Brodribb eds, 1885). As Thomas indicates, "in a general and undefined sense, the king was subject to the unwritten customary law, as declared and accepted by the folk and the king" (p472).

In the oath of coronation, the Anglo-Saxon kings swore to keep the good old laws and customs practiced and extracted by the whole community. According to Maitland, "in the ancient form of oath the king promised to hold and keep the laws and righteous customs which the community of the realm shall have chosen—*quas vulgus elegerit, les quells la communaute de vostre roiaume aura esleu*" (P286). The Anglo-Saxon kings treated themselves more as the law keepers than legislators, the keepers of the legal tradition of the nations and of their ancestor's law codes. The Wessex king Alfred "confined his own activity to discovering what seemed him most just 'either of the time of my kinsman, King Ine, or of Offa, king of the Mercians, or of Ethelbert, who first among the English received baptism'" (Loyn, p65). Alfred doubted the ability of the king to make new laws on the ground that the king could not legislate for future based on present situation and knowledge. No one could predict what would be the good for the men in future. In other word, Alfred put himself in a very hamble position under the law. Since the law on his view should do the right good thing for the people, if he could not know what the right thing in time to come will be, he has no power to make the law for that uncertainty.

The tradition of keeping their ancestor's law and ruling with that law was continually practiced by the Norman kings. It is certain that William the Conqueror confirmed the old English law by swearing "This I will and order that all shall have and hold the law of king Edward as to lands and all other things with these additions which I have established for the good of the English people" (Maitland, p7). The Edward he mentioned is the last Anglo-Saxon king, Edward the Confessor. The Conqueror's son Henry I on his accession also confirmed the English law by swearing "I give you back king Edward's law with those improvements whereby my father improved it by the counsel of his barons." Unsurprisingly, the practice of 'counsel and consent' is also found in that oath.

The Anglo-Saxon kings and the Norman kings did not usually legislate. But if they did legislate (especially after the Christianity was introduced the royal concerns were more and more occupied with ecclesiastical issues), they did it with the counsel and consent of their councils (witan or the Great Council). Since the 'counsel and consent' have been elaborated in the previous chapter, I will not give unnecessary details about it here again. But to legislate with the counsel and consent is actually another kind of the rule of law. The law here is to obey this ancient practice, rather than to legislate in an absolutist way. It is because the law is issued by the lawmakers, if the aim of those lawmakers is to protect their own selfish interests rather than for the good of the public, then the rule of law is worthless. To legislate with the counsel and consent of those 'wise men', those great warlords and high prelates, the king's tenants in chief, or great stakeholders, could to the large extent prevent the possibility of making the laws for the good of royalty itself. Although the king may choose with whose counsel he legislates, and the law made in this way lack the mandate of the whole community, it is at least the result of balancing of different interests. Given the background of still a primitive age, legislate with counsel and consent is indeed a benign practice.

The evidence that the rule of law was practiced by the early English kings could not only be found in their oath and legislation, but also be seen in the cases of deposition. There were several occasions when the Anglo-Saxon kings and later medieval kings were deprived of their crown for their misconducts. For example, in 757, the king Sigeberht of Wessex (756-757) was deposited by witan for his unlawful acts; Alhred of Northumbria (765-774) was deposed and exiled in 774; Edward II (1307-27) was deposed because of his political and military incompetence; and Richard II (1377-99) was charged of breaking the laws and was therefore deposed because of it. He was the king trying to play the absolute monarchy, to change and legislate on his wills, which is on the contrary to the English tradition—to legislate with the counsel of prelates and barons. From these cases, the king could be deposed not only by his badness or

incompetence, but also by breaking the laws. In both cases, it conveys an idea that the crown is not unshakable. The power of the monarchy is limited is widely recognized by the medieval English society.

The rule of law could not be more embodied during the medieval time when it comes to taxation. Actually, Anglo-Saxons were not familiar with tax, the kings had other sources of income, like the rent from his demesne land, incomes derived from his feudal rights of imposing scutage, aids, reliefs, wardships, and marriages, and other considerable sources of income like the profits of justice in the king's courts. Until it was demanded to pay the tribute to the Danes during the end of Anglo-Saxon period, the Danegeld, the first land tax appeared in the English history (Maitland, 1908).

Magna Carter may be seen as the first written constitutional document in the European history which dealt directly with tax. "The clauses of the charter of 1215 mark a very definite step: no scutage or aid (save the three feudal aids) is to be imposed without the counsel of the prelates and tenants in chief" (Maitland, p93). Since then, imposing tax, especially direct tax like land tax and tax of movables, without the common council of the realm was becoming impossible. This practice was kept until Edward I confirmed that no aids, tasks, and taxes should be taken for the future without the common consent of the realm, saving the ancient aids, prises and customs in *Confirmatio Cartarum* in 1297. As mentioned earlier, the year 1295 is significant in the British history that a regular practice of summoning the representatives of the commons (knights and inferior clergy) began. Therefore, "after 1295 the imposition of any direct tax without the common consent of the realm was against the very letter of the law" (Maitland, p96). It is interesting to observe that the phrase in Magna Carter is 'counsel of the prelates and tenants in chief, while the expressions in Edward I's confirmation is 'common consent of the realm'. The former was still in the ages that the counsel of the tenants in chief

was enough to represent the mandate of the nation, whereas the latter was a significant step that with time goes on, not only the counsel of the magnates, but also the consent of representatives of common freeholders was necessary for that mandate. Since then, the parliament with distinct two chambers system was becoming the defender of the nation to consent a tax, and to supervise the kings to rule of law.

In short, the principle of the rule of law was generally fulfilled by the Anglo-Saxon kings. It may be explained by that the law that guided the early Anglo-Saxon society was Germanic legal tradition practiced and chosen by people. The king before ascending the throng was tribal leader who lived with these traditions and was adapted to them, and therefore would not easily change them after assuming power. He still needed to consider his companion's opinions and feelings because these warlords were his most capable and loyal comrade-in-arms. He would lose their support and confidence if he behaved in an absolutist way. Even worse, he may be beset by the petitions of his barons. Meanwhile, the reverence to the God forced a king to rule of law. The Christian doctrine told him to rule of law. He also needed to take the high prelates' interests into considerations because they represented the God, the ultimate center of power. His conscience must be condemned if he broke the law. These punishments were enough for a medieval king to rule in a proper way, although the punishment was more of moral than legal consequences.

However, as time goes by, with these ancient traditions like to rule with counsel and consent institutionalized into the very letter of the law, the king has to share his power to rule with the enlarged version of witan or Great Council, the parliament with mandate of freeholders. Now to break the law is no longer the purely inner suffering but the condemnation by the barons and the nations. Moreover, the impeachment appeared in the history in 1376 that if the parliament could not sue the king, his servants could be

prosecuted. The king's ministers holding public office could no longer be shielded by the king. They were required to be accountable to the parliament for the royal account. It was the time that the rule of law was transforming from monarch's self-restraint to the parliament's legal sanction. However, had there been no tradition of counsel and consent, nor tradition of customary law or Christian Culture, the rule of law is lacking its roots to grow stronger. Cultural tradition is the soil where suitable institutions grow in it. They are not invented suddenly, but to brew until the right moment.

.5 Common Law

The common law legal system is another great contributor to Britain's constitutionalism. It is not only because the individual and property right embodied with both cases and statutes are engraved in the common law, but also this legal system is from the beginning derived from the unwritten customary laws of Anglo-Saxons rather than from codes ordered and issued by kings or emperors for the public to obey. In other word, it is the traditions and customs of the community rather than the authority and prerogative of rulers that laid the foundation of the common law legal system. As Maitland points out, "Roman law here as elsewhere would sooner or later have brought absolutism in its train" (p22). Mcllwain (1943) also argues that "the principal background of our modern constitutionalism is to be found in the common law in which these rights of individuals are defined and only secondarily in the parliament which maintained them" (p23).

If common law is viewed as the "chief bulwark protecting individual and 'common' right against the despotic will of kings", then the Anglo-Saxons' contributions to the development of common law legal system could be considered as indirectly

contributing to Britain's constitutionalism. Although the most conspicuous development of common law took place during the Henry II's reign, the main contributions of Anglo-Saxons, I would argue, rested with two areas. Firstly, the customary laws transmitted and preserved by oral tradition among the Anglo-Saxon free men who sat as judges in the local courts laid the foundation for the common law legal system as traditional law, based on precedent (*stare decisis*) and common local knowledge. As Thomas (1986) points that "the source for most common law was wholly Anglo-Saxon" (p109). Secondly, the Anglo-Saxon local courts, especially the shire moot, provided the locations for the later Norman justiciars and Henry II's itinerant justices to the locality to bring the varying local customs and judicial decisions to the king's court. After these decisions were binding with each other, with different local customs incorporated and new remedies infused to resolve old problems, we got the law common to the whole kingdom, which was further reinforced throughout the country by itinerant justices. The common law legal system was thus named because it is the law common to all (Maitland, 1908).

Common law draws its legal sources from the Germanic traditions and customs preserved by the Anglo-Saxons. "It has been shown that Germanic legal customs were brought to Britain and proceeded in an unbroken course of development to become the foundation for law common to all of England" (Thomas, p503). The new circumstances in England more or less changed these customs, especially after the Christianity was introduced and kingship emerged into the central force for the legal development in the Anglo-Saxon England. Even so, the Anglo-Saxon kings' role towards legal development was more like organizer than legislator. And this concentration of royal power prepared the way for the future Norman and Plantagenet rulers to mold the varying local customary law into the common law. As Maitland argues, "as the old local courts give way before the rising power of the king's court, so local customs give way to common law" (p18).

Because the ancient Germanic legal customs that guided the early Anglo-Saxon society remained largely unwritten, it is only from the early legal codes of the Anglo-Saxon kings could we learn the social concerns engaged by kings and people alike in an emerging Anglo-Saxon kingdom. The earliest legal code written in Anglo-Saxon dialects belonged to those dooms of Æthelberht of Kent dating in 601-605. These dooms are preoccupied with schedules of 'composition' (a Germanic tradition of compensation multiplier for offences against the church and clerics, king and his servants, noblemen, and normal freemen based on their different wergild system and seriousness of the offense), payments for specified offenses in breaking the peace (like forcible entry into and theft from dwellings and fenced enclosure), and kings' other legal concerns (like false imprisonment) (Attenborough, 1922). All of these measurements were based on legal traditions of Germanic society which could be proved by the similarity of this code with *Lex Salica* (one of the earliest Germanic codes in the continent written in Latin) in terms of subjects (Thomas, 1986), the subjects revolved basically around blood feud, kindred, land, peace maintenance, and compensation. The schedule of compensation to deal with different kinds of offenses makes the doom like a tariff of offences. The tort law in the modern common law legal system probably originated from this ancient legal tradition of compensation by money or agricultural products to avoid blood feuds.

The king's role and aim in issuing these codes was primarily to organize these social customs to make it clearer, especially in the areas concerning the church property and ecclesiastical issues, the king's special peace, and to enforce these customary laws accordingly. As Thomas argues, "all of these 'codes' were codes only in the sense that they were organized somewhat systematically or logically, not because they were comprehensive statements of law. They probably reflected some customary law of the time, but in fact did not include the vast bulk of customary law" (p479). Moreover, the

driving force for the Anglo-Saxon kings to issue legal codes may be the Christianity rather than their royal ambitions, given the reason that issuing law code is the practice in the Roman law legal system, and the fact that the first law codes of Æthelberht of Kent was made after Æthelberht was converted to Christianity. It was probably that the bishops came from Roman encouraged the king to do so to protect the church's interests, since issuing law codes was never happened in the pagan England. And the following law code of Wihtred of Kent are almost exclusive to the ecclesiastical issues under the counsel of church officials.

Therefore, the fundamental distinction of common law legal system was determined in the Anglo-Saxon period that it is not statutory law, but customary law, although there are many statutes in the common law legal system after the parliament was found. But the new statutes were just added to the old common law to deal with new circumstances and to make it more complete. At first, it is the local judges who decided what the law is, based on local customs and common sense of the community. Later on, the judges in the king's court decided what is law, the so-called 'judge-made law'. However, the law was made based on precedents and was bound by peer decisions. It is the law originated from people's rights and duties in the land, rather than the law enacted by the rulers for the public good. In this sense, the common law legal system tends to be more constitutional. As Maitland indicates, "Common law is in theory traditional law—that which has always been law and still is law, in so far as it has not been overridden by statute or ordinance" (p23).

On the other hand, the emerging Anglo-Saxon kingship in bringing together a body of customary laws governing an ever more complicated society paved the way for the development of law to be applied to the whole land in the coming future. It is worth mentioning that the law code of Wessex king Alfred was the first applied to all lands

under the English rule (Fisher, 1973), implying the tendency toward a unified legal system already before the Norman Conquest. As Thomas indicates, "concentration of ruling power generated legal developments that were different from, but natural extensions of, old customs. This concentration (of power) prepared the way for the common law. At the same time, purely local practices developed virtually unhindered by central authority and made their own contributions to common law foundations. (p503)

Norman rulers were great administrators than legislators. "There is no Norman law book that can be traced beyond the very last years of the twelfth century" (Maitland, p7). Their judicial activities of royalty were mainly for financial purposes. By assigning the justiciars to the shire-moot, the rulers received audited money returns from sheriffs (Lindsay, 1974 & Pollock & Maitland, 1952). The famous *Domesday Book* ordered by William the Conqueror was financial inquiry in nature. As Thomas argues, "the Norman presence did little to alter the substantive features of the English legal system" (p109). In fact, they inherited and retained the Anglo-Saxon legal tradition and local courts intactly. The significance of Norman Conquest in the development of the common law legal system thus rested with the strong kingship that brought the national unity for England. The local courts were during this time under the direct charge of the royal court through powerful sheriff and royal writ, which facilitated the law to be applied to the whole kingdom subsequently. Writ, by the way, is regarded as one of the most important contributions of Anglo-Saxons' to the science of government, which had been devised for the purpose of conveying the royal orders and of bringing the cases before the king's court. Many scholars hold that the trial by jury in the common law system was probably brought by Norman conquerors since it was widely used in compiling the *Domesday Book* by the verdicts of juries. However, in view of that the jury of presentment was also used in the Danelaw during the Danish Conquest period where the twelve leading thegns of the wapentake were appointed by a court to give a

collective verdict on oath (Stenton, 1971), the origin of this institution is lost in obscurity.

The Danish occupation did not change the English legal system since they both belonged to the Germanic nations with similar legal traditions of kindred organizations, wergilds, and public assemblies (Loyn, 1977). Although there was slight differences in the schedule of wergild and compensation system, these differences were only applied in the Danelaw (Danish occupation area). As Thomas indicates, "the impact of all these circumstances on legal developments may have been pervasive in the Danelaw, but their impact on national law as a whole was subtle and imperceptible" (p502). The reason for why the Norman conquerors obeyed and retained the English legal system could probably be explained by that, besides the appeal of the Conqueror in seeking for the legitimacy to rule in England, the Normans are also Germanic in lineage. Normans were descended from Norse Vikings. According to Thomas, Norman was founded by William the Conqueror's Viking great-great-grandfather Rollo in France (p112). Therefore, with similar origin, it is not hard to understand why the English legal system could be kept all the way during the twice conquests in the British history by other nations without obvious interruptions.

From Henry II on ward, "the importance of the local tribunals began to wane; the king's own court became ever more and more a court of first instance for all men and all causes. The consequence of this was a rapid development of law common to the whole land; local variations are gradually suppressed; we come to have a common law. This common law is enforced throughout the land by itinerant justices, professional administrators of the law, all trained in one school" (Maitland, p.13).

From the Germanic local customary law to the law common to all the land, the development of common law legal system went through a circular course in a bottom-up-bottom manner. The Anglo-Saxons' legal practice and tradition provided common law with profound legal sources and decided the pattern of common law to be traditional law and case law. The Norman and subsequent royal houses brought powerful central government and strong administrative force to mold these Germanic legal sources into a distinct legal system with contrasting jurisprudence with Roman law. Its mechanism, in a sense, is judge's reasoning and interpretation, based on precedents and profession, rather than the legislation of the kings or emperors. In nature, it is a law comprising people's landed rights and duties: the right to claim a compensation, to attend a court, to demand aids, relief, wardship and marriage (lordly right), and to enjoy a vote; and the duty to conduct blood feud, to swear fealty to one's lord, and to pay rent or to serve in army. With different rights preserved and practiced by different social class engraved in law or in tradition, it is therefore better able to resist royal encroachment.

IV. Conclusion

A certain political system is the historical result of numerous selections and eliminations. Like “survival of the fittest” by Darwinism, the institutions which could remain in a long period of time in a given society must be the fittest ones to a certain social type, selected unconsciously by its cultural traditions. Radicalness and restoration are in the polar ends of the social pendulum. Numerous interests of stakeholders are like the invisible hands pushing the pendulum to waggle between the two extremes. But the equilibrium of this social pendulum must stay for most of time in the place where most people in that community think as comfortable and suitable. They may not give a reason why they think that place as most comfortable, but if the pendulum deviates that place, they will immediately find themselves living in an uneasy circumstance. There is always a resilience to pull the pendulum to the equilibrium. That resilience is the power of culture, the ‘taken-for granted beliefs’ of most people living in that community generation after generation.

The constitutional monarchy is also the equilibrium in the British society. Between absolutism and republicanism, it is mild and moderate. It is the result of historical selections, driven by Britan’s constitutional culture. The origin of this culture is from the Anglo-Saxons, a type of Germanic culture in nature. And the constitutional gene rooted in a basic assumption of Germanic nations, that all public rights and duties are derived from land possession. The land possession was the basic qualification distinguished free and unfree. Once affiliated to the free class, a man’s right was protected by customary law, and was entitled to attend the local court to participate in primitive political life. Once ascribed to unfree, like slave, they were treated as the

private property of their lords (usually ceorls), without any legal protection. Court attendance is therefore another important Germanic tradition in determining constitutionalism since it is regarded as a civil right among Germanic nations and only the free were entitled to fulfill this right. The local court is at the same time local government and local council as well. In the age of barbarism, when the kingship was still an unfamiliar concept, these local courts were already the center of power in the community, tackling almost all the issues towards people's common life, the so-called self-government. Therefore, when the kingship was emerging with the conquest and with the evolution of a more complicated society, the local courts had acted as a check of royal power, since they governed almost all the local affairs. In other word, the kingship in the Anglo-Saxon origin was already limited, if not limited by customary law, or by Roman church after the Christianity was introduced, it was to the large extent restricted by a far more ancient institution. However, the constraint of royal power by a local court is totally different with that by a powerful feudal domain. Because local court is people in council. The interest of that court is collective rather than individual. It exerted royal government with constructive limitation rather than self-protection. The king's primary role was to lead his people in war. For other affairs, the king left them to the local courts. In this sense, a limited kingship was a consensus by the early English society, which laid the pattern and practice for the future constitutional monarchy.

If people had their local council, the king in certain would have his own council, that is the witan, the assembly of the wise. "The wise" were made up of magnates of the realm. Besides the high prelates who governed the spirit of the people, the others were mainly warlords. They were the king's companions in war, his most faithful men. The king and these lords formed the most sacred relation in the Germanic society—the bond between lord and man. The value of good lordship encouraged a king to reward great number of lands to his faithful men in return for their services and contributions in war. Besides that, good lordship also advocates a lord to consciously recognize his men's interests

and to protect those interests accordingly. Based on the assumption that all public rights and duties are derived from land possession, the men with more land should enjoy exalted right, and at the same time assumes more duty. Therefore, the king summoned his most devoted lords to the witan to discuss national importance, and to rule with the counsel and consent of these nobilities. The summons to the witan by a personal writ was regarded as the privilege, implying the king had recognized a lord's political status. The king's tenants in chief who were summoned to witan or later Great Council by personal writs were the forerunners of the House of Lords.

Accompanying the enlarged political rights of these lords was the judicial rights. In the ancient doctrine the king was the only source of all jurisdictions (Maitland, 1908). And he could alienate his jurisdictions along with the lands to the lords. That is what we called feudalization in Britain. The previous land possession became the feudal land tenure. The previous local court system became the tertiary court system with local court in the bottom, feudal court (manorial court) in the middle, and king's court on the top. The previous freemen were gradually losing their land and independence, since the lands were more and more concentrated to the feudal lords' hands. The economic hardship even drove more peasants to seek a lord's protection. These peasants served in different kinds of feudal tenures, and most of them served in socage, which means to pay rents rather to serve in army. The peasants serving in socage, and other military tenure were still regarded as freemen. Although they were economically unfree, they were legally free in the customary law, which is of significance. They possessed their land freely and their rights were perfectly protected by law. They were still entitled to attend the local courts, although their jurisdictions by then were greatly took away by the feudal courts. The peasants who served in villeinage, the bottom layer of feudal ladder, were villein. They were economically and legally unfree. Like slaves, they could not leave their lords, and were not qualified to attend local court.

If local court attendance was the symbol distinguishing free and unfree in the Germanic tradition, it would finally become the badge differentiating different political right: the freeholders enjoyed their political rights whereas the others did not, like a lease holder, or a villein. After 1295, the knights were regularly summoned to the Great Council to treat with taxation as the representatives of the local shire. They were sent by sheriffs from the local courts in different shires. The knights were well born young men who joined a renowned lord in the first place. Serving in the feudal knight tenure, these knights were precursors of the House of Commons. Since 1430, the forty shillings freeholder were qualified to vote their representatives in the local courts to the parliament (the Great Council with the House of Commons could be called parliament). The freeholders were the freemen serving in different feudal tenures except the villeinage. In other word, those who did not lose their legal freedom marked by free land tenure even during the darkest hour of feudalization course finally redeemed their due political rights. In this sense, isn't it the basic assumption of the nation that the public right originated from land possession finally achieved the British parliament? The great landowners constituted the House of Lords, while the petty bourgeoisies made up of the House of Commons.

Although we have to owe much credit to the Norman rulers who saved the fortune of Britain's due constitutionalism by saving those Anglo-Saxon local courts as the check of the emerging feudal lords in England. Because of anti-feudalism, the symbol of freedom and equal legal right embodied in the local courts did not disappear. The taxation was therefore not that feudalized too, which provided an option for the kings to rely on the commons if the lords would not be willing to aid. This would never happen in an ideal feudalized state because the king could not tax his people directly but from his tenants in chief under the ideal feudal principle. The need of money for war and the possibility to negotiate that money through taxation with the vast people in the locality therefore offered the catalyst for the birth of House of Commons.

The Germanic customary law was also in the large extent revolving around people's rights and duties in the land and tended to protect landed property and rights, since it was the freemen with land possession attending local courts to give their judicial judgement there. The rights included claiming for compensation based on wergild system, participating in political life in the local courts, and numerous lordly rights to claim aids, reliefs, *manbot* and the *heriot*, wardship, marriage, confiscation, and private jurisdiction. While the duties covered kindred duty of taking revenge for injured family members; social duty of following a lord to form a war band, swearing fealty to one's lord and fighting for him; and civil duty of court attendance, peace maintenance, oath swearing as compurgators or oath-helpers, rent paying, bridge and fortification repairing, and so on. These Anglo-Saxon legal traditions were the sources of the common law legal system. In other words, the common law was from the origin comprising the rights and duties of different social classes marked by different level of land tenure and therefore acted as the bulwark protecting each level of due right. The common law legal system and Anglo-Saxon's cultural tradition are the same strain and mutually reinforcing each other. If the formation of parliament was the result of feudal land tenure originated from civil right by virtue of land possession, the common law was in the same course protecting each right out of each land tenure. If one party asks for more rights from the others, it needs to seek for consent of others. Otherwise, it is outlaw. The law is not made by people in power, but rights in land.

Constitutionalism is a mild limitation of royal power. The relation between the monarchy and people is correlative dependent but mutually restricted. Absolutism is the result of over-feudalization which wipe out people's constructive force, leaving an antagonistic relation primarily between monarchy and lord. Republicanism, to the other extreme, over emphasizes people's rights than duties. Therefore, for the nation whose ancestors were already accustomed to the right and duty out of land possession, and to

participate in public affairs to fulfill their right and duty, constitutionalism in Britain is just a natural result for people in different social classes to perform their own functions, to enjoy their due rights, and to ask for consent of others in times of urgency.

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