Certiorari and Policy-Making in English History

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CONCENTRATION ON MAJOR LEGAL INSTITUTIONS such as the courts, bar, or the judicial system in general has dominated studies of legal phenomena. The few works directed to the area of procedure have been more concerned with indicating the changing legal rules surrounding them than with their use and effect as means of exerting political control. This article is designed to investigate historically a procedural device—the writ of certiorari—which today is of such significance in judicial policy-making in the United States. It is assumed that certain of its characteristics, peculiar to itself as an institution, can provide insight into its current use in both England and the United States.

Additionally, an historical study of such a device can throw light on how policy-makers in the past exerted power over their competitors. This requires that emphasis be placed on institutions, struggles, and theories within which the writ system developed. Approaching the legal system from the perspective of the overall political process should bring insight into the development of substantive law. For tracing simply the legal rules governing certiorari would be a sterile means for understanding the operations of a political system. To illustrate its political usage, the sections following trace the development of the writ from the Conquest to modern England.

POLITICAL INSTITUTIONS AT THE TIME OF THE CONQUEST

It comes as no surprise to learn that the most important political institution in English history to modern times was the kingship. Almost all the power struggles of any reign revolved about the personage occupying the throne. Whether the king was strong or weak, the perquisites, habits of obedience, religious overtones of the position, as well as the prevailing ideas of politi-

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cal authority were all oriented toward the crown. For protection of their position as well as extension of their power, the monarchs institutionalized their means of rule. It is with one institution, the judicial, as it existed at the time of the Conquest, that this section deals.

The origin of the kingship in England is still a matter of some speculation. Until about the third century, there does not appear to have been such an office. Prior to this time, the government of a tribe was conducted by a chief responsible for administration and justice and private individuals who performed such transitory functions of leadership as leading warrior bands into neighboring territories. At a later period, at least by the seventh century, there were a number of kings who merged one with another to form larger kingdoms. Probably a war chief simply imposed himself upon others, and from this origin developed the "character and functions of the kingship"[1] which we now identify with the concept. This almost certainly included the functions of administration, providing justice and acting as commander-in-chief.[2]

Emphasis here, however, must be upon the peculiar merger of the obligation to ensure justice and the concept of kingship. Exactly how this came about is difficult to ascertain. One theory which appears plausible arises from the fact that the tribes in England were of Germanic origin. Within the latter had evolved a belief in an omnipresent folk-law which embraced all members of the tribe, including the king. "Each member lived within the people's 'peace,' and the law provided especially the regulations necessary to prevent that peace from being broken."[3] As the leader of the tribe it was assumed that the king should require order and ensure that the law be obeyed. Justice was assumed to be embodied within the law and thus the function of ensuring justice became attached to the notion of kingship. Whether the rationale was as logical as this cannot be proven, but that the king early de-

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[1] G. B. Adams, *Constitutional History of England* 10-11 (1921).

[2] S. B. Chrimes, *An Introduction to the Administrative History of Mediaeval England* 1 (1959).

[3] George H. Sabine, *A History of Political Theory* 200 (1961). For a more extended discussion, see Adams, *op. cit. supra* note 1, at pp. 23-7. The actual relation between the Teutonic tribes and the Anglo-Saxons is uncertain. Adams, for example, takes for granted that the English institutions were directly influenced by the Germanic. On the other hand, Richardson and Sayles see the alleged direct relation as a myth created by the famed historian, William Stubbs. H. G. Richardson and G. O. Sayles, *The Governance of Medieval England from the Conquest to Magna Carta* 23-4 (1963).

cided some controversies among his subjects and enforced judgments is an historical fact.[4]

Later, by the time of the Conquest certainly, this function of distributing justice was reinforced by the belief that God had instituted the kingship. According to this theory, "God's purpose in establishing kingship, and all subordinate magistrates as well, is to secure and enforce justice among fallen men. The end of all secular government is justice, and without it no political authority can ever be legitimate." [5]

In this early period, however, the idea of justice as solely associated with the king of England had not yet reached fruition. Smaller territorial areas had their own courts and procedures for ensuring law and order. The primary reason for this was probably because, existing earlier than the kings, they had an established and autonomous jurisdiction from which to oppose royal encroachments. Concomitantly, the kings were often too weak to control the various subdivisions effectively. The shire, hundreds, and manorial courts constituted these local jurisdictions.

The shire court was the largest and was administered by an ealdorman who sometimes governed several shires. "As official head of the local judicial system, the ealdorman received in some parts of the country one third of the proceeds of court fines and fees . . ." [6] which indicates that the position could become rather lucrative. By the time of Edward the Confessor the position had become a very powerful one, similar to that of a governor. At the time of the Conquest, the ealdorman was appointed by the king although hereditary claims usually had to be recognized. Protection of the king's interests was supposed to be the duty of another officer called the sheriff. It appears that an individual ealdorman could be powerful enough to oppose the king's interests if he wished to do so.[7] If such was the case, the shire court must have been an important rival to the king's courts.[8]

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[4] Frank Zinkeisen, "The Anglo-Saxon Court of Law," 10 *Pol. Sci. Q.* 132 (1895). The notion of royal justice was both of a political and legal nature, with the latter lagging behind the former until all of England came within the royal peace. Bryce Lyon, *A Constitutional and Legal History of Medieval England* 42-4 (1960); cf. G. O. Sayles, *The Medieval Foundations of England* 170-171 (1950).

[5] Charles Howard McIlwain, *The Growth of Political Thought in the West* 154 (1932). Cf. 1 Lewis, *Medieval Political Ideas* 146-47 (1954).

[6] Adams, *op. cit. supra* note 1, at p. 22. Cf. F. W. Maitland, *The Constitutional History of England* 41 (1931).

[7] Lyon, *op. cit. supra* note 4, at p. 63.

[8] The actual relationship between the local courts and the king remains unclear. Adams, *op. cit. supra* note 1, at pp. 22-4, sees it as

The hundred court was the other principal public local court. By the end of the Conquest, the judges were local landowners who, in turn, delegated the judicial powers to twelve of their number. It had both civil and criminal jurisdiction although its most important duty was to inquire into the proper functioning of the tithing system, which "was regarded by the writer of the *Laws of Edward the Confessor* as the main security for the keeping of the peace." [9] A question of importance is the relationship which existed between the two types of courts. Maitland suggests that a plaintiff could not go to the shire court unless there has been a "default in justice" in the hundred court.[10] Adams disagrees, stating that the hundred court "was of concurrent jurisdiction with the shire court." [11] In addition he feels it was up to the plaintiff to decide which court to go to but that the controversy must be an important one for the shire court to accept it.[12] Whichever view is most accurate undoubtedly each court was interested in maintaining its jurisdiction and business as against a competitor.

Both of these courts were used by the king as administrative agencies, especially as their personnel often overlapped. However, it was the hundred court which was most frequently so used, especially as a police court.[13] The reasons for this were probably that the hundred court was closer geographically to the people and also that the court met under the presidency of the sheriff or his deputy. On the other hand, the kings apparently had trouble controlling the sheriffs and thus often allowed even important disputes to be decided in the local courts.[14]

A third type of court differed considerably from the first two.

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having independent judicial authority since judgment is given by an assembly. On the other hand it was used as a royal administrative unit with the sheriff acting as chief administrator. Richardson and Sayles, *op. cit. supra* note 3, at p. 25, simply assert that "they are devices of royal government." The problem is important in discovering if cases were removed from the shire courts to the royal courts. The better view seems to be that they were separate until about the time of the Conquest.

[9] Holdsworth, *A History of English Law* 15 (7th ed., 1956).

[10] Maitland, *op. cit. supra* note 6, at p. 45.

[11] Adams, *op. cit. supra* note 1, at p. 24.

[12] Adams, *op. cit. supra* note 1, at p. 24. It is certain, at least, that cases were transferred from one court to the other. See Thomas Pitt Tasswell-Langmead, *English Constitutional History* 26 (10th ed., n.d.); Lyon, *op. cit. supra* note 4, at p. 68.

[13] Adams, *op. cit. supra* note 1, at p. 24; Tasswell-Langmead, *op. cit. supra* note 12, at p. 24; 1 Holdsworth, *op. cit. supra* note 9, at pp. 6-7.

[14] Richardson and Sayles, *op. cit. supra* note 3, at p. 173.

This was what was known as the franchise or manorial court under the control of an Anglo-Saxon and, later, feudal lord. These were rights granted by the king to the church and lords in return for military service and work by inhabitants of the franchise on bridges and fortifications. By 1066, so many charters were given out, and so many peasants and townsmen had commended themselves to lords that the shire and hundreds courts were losing their functions, "a process that during the twelfth century blocked most peasants from obtaining justice in public courts." [15] Why the practice of granting such charters became so extensive is difficult to say but part of the reason was probably to purchase the allegiance of the nobles.

Aside from the two public courts and the franchise court, there was also a rather unique royal court known as the witan. Basically, it was an advisory council of aristocrats which exercised jurisdiction over cases "affecting the king and his great lords plus a few cases that were appealed from the shire." [16] It had no clearly defined functions, although it does appear to have been the "highest judicial body in the kingdom." [17] However, since it was primarily a tribunal of aristocrats, the bulk of its judicial work was in the first instance. Its importance lies in recognizing its existence as an example of the close institutional relationship between the king and the duty to provide justice.

With the king exercising a personal jurisdiction and each locality having its own customs, it is not difficult to see how tenuous was the rule over sub-kingdoms or territories exclusive of his. Consequently, reliance was placed upon physical power, kinship, and contract for extending his jurisdiction. An exception to this probably occurred only in the event of a victorious war followed by a succession of strong rulers, such as took place after the Conquest.

As could be expected, these several courts of differing jurisdiction each evolved their own rules of law. Additionally, while the public courts were considered administrative units of the crown, they were always potential and often actual obstacles to the king and the royal administration. This was even more true of the manorial courts which, controlled by the powerful lords, often extended their jurisdiction to include several villages. A lessening of local or public control resulted which eventually allowed the manorial courts to outlive feudalism itself.[18]

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[15] Lyon, *op. cit. supra* note 4, at p. 78.

[16] Lyon, *op. cit. supra* note 4, at p. 91.

[17] Adams, *op. cit. supra* note 1, at p. 15. However, "justice in pre-Conquest England was essentially local justice." Richardson and Sayles, *op. cit. supra* note 3, at p. 173.

[18] Adams, *op. cit. supra* note 1, pp. 27-45.

While these courts often had jurisdiction over civil and minor criminal matters, jurisdiction over more grievous crimes was usually reserved for the king's courts because of the concept of the king's peace. This also was closely associated with the Teutonic "folk-law" by which a wrong must be atoned for not only to the injured person but to the nation or community. Being responsible for the preservation of order within his community, the king had a special interest in punishing the transgressor. According to Holdsworth, this was "an idea which is the condition precedent to the growth of a criminal law." [19] And over a number of centuries the king's peace "devours all other peaces." [20]

As the king's peace extended in jurisdiction, more and more cases were taken from the local courts particularly by proceedings initiated by the royal writ.[21] Offenses against the king came to be punished more severely than those against the local peace; and the king further extended his power by making special grants of his peace to areas, such as highways, through his intermediary the sheriff.[22]

One can well imagine the number of power struggles submerged beneath the surface but which often burst through during the reign of an ambitious king. In addition, the problems inherent in the administration of the courts were most conducive to conflict. Not only were there pecuniary rewards in the form of fines but also opportunities for tax collection and making regulations. The king himself participated in the conflicts by granting liberties or franchises to individuals. Thus royal power could be increased not only by absorbing formerly local jurisdictions but by granting this jurisdiction to feudal lords in return for their allegiance and material support. "In this way the organization of the hundred was considerably weakened, and the administration of justice became to a large extent not national or royal, but territorial and feudal." [23]

THE WRIT SYSTEM AFTER THE CONQUEST

Issuance of writs was one of the forms which the king's intervention took.[24] In times prior to the Conquest, when executive

[19] 2 Holdsworth, *A History of English Law* 47 (3rd ed., 1923).

[20] Maitland, *op. cit. supra* note 6, at p. 108.

[21] 2 Holdsworth, *op. cit. supra* note 19, at p. 49.

[22] Adams, *op. cit. supra* note 1, at pp. 25-6.

[23] Tasswell-Langmead, *op. cit. supra* note 12, at pp. 25-6.

[24] Unfortunately, most of the evidence dealing with the writ system at the time of the Conquest is tentative. F. E. Harmer has concluded that "of the origin and early history of the Anglo-Saxon writ nothing certain is known." *Anglo-Saxon Writs* 10 (1952).

and judicial functions were not distinguished, the king's writ was an order directed to the sheriff or some other person commanding what was to be done.[25] The writs dealt with varying types of subject matter:

> There might be a direction to invest a bishop with the rights of his see, to compromise a suit, or to give possession of property. It was because the writ was so adaptable that, in the following period, it developed into many different instruments —charters, letters patent, letters close, and the ordinary judicial writ.[26]

The writs must have been used as means for exercising control over subjects and thus as much for political purposes as anything else. For where the king's orders are obeyed without the necessity of actual force, one can say that the king has actually extended his institutional power. Consequently, it is significant that the writs were used and were effective in withdrawing jurisdiction from local officials and local courts and in requiring certain things to be done.

By the eleventh century the power of the Anglo-Saxon monarchy was visibly deteriorating. Doubtless the granting of the franchises reflected the growing power of the nobility vis a vis the king and thus threatened the kingdom with disintegration. "The great earls . . . were forming a separate order in the state inimical alike to the supremacy of the king and the liberty of their fellow subjects." [27]

At this point in history William the Norman conquered England and established the dominant influence of the kingship. While the strengthening of feudalism was of importance, centralizing administration was to be of more lasting value. Perhaps the most important innovation was the extension of the king's jurisdiction from that over person to land or territory so that "by gradual process and with an outward show of legality, nearly all the lands of the kingdom came into the hands of the king, and were by him granted out to his Norman nobles, to be held by the feudal tenure, to which they were alone accustomed in their own country." [28]

While the primary administrative divisions of the country "were accepted as a matter of course," [29] some changes did take

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[25] S. B. Chrimes, *An Introduction to the Administrative History of Mediaeval England* 14 (rev. ed., 1959).

[26] 2 Holdsworth, *op. cit. supra* note 19, at p. 77.

[27] Tasswell-Langmead, *op. cit. supra* note 12, at p. 31.

[28] Tasswell-Langmead, *op. cit. supra* note 12, at p. 35.

[29] F. M. Stenton, *Anglo-Saxon England* 674 (1943).

place. The ancient Witan or witenagemot [30] came to be replaced by the private household of the king, which in turn developed into the *curia regis*, "the court of the king's tenants-in-chief." [31] Like the witenagemot, the functions of the *curia regis* were not differentiated immediately. "Whatever manifestations of the king's executive may occur, whether falling in the sphere of what we should call judicial, fiscal, or simply administrative action, they occur within the Curia." [32] Inasmuch as the *curia regis* was where the king was located with his most important officials and since this was "the supreme central court where the business of government in all its branches was transacted." [33] it is difficult to believe that the habit of policy-making did not overlap its judicial duties.

Eventually, two divisions appeared within the *curia*. The larger *curia regis* became an advisory council with the most important noblemen having a duty of attendance. However, a smaller *curia* consisting of the regular members of government performed the functions of legislating, administering, and judging. "It possessed originally all these different powers which were subsequently distributed among the three courts of the Kings Bench, the Common Pleas, and the Exchequer." [34]

Until the reign of Henry II the same individuals handled both the business of the Exchequer and the tasks of the judiciary. As such it served as a court of final appeal until 1178 when this function was transferred to the king's own hearing. By the time of John's reign, it also had been deprived of its jurisdiction over civil suits between private persons by the creation of the court of Common Pleas.

As could be expected the power struggle continued between the king and the great lords. Under William, the king held the ascendancy because of the decline in autonomy of the shire and hundred courts as the sheriff now had more extended authority and rendered more obedience to the king. On the other hand, the manorial courts increased in number and jurisdiction.[35]

The influence of the shire and hundred courts was decreased in two ways: they were forced to recognize the king "as their direct lord," [36] and the king was able to transfer cases and records into

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[30] Cf., T. J. Oleson, *The Witenagemot in the Reign of Edward the Confessor* (1955).

[31] Tasswell-Langmead, *op. cit. supra* note 12, at p. 47.

[32] Chrimes, *op. cit. supra* note 25, at p. 45.

[33] 1 Holdsworth, *op. cit. supra* note 9, at p. 32.

[34] Tasswell-Langmead, *op. cit. supra* note 12, p. 107.

[35] Richardson and Sayles, *op. cit. supra* note 3, at pp. 34-6.

[36] Richardson and Sayles, *op. cit. supra* note 3, at p. 35.

his courts.[37] "The royal ascendancy was further demonstrated by the ease with which pleas could be removed from the county court to the Common Pleas by writs of *pone* or *recordari facias*, if a judgment had already been given, and also by the participation of the royal itinerant justices in the country's judicial business." [38] Also used was the writ *praecipe*, the "bluntest instrument to attract cases to the royal courts." [39]

The writ *praecipe* was probably the progenitor of most of the later extraordinary writs.[40] This was the most widely used writ for bringing cases into the royal courts. In its use "the process of judicialization of the old high-handed method of redress, that remarkable marriage of the power and law, can be grasped most easily." [41] Usually it could be used only when land was held directly of the king; therefore, only for or against the greater lords.[42] What seems to be the earliest record of the use of the writ occurred under William I in 1077. Apparently one of the king's attendants had alienated certain lands to important vassals of the king while acting *ultra vires*. The record went as follows:

> William, by God's grace king of the English, to Lanfranc, archbishop of Canterbury, and Geoffrey, bishop of Coutances, and R[obert], count of Eu, and H[ugh] de Montfort and his other magnates of the realm of England, greeting. I command and order that you cause St. Augustine's and abbot Scotland to be reseised of the borough of Fordwich, which Haimo the sheriff holds, and of all the other lands which abbot Alsin, my runaway [man], has given away or consented to be alienated, whether for levity or fear or cupidity. And if anyone with any violence take anything away there, you shall force him, willy nilly, to give it back. Farewell. Witness: Odo, bishop of Bayeux. In the dedication of Bayeux.[43]

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[37] R. C. Van Caenegem (ed.), *Royal Writs in England from the Conquest to Glanvill* 22 (Selden Soc., v. 77, 1959).

[38] Sayles, *op. cit. supra* note 4, at p. 342.

[39] Sayles, *op. cit. supra* note 4, at p. 394.

[40] The specific origins of the extraordinary writs are unknown. However, they are usually characterized as being issued *de gracia* rather than *de cursu*. Unfortunately, even this distinction is often blurred, as will be seen. The distinction apparently was first noted by Bracton when he "contrasts *brevia de cursu* with *brevia magistralia*. . . ." S. A. de Smith, "The Prerogative Writs," 11 *Cambridge L. Rev.* 43 (1951).

[41] Van Caenegem, *op. cit. supra* note 37, at p. 238.

[42] 3 Holdsworth, *op. cit. supra* note 19, at pp. 5-7.

[43] Van Caenegem, *op. cit. supra* note 37, at 425.

This particular order deals with the most important subject matter of the middle ages: land. The use of the writ is noted by Glanvill in a case which indicates its use as an order to a vassal sanctioned by the threat of bringing the case into a royal court:

> The king to the sheriff, greeting. Command N. that justly and without delay he render to R. one hide of land in such a vill, whereof the said R. complains that the said N. deforces him. And if he does not do this, summon him by good summoners that he be before me or my justices on the morrow of the second Sunday after Easter at such a place to show why he did not do it. And have there the summoners and this writ. Witness: Ranulf de Glanvill. At Clarendon.[44]

In the use of this writ one can see the genesis of two modern extraordinary remedies: injunction and certiorari. The writ was of much significance as "no other type of writ brought so much litigation to the royal courts." [45] However, it was severely curtailed by Article 34 of the Magna Carta which stated that "the writ which is called *praecipe* shall not for the future be issued to anyone, regarding any tenement whereby a freeman may lose his court." [46] Essentially, it meant that a case concerned with land must begin in the lord's court from whom the land was held. "To a certain extent in cases of land this puts a check on the acquisitiveness of the royal court." [47] Other ways, however, were found to avoid this limitation.

Another writ, of somewhat later origin than *praecipe*, was the writ of *recordari facias*. Like the *praecipe*, it was used primarily where rights to land were in question. Unlike *praecipe*, it could be used by the king only to remove from county courts cases which had not been initiated by the writ [48] (i.e. where the king's permission had not been necessary to initiate the litigation). Formally speaking, it "directed the sheriff in full county to record the cause (loquela) and have the record before the king's justices at Westminister under the seal of himself and four knights who were present at the record, and to summon the parties to be there on the appointed day." [49] Essentially, then, *recordari* was not a writ of

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[44] Van Caenegem, *op. cit. supra* note 37, at p. 437.

[45] Van Caenegem, *op. cit. supra* note 37, at p. 238. For examples of its use for land, for a mill, and against a warrantor, see 1 D. M. Stenton (ed.), *Pleas Before the King or His Justices, 1203-1212* (Selden Soc., v. 68, 1953), secs. 3481, 3541, 3505.

[46] W. S. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 346 (1914).

[47] Maitland, *op. cit. supra* note 6, at p. 113.

[48] G. J. Turner (ed.), *Brevia Placitata* lxiii (Selden Soc., v. 66, 1951).

[49] Turner, *op. cit. supra* note 48, at p. lxvi.

review but a way for the king's court to gain jurisdiction in the first instance.

It is uncertain just when recordari was first used. One case appears in 1290 where the sheriff was ordered to have the record of a trial brought before the king to show why he did not execute an earlier order.[50] Unfortunately, further details are missing. However, it is felt that the writ was in common use prior to the twelfth century.[51]

Only the plaintiff, usually a disseized tenant, could obtain *recordari*.[52] The demandant could, however, bring the case into the royal court by obtaining a writ of *pone*. Eventually, this writ tended to supersede the writ of *recordari* as it was simpler and could be used for pleas other than land. Its importance to the formation of certiorari is noted by Edward Jenks: "The principle of the *Certiorari* is indeed very old in our law; for it is, in essence, little more than a development of the ancient Pone." [53]

Proceedings in error also developed concurrently with certiorari and the latter over the centuries took on many of the characteristics of the writ of error. Actually, by the thirteenth century certiorari was used specifically for reviewing errors.[54] Professor Goodnow has claimed that the main difference "between the writ of certiorari and the writ of error was that the writ of error was issued to tribunals having full common-law jurisdiction, courts which decided controversies; while certiorari was issued to tribunals not acting in accordance with the common-law, i.e. tribunals of limited jurisdiction. . . ." [55] Since the writ of error could not quash convictions, however, certiorari came to be used more frequently.[56]

CERTIORARI IN THE MIDDLE AGES

As with the writs already discussed, the precise origins of the writ of certiorari are uncertain. But as some of these earlier writs slowly faded into disuse many of their characteristics were appended to certiorari. The essence of the writ, as may be evident

[50] 1 G. O. Sayles (ed.), *Select Cases in the Court of King's Bench under Edward I* 3-4 (Selden Soc., v. 55, 1936).

[51] Van Caenegem, *op. cit. supra* note 37, at p. 22.

[52] 1 Holdsworth, *op. cit. supra* note 9, at p. 178.

[53] E. Jenks, "The Story of Habeas Corpus," 2 *Select Essays in Anglo-American Legal History* 539 (1908). His citation is to Glanvill, vi. 7.

[54] 2 G. O. Sayles, *op. cit. supra* note 50, at pp. 44-5.

[55] Frank J. Goodnow, "The Writ of Certiorari," 6 *Pol. Sci. Q.* 515 (1891).

[56] de Smith, *op. cit. supra* note 40, at p. 48n.

from the discussion so far, was to transfer records of a case from one forum to another and, presumably, a superior one. The records indicate that they need not be those of courts alone, since many of the writs went not only to the justices of assize, but also to "escheators, coroners, chief justices, treasurers, and Barons of the Exchequer, mayors of boroughs, the clerk of the Common Bench, bidding them send records in their custody, or certify the contents thereof." [57] The traditional phrasing of the writ: *certis de causis,* makes its first appearance in 1272. Again, it may be presumed that its use was somewhat earlier.[58]

Unlike many of the common-law writs in use, certiorari, as with most of the prerogative writs, was "at first never issued except to carry out the direct purposes of the Crown, or later, as a special favor, to place at the disposal of some specially favored suitor the peculiar remedies of the Crown."[59] However, so far as this statement suggests that it was always a prerogative writ, it must be remembered that such an assertion rests only upon circumstantial evidence. Bracton contrasted *brevia de cursu* with *brevia magistralia,* the latter being writs of grace; but it was not until Elizabeth's reign that certiorari was definitely included as a writ *de gratia.*[60]

Its uses were many during the middle ages, primarily because judicial functions were not clearly distinguished from other governmental duties. Thus, as early as 1292, certiorari was used to require the return of certain records of a special commission of auditors to the *coram rege.* The following report illustrates its form and use;

> We therefore, wishing to be certified upon your aforesaid deed and for justice to be done in this matter to the aforesaid Martin, if he has been wronged in any way, command you, the bishops aforesaid, to send us plainly and openly under your seal the record and process of the aforesaid assize, taken before the aforesaid John and his aforesaid fellows, which we caused to come before you for the aforesaid reason, and this writ, so that we may have them a fortnight after Mi-

[57] E. Jenks, "Prerogative Writs in English Law," 32 *Yale L.J.* 529 (1923).

[58] de Smith has traced the term back to "a letter written in 1252, from Henry III to the Mayor and commonalty of Bordeaux, expressing the King's readiness to be informed of the grievances of his subjects in that city." *Op. cit. supra* note 40, at p. 45n.

[59] Jenks, "Prerogative Writs in English Law" *op. cit. supra* note 57, at p. 524.

[60] de Smith, *op. cit. supra* note 40, at p. 45.

> chaelmas . . . in order that, having examined the aforesaid records and processes, we may cause to be done in the aforegoing matters what by right and according to the law and custom of our realm ought to be done.[61]

Most of the characteristics associated with the medieval writ are found in this case. The order issues from the King's Bench which, as will be seen below, issued many of the prerogative writs. It is a request for the records connected with an assize, although it was not always necessary that the recipient be part of the judicial system. The duty to do "right" or justice is the guide to be followed according to the "law and custom" of the realm. And the reason for interceding was vague and circumspect, the usual statement being "because for some definite reasons we want to be certified upon the record and process of a suit. . . ." [62]

A later case, in 1326, indicates the relationship between certiorari and habeas corpus. A writ of certiorari had been issued by the king to inquire into the reasons for the arrest and detention of one Henry in Newgate Prison. The reasons for the arrest were sent to the Chancery:

> And because the king sent word to his justices here that, after examination of the cause of Henry's arrest and detention, further etc. what they think should be done etc., the sheriffs of London are ordered to have the body of Henry before the king at Westminster this instant Tuesday at the Octave of St. John the Baptist to do and receive what the court etc. [sic] At that day the sheriffs sent here before the king the body of Henry. . . . And after examination of the cause of the arrest and detention, it seems to the court here that the cause is insufficient etc. Therefore Henry of Wellingborough is released by the mainprise of Henry Basset, Peter of Newport . . . who undertook to have Henry of Wellingborough before the king. . . .[63]

Aside from the fact that certiorari was used as a means for strengthening the power of the central government, its use also serves to illustrate the prevailing legal theory of the middle ages. Essentially writs such as *praecipe* and certiorari were the means by which the king bestowed a special favor. "They were the expedients by which the *jus honorarium* of the King as a fountain of justice was enabled to remedy the defects of the *jus civile* or

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[61] 1 Sayles, *op. cit. supra* note 50, at p. 87.

[62] E.g., the report in 1 Sayles, *op. cit. supra* note 50, at p. 20.

[63] 1 Sayles, *op. cit. supra* note 50, at p. 165.

commune as applied in the local popular courts." [64] In this aspect the earliest use of certiorari was "to rectify wrongs done to subjects." [65]

At first the writ came to issue only from the functional part of the *curia regis* which later became the Chancery.[66] Thus, the writ was not one of common law as there was a "rule that appellate jurisdiction belonged only to the king's courts upon which rested the ultimate responsibility for administering justice in the land." [67]

The justice distributed in the name of the king was not simply to those who might help advance his power. Rather, decisions in many of the cases appealed were against the king's material interests and against his own officers. Undoubtedly the requirement of doing justice to his subjects was enhanced by the feudal concepts of contract which assumed rights and duties to everyone, the king not excepted. Implicit in this assumption was the principle that there did exist an area from which the public power of the king was excluded.[68]

This theory of limited government needed to be implemented in some manner. A customary means was for the king to call together parliament in order to request money and, in return, to grant liberties and franchises. Another means, in the judicial and administrative area, was to allow suit against the government. Since this was an unusual procedure, extraordinary writs were used such as mandamus, prohibition, and certiorari. At first Chancery would issue a writ of certiorari and then send it by a writ of *mittimus* to the King's Bench for further action. Eventually, the King's Bench also came to issue the extraordinary writs. It soon "was regarded as the highest court in the land, with a superintendance over all other courts; and, as there was no conscious distinction between justice and administration in these early days, over all authorities whatever their nature." [69]

A significant characteristic of certiorari was, and still is,

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[64] Goodnow, *op. cit. supra* note 55, at p. 495.

[65] de Smith, *op. cit. supra* note 60, at pp. 40-1.

[66] 1 Holdsworth, *op. cit. supra* note 9, at p. 178.

[67] Harold Weintraub, "English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus," 9 *New York L. For.* 503 (1963). Cf., 1 Holdsworth, *op. cit. supra* note 9, at p. 228.

[68] See Fritz Kern, *Kingship and Law.* (Chrimes trans. 1956), *passim.* On this entire subject see Ludwik Ehrlich, "Proceedings Against the Crown, 1216-1377." *Oxford Studies in Social and Legal History* (ed. Sir Paul Vinogradoff, 1921), *passim.*

[69] Goodnow, *op. cit. supra* note 55, at p. 497.

the use of discretion allowed the issuing courts. Technically, the writ could be granted only be the grace of the king except when it was requested by the crown in criminal cases. In such a case it was then granted *de cursu*.[70] In practice it appears that the writ often was used as a means of pettifoggery by both plaintiffs and defendants.

Thus, a statute in 1414 was issued to suppress the practice of condemned prisoners buying the writ and getting released on bail.[71] The writ was also used by prosecutors to arrest outlaws without giving them time to appear.[72] And the practice developed of using the writ to delay proceedings in local courts although this abuse was checked by statutes in the fifteenth and sixteenth centuries.[73] By that time it appears the writ was granted very much "of course." [74]

The reasons for the large demand for the writ are fairly obvious and were implicit in the preference for royal rather than local justice. In the first two or three centuries after the Conquest, for example, the local courts still often adhered to primitive methods of proof, such as the ordeal. The local and manorial courts also suffered from lack of executive power especially where the losing party was very powerful and, consequently, judgments often were not enforced. Such was not the usual case in the royal courts. In addition, the royal courts rapidly gained in prestige for their impartiality and for the learnedness of those practicing before them.[75] Essentially the king attracted men to his court "by giving

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[70] 1 Holdsworth, *op. cit. supra* note 9, at p. 228.

[71] 2 Henry V. Stat. c. 2 (1414).

[72] 10 Henry VI, c. 6. (1432).

[73] 43 Eliz. c. 5. (1601). The reason for the statute was because defendants were using the writ "to no other Purpose or Intent, but to put the Parties Plaintiffs to as great Charges and Expenses as they the said Defendants can. . . ." See also, 21 Jac. I, c. 8. (1623); 22 Car. II, c. 12. sec. 4. (1670); 5&6 W. & M., c. 11. (1694).

[74] Although impossible to document, one reason for not restricting the use of the writ may have been because of the fratricidal quarrels among the royal courts for greater power. Should a petition be refused by one court, it might mean business for another. If such was the case, Plucknett's conclusion concerning royal competition with local courts may be apropos here, that "the result was not infrequently confusion and injustice." Theodore F. T. Plucknett, *A Concise History of the Common Law* 57 (1956). On the conflict itself see 1 Holdsworth, *op. cit. supra* note 9, at pp. 459-65; Maitland, *op. cit. supra* note 6, at pp. 271-72, notes that habeas corpus also was granted *de cursu* by this time.

[75] 1 Holdsworth, *op. cit. supra* note 9, at pp. 48-9.

better justice than the courts of honours and manors, shires and hundreds." [76]

In addition to the reasons explaining why suitors came to the royal courts, the reasons why the crown was willing and able to accept them are of importance. These are admirably summarized by Van Caenegem:

> The kings with their administrative and judicial genius were ready enough to intervene. Not only were they ready but also capable and powerful enough to decide and to impose their decision. . . . They were supported by the very old tradition of loyalty to the crown in England and, as feudal suzerains, by the personal bonds of feudal loyalty. However, they were also supported by an extraordinary wealth of material resources. They disposed of an income in money quite unique for the age. Not only were they huge landowners, but various taxations, levies, and tolls from their prosperous lands augmented their treasure . . . with a constant flow of money. It meant power which was of an order altogether different from that of the most powerful subjects in the country. It meant that they could attach to their service large numbers of able officials as well as armies of mercenaries. In addition, these kings did not squander their resources, but administered and governed the country capably.[77]

Due to the desire by suitors to use royal courts and a willingness on the part of the latter to hear them, certiorari came to be used for a variety of purposes. A brief listing indicates the several types of jurisdiction with which it dealt. By it, supervision was exercised over the Commissioners of Sewers, the Courts Merchant, the Courts of the Forest, the Justices of the Peace and for cases in the sheriff's tourn. These, of course, were in addition to that exercised over the local and manorial courts.[78]

MEDIEVAL VIEW OF SOCIETY

By the beginning of the seventeenth century, rules were being formed regulating the use of the writ of certiorari. Until the time

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[76] D. M. Stenton, "England: Henry II," 5 *Cambridge Medieval History* 586 (1924).

[77] Van Caenegem, *op. cit. supra* note 37, at p. 399.

[78] For various illustrations of the use of certiorari, see de Smith, *op. cit. supra* note 40, at pp. 46-7; Edith G. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* 9-45 (1963); Jenks, *op. cit. supra* note 57, at p. 529; 1 Holdsworth, *op. cit. supra* note 9, at p. 297.

when these rules would be formalized, however, the royal courts were virtually unhampered in the uses to which they could put the writ. Its functions were probably more political than legal, inasmuch as it was used to limit jurisdiction of competing courts, to strengthen and centralize royal administration, and to implement the function of the king characterized as the "fount of justice."

Such broad discretion vested in the hands of the royal courts was certainly not at variance with the political theories of the middle ages which were more intent upon preventing anarchy, instilling in the king the duty to see justice done, and to check the more obvious forms of royal tyranny. But more subtle opportunities, such as the writ system, available to the king and his courts for policy formation and implementation were largely ignored by the theorists.

At the same time, society was considered a microcosm of which God was both a part and also above. All else was within it and its principle of order was law. From this point of view, the king was as subordinate to the law as his meanest vassal. Thus the exercise of the royal power was subject to certain limitations.[79] As was noted above, most of these restrictions on the king were political in nature. However, the legal concepts of rights and duties were to have more lasting effect upon the way in which the legal system, including procedure, was to develop.

In England, the customary law had evolved in the sense of creating, or better, recognizing the rights of individuals. But the medievalists did not make a clear distinction between custom and natural law, or the law of reason. Since the natural law was considered man's participation in the eternal law, then there was a positive injunction on the part of the king to implement and protect the natural law and its embodied rights. In this sense, "the duty owed by the king to *iustitia* and *aequitas,* comprised both customary and natural law. . . ." [80] And, unlike other members of the community, he "alone is responsible for the rights of all and for all rights." [81]

However, the local courts which were to protect these rights often failed, for various reasons, and their duties taken over by the royal, or common law, courts. Eventually, the common law procedures became rigidified with the tragic consequence that in-

[79] For particularly good discussions of the subject see Maitland, *op. cit. supra* note 6, at pp. 101-105; Ehrlich, *op. cit. supra* note 68 at p. 42; and E. H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* 148-49 (1957).

[80] Kern, *op. cit. supra* note 68, at p. 72.

[81] Kern, *op. cit. supra* note 68, at p. 185.

justice was often suffered. To provide some measure of relief, the chancellor, and later the royal courts when petitioned, could issue a writ, such as certiorari, in order to correct the alleged injustice. Ostensibly, this appeal for the correction of injustice was the theory behind the institution of certiorari and it persisted throughout the middle ages,[82] although in practice discretion was sometimes abused. So long as "the medieval mind . . . regarded the establishment of justice, through, or even in spite of the law, as the ideal to be aimed at by all rulers," [83] so long would defined rules governing the prerogative writs, such as certiorari, be lacking. As the middle ages wore on, however, this attitude lost some of its force so that by the seventeenth century, the rules governing the granting of the writ became more formalized.

In summary, then, the pattern appearing from the use of the writ in the early middle ages is fairly clear. The political and legal attitude or culture is one sensitive to legal and contractual injustice (as opposed, for example, to social injustice). It is also a time when the struggle for jurisdiction among various types of courts is keen but in which the capabilities of the king, and the institutions most closely associated with him, are the most potent. The quest for power, the theory of the king as the natural "fount of justice," and the more civilized court procedures allowed the early kings to transfer cases to their courts via a writ system. Eventually, the writ of certiorari appears which orders records to be brought before Chancery or King's Bench to ascertain if injustice was incurred by the petitioner.

This writ is directed to all manner of governmental offices and officers dealing with an enormous variety of subject matter. Eventually, the writ ceases to be granted "by grace" and is issued *de cursu* as the highest royal courts compete for business with the result that financial expediency is substituted for the exercise of justice. This also is a time when the struggle for constitutional or limited government ensues and when a decision is made as to whether the king's prerogative is subject to law. The role of the writ of certiorari in this struggle is the subject of the following section.

CERTIORARI IN MODERN ENGLAND

With the passing of the disorders which occurred when the house of Tudor replaced the Yorkist, England entered the transi-

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[82] de Smith, *op. cit. supra* note 40, at p. 46; Kern, *op. cit. supra* note 68, at p. 170.

[83] 2 Holdsworth, *op. cit. supra* note 19, at p. 345.

tion period to modern times—a transition which was not completed until the end of the seventeenth century. The basic framework of the political system continued to exist but changes were needed if the twin extremes of disorder and absolutism were to be avoided. Conflict among medieval and modern institutions and ideas was rampant throughout Europe, but England was eventually to find a way of integrating them and forming a government much less absolute than most established on the Continent.

The institutional changes were reflected as much in the legal system as in the political relations between the monarchy and parliament. Particularly was this true of the specialized courts upon which increasing reliance was placed. The royal courts had steadily increased their jurisdiction as against the local courts, but "during the sixteenth century the process had been accelerated by the increase in the jurisdiction of the Council and its offshoots, the Star Chamber, the Chancery, and the Admiralty." [84] During this period:

> The King was the greatest of all litigants, and the best served. . . . Apart from the prime necessity of repairing the complete breakdown of the jury system in both civil and criminal proceedings during the fifteenth century, and the restoration of a reasonable degree of order, something had to be done to check the swelling discontent of the growing lower middle class, and also of the poorer gentry, who found justice effectually denied to them by the intricate maze of technicalities, so infinitely patient of delay and subterfuge, and hence so infinitely costly, which was presented by the civil side of the Common Law. . . . Radical reform was politically impossible. . . . [85]

As will be discussed more fully later, these special courts were called "prerogative" courts since they originated with the king's Council and did not apply common law. The disputes and acrimony between the prerogative and common law courts both reflected and exacerbated the growing conflict between the monarch and parliament, especially since the most influential members of parliament were the common lawyers. As a matter of fact, parliament itself was still primarily a court—and a common law one at that.[86]

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[84] 5 Holdsworth, *op. cit. supra* note 19, at p. 151.

[85] Charles Ogilvie, *The King's Government and the Common Law: 1471-1641* 7 (1958).

[86] Charles Howard McIlwain, *The High Court of Parliament* 214-216 (1910); Keith Feiling, *A History of England* 330 (1948).

Generally speaking, the period of the Tudors can be considered one of monarchical supremacy degenerating catastrophically in the reign of the Stuarts to one of parliamentary supremacy. One means by which the Tudors were able to maintain their position was by regularizing the procedures of the Council and thus increasing its efficiency. "It was generally admitted that it could punish those offenses which the courts of common law were incompetent to punish, offenses falling short of felony . . . in particular, offenses which consisted in an interference with the ordinary courts of justice, riots, bribery of jurors, and so forth." [87] The institutionalization of some of these procedures resulted in the establishment of the prerogative courts.

THE ROYAL PREROGATIVE

Fundamental to both the conflict between parliament and the king and that between the common law and equity courts or jurisdictions was the notion of "prerogative." And, by the seventeenth century, the conflict of interpretation was obvious to all. For "the main political question of the day was the position of the royal prerogative—was it or was it not the sovereign power of the state?" [88] As ancient as the kingship itself, the concept had had the benefit of considerable attention from jurists. Some consideration of the concept is necessary since "it was by virtue of this absolute prerogative that James claimed to settle all conflicts of jurisdiction between courts, and to stop pending cases in which his interests were concerned." [89] An elucidation of the nature of "prerogative" will indicate some of the characteristics of the writ of certiorari since it is classified as a prerogative writ.

While in the middle ages the king was regarded as supreme, it was also assumed that the "royal power should be exercised subject to the law," thus making the law "the bridle of royal power." [90] The idea of the natural law as expressed in custom gave a particularly pre-eminent moral sanction to the law, and the obligation of the king to bear his own expenses posed a real handicap to a king desirous of expanding his powers. On the other hand, it was recognized that it was "the King's prerogative . . . to govern." [91] And this was not disputed, at least until the seventeenth century. But the primary characteristics distinguishing him

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[87] F. W. Maitland, *op. cit. supra* note 6, at p. 219.
[88] 6 Holdsworth, *op. cit. supra* note 19, at p. 19.
[89] 6 Holdsworth, *op. cit. supra* note 19, at p. 22.
[90] 2 Holdsworth, *op. cit. supra* note 19, at p. 253.
[91] Ogilvie, *op. cit. supra* note 85, at p. 3.

from other feudal lords were the specific privileges associated with his "right to govern." [92]

Prior to the sixteenth century, the prerogatives were primarily exceptions to certain procedural requirements dealing with matters of wardship, marriage, dower, interpretation of the king's grants and so forth. In addition, the king had the prerogative of complete allegiance from all his subjects. An important prerogative moreover was recognized by the maxim that the king could do no wrong and, therefore, could not be sued in his courts.[93] Essentially the attitude toward the king in this period was to regard him simply as a lord with a few special privileges.[94]

In the sixteenth and seventeenth centuries, new theories were developed to rationalize the primacy of the king and these included considerable extensions of the notion of prerogative. Of most importance in this development was the distinction drawn between the "king's two bodies," his natural body and his corporate or politic body:

> The view . . . that the king, though the head of the state, is yet a natural man with no sort of double capacity helped to preserve the influence of the feudal ideas which all through this period coloured men's political thoughts. It is not until these feudal ideas have ceased to influence politics, it is not until men have begun to think of their ruler as the national king of a modern state, that he acquires other capacities and that his prerogative begins to assume another form.[95]

Nevertheless, the feudal ideas continued to influence the relation between law and prerogative. The distinction between the twin concepts of natural and politic was mirrored in the distinction between the ordinary and absolute nature of the prerogative. In the sixteenth century the corporation politic was assumed to be the king and the people together, but in the seventeenth century the trend was simply to identify the corporation with the king. By distinguishing the two capacities, the medieval prerogatives associated with the king's person were moved to a lesser position leaving free the development of the alleged prerogatives of the

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[92] 3 Holdsworth, *op. cit. supra* note 19, at p. 459.

[93] 3 Holdsworth, *op. cit. supra* note 19, at pp. 460-63. This was also true of other feudal lords and thus not unique to the king. 1 F. Pollock and Maitland, *History of English Law* 513 (1923).

[94] 3 Holdsworth, *op. cit. supra* note 19, at p. 463.

[95] 3 Holdsworth, *op. cit. supra* note 19, at p. 468.

corporate kingship.[96] From this point of view, it may be noted that Staunford's definition of prerogative (1548) reflects the medieval concept as he considers it:

> . . . a priuiledge or preheminence that any person hath before an other, which as it is tollerable in some, so is it most to be permitted & allowed in a prince or soueraigne gouernor of a realme. For besides that, that he is the most excellent & worthiest part or member of the body of the commonwealth, so is he also (through his good gouernance) the preseruer, nourisher, and defender of al the people being the rest of the same body. And by his great trauels, study and labors, they inioy not only their lives, lands and goodes but al that euer they have besides, in rest, peace, and quietness.[97]

Thus there was a recognition that the king was head of state and that he was responsible for its good order. But the king is still considered part of the state and not above it and, therefore, still bound by the fundamental law constituting it. Nor are his privileges different in kind from others within the state but only preeminent. The concept of sovereignty, which is closely related to the idea of prerogative, is not yet fully developed. In addition, "no controversy had as yet arisen as to the extent of the powers of the king or the powers of Parliament." [98]

Others, however, were beginning to assert that while the king's prerogative was subject to the law, there was a wide area where the king could act at his discretion. It was to provide for this duality of function that a distinction was made between his ordinary and absolute prerogatives. The ordinary prerogatives were essentially those included in the middle ages and thus identified with his natural person. But, the concept of an absolute prerogative eventually "gave countenance to the idea that the king had a large and indefinite reserve of power which he could on occasion use for the benefit of the state." [99]

This interpretation was exemplified by Justice Berkeley when he claimed that:

> The law is of itself an old and trusty servant of the king's; it

[96] For extended discussions of the two capacities, the following are suggested: Allen, *Inquiry into the Rise and Growth of the Royal Prerogative in England* (1849), *passim;* E. H. Kantorowicz, *The King's Two Bodies* (1957), *passim;* 3 Holdsworth, *op. cit. supra* note 19, at pp. 469-490; 9 Holdsworth, *op. cit. supra* note 19, at pp. 4-7.

[97] Quoted in McIlwain, *op cit. supra* note 86, at pp. 337-38.

[98] 4 Holdsworth, *op. cit. supra* note 19, at p. 208.

[99] 4 Holdsworth, *op. cit. supra* note 19, at p. 207.

> is his instrument or means which he useth to govern his people by. . . . The king, *pro bono publico* may charge his subjects, for the safety and defense of the kingdom, notwithstanding any act of parliament, and a statute derogating from the prerogative doth not bind the king; and the king may dispense with any law in case of necessity.[100]

Earlier, James I had added an element of mysticism to the concept. In a speech in the Star Chamber in 1616, he said:

> . . . Incroach not vpon the Prerogatiue of the Crown:
> If there fall out a question that concerns my Prerogatiue or mystery of State, deale not with it, till you consult with the King or his Councell, or both: for they are transcendent matters . . . : That which concernes the mysterie of the King's power, is not lawfull to be disputed; for that is to wade into the weaknesse of Princes, and to take away the mysticall reuerence, that belongs vnto them that sit in the Throne of God.[101]

These seventeenth century interpretations went further than those of the century before, which, in turn, had gone further than in the middle ages:

> Instead of saying (as the sixteenth century lawyers had said) that the king had certain absolute prerogatives (such as the right to make war) which could not be questioned by Parliament or the courts, and certain ordinary or private prerogatives which could be so questioned, it was laid down that he had overriding absolute prerogative to deal with matters of state.[102]

However, the common lawyers of the seventeenth century were not so ready to accept such an absolutist interpretation as they had been under the Tudors since the latter had asserted their prerogatives with considerably more discretion than the Stuarts.[103] Coke, in his definition of prerogative, represents the approach of the common lawyers:

> *Praerogativa* is derived of *prae*, i.e. *ante*, and *rogare*, that is, to ask or demand before hand, whereof cometh *praerogativa*, and is denominated of the most excellent part; because though

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[100] John Hampden's Case [1637] 3 S.T. 825. Cf. Bate's Case [1606] 2 S.T. 389, 145 Eng. Rep. 267.

[101] Charles Howard McIlwain (ed.) *The Political Works of James I* 332-33 (1918).

[102] 6 Holdsworth, *op. cit. supra* note 19, at p. 21.

[103] 6 Holdsworth, *op. cit. supra* note 19, at pp. 20-21; McIlwain, *op. cit. supra* note 101, at p. xxxix.

> an act hath passed both the houses of the lords and commons in parliament, yet before it be a law, the royal assent must be asked or demanded and obtained, and this is the proper sense of the word. But legally it extends to all powers, preeminences, and privileges, which the law giveth to the crown. . . .[104]

The medieval concept of a limited kingship is still present in the definition but the emphasis is more upon the negative function of the king to refuse to assent to a parliamentary act than upon a positive assertion of royal independence and discretion. Indicating a similar attitude, the speaker of the House of Commons in 1556 is quoted by Professor Wormuth as saying that "by our common law, although there be for the Prince provided many Princely Prerogatives and Royalties: yet it is not such as the Prince can take money, or other things or do as he will at his own pleasure without order; but quietly to suffer his subjects to enjoy their own, without wrongful oppression, wherein other Princes by their liberty do take as pleaseth them." [105] Conflicting theories of themselves, however, would have been unlikely to lead to civil war unless articulated within concrete circumstances; one of these circumstances was the dispute over the control of prerogative jurisdiction.

THE PREROGATIVE COURTS

Courts such as the Chancery, Star Chamber, and the Court of Requests were among the institutions established by the monarchy to exercise jurisdiction in areas of crucial importance to the nation, especially where the common law provided no remedy. Eventually, these courts became sources of friction with the common law courts as they often "created rules of law which either anticipated and inspired later developments of the common law, or introduced new ideas, sometimes wholly opposed to established common law doctrines, into the English legal system." [106] Since direct proof is not available, the political use of certiorari must be inferred from the nature of the courts which used the writ. The following discussion tries to put forth the evidence from which this conclusion may be drawn.

The two most controversial courts were Star Chamber and

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[104] 1 J. H. Thomas (ed.), *A Systematic Arrangement of Lord Coke's First Institute* 72 (1818).

[105] D. Wormuth, *The Royal Prerogative: 1603-1649* 14 (1939).

[106] 5 Holdsworth, *op. cit. supra* note 19, at p. 3. On the prerogative of the king to create courts, see Maitland, *op. cit. supra* note 6, at pp. 419-21. It might be added that these courts took over judicial functions originally belonging to the King's Council.

Chancery. The former had existed for some time before 1487, when a statute directed particular members of the Council to examine and judge persons accused of certain offenses. Before long, the Court punished a wide range of offenses, much wider than the statute had originally directed.[107] Prior to 1540, the business of the Star Chamber was primarily administrative and secondarily judicial, but after that date the king reorganized it by appointing "a small unofficial inner ring who enjoyed the King's confidence" and it began to sit for criminal trials.[108] Thus the same members sitting on the Privy Council sat in the Star Chamber and it was this overlap of personnel that inspired so much distrust. Much fear of it was created also due to the fact that it dealt with particular heinous crimes and subjected the accused to the notoriety of a public trial.[109]

One of the procedures which distinguished the Star Chamber from the common law courts, and made for its efficiency, was use of the writ of subpoena, which initiated Star Chamber and Chancery proceedings. Historically, it was an offshoot of certiorari since the latter could require submission of records, and its form was available for the newer writ of subpoena.[110] Originally, the writ of subpoena carried no penalty but "ran in the form called by the Commons in a petition of 1389 'brief Quibusdam certis de causis' ".[111] This, of course, was the classic formula of certiorari.

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[107] Maitland, *op. cit. supra* note 6, at p. 220. It was partly due to this discrepancy between the Act of 1487 and its practical jurisdiction that convinced Parliamentarian lawyers that it was an illegal institution. Cf. J. R. Tanner, *Tudor Constitutional Documents, A.D. 1485-1603* 249-51 (1951).

[108] Ogilvie, *op. cit. supra* note 85, at p. 99; Maitland, *op. cit. supra* note 6, at pp. 219-21. Originally it appears to have been needed to deal with cases "where the offender was too powerful for the ordinary courts." Adams, *op. cit. supra* note 1, at p. 248.

[109] Ogilvie, *op. cit. supra* note 85, at pp. 101-103. Some of the cases with which it dealt were defamation, violation of royal charters, abduction, great riots and extortion. Tanner, *op. cit. supra* note 107, at pp. 251-52, 257-58. "Although the Star Chamber was a judicial tribunal, it never quite lost its political character as a council of state, and ambassadors were sometimes received there and speeches made before the Lords on occasions of special solemnity. . . . The Star Chamber was tyrannical, because it tended to become a court of judges administering the law. . . ." Tanner, *op. cit. supra* note 107, at pp. 257-58. It may be inferred that certiorari was used as much for political business as for judicial.

[110] 9 Holdsworth, *op. cit supra* note 19, at pp. 184-85.

[111] E. S. Leadham (ed.), *Select Cases Before the King's Council in the Star Chamber, 1477-1509* xxi (Selden Soc., v. 16, 1903).

Eventually, words conveying a penalty were added as were also the words "ex parte nostra" which, presumably, signified that the case was heard before the king and his counselors.[112]

Certiorari was also used by the Star Chamber and its use was as avidly disliked by common lawyers as the tribunal from which it issued:

> And the law of R.2. did only give power to the chancellor alone, that the grieved party might have the more speedy relief from one than from many; by which, it may be noted, the commons seemed to give allowance to this kind of prosecution, although they had in those ill-governed times opposed the very writs now used in this court called *quibusdam certis de causis*. . . .[113]

In addition, Hudson notes that the Star Chamber could take cases from other courts and punish the offenders, and this removal was by certiorari:

> The court understanding of a great riot committed by *Lister* and his company against one *Delaber*, in Herefordshire, within the marches, and the matter being there examined before that council, *certiorari* was awarded to the council, there to certify the examinations of the witnesses to this court, not leaving the cause to be by them punished, but punished it themselves.[114]

The other court to be dealt with here was the Court of Chancery, which, in the area of civil suits, held a position analogous to that of the Star Chamber in criminal matters. Originally, Chancery was the secretariat of the king's household responsible for drawing up and authenticating documents. As government expanded so did Chancery, eventually becoming one of the strongest departments of the household with its own traditions and procedures. Because of its unique importance as the medium through which the king's orders and writs were communicated to subordinates, the prerogative come to be closely identified with it.

By the fourteenth century it was separated from the household but continued to maintain a close relationship with it as the chancellor himself remained an intimate advisor to the king. The sixteenth century saw it become a real threat to the common law

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[112] Leadham, *op. cit. supra* note 111, at pp. xxii-xxiv.

[113] William Hudson, "A Treatise of the Court of Star Chamber," *Collectanea Juridica* 13 (Hargrave ed., 1792). A note at the foot of the essay indicates it was written shortly before 1635.

[114] Hudson, *op. cit. supra* note 113, at p. 116. For a case involving both certiorari and the writ of subpoena, see Abbot of Eynesham v. Harcourt et al., in Leadham, *op. cit. supra* note 111, at p. 137.

courts as it was not so tightly bound by precedent and esoteric forms of action.

Thus by the end of the sixteenth century, the king had considerable discretion in the judicial field. And at the same time as the growth of the powers of the king and Council, the makings of an administrative system were also in evidence. Most of the members of the Council were heads of major departments of government, acting under the guidance of the king. These officials also served on commissions dealing with various functional problems such as supervision of local government, regulation of religious exercises, calling in of debts, bills for initiation in parliament, and so forth.[115] The Council members proved to be quite efficient and meticulous in performing their functions, whether dealing with either central or local governmental organs. Holdsworth cites as one of the reasons for their success:

> . . . the system of procedure which they employed. It was through this system of procedure that they were able to develop many new branches of the criminal law; to punish many kinds of sharp practice, and many attempts to use the procedure of the common law; and to exercise occasionally a civil jurisdiction in cases in which the rules of the common law worked or were made to work injustice.[116]

Since the Council desired to have its programs carried out, and since it had the king's authority, it used the prerogative courts of Star Chamber and, especially, Chancery to ensure at least a hearing. In many cases, this meant intervention by these courts to remove cases from common law jurisdictions and to determine disputes of jurisdiction as between the common law courts and the prerogative courts. "Thus the Council was in the habit of issuing orders to the judges of the different courts as to the conduct of cases. It stopped, delayed, and expedited actions, gave directions as to their hearing, issued injunctions, and gave directions as to the issue of prerogative and other writs." [117] To a large extent, this supervision was considered a danger by parliament and the common lawyers because it was feared that these activities "tended to foster the continental idea that the crown and its servants were outside the ordinary law, that the servants of the crown were governed by special courts and a special law, and that in their deal-

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[115] 4 Holdsworth, *op. cit. supra* note 19, at pp. 60-7.

[116] 5 Holdsworth, *op. cit. supra* note 19, at p. 156; cf. Ogilvie, *op. cit. supra* note 85, pp. 35-39.

[117] 4 Holdsworth, *op. cit. supra* note 19, at p. 84.

ings with the subject they need not necessarily be bound by the common law." [118]

The Council exercised its equitable power principally through Chancery because, "like the common law courts of the thirteenth century, it was closely related to the king, and therefore able to administer that equity which it was the prerogative and duty of the kings to apply, in order to prevent the law from working injustice." [119] To curtail Chancery's power, Parliament sought several times to restrict its power to issue certiorari. Noting this fact, Coke gave an illustration indicating the length of time this conflict had existed:

> In the parliament held on 13 R. 2 the commons petitioned to the king. That neither the chancellor nor other counsellor doe make any order against the common law, nor that any judgment be given without due processe of law. Whereunto the king's answer was, The usages heretofore shall stand, so as the king's royalty be saved. In the same parliament another petition was, That no person should appear upon a writ De quibusdam certis de causis, before the chancellor or any other of the counsell, where recovery is therefore given by the common law: whereunto the king's answer is, The king willeth as his progenitors have done, saving his regalty.[120]

In retrospect, it appears that several reasons account for the jealousy of the Chancery. Common law courts were in active competition for the fees coincident with business. There was the general problem of conflicting jurisdictions both between Chancery and the House of Commons and with the other courts. And common lawyers looked "askance at the power of the clerks of Chancery, now that it extended to the granting of new equitable remedies, as well as to the allotment of old cases in the granting of original writs or in their capacity as receivers of petitions." [121]

Eventually, the controversies between king and Parliament erupted into civil war with the consequence that the royal prerogative was severely curtailed, almost to the point of being brought to an end. This result came about primarily from passage of a bill in 1641 known as the "Act for the Regulating the Privy Council, and taking away the Court called the Star Chamber." [122] The Act

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[118] 4 Holdsworth, *op. cit. supra* note 19, at p. 85.

[119] 2 Holdsworth, *op. cit. supra* note 19, at p. 596; cf. Maitland, *op. cit. supra* note 6, at p. 219.

[120] 4 Coke, *Institutes* 82 (1792).

[121] McIlwain, *op. cit. supra* note 101, at p. 214.

[122] 16 Charles I. c. 9. 10 (1641).

also went to the heart of government machinery when it severely restricted the Privy Council. A little later, attempts were made to abolish Chancery but it was able to escape such a fate.[123] After the Restoration, however, Chancery procedures began to rigidify and became "a settled system of rapidly developing principles . . . giving additional remedies and enforcing additional duties—but a system of case law with precedents reported and respected." [124]

A final question remaining however was, since the crown was stripped of most of its prerogatives, who appended them? The Militia Ordinance of 1642, a truly revolutionary measure, declared:

> It is acknowledged that the King is the Fountain of Justice and Protection, but the Acts of Justice and Protection are not exercised in his own Person, nor depend upon his pleasure but by his Courts. . . . The High Court of Parliament is not only a Court of Judicature, enabled by the Laws to adjudge and determine the Rights and Liberties of the Kingdom . . . but it is likewise a Council to provide for the necessity, to prevent the imminent Dangers and preserve the publick Peace and Safety of the Kingdom: [125]

In this manner did the division between the natural and politic bodies of the kingship bear fruit. For by this rationale, parliament "transferred to themselves the sovereign authority attributed to him by lawyers in his ideal capacity." [126] Increasingly, from the seventeenth century to the present, the use of the discretionary writs to remedy injustices were to be restricted to administrative matters supervised by the common law courts. The injustices which could not be remedied by the common law or the equally static equity courts had to await periodic reforms of procedure.

After the upheavals of the seventeenth century, most of the prerogative powers of the king, that is those dealing with the administration of justice, were transferred from Chancery to the common law court called the King's Bench.[127] Discretionary power was focused on a much smaller area than formerly when almost any event touching government could be brought directly to the attention of the king. But with new conditions bringing about increased administrative functions the writ of certiorari did not fall into disuse.

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[123] Ogilvie, *op. cit. supra* note 85, at p. 166.

[124] Maitland, *op. cit. supra* note 6, at p. 312.

[125] Quoted in G. L. Haskins, *The Growth of English Representative Government*, 127 (1960).

[126] Allen, *op. cit. supra* note 96, at p. 83.

[127] de Smith, *op. cit. supra* note 40, at p. 43; 4 Blackstone *Commentaries* 266-67 (1811); 5 Holdsworth, *op. cit. supra* note 19, at p. 300.

> With the vast increase in the duties of the Justice out of Sessions after 1660, *certiorari* acquired a new importance. Not only did Parliament create numerous minor offenses punishable summarily, but it heaped new administrative duties upon the Justices and *ad hoc* authorities. It had been decided before the end of Elizabeth's reign that a summary conviction tainted with irregularity or made without jurisdiction could be removed into the King's Bench by *certiorari* and quashed.[128]

However, in one area of particular importance, there was removal of certiorari jurisdiction. This was where formerly *habeas corpus* was brought but the prisoner also desired a judgment on the reasons for his detention. To get this a certiorari had been needed to bring up the record. By the eighteenth century, however, *habeas corpus* brought forth both the body and the record and, consequently, certiorari lost much of its use as a means for redressing injustice in the area of criminal law.[129]

From the eighteenth to the mid-twentieth century, the writ was regulated more and more by statute until 1938, when it was replaced by an "order" for certiorari.[130] Jurisdiction to grant certiorari now resides in the High Court of Justice and is exercised by the Queen's Bench Division. Nevertheless it still bears several characteristics originally associated with the crown and its history still influences the uses to which it is put.[131] A few examples indicating the continuity of these characteristics follow.

The order still issues at the discretion of the judge or court rather than as a matter of right. A subject who wishes leave to apply for certiorari must present his reasons either to a justice in chamber or to the Divisional Court and if the order is refused an application may be made to the Court of Appeals.[132] However,

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[128] de Smith, *op. cit. supra* note 40, at p. 48; 10 Holdsworth, *op. cit. supra* note 19, *passim;* Gardner's Case, [1600] Cro. Eliz. 821, 78 Eng. Rep. 1048 is the case referred to by de Smith.

[129] 2 M. Hale, *The History of the Pleas of the Crown,* 210-211 (Emlyn ed., 1778).

[130] The Administration of Justice (Miscellaneous Provisions Act, 1938). 1 & 2 Geo. 6. c. 63 (1938). It provided that prerogative writs should no longer be issued by the High Court but that the Court could still issue orders of the same name to attain the same effect as previously. The procedure for obtaining the writs was simplified.

[131] For a particularly interesting case illustrating this point, see Rex v. Chancellor of St. Edmundsbury and Ipswich Diocese, [1948] 1 K.B. 195.

[132] 2 Halsbury's Laws of England (3rd ed.), tit. Crown Proceedings, p. 71.

it will issue *de cursu* at the request of the attorney-general.[133] In addition, it will usually be granted *ex debito justitiae* where the lower court has been shown to have acted in excess of its jurisdiction.[134]

As noted earlier, the writ is used to control and supervise inferior jurisdictions. However, this control extends only to judicial acts although this is broadly interpreted by the courts.[135] If an order for certiorari is disobeyed, the party to whom it is directed is liable to attachment for contempt of court. Thus, a lack of good faith, failure to listen to both sides, failure to inform the parties of a fact which could be statutorily detrimental to them, and failure to give notice have all given rise to a certiorari to quash the orders or decisions.[136]

Because of the writ's association with the king's prerogative, a tribunal cannot be exempted from the reach of a certiorari except by express words of a statute. This ruling was enunciated as early as 1686, when the lack of an explicit statement in a statute allegedly taking away certiorari was interpreted as showing "that the intention of the law-makers was that a certiorari might be brought. . . ." [137]

While certiorari still has much use in administrative law, its ancient use as an instrument for political power has largely disappeared. Circumscription may further occur as it has come in for more and more criticism. These criticisms have been directed primarily at certain procedural requirements which are thought to be too cumbersome. Such include a six-month time limit and

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[133] Lampriere's Case, [1670] 86 Eng. Rep. 717, where it was held that the king is entitled to a certiorari as a matter of right, but if the appeal is made by a subject, it is a matter of discretion; cf. Rex v. Stafford, [1940] 2 K.B. 33, where it is stated that "the order for the issue of the writ of certiorari is, except in cases where it goes as of course, strictly in all cases a matter of discretion."

[134] Rex v. Stafford, [1940] 2 K.B. at p. 44, where it is indicated that the writ is granted to the subject unless a reason is shown why it should not be.

[135] Rex v. London County Council, [1931] 2 K.B. 215 (C.A.), pp. 233-34, where it is said that the judicial function extends even to deciding on evidence between a proposal and a counter-proposal.

[136] Halsbury's Laws of England, *op. cit. supra* note 132, at pp. 1-154. These are simply continuations of earlier determinations that "the very end of certiorari" is to see if justices have acted according to their jurisdiction. Rex v. Berkley and Bragge, [1754] 1 Keny. 80, 96 Eng. Rep. 923.

[137] Rex v. Plowright et al. [1686] 3 Mod. 94, 87 Eng. Rep. 60; cf. Rex. v. Medical Appeal Tribunal, [1957] 1 Q.B. 574 (C.A.).

the unavailability of required supporting documents when applying for certiorari. In addition, since the eighteenth century, certiorari goes only to questions of law and not of fact or purely ministerial decisions and thus leaves a hiatus for the occurrence of injustice.[138]

Should certiorari, and other prerogative writs, disappear in England a new procedure with new rules would have to replace it. Confusion and injustice would be the result. It would seem better to expand the notion of jurisdiction—perhaps, to return to the seventeenth century and eighteenth century procedures, when "no distinction was made between judicial and administrative powers." [139] For the prerogative writs "are monuments to the judge's genius for improvisation, for having originally been instruments of royal power they have been converted into bulwarks of the rights of the subjects." [140]

Whatever the final position of the writ in English law, it is clear that the desire for political power, behind the facade of being a mere "rule of procedure," motivated much of its use. Similar usage by the United States Supreme Court, even though modified by statute, indicates that its discretionary characteristic is still subject to political motivation. Historical studies of other procedural devices, utilizing insights from more recent sociological investigations of administrative agencies could well enrich understanding of historical political struggles as well as alert observers of contemporary society to fruitful areas of research.

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[138] In an effort to provide for more flexibility the order for certiorari has been modified to allow the High Court to substitute sentence rather than have only the alternatives of affirming or quashing the conviction. Administration of Justice Act, 1960 (c. 65), S. 16. 9 & 10 Eliz. 2 (1960).

[139] H. W. R. Wade, "The Future of Certiorari," 18 *Cambridge L.J.* 225 (1958).

[140] Wade, *op. cit. supra* note 139, at p. 219. Proposals for some type of ombudsman reflect concern over this kind of problem.