BOOK REVIEW

FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW
By NORMAN DOE
Cambridge University Press, 1990, xxi + 197 pp.
(Hardback £25).

A review by Fr Robert Ombres OP, Blackfriars, Oxford.

The late Richard O'Sullivan claimed that the great texts of the common law reveal the constant influence of the classical and Christian philosophers, of Aristotle, Augustine, Aquinas, Ockham. The same influence is revealed in the Year Books and in the Reports. Norman Doe's original and fully documented book now provides a wealth of late-medieval texts, from theorists and from practitioners, to test in various ways this claim, although O'Sullivan's *The Spirit of the Common Law* is not listed in the bibliography.

Doe's stated aim is to explore the basic components of thinking about the secular law of approximately the 15th Century. Essentially, he traces the late-medieval English conceptions of the nature and authority of law. The author tends to concentrate austerely on the letter of his written sources, generally not providing them with much context or history.

The first chapter examines thinking on authority and consent, sketching the ideas of Pecock, Fortescue, Saint German and Littleton, and measuring them against what can be gleaned of the attitudes of the practitioners. Doe's belief is that the theorists did not invent a concept of law peculiar to the indigenous common law. It was to existing civilian, canonist and Thomist theories that they turned. In medieval terms, their philosophy of law is thoroughly orthodox and largely European. There were, however, gaps between these theoretical accounts and the statements of legal practice.

The second chapter is on the concept of human law in terms of the positivist thesis. Here, as elsewhere, extensive use is made of Aquinas. The key sections are on the imperative, obligatory and coercive nature of law, and the classification of law. The enactment of fixed-term and perpetual legislation is a striking feature, apparently without parallel in theory. When it comes to the purpose of law, the practitioners tended to see law as operating on a mundane level. Law's higher function, the advancement of virtue, appears only from time to time, and then mainly in legislation, not in the Year Books. One of these infrequent judicial observations was made in a 1410 case in which two masters of a school in Gloucester sued trespass against D for founding a rival school. Hill JCP remarked that a qualified person setting up as a teacher is doing a virtuous and charitable thing, needful to the people, and for that he cannot be punished.

No account of medieval law can ignore divine law and natural law, and to these Doe turns next. Having looked at these topics in legal theory, he then provides a most interesting section on the judicial use of natural law. It seems that the specific expression 'natural law' was never utilised in 15th-Century legislation and that it was not common for the judges to make appeal to it. The evidence, as Doe admits, is of course fragmentary but it enables him to say that judicial statements on natural law are of four types: natural law could be used to fill the gaps of the positive law, all judicial decisions ought to be based on the law of nature, sometimes the requirements of human law and those of divine law actually coincided, and lastly it was said (at least) once that human law could not revoke or

abrogate natural law. As for divine law, legislation often prohibited conduct or a state of affairs described as offensive to God or against the law of God. Also noteworthy is the discussion of abhorrent law, complementing that in an earlier chapter.

In the course of his work, Doe quotes some extraordinarily interesting remarks of Yelverton JKB in a 1468 case. In the absence of an appropriate law, Yelverton reasoned that the court was to act as the canonists and civilians do in such circumstances. They resort to the law of nature which is the ground of all laws, and according to that which is suggested by them to be more beneficial to the common weal they do. Although Doe brings out the importance of this passage, he does not dwell on the telling words that the law of nature is 'the ground of all laws'. Surely these words are claiming a fundamental function for the law of nature, going beyond the filling in of gaps in a legal system. Yelverton's thought is in line with Aquinas's belief that all human law derives from natural law. As for the idea of the 'common weal', surely this too is to be related to Aquinas's 'common good' *(bonum commune),* towards which human law is directed.

Instead of relying explicitly and in detail on the natural law, the judicial idea of a moral authority is to be found rather in the notions of conscience and reason. But before examining these two notions, Doe includes a chapter on justice, equity and the rigour of the law. It is full of surprises. We are told that the usage of the words *iustitia* and *justice* is almost entirely absent from the Year Books, and that equity is very rarely used in the practical literature as a moral authority, a representation of general fairness, and then only in the later part of the period. In passing, our attention is drawn to the highly original statement by Fortescue that justice which is none other than natural law is the will to render each his due. Also highlighted is Pecock's idea of a right.

In a fundamental paragraph, Doe observes that the theorists explicitly related their 'reason' to divine law and natural law, whilst the practitioners' understanding of the term was more mundane. There is no express and regular joining of reason to natural or divine law in the practical sphere. The practitioners do not define reason in (overtly) moral terms nor do they say it requires the same conclusions as divine or natural law. Even for the practitioners, however, reason is postulated as an idea of abstract right, and reason was in some ways seen as the very foundation of the common law; we often read in the Year Books that 'law is reason' or similar. The appeal to reason was used to exclude absurd, inconsistent or unjust results.

Interesting and important things are said in the chapter on the notions of 'mischief' and 'inconvenience', but let us dwell on the chapter on conscience. In it Doe remarks that the connection of conscience and the common law frequently appears in the practical sphere of the common law. Time and again practitioners, legislators and judges employed conscience as the basis of their decisions, in a world that shaped its public institutions partly on belief in the reality of heaven and hell. It may come as a surprise to read Doe's forthright statement that the appeal to conscience was not confined to the chancery, and that the common law judge knew as much about conscience as the chancellor. Indeed the reader is almost enabled to see this in action. In 1456 Moile JCP asked a plaintiff whether he could find it in his conscience to declare against a young child. The infant did not know malice. To illustrate his point, the judge then lifted up the child in front of the court.

In reconstructing the fundamental ideas and assumptions of practitioners, it seems worth saying that we can only describe the medieval common law as 'secular law' (as Doe does), if we generally exclude the modern connotations of secularisation. The common lawyers were, after all, part of a *Christian* culture. Take Thomas Kebell as an example. From his appointment as a serjeant he must have been one of the most prominent counsel in the land, often mentioned in the Year Books. Doe quotes him a number of times, and in a footnote refers to his use of the Old and New Testament in *Rollesley v Toft* (1495). But, as elsewhere in Doe's book, practitioners remain names without biography or context, although (when available) such information could be most enlightening for his theme. Thus, Kebell, a married layman, had a chapel and a private chaplain. In addition to the standard philosophical treatments of faith and reason, obligation, friendship and virtue, he owned a good number of religious books, especially on biblical matters. In his own room he kept a copy of Ludolf of Saxony's *Vita Christi,* a widely used book of spiritual meditations and exercises. About Kebell we have known for some years. Now, the inventory has been edited of the large personal library, including religious books, of Roger Townshend JCP, a contemporary of Kebell. Doe refers in particular to his statement in *Gylys v Watterkyn* (1485) that adultery was a great sin by the law of God and man. Doe might have mentioned Townshend's reference in that case to the Old Testament; further evidence of the use of Scripture by common lawyers in legal argument.

Doe's book will be indispensable reading for anyone concerned with the nature of English law in the late Middle Ages. In addition, his researches into the fundamental dimensions of law will interest all Christians concerned about the present understanding of parliamentary sovereignty and our law's responsiveness to moral values. To adapt an image from one of Lord Atkin's judgements, Norman Doe does not present us merely with ghosts of the past clanking their medieval chains.