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978-0-521-32391-8 - Law, Politics and Society in Early Modern England

Christopher W. Brooks

Excerpt

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1 English history and the history of English law 1485–1642

This book seeks to reintegrate the history of law, legal institutions and the legal professions with the general political and social history of the period between the end of the Middle Ages and the outbreak of the English civil wars in 1642.

Conceived over two decades ago, it was originally inspired partly by the now-famous last chapter of Edward Thompson's work on the 'Black Acts' of the eighteenth century, *Whigs and Hunters*, in which he found, rather to his surprise, that the 'culture of the rule of law' seemed to amount to something more than the simple hegemony of the gentry over the rest of society.¹ It might be, he acknowledged, a set of values and practices that transcended the interests of any given group, one that was sometimes appropriated and used as much by the politically dispossessed as by the elite. At roughly the same time, my own studies of civil litigation and the legal profession indicated that the numbers of lawyers were rapidly increasing in the later sixteenth century, that by the beginning of the seventeenth the central courts in England were probably more heavily used than they ever had been before, and that the social range from which the litigants were drawn was surprisingly wide.² Both sets of findings seemed to point to the need for a fuller examination of the place of law in early modern society, and although it was already evident by the early 1980s that a considerable renaissance in legal history was taking place, the subject had been so neglected for so long that, while political as well as social historians frequently acknowledged the importance of 'the law', there was evidently a very real need for a work which attempted both a fair amount of detailed exposition as well as an interpretative overview.

During the years that have passed between the book's conception and its completion, a number of excellent works on some of the themes with which it deals have been published. There have been books on

¹ E. P. Thompson, *Whigs and Hunters: the Origins of the Black Act* (1975).

² Brooks, *Lawyers, Litigation*.

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crime,³ on the ecclesiastical courts,⁴ on the legal professions,⁵ on civil litigation, and on the place of common-law thinking in early modern political thought.⁶ However, while all of these have contributed to the story that is told here, most have been written with a number of different agendas in mind. They have been dispersed in their chronological coverage, and none has been explicitly concerned with the role of law in politics and society broadly conceived. Those working on the lawyers have concentrated on internal professional developments and the social origins and social mobility of practitioners. Studies of crime in the seventeenth century usually draw their conclusions with little reference to the institutions and attitudes that were associated with law enforcement in the sixteenth. Those who have used quarter sessions and assize records to study crime, or ecclesiastical court depositions to examine sex and marriage, have on the whole been more concerned with the nature and incidence of crime and criminals, or the character of sexual and marital relations, than with legal thought and practice. Several recent studies have confirmed the importance of ‘going to court’ for ordinary people of both sexes, and have addressed questions about the relationship between law and agency, but they have for the most part been interested primarily in the value of legal records as sources for social and cultural history rather than in the social history of law itself.⁷

Indeed, many British historians would probably maintain that whilst legal records are a useful source of evidence, ‘the law’ itself is not a very worthwhile or rewarding subject of investigation. This lack of interest, which accounts for the relative paucity of work on the subject since the late nineteenth century, is frequently, and with some justification, blamed on the insularity and sterility of what is usually described as

³ For example, J. A. Sharpe, *Crime in Early Modern England 1550–1750* (1984); C. Herrup, *The Common Peace: Legal Structure and Legal Substance in East Sussex, 1594–1640* (Cambridge, 1987); G. Walker, *Crime, Gender and the Social Order in Early Modern England* (Cambridge, 2003).

⁴ R. Houlbrooke, *Church Courts and the People during the English Reformation 1520–1570* (Oxford, 1979); M. Ingram, *Church Courts, Sex and Marriage in England 1570–1640* (Cambridge, 1987); R. H. Helmholz, *Roman Canon Law in Reformation England* (Cambridge, 1990).

⁵ E. W. Ives, *The Common Lawyers of Pre-Reformation England: Thomas Kebell, a Case Study* (Cambridge, 1983); Prest, *Barristers*; Brooks, *Pettyfoggers and Vipers*.

⁶ For instance, J. P. Sommerville, *Politics and Ideology in England 1603–1640* (1986); G. Burgess, *The Politics of the Ancient Constitution* (Basingstoke, 1992); A. Cromartie, *The Constitutionalist Revolution: an Essay on the History of England 1450–1642* (Cambridge, 2006).

⁷ L. Gowing, *Domestic Dangers: Women, Words and Sex in Early Modern London* (Oxford, 1996); T. Stretton, *Women Waging Law in Elizabethan England* (Cambridge, 1998); M. Gaskill, *Crime and Mentalities in Early Modern England* (Cambridge, 2000); A. Wood, *The Politics of Social Conflict: the Peak Country, 1520–1770* (Cambridge, 1999); S. Hindle, *The State and Social Change in Early Modern England 1550–1640* (Basingstoke, 2000).

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doctrinal legal history, but its roots go more deeply into the heart of western social thought. Works of lawyer/historians such as F. W. Maitland and W. S. Holdsworth reflect a late Victorian and Edwardian tradition that regarded legal thought and institutions as keys to the understanding of any society, and a similar perspective informed the work of continental sociologists, such as Max Weber and Emile Durkheim, as well as early investigations in the relatively new discipline of anthropology.⁸ Ultimately, however, other, more influential perspectives have driven scholars away from the study of law and legal history.

Although Karl Marx was educated as a lawyer, his thought, and that of his collaborator, Frederick Engels, placed little emphasis on the independent history of law as a societal institution. Instead, they regarded it as little more than an epiphenomenon of the means of production, a view that did little to promote studies of the legal organisation of society. At the same time, during the twentieth century, the overweening power of the state in western countries with democratic forms of government, no less than in the totalitarian regimes of the former Soviet empire, was accompanied by scepticism about the congruity between the law as legislated, or determined by judges, and the aspirations or values of the community at large, not to mention the realities of power.⁹ According to the influential French theorist Michel Foucault, for example, in modern liberal states social and political relationships are construed with little reference to legal or constitutional structures, and there may be some justification for this view.¹⁰ As the American legal historian Lawrence Friedman has put it, compared with other societies and other periods, western legal systems for most of the twentieth century removed the bulk of the population from any extensive voluntary contact with courts or the ideas and practices associated with them.¹¹ Closer to home, John Baker has observed that in the twentieth century the delegation of power to administrative bodies established by parliament meant that the rule of law was been replaced by policy.¹² No less important, twentieth-century

⁸ E. Durkheim, *The Division of Labor in Society* (New York, 1933); Max Weber on *Law in Economy and Society*, ed. M. Rheinstein and E. Shils (Cambridge, MA, 1954); K. N. Llewellyn and E. A. Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, OK, 1941); D. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge, MA, 1990).

⁹ In fact an early assertion of a point similar to this can be found in Edward Jenks, *Law and Politics in the Middle Ages* (1912), ch. 1.

¹⁰ See L. Engelstein, 'Combined underdevelopment: discipline and the law in imperial and soviet Russia', *American Historical Review*, 93(2) (1993), 338–53.

¹¹ L. M. Friedman, 'Opening the time capsule: a progress report on studies of courts over time', *Law and Society Review*, 24 (1990), 237–8.

¹² J. H. Baker, *An Introduction to English Legal History* (1979 edn), p. 131.

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traditions amongst lawyers themselves aimed to stress the political and social neutrality of law in order to validate their discipline as a ‘science’ impervious to change.¹³

These contentions about the role of law in civil society also coincided in European and British history with a concern about distinctions between what have become known as ‘elite’ and ‘popular’ culture.¹⁴ Here, a critical assumption is that in societies where levels of literacy were low, and where the equivalents of modern mass media were limited (or controlled by the few), overarching discourses such as those connected with religion or law would be dominated by the social elite in their construction and in their appropriation and use for practical purposes. In the case of religion, for instance, the argument has been put that if we want to know about the spiritual lives of ‘ordinary’ people, then it is better to look to magical practices and witchcraft rather than to the orthodoxies of established churches.¹⁵ Similarly, there has been an assumption that the knowledge and use of law was effectively limited to the social elite, the aristocracy and gentry.¹⁶ Ordinary people had little impact in shaping the law, and since they also had little opportunity to use it, they were bound to have found it so distant and unfamiliar that it was unlikely to provide the language in which they would seek to understand and articulate either political concerns or the social and economic relationships that constitute everyday life.

This construction of the past may tell us more about the sense of disenfranchisement that exists today under the House of Windsor than it does about the history of the Tudor and Stuart periods. But alternative interpretations of the relationship between law and society have been put forward. These have thus far come more frequently from American law schools than from history faculties on either side of the Atlantic, and they have had little perceptible impact on the writing of British history, but they do suggest that the subject should be approached with an open mind. Echoing Durkheim, Roberto Unger has postulated that every ‘society reveals through its law the innermost secrets of the manner in which it holds men together’.¹⁷ Writing about modern Morocco,

¹³ M. J. Horwitz, ‘The conservative tradition in the writing of American legal history’, *American Journal of Legal History*, 17 (1973), 275–94; Brooks, *Lawyers, Litigation*, ch. 4.

¹⁴ The seminal work in English is P. Burke, *Popular Culture in Early Modern Europe* (1978).

¹⁵ Compare K. Thomas, *Religion and the Decline of Magic* (1971) with E. Duffy, *The Stripping of the Altars: Traditional Religion in England, c. 1400 – c. 1580* (New Haven, CT, 1992), p. 2.

¹⁶ For an updated view see M. J. Braddick and J. Walter, eds., *Negotiating Power in Early Modern Society: Order, Hierarchy, and Subordination in Britain and Ireland* (Cambridge, 2001), Introduction.

¹⁷ R. W. Unger, *Law in Modern Society* (New York, 1976), p. 47.

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Lawrence Rosen found that judicial reasoning surprisingly often corresponded with everyday views within society at large.¹⁸ Indeed, recent work on early modern English subjects such as the nature of religious conformity or attitudes towards gender relations appears to confirm the observation of R. W. Gordon that it is hard to describe any set of basic social practices without describing the legal relationships amongst the people involved.¹⁹ While it would be a grave error to say that simply knowing the law enables us to describe any society, it is equally evident that lawsuits and legal discourse have been seriously neglected as sources for understanding the articulation of social, economic and political relationships and the ways they changed over time.

These radically differing perspectives on the place of law in society constitute an underlying problematic at the heart of this book, one that contributed greatly to the research strategies adopted in order to write it. Questions about ‘the law’ could only be addressed in the light of a fuller understanding of its meaning in the sixteenth and seventeenth centuries. Given the state of the historiography of the period, there was clearly a need to supplement statistical studies of crime and civil litigation with an investigation of English law as a set of discourses or ideas that involved both general assumptions about the nature of the state and society as well as the more narrow reasoning that dictated the outcome of particular cases. Yet ‘the law’ is a diabolically ambiguous term. Early modern jurists, like their ancient, medieval and modern counterparts, always regarded it important to provide pithy technical answers to the question, ‘what is law?’. But in order for it to achieve any historical purchase, the reified abstraction must be broken down into its constituent ideas, institutions, processes and personnel. English law consisted of centuries of judicial reasoning as well as statutes passed by parliament. Lawsuits were complex transactions in which the interests and aims of the parties were contested in different fora, each of which had its own technical rules, as well as institutional peculiarities that were mediated by legal professionals. The application of the criminal law depended on the interaction of victims, lay constables, justices of the peace (JPs) and juries as well as the authority of the judges who visited the localities to supervise trials. Legal discourse and ‘constitutional thought’ was a creation of the profession, but it contained many different voices and may well have had different resonances amongst different social groups within the population. Furthermore, its impact on society can only be

¹⁸ L. Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge, 1989), ch. 3.

¹⁹ Robert W. Gordon, ‘Critical legal histories’, *Stanford Law Review*, 36 (1984), 57–125.

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properly evaluated if it is measured against values that were associated with other sources such as religion or social custom.

The source material available for a study which aims to concentrate on the law whilst attempting to maintain a broad and multifaceted understanding of that word is abundant, but it is also in some respects frustratingly limited. Although public trials of both civil and criminal matters are an essential characteristic of English common-law procedure, there are hardly any coherent first-person accounts of one. Nor is it possible to investigate very thoroughly the critical role of juries in the process of adjudication.²⁰ On the other hand, court records themselves, which give some idea of the people involved and the issues they were contesting, survive in almost overwhelming quantities, and some of these have been put to good use in modern studies. Investigations of crime have thrown light on the records of quarter sessions and assize as well as the nature of crime and criminals. Historians interested in sex, marriage and gender have produced illuminating studies of ecclesiastical court records. But the civil courts and, especially, professional legal materials have received less scrutiny.

From the early sixteenth century onwards, professional legal works such as law reports, treatises and lectures delivered to law students survive in increasing numbers in both print and manuscript.²¹ In addition, there are a significant number of extraparliamentary speeches that offer a tantalising opportunity to consider ideas about law that were communicated to the wider public by lawyers and JPs at meetings of courts stretching from the village leet to the twice-yearly visitation into the localities of the assize judges. Material of this kind has been essential in the process of trying to understand ideas about ‘the law’ in the period, and it has been supplemented by work on semi-official archives such as those of the late Elizabethan and early Stuart lord chancellor Thomas Egerton, those of Charles I’s attorney general during most of the 1630s, Sir John Bankes, as well as by consulting the private collections of lawyers and gentry magistrates such as those of the Yelvertons, the Whitelockes, the Newdigates and the Wynns of Gwydir in Wales. Finally, given the objective of investigating law in society, and especially law in the community, court records at the town and manorial level as well as those of the central jurisdictions in London have also been consulted. Yet the book is not so much a study of court usage, or indeed

²⁰ J. S. Cockburn and T. Green, eds., *Twelve Good Men and True: the Criminal Trial Jury in England 1200–1800* (Princeton, 1988).

²¹ See, for instance, Baker, *Readers and Readings* and J. H. Baker and J. S. Ringrose, *A Catalogue of English Legal Manuscripts in Cambridge University Library* (Woodbridge, 1996).

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the development of legal doctrine, as it is an investigation of the terms on which legal arguments were made and the ways in which legal ideas mapped political and social relationships. For that reason an extremely traditional source of the legal historian, printed and manuscript law reports of cases that were brought before the courts, have proven to be a surprisingly important source.

The overall aim has been to combine an intimate familiarity with the institutional and intellectual world of early modern lawyers with as much local knowledge as possible of the streets and households of villages and market towns from Devon to Northumberland and from Wales to London and East Anglia. Yet since so many relationships, from that between the subject and the monarchy, to that between landlords and their tenants, to that between the person and the community, were contested in courts of law and discussed within the medium of legal thought, it seems inappropriate to preface the work as a whole with the kind of overview of early modern society that readers might normally expect as a background to the more detailed exposition. Since questions about how we should perceive the political, social and economic life of the past are so central to the book's agenda, these have been left to be worked out during the course of its chapters.

Nevertheless, several long-term, and generally uncontroversial, features of the period constitute an essential context for the more detailed story. In chronological order, the first amongst these was the advent of printing in the late fifteenth century and its steady growth and influence thereafter, a development that coincided with the intellectual changes associated with 'humanism' and 'the Renaissance'. Next, there are the religious changes that began in the 1530s with Henry VIII's decision to use a breach with the Roman Catholic Church in order to obtain a divorce from his wife, Catharine of Aragon, and then developed during the reign of Elizabeth (1558–1603) into the creation of a distinctly Protestant church of England that had a profound impact on the religious sensibilities of large numbers of people, rich and poor alike. Thirdly, although it was at times severely set back by epidemic disease before 1550, the sixteenth and seventeenth centuries saw a steady overall increase in the population of England from about 2.3 million at the beginning of the period to as many as 5 million by the end of it. One consequence of these demographic developments was an acceleration in the number of economic transactions as markets in both lands and goods expanded in volume and in the distances covered.²² At the same time,

²² K. Wrightson, *Earthly Necessities: Economic Lives in Early Modern Britain* (New Haven, CT, 2000).

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since the economy of the country and the physical well-being of its inhabitants were heavily dependent on the land and agricultural productivity, the period saw the greater enrichment of those who were able to produce food for the market, and a greater precariousness in the economic condition of those who lived by wages alone. The extent of both the rise of the gentry and systemic poverty in the period have probably been exaggerated, but there seems little doubt that both the gentry and the lesser farmers known as the yeomen and husbandmen added to their wealth and saw improvements in their standards of living, as did many of the townsmen. By contrast, during difficult periods caused by harvest failures, stoppages of trade because of foreign wars or domestic policy, families on the margins of subsistence, the elderly and single parents (most often female), were likely to find themselves dependent on the parish relief which was increasingly made available as a result of late sixteenth-century statutory provision for the poor.²³

Apart from these general characteristics of the period, several interlocking, but incompletely resolved historiographical issues have helped to determine the shape of the study as a whole, and the identification of these should alert readers to the fact that, for better or worse, the book has been written from the perspective of someone working in an academic history department rather than in a law faculty. Although few historians nowadays would argue that the reigns of either of the first two Tudor kings, Henry VII and his son, Henry VIII, marked an unequivocal break with the late medieval past, an ongoing tradition of interpretation has identified the period as a whole as one in which the agencies of the state became more far reaching and during which the place of ideas about law, and the rule of law, became more deeply engrained in social and political life. According to one long-standing interpretation of the later Middle Ages, if we look closely at fifteenth-century England, we see a social world in which the rule of law as we know it played a relatively small part.²⁴ The major common law courts were generally under-used, and in the view of some historians, largely ineffective. Amongst the aristocracy and gentry, ties of kinship and the values of an honour society were just as important for regulating behaviour as any concept of adherence to the rule of law. Private disputes were settled either by the resort to violence or by informal arbitration, and there was no very highly developed public law to which constitutional disputes could be referred. By comparison, if we turn from the fifteenth to the mid seventeenth

²³ P. Slack, *Poverty and Policy in Tudor and Stuart England* (1988); S. Hindle, *On the Parish? The Micro-politics of Poor Relief in Rural England c. 1550–1750* (Oxford, 2004).

²⁴ See below, pp. 30, 278.

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century, there at first sight appears to be abundant evidence of change. The size of the legal profession had grown enormously, and between 1550 and 1640 litigation came flooding into the central courts at Westminster on an unprecedented scale. The aristocracy and gentry pursued lawsuits and service as local magistrates (JPs) rather than private feuds as a way of maintaining their hegemony over the rest of the population. Furthermore, the common law and common lawyers were deeply involved in many of the constitutional disputes of the early Stuart period.

The questions implied in these formulations, as well as the chronologically fragmented character of much of the existing work on them, accounts for the long-term narrative of the relationship between legal thought and political and constitutional issues that is found in chapters 2 to 8. In particular, while much has been written about the so-called ‘common-law mind’, the ‘ancient constitution’ and political conflict in the years prior to 1642,²⁵ very little of this takes much account of the content and development of Tudor legal thought, a feature of the historiography that partly explains why it has been difficult in recent years to conceptualise a coherent ‘constitutional’ account of the period leading up to the civil wars, one of the most turbulent periods in the political history of the nation.²⁶

At the same time, thanks to the general interest over the past half-century in so many aspects of social history, including questions about the political awareness and ‘agency’ of people outside the landed elite, any study of law that concentrates only on high politics is bound to seem unsatisfactory and myopic. If lawyers and judges were involved in the collapse of political institutions in the mid seventeenth century, studies of the profession and of litigation have also shown that they were deeply involved in the everyday lives of ordinary people ranging down through the gentry to the so-called middling sort and even the poor. One obvious question suggested by this concerns the relationship between the legal ideas discussed in parliament, or famous state trials, and the everyday legal life of the mass of the population. No less important, though, since law was such an important factor in constituting, or inscribing, social and economic, as well as political relationships, it should have something to tell us about the posture of individuals and families not only in respect

²⁵ The original inspiration for this conceptualisation is, of course, J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: a Study of English Historical Thought in the Seventeenth Century: a Reissue with a Retrospect* (Cambridge, 1987), originally published in 1957.

²⁶ For a good account see Thomas Cogswell, Richard Cust and Peter Lake, eds., *Politics, Religion and Popularity in Early Stuart Britain* (Cambridge, 2002), Introduction.

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of the crown or the state, but in the more confined, but no less important, spheres of interpersonal relations and the community. Hence the second half of the book attempts to investigate a series of questions about the nature of local legal institutions and their impact, about economic and tenurial relationships, about privacy, gender and the family, about the powers of local authorities, and about the way in which the social elite (the aristocracy and gentry) as well as ordinary people, were characterised and affected by legal discourse. The intriguing thing about ‘the law’ is that it appears to offer a tantalising opportunity to transcend the divide between political and social history.