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978-0-521-78269-2 - The Constitutionalist Revolution: An Essay on the History of England, 1450-1642

Alan Cromartie

Excerpt

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Introduction

Some civil wars are easily predicted. They split the polity concerned along an obvious fault-line created by race, geography, religion, patronage ties, or economic dealings. They happen where the centre is relatively weak, where sectional attachments trump wider loyalties. But there are other, more unusual conflicts in which the usual pattern appears to be reversed, in which the tug exerted by the values of the centre (or some interpretation of those values) creates new groups that cut across existing social structures. The English civil war was one such conflict. The English fought each other in 1642 because their precociously unified national culture turned out to have ambiguous political implications. Both sides maintained, apparently sincerely, that they were fighting for the king, the laws, and the established Protestant religion, but each side turned out to be loyal to different understandings of these concepts. The cluster of apparently shared values was powerful enough to split the nation's governing class and to produce both royalists and roundheads in virtually all areas of the country. The kind of war the English fought reveals the kind of country that they lived in.

A satisfying history of early modern England must make this kind of war intelligible. No such account is likely to be wholly secular, for legalism, monarchy, and Protestant religion were intertwined and mutually supportive: the rights of church and crown were legal rights; the institutional structure of church and state was an expression of monarchical power; obedience to the King and to the law was a religious duty. In any case, there is much evidence of narrowly religious motivation. Though Oliver Cromwell in retrospect maintained that what he later came to call 'religion' was 'not the thing at the first contested for',¹ such statements reflected a subsequent shift in perspective. Even in 1642, the nucleus of the parliamentary party consisted of those who wanted church reform, while

¹ *The writings and speeches of Oliver Cromwell*, ed. W. C. Abbott, 4 vols. (Cambridge, MA, 1937-47), III, 586.

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many of King Charles's most active supporters were certainly attracted to his cause by his determination to resist it. Both sides produced effective propaganda, in which they demonised their foes as Jesuits or Munster Anabaptists.

But there are limits to the power of any explanation that focuses upon religious motives. What might be termed a 'genuine' war of religion, a conflict generated by opposed theologies and modes of worship, would surely have been lost by parliament, if only because puritans had need of non-puritan allies. If puritanism is defined as principled belief in reform of the church, pursued by a distinctive group self-identified as 'godly', then puritans were, and would remain, a small minority. Although entrenched in certain areas (especially in some provincial towns, and in regions with a clothing industry), their strength was unevenly spread across the country. If, as has often been maintained, their doctrines were attractive to the literate 'middling sort', they found it much harder to influence both more and less sophisticated people. Unlike their enemies, who saw advantage in posing as defenders of folk custom, they had to work against the grain of popular tradition; but they also found themselves cut off from aristocratic and academic circles. They had no agreed coherent positive programme. It was striking, but hardly surprising, that none of the post-war puritan regimes were to acquire much legitimacy and that their military control of England had very little effect upon its culture.

Puritanism narrowly defined was thus a handicap to parliament, which was no doubt why the Houses' public statements during the crucial summer of 1642 were not overtly puritanical. One could of course coherently maintain that an unintended consequence of royal policy was to radicalise much moderate opinion, creating a temporary movement for puritan reform that went beyond the previously 'godly'. But the more loosely the idea of puritanism is used, the more it covers groups whose aspirations for the church were functions of their attitudes to monarchy and law. This is not to assert that such people had 'secular' motives (though some of them probably did), but only that their views about religion cannot be separated from their wider social values. The parliamentary movement's political theory was blended with its anti-Catholic feeling in such a way that none of its supporters had any immediate need to choose between them. It is anachronistic to suppose that there was any necessary tension between these different strands of propaganda, because the threat of 'popery' was amongst other things a threat of secular oppression (just as the threat presented by the ultra-puritan sects – the favoured bogey of the royalists – was amongst other things a threat of democratic or anarchic licence).

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This book sets out to recreate the intellectual world in which the aspirations of the godly fitted into a *political* solution to the crisis of the Stuart monarchy. From a sufficiently long-term perspective, that crisis can be understood as the result of two developments. The first was the emergence of a mode of government that both expanded and constrained the powers of the monarch. During the sixteenth century, the English crown vastly extended its reach – its capacity to motivate its servants – by an appeal to the prestige of English positive law; but in so doing, it provided means by which its power could be limited. The country's legalistic Reformation helped to encourage the belief that English common law was in a strict sense omniscient, that is, was capable of finding answers to every social and political question, including questions that concerned the powers of the church and the monarch. This high view of the common law in general strengthened kings, but as soon as royal policies conflicted with expectations of the legal system, it had the effect of stiffening resistance. By the later 1620s, it had produced a parliamentary deadlock that a much subtler king than Charles would have had difficulty in resolving.

The second long-term development was also the result of the unusual character of England's Reformation. In the religious sphere, the great peculiarity of England was not so much the vestiges of Catholic modes of worship as the survival, virtually unscathed, of a medieval institutional structure. One fruit of this survival was the latent disaffection of the godly; another was the attractiveness to the supporters of the *status quo* of a more Catholic theology. The greatest of these, Richard Hooker (1554–1600), succeeded in fusing defence of the church with regard for legal values, but later high churchmen adopted a more risky strategy. As their claims for the church became bolder, their politics became more absolutist. They regarded themselves and the crown as equally menaced by the aggression of the common lawyers, and looked to a powerful monarch to defend them. Though James was sympathetic, he rejected their political assistance; Charles by contrast went into alliance with an anti-erastian church, and in so doing, helped to doom both church and monarchy.

This book's account is focused on the history of law, but neither of these stories is comprehensible without the background presence of the other. The English constitutionalist tradition would hardly have developed as it did without the impulse given it by attitudes towards religious questions, but the effect of law upon religion was arguably almost as important. Together, they moulded the rational, rights-bearing self that has persisted and that shapes our present situation.

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CHAPTER I

Fortescue's world

Any account of late medieval England must take some note of a surprising contrast. The kingdom's rulers were unfortunate (five out of Henry VIII's ten predecessors died violent deaths at the hands of their own subjects), but the society they tried to govern appears to have been increasingly well ordered. Its relative stability could even survive a uniquely unsuitable monarch. The regime of Henry VI suffered every disaster that could happen to a personal monarchy – foreign defeat, court faction, royal minority and lunacy, kidnapping, civil war, and usurpation – but the result was nothing like the Anarchy of Stephen. The Wars of the Roses were brief campaigns concluding in formal engagements; the houses that magnates erected were only minimally fortified; and few of them spent more than a tenth of their income on wages for retainers. There is not in fact much evidence that violence was endemic, or murder other than exceptional.¹ What really needs to be explained is not dynastic chaos, but the resilience of social order.

One cause of this resilience was surely the role of the gentry in county government. Before 1294, the senior central court, King's Bench, aspired to visit the counties on regular 'general eyres', thus bringing the whole panoply of royal law to the localities. After this mechanism was abandoned, the crown began to make more use of local notables. The history of county commissions of the peace – bodies intended to combine so-called 'sages de la ley' with landowners worth at least £20 a year – was virtually continuous from 1361; a century later, in 1461, their members in effect displaced the sheriffs as royal judges at a county level. There were and are two different ways of looking at these local magistrates. On one quite easily constructed view, their very existence weakened monarchy. Their emergence has been seen as symptomatic of the way in which a 'law state' turned into a 'war state', a country in which the demands of foreign warfare forced kings to

¹ P. C. Maddern, *Violence and social order: East Anglia 1422–1442* (Oxford, 1992), 5.

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abandon performing a core royal function.² A 'strong' king would not have permitted this to happen. The exceptionally capable Henry V attempted to revive the earlier practice of sending King's Bench to project royal power in the localities; it was the new and insecure regime of Edward IV that witnessed the displacement of the sheriff.

On another view, however, the JP was the central mechanism of what, potentially at least, was an immensely powerful apparatus. The principal cause of the general eyre's collapse was the sheer weight of popular demand for its attention; the JP could handle indefinite amounts of trivial business without administrative overload. What was more, one great advantage of commissions of the peace was that they gave the more important gentry a certain stake in the idea of law. Thus William Worcester's *The Boke of Noblesse*, a work that reached its final form in 1475, regretted the high value that was set on legal knowledge:

knichtis sonnes esquiers and of othir gentille bloode, set hem silfe to singular practik . . . as to learn the practique of law or custom of lande, or of civile matier, and so wastyn gretlie theire tyme in such nedelesse besinesse, as to occupie courtis halding, to kepe and bere out a proud countenaunce at sessions and shiris halding . . . And who can be a reuler and put hym forthe in such matieris, he is, as the worlde goithe now, among alle astatis more set of than he that hathe despendid 30 or 40 yeris [in the wars].³

This perception was no doubt exaggerated (it may indeed have been a generalisation from Worcester's pushy acquaintances, the Pastons), but its expression at this date, less than four years from Tewkesbury and Barnet, is nonetheless both striking and suggestive.

The legalistic character of English social life was perfectly consistent with a large role for aristocratic power – indeed it explains how a governing class that was threaded with patronage networks could stop its disagreements escalating. Some law-suits are perhaps best understood as a symbolic substitute for battle; this was probably why the Pastons spent at least 600 marks – to say nothing of time, trouble, political capital, and travel costs – on the struggle for a property, East Beckham, that may have been worth 20 marks a year.⁴ The obvious shortcomings of the medieval law did not prevent it structuring such quarrels. A powerful man could resort to self-help or intimidating juries – a jury was an admirable method

² R. W. Kaeuper, *War, justice, and public order* (Oxford, 1988).

³ *The Boke of Noblesse: addressed to King Edward IV on his invasion of France in 1475*, ed. J. G. Nichols (1860), 77. Spelling of quotations has been modernised, unless (as here), there might be some loss of the author's intended meaning.

⁴ Colin Richmond, *The Paston family in the fifteenth century: the first phase* (Cambridge, 1990), 114.

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of ratifying ‘facts upon the ground’ – but these are best seen as irregular moves within or around a respected legal process: as gamesmanship which presupposed a rulebook. Even the apparently slow pace of standard court procedures had the important practical advantage of offering ample time for arbitration.⁵ The law both shaped and tamed the gentry’s squabbles, whatever other methods were used to settle them.

A faith in legal processes affected even national politicians. Thus Richard duke of York could write to the council (probably in October 1450), denouncing unnamed enemies in legalistic terms. His letter was a kind of memorandum ‘to your highe and noble discrecion, and the trewe lordes of the kinges counsele’, complaining of ‘grete injuries, coloured theasons and oppressions maignetened by highe astates, the enstimiable extorcions and the sophistical subverting of the kinges lawes’. These had led to the loss of King Henry VI’s ‘enheritaunce of his reame of France’, to ‘rising and rebellions’ at home, and ‘shamefull rebuke in the conseyte of straungeres’. York demanded that ‘suche personnes detecte and charged with theason and crymis, beyng aboute the kinges persone, maybe arrested, to be determined and juged after the forme of lawe’. He went on to offer a vivid account of law’s centrality:

And it is to be advertised in the correccions of the highe and noble discrecion that a king or alorde lawlesse ys as afisshe watirlesse, for lawe causith the king inheritable to the croune. Lawe causith every astate and degree to kepe ordinate reule, and the king is sworne to his lawe and to defende his people, and so under your highe correccion hit is conseyyed, who that subvertith or hath subverted the lawe, hit is the most theason on earthe that can be thoughte, for they impovereth here prince in unlawfull askinges of his inheritaunce and demaynes.⁶

The purpose of this missive was not philosophical – Richard and his advisers were attempting a political manoeuvre – but its ingenious rhetoric is useful evidence of what was thought politically appealing. Its strategy was to conflate the King’s ‘inheritance of France’ with ‘the inheritance and domains’ *unlawfully* asked by suitors: misgovernment was redescribed as illegality; misdeeds were characterised as crimes; and crimes in turn were characterised as treasons. ‘Discretion’ was repeatedly referred to, but the discretionary action sought was just an ordinary legal process: York was arguing that the law must take its course.

⁵ Edward Powell, *Kingship, law, and society: criminal justice in the reign of Henry V* (Oxford, 1989), 274.

⁶ M. L. Kekewich, C. Richmond, A. F. Sutton, L. Visser-Fuchs, and J. L. Watts, *The politics of fifteenth-century England: John Vale’s Book* (Stroud, 1995), 187–8.

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Appeals to legal processes were not confined to Yorkists. In a text composed in 1459 (usually known as 'Somnium Vigilantis'), one of Henry VI's supporters could assert that

all controversies and debates civil or criminal, real or personal, ben decided by the king's laws without maintenance or wilful interruption of the course of justice, and in case that any thing fall of the which determination is not expressed in the common law, then the prince must be asked and enquired and by his exceeding auctorite and prudence of his council an expikan shalbe made thereupon, and so that no thing may be done by singular will and senceall affection.⁷

Here, just as in York's letter, the King was presented as standing outside law, but royal power dissolved, upon further inspection, into a right to set the law in motion. An 'expikan' may be an 'explication' or an unusually illiterate spelling of Aristotle's word *epieikeia* (a concept that will be discussed below), but it seems to refer to some kind of impersonal process.

The claims so confidently made in these essentially propagandist texts are evidence, if any is required, that late medieval Englishmen had an ideal of government by law. As heirs to seventeenth-century disagreements, we naturally seize on such pronouncements as the essential stuff of political theory, but in the late Lancastrian period, they seem to have been made quite casually. They suggest that the law's prestige was worth invoking, but that the King's relationship to law was not politically sensitive: that politicians with some transient reason for stressing the supremacy of legal processes were not afraid that over-stating matters would leave them vulnerable to criticism.

Part of the explanation of their insouciance was that the law was something the king *did*. In calling for the rule of law, these writers were calling for kingship, not undermining it. Upholding the law – 'doing justice' to his people – should have been one of Henry's central functions: as York pointed out, it was a royal duty to which the monarch had been sworn by his coronation oath; conversely, 'denial of justice' had been prohibited by Magna Carta. A true king, that is, one who acted rightly – the word *rex* was often derived from *recte agendo*⁸ – was one who acted to promote the common weal of the community. Dispensing remedies through known procedures, assisted by appropriate counsellors, was an important aspect of his function. As we shall see, this was the view of kingship that seems to underlie the scattered comments of the few English writers of legal treatises.

⁷ J. P. Gilson, 'A defence of the proscription of the Yorkists', *English Historical Review* 26 (1911), 518.

⁸ *Isidori Hispalensis episcopi etymologiarum sive originarum libri xx*, ed. W. M. Lindsay, 2 vols. (Oxford, 1911), Book 1, chapter xxix.3.

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Although it long pre-dated the translation of Aristotle's work *The Politics* (a treatise not available in Latin before the later thirteenth century), it harmonised neatly with Aristotelian thinking; an Aristotelian king, as opposed to a tyrant, was someone who possessed the moral habits (in medieval terminology, the 'virtues') encouraging promotion of the common interest. Thus the constraints on kingship were the constraints internal to a role, expressed through habits that the role demanded.

One side of Aristotelian thought had a republicanising tendency. As Aristotle had explained, a law was better than a human ruler because it was 'intellect without desire'; to use the *Somnium's* phrasing, it was a process without 'will and senceall affection'. But as Aristotle also pointed out, a rule of law would generate hard cases; the common good demanded an agent equipped with the virtue of *epieikeia*, the equity that 'rectified' the law's unpalatable consequences. This was indeed the Aristotelian reason for thinking that the rule of the best man should be preferred to that of the best laws. The point was well explained by Giles of Rome (?1243–1316), whose *De regimine principum*, a mirror for princes developed from Aristotelian materials, was the most popular 'political' work in fifteenth-century England.⁹ The idea was readily assimilable, because medieval Englishmen expected justice tempered by 'discretion'. At English coronations, the monarch was asked 'Will you cause (*facies*) equal and right justice and discretion in mercy (*misericordia*) and truth to be done in all your judgements, to the utmost of your powers', to which the reply was 'I will do so' (*faciam*).¹⁰

The charges by which Henry IV had justified deposing Richard II show the importance of this undertaking. They quoted this part of the oath before complaining that Richard acted 'without any pity (*absque omni misericordia*)' in his behaviour to the banished Henry. A further indication of the relevant patterns of thought is found in the best-known of all these charges: the claim that Richard had maintained that he could make and change the laws at will. The full charge runs as follows:

The same king not wishing to conserve or protect the just laws and customs of the realm, but to enact according to the decision of his will whatever might occur to his desires, from time to time, and often when the laws of the realm were expounded and declared to him by judges and others of his Council and when he should have displayed justice to those who sought it according to those laws,

⁹ *The governance of kings and princes: John Trevisa's Middle English translation of the De regimine principum of Aegidius Romanus*, ed. D. C. Fowler, C. F. Briggs, and P. G. Remley (New York, 1997), 378.

¹⁰ S. B. Chrimes and A. L. Brown (eds.), *Select documents of English constitutional history 1307–1485*, (1961), 4.

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said explicitly, with a harsh and shameless countenance, that his laws were in his mouth and sometimes in his breast, and that he could make and change the laws of his realm by himself. And seduced by that opinion, he did not allow justice to be done to many of his subjects, but by threats and fears forced many to desist from the pursuit of ordinary justice.¹¹

The anxiety expressed here is superficially familiar; Richard's opponents were alarmed by what their seventeenth-century descendants would demonise as 'arbitrary power'. But the immediate context is subtly alien. Two features of Richard's assertions were particularly shocking: their flat rejection of appropriate counsel; and their denial of his aid to subjects who approached him for assistance. Both these unkingly elements of his behaviour derived from an imbalance in his personality: the dominance of a will (*arbitrium*) that was the prey of momentary desires. Though one of King Richard's offences was a disregard for rules, his failure to do 'justice' was an aspect of a more general failure to be royal.

One way of describing the intellectual changes that are the principal subject of this book is as a shift away from this conception: a move, in fact, from personal to rule-bound monarchy. Medieval conceptions of kingship required the king, from time to time, to over-ride existing regulations. The notion of kingship involved, to be sure, respect for 'laws and customs', but it was not exhausted by this duty; the habits befitting a monarch included the 'discretion' and the 'mercy' demanded by particular situations. If some medieval writers thought that 'law' could 'make' the king, they seem to have been thinking of *lex naturalis*; at all events, no other human being had the authority to define the limits of his power. Constraints on his behaviour were, as it were, internal to a picture of the monarch as someone directed by reason, not by will. During the Stuart period, by contrast, it came to be held that monarchical power could be defined by ordinary judges: that much the same procedures that settled disagreements about property in land could settle conflicts between king and subjects. An arbitrary power was not so much a power swayed by passion (although the phrase retained this connotation) as one that escaped the scrutiny of lawyers.

The claim that ordinary law defines the monarch's power will be referred to in this book as 'constitutionalism'. Seventeenth-century Englishmen of constitutionalist sympathies were naturally prone to discover this claim among their ancestors, but (as we shall see) their ability to do so was actually the product, not the cause, of the transition that needs explanation.

¹¹ Ibid., 189.

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Although the details of the shift are complex, its essence can be simply formulated. The faith that the English developed in ‘law’ was faith in the tradition of behaviour, generally known, of course, as ‘common law’, evolved by a small group of royal servants. These royal servants came to feel that their professional learning was adequate to any situation: that their particular form of royal justice incorporated royal *epieikeia*. This strange belief did not emerge until the Tudor period, but some of the materials from which it was constructed had been supplied by Sir John Fortescue (c.1390–1479). The starting point for any exploration of the process must be a brief description of his professional world.

I

The law that Fortescue described and practised consisted in the methods and traditions of two courts: King’s Bench, which originally dealt with those suits to which the monarch was himself a party; and Common Pleas, which dealt with litigation between subjects, especially suits concerned with debt and real property. Although King’s Bench was notionally superior – its suits were fictionally *coram rege*: before the king himself – professional tradition owed much more to Common Pleas. It was Common Pleas that was observed by students, it was Common Pleas whose business was reported in the professional texts we know as ‘Year Books’, and Common Pleas whose advocates (known as ‘serjeants’) supplied the judges of both jurisdictions.

One way of thinking about common lawyers was as members of a small professional guild whose craft could only be picked up by living and working among them. This was probably the reason why four ‘Inns’, which may have started as mere lodging houses, had come to acquire some educational functions, to the point where being a member of an Inn was constitutive of professional status. Living alongside students at these ‘Inns of Court’ in Holborn helped generate a corporate life that centred round their training, so much so that the law’s articulation was intimately linked to its transmission. The importance of this corporate life to lawyers can be inferred from the fact that invisible pressures eventually led all four Inns to adopt broadly similar structures;¹² as members had no personal financial interest in seeing that fresh students were recruited, the spread of best practice presumably owed something to a developing professional ethos.

¹² For some of the complexities of this process, see A. W. B. Simpson, *Legal theory and legal history: Essays on the common law* (1987), 17–52.