

PART I

The Profession Described

Cambridge University Press
978-1-108-49906-4 — The Profession of Ecclesiastical Lawyers
R. H. Helmholz
Excerpt
[More Information](#)

Introduction

This book is meant to contribute to the history of one segment of the legal profession, that which was occupied by English ecclesiastical lawyers. It deals with their lives and professional careers from the time a system of ecclesiastical courts, in which most of them practised, came into existence in the thirteenth century up to the time of the curtailment of the scope of ecclesiastical jurisdiction that occurred towards the end of the nineteenth century. It pays particular attention to the years between 1500 and 1640, when the character and future of the courts in which they served was called seriously into question but nonetheless survived, only to be abolished during the Interregnum and then brought back to life in the 1660s.

The book has two parts. The first describes the law that regulated their professional conduct, the nature of their education in becoming lawyers, their reaction to the English Reformation, and the changes and developments during the years that led up to the English Civil War. The second part consists of eighteen descriptive portraits of noteworthy ecclesiastical lawyers. My hope has been that the book's two parts will complement each other, the second providing specific examples of lives and careers spent in the profession described in the first. There is some obvious overlap, repetition even, in the coverage of the two parts. This has proved inevitable. They are both built upon the same body of evidence that is today found in the archives of England's ecclesiastical courts.

Akin to the English common law's division of lawyers into two classes – barristers and attorneys – the profession of the men who administered the church's law was divided into two basic classes: advocates and proctors. The similarity between the divisions in these two English court systems was never exact, and some variety in the terms used within each category also existed.¹

¹ Barristers were sometimes described as advocates, for example.

Common law barristers were sometimes described as advocates, for example. But even when different terms were used, in substance a similarity between these two parts of the legal profession remained. It has long been recognized as an apt parallel. John Cowell (d. 1611) made the connection in his *Interpreter*, for example,² and several other writers, both then and now, reached the same conclusion.³ There were two different classes of lawyer within each jurisdictional system, and in both, the primary distinctions between the two were ones of function and learning. Advocates and barristers argued in favor of the legal positions of their clients; proctors and attorneys took their place in court, thus effectively standing in the client's stead.⁴ Both advocates and barristers were also better educated and more fully versed in legal doctrine than were proctors and attorneys. The judges, who were usually called *Officiales* during the Middle Ages, and later more usually Chancellors in the ecclesiastical courts, were drawn from the first group, only rarely from the second, just as the judges of the courts of common law were chosen from among the barristers.

Recognition of this parallel between the lawyers of the common law and those of the ecclesiastical law also turned out to have at least one meaningful consequence. When the general jurisdiction of the ecclesiastical courts was drastically curtailed in the nineteenth century, the men who had served as advocates in them were invited to continue in practice as barristers without further training; the proctors were similarly permitted to act as solicitors.⁵ At least in areas of law taken over by the common law, the similarity in their prior professional careers was close enough for them to be allowed to continue under a new name.

This book, however, is not directly concerned with this comparison, intriguing though it is and worthy as it also is to be kept in mind. It is about the professional life and work of English advocates and proctors, who were often called civilians from their education and continuing connection with the civil or Roman law. It attempts to describe their preparation for work in the courts of the church and the use they made of what they had learned in

² *The Interpreter (or Booke Containing the Signification of Words)* (Cambridge 1607), s.v. *Attorney*.

³ G Jacob (d. 1744), *New Law Dictionary*, v *advocate* (London 1732); T Wood (d. 1722), *Institute of the Law of England*, Bk IV, c 1 (London 1772), pp 444–45; *Bl. Comm.* vol III *25–26; see also the examples in F Pollock and F W Maitland, *History of English Law*, vol I, (2d edn reissued, Cambridge 1968), p 215, and B Levack, ‘The English Civilians, 1500–1750’, in W Prest (ed), *Lawyers in Early Modern Europe and America* (London 1981), pp 110–11.

⁴ P Tucker, *Law Courts and Lawyers in the City of London, 1300–1550* (Cambridge 2007), p 272: ‘An advocate spoke for his client in the client or attorney’s presence ... whereas the attorney substituted for his client’.

⁵ Court of Probate Act, 20 & 21 Vict. c. 77 §§ 40–41 (1857).

that preparation, either at university or as a clerk in an apprenticeship-like position.

Historical study of the legal profession is far from a new subject. In fact, the last quarter of the twentieth century witnessed something close to an explosion of scholarly interest in the history of the legal profession in England. Most of it has focused upon the common lawyers.⁶ That is as it should be. However, even though much less attention has been devoted to the professional work of English civilians, the lawyers whose primary source of employment was in the courts of the church, several exceptions do exist. One need only cite books by Daniel Coquillette,⁷ Brian Levack,⁸ G D Squibb,⁹ J H Baker¹⁰ and also several chapters in academic journals and books of collected essays.¹¹ In addition, several books written to describe the history of the courts themselves have also devoted at least incidental attention to the lawyers who made the system run.¹² So the subject treated here is not written on a blank page. What it is meant to add to the existing studies is derived primarily from two sources not much used in the earlier English language scholarship. The first is the legal literature of the time – the treatment of the lawyers and the legal profession that is found within the *ius commune*. Both the Roman and the canon laws contained rules and principles devoted to the subject, and jurists in England and on the Continent paid attention to it. This mattered in practice. The second addition comes from information derived from an exploration of the

⁶ See the review of the subject by A Musson, 'Men of Law and Professional Identity in Late Medieval England', in T Baker (ed), *Law and Society in Later Medieval England and Ireland: Essays in Honour of Paul Brand*, (London and New York 2018), pp 225–53, at p 225. Its footnotes draw particular attention to works by Brand himself, and also to works by E W Ives, J H Baker, C W Brooks, W R Prest. It also lists other articles devoted to the subject.

⁷ *The Civilian Writers of Doctors' Commons*, London (Berlin 1988).

⁸ *The Civil Lawyers in England 1603–1641* (Oxford 1973).

⁹ *Doctors' Commons: A History of the College of Advocates and Doctors of Law* (Oxford 1977).

¹⁰ *Monuments of Endlesse Labours: English Canonists and their Work 1300–1900* (London and Rio Grande, OH 1998).

¹¹ See, e.g., P A Brand, *The Origins of the English Legal Profession* (Oxford and Cambridge, MA 1992), pp 143–57; C T Allmand, 'The Civil Lawyers', in C Clough (ed), *Profession Vocation, and Culture in Later Medieval England* (Liverpool 1982), pp 155–82; M Beilby, 'The Profits of Expertise: The Rise of the Civil Lawyers and Chancery Equity', in M Hicks (ed), *Profit, Piety and the Professions in Later Medieval England* (Gloucester 1990), pp 72–90; R O'Day, 'Rise and Fall of the Civilians', in her *The Professions in Early Modern England, 1450–1800* (Harlow 2000), pp 151–61.

¹² See C Chapman, *Ecclesiastical Courts, their Officials and their Records* (Dursley 1992), pp 33–34; R Marchant, *The Church under the Law: Justice, Administration and Discipline in the Diocese of York* (Cambridge 1969), pp 41–60; R Houllbrooke, *Church Courts and the People during the English Reformation, 1520–1570* (Oxford 1979), pp 40–43, 51–52; Brian Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (Oxford 1952), pp 40–45.

archives of England's ecclesiastical courts. These contents include the contemporary records and ancillary literature compiled by the English civilians (formularies, case reports, and manuscript notes) for their own use in day-to-day practice. There is a lot of it, and it sheds light on the subject's history that is not available from any other source. The book's primary focus is also upon the working lives of ordinary ecclesiastical lawyers rather than those of the most prominent and successful among them.

One additional word of introduction. The book's concentration is upon what happened in the courts of the English church. It is true that other courts were open to the professional lawyers described in its pages. For instance, courts of Admiralty, Chivalry, and the two English universities all adopted the procedural system in which the civilians were at home. They acted professionally in them. Even the court of Chancery provided a workplace for some of the lawyers trained in the canon and civil laws. In addition, it is true that English civilians were often called upon for diplomatic service; their knowledge of Roman and canon laws was thought to qualify them for dealing with European lawyers. They spoke a common language, one that most English common lawyers were thought not to possess. Some of the best existing scholarship on these lawyers deals with those aspects of the careers of the same men to be described here, as well as the contributions made by civilians to the field of general jurisprudence. Indeed, some of the work of civilians in England has seemed deserving of study because it can be said to have had an impact in the development of aspects of today's legal systems.

Though a legitimate way of studying the subject, this book does not adopt it. The English civilians were primarily ecclesiastical lawyers. The courts of the church provided careers for most of them, and it is upon these courts that this book focuses its attention. Their records have provided the primary basis for descriptions herein. It is also true that much of what the English civilians accomplished in the centuries covered by this book has been swept away by later jurisprudence. Much of it is now obsolete. Some of it now strikes us as unduly harsh or even as slightly foolish. But this book is a work of history, and it appears as part of a series meant to explore different aspects of the relationship between Law and Christianity. From both these perspectives, devoting attention to the routine work of the lawyers who appeared in what were then often called the 'Courts Christian' seems appropriate.

1

The Law of the Legal Profession: Advocates and Proctors

A history of the profession of ecclesiastical law in England should begin with Roman law. Appropriate terminology is one reason. The terms used to designate the lawyers who served in the courts of the Church from the thirteenth century to the nineteenth were the contributions of the ancient Romans. So too was a considerable part of the law that determined the character of the work these men performed. Texts from the civil law used to define their duties and regulate their conduct were taken from the *Corpus iuris civilis*, the great collection of ancient law texts made at the instigation of the Emperor Justinian in the sixth century. The Digest (Dig. 1.19; 3.3.1–78), the Codex (Cod. 2.7–8), and even the Novels (Nov. 71.1) contained titles devoted specifically to advocates and proctors. So did the *Codex Theodosianus* (Cod. Th. 2.10.1–5; 2.12.1–7). These same two offices also appeared incidentally elsewhere in the texts found within these great collections of law.

The connection to Roman law was not simply a matter of names. It turned out to matter a great deal in the later development of a European legal profession, one that directly shaped the legal practice of ecclesiastical lawyers in England. That development effectively began at Bologna. When the texts from the Digest came to light and began to be taught in the Schools there in the late eleventh century, they were put to practical uses as well as to those of the Schools. Of course, this is well known.¹ The civil law dominated several different facets of the legal renaissance that began with the Digest's recovery, not simply the contents of lectures given in university law faculties. However,

¹ The modern literature on the subject is extensive; see, e.g., E. Cortese, *Il Rinascimento giuridico medievale*, 2d edn (Rome 1996); F. Wieacker, *History of Private Law in Europe*, T. Weir (trans) (Oxford 1995), pp 28–41; A. Gouron, 'Some Aspects of the Medieval Teaching of Roman Law', in J. Van Engen (ed), *Learning Institutionalized: Teaching in the Medieval University* (Notre Dame, IN 2000), pp 161–76; J. Fried, *Die Entstehung des Juristenstandes im 12. Jahrhundert* (Cologne and Vienna 1974), pp 61–67.

the dual role played by the civilian texts is worthy of particular note here. It had consequences for this book's subject, because those jurists who had an eye on the world of law as it was applied in courts themselves turned to the ancient texts in determining how lawsuits were to be conducted. Their move devoted to the conduct of litigation was thought to require more than the presence of the parties and a judge. Reliance on experts was needed. Men who were familiar with the relevant laws and who could speak on behalf of the litigants were needed. That is what the medieval jurists thought, and for this purpose, they took what they required from the ancient texts of the Roman law.

When this moment for action arrived in the twelfth century, the consequences of the recovery of these sophisticated sources of law must be seen as a real change of direction. The period from the fall of Rome to the years around 1100 has sometimes been described as a 'World without Lawyers'.² Perhaps that is an exaggeration. The notarial tradition never disappeared completely.³ The church itself preserved relevant aspects of Roman traditions.⁴ Collections of conciliar and papal decrees had long been made, and there were men who knew how to use them. Diocesan synods had also met in the centuries before 1100. In them disputes had been aired and decided, though we rarely know much about the details. References to *advocati* and *procuratores* also appear from time to time in early medieval sources, though it is not always certain what functions they performed.⁵ Penetrating the realities of early medieval law as it was put into practice has proved to be no simple matter. It does seem right to say, however, that the centuries between the sixth and the eleventh produced nothing like a legal profession as we know it today. In that sense, it was indeed a world without lawyers. True, most European rulers did promulgate laws dealing with what one could call legal rights and wrongs. True also, there were men who had acquired a special familiarity with those laws. However, there was no group of professional lawyers if one takes the term to mean men trained in law who devoted their careers to it and made a living

² J A Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago, IL 2008), pp 46–74; see also M Bellomo, *The Common Legal Past of Europe 1000–1800*, L Cochrane (trans) (Washington, DC 1995), pp 34–44; P Brand, *Origins of the English Legal Profession*, pp 2–3; H Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA 1983), pp 50–84.

³ E.g., C M Radding, *Origins of Medieval Jurisprudence: Pavia and Bologna, 850–1150* (New Haven, CT 1988), pp 23–24.

⁴ See M Schmoekel, 'Procedure, proof, and evidence', in J Witte Jr. and F S. Alexander (eds), *Christianity and Law: An Introduction* (Cambridge 2008), pp 143–62.

⁵ Several of them are collected in J Hogan, *Judicial Advocates and Procurators* (Washington, DC 1941), pp 25–31. The situation in England is described in J Hudson, *Oxford History of the Laws of England, Volume II 871–1216* (Oxford 2012), pp 63–64.

from its practice. No settled and enforceable rules for the place of lawyers in the procedural process used to settle disputes existed. Contestants in them must have been guided by long-established custom. They made their way without the professional help a lawyer provides.

THE RENAISSANCE IN LAW

By the years around 1200, that state of affairs came to an end. It appeared to thoughtful men that something more was required than adherence to customary norms and good sense. A set of formal rules for the conduct of litigation would become a matter of necessity for the church's bishops, just as it did for secular rulers.⁶ Effective diocesan organization, it could accurately be said, 'demanded intensive and a quite legally technical administration'.⁷ Rulers and jurists responded, and as a matter of course they turned for help to the Roman law's texts. This was the step taken in the temporal forum, and the church's procedural law followed the same path. Development in both halves of societal regulation virtually always began with Roman law,⁸ though never in the church's jurisdiction without reference to spiritual principles and more strictly canonical sources. What the jurists – canonists and civilians alike – did was to make a sensible choice too. Although it would have been impossible to recreate the system of ancient Rome, what the civil law's texts contained on the subject of the practice of law provided a start for the creation of something that was new and useful. It provided procedural principles and building blocks for the development of a class of professional lawyers.⁹

⁶ See W Trusen, 'Advocatus – zu den Anfängen der gelehrten Anwaltschaft in Deutschland und ihren rechtlichen Grundlangen' in H Kipp et al. (eds), *Um Recht und Freiheit: Festschrift für August Freiherr von der Heyde zur Vollendung des 70. Lebensjahres* (Berlin 1977), vol II, pp 1235–48; L Fowler-Magerl, *Ordines Iudicarii and Libelli de Ordine Iudiciorum* (Turnhout 1994), pp 16–28; L Mayali, 'Procureurs et representation en droit canonique médiéval' (2002) 114 *Mélanges de l'Ecole française de Rome. Moyen-Age* 44–57; K Pennington, 'Representation in Medieval Canon Law' (2004) 64 *The Jurist* 361–83.

⁷ A Hope, 'Bishops' Deputies and Episcopal Power in Medieval law, c.1150 to c.1350', in P Coss et al. (eds), *Episcopal Power and Local Society in Medieval Europe, 900–1400* (Turnhout 2017), pp 195–217, at pp 213–14; K Pennington, 'Due Process, Community and the Prince in the Evolution of the Ordo iudicarius' (1998) 9 *Rivista internazionale di diritto comune* 9–47.

⁸ See G Gottschalk, *Über den Einfluss des römischen Rechts auf das kanonische Recht* (Mannheim 1866, reprint 1997), pp 95–105; K W Nörr, *Romanisch-kanonisches Prozessrecht* (Heidelberg 2012), pp 28–36; K-H Ladeur, *Der Anfang des westlichen Rechts* (Tübingen 2018), pp 120–23.

⁹ See C Donahue, Jr, 'Procedure in the Courts of the Ius commune', in W Hartmann and K Pennington (eds), *History of Courts and Procedure in Medieval Canon Law* (Washington, DC 2016), pp 74–124, esp. 80–83; S Reynolds, 'The Emergence of Professional Law in the Long Twelfth Century' (2003) 21 *Law & History Review* 347–66.

One sign of this usage was that regular reference to the texts involving Roman advocates and proctors appeared prominently in some of the earliest *ordines iudicarii*, the guides compiled to meet the need for direction in the details of court procedure. Bulgarus (*fl.* c.1130), the leader among the ‘four doctors’ who followed Imerius, was one of the first to take this step.¹⁰ He devoted a title in his brief treatment of procedure to describing ‘advocates’ as men who lent their aid to parties to litigation by arguing persuasively on their behalf.¹¹ Other examples followed, such as the Anglo-Norman *Ordo iudiciarius* from just a few years later. It contained short chapters on both proctors and advocates, using the categories from the law of Rome.¹² Later but of more lasting effect was the inclusion in the *Ordo iudiciarius* compiled by Tancred of Bologna (d. c.1236) of titles devoted expressly both to advocates and proctors.¹³ His definition of advocates began with texts from the Roman law; their duty, he recorded, was to formulate a petition for themselves or for a friend, and to present it before a judge who held jurisdiction over the matter raised by the petition.

Under the civil law, the position of an advocate was an honorable one. According to then current norms, it followed that this office could not be held by children, women, slaves, or lunatics (Dig. 3.1.3).¹⁴ To this list of obvious exclusions, Tancred added heretics and monks, taking as his authority for their exclusion texts from Gratian’s Digest and a decretal of Pope Innocent III.¹⁵ His formal definition of a proctor – a man who transacts the business of another in accordance with the terms of the latter’s mandate – similarly began with a text taken from the Roman law (Dig. 3.3.1), adding an open-ended statement that

¹⁰ A Gouron, ‘Le rôle de l’avocat selon la doctrine romaniste du douzième siècle’, in A Gouron, *Pionniers du droit occidental au Moyen Âge* (Aldershot 2006), n XV.

¹¹ *Summa de Iudiciis*, tit. 3, in A Wunderlich (ed), *Anecdota quae processum civilem spectant* (Göttingen 1841), p 3. Bulgarus is often credited with having compiled the first such *ordo* but what he composed is something less than that; see Fowler-Magerl, *Ordines Iudicarii*, p 24; P Landau, ‘The Origin of Civil Procedure’, in Uta-Renate Blumenthal, A Winroth and P Landau (eds), *Canon Law, Religion and Politics: Liber Amicorum Robert Somerville* (Washington, DC, 2012), pp 136–43.

¹² See the edition in B Brasington, *Order in the Court: Medieval Procedural Treatises in Translation* (Leiden and Boston, MA 2016), pp 139–40, 148–50.

¹³ ‘Ordo iudiciarius’, Pt. I, tits. 5–6, in F C Bergmann (ed), *Pillius, Tancredus, Gratia, Libri de iudiciorum ordine* (Göttingen 1842, reprint 1965), pp 111–23. See also ‘Ordo iudiciarius’, C. 1 §§ 7–9, in L Rockinger (ed), *Briefsteller und Formelbücher des eilften bis vierzehnten Jahrhunderts* (Munich 1864, reprint 1961), vol II, pp 998–99.

¹⁴ The second was a text from the vulgate version of the *Decretum* that had been taken from the Digest: C. 3 q. 7, c. 2, taken from Dig. 3.1.1.

¹⁵ Dist. 7, De pen. c. 1; X 5.7.10 (Comp. III, 5.4.1).