Introduction

On 28 July 1639, Katherine Atkins of Sutton in the Isle of Ely was absent from her parish church both morning and afternoon. To make matters worse, she spent the time she should have been at prayers in 'railing and scolding with her neighbours'. Her son-in-law warned her 'to hold her tongue and to be silent else she would be put into the bawd court, for there was none but rogues and whores went thither', while his wife added 'that there was never none of them there yet and says let us now keep out of the bawdy court'. It was a vain hope. In the event all three were reported to the court of the bishop of Ely: Katherine for absence from church and for scolding, the others for abusing the name of the ecclesiastical courts.[1]

Today the church courts eke out a shadowy existence, their jurisdiction limited to a few ecclesiastical matters and their activities all but unknown to the mass of the laity. In early modern England the situation was very different. The ecclesiastical courts formed an elaborate, omnipresent complex of institutions organised at the levels of province, diocese and archdeaconry. Their jurisdiction naturally included much of a purely ecclesiastical nature, but it also extended to some of the most intimate aspects of the personal life of the population as a whole. The apparitors or messengers of the courts were a familiar sight as they strode or rode about the countryside serving citations and transmitting orders, and the courts which they served existed in every cathedral in the land. One fully fitted out courtroom still survives at Chester, formal yet curiously intimate, with a raised throne for the judge, a table where the registrar sat and inscribed the record and before which the culprit stood, the whole being enclosed for protection against draughts in a panelled, pew-

[1] W. M. Palmer (ed.), *Episcopal visitation returns for Cambridgeshire: Matthew Wren, bishop of Ely, 1638–1665* (Cambridge, 1930), p. 54.

like structure.[2] But the courts sometimes left such hallowed precincts to go on circuit, and sessions were held in improvised surroundings in parish churches or in inn parlours. It was not strictly true that only rogues and whores went thither. To be sure, there were plenty such among the accused, and some said – with what degree of justice will appear in the following pages – that the judges and court officials were themselves rogues. But a sizeable proportion of the population must at some time in their lives have experienced the atmosphere of an ecclesiastical court as suitor, accuser, witness or defendant.

The scope of ecclesiastical justice in Elizabethan and early Stuart England was very wide. Though the courts had long ago abandoned their claim to jurisdiction over advowsons (rights of presentation to church livings), they still dealt with many matters concerning ecclesiastical benefices, such as simony, spoliation and dilapidation. The courts also enforced the maintenance of ecclesiastical buildings, took action to ensure that the internal arrangements, fittings and liturgical equipment of parish churches and chapels conformed to official requirements, and adjudicated disputes over the possession of pews. Many forms of misconduct by the clergy, including neglect of duty, offences against conformity in doctrine and ritual, and scandalous behaviour, were dealt with under church law; and the courts supervised such matters as the licensing of curates and preachers. The laity were subject to ecclesiastical justice in a variety of ways. Despite encroachments by the royal courts, the church in early modern England still had an extensive jurisdiction in disputes over the payment of tithes and of various fees due to the clergy. They also enjoyed a wide jurisdiction over wills and the administration of intestate estates. Even more striking to modern eyes, the courts punished a wide range of sins of commission and omission on the part of the laity, especially religious offences and personal immorality. Within limits imposed by statute, they could bring prosecutions for apostasy, idolatry and heresy; catholic recusancy, sectarianism and related offences; the abuse of ministers or ecclesiastical officers and misbehaviour in church or churchyard; wilful absence from church, failure to receive the communion, and neglect of baptism, churching or catechism; the profanation of Sundays and holy days by working, playing games or drinking in service time; practising witchcraft and sorcery; scolding, talebearing and defa-

[2] Illustrated in E. R. C. Brinkworth, *Shakespeare and the bawdy court of Stratford* (London and Chichester, 1972), p. 9.

mation; usury; drunkenness; and a wide variety of sexual offences. Finally, the courts had an extensive jurisdiction in matrimonial matters. They adjudicated disputes over marriage contracts, issued marriage licences, heard petitions for separation and annulment, and brought prosecutions for irregular marriage, unlawful separation and similar offences.

Some of these matters were dealt with as suits between parties – rather like civil actions in the secular courts. Many, including most matters involving a strong moral element, were handled as 'office' or disciplinary cases: the courts themselves initiated prosecutions in a fashion roughly analogous to criminal proceedings. But such prosecutions were not, at least in theory, primarily designed to exact retribution for offences. They were intended to *reform* the culprit, and were ostensibly undertaken 'for the soul's health' (*pro salute animae*), to restore offenders to a healthy relationship with God and their neighbours. Yet proceedings were by no means secret. On the contrary, the rehabilitation of the sinner was conducted in a blaze of publicity as a system of communal discipline. The characteristic penalty imposed by the courts was public penance, a ritual of repentance and reconciliation, but equally a deeply humiliating experience designed to deter others and give satisfaction to the congregation for the affront of public sin. The ultimate sanction of the courts, whether in suits between parties or in disciplinary cases, was excommunication. The essence of this penalty was the exclusion of the offender from the communion of the faithful; but, symbolic of the fact that the church was supposed to be coterminous with the whole society, excommunication could also involve civil disabilities. In fine, the church courts reflected the fact that in early modern England the notions of 'sin' and 'crime' were not clearly differentiated.[3]

The range and nature of their activities gave the ecclesiastical courts, at least in theory, a place of the utmost importance in the social fabric. Yet until quite recently these institutions had a poor reputation among historians and their work was little studied. In

[3] Ronald A. Marchant, *The church under the law: justice, administration and discipline in the diocese of York, 1560–1640* (Cambridge, 1969), p. 4. On notions of 'sin' and 'crime', see J. A. Sharpe, *Crime in early modern England, 1550–1750* (1984), pp. 5–6. The English church courts are set in wider context in Bruce Lenman, 'The limits of godly discipline in the early modern period with particular reference to England and Scotland', in Kaspar von Greyerz (ed.), *Religion and society in early modern Europe, 1500–1800* (1984), pp. 124–45.

part this combination of neglect and contempt sprang from a distaste for records apparently packed mainly with sordid details of fornication, adultery, bigamy and other unsavoury peccadilloes of obscure individuals; a distaste which was itself a reflection of the general lack of interest displayed by the majority of historians before about 1970 in the study of marriage, illicit sexuality and other aspects of social history which are now regarded as of major importance. But there were other, more profound, reasons.

One was the fact that the Elizabethan and early Stuart church courts had suffered criticism and indeed flagrant abuse from certain groups of contemporaries. There were currents of internal criticism, springing from a desire to improve governmental and pastoral efficiency, voiced even by such fully committed exponents of the established church as archbishop Whitgift.[4] But a much more thoroughgoing critique was mounted by puritan advocates of further reformation and alteration in church government, and by common law rivals of the church courts. Puritan critics were in general not averse to moral discipline exercised by public institutions, but they regarded the church courts in their existing form as unsuitable instruments for godly reformation. They saw them as relics of the popish past, palpable signs of a church 'but halfly reformed'. They argued that the professional bureaucrats who ran the courts – mostly laymen in the period after the Reformation – were suspect in their commitment to protestantism and generally more interested in court business as a source of income than as a means of spiritualising and moralising the people. Some argued that in dealing with the immoral the strictures of the courts were too mild: public penance, it was said, was too light a punishment for such heinous sins as adultery. Above all there was fierce criticism of the church courts' extensive and indeed routine use of excommunication (at variance with the practice of the early church) and its pronouncement by lay officials. In fine, many puritan critics wished for a radical reform of the ecclesiastical courts, or even for their replacement as agents of religious and moral discipline by locally organised consistories on the Genevan model or by godly lay magistrates working in harmony with parish ministers.[5]

[4] John Strype, *The life and acts of John Whitgift*, 3 vols. (Oxford, 1822 edn), vol. 1, pp. 231–2, 364–6, 396, vol. 2, pp. 446–52.

[5] Patrick Collinson, *The Elizabethan puritan movement* (1967), pp. 38–41, 187–9, 457; Ralph Houlbrooke, 'The decline of ecclesiastical jurisdiction under the

In the later reign of Elizabeth, the use of the church courts under the aegis of archbishop Whitgift to prosecute puritan critics of ecclesiastical government stimulated additional opposition to them. Certain procedures of the courts, notably the *ex officio* oath (which was administered to all defendants in serious disciplinary cases and could, it was objected, force individuals of tender conscience to incriminate themselves) were bitterly attacked. Such grievances continued to be voiced in the reign of James I; and they flared up with renewed vigour in the 1630s, when the church courts were employed to impose supposedly Arminian doctrine and practices in the face of opposition from staunchly Calvinist elements in the church.[6]

Further criticism, combined with specific action tending to diminish the role of the church courts, came from another quarter – from the common law rivals of the ecclesiastical tribunals and from other interests which were concerned to strengthen the secular power relative to the jurisdiction of the church. All through the middle ages there had been sporadic conflict between church and state, above all in the later fourteenth century. The upshot was that effective royal control over many aspects of the church was already a reality long before 1500. But it was not until the Henrician Reformation that the church was finally and decisively subjected to the crown. At this juncture the role of the spiritual jurisdiction in the English polity was a major issue; and for a while it seemed possible, amid the tumultuous changes of the 1530s, that the church courts would be all but destroyed and that the bulk of their business would pass under secular control.[7] In the event the courts survived largely intact, subject to the supreme headship of the monarch; and whereas Henry VIII had purported to discover that the clergy were but half his subjects, by the early seventeenth century the church courts and the lawyers who staffed them were regarded as among the major bulwarks of monarchical government. But this situation aroused

Tudors', in Rosemary O'Day and Felicity Heal (eds.), *Continuity and change: personnel and administration of the church in England, 1500–1642* (Leicester, 1976), p. 251.

[6] Collinson, *Elizabethan puritan movement*, pp. 266–7, 270–1, 409–12; Mary H. Maguire, 'Attack of the common lawyers on the oath *ex officio* as administered in the ecclesiastical courts in England', in *Essays in history and political theory in honour of Charles Howard McIlwain* (Cambridge, Mass., 1936), pp. 199–229.

[7] Houlbrooke, 'Decline of ecclesiastical jurisdiction', pp. 239–44; G. R. Elton, *Reform and renewal: Thomas Cromwell and the common weal* (Cambridge, 1973), pp. 129–35.

criticisms that the ecclesiastical lawyers were infected with absolutist notions, while some critics persisted in regarding the spiritual jurisdiction as essentially foreign, a hateful fifth column which might eventually provide a road for the reintroduction of catholicism.[8] As one Elizabethan put it, the operation of the church courts meant that 'the pope hath his horse ready saddled and bridled, watching but the time to get up again'.[9]

Another threat to ecclesiastical jurisdiction came from piecemeal encroachment by common lawyers. Their rivalry with the church courts was proverbial, and medieval England had seen major jurisdictional conflicts in matters of tithe, testaments and debts (the last being dealt with by the church courts as 'breach of faith'). In their battles with the spiritual courts – to some extent stimulated, it must be said, by the demands of suitors – the common lawyers availed themselves of the statutes of *praemunire* (fourteenth-century laws designed to limit ecclesiastical power relative to the crown) and, increasingly after the Reformation, of writs of prohibition (a device to stay proceedings in particular cases in the spiritual courts and transfer them to the common law on the grounds that the former had exceeded their jurisdiction). To justify these encroachments, common lawyers voiced criticisms of some of the procedures and principles of law which their rivals employed. Common law attacks eventually coalesced with those of puritan detractors, especially when the controversy over the use of the *ex officio* oath in the 1590s provided a common focus for complaint. The result was an extensive contemporary literature of denigration in which the church courts were characterised as oppressive, unjust, corrupt and inefficient. The effect of such trenchant criticisms could not be fully dispelled by the numerous essays published in defence of the church courts, notably Richard Cosin's *Apologie of and for sundrie proceedings by iurisdiction ecclesiastical* (1591).[10] The battery of critical arguments remained current under the early Stuarts and helped to justify the suspension of most of the church's judicial apparatus amid the breakdown of Charles I's government in the early 1640s.[11]

Indeed this contemporary propaganda lived on to exercise a strong influence on later historians' views of ecclesiastical justice:

[8] Brian P. Levack, *The civil lawyers in England, 1603–1641* (Oxford, 1973), ch. 3.
[9] Quoted in Levack, *Civil lawyers*, p. 159.
[10] Houlbrooke, 'Decline of ecclesiastical jurisdiction', pp. 253–6.
[11] 17 Car. I c. 11.

the puritan/common law myth of the corrupt, unpopular church courts became the myth of historical textbooks in the nineteenth and early twentieth centuries. This adverse historical view was strengthened by another factor, the notion that the post-Reformation courts were by their very nature at odds with major social and political developments, and hence bound to be both unpopular and ineffectual. Certainly to modern eyes much of their work appears archaic, even bizarre. Though today we accept, grudgingly or otherwise, the intrusion of the state into our lives on a scale which early modern Englishmen would have regarded as grossly tyrannical, we do assume that moral behaviour and religious observance are largely matters not for the public forum but for private conscience. And in a state which, despite the continued existence of an established church, is essentially secular in its organisation, there can be no place for religious authorities to exercise jurisdiction over the population at large and to attempt to control its behaviour by judicial means grounded on spiritual sanctions. In retrospect the church courts were obviously doomed to decline. But when was the crucial period in which this decline set in? In the past many historians assumed that it was in the sixteenth and early seventeenth centuries that the burgeoning of new attitudes and changing circumstances rapidly rendered the church courts anachronistic. The temporary abolition of the courts in the 1640s seemed a palpable confirmation of this assumption. The fact that the structure of ecclesiastical justice was revived after 1660, and that the courts continued to play a significant social role in the later seventeenth and even into the eighteenth century, could be written off as a mere detail – a coda to the movement of historical change.

The two themes of obsolescence and contemporary criticism were skilfully blended by Christopher Hill, who in the 1960s argued that the Elizabethan and early Stuart church courts were not only lax, inefficient and corrupt, but also hated because many aspects of their work were repugnant to what he termed the 'industrious sort of people'. In particular, he asserted that the courts' attacks on puritan activities were widely resented; that their testamentary and tithe jurisdiction was disliked by the property-owning classes; and that their power to bring prosecutions for such offences as usury and labouring on saints' days was anathema to the 'industrious sort', whom he saw as representatives of a nascent capitalism. His attitude to the church courts' jurisdiction over sexual delinquency and other

forms of immorality was less clear. On the one hand, he stressed that some contemporary writers criticised the courts for not punishing sexual offenders with sufficient rigour; on the other hand, he suggested that changing social and religious ideas were tending to produce a shift in emphasis from public control over morality to the operation of the private conscience. In any event, Hill argued, the church courts were rapidly becoming socially anachronistic in the early seventeenth century. Their collapse in the early 1640s was thus readily comprehensible.[12]

Hill's brilliantly argued thesis depended heavily on contemporary puritan and common law critical literature. When he wrote, in fact, comparatively little was still known about the day to day operations of the church courts. For a long time the actual records of ecclesiastical justice were largely inaccessible. Some fragments of material were published in the nineteenth century and the early years of the twentieth, but the bulk of diocesan archives was at that time lying, unsorted and virtually unusable, in neglected cathedral repositories. Some were rescued from this obscurity in the inter-war years; but many only became available to scholars in the 1950s or later.[13] Research on these archives, coupled with a growing appreciation of the nature of the society in which they were generated, has led in some respects to a much more sympathetic view of ecclesiastical justice and a more realistic assessment of its strengths, weaknesses and social significance.

In the first place, the reputation of the legal system which governed the church courts' work has been largely rehabilitated. Clearly it was not perfect – no system of law ever is. But Ronald Marchant showed that the traditional view of ecclesiastical justice as oppressive was a travesty of the truth. The criticisms of contemporary common lawyers were, he pointed out, motivated essentially by self interest and largely unjustified. By any standard the system of law practised

[12] Christopher Hill, *Society and puritanism in pre-revolutionary England* (1964), chs. 8–10.

[13] For a survey of the conditions of storage of diocesan archives in the early 1950s, and of how far they were accessible to scholars, see the *Pilgrim Trust survey of diocesan archives*, 4 vols. (1952). Extracts from the judicial records of the diocese of London were published by W. H. Hale, *A series of precedents and proceedings in criminal causes from 1475 to 1640* (1847); and see also J. Raine (ed.), *Depositions and other ecclesiastical proceedings from the courts of Durham, extending from 1311 to the reign of Elizabeth*, Surtees Soc., 21 (1845); C. Jenkins (ed.), *The act book of the archdeacon of Taunton*, Somerset Record Soc., 43 (1928); E. R. C. Brinkworth (ed.), *The archdeacon's court: liber actorum, 1584*, Oxfordshire Record Soc., 23–4 (Oxford, 1942–6).

in the church courts was worthy of respect, and in terms of fairness to plaintiffs and defendants it was in some ways superior to common law procedures. Ralph Houlbrooke came to similar conclusions. He stressed in particular the extent to which canon law encouraged the peaceful settlement of lawsuits by compromise and arbitration, and concluded that 'ecclesiastical court procedure was a good deal more speedy, flexible, inexpensive, and readily understandable than has been commonly allowed'.[14]

But how was this law administered in practice? Were the church courts guilty of corruption and lax administration, as their detractors claimed? Detailed studies indicate that the courts were certainly not entirely free from slackness and venality, which varied in degree from place to place and time to time, but to regard them as exceptionally corrupt and inefficient is wrong. Marchant found that the church courts in the diocese of York in the period 1560–1640 were, in general, remarkable for their probity and vigour, though there were periods of administrative torpor and some instances of venality. E. R. C. Brinkworth found that 'fair and considerate dealing' governed the disciplinary activities of the court of the archdeacon of Oxford in 1584–5. There was no evidence of corruption; the supervision of clergy, church officials, and ordinary laity was thoroughgoing; and the business of the court was 'pursued with diligence and in detail'. He was even more impressed by the records of the archdeaconry of Buckingham for the period 1634–6, concluding that in those years the supervision of the religious and moral life of Buckinghamshire was to all appearances minute and thorough.[15] J. P. Anglin, in a study of the court of the archdeacon of Essex in the period 1571–1609, was satisfied of its probity and general efficiency; while Jean Potter came to a similar assessment of ecclesiastical court administration in the diocese of Canterbury under the early Stuarts.[16] Houlbrooke's study of the church courts in the dioceses of Norwich and Winchester in the period 1520–70 was only slightly less

[14] Marchant, *Church under the law*, pp. 1–11, 243–5 and *passim*; Ralph Houlbrooke, *Church courts and the people during the English Reformation, 1520–1570* (Oxford, 1979), p. 271 and *passim*.

[15] Marchant, *Church under the law*, pp. 243–5 and *passim*; Brinkworth (ed.), *Archdeacon's court*, vol. 1, p. xv, vol. 2, pp. v-vi; E. R. C. Brinkworth, 'The Laudian church in Buckinghamshire', *Univ. of Birmingham hist. jl*, 5 (1955–6), pp. 31–59.

[16] J. P. Anglin, 'The court of the archdeacon of Essex, 1571–1609' (University of California Ph.D. thesis, 1965), p. 306 and *passim*; J. M. Potter, 'The ecclesiastical courts in the diocese of Canterbury, 1603–1665' (London University M. Phil. thesis, 1973), pp. 207–13 and *passim*.

favourable. He recognised that there was probably much petty corruption and inefficiency among court personnel, but doubted whether it was worse than in other courts of law at this time.[17] The most striking evidence of corruption so far discovered relates to the diocese of Gloucester in the early part of Elizabeth's reign. F. D. Price, though favourably impressed by the vigour of the church courts under the personal supervision of bishop John Hooper (1551–3), found that a marked decline set in during the weak episcopate of Richard Cheyney (1562–79). Under the aegis of Thomas Powell, chancellor of the diocese from 1576 till his dismissal in 1579, the courts became inefficient and venal. In the light of the other findings, however, the experience of Gloucester at this time appears atypical.[18]

The idea that the church courts represented outmoded values at odds with social and economic developments has also been shown to be wrong, or at least a seriously misleading oversimplification. In particular, Hill's argument that the ecclesiastical courts were engaged in a futile resistance to the development of a capitalist society does not bear close scrutiny. Marchant has shown, for example, that the idea that church court prosecutions for usury aroused the wrath of commercially minded men is misguided: the numbers of such prosecutions were in practice negligible. He has also argued convincingly that the church courts' testamentary jurisdiction provided a largely satisfactory service, remarking acidly that 'the imagination flinches before the thought of a state-run system of probate offices managed by the courtiers of James I, which must have been the only alternative to a church probate system'. Further, there is no immediate reason to suppose that the kind of discipline which the church courts exercised over sexual offenders was anomalous. Marchant stressed that immorality was punished not only by the ecclesiastical courts but also by the justices of the peace and borough

[17] Houlbrooke, *Church courts and the people*, p. 271.

[18] F. D. Price, 'Gloucester diocese under bishop Hooper, 1551–3', *Trans. Bristol and Gloucestershire Archaeol. Soc.*, 60 (1938), pp. 51–151; F. D. Price, 'An Elizabethan church official – Thomas Powell, chancellor of Gloucester diocese', *Church quarterly rev.*, 128 (1939), pp. 94–112; F. D. Price, 'The abuses of excommunication and the decline of ecclesiastical discipline under Queen Elizabeth', *Eng. hist. rev.*, 57 (1942), pp. 106–15. For continuing difficulties at Gloucester later in Elizabeth's reign, see F. D. Price, 'Elizabethan apparitors in the diocese of Gloucester', *Church quarterly rev.*, 134 (1942), pp. 37–55; F. D. Price, 'Bishop Bullingham and chancellor Blackleech: a diocese divided', *Trans. Bristol and Gloucestershire Archaeol. Soc.*, 91 (1972), pp. 175–98.