

ENGLISH LAW UNDER TWO ELIZABETHS

Comparative legal history is generally understood to involve the comparison of legal systems in different countries. This is an experiment in a different kind of comparison. The legal world of the first Elizabethans is separated from that of today by nearly half a millennium. But the past is not a wholly different country. The common law is still, in an organic sense, the same common law as it was in Tudor times and Parliament is legally the same Parliament. The concerns of Tudor lawyers turn out to resonate with those of the present and this book concentrates on three of them: access to justice, in terms of both cost and public awareness; the respective roles of common law and legislation; and the means of protecting the rule of law through the courts. Central to the story is the development of judicial review in the time of Elizabeth I.

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Cambridge University Press
978-1-108-83796-5 — English Law Under Two Elizabeths
Sir John Baker
Frontmatter
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The Late Tudor Legal World and the Present

SIR JOHN BAKER
University of Cambridge



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[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781108837965

DOI: 10.1017/9781108936705

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First published 2021

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

NAMES: Baker, John H. (John Hamilton), author.

TITLE: English law under two Elizabeths : the late Tudor legal world and the present / Sir John Baker, University of Cambridge.

DESCRIPTION: Cambridge, United Kingdom ; New York, NY : Cambridge University Press, 2021. | Series: The Hamlyn lectures | Includes index.

IDENTIFIERS: LCCN 2020047380 (print) | LCCN 2020047381 (ebook) | ISBN 9781108837965 (hardback) | ISBN 9781108947329 (paperback) | ISBN 9781108936705 (ebook)

SUBJECTS: LCSH: Common law – England – History. | Law – England – History. | Statutes – England. | Elizabeth I, Queen of England, 1533–1603. | Elizabeth II, Queen of Great Britain, 1926– | Great Britain – History – Tudors, 1485–1603.

CLASSIFICATION: LCC KD671 .B353 2021 (print) | LCC KD671 (ebook) | DDC 349.4209/031–dc23

LC record available at <https://lcn.loc.gov/2020047380>

LC ebook record available at <https://lcn.loc.gov/2020047381>

ISBN 978-1-108-83796-5 Hardback

ISBN 978-1-108-94732-9 Paperback

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THE HAMLYN TRUST

The Hamlyn Trust owes its existence today to the will of the late Miss Emma Warburton Hamlyn of Torquay, who died in 1941 at the age of eighty. She came from an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor and was a Justice of the Peace for many years, and it seems likely that Miss Hamlyn founded the trust in his memory. Emma Hamlyn was a woman of strong character who was intelligent and cultured; well versed in literature, music and art; and a lover of her country. She travelled extensively in Europe and Egypt, and apparently took considerable interest in the law, ethnology and culture of the countries that she visited. An account of Miss Hamlyn may be found, under the title ‘The Hamlyn Legacy’, in volume 42 of the published lectures.

Miss Hamlyn bequeathed the residue of her estate on trust in terms that, it seems, were her own. The wording was thought to be vague, and the will was taken to the Chancery Division of the High Court, which, in November 1948, approved a scheme for the administration of the trust. Paragraph 3 of the scheme, which follows Miss Hamlyn’s own wording, is as follows:

The object of the charity is the furtherance by lecturers or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the

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knowledge of the Comparative Jurisprudence and Ethnology of the Chief European countries including the United Kingdom, and the circumstances of the growth of such jurisprudence to the Intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.

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From the outset, it was decided that the objects of the trust could be best achieved by means of an annual course of public lectures of outstanding interest and quality by eminent lecturers, and by their subsequent publication and distribution to a wider audience. The first of the lectures was delivered by the Rt Hon. Lord Justice Denning (as he then was) in 1949. Since then, there has been an unbroken series of annual lectures published until 2005 by Sweet & Maxwell and from 2006 by Cambridge University Press. A complete list of the lectures may be found on pages x to xiv. In 2005, the trustees decided to supplement the lectures

THE HAMLYN TRUST

with an annual Hamlyn seminar, normally held at the Institute of Advanced Legal Studies at the University of London, to mark the publication of the lectures in printed book form. The trustees have also, from time to time, provided financial support for a variety of projects that, in various ways, have disseminated knowledge or promoted, to a wider public, understanding of the law.

This, the seventy-first series of lectures, was delivered by Professor Sir John Baker at the University of Cambridge, the University of Reading and Senate House, University of London. The board of trustees would like to record its gratitude to John Baker and also to the three venues that generously hosted these lectures.

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P R E F A C E

In 1983, at the end of the thirty-fifth series, Lord Hailsham expressed confidence that ‘in 2018 (or thereabouts) Miss Hamlyn’s seventieth lecturer will be preparing to deliver his own series of lectures’. That must have seemed very far in the future, but it has indeed now come to pass, and it has been my privilege to make this contribution to what is now a venerable collection. Underlying Lord Hailsham’s remark was the concern that new ways would have to be found of carrying out Miss Hamlyn’s intentions, as the law of this country receded further from her understanding of it. Certainly, in common with most of the previous lecturers, I have had to adopt a free interpretation of her stipulations. Her will provided for ‘the furtherance by lectures . . . of the knowledge of the comparative jurisprudence and ethnology of the chief European countries . . . and the circumstances of the growth of such jurisprudence . . .’, with a view to demonstrating to the general public (‘the common people’) the superiority of our law. Although she indicated that comparison was to be made with other ‘European peoples’, few of my precursors have tried to tackle legal history from a comparative, let alone an ethnological, perspective. I hope it was not too far ultra vires for me to attempt a different kind of comparison, for which I can find no precedent. I have sought to say something about the jurisprudence and legal system of England, and the circumstances of its growth, from

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a comparative angle but by making a comparison across time rather than space.

Comparison over time can tell us at least as much about where we are now as the kind of ethnological comparison over space proposed by Miss Hamlyn; and it may also assist a reciprocal understanding of the past. Historians often like to think that they study the past in isolation, with protective social distancing, uninfected by preconceptions picked up in today's world. Sometimes, however, they make comparisons with the present covertly, while pretending not to; and sometimes they do it inadvertently. In truth, if only through the limitations of language, comparison is unavoidable. Insofar as historical scholarship involves the study of change over time, or just the differences due to time, it must deal with the evolution of ideas, sentiments and institutions which keep their old names as they mutate in reality. Our understanding of former societies and modes of thought can therefore be enhanced, rather than distorted, by occasionally venturing to discuss the longer-term changes – and also the continuities – more openly.

I have spent much of my career working on the sixteenth century, and so it seemed natural to choose the long reigns of two admired queens four centuries apart. The world of the first Elizabethans¹ is sufficiently different from our own, while being at the same time organically connected with it, to have made this an intriguing and challenging exercise. Some

¹ To avoid circumlocution, I have throughout used the word 'Elizabethan' (unless with qualification) to refer to the period of Elizabeth I (1558–1603).

PREFACE

features of the Elizabethan legal world are already well known, but others, particularly in relation to public law, have had to be exhumed from long-dormant manuscript materials. Several major differences, some striking resonances and perhaps even a few potential lessons emerge from the comparison.

Miss Hamlyn's will spoke of 'this country', almost certainly meaning England, though the Chancery Division saw fit to reword it as 'the United Kingdom'. Since there was no United Kingdom in the time of the first Elizabeth, I have had to limit myself to the original intent. With respect to another aspect of that intent, it will be evident from some contemporary passages cited at the end of Chapter 2 that our Elizabethan forebears were as eager as Miss Hamlyn was to compare the happy state of the English with the misery of those less fortunate 'European peoples' who lived outside the common law. For practical reasons, however, I have not attempted to assess how right or wrong they were with regard to the multifarious continental legal systems of the sixteenth century, and certainly not to make any comments on the European laws of today.

This book goes into more detail than the lectures as delivered in November 2019, but it does not pretend to be a comprehensive outline of the legal history of either Elizabethan period. I have confined it to some salient features that lend themselves to comparison, and tried to avoid too much technicality. In that connection, I am grateful to my wife Liesbeth for her valuable comments on the draft lectures. I also acknowledge the helpful comments received at an early stage from the anonymous referees. Quotations from law-French texts have been translated into English, and original

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English texts have been transposed into modern spelling with modern punctuation, even when taken from printed editions. I have nevertheless provided full references, many of them to unpublished Elizabethan manuscripts, for those who wish to know my sources.

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ABBREVIATIONS

Unless otherwise stated, all books cited here or in the footnotes were published in London.

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| Att.-Gen. | Attorney-General |
| B. & M. | J. H. Baker and S. F. C. Milsom ed., <i>Sources of English Legal History: Private Law to 1750</i> (2nd edn by Sir John Baker, Oxford, 2010). |
| Baker, <i>Collected Papers</i> | Sir John Baker, <i>Collected Papers on English Legal History</i> (Cambridge, 2013), three volumes. |
| Baker, <i>Magna Carta</i> | Sir John Baker, <i>The Reinvention of Magna Carta 1216–1616</i> (Cambridge, 2017; reissued in paperback 2018). |
| Briggs Report (2016) | Lord Justice [Sir Michael, now Lord] Briggs, <i>Civil Courts Structure Review: Final Report</i> (2016). |
| Brooks, <i>Pettyfoggers and Vipers</i> | C. W. Brooks, 'Pettyfoggers and Vipers of the Commonwealth': The 'Lower Branch' of the Legal Profession in Early Modern England (Cambridge, 1986). |
| Burrows, <i>Thinking about Statutes</i> | A. Burrows, <i>Thinking about Statutes: Interpretation, Interaction, Improvement</i> (Hamlyn Lectures: Cambridge, 2018). |

LIST OF ABBREVIATIONS

| | |
|------------|---|
| CB | chief baron of the Exchequer |
| Ch. | chapter (in this book) |
| <i>CLJ</i> | <i>Cambridge Law Journal</i> |
| Co. Inst. | Sir Edward Coke, <i>Institutes of the Laws of England (1628–44)</i> , four volumes. The first volume (the commentary on Littleton's <i>Tenures</i> , 1st edn, 1628) is cited as Co. Litt. Quotations are here modernised. |
| Co. Litt. | See Co. Inst. |
| Co. Nbk | Edward Coke's manuscript notebooks and commonplace, BL MSS. Harley 6686A-B, 6687A-D. An edition of the cases from 1572 to 1600 is in preparation for the Selden Society. |
| Co. Rep. | <i>The Reports of Sir Edward Coke</i> , first published in French in eleven separate parts (1600–15), with two posthumous volumes in English translation (1658–9). Quotations are here translated. |
| CP 40 | Public Record Office, plea rolls of the Court of Common Pleas. |
| CUL | Cambridge University Library |
| Dyer | Sir James Dyer, <i>Ascuns Novel Cases</i> (1585; 1586 new style). Quotations are here translated. |

LIST OF ABBREVIATIONS

- Dyer's Notebooks* *Reports from the Lost Notebooks of Sir James Dyer*, ed. J. H. Baker (109–10 Selden Soc., 1994–5). References in Roman numerals are to the introduction in vol. i.
- Dyson, *Justice* J. [Lord] Dyson, *Justice: Continuity and Change* (Oxford, 2018).
- Emmison, *Elizabethan Life: Disorder* F. G. Emmison, *Elizabethan Life: Disorder* (Essex Record Office Publications no. 56, Chelmsford, 1970).
- Fleetwood, *Discourse* [W. Fleetwood], *A Discourse upon the Exposition & Understanding of Statutes*, ed. S. E. Thorne (San Marino, CA, 1942). Unknown to Thorne, this had first been printed at the end of Fleetwood's *Justice* (1658). Quotations are here modernised.
- Genn, *Judging Civil Justice* Dame Hazel Genn, *Judging Civil Justice* (Hamlyn Lectures: Cambridge, 2010).
- Hailsham, *Hamlyn Revisited* [Q. Hogg], Lord Hailsham, *Hamlyn Revisited: The British Legal System Today* (Hamlyn Lectures, 1983).
- Hake, *Epieikeia* E. Hake, *Epieikeia: A Dialogue on Equity in Three Parts*, ed. D. E. C. Yale (New Haven, CT, 1953). Quotations are here modernised.

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| Hawarde | J. Hawarde, <i>Reportes del Cases in Camera Stellata 1593–1609</i> , ed. W. P. Baildon (1894). An edition of the only known manuscript, now in the Carl H. Pforzheimer Library, University of Texas at Austin, MS. 36. |
| HLS | Harvard Law School Library, Cambridge, MA |
| <i>IELH</i> (5th edn) | Sir John Baker, <i>An Introduction to English Legal History</i> (5th edn, Oxford, 2019). |
| KB 27 | Public Record Office, plea rolls of the Court of King's Bench. |
| Kesselring, <i>Mercy and Authority</i> | K. J. Kesselring, <i>Mercy and Authority in the Tudor State</i> (Cambridge, 2003). |
| Lambarde, <i>Charges</i> | <i>William Lambarde & Local Government: His 'Ephemeris' and Twenty-Nine Charges to Juries and Commissions</i> , ed. C. Read (Ithaca, NY, 1962), pp. 153–89. |
| Lambarde, <i>Ephemeris</i> | <i>William Lambarde & Local Government: His 'Ephemeris' and Twenty-Nine Charges to Juries and Commissions</i> , ed. C. Read (Ithaca, NY, 1962), pp. 67–149. |
| Laws, <i>The Common Law Constitution</i> | Sir John Laws, <i>The Common Law Constitution</i> (Hamlyn Lectures: Cambridge, 2014). |
| LI | Lincoln's Inn library, London |
| LK | Lord Keeper of the Great Seal |

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| OHLE, vi | Sir John Baker, <i>Oxford History of the Laws of England</i> , vol. vi (1483–1558) (Oxford, 2003). |
| PC 2 | Public Record Office, Registers of the Privy Council. |
| Plowd. | E. Plowden, <i>Les Comentaries ou Reports</i> (1571; second part 1579). Quotations are here translated. |
| <i>Proc. Parl.</i> | <i>Proceedings in the Parliaments of Elizabeth I</i> , ed. T. E. Hartley (Leicester, 1981, 1995), three volumes. |
| Scarman, <i>English Law – The New Dimension</i> | Sir Leslie Scarman, <i>English Law – The New Dimension</i> (Hamlyn Lectures, 1974). |
| Sedley, <i>Lions under the Throne</i> | Sir Stephen Sedley, <i>Lions under the Throne: Essays on the History of English Public Law</i> (Cambridge, 2015). |
| sjt | serjeant-at-law |
| Smith, <i>De Republica</i> | Sir Thomas Smith, <i>De Republica Anglorum</i> (1583). This was written in about 1565. |
| Sol.-Gen. | Solicitor-General |
| SP 12 | Public Record Office, State Papers (Domestic), Elizabeth I. |
| Star Cha. Rep. | <i>Star Chamber Reports: BL Harley MS. 2143</i> , ed. K. J. Kesselring (List & Index Society, Kew, 2018). |
| tr. | translated, translation |

LIST OF ABBREVIATIONS

- YB Year Books, Edw. III to Hen. VIII.
 Passages are translated from the latest
 black-letter edition (1679–80).
- Zander, *The State of Justice* M. Zander, *The State of Justice* (Hamlyn
 Lectures, 2000).

Printed law reports are cited by the standard abbreviations currently in use, which may be found in P. Osborn, *A Concise Law Dictionary for Students and Practitioners* (12th edn, 2013).

Cambridge University Press
978-1-108-83796-5 — English Law Under Two Elizabeths
Sir John Baker
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