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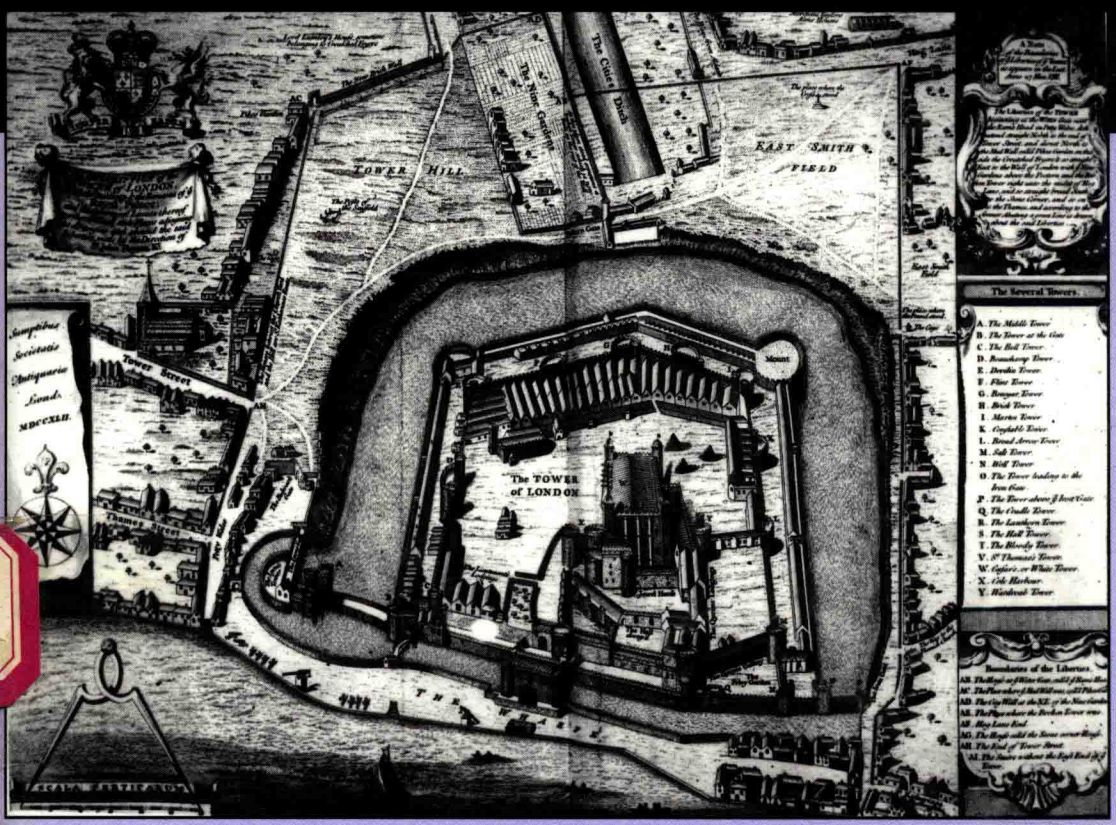
Boundaries of the Law

Geography, Gender and Jurisdiction in Medieval and Early Modern Europe

EDITED BY

ANTHONY MUSSON



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BOUNDARIES OF THE LAW

For Jeremy

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Slander"', *Cambrian Law Review* 33 (2002); 'Doctrinal Development, Legal History, Law and Legal Theory', *Oxford Journal of Legal Studies* 22 (2002); 'Of Ambidexters and Daffidowndillies: Defamation of Lawyers, Legal Ethics and Professional Reputation', *University of Chicago Law Review* 8 (2001); 'Medieval Attitudes Toward the Legal Profession: The Past as Prologue', *Stetson Law Review* 28 (1999).

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Chapter 1

Introduction

Anthony Musson

In exploring boundaries of the law this volume challenges traditional views and orthodox ways of looking historically at the law's context(s) and its operation. It draws on a series of papers given at the Second International Legal History Conference held at the University of Exeter in April 2003. The theme on this occasion was 'Mapping the Law', which encouraged speakers and delegates to consider the ways in which the law can be perceived during the medieval and early modern periods as existing within and being constrained by (even transcending) numerous physical, behavioural and conceptual parameters. The conference examined from different standpoints examples of conflict, reciprocity, isolation and overlap resulting from legal boundaries and discussed the extent to which these have been (and indeed can be) charted and plotted by lawyers and historians. The event benefited from the truly international participation and from the financial assistance afforded by the British Academy, the Royal Historical Society and the Journal of Legal History.

The papers included here focus specifically on the types of law and legal institutions within Europe in the medieval and early modern periods. The boundaries highlighted are primarily those real or notional, formed or imposed by, or arising from, geographical considerations, gender implications and aspects of jurisdiction. It is apparent, however, that these nodal points of focus should not themselves be too compartmentalised conceptually by lawyers and historians since they frequently intermesh on a variety of levels to form a matrix of relationships. Existing perceptions have been conditioned by particular approaches to the sources and certain case studies in the volume reveal how the sources themselves (and attitudes towards them) have determined the limitations of historical enterprise. Adopting an interdisciplinary approach to their subjects, the contributors demonstrate the fruitfulness of examining the interfaces of apparent diverse disciplines. Making fresh connections across subject areas, they examine, for example, the role of geography in determining litigation strategies, how the law interacted with social and theological issues and how fact and fiction could intertwine to promote notions of justice and public order.

Essays by Ormrod, Gergen, Olson, Heirbaut and Knafla investigate from various perspectives landscapes, locations and topographies: the physical location of territorial and jurisdictional boundaries and the effect they could have on legal and political relationships. In literal terms legal systems were limited by

geography, by the territory in which the law was applicable, an area that by nature or design could vary in its dimensions. Alterations to the geographical and jurisdictional boundaries could occur with changes in the sovereignty of territory. Fluctuating boundaries sometimes gave rise to hybrid forms of law at the borders, while more enduring changes of sovereignty might lead to legal enclaves. The applicability of laws and the effectiveness of the exercise of jurisdiction were dependent upon how these boundaries were viewed and observed at both the macro and micro levels. The yearly ritual traditional in England of beating the parish bounds, an enactment or recreation of the physical jurisdictional parameters, may have provided a very real sense of legal territory in the mind of the local community. On the other hand, topography could serve to neutralise formal jurisdictional boundaries: the limits of a forest or other natural feature, where it straddled a county boundary, for example, might be recognised more readily and understood more easily by local people as forming a boundary than the actual one.

Defined spaces, whether sacred or secular were given special prominence legally. The concept of sanctuary and the peace rules gained effect from their coincidence with zones of protection, which were accorded to particular locations, towns, or buildings and defined areas or architectural features within them. Equally, jurisdictional power could be associated with specific locations. The physical location of courts of law could imbue a particular castle or county town with prestige and serve to institutionalise justice. This is particularly noticeable in the outlaw tales where the notion of England's capital (London or more correctly, Westminster) as the ceremonial and jurisdictional headquarters is reinforced. The physical location of courts also had implications for the choice of litigation forum and attending court (as a juror or witness, for example). The landscape could thus impact on jurisdictional competition, the operation of the legal system and access to justice. Analysing the habitat in which courts and litigants existed, their physical, mental, and socio-economic structures, can yield important correctives to assumptions about the extent of civil litigation or criminal prosecution in any given region. As Knafla's study indicates, explanations concerning recourse to the courts and the exercise of jurisdiction need to take into account a combination of factors unique to the particular environmental region.

The multiplicity of courts and jurisdictions prevalent in Europe during the medieval and early modern period as revealed in various papers in this volume yields a picture of legal pluralism. When looking at specific areas of law and at legal actions in isolation, however, it is apparent that many of the problems arising from the multitude of legal fora cut across the boundaries afforded by jurisdiction. Heinous sexual crimes concerned both church and secular authorities. Disputes concerning marital property were not suitably covered by the common law nor yet by canon law. Similarly, the development of the law governing impediments to marriage was hindered by differences in attitude towards magic impotence as expressed in the early canon law and through regional customary decisions.

Klerman examines the essence and dynamics of jurisdictional competition arising from legal pluralism. In particular he argues that complainants (plaintiffs) drove the legal system at every stage, choosing the forum, encouraging judges to make procedures more favourable and develop doctrines that made it less easy for

defendants to prevail. Taking a long view on English legal history he posits that this was a prime motor for change and development within the legal system right up to the nineteenth century. Other contributors address the pressures to develop specific rules to overcome the contradictions and conflicts of different jurisdictions. Focusing on transboundary elements in disputes, Heirbaut, for example, looks at the methods employed by Flanders to solve interregional and intercustomary conflict. Butler shows how the English court of chancery's equitable jurisdiction was prepared to render assistance when requested in disputes over marital property. Exhibiting rather different remedies for conflict, Korpiola charts the gradual transfer of jurisdictional control over serious sexual crimes in Sweden from church to state. She points out that rivalry between the two jurisdictions was reduced through a compromise whereby the church was allowed to keep a part of any fines exacted as penalty. Likewise, Rider demonstrates how canon law writers took cognisance of the differing attitudes towards magic impotence and tried to accommodate these as a means of formulating a workable law.

The emphasis on what was workable, marking the line between legal theory and practice, is common to many of the papers. The outlaw tales, for instance, articulate discrepancies between the theory and practice of administering the law in medieval England. Indeed, outlawry (or waivery, the female equivalent) itself was an admission of failure on the part of the judicial agencies to locate an individual and bring him/her to justice.[1] This administrative and logistical failure, however, can be countered (and was thus remedied to an extent) by the fact that individuals who had been outlawed could cut through the strictures of legal theory and the levels of bureaucracy and petition the king directly and in person. The disparity between the practices of the courts and formal sources of law can equally be seen in the very practical interpretation given marital obligations in the provision of maintenance for wives.

The picture is slightly more complex in other areas. The peace rules operated as rules of conduct in people's minds, but in turn came to be regarded as a source of law in their own right differentiated from customary law. Notions of sanctuary themselves were not absolute and their operation was subject to restrictions and violations, notably if the sanctuary seeker did not make recompense or he/she were forcibly removed from the place of sanctuary. The attempt of canon law commentators and treatise writers to come to grips with the disparities of practice involving magic impotence is remarkable. They demonstrate an awareness and concern for the practicality of the law, even though they themselves were hindered in their formulation since the law required strict proofs and evidences that were not necessarily available when dealing with the world of magic. In the example of Flanders we see the tensions that emerged from the gap between theory and practice: the conflict-solving rules were flawed as they simply led to further conflict.

Conceptual parameters involving notions of law and jurisdiction are equally subjected to scrutiny. The boundaries of erstwhile dichotomies are shown to be permeable or illusory in many respects. As Heirbaut notes, there are difficulties of terminology when talking about public and private international law

in the medieval period since such distinctions cannot easily be drawn. Indeed, it would be difficult to fit feudal relationships into such a straitjacket. Moreover, 'international' implies conflicts of national laws, which as such do not seem to occur in northern Europe in the later medieval period. Instead Heirbaut uses the terms 'intercustomary' and 'interregional' (without mentioning public or private) as being 'better able to express medieval realities'. With regard to serious sexual offences such as sodomy and rape the lines became blurred as what was previously regarded as a personal wrong brought by the private accuser was increasingly throughout Europe being taken over and prosecuted publicly by the state, although private prosecutions at least remained an option. The peace rules were intended to limit private disputes, while the concept of sanctuary can be seen as offering a mid-point between private and public justice.

Similarly the division between ecclesiastical and secular jurisdiction should not be overdrawn. There are several examples in this volume where the lay and the ecclesiastical authorities joined together: in applying the peace rules in Aquitaine, for instance, and in punishing heinous sexual crimes in Sweden. While such divisions should not necessarily be accentuated, the two jurisdictions nevertheless remained distinctive. In the case of perpetrators of sodomy or similar serious crimes in Sweden the treatment of offenders by the church was markedly different from that of the state if he/she managed to reach the ecclesiastic jurisdiction first. There were also clear differences in the attitude of the church and secular authorities towards marriage which influenced policies on settlements.

Several papers indicate that distinctions should not too readily be drawn in certain instances between the personal and the institutional, nor assumptions made as to the oppositional nature of centre and locality. The duality that could be entertained by the medieval mind can be found in the location of the concept of peace in the person of a bishop or king in addition to their embodiment of the institutional aspects of the Crown and the Church. It can also be seen in the corresponding theory that, as God's representative on Earth, justice resided with the king personally, which gave rise to the perceived geographical zone of 'the king's presence'. This duality can be observed practically in the way that an individual could petition the king personally, thereby short-circuiting more institutional (and often time-consuming) methods of achieving legal redress. The peripatetic nature of the English royal court (including to an extent its judicial agencies) and the influence exerted by the physical presence of the king could in turn (during various historical periods) counter notions of 'justice' having a perceived jurisdictional centre. Knafla's study of litigation in Kent demonstrates that the inhabitants of the *pays* of the county viewed the court structure in different ways and with different strategies in mind. Some regions preferred to use the central courts (especially the prerogative courts) over the local courts, while others pursued their litigation closer to home, rather than opting for the capital.

In a sense the reader or researcher must unburden himself or herself of preconceived ideas of how 'justice' worked and was perceived in the medieval and early modern periods. While notions of complementary or 'alternative' methods of dispute resolution are now being accommodated by the modern legal system, it should be recognised that they were very much a feature of earlier frameworks of

justice. The jurisdiction exercised in the courts provided a formal setting for the adjudication of disputes, but various papers observe a readiness to resort to more informal methods. Extra-legal separation agreements were accepted as a necessary step to resolving problems of maintenance. Sanctuary and the peace rules could also provide for conflict resolution outside of the more formal bounds. Moreover, informal local pressures and private negotiation between parties probably lie behind many allegations of rape. Unofficial actions and solutions to magic impotence were condoned by the canon legists as a way forward in a difficult area.

In the same way, while the modern individual tends to arbitrate between the worlds of fact and fiction, between the imagined and the real, the medieval or early modern person was quite prepared to merge the two. Magic (and its associated practices) was something that troubled canon law commentators, but its inclusion in legal tomes testifies to the seriousness with which it was viewed. Similarly, the imaginative literature of violence and crime could be drawn upon for reference and in turn have an influence upon reality. The practices of the past are viewed by some modern commentators as being at odds with the so-called 'civilised' or acceptable view of the legal system. The concept of sanctuary, for instance, has been greatly misunderstood and maligned. A more balanced interpretation shows that by incorporating notions of mercy and justice, in the social context of the time, it was a useful means towards a settlement or resolution of conflict, not simply an irrational way of avoiding due punishment and retribution.

The need to move beyond the traditional orthodoxies and preconceived notions holds true for issues of gender, too, as Butler, Rider and Musson demonstrate. Women's ability to claim and achieve financial support following the breakdown of their marriage has been vastly underestimated. Indeed, there is clear evidence that medieval husbands had to bear the burden of their former wife's maintenance. The settlements attempted to avoid or reduce problems that might affect the success of arrangements such as a delinquent or miserly husband. Equally, the severance of ties between the couples prevented any need for close communication between the parties, which might in turn have led to the reintroduction and reinforcing of dominating power relationships.

The web of gender relations is highlighted with the canon law regarding impotence, which normally arose from the inability of the male/husband to have sexual intercourse. One of the problems arising from impotence caused by magic lay in the fact that it provided an element of unpredictability that ran counter to the certainty desired in the laws of marriage. In offering an impediment to an otherwise valid marriage, the spotlight in fact often turned on the woman as well since the bewitching was usually ascribed to her or to a rival for his affections. The husband's impotence, however, in fact could work to the advantage of both sexes: she could put forward a valid impediment if she did not really want to marry him, while unlike natural impotence claims, if the impotence proved temporary and he was later able to have sex with someone, he did not have to resume the marriage to his original wife.

From the evidence of court proceedings, the crime of rape, similarly, was blurred both conceptually and legally. Rather than simply recording the elements

of sexual violence against women, the documents can reveal more complex notions of law and justice in operation, the transcending of numerous boundaries and the interplay of legal and social relationships. The indictments show communities trying to come to terms with the most appropriate ways for prosecuting, punishing and compensating for the offence, given the wide variety of forms that sexual and non-sexual violence (under the heading of rape) could take in the medieval period.

The need to interpret the legal records carefully and evaluate their contents historically can pose problems for the unwary or uninitiated. Rose, Knafla, Klerman and Musson address the problems associated with undertaking historical research in the field of law and the limitations of certain methodologies and approaches to the subject matter. In their different ways they outline methods of expanding the conceptual boundaries of legal history and assess the advantages and disadvantages that partnerships with other disciplines can bring. The supposed narrowness and insularity of legal history is not a criticism that can justly be levelled here.

This book, therefore, demonstrates the vitality of research currently being undertaken in the history of law and the advantages of historians and lawyers pooling their knowledge and understanding of the legal past. At first blush topics such as sanctuary, magic impotence and outlawry appear to be on the margins or the outer boundaries of what 'law' usually encompasses. As historical phenomena they have been variously condemned, sensationalised, or simply regarded as not sufficiently legal in nature and consequently ignored. Yet examining these and other such problematic areas more closely serves to challenge conceptual boundaries and underlines the need for widening horizons, leading to a redefining of the parameters and a reshaping of our understanding of the law and how it operated historically in all its various guises and contexts.

Note

[1] A paper was given at the conference on this area by Louise Wilkinson: '"*Non fuit in francoplegio quia mulier*": Gender Boundaries and Law Enforcement in Thirteenth-Century England'. A fuller version appears in her forthcoming book: *Women in Thirteenth Century Lincolnshire*.