

Lawyers in Early Modern Europe and America



Edited by *Wilfrid Prest*

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ABBREVIATIONS

AHR: *American Historical Review*

AJLH: *American Journal of Legal History*

Baker, *Spelman's Reports*: J.H. Baker (ed.), *The Reports of Sir John Spelman* (2 vols., Selden Society, 1977-8), vol. 2

BIHR: *Bulletin of the Institute of Historical Research*

B.L.: British Library

Bodl.: Bodleian Library

CLJ: *Cambridge Law Journal*

CP: Public Record Office, Common Pleas series

C.U.L.: Cambridge University Library

De Laudibus Legum Angliae: Sir John Fortescue, *De Laudibus Legum Angliae*, ed. S.B. Chrimes (Cambridge, 1942)

EHR: *English Historical Review*

GIPB: R.J. Fletcher (ed.), *The Pension Book of Gray's Inn* (2 vols., 1901-10)

H.M.C.: Historical Manuscripts Commission (individual reports cited by short title)

Holdsworth, *History of English Law*: Sir William Holdsworth, *A History of English Law*, 7th edn (13 vols., 1922-52)

IND: Public Record Office, Index series

ITR: F.A. Inderwick (ed.), *A Calendar of the Inner Temple Records* (5 vols., 1896-1901)

Ives, 'Reputation': E.W. Ives, 'The Reputation of the Common Lawyer in English Society, 1450-1550', *University of Birmingham Historical Journal*, vol. 7 (1959-60), pp. 130-61

KB: Public Record Office, King's Bench series

LIAdmR: W.P. Baildon (ed.), *The Records of the Honourable Society of Lincoln's Inn. Admissions from A.D. 1420 to A.D. 1893* (2 vols., 1896), vol. 1

LIBB: W.P. Baildon and R.F. Roxburgh (eds.), *The Records of the Honourable Society of Lincoln's Inn. The Black Books* (5 vols., 1897-1968)

Lic.: *licenciado*

L.P.L.: Lambeth Palace Library

LRH: J.H. Baker (ed.), *Legal Records and the Historian* (1978)

MTAdmR: H.A.C. Sturgess (ed.), *Register of Admissions to the Honour-*

able Society of the Middle Temple, from the Fifteenth Century to the Year 1944 (3 vols., 1949)
MTR: C.T. Martin (ed.), *Minutes of Parliament of the Middle Temple* (4 vols., 1904-5)
P & P: *Past and Present*
PROB: Public Record Office, Probate series
P.C.C.: Prerogative Court of Canterbury (testamentary records now reclassified in Probate series above)
P.R.O.: Public Record Office
Prest, Inns of Court: Wilfrid R. Prest, *The Inns of Court under Elizabeth I and the Early Stuarts, 1590-1640* (London and Totowa, NJ, 1972)
R.O.: Record Office
SP: Public Record Office, State Papers series
TRHS: *Transactions of the Royal Historical Society*
WMQ: *William and Mary Quarterly*
YB: Year Book

Note: all books cited here and below were published in London, unless otherwise indicated.

Spelling and punctuation have been modernised, except for the titles of works in English.

LAWYERS IN EARLY MODERN EUROPE AND AMERICA

INTRODUCTION

Lawyers seem to be a peculiarly Western phenomenon. Outside Western Europe and her colonial offshoots, specialist secular legal advisers and representatives were unknown until very recent times. Indeed Weber held the lawyers decisively responsible for those two institutions — capitalism and the 'legal-rational' modern state — which have most strikingly differentiated Western Europe from the rest of the world between the Renaissance and the present day.¹

On the whole historians have shown little enthusiasm for exploring these large themes, either within or across national boundaries. Besides innate professional circumspection (or timidity), this failure reflects a more general lack of interest in the history of law and its institutions. For historiographical purposes lawyers have tended to be absorbed into an amorphous middle class, which lacks the exotic appeal or ideological significance often attached to the study of aristocrats and plebeians. If in class terms historians may have found lawyers too familiar to be interesting, their vocational concerns are apt to seem more arcane, forbiddingly technical or plain boring than those of clergymen, doctors, entrepreneurs and soldiers. Thus academic historians, with a few notable exceptions,² have until recently left the law and its practitioners to lawyers and legal historians located in schools of law. (Just so, Professor Kuhn reminds us, does the history of most arts and sciences tend to be relegated to their practitioners and teachers, while general historians confine their attention to aspects clearly impinging upon the broader historical mainstream.)³

Legal historians, concerned primarily with tracing the evolution of the law as a body of substantive doctrines and rules, have hitherto paid little more than passing attention to its practitioners, except in biographies of eminent jurists and Whiggish accounts of professional institutions. Within the last decade, however, a number of younger scholars have taken up the systematic study of lawyers and legal professions in various parts of early modern Europe and America. This volume aims to present an overview of their recent work. While in most cases bearing the characteristic stamp of the social historian, it is also recognisably part of that wave of interest in the history of law which has gathered increasing momentum, both in history departments and law schools, since the mid-1970s.

Seven of the nine chapters below were written specially for this book, while the other two have been adapted from unpublished papers. Readers should know that the slight numerical bias in favour of England was not planned, but results from failure to locate contributors for projected chapters on Italy, the Netherlands and (more conjecturally) Russia.⁴ As it is, the degree of concentration on England is probably not an entirely misleading representation of the current state of scholarship, while the remaining chapters provide, if not a totally comprehensive basis for comparisons, at very least a series of compelling contrasts and parallels.

The strongest initial impression is of wide diversity; in each society covered the lawyers were a large, heterogeneous group, ranging from a small elite of advocates to a fringe of obscure part-time practitioners of equally dubious qualifications and reputation. The detailed activities and organisation of the various grades of practitioners, their relationship with each other, the rest of society and the state, varied widely over time and space. But some common features and tendencies do emerge, including a clear correlation between social exclusiveness and academic requirements for entry to legal practice, the broad appeal of the Roman lawyer model as a source of professional identity and status in both common and civil law jurisdictions, and a characteristic political caution or moderation, perhaps reflecting the lawyer's somewhat ambivalent moral and social position. It may indeed be this last quality, in conjunction with their pervasive presence, argumentative skills and broad range of human contacts and experience, which particularly fitted lawyers for the role of agents of change in early modern societies.

If the possibility of comparative insights is perhaps the ultimate justification for bringing together the work presented below, each chapter nevertheless focuses upon certain groups of legal practitioners in a specific time and place. Within the confines of a fairly tight word limit, contributors were free to develop their topics as they saw fit, while being encouraged in the interests of overall coherence to include a minimum core of basic information and common themes. The main differences in approach which have resulted are between the treatment of lawyers as significant figures on a larger historical canvas, as against a concentration on their historical conditions and experience *per se*. While these are differences in emphasis rather than mutually exclusive alternatives in the present instance, each has its peculiar strengths and dangers.

If historians of the legal profession, or indeed any human group, concentrate exclusively on its internal history, writing as it were from

the inside, they will very likely be confined to a limited range of questions and an equally restricted audience.⁵ On the other hand, historians who rush in to liberate the history of law from the constricting grasp of the lawyers, as religious history has been rescued from the theologians, run the opposite risk, of superficiality and error in the treatment of major questions, arising from ignorance of those very features which give the law and lawyers a claim to their own history.⁶ It is for the reader to judge how effectively contributors have managed to navigate between this historiographical Scylla and Charybdis.

Besides providing a conspectus of current knowledge and research, this volume may also help to stimulate further work and new lines of investigation. The biographical studies of Baker, Brooks and Levack show how hitherto obscure legal personnel can be illuminated by information drawn from a wide range of archival sources; there is little doubt that similar strategies applied to other periods and places would yield equally rich results. As they also demonstrate, however, when part-time occupations were commonplace and vocational specialisation not highly developed, there is often room for doubt about where precisely the line between lawyer and layman was (or should now be) drawn.

Membership of professional organisations would today supply a straightforward criterion, but it is not at all clear how far those which existed during the period covered by this volume, with the possible exception of the London-based Society of Gentlemen Practisers, were in fact functional equivalents of their modern successors. Nevertheless, as the work of Berlanstein, Botein, Duman and Murdoch on the collective autonomy, cohesion and public image of eighteenth-century American, English, French and Scottish lawyers amply demonstrates, the history of the professions need not be tied exclusively to organisational or institutional preoccupations, and may well provide the most effective conceptual framework for the historical study of men of the law.

There is certainly no lack of material to be worked over or of questions to be posed. The most serious current deficiency is our general ignorance about the interaction between lawyers and their clients. There is an urgent need for more work, along the lines of Kagan's study, to discover exactly who used lawyers' services in early modern times and for what sorts of purposes: were lawyers in fact retained largely by an elite clientele, or did they also serve peasants and urban artisans to any significant extent? Were they mere instruments of class rule, or also in some sense mediators between disparate social ranks and worlds? How well did they serve their clients? How and how much were

they paid in return?

In following up such questions we may well need to call upon anthropologists as well as sociologists for assistance, paying no less attention to attitudes and perceptions than to more objective data, observing our subjects' private and domestic lives as well as analysing their public transactions. The historical study of lawyers and the legal profession may thus turn out to have even broader bounds and larger possibilities than its current explorers are yet fully aware.

For assisting the idea of this book to emerge from protracted incubation, I am most grateful to my friend and former pupil Christopher Brooks, as also to my friend and former examiner Eric Ives. The enthusiastic support of Christopher Helm and the expert counsel of Stanley Katz materially reduced the difficulties inherent in bringing together the work of nine scholars scattered over three continents. The final stages of that task were transferred from Adelaide to Princeton early in 1980; I gratefully acknowledge support, both intellectual and material, from the Shelby Cullom Davis Center for Historical Studies, Princeton University, towards finishing the job. Finally, besides my fellow contributors, I should like especially to thank Cedar, Richard and James for their patient forbearance and positive assistance.

W.R.P.

Notes

1. H.H. Gerth and C.W. Mills (eds.), *From Max Weber: Essays in Sociology* (New York, 1958), pp. 93-4, 216-18. Cf. Perry Anderson, *Lineages of the Absolute State* (1974), pp. 420 et seq.; V.G. Kiernan, 'Private Property in History' in J. Goody, J. Thirsk and E.P. Thompson (eds.), *Family and Inheritance* (Cambridge, 1976), p. 376.

2. Significant exceptions include, in chronological order, E.W. Ives, 'Some Aspects of the Legal Profession in the Late Fifteenth and Early Sixteenth Centuries', unpublished PhD thesis, University of London, 1955; Robert Robson, *The Attorney in Eighteenth Century England* (Cambridge, 1959); Paul Lucas, 'Blackstone and the Reform of the Legal Profession', *EHR*, vol. 77 (1962), pp. 456-96; Lauro Martines, *Lawyers and Statecraft in Renaissance Florence* (Princeton, 1968).

3. T.S. Kuhn, 'The Relations between History and History of Science' in F. Gilbert and S.R. Graubard (eds.), *Historical Studies Today* (New York, 1972), pp. 179-80.

4. For which now see discussion in R.S. Wortman, *The Development of A Russian Legal Consciousness* (Chicago, 1976), Ch. 1, and W.E. Butler, 'Foreign Impressions of Russian Law to 1800: Some Reflections' in *idem* (ed.), *Russian Law: History and Political Perspectives* (Leyden, 1977), pp. 64-92.