MANCHESTER MEDIEVAL STUDIES

MEDIEVAL LAW IN CONTEXT

The growth of legal consciousness from Magna Carta to the Peasants' Revolt

Anthony Musson

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THE GROWTH OF LEGAL CONSCIOUSNESS FROM MAGNA CARTA TO THE PEASANTS' REVOLT

Anthony Musson

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PREFACE

This book is intended as both a history of judicial developments in the thirteenth and fourteenth centuries and as a contribution to the intellectual history of the period. Its genesis was my concern that in charting the evolution of English justice one needed to try and ascertain what people actually thought about the law and how this influenced their actions and how they themselves were able to bring about alterations in the law and legal thinking. It therefore aims to provide a new perspective on the period by examining the contextualisation of law within society and by revealing a theology, ideology and psychology of law. To do so in an accessible and stimulating way has also been my aim throughout. In writing this study I am indebted to the other scholars working in the various disciplines into which I have ventured. I owe particular thanks though to Dr Michael Clanchy, Professor Mark Ormrod and Dr Chantal Stebbings, who have patiently read and commented upon drafts and listened to me expounding ideas. I am also grateful to the conference delegates, colleagues and students upon whom some of these ideas have been tested and for the feedback I have obtained. My single-mindedness in researching and writing this book has entailed domestic and personal sacrifices and I am eternally at the behest of those who have allowed me the space to continue along the lonely path.

A.J.M.
Exeter

ABBREVIATIONS

AJLH *American Journal of Legal History*
BIHR *Bulletin of the Institute of Historical Research*
Brand, *Origins* P. Brand, *The Origins of the English Legal Profession* (London, Blackwell, 1992)
CCR *Calendar of Close Rolls*
Clanchy, *Memory* M. T. Clanchy, *From Memory to Written Record: England, 1066–1307*, 2nd edn (Oxford, Blackwell, 1993)
CLBCL *Calendar of the Letter Books of the City of London,* ed. R. R. Sharpe (London, John Edward Francis, 1899–1907)
CPMR *Calendar of Plea and Memoranda Rolls*, ed. A. H. Thomas (Cambridge, Cambridge University Press, 1926–32)
CPR *Calendar of Patent Rolls*
EELR *The Earliest English Law Reports*, ed. P. Brand, Selden Society, 111 & 112 (London, 1996)
EHR *English Historical Review*
Foedera *Foedera, conventiones, litterae etc. or Rymer's Foedera, 1066–1383,* ed. A. Clarke *et al.* (London, Record Commission, 1816)
JBS *Journal of British Studies*
JLH *Journal of Legal History*
JMH *Journal of Medieval History*
Learning the Law J. A. Bush and A. Wijfells (eds), *Learning the Law: Teaching and the Transmission of Law, 1150–1900* (London, Hambledon Press, 1999)
LHR *Law and History Review*
LQR *Law Quarterly Review*
Musson, *Public Order* A. Musson, *Public Order and Law Enforcement: the Local Administration of Criminal Justice, 1294–1350* (Woodbridge, Boydell Press, 1996)
Musson and Ormrod, *Evolution* A. Musson and W. M. Ormrod, *The Evolution of English Justice: Law, Politics and Society in the Fourteenth Century* (Basingstoke, Macmillan, 1998)
OJLS *Oxford Journal of Legal Studies*
P&P *Past and Present*

Powell, *Kingship* E. Powell, *Kingship, Law and Society: Criminal Justice in the Reign of Henry V* (Oxford, Clarendon Press, 1989)

Return of Members *Return of the Name of Every Member of the Lower House of the Parliaments of England, Scotland and Ireland ... 1213–1874*, Parliamentary Papers (London, 1878)

RP *Rotuli Parliamentorum* (London, House of Lords, 1783)

RPHI *Rotuli Parliamentorum Hactenus Inediti*, ed. H. G. Richardson and G. O. Sayles, Camden Society, 3rd series, 51 (London, 1935)

RS Rolls Series

SCCKB *Select Cases in the Court of King's Bench*, ed. G. O. Sayles, Selden Society, 55, 57, 58, 74, 76, 82, 88 (London, 1936–71)

SR Statutes *of the Realm* (London, Record Commission, 1810–28)

SS Selden Society

TRHS *Transactions of the Royal Historical Society*

YB *Year Books* (Selden Society and Rolls Series)

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Towards a psychology of law

THE dates 1215 and 1381 mark significant turning points in English history. As is well known, they were both years in which the reigning monarch came face to face with rebellious subjects whose demands they were forced to acknowledge. Separated by nearly two hundred years, the two situations contain some basic similarities, but the differences are also significant. Although King John faced dissension among the leading barons and knights in 1215 the rebellion itself was essentially peaceable (even if civil war erupted not long afterwards). In 1381, by contrast, the young King Richard II confronted an angry crowd of peasants and towns-folk amid scenes of death and destruction. John acceded to the rebels' demands by drawing up a great charter of liberties recognised by the Crown (the document later known as Magna Carta). Richard II made far-reaching promises of change in order to save the day, and charters freeing villeins from customary services were drawn up. Nevertheless, unlike those of 1215, the actual demands of the 1381 rebels were not incorporated into any binding document (they appear only in the texts of chroniclers). Significantly, both kings were reluctant to be bound by their undertakings: John sought a papal release from Magna Carta, while Richard II soon revoked the charters of manumission. While it is obvious that the two kings were dealing with very different classes and types of people, the themes underpinning the Peasants' Revolt were deeply rooted and well articulated. Why was there this sudden burst of feeling? From where had the ideas welled up? What had happened in the intervening years?

This book sees the crucial dynamic in this changing world as being the growth of 'legal consciousness'. The product of legal culture and experiences (at the level of both the individual and groups within society), 'legal consciousness' can be seen both as an active element shaping people's values, beliefs and aspirations and also as a passive agent providing a reserve of

knowledge, memory and reflective thought, influencing not simply the development of the law and legal system, but also political attitudes. The law in some form or other touched the lives of the entire population of medieval England. Focusing on the different contexts of law and legal relations, this book aims to shift the traditional conceptual boundaries of 'law', portraying both the law's inherent diversity and its multi-dimensional character. Indeed, this study emphasises the need to see law (or 'The Law') not simply as an external mechanism regulating daily life, but as an integral part of the way in which social relations were actually lived out and experienced.

By offering a re-conceptualisation of the role of the law in medieval England, this book aims to engage the reader in new ways of thinking about the political events occurring during the thirteenth and fourteenth centuries. It considers the long-term effects of John's encounter with forces questioning royal government and provides a new explanation for the dangerous state of affairs faced by the boy-king during the Peasants' Revolt over a century and a half later. The book puts forward the view that the years subsequent to the signing of Magna Carta yielded a new (and shifting) perspective, both in terms of prevailing concepts of 'law' and 'justice' and with regard to political life in general. Reissued at intervals in the years after 1215, Magna Carta enshrined aspects of custom and provided a model for legislation. Yet significantly, it can be seen to have reached beyond the purely legal content of its chapters, becoming (along with a duty to uphold the common law) the touchstone of good governance and symbolising a body of 'rights' applicable to all. Magna Carta evolved from certain deeply held notions and beliefs about law and government and, in turn, it created in people's minds expectations concerning royal justice and the king's authority: expectations as to what the law was enabling or providing; how royal authority was exercised; how the legal system operated; and how redress could be achieved.

In terms of the substantive law and the operation of the judicial system, there is a significant contrast between the early thirteenth century and the late fourteenth century, one which serves to underline the constructive, evolutionary process occurring over the two centuries. As will be demonstrated over the course of successive chapters, there was a decisive shift during the thirteenth and fourteenth centuries not only in the number of actions and types of procedures, but also in the nature of the judicial agencies and the personnel staffing them. These changes coincided with – and indeed predicated the development of – a distinctive legal profession, and

emphasised the participatory role (either as jurors or as litigants) of members of particular communities. Alterations in substance and scope also affected (and were influenced by) the contexts in which the law developed and was administered, the way which it was perceived and the criteria by which it was judged.

As a critical analysis of developments occurring over the two centuries, this study adopts a holistic and interdisciplinary approach that reflects the cross-cultural trends and qualities inherent in the law. The law as an object of inquiry is pursued in terms of its interaction with other crucial areas of everyday life, notably the political, economic, social and religious spheres. In order to develop this interpretative framework, attempts have been made to register the communication of ideas and understand the internalisation of symbols by employing evidence of a literary, dramatic and visual nature and by adopting modes of thinking currently being developed in cultural history, art history, psychology, sociology and anthropology. By taking advantage of the perspectives afforded from the standpoint of other disciplines, by looking at historical periods more thematically, and by asking the right types of questions of material realistically susceptible to cross-cultural analysis, illuminating comparisons can be drawn and conceptual breakthroughs made in pursuit of the role of law in history.

In so doing, this book moves beyond the somewhat restrictive or myopic view of the law and legal institutions afforded in many conventional interpretations and espouses the aims and values of the 'new legal history': a historiographical and methodological revisionism that has developed apace over the closing decades of the twentieth century. A key platform in this approach has been exploration of the interface between the legal and the social. Revitalising historical thought and bringing a veritable renaissance to the writing of legal history, the new 'movement' has significantly altered perceptions of law and society, particularly for those studying the early-modern and modern periods.[1] This in itself is only part of a wider movement in social history.[2]

The role of ideology

This book takes as its starting point the need for a conceptual basis for an understanding of law in history and so seeks to explore the role of ideology in both law and politics. This chimes conveniently with the requests made over the last decade by proponents of a 'new constitutional history' of late medieval England that historians should focus not just on the tangible elements of royal

government, its administration, patronage and personalities, but also on ideas, mentalities, values and principles.[3] Several writers have already underlined the centrality of the law to medieval society (from both a local and national perspective) and have stressed the importance of ascertaining and assessing the influences on – and attitudes towards – the policies adopted by the Crown, especially concerning matters of public order and social control.[4] Indeed, consideration of contemporary views of kingship and aristocratic authority in terms of values and expectations has proved a useful 'tool' when examining the functioning of medieval government in the reigns of Henry V and Henry VI.[5]

Yet, significant and illuminating as such studies may be, to be concerned solely with elite ideologies, the views and guiding principles of landowners and lawyers – in effect the governing classes – runs the risk of creating a rather rarified, one-dimensional model of political involvement and negates the whole reasoning behind the search for 'discourses', modes of thought and silent voices.[6] An attempt must be made (however difficult) to draw upon a wider context of political and legal involvement, to engage with surviving sources (and their subtexts) in diverse ways and to seek to penetrate the ideas, beliefs and attitudes of people operating in different spheres from that of the comparatively well-studied gentry and lawyers: those with urban and mercantile interests, the lesser clergy, wealthy peasants and smaller landowners (both free and unfree).[7] In order to appreciate the drama and tensions of political events, we need to ask some basic questions. As one commentator has suggested, we should display 'a curiosity about what drove the rebels [in 1381], about what they thought and what they wanted'.[8]

Ideology itself has been described as a 'difficult, slippery and ambiguous concept'.[9] It is perhaps best thought of as comprising strategy, motive, attitude and commitment – as being the justificatory dimension of a particular culture based on patterns of belief and value. The rhetoric employed or the expression of certain ideas can often provide vital clues towards perceiving the relevant thought-structures, particularly when claims are made about the nature or condition of society and the direction in which it is perceived to be heading. As 'matrices for the creation of collective consciousness', ideologies can evolve naturally among the lower echelons of society, the socially subordinate and inferior sectors, as much as in socially superior or dominant ones. Such claims should not be seen as purely class-related nor restricted to a literate intellectual elite, but applicable to overlapping and interactive social groups.[10]

The construction of an ideology, however, presupposes the formation and

operation of the requisite driving 'consciousness'. Consciousness should perhaps be regarded as the thoughts and feelings that exist in the mind which have been translated into attitudes, but have not yet been refined into an ideology. In other words, an ideology stems from the ordering, rationalising, contextualising and articulating of conscious thought. It is important for historians to have at least a basic understanding of the mental processes at work since it enables them not only to identify and extrapolate possible influences on an individual or a group of people, but also to hypothesise as to the ways in which the individual or group perceived events and relationships and how their perceptions may have accorded with or, indeed, differed from reality.

Analysis of the mental processes behind conscious and unconscious thought demonstrates how information about the human environment is accumulated and how experiences themselves are processed, adjusted, transformed and stored before being reproduced and recalled. The most prominent function of consciousness is held by neuro-physicists to be the construction and rearrangement of mental 'schemata' when stimulated to do so by an external (and often complex) situation. The experience is stored and remains 'unconscious' until stimulated either accidentally or through a deliberate attempt to recapture the memory. Generally the individual will not take in every minute detail of a situation, but create instead a general impression from which the probable details are then reconstructed. The conscious reconstruction of a past event held in the memory may of course be (or result in) a misconception of the original event or experience. It has also been shown that recollection is accompanied by the emotions associated with the occasion. The psychological manifestation of this process is the creation of an 'attitude', perhaps a feeling, the effect of which is then justified by the mind in the process of remembering.[11] As F. C. Bartlett pointed out in his influential study on theories of memory:[12]

> The need to remember becomes active, an attitude is set up; in the form of sensory images or, just as often, of isolated words, some part of the event which is to be remembered recurs, and the event is then reconstructed on the basis of the relation of this specific bit of material to the general mass of relevant past experiences or reactions, the latter functioning, after the manner of the 'schema', as an active organised setting .... In many cases, when the material had to be dealt with at a distance, as in remembering, the dominant features were the first to appear, either in image form, or descriptively through the use of language. In fact, this is one of the great functions of images in mental life: to pick items out of

> 'schemata' and to rid the organism of overdetermination by the last preceding member of a given series. I would like to hold that this ... could not occur except through the medium of consciousness .... The theory brings remembering into line with imagining, an expression of the same activities ... it gives to consciousness a definite function other than the mere fact of being aware.

Assessing the functioning and effects of an intangible concept such as consciousness obviously presents difficulties, especially as it comprises inner experiences not easily discernible except in an external manifestation. It would be wrong, however, to adopt the attitude that, if it cannot be measured precisely it does not in fact exist or the general context of thought cannot be explored.[13] Psychologists and anthropologists regard conscious perception as constituting an act of recognition – a conceptual alignment based on previously stored cultural patterns: '[T]hinking, conceptualisation, formulation, comprehension, understanding or what have you consists not of ghostly happenings in the head but of a matching of the states and processes of symbolic models against the states and processes of the wider world.'[14]

Medieval life, as with life today, was lived or experienced within a complex of relations. Some of these relations, be they legal or social, could be called external or objective relations and important in determining the nature of a particular society: they were hierarchic, gendered, subordinating and empowering in ways that the individual was unable to affect and into which he or she was cast at birth. These objective sets of conditions and social practices should not of course be regarded as the sole influences on the individual or indeed as the final determinants of a society's profile. Social relations can also be regarded as having an internal or subjective element. This might be perceived from the way a particular life is lived, how the individual reacts within a given culture, and how he or she contends with and constructs different languages and discourses. It is the overall 'experience', however, which forms both the individual and collective senses of 'consciousness' and enables people to appear to act with purpose and intention when viewed within a historical setting.[15] The impact of the ideological dimension of law, therefore, should be measured in terms of the law's influence on people of all walks of life and especially in their relations with other individuals and groups.

We should not necessarily think in terms of there being a single or universal ideology among the lower orders or assume that the dominant or governing classes themselves espoused the same ideology. There are other problems as well: we should be careful how we attribute an ideology or

interest to a particular group. What may appear as a homogeneous group sharing the same ideology, may in fact be a disparate collection of people with diverse interests who give the illusion of operating as a collective. The Peasants' Revolt of the 1381, for instance, involved many people in the uprisings, some of whom were genuine peasants, but others were townsfolk, merchants and members of the gentry who had their own interests in fomenting rebellion. Moreover, as the Baronial Wars of the mid-thirteenth century illustrate, there could be a multiplicity of ideologies, sometimes competing, sometimes shared both *within* and *between* social groups and as such these ideologies could be concerned with reform, revolution or simply preservation of the status quo. There is also the temptation to view ideology as a positive affirmation of direction or with regard to considered goals: it can in fact disguise failure or loss of orientation. To some extent this may have been experienced after the civil wars of 1263 and 1322, or in 1327 following the deposition of Edward II, as the newly disorientated and demoralised groups sought a fresh, meaningful symbolic framework. The extent to which the disoriented could latch on to new ideas or embrace a different set of guiding principles (or in fact failed to do so, as the case may be) may of course say much about the success or failure of the succeeding administrations.

Ideologies of law are themselves multi-dimensional and operate on a number of different levels. In the medieval period it was possible for them to be articulated in both legal and essentially non-legal sources. They could stem from elements of a legal text (such as a statute, law report or treatise) or a judicial pronouncement (either a decision in a court case or an elaboration of legal rules) and they could arise from the association or fusion of different ideological elements (such as philosophical, religious, political, even satirical texts or quasi-legal documents). Institutions forming the royal judicial and administrative machine and other bodies, such as parliament, the county, urban and manorial courts, the Church, and the universities, could also create and disseminate ideology by providing an interface for the communication and exchange of ideas, beliefs and opinions. The actors themselves, whether legal professionals, litigants or those for whom (and upon whom) the law was enforced, as participants in the processes and thus creating the dialogues of law, were also eminently capable of reflecting upon and discussing their views and experiences.

The determining features of ideology are not wholly psychologically based: a pivotal role is played by culture. This study explores the ways in which the culture and life experiences enjoyed (or suffered) by medieval

people informed their sense of law; and conversely, the manner in which their sense of law informed attitudes and aspirations, and consequently their life experiences. Some explanation of the term or concept of 'legal consciousness' is required. This phenomenon is regarded as having a definite function and is examined and employed as a term in both a specific and a general way. It is used in a narrow sense (Chapter 2) with reference to the advanced or refined legal consciousness redolent of the nascent legal profession. Indeed, it represents an obvious common feature of those steeped in the languages of the law, its rules and processes. Their primary viewpoint was determined by the various texts and practices associated with their privileged education and livelihood and it was they who, in turn, contributed to the intellectualising of the law and the espousal of ethical standards of professional behaviour. 'Legal consciousness' is also used in a broader sense to describe the reserves of knowledge and thought of those who experienced the law and legal institutions in everyday life, who participated in the legal culture, on whom it created an impression and for whom it provided an integral part of social relations (see Chapters 3 and 4). A coming together of these two forms of legal consciousness can be seen in the way that it infused and influenced both the institution of parliament and events occurring within the wider political arena (see Chapters 5 and 6).

In choosing the word 'growth' – a word imbued with active or developmental overtones – in the explanatory sub-title, 'The growth of legal consciousness', it is not intended to imply that before 1215 any form of legal consciousness was inert or dormant and that in some simple way over the course of nearly two centuries it gradually became a recognisable and important force for change. Historians writing on the Anglo-Saxon and Anglo-Norman periods have stressed the fact that concepts of law were strongly held and that people 'wrote, spoke, and thought in terms of law and laws'.[16] The difference between the periods should be seen in qualitative terms as regards the facilitative nature of legal consciousness. As psychologists and neuro-physicists have stated: to acquire a particular concept does not involve an increase in knowledge or mental faculties, rather it indicates that the information has been re-categorised and generalised.[17] In other words, a key element in the growth of legal consciousness was the ability to process, adjust and learn from past experiences and events. The shifting views in law and politics should be seen in terms of the mental readjustments being made over time by individuals and groups.

In the century and a half after Magna Carta, the nature of 'legal consciousness' changed in England: it became in some respects more focused

and concentrated as people assimilated concepts of law and responded by thinking, talking and writing about them, and as the experience of law itself became more diversely spread across the population. Legal consciousness should be regarded as a complex phenomenon enabling people to reformulate their ideas and general opinions on the basis of their existing experiences and in accord with new legal opportunities. The process itself could be intermittent, though, rather than constant, depending on the nature of internal reflection and the stimulus of external events. The idea of 'growth' as encapsulated in the sub-title, therefore, is to be given a wide definition and considered as carrying connotations of germination and expansion (spreading, deepening, broadening, increasing) as well as elements of accumulation, maturation and evolution.

The contexts of law

The complexity of the medieval experience of law should be seen as a key component in the growth of legal consciousness. As A. L. Brown notes, 'English law was more elaborate than the law in any other kingdom in Europe at that time'[18] – one might add, both in terms of substantive law and with regard to its legal systems. Contrasts are inevitably drawn with the systems of law existing on the Continent at this time, but some commentators maintain that the perceptible differences, such as they were, should not be overdrawn: it was not so much the laws themselves which differed as the approaches to (and legal thinking behind) them and approaches to record-keeping.[19] Medieval England was graced not simply with a single, monolithic form of law, but several distinct types of law, sometimes competing, occasionally overlapping, invariably invoking different traditions, jurisdictions and modes of operation. Indeed, the variety and range of application was the main and remarkable characteristic.[20] In order to appreciate the diversity and variability of the English judicial scene, and the co-existence of different forms of legal relations, it is necessary to provide a fuller explanation of the forms of law in existence.

There were three main legal traditions operating in the country during the thirteenth and fourteenth centuries: common law, canon law and customary law, which were based on the justice dispensed by the various royal courts, the ecclesiastical courts, and the customary (or local) courts respectively. The 'common law' (while not a contemporary term as such) emerged from the knitting-together of customs and practices existing in Anglo-Saxon and Anglo-Norman times with the considerable administrative

innovations put forward in the twelfth century under Henry II. As a body of rules and processes that was authorised by the king, it was intended to be applied in standard or 'common' form across the realm to guard against regionality and arbitrariness.[21] Canon law formed the governing principles and rules ('canon' in Greek) of the Western Church and therefore extended not only throughout the realm, but beyond it. Comprising first and foremost a body of papal decretals and promulgations, it also made use of the Roman civil-law tradition to provide a complex (though flexible) amalgam of traditions and procedures covering issues such as ecclesiastical discipline and morality. It was confusingly referred to by jurisprudential treatise writers as 'ius commune' (the 'common law') to distinguish it from provincial (ecclesiastical) legislation and local custom.[22] Customary law, by contrast, was theoretically multifarious and non-uniform in its applicability in that it consisted of local urban and village practices that were interpreted according to local 'custom' or convention. This was not usually a clearly articulated and systematic body of law, but a flexible collection of principles and habits deriving from (and adapted by) folk memory and the decisions made by the court and the body of the community.[23]

In addition to the three categories outlined above there existed other important specific types: statute law, forest law, the law of the march, the law merchant, maritime law and martial law. Some of these had links with the common law, customary law and Roman civil law, but were in some way separate or effectively hybrids of several traditions in that they were designed to fill gaps in the regulation of life that were not possible using the rules and procedures of the three main systems of law. Statutory legislation, sometimes referred to as 'new law' or 'special law', initially comprised pronouncements on a range of matters issued by the king and his council. With the growing supremacy of parliament during the fourteenth century, statutes rapidly became a second tier of law to be enforced in the royal courts in addition to the existing and evolving common law. As a reflection of this change in status and volume, the content also altered: taking on the regulation of human life and behaviour as well as confirming practices in existence.[24]

The area of jurisdiction covered by the forest laws was comparatively large: by the thirteenth century a quarter of England was covered by the royal forest. Accordingly, the laws of the forest were designed to protect the king's deer, trees and other woodland by-products as well as providing for a system of administration. They stood apart from the common law in that the laws themselves always contained an arbitrary element and the punishments

(particularly for poaching) were disproportionately harsh.[25] The law of the march combined a recognition of the difficulties involved in maintaining law and order on the frontiers of the English realm (especially when they were actual war zones) with an acceptance of the necessity for the co-existence of – or an amalgamation with – neighbouring traditions and customs.[26] The codification in 1249 of the 'laws and customs of the march' provided the basis for border law in the Anglo-Scottish march, though the corpus was significantly developed under Edward III and consolidated in Richard II's reign.[27] The law pertaining to the Welsh marches was shaped and defined by voluntary charters in various lordships (such as Gower and Maelienydd), the subject matter being fairly similar from one to another.[28] No specific body of border provisions seems to have been in operation in Ireland, though it appears that inhabitants on the fringes of settled areas were allowed to come to agreements with individuals from the hinterland over compensation for wrongs suffered.[29]

Mercantile law, although not a definite code of laws, comprised a composite body of traders' customs that were applicable internationally and based on natural law principles of good faith and plain justice.[30] While there were some points of connection, its doctrines and procedures differed from both those of the common law and (to a lesser extent) the customs of boroughs. The laws were designed to provide swift justice and overcome problems which might confront and deter a foreign merchant seeking redress, such as local prejudice or an unfamiliarity with both the local and national customs. In this, as well as providing remedies for the ramifications of international trading, they were essentially trans-national in character.[31] The problems posed by differing legal traditions were also potentially faced by sailors who were in dispute with men of other nationalities. However, various bodies of maritime law had emerged, the earliest written forms dating from the late twelfth and early thirteenth centuries. The *Consolato del Mare* was widely used and favoured in the commercial centres of the Mediterranean, but the maritime law relied upon by English sailors comprised an international body of rules (operated in the later fourteenth century through the Court of Admiralty), based partly on civil law and partly on the Laws of Oleron and the Laws of Wisby.[32] The 'law of arms' (certainly up to the mid-fourteenth century) was an ill-defined body of military customs covering a range of matters related to arms and warfare occurring both within the realm and beyond the sea. The procedures used did not follow common law and judgments were often summary. The hereditary Constable and Marshal of the

Royal Household exercised jurisdiction in disputes over indentures, traitors, prisoners and ransoms (later through the Court of Chivalry), though jurisdiction over matters of discipline and armorial bearings was also accorded to constables and captains holding summary courts in the field.[33]

While the various systems of law can be isolated for analysis, they did not in practice inhabit such discrete categories. Customary law by definition, as particular local practices and commonly held assumptions, provided a basis for most, if not all, forms of law. The English common law itself was, according to *Bracton*'s 'Introductio' at least, a generalised and standardised form of custom. Indeed, it was usually referred to as the 'customary law of England' or the 'law and custom of the realm'. Moreover, the dominant perception of the supreme, unadulterated common law, which has been reinforced down the ages by historians of the common-law tradition, is something of an illusion. Civil-law concepts in fact permeated many areas of law and politics and were utilised not only in ecclesiastical matters, but in the prerogative courts (notably the courts dealing with Admiralty and Chivalry business), in international law and in Anglo-Scottish border law.[34]

As was suggested above, within the different jurisdictions there were considerable overlaps and mutual benefits as well as elements of competition and exclusivity. The Court of Chivalry, for instance, was censured in fourteenth-century parliamentary petitions (and restricted by statute in 1384) for encroaching on matters which arguably ought to have been tried at common law, despite the fact that there was clearly a jurisdictional overlap when dealing with cases of debt which related to military contracts or appeals of treason in time of war.[35] As a multifarious body of customs, border law in Wales was influenced not just by English common law, but by the indigenous Welsh law (*Cyfraith Hywel*), the impact of which was particularly noticeable in the northern Welsh marches, especially in criminal law and in the rules relating to land transactions.[36] In the counties neighbouring the Scottish border, Northumberland, Cumberland and Westmorland, the common law was habitually complemented, supplemented and occasionally even overridden by the law of the march.[37]

The common law was itself influenced by other forms of law. Some early contractual actions – such as deceit for sale of goods without warrant or with false warranties of quality, and the action of *assumpsit* for contractual negligence – resemble or have their models in the law merchant.[38] Similarly, while there is evidence that the customary courts responded to the practices of the royal courts in that they copied some of the forms and procedures used at

there, the traffic of ideas and forms was not all one-way. The practices in some manorial courts (and notably Chester city court) pre-empted the statute *Quia emptores* (1290) with its use of grants of surrender and admittance when transferring land,[39] while certain common-law writ actions (such as *mort d'ancestor* and *cui in vita*) likewise had similarly phrased counterparts in use in the manorial courts.[40] The city of London (and some other local courts) also prefigured the central courts in providing remedies for negligent fire-keeping, negligent handling of animals and certain breaches of contractual duty.[41] The continued vitality of the customary courts and the range of actions and business they entertained not only point towards an intimate relationship with the royal courts, but a significant role in the formation of legal attitudes.

Although technically spiritual and temporal were separate and distinct entities, in practice the ecclesiastical and secular spheres proved to be permeable in a number of ways. Indeed, the institutions of Church and state mutually influenced each other's development in that they continually mixed or exchanged practices, personnel and ideas.[42] First, there are indications that the king's courts encroached on a number of areas of the Church's traditional jurisdiction. Benefices and appurtenances became subject to secular law and the royal courts provided the forum for disputes concerning the patronage of livings, as well as their land and income.[43] The king's courts also appear to have accepted some disputes involving testamentary and matrimonial matters (including adultery), and through statutory legislation and judicial examination exhibited a concern for aspects of parenting and childcare – traditionally the preserve of the Church.[44] This was matched by the ecclesiastical courts occasionally moving outside their normal concern for morality and personal conduct in trying to usurp areas of secular law such as debt litigation. Cases concerning petty debts were generally heard in the manorial and borough courts, but many instances came before the ecclesiastical courts. Restrictions on the reach of the secular arm also featured in the alternative sanctions (or relief) afforded those criminals who – by reaching the sanctuary of a church and remaining there – were allowed to abjure the realm, or who upon conviction in the king's court were able to avoid capital punishment by (successfully) claiming benefit of clergy and transferring to the 'softer option' of ecclesiastical jurisdiction. In addition to jurisdictional competition, parallel jurisdiction was exercised in inheritance matters, instances of invalid marriage, and in bastardy cases (where there was a possibility of opting for either lay or episcopal procedures).[45] Sometimes litigation was brought in both courts at the same time.[46]

There were also overlaps in terms of personnel. Half the royal judges were clerks in holy orders, at least until the laicisation of the judiciary, which became widespread in the fourteenth century.[47] This could cause some conflicts of conscience. William Raleigh, a senior royal judge before becoming bishop of Norwich and then Winchester, sided with the barons in their refusal to recognise legitimation by a subsequent marriage, which Pope Alexander III had espoused as canon law.[48] The principal officials of royal government and of the later fourteenth-century prerogative courts of chancery and exchequer chamber, the chancellor and the treasurer, were frequently drawn from the episcopate. Similarly, senior Church leaders were involved in local justice. Bishops, abbots and prioresses, as lords of temporal possessions, controlled manorial or honorial courts at which they sometimes, though not generally, presided in person, exercising responsibility for criminal and customary law.[49] Examples of spiritual incumbents whose authority stretched over a vast territory include the bishop of Durham, ruler of the Palatinate of Durham, and the abbot of Bury St Edmunds, whose lands covered nearly half a county. The peace commissions of the later fourteenth century also reserved positions for spiritual leaders in recognition of their place in local society, though the appointments were purely honorific and such figures rarely, if ever, sat at actual sessions. The peculiar nature of the Scottish frontier, however, may have been an exception since it is clear that Bishop Appleby of Carlisle, one of the royal wardens of the march, was expected to perform his duties and turn up to court sessions (known as days of the march) in spite of his reservations at the weight of business and its suitability for a clergyman.[50] Also in the context of border peace commissions, one of the first appointments to the post-1344 style 'quorum' for the march area in 1373 was the civil lawyer, Master John Appleby, dean of St Paul's Cathedral in London.[51]

The religious side influenced the secular world of law both in terms of substantive legal principles and in the psychological overlap between law and morality. In addition to their invocations of divine law, biblical quotations and elements of sermonising, some legal texts of the thirteenth and fourteenth centuries blend the languages of religion and law often using the term 'sin' (either the Latin *peccatum* or the French *pecche*) as interchangeable with 'offences, injuries, wrongs'.[52] With a number of thirteenth-century and early fourteenth-century judges trained in the 'learned laws' at one of the universities, or at least having some knowledge of the maxims of Roman law, it is not surprising that some of the principles with which they were familiar

should influence their thoughts when considering their native law. Maxims of canon law such as *volenti non fit injuria* (to a willing person no injury is done) – now firmly embedded in the common law of tort – and *nemo obligatus ad impossibile* (no one is obliged to do the impossible) were cited by Chief Justice William Bereford in about 1310.[53] Moreover, the chancery's gradual development as a 'court of conscience' owed much to the procedures followed by lawyers of the ecclesiastical courts. 'Leaving matters to the conscience' was a frequent recourse among lawyers seeking reconciliation among litigants, such as Agnes atte Hull and John Weston, who came to the Ely Consistory Court in a marital suit in 1376. The willingness of the chancellor to take decisions based 'in equity', in other words on fairness and right, was also influenced by the *Denuntiato Evangelica* (a canonical device that enabled someone suing in certain secular matters to have the defendant face trial after two admonitions). It was felt that petitioners had a right on grounds of conscience to have secular causes brought before the church courts so as to ensure the upholding of natural law. Equity itself was founded on the medieval notion that 'right' and 'law' could not be overlooked without endangering the soul and thus formed the basis for a more discretionary, morally-based form of justice.[54]

A moral dimension to law was also invoked through preaching and other Church teaching. The Church's views on guilt and the state of a someone's soul in the eyes of God engendered concern for 'spiritual manslaughter', which was delineated by canonists as a category of homicide, but distinguished from 'corporeal homicide' in that it was regarded as inhabiting the world of thought, intent and impulse. Misunderstandings (on the part of the compilers of penitentials and vernacular manuals for clergy) of the canonists' distinctions could give rise to a conflation of, for example, deadly hate and deprivation of food, which (in the minds of thirteenth-century reformers) led to 'spiritual homicide' being seen as a social crime against the poor and oppressed.[55] In the fourteenth century, many churchmen put forward the belief that since recourse to the legal system symbolised the collapse of normal obligations of Christian brotherhood, those who represented the human face of the law (and whose professional life in fact depended on litigation) must be stirring up animosity within society since they stood to gain by it. John Wycliffe, for example, was particularly vehement against the moral reprehensibility of formal dispute settlement.[56]

The institutional aspect of law (in all its various forms) is clearly an important and necessary area to consider. Nevertheless, it was only one of the contexts affecting legal relations and the legal world-view. The concepts and

strictures of the different systems of law were frequently abrogated, circumvented and supplemented by alternative means of dispute settlement and more informal sanctions. The importance of extrajudicial forms is demonstrated, firstly, by the popularity of arbitration as a way of settling disputes: a method whereby all parties could be pacified rather than one humiliated or punished. Negotiation and private treaties were actively encouraged among the gentry and members of the nobility, [57] but also widely employed by merchants as a means of achieving compromise in trade and commercial disputes.[58] Settlements made outside the courtroom – or 'lovedays' as they were known – were equally favoured by the less affluent parts of society and took place even at the borders of the kingdom, where they were sometimes known as 'days of the march'. Undoubtedly a key resource (either as natural recourse or in last resort), arbitration or mediation embodied a significant response to a breakdown in relations in potentially providing for amicable and non-confrontational approaches.[59]

Informal pressures towards compromise and conformity were also employed behind the closed doors of the gilds, misteries and religious confraternities.[60] The Gild of the Assumption in London, for example, expressly forbade members from embarking on court action against each other before the gild had had an opportunity to settle the argument.[61] The Pepperers' Fraternity of St Antonin, similarly, placed pressure on members not to submit disputes against fellow members to a public court (unless a felony had been committed) and established their own private court within the trade to which differences could be brought for arbitration and settled swiftly and cheaply.[62] Private settlement within the bounds of the family, affinity or work association was probably a natural and necessary first step – one that should be kept in mind – to avoid bringing disrepute upon a particular community. Where the private failed, more public methods of shaming, including expulsion or exclusion, might be considered.[63]

Again, we should not regard the formal judicial apparatus and extra-legal methods as incompatible or mutually exclusive. Nor were out-of-court settlements and informal sanctions viewed simply as an alternative. Non-institutional forms, significantly, operated both *within* and *beyond* the legal order of the state. Indeed, the motives behind their employment and the particular forms they took relied in part on the very existence of an established legal system; and litigants recognised the benefits of utilising both law courts and arbitrament. For instance, initiating litigation might be seen simply as a preliminary stage in the arbitration process; and could be