Common Law - Henry II and the Birth of a State

By Professor John Hudson
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Whilst many remember Henry II for his turbulent relationship with Thomas Becket and his sons, Richard the Lionheart and John, it was the establishment of permanent professional courts at Westminster and in the counties for which he might be best remembered. These reforms changed forever the relationship of the King to Church, State and society.

Law and the State

In the mid-1230s, the rulers of England were confronted with a problem concerning bastards. Church law legitimised children born out of wedlock whose parents subsequently married. English lay law did not legitimise such children. This was a major problem, for a bastard would not be the heir to his father's lands. Churchmen sought that English practice be brought in line with ecclesiastical thinking, but the barons resoundingly rejected their advances: 'we do not wish to change the laws of England.' By the 1230s, therefore, law was seen as an important element in national identity, even though English law in reality still had many resemblances to that of France and indeed of other areas.

Such an association of law and national identity may be related to the development of the sovereign state, and certainly in modern thinking law and the state are often closely associated. However, 'state' is a problematic word in writing of the Middle Ages. It was not used in its modern sense in the England of c. 1200. It has implications of impersonality which seem inappropriate to a world where the king's anger could have a major impact upon individuals and upon the affairs of the realm. It is also a word with more than one meaning. It can refer to one state as opposed to another, say England as opposed to France. But it can also mean the state as opposed to society, or the state as opposed to the individual.

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Nevertheless, it can be argued that law contributed significantly in the development of the English mediaeval realm towards what may be called a 'state'. Firstly, political thinking was greatly stimulated by clashes between kings and Church over their relative authority. These frequently were conducted through polemic resting heavily upon law and legal argument, and were a vital stimulus to the ideological thinking which underlay the development of abstract notions of the state. Secondly, the study of Roman and the church's canon law from the late eleventh century provided much of the language and many of the ideas for thinking about the state. Thirdly, a frequently used test of the existence of the state is that it should have a monopoly of legitimate violence. In the middle ages - as in all societies - law was only one method of resolving disputes. An alternative was the resort to violence. Rulers sought to limit or to prevent such direct action, to channel disputes through royal law. Fourthly, law was important in establishing a relationship between the king and his people as a whole, rather than simply the great men of their realm. Such a direct relationship between king and subject is another important element in many views of the state.

Law before Henry II and the Impetus for Reform from 1154

Even before the reforms of Henry II (1154-89), which are often seen as the vital period for the creation of English common law, England had known a legal regime characterised by considerable royal control. From Anglo-Saxon England came a tradition of law-making which focused on the king as the protector of the realm, the corrector of wrongs. Likewise, the powerful administration of the period tackled many of the same problems of theft and


Thomas Becket in stained glass at Canterbury Cathedral ©

interpersonal violence as would Henry II, and in rather similar ways. This administration, characterised in particular by the courts of the shire and its sub-division the hundred, survived the Norman Conquest. Crucially, in contrast with some areas of France and elsewhere in Europe, these administrative areas largely remained under royal control. The Normans also brought important elements of their own to English law, most notably customs relating to land-holding.

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In the middle of the twelfth century, however, both the extensive involvement of the king in particular legal matters and the general administrative pattern were severely threatened by the civil war of King Stephen's reign (1135-54). The need to restore royal authority, to return the realm to its condition in his grandfather's reign, was one of the main forces behind Henry II's reforms. The same desire underlay his efforts to reassert control of the Church. These efforts brought him into conflict with his own chosen archbishop, Thomas Becket, and the circle who conducted the dispute with Becket, and developed their ideas of kingship in that context, were the men whose ideas shaped the legal reforms. At the same time, impersonal factors, such as the growth of literate government, also had an impact upon legal development.

The Angevin Legal Reforms

Strong law enforcement is often seen by historians as a sign of 'good government'. To people of the time it could be frightening:


Ordeal of water ©

By royal command, men who had committed homicide, theft, and the like were traced in the various provinces, arrested, and brought before judges and royal officers at Bury St Edmunds and put in jail, where to avoid their liberation by some ruse, their names were entered on three lists by the command of the judges. Amongst them was one Robert, nicknamed the putrid, a shoemaker from Banham, who was certain he saw and heard himself put on the list.

Robert either was under a misconception or his name was miraculously removed from the list, but the incident shows the individual impact of legal reforms. Royal legislation, referred to as assizes, was issued at Clarendon in 1166 and Northampton in 1176 in an effort to clamp down on serious offenders. Royal justices were to travel throughout the realm, and:

Inquiry shall be made throughout every county and every hundred, through twelve of the more lawful men of the hundred and through four of the more lawful men of each village upon oath ... whether there be ... any man accused or notoriously suspect of being a robber or murderer or thief.

All accused by the presenting juries were to be put to ordeal of water...

These bodies of twelve are referred to as 'juries of presentment', and are the ancestors of the Grand Jury which survives in the U.S. legal system. Their accusations did not replace but rather supplemented the traditional form of prosecution where the victim, or a relative in cases of homicide, had to bring an individual accusation against the suspect. It seems that Henry regarded the traditional methods as insufficient, and hence introduced the general practice of presentment to the travelling justices. All accused by the presenting juries were to be put to ordeal of

water, a test whereby those who floated were regarded as guilty, since they were rejected by the water which had been blessed by a priest. Any convicted were to lose a foot and, from 1176, their right hand. Even if acquitted by ordeal, those of particularly ill-repute were to leave the realm, under oath never to return.

Changes were also introduced to land law. Swift methods were employed to deal with a variety of cases, for example concerning recent dispossession of land ('the assize of novel disseisin') and disputed inheritance ('the assize of mort d'ancestor - death of an ancestor). These involved a royal writ (a letter) being sent to the sheriff, ordering him to assemble twelve men who would declare, for example, whether the plaintiff really had been recently dispossessed 'unjustly and without judgment'. In their speed and focus on a specific, limited issue, such procedures differed from the traditional approach, which dealt with the general and often more difficult issue as to who had the 'greater right' to the land. This question could still be raised, and Henry offered sitting tenants trial by jury as an alternative to defending their case by fighting a duel, but the speed of the new procedures concerning possession rapidly made them popular.

Law, Magna Carta, and the development of the State

Henry II's reforms regarding land law protected tenants against their lords, by allowing them to look to the lord's superior, the king. One group of tenants did not have that option, the tenants-in-chief who held directly of the king. Their discontents are reflected in the varying attitude towards law displayed in Magna Carta, issued by King John in 1215. Certainly some clauses show the popularity of new procedures, for example promising the frequent holding of assizes such as novel disseisin. However, others protested about the abuses of royal law, for example the delaying or selling of justice, a problem which seems to reflect the huge amounts sometimes charged tenants in chief. They were demanding that law be applied to all free men in similar fashion.

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It is further notable that whilst some clauses of Magna Carta talk in terms of lords and tenants, others refer to free men generally. It is as if two, probably unconscious, models underlie the charter, one regarding the realm as based upon a hierarchy of lordship, the second regarding it as consisting of the king and all his free subjects. This model, which we earlier associated with ideas of the state, had been encouraged by developments in law and justice. In 1170 Henry II's officers had heard complaints concerning the administration not only of sheriffs but also of lords. Likewise, his justices travelling throughout the realm had brought the free men in the local courts into regular, direct contact with central government, where their predecessors had dealt with local officials. Henry's regime was not necessarily more powerful than that of the greatest Anglo-Saxon or Norman kings, but it worked in a different way, a way which foreshadowed later mediaeval developments towards a state.

Find out more

Books

W. L. Warren, *Henry II*, London, 1973, is the standard work on the king. R. J. Bartlett, *England under the Norman and Angevin Kings, 1075-1225*, Oxford, 2000, is packed with ideas and unusual information. First published in the 1890s, Sir Frederick Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I* (2 vols, repr. Cambridge, 1968), is a masterpiece in comparison with which all later efforts pale. J. G. H. Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta*, London, 1996, is a straightforward introduction to the subject. J. C. Holt, *Magna Carta* (2nd edn, Cambridge, 1992) is both masterful in its treatment of the charter and profound in its analysis of long-term developments.

About the author

John Hudson is Professor of Legal History in the Department of Mediaeval History, University of St Andrews. He is author of *Land, Law, and Lordship in Anglo-Norman England* (Oxford University Press, 1994) and *The Formation of the English Common Law* (Longmans, 1996). He has edited and translated a major twelfth-century chronicle, *The History of the Church of Abingdon* (two volumes, Oxford University Press, 2002, 2007) and is currently working on the volume of *The Oxford History of the Laws of England* covering the period 870-1220. His media contributions include interviews

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