Zeitschrift des Max-Planck-Instituts für Rechtsgeschichte und Rechtstheorie
Journal of the Max Planck Institute for Legal History and Legal Theory

Rechts Rg geschichte

Rechtsgeschichte
Legal History

www.lhlt.mpg.de

http://www.rg-rechtsgeschichte.de/rg30
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 30 (2022)
http://dx.doi.org/10.12946/rg30/241-243

Rg 30 2022 241 – 243

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The Common Law of the Foreign Past

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The Common Law of the Foreign Past*

Sir John Baker is the (English) lawyer's legal historian, and in his craft he is an unquestionable master. His book, *English Law Under Two Elizabeths*, is an expanded form of his Hamlyn lectures, a series whose explicit purpose is to further the »Common People's« understanding of the »privileges which in law and custom they enjoy« through »comparative jurisprudence«.[1] The lectures are always given by well-established lawyers or scholars, and the list of former lecturers reads like a who's-who of the English legal profession and academia from 1949 onwards.

Given the intended audience, one cannot expect much in the way of overt analysis of historiographical or methodological choices, or other such academic matters. Nor is the author known to be particularly apologetic of his rather internal view of English law, its procedures and practitioners. However, perhaps in an attempt to find an approach more engaging to the general public, the author has chosen to present the lectures and the resulting book as a ›comparative law‹ of English law from the reign of Elizabeth I (r. 1558–1603) and English law from the reign of Elizabeth II (r. 1952 – present). Legal historians familiar with the author's excellent work may be forgiven a degree of amusement about this choice – even Sir John Baker's comparative law scholarship is between English law and English law – but the approach has the potential of making certain historiographical questions comprehensible to a non-expert audience without ever having to mention them. It is difficult to understand the legal normative landscape from 400 years ago without understanding the context in which those norms existed, a methodological assumption that is not too different from the basic idea of comparative law between two modern jurisdictions. However, some questions arise as to how rigorously this approach is followed, to which I shall return below.

As regards its content, the book is classic Baker. It is full of interesting points about the development of the doctrine of precedent and majority judgments (13) and how this relates to archiving practices (154), details on individual cases and their costs (e. g. 21), statistics about the socio-economic status of plaintiffs and defendants (23) and the composition of the legal profession (29). It also includes administrative minutiae of which remedies could be enforced in which court and what modern courts they were consolidated under (e. g. 176–177), difficult logical puzzles of whether common law is extinguished or made dormant by statute that is later repealed (126 onward), and statistics about the number of lawyers in relation to the general population in the 16th century and now (185). It may be doubtful whether members of the general public really perceive the »privileges they enjoy« as a result of these figures or common law logic puzzles, but this approach is very much in keeping with the author's other works.

The book is at its finest as an introductory work of internal legal history, that is, the history of legal thought and the legal profession in England. Its articulation of the basic tenets of the common law as an »immemorial« (e. g. 35) expression of reasoning and logic and its consequent uneasy relation to statute (e. g. 92–94 and 96 onward) are as succinct and accessible as any the reader is likely to find. In particular, the »fiction of legislative intent« (103) and the overall approach – that statutes are intended to cure some mischief within the common law – is an interesting inheritance of the internal logic of the common law that survives in some form to the present day (139) and helps us understand some of the methodological differences between continental and common law systems (though such explanation is not actually attempted in the book).

A minor point of criticism, perhaps inherent in Baker's general approach as the foremost doctrinal

* John Baker, English Law Under Two Elizabeths. The Late Tudor Legal World and the Present, Cambridge: Cambridge University Press 2021, 222 p., ISBN 978-1-108-83796-5

1 Chantal Stebbings, »The Hamlyn Legacy«, in: Claire Palley, The United Kingdom and Human Rights, Hamlyn Lectures Vol. 42, London 1991, xiii–xx.

legal historian of English law in Britain today, is that a general audience (and even trained historians) will not find it easy to navigate the difficult distinctions in 16th-century land law (see, e. g., 113) or highly technical remedies of administrative law (177) without at least the first two years of formal legal education. While some legal sophistication is to be expected from doctrinal legal history, it is perhaps a symptom of a more substantial limitation of this otherwise excellent work.

As noted, the general approach is commendable in that it attempts to teach a general audience not just about the substance of doctrine in the 16th century but also about the methodology of doctrinal legal history in a way that promises to be quite engaging. However, in practice the emphasis of the ›comparative‹ approach seems to be in finding similarities that sometimes feel stretched in order to make pre-Enlightenment English law seem conspicuously modern, without a full explanation of the immense socio-economic differences between the two periods.

This glossing over of the comparative differences in favour of highlighting abstract similarities between the two periods is reflected in the legal analysis as well. Almost entirely absent is any real discussion of the messy multinormativity and legal pluralism of the early modern era. Piepowder courts and the Doctors' Commons are each mentioned only once, without any explanation of the various overlapping jurisdictions and formalistic difficulties that plaintiffs were likely to encounter. Mentioning each type of court only in conjunction with its best feature and without discussing the desperate in-fighting between these jurisdictions in the relevant period[2] makes early modern English law seem like a well-functioning machine of specialist courts and well-defined jurisdictions, and hides the fact that even a term like ›English law‹ might suggest a unity of purpose that is more myth-making for a general audience than scholarship intended to inform.

Similar myth-making appears to apply to the content of law in the 1500s. In an effort to make Elizabethan law seem recognisably modern, Baker argues that it included nascent forms of individual liberty and the ›rule of law‹ that even bound the Queen. However, he then immediately proceeds to show multiple examples that appear to disprove these points. Women, we are told, were free – but could not vote, serve in parliament or on juries, and lost their legal autonomy when they married (40). ›Aliens‹ were protected by the common law – unless they were Jews, Jesuits, Travellers, Irish labourers, black immigrant workers, Hanse merchants, or had previously been expelled or banned from entering the country – and no ›foreigner‹ could buy land (42). Given that these exclusions from the common law's protection amount to most economic or socio-cultural activity (even including travelling »out of ancient custom« or to spread religion), it is difficult to see this as equal protection of foreigners. Similarly, Baker states that Elizabeth I's reign was a »constitutional monarchy« (79), but also notes that she dissolved Parliament at will, declined to summon it at all when it suited her, and locked up MPs if they »overstepped the mark in debates« (80). She imposed martial law in crises, intervened in private suits to preserve her privileges and prerogatives, and proclaimed rigid adherence to formalistic logic to be »absurd« as a reason for not trying Mary, Queen of Scots according to the common law (81–82).

Of course, Baker's claim is only that the roots of our modern legal landscape, with its emphasis on individual liberty and the rule of law, can already be seen during the first Elizabeth's reign, and he does not shy away from pointing out the incongruities mentioned above. However, some of his claims about ›liberty‹ seem so bizarre in their context that I cannot make out whether they are intended as serious academic commentary or as jokes to amuse a lecture hall audience.

Whether inadvertently or intentionally, much of what Baker does to make early modern law reflect the principles of a modern constitutional monarchy seems to line up with the basic myth of the common law as an ancient normative system discovered through reasoned argument that is somehow still recognisably the same, as a system

2 Baker has written about the resolution of some of these tensions in John Baker, The Common Lawyers and the Chancery: 1616, in: idem., The Legal Profession and the Common Law, London 1986, 205–229.

if not in detail, as it was in the days of Sir Edward Coke. Baker is, after all, the common lawyers' legal historian, and the common law survives on its myth of continuity that the Hamlyn lectures exist to highlight. When the book is seen in this light, Baker is only following the expressly stated purpose of the Hamlyn Trust. It is probably not a coincidence that the »common law man« – the personification of the English legal system's central myth of a stubbornly free, responsible, just and reasonable person that English law has as both its fictional maker and subject – was sketched out in early Hamlyn lectures (166). The book is therefore highly commendable and a good introduction to Baker's work, but should be seen within its context as one of a lecture series intended to inform the public about what a magnificent legal system England has.

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Musulmanes entre infieles*

Las interacciones entre cristianos y musulmanes representan un elemento sustancial en las dinámicas políticas, sociales, económicas y culturales del ámbito mediterráneo a partir del siglo VII, cuando se produce el comienzo de la expansión islámica en el Próximo Oriente y el Norte de África, que alcanzó la península ibérica en 711. A partir del siglo XI, sin embargo, el proceso de arabización e islamización de amplias zonas del espacio mediterráneo oriental y meridional fue seguido por una dinámica inversa de expansión cristiana que supuso el retroceso territorial de los musulmanes en distintos escenarios históricos, de forma definitiva, en algunos casos, y temporal, en otros. Un proceso que se extiende más allá de los límites tradicionalmente admitidos del período medieval, con las conquistas portuguesas y españolas en el Norte de África durante el siglo XVI y la posterior dinámica de expansión colonial decimonónica, cuyas consecuencias alcanzan hasta la segunda mitad del siglo XX.

La obra reseñada analiza un capítulo importante de estas cambiantes relaciones entre musulmanes y cristianos en el espacio mediterráneo. Desde una perspectiva histórica amplia, situada entre los siglos XV y XX, *Leaving Iberia* plantea el problema legal y doctrinal asociado a la presencia de comunidades musulmanas que viven bajo el dominio político de autoridades no islámicas. En el contexto expansivo y de superioridad islámica inicial, este asunto no había preocupado a las autoridades musulmanas, más interesadas en definir el estatus legal de las minorías no musulmanas que vivían en el territorio islámico. A partir del siglo XI, en cambio, los ulemas, los hombres de religión que detentan la autoridad religiosa en las sociedades islámicas suníes tradicionales, comienzan a enfrentarse a una realidad hasta entonces inédita o marginal. A lo largo del tiempo, distintos ulemas emitieron fetuas (dictámenes legales) en las que dieron respuestas variadas a este asunto, formulando opiniones contrapuestas sobre la posibilidad de vivir como buen musulmán en un contexto político y social no islámico. En otras palabras, los ulemas debieron enfrentarse al problema de si la doctrina islámica obliga a vivir en la *dār al-islām*, el territorio gobernado por autoridades islámicas, y, por lo tanto, no es legal para el musulmán permanecer en la *dār al-ḥarb*, literalmente, »la casa de la guerra«, es decir, el territorio donde no rigen las normas islámicas.

La estructura de la obra reseñada presenta la siguiente forma. Tras la Introducción (cap. 1), se suceden cuatro partes, en las que la autora aborda el análisis de textos islámicos datados entre los

* Jocelyn Hendrickson, Leaving Iberia. Islamic Law and Christian Conquest in North Africa, Cambridge: Harvard University Press 2021, 417 p., ISBN 978-0-674-24820-5