

Law, Lawyers and the Interregnum: 1649-1660

Michael A. Milgate

21 February, 2007

Law, Lawyers and the Interregnum: 1649-1660

**Michael Andrew Milgate
BBus (Newcastle)
MEd (Higher & Professional) (UTS) MPET(WVET)(Deakin)
MCom(Hon) (UWS)
PhD (Law) (UNSW)**

**A Thesis Submitted to the
School of Classics, History and Religion
Faculty of Arts, Humanities, and Social Sciences
University of New England**

in fulfilment of the requirements for the degree

Master of Arts (Honours)

21 February 2007

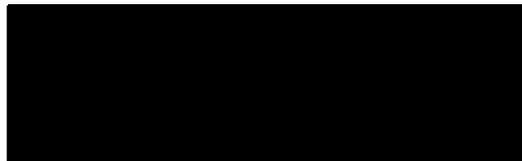
© 2007 Michael A. Milgate

This thesis is copyright. Apart from any fair dealing for the purposes of private study, research, criticism or review as permitted under the Copyright Act of the Commonwealth of Australia, no part may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise.

Certificate of Originality

I hereby declare that this submission is my own work and to the best of my knowledge it contains no material previously published or written by another person, nor material which to a substantial extent has been accepted for the award of any other degree or diploma at the University of New England (UNE) or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNE or elsewhere, is explicitly acknowledged in the thesis.

I declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation, and linguistic expression is acknowledged.



Michael Milgate
21 February 2007

Acknowledgements

Thanks are owed to my supervisor, David Kent for his advice and editing suggestions.

This research grew from remarks from two of my examiners for the PhD I did in legal history on the last book Thomas Hobbes wrote – *A Dialogue*. Not coming from a pure or traditional history background, the comments and suggestions by David were invaluable to ensure that what I produced was of an appropriate standard for a history thesis.

Many thanks to the interlibrary loan staff at the University of New South Wales for their assistance in obtaining copies of many of the period pamphlets, tracts, books and so on, that were essential to this thesis research.

A special thanks to AQDLT for help with proofreading and putting up with my consistent “prattling on about dead has beens, like they really changed the world.”

Abstract

In the revolution that marked the beginning of the English Commonwealth and Protectorates, law and the lawyers were subject to devastating challenge. Radicals, perceiving a failure of the law to guard the liberties of the subject, demanded sweeping changes which Oliver Cromwell and succeeding parliaments consistently threatened to implement. Yet these attacks were not against the law as law. Through political discourse and the imagery of legal ceremony, Interregnum governments invoked the authority of law. The law was a scene of contention as protagonists of various persuasions sought to possess it. Lawyers were therefore under enormous strain. This thesis will study that strain, the responses of the lawyers as a whole and, where possible, as individuals, to the competition for the sanction of legal authority. The key element of the lawyers' response was the refinement of a professional ideology characterised by a rigorous attention to form and precedent. That ideology ran counter to early seventeenth-century advances in the study of legal history which in turn supported the legal positivism so important to the intellectual underpinnings of the republic. Though John Selden is considered to be the better jurist, Sir Edward Coke's ancient constitutionalism offered lawyers the tools to preserve the shape of a law in which they held a proprietary interest. That ideology had political and professional consequences. In parliament, lawyers placed a conservative stamp on the direction of constitutional development. Partly in reaction to the instability occasioned by a plethora of constitutional innovations, partly out of their faith in the old forms of the past, lawyers tended to impede parliamentary business in the early 1650s. However, under the more conservative *Humble Petition and Advice of 1657*, lawyers acted pragmatically. They saw in that constitutional package progress towards their goal of a restoration of the monarchy if not of Charles II. Professionally, the lawyers' ideology justified service in the courts of a usurping power. After 1642, patterns of practice in the courts changed little. This continuity testified to the pre-eminence the profession gave to the law over the state, as well as to the success of the bench in insulating the courts from reformist fervour.

Contents

Acknowledgements	i
Abstract	ii
Contents	iii
A note on references	iv
A note on the literature	iv
Chapter One – The Competition for the Law	1
Chapter Two – The Ideology of a Profession	6
Chapter Three – Professional Politics of the Law: Development 1642-1649	26
Chapter Four – Professional Politics of the Law: Expression 1649-1660	50
Chapter Five – Legal Institutions	73
Chapter Six – Ritual, Language, and Power: The Trials of the Tyrannicides 1660	94
Chapter Seven – Conclusion	
Appendix 1 – Technical law texts, 1600-1670	105
Appendix 2 – Motions in King's Bench/Upper Bench Pleas Side, Entry Books: 1640-1662 (KB/125)	108
Appendix 3 - Motions in King's Bench/Upper Bench Crowns Side, Entry Books: 1640-1662 (KB/21)	154
Appendix 4 - Motions in Commons Pleas, Entry Books: 1640-1662 (PRO CP/45)	164
Appendix 5 – Motions in Exchequer of Pleas Entry Books: 1640-1662 (E/12)	171
Appendix 6 – Motions in Exchequer of Pleas Remembrancer Rolls: 1640-1662 (E/125)	177
Appendix 7 – Motions in Chancery Decrees and Orders: 1640-1662 (C/33)	185
Bibliography	193

A note on references

As many of the titles of the primary sources appear in different variations depending on reprints or how they are catalogued by different libraries, I have cited them as they appear on the catalogue for the British Library to ensure consistency and enable the reader to identify the material should they seek to consult it.

A note on references

I have not included a more traditional literature review as a separate chapter in this thesis. The rationale for this approach is that while there are many books and articles written on specific topics, aspects or people involved with English Civil War, the removal and execution of a tyrant, the Commonwealth and Protectorate and the Restoration of the Monarchy, there is nothing that looks at the legal profession and how they acted as a whole during the period 1649-1660.

For example, Christopher Hill's *God's Englishman: Oliver Cromwell and the English Revolution*,¹ Veronica Wedgwood's *The Trial of Charles I*,² Blair Worden's "The 'Diary' of Bulstrode Whitelocke,"³ and Ruth Spalding's *The Improbable Puritan: A Life of Bulstrode Whitelocke, 1605-1675*⁴ deal with individuals, Blair Worden's *The Rump Parliament: 1648-1653*⁵ and David Underdown's *Pride's Purge: Politics in the Puritan Revolution*⁶ look at specific events. While David Lemmings and Wilfrid Prest do look at the English Bar they do so after the restoration or before the period in question respectively.⁷

The literature is discussed as and where it relates to what I am discussing within my thesis.

¹ C. Hill, *God's Englishman: Oliver Cromwell and the English Revolution*, (London: 1970)

² C.V. Wedgwood, *The Trial of Charles I*, (London: 1964)

³ B. Worden, "The 'Diary' of Bulstrode Whitelocke," *English Historical Review*, 108 (1993)

⁴ R. Spalding *The Improbable Puritan: A Life of Bulstrode Whitelocke, 1605-1675* (London: Faber & Faber, 1975)

⁵ B. Worden, *The Rump Parliament: 1648-1653*, (Cambridge: 1974)

⁶ Underdown, D. *Pride's Purge: Politics in the Puritan Revolution* (Oxford: Clarendon Press, 1971)

⁷ D. Lemmings *Gentlemen and Barristers at the Inns of Court and the English Bar, 1680-1730*, (Oxford: 1990); W.R. Prest *Some Aspects of the Inns of Court, 1590-1640*, DPhil Thesis, Oxford University (1965); W.R. Prest, *The Rise of the Barristers: A social history of the English Bar 1590-1640* (Oxford: 1986).