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NEW APPROACHES TO LATE MEDIEVAL COURT RECORDS

**Afterword: Court Records and the
Growth of States 1100–1800**

Ian Forrest

University of Oxford, GB

ian.forrest@history.ox.ac.uk

An afterword to the special collection 'New Approaches to Medieval Court Records'. The piece reflects on the role of law courts in medieval and early modern state formation, and offers critical assessment of the state of the field, examining chronological and geographical limitations to current scholarship.

The emergence of law courts to occupy a central position in medieval and early modern society enables historians to observe a number of phenomena in considerable detail, among them the growth of states.¹ In contrast to students of the earliest known states in Mesopotamia around 3000 BCE, or even compared with scholarship on Hellenic cities or the Roman Republic and Empire, historians of Europe and its colonial territories between about 1100 and 1800 CE do not have to rely upon archaeological or literary echoes of state formation; they can see its sociology unfolding in real time. The sociology of state formation is a story of how institutions formed around power and status hierarchies, and how those bodies subsequently evolved through innumerable interactions with the wider society in which they sat. Late medieval and early modern court records, whatever their omissions and omissions, show us these interactions up close. They are thus unrivalled in world history as evidence for the intensification of institutional and political power, to say nothing of their fascination for social, cultural and legal historians, as amply demonstrated in the essays gathered here.

Court records are minute parts of much larger historical processes. As if they were particles of calcite, water-borne through layers of limestone, running along rifts and folds in the rock to form stalactites and stalagmites, the fragments of everyday life that became contests in medieval and early modern law courts left traces of themselves around the existing institutional structures, making these gradually more substantial, but also – over time – changing them. Certainly, the entire business of historians is gauging continuity and change, but seldom do we have the sources at our disposal to see the discrete moments in the story so intimately. The consequence of an individual court case, like a single particle of calcium carbonate in a cave, may be imperceptible, but the cumulative effect of thousands or hundreds of thousands of court cases can be made visible through historical analysis.

The physics of this simile are all wrong of course, given that the timescales of calcification stretch way beyond the lifetime of human political formations. But it

¹ In using the word 'state' I do not claim that medieval government was of a kind with its modern successors; I use the term as shorthand for the accumulation of institutions around power hierarchies, and thus applicable to royal, ecclesiastical, aristocratic and civic government in the Middle Ages.

is still instructive, because courts and states do seem immutable to the people who have to deal with them. The historian though, takes a wider view, whether she is examining the far-reaching ramifications of a single lawsuit through the lens of the micro-historian, or describing changes in the structures and use of a court over a century or more. Despite the riches of this field of research, whose varied insights and potential are demonstrated by the essays in the present collection, court records have not been exploited to their full potential in explaining the institutional and social development of state power. Legal history, whether purely procedural or wrapped up in the larger enterprise of constitutional history, tends to be based on the assumption that state formation is self-generated within the loins of the very institutions whose development is under examination. Social and cultural history tends not to concern itself with the institutional intensification implied by the activities of courts, preferring to use their records as windows – however problematic – into historic lived experiences. As the essays gathered here indicate, these approaches to court records can be combined, and surpassed, in myriad ways.

In order to view late medieval court records in this larger context we can begin by distinguishing between the stated purpose and historical effect of courts. Many judges and jurists in the Middle Ages might have agreed with William the Conqueror's *dictum*, ventriloquized by the chronicler Orderic Vitalis (Chibnall, 1969–80: iv.97), that 'right custom requires and the divine law ... commands earthly rulers to restrain evil doers so that they cannot injure the innocent', but we should not accept such abstract and general statements as the final word on how courts actually functioned.² Historical evaluations of the meaning of justice ought to ask whom it served and how it was provided, and here court records are invaluable. But courts, it should be remembered, had structures and priorities that served particular interests, and this determines the meaning of the evidence that their records provide to historians. They served the interests of property and status hierarchies.

² For invaluable discussion of the intellectual context in which such words made sense, see Byrne (2019).

For example, the formalisation of the English Common Law under Henry II served, in the first instance, the property interests of the crown (Hudson, 1996). Three other functions of the common law courts – holding royal officers to account, acting for the common good, and private litigation – developed only as by-products of what was in effect the king's private court. The evolutionary success of these by-products is then highly instructive. How telling that the major extension in the business of the English royal courts in 1170, known as the Inquest of Sheriffs, accommodated the interests of a wider group of property-holders whose rights had been abused by public officials, a.k.a. corruption; thus new organs of royal rule were created to protect people from the agents of that same public authority. This tells us that the history of accountability (in which the people, via the law, gains some measure of control over unbridled power) is really the history of social predation and the co-option of dissent: complaints about public authority were converted – via the courts – into support for public authority. In this way the role of courts in state formation was to spin the wheel of resistance hard, so that it turned again to the benefit the powerful.

Courts were also, across Europe between the mid-twelfth and mid-fourteenth centuries, adding inquisitorial powers to their technologies of law. When judges acquired investigative capacity in addition to their adjudicatory powers it became possible for courts to take a much more interventionist approach to the world around them. *Inquisitio hereticae pravitatis* was only the most famous example of this new power, which was in fact exercised in every region of Europe to prosecute offences 'in the public interest' (Fraher, 1984). Such a nebulous, yet formidable, moral claim was fed by anonymous reports (*publica fama*), but anonymity did not mean open access to the law. Credibility was determined in such a way as to ensure that the courts served the interests of older propertied males. This is often celebrated as a great widening of the political community, bringing large numbers of substantial peasants and townsmen into the nascent public sphere. Such is true so far as it goes, but it is a conclusion that does not take account of whose testimony was not credible: the poorest, women, children. In this second way the courts of late medieval Europe served status hierarchies of wealth, gender and age (Forrest, 2018).

The third function of courts in the later Middle Ages was to adjudicate litigation between private parties, be it a claim of crimes against the person or a suit for recovery of debts. Here the 'progressive' narrative of state growth – that courts permitted the redress of wrongs and the individual pursuit of justice – seems most secure. From one point of view it certainly is. But this function of courts needs to be examined closely if we are to truly grasp what the medieval courts were and the nature of their impact upon society.

When someone opted, or was coerced, to use a court to settle a dispute or redress a wrong, there would be a winner and a loser if the case proceeded to a conclusion, or the parties might step back from the brink and find a compromise solution (most medieval lawsuits appear not to have reached the stage of judgement). It would feel to those involved as though they were struggling to win, or at least not to lose. Again, this is a partial description of reality. What is missing is an appreciation of how the court itself – whatever the outcome of an individual case – was the real winner, growing in power and stature with every case brought before it. This accretion of institutional power came about because the more cases it heard, the greater the impression of a court's authority would become in a self-reinforcing cycle. For the history of the courts as institutions, it therefore mattered not a bit who won or lost, only that its business grew. When business stopped growing or was leached away into other jurisdictions – as happened with the English church courts in the 1480s and 1490s – a court's power could go into terminal decline (Palmer, 2002: 23–7, 63–9).³ In this way the social history of values and disputes is inseparable not only from legal history but also from the history of power.

To adopt a concept from Anna Tsing's analysis of value and meaning in commodity supply chains, late medieval courts were therefore engines of transformation or 'translation', co-opting activity in one realm of life for the benefit of another: in this case a twofold translation. First, anger about the accumulation and abuse of power was translated into fuel for the further extension of that very power, and second, the

³ It is notable that the attack on the church courts preceding the break with Rome has not been seriously considered as a contributory factor in the declining power of the medieval church.

friction of everyday life – arguments with neighbours about behaviour and resources – was transformed into state growth and the preservation of hierarchy (Tsing, 2015). In these ways courts were the means by which nascent states entered the daily lives of those they sought to rule, legitimising institutional power by edging out the alternatives (face-to-face compromise or personal violence). Courts were successful in this because they formed alliances with a particular group in society – the older, wealthier male peasants and townspeople – protecting their property and providing a vehicle for the pursuit of their own economic and moral agendas. Despite their rhetoric, courts did not simply ‘restrain evil doers’, regardless of who they were or against whom the evil was directed. That would in fact have been self-defeating, disincentivising local patriarchal support for courts.

The records which all this activity generated, and upon which it was based, are insightfully characterised in a number of contributions to this special issue. For me one of the most striking things about judicial records is that they reveal moments of cultural and political ‘translation’ as they happened. For a start it is now a commonplace of the source criticism associated with medieval judicial records that they do not offer up the unmediated words of victims, defendants and witnesses. Instead the testimony reported in them is understood to have been called into being by the dictates of legal and institutional rules, translating one form of experience into another (Arnold, 1998). Put another way, people talk differently when they are answering questions in court – perhaps on the advice of a lawyer – so as to achieve a certain result. Furthermore, the original language in which people (other than lawyers) addressed courts was almost always one of the European vernaculars, whereas until the fifteenth century very few courts kept records in anything other than Latin. Again there was a translation from one language into another. But overriding all of this linguistic translation, the court, as an assemblage of rules, practices, personnel, places and – crucially – record-making, was a machine for turning fragments of everyday life into fuel for the engines of state growth.

Finally, since my comments here clearly speak to a longer period than that usually encompassed by the ‘later Middle Ages’, it is necessary to say something

about periodisation and the geographical constraints of studying European court records. The chronological beginning and end of the late medieval period present some interpretative difficulties. First, it is impossible to pinpoint the origins of courts – or more generically occasions when judgements were delivered by a legal authority – since they were certainly present before the ‘late medieval’ period, with many areas of Europe between 400 and 1100 CE carrying an inheritance of Roman law or seeing rulers claim public authority, besides knowing popular involvement in justice as litigants and jurors (Macnair, 1999). The late medieval centuries did, however, see acceleration in the activity of courts, growing volumes of business, new forms of action, new modes of recording, increasing organisational complexity, and new ideologies of power and authority. All of this, together with the numerical density of seigniorial, civic, church, royal and other courts, differentiated the later from the earlier medieval centuries in the extent to which courts played a central role in everyday life.

These were, however, characteristics that persisted (though not unchanged) from the so-called medieval into the equally arbitrarily named ‘early modern’ period. While there certainly was a European inflection point around 1500, defined by the coincidence of religious reform, economic growth, and the acceleration of European overseas colonialism, there was no sharp break in the nature of courts or their records. The major developments here were a shift in archival practice towards more systematic preservation of court records, and the extension of the social field governed by ‘European’ courts to encompass numerous colonial and imperial populations.

Apart from in some Italian cities, where judicial records enter the hundreds-of-thousands of entries already in the thirteenth century, it was only in the sixteenth century that most European court records were systematically stored for future reference, rather than being destroyed once their immediate purposes had been served (De Vivo, 2007). Furthermore, from this century onwards, the institutional patterns of ‘medieval’ European justice were imposed around the world, forming one of the most important bases of colonial rule (Roque & Wagner, 2012). This means

that even though early modern historians have vastly more sources to grapple with, and their analyses cannot be plausibly restricted to continental Europe, the social and institutional processes they describe are in many important respects continuous with those studied by late medievalists. The continuity with early modernity is a barrier as much criticised as it is fondly observed. The continuity with global history likewise remains under-explored and under-theorised. This is so despite some medieval historians' engagement with postcolonial readings of the archive, notably Gayatri Chakravorty Spivak's article 'Can the Subaltern Speak?' (Spivak, 1988). Medievalists may have imported some useful postcolonial theoretical insights, but in the study of court records the institutional continuity between pre-1500 Europe and colonial history is yet to generate substantive questions. This is an occlusion of historical continuities in which I have been complicit myself.

The characteristic feature of the continuity is the manner in which courts and society were entangled, creating thick and thin lines of historical causation across the 1500 divide and across the false division between European and 'global' history. Although the geographical and temporal forms varied a good deal, across European and colonial societies all courts have in some way been reliant upon the involvement of male local elites as jurors, informants or witnesses. Courts were also unescapable for many people seeking to purchase property, receive their inheritance, extricate themselves from a marriage or navigate any number of urgent moments in life. As such, ideas used in court – to do with the authority of speech and memory, the reliability of this man over that woman, the meaning of guilt or debt – entered into ordinary life (Kane, 2019).

Litigants and witnesses in turn defined the reach and character of the courts through their choices of when to use the law, and through the legally-superfluous details (important to them even if not justiciable in law) they introduced into their strategic story-telling. For instance, defamation suits in the church courts often catalogued sexual or scatological insults in addition to what was, strictly speaking, actionable, namely imputations of crimes; this encouraged other litigants to do the same (Neal, 2007). The extent to which courts were inseparable from everyday life was one of the major reasons why the inequalities they sustained could be seen as

natural and justified. And yet, as this discussion and the essays in this collection attest, court records are far from being coterminous with lived reality. The archive is tyrannous in this regard, a 'policed state of knowledge', as Anjali Arondekar has put it in her study of homosexuality in South Asia (Arondekar, 2005: 14). Bearing this in mind I have tried to draw attention to the role of courts in turning fragments of social life into fuel for the 'policed state' itself. How the social history of judicial institutions developed from medieval European contexts to global early modern ones thus poses a set of interesting questions for future research.

We see, between 1100 and 1800, across much of Europe and its colonial territories, societies in which patriarchal power – at the several and mutually-constitutive levels of family, community, class, race and the state – was sustained by the role of courts in protecting property, and their effect of entrenching hierarchy (Lerner, 1997: 146–98). In most medieval European courts it was local male elites who, as jurors of one kind or another, determined what wrongs were worth reporting to a court. The early modern period saw the emergence of moral pressure groups presenting various offences to the courts, although these still channelled the values of patriarchal elites (Dabhoiwala, 2007), and in the nineteenth century this function, along with similarly patriarchal attitudes, was transferred to professional police forces.⁴ Today what counts as crime is largely determined by what the police decide to take seriously.⁵ Whether motivated by genuine community concern or by narrow self-interest, small-scale patriarchy was what made the wheels of court procedure turn for a very long period of European and colonial history (Herrup, 1987; Forrest, 2018).

If court records can be integrated into historical study as constitutive of change (an approach much in evidence in the essays gathered here) and not merely treated as vectors for information about change, the commonalities of the long pre-modern

⁴ The northern Italian cities constitute an exception to this broad chronology, having had paid patrolmen (*berrovieri*) akin to modern police forces in the fourteenth century (Dean, 2019).

⁵ One of the many ways in which the history of crime disrupts complacent narratives of modernisation is the fact that the transfer of responsibility for investigating sexual violence, from local juries to professional police, has resulted in no improvement to prosecution rates.

period ought to come into focus. This also indicates some methodological common ground, encapsulated in the comment by Arondekar (2005) that our interpretative challenge is to 'juxtapose ... the archive's fiction-effects (the archive as a system of representation) alongside its truth-effects (the archive as material with "real" consequences)'. Medieval historians do know that the source criticism of court records owes much to historians of the sixteenth century, such as Natalie Zemon Davis, and of the eighteenth, such as Arlette Farge, and the most trenchant criticism of how historians approach court records now comes from an early modern literary critic (Davis, 1987; Farge & Foucault, 1982; Dolan, 2013). Nevertheless, our dialogue across the 1500 divide is not as integrated and continuous as it might be. This introduces damaging discontinuities into the study of pre-modern court records, with chronological boundaries compounding Eurocentrism.

Other discontinuities are, however, entirely warranted and even necessary, particularly a willingness to resist the idea that courts have a history continuous with order, peace and civilisation. The exposure of the role of courts in supporting property together with gendered and – initially in colonial contexts – racialized hierarchies, and the connection of these inequalities to state formation, ought to alert us to the political and partial character of that order. This could certainly be an enquiry capable of bringing medievalists into more sustained dialogue with historians of the colonial early modern and modern worlds. We would do well, therefore, to question the association of courts with the promotion of peace and the pursuit of evildoers, and to ask whether grand narratives of civilisation constitute historians' own tacit support for hierarchies past and present.

Competing Interests

The author has no competing interests to declare.

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