

Politics, Law and Counsel in Tudor and Early Stuart England

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This publication in a convenient and user-friendly format of fifteen essays written by Professor Guy over the past quarter century is to be welcomed. Since most of the work is fairly readily available elsewhere, the usefulness of the volume lies less in its function as a work of reference (though it is nice to have for that reason) than in the opportunity it provides to consider Guy's contribution to Tudor and Stuart history to date, and to ponder what he thinks are some of the most important general themes in the political history of the period between the early sixteenth century and the outbreak of civil war in 1642.

The first half of the volume reflects Guy's early interest in Cardinal Thomas Wolsey's role as Henry VIII's leading councillor and presiding judge in the courts of Star Chamber and Chancery during the 1520s. The questions are mostly, though not exclusively, informed by debates current in the late 1960s and early 1970s, primarily those between Guy's postgraduate supervisor, Sir Geoffrey Elton, and Professor J. J. Scarisbrick about the relative importance of the King, Wolsey, and Thomas Cromwell, in the major developments of the period - the evolution of the privy council, the break from Rome, and the pursuit of agendas of social reform. Vigorously argued, all of these essays reflect the relentless and virtuoso employment of archival sources that is a signature of Guy's work, a point illustrated by, for example, his use of late sixteenth and early seventeenth-century manuscripts (including a number in the Ellesmere collection at the Huntington Library in California) to reconstruct the archive of Star Chamber in Wolsey's time.

Although the views put forward have no doubt failed to satisfy every participant in the close textual controversy that sometimes characterises Henrician history, they are, taken as whole, balanced and plausible. If his interpretation of Wolsey as judge sometimes takes too little account of contemporary opinion at the time, and consequently seems hard-put to explain adequately why the Cardinal had by the early seventeenth century come to be seen as a symbol of all that could be objectionable about conciliar justice administered by a cleric, Guy's study of the legal career of Wolsey's successor, Thomas More, which is also reflected in

these papers, does show that there was little difference in the case loads over which the two presided. As against Scarisbrick, moreover, Guy demonstrates how Wolsey's reforming rhetoric was a hostage to his need to raise money for the expensive foreign policy he directed, and it is hard to disagree with the conclusion of the fine paper on 'Wolsey and the Parliament of 1523', that the cardinal was 'both good and bad'. At the same time, Guy argues convincingly that the emergence of the privy council during the course of the 1530s was the continuation of a process of differentiation of the larger king's council that had been to some degree anticipated by Wolsey in the 1520s, and was subsequently as much a consequence of the ever-growing pressure of business as the product of the bureaucratic genius that Elton attributed to Cromwell.

Indeed, unlike Elton, who saw the minister as the hand that manipulated the throne, or writers such as Eric Ives, who stress the role of faction in giving direction to the politics, Guy argues that by the 1530s Henry VIII was both his own master and fully cognisant of the possibilities for monarchical power that could be read into some of the intellectual positions that were used to justify the breach from Rome necessitated by his love affair with Anne Boleyn. Although the evidence is too complex to make for certainty, Guy suggests that Henry saw very early (maybe as early as 1515) that threatening the clergy with the offence of praemunire, and arguments for the royal supremacy over the church, potentially gave the crown a jurisdictional omnicompetence that could imbue the king with a form of sovereignty similar to that enjoyed by Roman emperors (Chapter VII, p. 496). In any case, the important point, which is not all that different from the view expressed by F. W. Maitland in his acute writings on the Tudor period, is that the break from Rome injected the language of 'imperial kingship' into the various strands of political thinking that had been inherited from the later middle ages, a high view of descending royal authority that was still alive and well when Charles I sat on the throne in the early seventeenth century. According to Guy, however, it is no less crucial that this aspect of Tudor political thought co-existed with another, which stressed participation and the supremacy of the king in parliament, that remained important because it appealed to laymen such as the common lawyers, who might well be confessional conservatives, but who were none the less willing to use parliamentary statute to break the jurisdictional autonomy of the spiritual courts in order to bring them under the control of the secular common law. For Guy, the key to this second insight is Christopher St German, the most influential legal writer of the Henrician period, whose polemical encounters with Sir Thomas More constitute the middle chapters of the collection, and whose position influences much of what Guy has to say in the remaining papers.

St German was the author of *Doctor and Student* (1523), the most important technical work on the law of equity and the function of the court of Chancery produced during the early modern period, but in *A Treatise concerning the Division between the Spirituality and Temporality*, a tract re-published five times between 1533 and 1537, he also attacked the procedures the church courts employed, especially in connection with the punishment of heresy. Furthermore, Guy shows that during the 1530s St German proposed a programme of parliamentary reform (including law reform and a scheme for helping the poor) that was far more revolutionary than anything put forward by Thomas Cromwell, but which stressed the power of the king in parliament, rather than the king alone, over both the temporal and secular spheres. The details of St German's career are largely limited to what can be deduced from his books, but Guy points out that his polemical works were published by Berthelet, the king's printer, and his parliamentary drafts reached the state papers. His thought was obviously useful to the government in the context of the passage of the 'Reformation' statutes. Hence Guy argues plausibly that Henry's reluctant decision to silence More by having him executed was driven largely by Sir Thomas's determination to reply in print to the works of St German.

In the end St German, who died in 1540, was perhaps too much of a free radical to have very much influence on the actual implementation of policy in the 1530s, but in essays written in the later 1980s and early 1990s, Guy depicted his brand of parliamentary legalism, reinforced by William Marshall's translation of Marsiglio of Padua's *Defensor Pacis*, as one of the strands that made up what he usefully describes as the 'polyglot' language of political thought in the Henrician period. In addition, these later papers take the subject a step further by addressing the works of Sir Thomas Elyot and Thomas Starkey, and elaborating from a reading of them the view that there was also another powerful stream of Tudor thought that drew on the classics, and in particular Cicero, to stress the importance of council, both inside and outside of parliament, as a way of

assuring good governance. Thus while Elton hailed the creation of the privy council as the foundation of modern bureaucratic state, Guy reminds us that it also triggered a set concerns about what happens when kings allowed themselves to be dominated by private, 'chamber' counsellors who were all too likely to put their personal interests before those of the commonwealth as a whole. This was a problem that the fifteenth-century judge, Sir John Fortescue had thought it important to address during the Wars of the Roses, and it was a question raised by the leaders of the Pilgrimage of Grace who protested against the direction of royal policy in the 1530s.

Guy's work on Tudor political thought is open to the criticism that it is based largely on a handful of figures, including some, like Starkey, whose works may not have been all that widely known at the time, and he has thus far made only limited attempts to trace the spread or the reception of the ideas he describes either in print or in public discourse. On the other hand, his discussion of political thought in terms of different modes or models, which reflected 'ascending' as well as 'descending' concepts of authority is extremely useful. It goes some way towards explaining the conflicting or self-contradictory political values often found in the sources. While it would be excellent to have fresh archival studies of institutions such as the Elizabethan Star Chamber to match Guy's own study of the 'Cardinal's court', the emphasis on ideas points towards fresh approaches to Tudor history that may enable us to better understand the period on its own terms while liberating it from the hackneyed dialectics of Eltonian orthodoxy and subsequent revisionism. No less important, Guy's view of English political development eschews any model of progressive linear development across the later sixteenth and seventeenth centuries, and in a brief but incisive preface to this collection, as well as in the concluding paragraphs of several of the later pieces, he suggests that problems raised by the break from Rome in the 1530s - the relationship between the ecclesiastical jurisdictions and the common law, that between crown and counsel inside and outside of parliament, that between royal authority answerable only to God and that created by law - remained of central importance right down to the outbreak of civil war in the 1640s. In his view the opposition of the Long Parliament to the ecclesiastical canons of 1640, and the printed exchanges over the Nineteen Propositions in early 1642 are best seen as particularly acute manifestations of a set of questions about the location of authority in the English state that were embedded in the ambiguities of the Act of Appeals, a parliamentary statute which proclaimed that England was an empire and that the king was the supreme head of the clergy as well as the laity.

Inevitably in a collection of this kind, it is left largely to the reader to fill in the details between these climactic episodes in the political history of early modern England, but the insight itself is a valuable one, and in two of the essays that are set outside the Henrician period Professor Guy suggests how it might be done. In a lengthy paper on 'The Elizabethan establishment and the ecclesiastical polity', he asserts that until the 1590s, the personalities and complexion of the Queen's regime made it possible for all of the strands in Tudor political thought to co-exist in relative harmony. But when the Presbyterian leader Thomas Cartwright combined non-conformity with the propagation of 'Polybian "mixed" polity' as the ideal form of constitution in church and state, there was a powerful reaction from the second-generation of Elizabethan governors, most notably Archbishop Whitgift, one that was unsuccessfully resisted by older and more 'liberal' counsellors such as Burghley. Non-conformists were brought before the ecclesiastical court of High Commission where they were also obliged, on pain of imprisonment, to take the oath *ex officio*, which required them to truthfully answer questions put to them before charges had been declared. Such procedures had been criticised by St German in the 1530s, and in the reign of Elizabeth a group of puritan lawyers, including the Essex MP James Morice and the clerk of the crown, Robert Beale, launched a further onslaught against them by compiling evidence, publishing tracts, acting as legal advisors to those brought before the courts, and putting forward bills in parliament. The general trust of the puritan legal position was that *ex officio* procedures were contrary to the rules of due process in canon and civil law, as well as those of common law as laid down in chapter 29 of Magna Carta. Morice, for example, did not fail to make an analogy between such procedures and the practices of the Spanish Inquisition, but the bishops, supported by the writings of Richard Cosin, stressed their practical necessity as a means of countering sedition and defended them by 'announcing the thesis that canon law was constitutionally independent of common law and claim[ing] that the church formed a *societas* separate from the civil state' (XIII, 148).

Taking this debate as an illustration of the break-down of the Elizabethan 'mixed polity', Guy argues both that the common law judges were weakly compliant in allowing the churchman their victory, and that the 1590s marked the start of a high road to the *jure divino* policies of Laud that were such a divisive feature in the years leading to outbreak of the Civil War. Inspired by the passionate rhetoric of Beale and Morice, Guy might be accused of drawing the ideological lines more clearly than contemporaries, faced by religious controversy and a long period of war, would have been able to do, but if anything, in this paper he may uncharacteristically have failed to develop the implications as far as they can go. He could, for instance, have pointed out that the most authoritative report of the critical test case of the deprived minister, Robert Caudry, was published in 1604 by Sir Edward Coke, and in this report Coke gives a notable history lesson that aimed to demonstrate to his fellow subjects the ancient subordination of the ecclesiastical jurisdiction to that of the king, king in parliament and the common law in a manner that is highly reminiscent of the views of James Morice (who had acted as legal counsel for Caudry). Furthermore, as the older works of R. G. Usher and Stuart Babbage show in great detail, controversy between the common law judges and the bishops over the relationship between the common law and the ecclesiastical courts was an important feature of the politics and political thought of the reign of James I that has been unduly neglected in most modern historiography of the period. In fact, this reviewer would go so far as to suggest that the concept of the 'ancient constitution', which is so often used and abused in discussions of Coke's thought, should be seen very largely as the offspring of these disputes.

Having said that, in 'The Origins of the Petition of Right [of 1628] Reconsidered', the final essay in this collection, and also the one that has probably been most widely quoted by other historians, Professor Guy does show how questions about the relationship between king, law, and parliament, which he would trace back to the 1530s, remained prominent in early Stuart politics. Focusing on the parliamentary reaction to the decision by the King's Bench judges to refuse bail to the Five Knights who were imprisoned by order of Charles I for objecting to the Forced Loan of 1626-27, Guy argues that the agitation leading to the passage of the Petition of Right was caused primarily by John Selden's allegation that Attorney General Heath, on orders from the king, intended to enrol a form of judgment in the court record that would have made a binding precedent in favour of the royal prerogative even though the judges themselves expressly forbade him from doing so. Mark Kishlansky has recently questioned this aspect of Guy's contention in great detail, and at a more general level, while Guy suggested that the lawyers in parliament were attempting employ Magna Carta and the concept of due process of law in order to defend the subject against a further extension of the arbitrary power by the crown, Kishlansky sees them participating in a short-term campaign against the Duke of Buckingham that led by accident to an innovative encroachment on the rights of the crown and the ability of the king to govern in a difficult situation.⁽¹⁾

Kishlansky may just have the better of the argument in terms of his refutation of any felonious intent on the part of Sir Robert Heath to alter the court record, but the evidence is complex and to some degree inconclusive. Given the circumstances of the period, which included the dismissal of Chief Justice Randle Crew for refusing to endorse the legality of the loan itself, Guy may, even if for the wrong reasons, more accurately capture the political atmosphere. In any case there is certainly something to be said for following the lead of Guy's preface and seeing this episode as another instance in the on-going Tudor and Stuart struggle between 'ascending' and 'descending' conceptions of political authority.

The fact that these essays makes us think hard about particular personalities and events, while at the same time offering an overall vision of the high politics of the century between the break from Rome and the outbreak of the civil war, is proof enough of their value.

Notes

1. M. Kishlansky, 'Tyranny Denied: Charles I, Attorney General Heath, and the Five Knights' Case', *Historical Journal*, 42, 1 (1999).[Back to \(1\)](#)

I am most grateful to Christopher Brooks for his generous and thoughtful review, which I pleased to accept.

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