Lawyers and the Legal Order in Early Modern England: Social and Cultural Origins of the Rule of Law

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Abstract

A valuable perspective may be gained on the rule of law by adopting a 'sociological' and 'cultural' view of the place of law in society. One such approach is the neo-institutional developmental model of law in society offered by Nonet and Selznick. This model provides a useful framework for understanding the emergence of the rule of law in early modern England, and in particular the crucial role played by the legal profession in that historic process. The repressive monarchical legal order in England relied on an extensive legal structure to enforce order. Through their unique training, reasoning and culture, the emerging cadre of common lawyers was able to create a distinct identity enabling them to assert expertise, attain legitimacy and attain a qualified separation from the Crown. Major technological and economic changes created new classes of aspirational citizens who required greater social and cultural freedoms. They provided the popular consent that enabled the lawyers to spearhead the political push for reform of the legal order, place limitations on monarchical rule and pave the way for the rule of law. The early modern English experience may arguably provide relevant lessons for developing legal orders today.

I INTRODUCTION

The rule of law is in many ways an elusive concept. It is of course readily understood in common parlance as the ordering of a society according to rules to which all citizens, including those in power, are subject. The rules are put into effect by accountable and responsible formal legal institutions. However, it is more difficult to describe how the rule of law may be created. To simply set up a variety of bodies entrusted with legal functions in any given place and expect a rule of law to emerge would resemble a mirage, like a scattering of courthouses in a wasteland. This article aims to shed light on how the rule of law may emerge in a legal

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culture. It revisits the emergence of the rule of law in early modern England and seeks to draw inferences from that experience. It is premised broadly on 'sociological' and 'cultural' understandings of the place of law in society. The focus will be on the pivotal role played by the legal profession in the history of the rule of law. It will argue that it was the unique culture, institutional characteristics and political influence of the common lawyers of the early modern era that enabled them to assert the requisite autonomy and authority with which to spearhead the English experience of rule of law. The article will make frequent reference to the developmental model of law in society expounded by Nonet and Selznick, who very usefully provide a theoretical framework within which to visualise the long-term dynamics by which the nature and shape of legal orders may be forged.[1] Grounding legal philosophy in the social sciences, their vision 'extends far, but its particular focus is the rule of law.'[2]

Central to Nonet and Selznick's approach is the potential to understand law on the basis of a developmental model reflecting 'stages of evolution in the relation of law to the political and social order'.[3] The crux of their thesis is that a sociological dimension to the study of law reveals three fundamental states of law in society, which they label as 'repressive', 'autonomous' and 'responsive'. The primary concern of repressive legal systems is order. In the intermediate, 'autonomous' phase of development, law and the judiciary are institutionally independent of politics and aspire to attain 'legitimation' through a qualified separation from the state. Legal institutions become powerful by forging a unique identity and thereby gaining the consent required to challenge the centres of repressive power.[4] They drive the push for a rule of law. However, as legal bodies become more diverse, specialised and sophisticated over time, the operation of the legal system itself becomes a major preoccupation of the law. The demand for change, and for a greater responsiveness to social realities, heralds a post-bureaucratic and 'responsive' stage which, perhaps unsurprisingly, anticipates a reintegration of law and politics.

It must be stated at the outset that the aim here is not to somehow validate or undermine the developmental theory through the English common law experience. For such a task, much more work needs to be done to make the necessary connections with other legal histories and orders. The model has a strong theoretical focus and a necessarily heightened level of

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[1] Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (Harper and Row, 1978).
[2] Martin Krygier, *Philip Selznick: Ideals in the World* (Stanford University Press, 2012) 164.
[3] Nonet and Selznick, above n 1, 18.
[4] Ibid 53-59.

abstraction. It offers an exposition of the development of law in context, and depends on the resolution of internal institutional dynamics. Some legal orders, but not necessarily others, may be disposed to developing predictably from repressive to autonomous legal institutions, and then possibly also to more responsive systems. The model as such does not attempt to address whether this will or will not eventuate in any given setting. That will mostly depend on factors that are external to the institutions themselves. However, as we observe the social and cultural origins of the rule of law in early modern England, it will become evident that the Nonet and Selznick framework shapes and informs our understanding of a complex and interwoven web of dynamic events.

Part One below will outline in brief an understanding of the rule of law for the limited purposes of the article as a whole. Part Two addresses the emergence of the common lawyers in England and traces key aspects of their training, manner of reasoning and professional language. It is argued that these provided the cornerstones of their unique identity, expertise and claim to legitimacy in the political challenge to the royal prerogative and power of the monarchy. Part Three outlines the social conditions that enabled the growth of the legal profession across the English landscape, the emergence of disparate social groups eager for greater economic and political freedoms and the alliances that were created with the battle of the lawyers for the rule of law. The conclusion will attempt to state the lessons that may be learned from the English story and invite consideration of how they may be of relevance to developing legal orders.

II THE RULE OF LAW

It should first be considered, very briefly, what is meant by ‘the rule of law’ in the context of this article. The literature on rule of law is extensive and is well known to most academics and commentators who have attempted to interpret and characterise its nature.[5] The aim here is not to enter into that multifarious and complex debate. It is of course recognised that the central understanding of societies being ruled by law rather than by the unfettered power of human monarchs and rulers is very old indeed. It may be traced in western thought to at least the Aristotelian idea that

[5] For convenient summaries of the prevalent conceptions of ‘rule of law’, see Martin Krygier, 'The Rule of Law' in Michel Rosenfeld and Andras Sajo (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford, 2011) 233-49; Miguel Schor, ‘The Rule of Law’ in D Clarke (ed), *Encyclopedia of Law and Society: American and Global Perspectives* (Sage 2005); Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law’ (1997) Autumn *Public Law* 467; Augusto Zimmerman, 'The Rule of Law as a Culture of Legality: Legal and Extra-Legal Elements for the Realisation of the Rule of Law in Society' (2007) 14(1) *Murdoch University E-Law Journal* 10; Cameron Stewart, ‘The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law’ (2004) 4 *Macquarie Law Journal* 135.

law was 'reason free from passion'[6] and that 'rightly constituted laws should be the final sovereign'.[7] Many other thinkers have contributed to the notion of society and its rulers subject to law rather than arbitrary human will: Thomas Aquinas, Grotius, Pufendorf, Hobbes, Locke, Rousseau, Rawls and others.[8] In the common law tradition, the principles afforded by A V Dicey emphasised that laws needed to be enacted in a proper and acceptable manner; that no citizen should be found guilty of an offence without due process; that all citizens were equal before the law; and that individual liberties were ultimately to be protected by the courts.[9]

Despite the apparent ease with which lawyers, elected officials and academics might refer to the term 'the rule of law', its utility is hampered by two difficulties. The first is that our understanding of the concept appears to oscillate between at least two fundamental interpretations. According to the 'formalist' school,[10] certain 'thin' and generic institutional requirements, such as generality, certainty, equality and prospective application are essential. This view holds that rule of law is likely to be evident in a legal order if these formal ingredients are in place. On the other hand, the 'substantive'[11] school highlights the inadequacy of the formalist approach and focuses on the need for evidence that a legal order has expunged 'bad' laws and incorporated 'thick' notions of reciprocally shared rights and duties between the state and its citizens. Both of these approaches are essentially liberal conceptions of rule of law as formulated in the constitutionalism of Dicey,[12] which has over time provided a virtually ubiquitous understanding of the concept in English-speaking polities. These notions of rule of law are further complicated by differences across common law and civilian legal systems rooted in the European continent, with *Rechtstaat* and *Etat de droit* variations in Germany and France respectively, which are often seen as emphasising the role of the state in

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[6] Aristotle, *Politics* III, 1287a.
[7] Aristotle, *Politics* I, 1252a.
[8] For an extensive historical treatment of rule of law theories see Franz Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Berg, 1986) 77-172.
[9] A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 1889).
[10] See Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195.
[11] See works of Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) and *Law's Empire* (Harvard University Press, 1986); H L A Hart, 'The Morality of Law' (1965) 78 *Harvard Law Review* 1281.
[12] See A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959).

the guarantee of individual liberty and limited political power under the law.[13]

The second difficulty is that, to many observers, the rule of law has been discredited by the realities of the world and the ravages of time, with some concluding that:

> … [T]he rule of law ideal has lost both its descriptive and prescriptive force … and does not correctly represent the reality of the post-modern state nor does it provide a model for assessing its performance.[14]

The notion that law is separate from politics seems to have lost its appeal in the 20th century and has been seen by some schools of thought as no longer relevant in a post-modern world. To some, law is viewed as inherently political and amounts to little more than 'the legitimised domination that results from the conflict of political groups, the market and bureaucratic organisations'.[15] To others, the liberal conception of rule of law seems at odds with a world dominated by administrators and promoters of regulatory convergence. Stewart has identified several sources of these attacks, including what can be labelled the 'sociological' school which, in its various guises, detects 'a major shift in the normative order of society away from a classical liberal form based on the rule of law towards a bureaucratic and administrative society'.[16] Notwithstanding these fundamental difficulties, and possibly because of them, the opportunity presents itself for not only continuing with a vibrant dialogue about the proper dimensions of the rule of law, at least as a vital normative and ethical standard, but also for being better informed about its nature and pre-conditions for growth. Perhaps paradoxically, the 'sociological' perspective informs the approach of this article in identifying the roots of the rule of law.

For the purposes of this article, it is not necessary to venture into the debate about thin and thick conceptions of the rule of law. This requires consideration of moral and normative factors that are outside the ambit of its focus. It is sufficient that 'the rule of law' be seen not just as an ideal but as a distinctive institutional system in which 'specialized, relatively autonomous legal institutions claim a qualified supremacy within defined spheres of competence.'[17] The system in question is underscored principally by a series of formal acts that serve to permanently limit the

[13] See Gianluigi Palombella, 'The Rule of Law and its Core' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing, 2009) 17, 23-26.
[14] Stewart, above n 5, 136.
[15] Ibid 152. Here one may note in particular theorists from Marxist, Critical Legal Studies and Feminist schools of thought.
[16] Ibid 155.
[17] Nonet and Selznick, above n 1, 53.

political power of the sovereign, whether a monarch or an institutionalised autocracy, and subject that executive power to formalised legal processes that minimise the possibilities of arbitrary rule. It implies that such processes to an appreciable extent guarantee restraints on government officials; maintain social order; and enhance certainty, predictability and security between citizens and the government, and among citizens.[18] Selznick has pointed out that in its essence 'the rule of law is a system of restraint. It presumes that an impersonal guardianship is vital to a free society.'[19] Tamanaha reminds us also that these processes and restraints require a 'well-developed legal profession and legal tradition',[20] but also that the rule of law as envisaged here 'does not in itself require democracy, respect for human rights or any particular content in the law … [T]he rule of law is a necessary but not sufficient condition for a fair and just legal system.'[21]

Finally, it should be appreciated that in the English context under review in this article, the rule of law can be seen as a form of legal order that emerged over a lengthy period of time and after considerable political and military conflict. It involved a long series of monarchical and parliamentary acts and instruments that placed restraints on political power. It should also be appreciated that the climactic era of that lengthy process is commonly held to be the violent 17th century and that the acts and instruments of that era, without which the English variant of the rule of law could not have transpired or be understood, involved at least the following key enactments: the *Petition of Grievances 1610*,[22] which confirmed 'the indubitable right of the people … not to be made subject to any punishment … other than such as are ordained by the common law of this land, or the statutes made by their common consent in parliament'; the *Petition of Right 1628*,[23] which defined certain fundamental rights and liberties of citizens, including that no person could be forced to provide a gift, loan or tax without an Act of Parliament, or be imprisoned or detained without due process; the *Habeus Corpus Act 1679*,[24] which was the culmination of a string of legislative enactments that consolidated the old prerogative writ of habeus corpus and guaranteed judicial review of lawful detention; the *Bill of Rights Act 1689*,[25] which, inter alia, placed limits on the powers of the Crown, defined the rights of parliament and

[18] Brian Z Tamanaha, 'A Concise Guide to the Rule of Law' in Palombella and Walker (eds), above n 13, 3, 4-7.
[19] Philip Selznick, 'Annual Report of the Center for the Study of Law and Society' (Report, July 1961-June 1962) 3-4.
[20] Tamanaha, above n 18, 12.
[21] Ibid 14.
[22] See *Proceedings in Parliament 1610* (UK), 2:257-71.
[23] 3 Car 1, c 1.
[24] 31 Car 2, c 2.
[25] 1 Wm & M sess 2, c 2.

the rules for freedom of speech in parliament, mandated regular parliamentary elections and guaranteed the right of citizens to freely petition the monarch; and the *Act of Settlement 1701*,[26] a key enactment that not only determined the rules of succession to the throne, but also set the groundwork for barring government officials from election to parliament, decommissioning errant judicial officers and securing for parliament the right of impeachment. Of course, other celebrated documents may be added to the list. It is fundamental to the argument in this article that these building blocks of the rule of law were products of a culture that was largely spearheaded by a robust legal profession.

III LAWYERS, LEGAL INSTITUTIONS AND IDENTITY

The task here is to consider how a powerful legal profession emerged in England and how it forged its unique identity, one that became synonymous with a unique form of reasoning and rhetoric. The rise over a lengthy period of time of a highly influential and autonomous legal profession laid the groundwork for a historic shift in the balance of power in English society. Most treatments of common law history begin conveniently with what Reynolds refers to as the 'long twelfth century'.[27] It was in this period that Anglo-Saxon England, which had hitherto been a 'land without lawyers',[28] underwent:

> … [A] change in legal practice [that was] caused by the transition from the diffused, undifferentiated, customary law of the earlier middle ages to the various forms of expert, esoteric, professional law that dominated the higher courts of the later middle ages.[29]

The post-invasion Norman courts, procedures and rules that accompanied this transition led to a novel and systematic treatment of legal disputes. Traditional and localised forms of dispute resolution were replaced over time by a centralised system of royal courts that issued writs for the commencement of claims and documented the claims by way of stylised pleadings.[30] A new vocation also grew out of this development:

> By 1300 a legal profession had come into being in England. There existed by that date a sizeable group of men who were recognized as having

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[26] 12 & 13 Wm 3, c 2.

[27] Susan Reynolds, 'The Emergence of Professional Law in the Long Twelfth Century' (2003) 21 *Law and History Review* 347.

[28] Franklin J Pegues, 'The Origins of the English Legal Profession' (1993) 98 *American Historical Review* 1587.

[29] Reynolds, above n 27, 347.

[30] For a useful review of the complex process of court centralisation and specialisation that took hold by the close of the twelfth century see R C van Caenegem, *The Birth of the English Common Law* (Cambridge University Press, 1988) 19-28.

> specific, professional skills in the representation of litigants and who spent much of their time and derived much of their income from putting those skills at the disposal of litigants. They also, by 1300, constituted a profession in another sense, for by that date they were also subject to special rules governing their professional conduct.[31]

A large increase in the number of royal writs fostered the need for litigation agents, as did the rules and customs of argument engendered by the courts themselves. The move also from oral to written pleadings in the 14th century fostered the growth of legal specialists.[32] The exclusive nature of the vocation and the high fees that were often charged by the practitioners led to early steps towards regulation.[33] What followed was a series of significant events for the history of the common law, including the dominance of the royal courts, such as King's Bench, Common Pleas, Chancery and Star Chamber. But there was evident also a diverse array of courts for the resolution of various kinds of disputation:

> This diversity of law was administered by an extremely large number of courts. In addition to the various royal jurisdictions, there were, among others, quarter sessions, county courts, borough courts, manorial courts, stannary courts, pye-powder courts, and … ecclesiastical courts.[34]

There arose a division among lawyers into specialists for litigation and non-contentious matters, between 'the attorneys who handled the procedural aspects of a suit and the counsellors and serjeants-at-law who were the students of the substantive law.'[35] An increasingly bureaucratised royal court apparatus facilitated two further significant developments at this stage. The first was the reporting of arguments, dicta and procedures in the courts in a nascent system of 'year books'. Baker notes that 'from 1300 there is a continuous stream of reports of arguments in the Common Pleas'.[36] This paved the way to law reporting, which in later times enabled the doctrine of precedent to take root and flourish. The recording of materials from court proceedings has been seen as:

> …[A]n important guarantor of formal rationality (the rendering of justice in accordance with neutral rules) in the functioning of the new courts, for

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[31] Paul Brand, 'The Origins of the English Legal Profession' (1987) 5 *Law and History Review*, 31, 35.
[32] For details of the development of written pleadings see J H Baker, *An Introduction to English Legal History* (Butterworths, 1990) 90-101.
[33] See Penny Tucker, 'First Steps Towards an English Legal Profession: The Case of the London Ordinance of 1280' (2006) 71 *English Historical Review* 361.
[34] Christopher W Brooks, 'The Common Lawyers in England, c 1558-1642' in Wilfrid Prest (ed), *Lawyers in Early Modern Europe and America* (Holmes and Meier, 1981) 42.
[35] Ibid 44.
[36] Baker, above n 32, 204-5.

> the record was accessible to litigants and might be reviewed by superior authority.[37]

The second was the advent of specialised legal education and a professional courtroom culture that promoted an exclusive form of reasoning. Legal historian Brand notes that 'the professionals came to develop their own forms of argument and even their own specific language, which was not readily accessible to outsiders.'[38] This elite form of reasoning was alien to the rustic wisdom of the pre-Norman local jury, notwithstanding that juries continued to perform an important function in criminal and civil proceedings. It was through a distinctive culture, language and education that the courts, the profession and other legal institutions fostered a unique identity. This identity was rooted in the roles played by rhetoric, system and method in the education, work and literature of the common lawyers. It has been observed by Nonet and Selznick that as legal institutions grow in a repressive legal order, they increasingly speak in a 'distinctive idiom' and foster an image of independence and competence.[39] In order to protect the claim on legitimacy that arises, their institutional autonomy is increasingly asserted and their 'differentiation' from repressive state organs becomes evident.[40]

This process of differentiation for the lawyers began with their education. The training that legal professionals in Coke's time received was channelled through professional associations known as inns of court, rather than the universities. The emphasis was on practical training for presentation and argument in the courts to which the inns of court were attached.[41] Pedagogically, learning was grounded in Renaissance humanism, which brought with it a revival of interest in classical and pre-Christian conceptions of human thought and action. A new secularist approach to the study of history was influential, as was the *studia humanitatis*, a curriculum based on grammar, rhetoric and dialectic that provided a new 'philological' form of looking at the past through textual criticism.[42] This approach was applied by continental humanists to a novel study of law from a historical perspective, taking account of social change, which in turn gave birth to comparative studies and 'to a new

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[37] Paul Brand, 'The English Difference: The Application of Bureaucratic Norms within a Legal System' (2003) 21 *Law and History Review* 383, 385.
[38] Ibid 386.
[39] Nonet and Selznick, above n 1, 57.
[40] Ibid.
[41] For useful accounts of legal training and the inns of court see: J H Baker, above n 32, 182-85; J H Baker, *The Third University of England: The Inns of Court and the Common Law Tradition* (Selden Society, 1990).
[42] C P Rodgers, 'Humanism, History and the Common Law' (1985) 6 (2) *Journal of Legal History* 129, 130.

interest in "system" and the methodology of law'.[43] Notwithstanding the English focus on precedential reasoning in the courts, the study of rhetoric and its application by practising common lawyers was fostered by the curriculum.

Rhetoric in 17th century England was 'accorded the same respect it had received from Cicero and Aristotle.'[44] At its core, rhetoric was concerned with the use of language to persuade through oratory, but it also included the study of 'reasoning and the crafting of judgments'.[45] Importantly, it was understood to contain an inherent propensity to initiate action,[46] because 'the language of rhetoric provided the languages of government and law'.[47] It was in rhetorical practice that the seeds of a systematised approach to law were found. From a semiotic perspective, Boyer illustrates the humanist pedagogical practice by which apprentice orators kept 'commonplace books' in which they recorded phrases and rhetorical examples from their teachers. They also noted aphorisms and other material from the classical authors, with the aim of 'break[ing] up pieces of classical literature into parts which the student could then reassemble into new structures'.[48] These recorded *exempla* were to be used as models, precedents and case studies in practical training. This was the foundation stone of a larger pattern:

> The humanist practice of collecting illustrations was matched by a practice of applying sententiae to exempla – that is, following the story by explicitly stating the moral. A skilful glossator could use for many different morals any of the exempla which he had collected … Each separate exemplum is a brick to be fitted into place. The glossing sententiae are the mortar which holds the structure together – which reshape those materials to new uses.[49]

The rhetorician's *exempla* provided the backbone of the common lawyer's *case*. Further, the commonplace books of the schools provided the foundations of rhetorical argumentation before the courts. Sir Thomas Elyot[50] noted the direct connections between the 'narrations, partitions, confirmations and confutations' of rhetoric and the 'declarations, bars,

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[43] Ibid 131.
[44] Allen D Boyer, 'Sir Edward Coke, Ciceronianus: Classical Rhetoric and the Common Law Tradition' (1997) 10 (28) *International Journal for the Semiotics of Law* 3, 10.
[45] Ibid 4.
[46] Sir Francis Bacon referred to it as the adding of 'reason to imagination for the better moving of the will.' See Bacon, *Works*, James Spedding (ed) (1857) Vol 3, 409.
[47] Boyer, above n 44, 25.
[48] Ibid 17.
[49] Ibid 18.
[50] English scholar (1490-1546).

replications and rejoinders' of pleadings.[51] The 'diffused, undifferentiated customary law'[52] experienced a kind of disassembling, a specialised breaking down into constituent parts, for repackaging into new arguments as required by new facts. This is what Coke is likely to have meant with his encomium to common law as 'nothing else but reason, which is to be understood of an artificial perfection of reason gotten by long study, observation and experience and not of every man's natural reason.'[53] The common lawyers made it clear that their professional artifice and 'artificial logic',[54] expressed through the language of their arguments and judgments, distinguished their reasoning from that of the monarch, the royal administration and the church. Nonet and Selznick recognise in their model that the autonomous law stage depends on 'rule-centredness'.[55] Because rules are complex and require consistency, specialist rule practitioners are required, as are canons of interpretation. The fact that Coke and the English common lawyers understood the 'special ingenuity' of the law, invoked its received wisdom and engaged in 'law-finding', is directly acknowledged by Nonet and Selznick in their study.[56] The 'jurists' claim to autonomy' was vindicated by this apparently objective expertise.[57]

The rhetorical discourse that provided the grist for the legal profession, however, came under technological, commercial and philosophical pressure as the society in which the lawyers operated underwent profound change. In terms of technology, it is worth noting the historical threat to oral culture posed by the increasingly ubiquitous written word. The development of typography:

> … [B]rought western man to react to words less and less as sounds and more and more as items deployed in space. Printing made the location of words on a page the same in every copy of a particular edition, giving a text a fixed home in space … [which heightened] the value of the visual imagination and the visual memory over the auditory … and made accessible a diagrammatic approach to knowledge … Typography did

[51] Sir Thomas Elyot, *The Book Named the Governor,* John M Major (ed) (Teacher's College Press, first published 1531, 1969 ed) 124.
[52] See above n 29.
[53] Edward Coke, *First Part of the Institutes of the Laws of England* (first published 1628, 1817 ed), 138.
[54] Boyer, above n 44, 32.
[55] Nonet and Selznick, above n 1, 61.
[56] Ibid 62.
[57] Ibid.

> more than merely 'spread' ideas. It gave urgency to the very metaphor that ideas were items which could be 'spread'.[58]

Furthermore, the systematic approach to the study and practice of law was enhanced not only by such technological advances but also by the notion that all knowledge could be accessed in a diagrammatical and systematised way. Of particular note in this regard was the very influential work of Ramus[59] and his followers in the 16th and subsequent centuries. The Ramists were chiefly concerned with extending logical learning to the humanities. They simplified the principles of rhetoric by reducing its five classical components (invention, judgment, style, memory and delivery) simply to style and delivery, which rationalised discourse in written material. Argumentation was confined to 'dialectic', which was made up of *invention* and *judgment*.[60] Each classification was capable of even further reduction. What emerged from this was a reasoning influenced heavily by 'method'.

> To avail oneself of Ramus' method, after first discovering 'arguments' which will prove what one wishes to say, one organizes the arguments into enunciations and syllogisms, and then, to relate the syllogisms to one another, one avails oneself of the principles of 'method'. These principles are utterly simple: one proceeds from the better known to the less known, and this, Ramus insists, means always that one proceeds from what is general to what is particular.[61]

Such reasoning, emanating initially from humanist thinking on the continent, influenced English lawyers as well. It potentially allowed all knowledge to be viewed as a systematically related set of items:

> [M]ethod came to denote the orderly arrangement of the topics within discourse. A topical logic was constructed … in which it was of central importance where things fell in an ordered and hierarchical series of places. In practice, Ramus was able to generate a highly sophisticated and successful textbook style of presentation … [and] produce a clearly spatialized documentation of how a discourse works.[62]

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[58] Walter J Ong, 'Ramist Method and the Commercial Mind' (1961) 8 *Studies in the Renaissance* 155, 156.

[59] Petrus Ramus (Pierre de la Ramee) (1515-1572), French-born scholar and polymath who taught at the University of Paris and published works on rhetoric, grammar, physics, metaphysics, mathematics and other areas of inquiry. A Protestant convert, he died in the St Bartholomew's Day Massacre.

[60] See Walter J Ong, *Ramus, Method and the Decay of Dialogue* (University of Chicago Press, 2004) 289-90.

[61] Ong, above n 58, 161.

[62] Grahame Thompson, 'Early Double-Entry Bookkeeping and the Rhetoric of Accounting Calculation' in Anthony G Hopwood and Peter Miller (eds), *Accounting as Social and Institutional Practice* (Cambridge University Press, 1994) 54.

The propensity to classify knowledge in this way had a profound effect on the way information was not only communicated but also understood, even spawning a new wave of large encyclopedic and other reference works.[63] An example of an early work that attempted to create order out of the 'apparent chaos of English law'[64] was Finch's *Nomotechnia.*[65] Consistent with the common lawyers' view that the seeming chaos 'was a mere surface phenomenon, beneath which lay certain fundamental grounds, maxims or principles, such as defined and governed all other arts and sciences,'[66] *Nomotechnia* had the aim of:

> …[R]educing the complex bulk of the law to a neat and comprehensible system, using what Ramus called the method of nature, whereby the component parts of a body of knowledge were ranged in descending order of generality.[67]

For the lawyers, whose concern was to consolidate the position of their profession as a major contributor to public life and the legal order, the systematic and scientific approach to legal study became paramount. This led to the growth of a new form of literature by which the legal profession asserted its expertise and rationality, and which in turn determined to a large extent the future shape of the law itself. It is almost a truism today that the doctrinal approach to the study of law has traditionally been geared toward the resolution of disputes by courts according to the law. This raises an important question:

> If one asks what this mysterious entity, the law, consists of, the classical version of legal science claimed that it consisted of principles, which in some way underlay the process of judicial decision, and which could be discovered by the legal scientist through careful attention to the legal sources, typically, in the common law world, cases. These principles were then applied to something called the facts, which also were supposed to be objectively discoverable …[68]

The discovery of legal principles and their application to the facts, involving the methodical movement from the general to the particular, provided the rationale for the various forms of professional literature by

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[63] A noted example is the *Encyclopedia* of Johann Heinrich Alsted (1588-1638), German Protestant scholar, which attempted to systematically digest the major works of over five hundred writers, philosophers and scientists from classical times to the 17th century.
[64] Wilfrid Prest, 'The Dialectical Origins of Finch's Law' (1977) 36(2) *Cambridge Law Journal* 326, 327.
[65] Sir Henry Finch, *Nomotechnia* (1613).
[66] Prest, above n 64, 327.
[67] Ibid 329.
[68] A W B Simpson, 'Legal Education and Legal History' (1991) 11 *Oxford Journal of Legal Studies* 106, 107.

which the common lawyers, and the institutions they controlled, asserted their competence, authority and autonomy.

As the robustness and independence of the courts and the legal profession increased, so did the influence of their written word. The most conspicuous form of text that promulgated intellectual and professional statements of the law was the treatise. The growth of legal literature, culminating in the treatise, was the means by which the new legal science facilitated the reduction of the common law to sets of rules and elements that could methodically be applied to facts. Some legal works were produced by jurists in the centuries preceding the 16th,[69] but Matthew Hale[70] was possibly the first to publish a comprehensive attempt to analyse the law systematically, modelled on classical Roman precedent. Simpson argues that a 'self-conscious analysis' of law by lawyers did not emerge until well after Fortescue[71] and St Germain,[72] by which time there was evident a 'set of inner principles of the common law'.[73] This made it possible for lawyers to confidently collect legal maxims,[74] being basic propositions of law needing 'neither authority nor support from argument,' which could be arranged by rational substantive method. The published maxims eventually gave way to monographs, such as Blackstone's influential works in the mid-18th century.[75]

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[69] For example: Ranulf de Glanvill's *Tractatus de Legibus* in the 12th century (but first printed in the 16th century) outlined forms of procedure in the royal courts; Henry de Bracton's *Laws and Customs of England* in the 13th century reviewed laws based on judicial records; Thomas Littleton's *Treatise on Tenures* in the 15th century attempted to classify property rights; Edward Coke's *Law Reports* and *Institutes of the Laws of England* in the early 17th century reported on cases and judgments heard in Westminster Hall and other places.

[70] Matthew Hale (1609-1676), English jurist and Chief Justice, author of *The History and Analysis of the Laws of England* (1713).

[71] Sir John Fortescue (1394-1476), English jurist and author of *De Laudibus Legum Angliae* (published 1545).

[72] Christopher St Germain (1460-1540), English jurist and author of *The Doctor and Student* (1518).

[73] A W B Simpson, 'the Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature'(1981) 48 *University of Chicago Law Review* 632, 642-643. These 'inner principles' were described as follows: 'First, they were ultimate in that they could not be supported by any further arguments or logical demonstrations … Second, they were thought to be self-evidently rational. Third, they had always been accepted, and thus they were timeless features of a timeless system. Finally, although only skilled lawyers could work out the detached application of principles, even a layman could, by knowing the principles, acquire a general knowledge and understanding of the law. With the belief in principles went the belief that there was always a right [judicial] answer … '

[74] For example, Sir Francis Bacon, *A Collection of Some Principal Rules and Maxims of the Common Laws of England* (1630).

[75] Sir William Blackstone, *Analysis of the Laws of England* (1756) and *Commentaries* (1765-69).

Of course, the treatise was at the same time the conduit for profoundly influential philosophical concepts of natural law and social contract that were absorbed from the writings of thinkers and jurists from the continental jurisdictions.[76] By the 19th century, treatises were the dominant form of legal publication and shared with modern textbooks the fundamental characteristic of *method*:

> It begins with a definition of the subject matter, and proceeds by logical and systematic stages to cover the whole field. The result is to present the law in a strictly deductive framework, with the implication that in the beginning there were principles, and that in the end those principles were found to cover a large multitude of cases deducible from them.[77]

This methodical process was legitimated in the courts by authoritative precedent, and was conducted by appealing to an objective and specialised rationality. The lawyers' distinct language, literature and way of reasoning contributed significantly to what Nonet and Selznick identify as the crucial separation of law and politics in the autonomous stage of legal development. It enabled the process of *legitimation*, whereby rulers acquire legitimacy, and therefore the consent of the ruled, when their acts are certified as legitimate by experts with objective and rational knowledge:

> Rulers have only limited credibility as certifiers of their own legitimacy. If their claims, and claims against them, are to be judged according to objective principles, it is helpful if the interpreter of those principles is removed from the day-to-day work of government and if his voice is heard to speak in a distinctive idiom.[78]

In summary, key components of the distinctiveness and separateness of the legal profession in the early modern period in the English towns were their closed and internalised method, systems and language that were generally unavailable to other political actors. These factors promoted an image of objective and dispassionate rationality, in which their training and education was rooted and upon which their claim to autonomy depended. The identity they brought to the institutions they populated had a profound effect on the influence of those institutions in the battle to restrain monarchical power and pave the way for a nascent and liberal

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[76] Natural law influences may be seen, for example, in Hugo Grothius, *De jure belli ac pacis libri tres* (*On the Law of War and Peace: Three Books*) (1625) and Samuel von Pufendorf, *De officio hominis et civis (On the Duty of Man and Citizen*) (1675). The later social contract influences may be seen in Jean-Jacques Rousseau, *Du contrat social ou principles du droit politique (On the Social Contract or Principles of Political Right)* (1762).

[77] Theodore F T Plucknett, *Early English Legal Literature* (Cambridge University Press 1958) 19.

[78] Nonet and Selznick, above n 1, 56-57.

rule of law. That battle was achieved, at least in part, through the political co-option of other social groups.

IV LAWYERS, SOCIAL GROUPS AND CONSENT

Even a cursory understanding of late medieval and early modern English history would recognize many of the indicators of repressive exercise of power described above. The divine authority of the early monarchs in feudal times carried with it sovereign immunity from prosecution, which over time became circumscribed and limited to certain crimes against the state. That the law was seen as a tool of monarchical power is evident, even after the enactment of the Magna Carta in the early 13th century, in the sovereign's primary constitutional position and the proliferation of a court system that was centred originally on the dispensing of justice and the determination of rights by the monarch him- or herself.[79]

In England the courts initially concerned themselves with regulating order and peace for the disprivileged majority, but also in later times for the proprietary and contractual rights of the privileged minority.[80] In Nonet and Selznick's terms, the institutionalised closeness of the monarchy, the executive organs of power and, later, the established church, guaranteed a 'collective conscience'[81] and a legalised morality that underpinned the legal order.[82] The official perspective, by which in the developmental model 'rulers identify their interests with those of the community',[83] is evident in the commonly held anthropomorphic view of the monarch, echoed by Henry VIII in *Ferrers' Case*,[84] as head of the body politic with Commons as the body and the judiciary as its eyes.[85] Although England was for a very long time ruled by a limited monarchy subject to an increasingly important legislature, a kind of institutional veil protecting the organs of royal administration was entrenched so that arbitrary decision-making in officialdom persisted stubbornly. Discussing the rule of law, Baker notes:

> The use of Parliament is not inconsistent with arbitrariness … What really matters … is not the mere existence of Parliament but its character, its independence in the face of royal pressure, its representativeness and

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[79] See John Hamilton Baker, *The Oxford History of the Laws of England* (Oxford University Press, 2003) vol 6 for a detailed history of the development and proliferation of royal courts such as the courts of Common Pleas, King's Bench, Exchequer and Chancery, as well as the Conciliar, Revenue, Local, Admiralty and other courts.
[80] Nonet and Selznick, above n 1, 44.
[81] Ibid 46.
[82] Ibid.
[83] Ibid 40.
[84] (1542) 1 Parl. Hist 555.
[85] Baker, above n 79, 56.

> responsiveness to the world outside, and the willingness of governments to listen to argument and opposition. Likewise, the effectiveness of the common law, as a control on executive power, is related to the degree of independence of the judiciary from the government.[86]

The tensions caused by such a repressive legal order, Nonet and Selznick remind us, bring into question the 'basic function of legal ordering', which is seen as the legitimation of power.[87] The discretionary power of officialdom and the close identification of the law with the state serve to achieve a kind of order, but at the expense of long-term stability. The central element to this analysis of the repressive stage of law is the manner in which legal institutions gradually 'remove themselves from, and tame, the power of the state'.[88] It is here that the dialectical origins of autonomous law in the common law setting are located. By creating a class of citizens who kept the peace and administered the rules in favour of the monarch, there emerged an institutionalised 'class justice'.[89] Using historical developments in contract law and property rights as illustrations, Nonet and Selznick point to the ways in which the law institutionalised 'disprivilege'[90] and a dependency of the disprivileged on the monarch or state, resulting in a 'dual system of law'.[91] In this dual system, the law of the 'privileged' became largely private and developed in ways that protected property and the autonomy of social arrangements such as contracts. The law of the 'disprivileged' was largely public, powered by prescriptive legislation and enforced by specialised bureaucracies armed with penal sanctions and remedies.

The reining in of arbitrary exercises of power could not be achieved by the lawyers through their unique identity alone. Political power had to be achieved and then exercised with the consent of the governed. According to Nonet and Selznick, a separation of law from politics, legitimation through a 'sustained justification of the *use* of power' as opposed to the *source* of power,[92] and an eventual consolidation of the rule of law were predicated on such consent. The monarchical state depended on arriving at an accommodation with the courts and legal institutions in order to shore up its legitimacy and receive a kind of 'certification' for its

[86] Ibid 63.
[87] Nonet and Selznick, above n 1, 51.
[88] Ibid 46.
[89] Ibid 44.
[90] Ibid. The authors refer to the transition from the law of master and servant to that of equality of contract to infer how a new power relationship between employer and employee emerged. Similarly, in property law recognition that one citizen had the right to exercise control over a *thing* necessarily meant that they had the power to issue commands over *people* in relation to the control over that thing.
[91] Ibid 45.
[92] Ibid 56.

authority.[93] However, the legitimation of the courts and institutions of law, characterised by their authoritative identity, required consent from the broader populace if they were to assert and maintain their role as guarantors of justice.

As we shall see, this is largely reflected in the English experience. An empowered class of legal professionals, endorsed by key social groups, provided the legitimacy required to challenge the authority of the Crown and pave the way for the entrenchment of constitutionalism, especially in the crucial period leading up to the politically charged 17th century. Two aspects of the consent should be noted: the growing social and economic impact of the new lawyers and the support they gained from emerging socio-economic and denominational elites.

The Tudor period of the late 16th and early 17th centuries was one of economic expansion and significant social change. The rise of the urban centres was at the root of the social changes that profoundly affected the law. Whereas England had prior to this time enjoyed a vibrant village life, the towns emerged as the hubs of provincial activity. Although rural production was still a primary economic force, the towns took precedence as 'significant centres of consumption, distribution and administration.'[94] What can be seen is the germination of a future middle class made up principally of lower gentry and yeomen who increasingly owned land in freehold. The focus of this mobile land-owning class was on newly acquired property and civil rights, tied respectively to the growth of uses,[95] the action of trespass and various actions on the case.[96] This new social stratum was increasingly prepared to litigate in pursuit of claims and it competed for political representation in the parliaments leading up to the civil war and constitutional interregnum of the mid-17th century.[97] The amplified social acceptance of litigation meant that demand for the legal profession escalated and that the high incomes of many lawyers guaranteed them entry to this land-owning class. In the background, a

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[93] Ibid.

[94] David J Ibbetson, 'Common Lawyers and the Law before the Civil War' (1988) 8 *Oxford Journal of Legal Studies* 142, 143.

[95] The origins of modern trust law can be found partly in the enforcement by Chancery of the use for the benefit of the church. The use became central to avoiding the primogeniture rules, creating future interests and bypassing the Crown's tax laws and other incidents of feudal tenure.

[96] Trespass was available for 'invasive interferences to land, goods, or the person', while action on the case 'covered a range of situations where loss had been caused wrongfully': David J Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) 155.

[97] See Christopher W Brooks, *Lawyers, Litigation and English Society since 1450*, (Hambledon, 1988) 10-11 (for details of the growth of litigation and cases in advanced stages in the King's Bench and Common Pleas in the period 1490-1640); 67-71 (for details of the rise of litigation in the 16th century to the early 17th century).

profound social phenomenon helped institutionalise the influence of lawyers and their impact on the broader polity, namely:

> … [T]he breakdown of the traditional social stratification based largely on birth, and its replacement by a more open social structure which permitted of considerable mobility, and within which wealth was as much a qualification for gentle status.[98]

The growing demand for litigation, in the pursuit of property and civil rights that were often determinative of wealth and status, and the growth of the gentry in the towns, was necessarily accompanied by the collapse of traditional dispute resolution:

> [T]here was a breakdown in the strength of traditional social bonds, especially those within the typical village community; this had the effect of weakening the power of the community to mediate in disputes, with the corollary that the resort to legal processes became less unacceptable.[99]

The legal processes were at first dominated by the power of the monarch and the legal organs of the regime to whom the monarch's judicial power was delegated. As Nonet and Selznick point out,[100] monarchs claimed 'sovereign immunity' and even divine right in their perennial battle to build legitimacy and deflect opposition. State organs invariably reflected a culture of arbitrariness in the exercise of power, and it was principally the courts that took up the role of limiting the arbitrary power of the sovereign. The influence of the courts necessarily grew as a result of the monarch's increasing need to legitimise power over the populace and the functionaries who exercised that power on behalf of the monarch.[101] Monarchs were over time also concerned to delineate their jurisdictional power from that of the church and its courts, while the courts in turn grew from the patronage they received and the specialist personnel who filled their corridors.

However, the empowerment of the lawyers was not confined to the courts. The upper level of the legal profession, which evolved into the Bar, found paths of entry to the gentry, from whose ranks it drew clients through wealth and access to elite education. With this upward mobility grew municipal and political power as well, so that by the early 17th century the legal profession enjoyed a significant role in the growing

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[98] Ibbetson, 'Common Lawyers and the Law before the Civil War', above n 94, 144.
[99] Ibid 143.
[100] Nonet and Selznick, above n 1, 41.
[101] Ibid 58-59. Nonet and Selznick contend that the influence of courts grows as they increasingly separate themselves from the political process: 'Legal institutions purchase procedural autonomy at the price of substantive subordination.' This enables courts to certify rulers' acts and, at the same time, to legitimately oppose arbitrary exercise of power by the rulers.

central administration of the towns through the circuits of the assize justices. Furthermore, as legal historian Brooks notes, legally trained personnel expanded their influence not just through the court system, but also within the expanding state administration:

> [A]ttorneys were regularly appointed to local offices such as the clerkship of the peace or town clerkships. Many barristers enjoyed places on the commissions of the peace, and they also were appointed frequently to borough recorderships … Posts such as these gave lawyers considerable influence, and the growth of the London-based profession along with the emphasis placed by the Tudors on the ideal of the rule of law undoubtedly amplified the place of the common law and of the common lawyers in the English polity.[102]

This observation highlights not only the growing leadership and influence of the lawyers in society generally, but also the prominence given by the turn of the 17th century to the idea that society was to be ruled by law, and therefore necessarily by experts in the law. By the early 17th century, this idea came to be tested finally in the confrontation between the Stuart kings and the parliaments in which the common lawyers played a pivotal role. By this time, the lawyers had already made their presence felt by championing in parliament the commercial interests of their constituents. Major developments in substantive law took place at this time, with lawyers instrumental in the legislature's acceptance of:

> [T]he conveyancing device of the lease and release … as a normal method of passing title to land, … relief against the enforcement of penalties in contractual obligations, … [t]he recognition of the use upon a use and the consequent rise of the trust, … [and] the mortgagor's equity of redemption …[103]

The rapidly increasing political influence of the lawyers was also closely tied to the rise of ideas associated with economic liberalism, parliamentary sovereignty and a religious-philosophical opposition to the doctrine of monarchical divine power. Their exclusive forms of reasoning and language characterised their identity and established their claim to legitimacy. But it was faith in the common law, as the vehicle through which the political power of the monarch was to be curtailed, that became central to the political strategy of the lawyers. The movement to limit the royal prerogative of the Stuart monarchs in the early 17th century, and even before them the Tudors, brought together several disparate groups for religious, economic and political reasons. For the lawyers, the movement initially took the form of a revival of interest in matters relating to their own identity and expertise, such as the works of the 13th century jurist Bracton, the writings of Littleton, a 15th century judge of the

[102] Brooks, above n 34, 57-58.
[103] Ibbetson, 'Common Lawyers and the Law before the Civil War', above n 94, 151-152.

Common Pleas, and in old common law texts such as a French language exposition of English law known as *Britton*. Evident also was a glorification of the common law as the embodiment of the mythical 'immemorial custom' and wisdom of the common man. The political subtext of this trend was to present the prerogative of the monarch as limited and simply part of a customary law that had existed even before the arrival of the reformist Normans. This expertise allowed the lawyers to pronounce with some authority on the proper exercise of governmental power. The law of custom was represented as providing also for the 'constitutional rights of parliament [which], like the common law itself, were of immemorial antiquity and could not be abrogated by the Crown.'[104] The monarchists on the other hand asserted that the king's power derived from divine law and was exercised by virtue of divine right. The lawyers highlighted the political risk.

> Hence the king could suspend all positive law by royal prerogative. … This viewpoint encountered the sharpest objection of Coke and the lawyers. Coke completely rejected the doctrine of the royal prerogative … [which], he said, was valid only within the framework of the law.[105]

However, the legal world and its parliamentary representatives were not interested in defining only the monarch's powers. They set their sights also on shaping the character of parliament itself. Coke's words in *Bonham's Case*[106] asserted a hitherto relatively untested doctrine, that of the supremacy of law in the face not only of an absolute monarch but also of an arbitrary legislature:

> It appears in our books [of law] that in many cases the common law will control the Acts of Parliament and sometimes adjudge them to be utterly void; for when an Act of Parliament is against the common right or repugnant or impossible to be performed, the common law will control it and adjudge such act to be void.[107]

The ground upon which the judiciary asserted control of a potentially wayward legislature was its exclusive access to the wisdom of the common law through the case decisions of authoritative and independent superior courts. This was the source of the judiciary's political legitimacy. As Nonet and Selznick have noted,[108] Coke had famously angered James I in *Fuller's Case*[109] by insisting that the reason employed

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[104] Rodgers, above n 42, 145.
[105] Carl J Friedrich, *The Philosophy of Law in Historical Perspective* (University of Chicago Press, 1963) 82.
[106] (1610) 8 Coke 113b.
[107] Ibid.
[108] Nonet and Selznick, above n 1, 62.
[109] (1607) 5 James 1.

by judges to resolve disputes was not synonymous with the natural reason of ordinary citizens, or even kings, because:

> [The] Fortunes of his [the king's] Subjects are not to be decided by natural Reason, but by the artificial Reason and Judgment of Law, which requires long study and experience …[110]

Again, this was in the political context of the movement to qualify the royal prerogative. It was also part of a rearguard action by the common law courts in the face of a growing jurisdictional threat from Chancery, which was in turn supported by a church establishment that had arrived at accommodations with the monarch. Coke's bold assertion of judicial pre-eminence may not have yielded immediate results, but it was a prescient forewarning of some of the major constitutional battles that preceded the emergence of a sovereign legislature.

> On the border of jurisprudence and power politics, Coke's definition of law as 'artificial reason', the collective professional opinion of experienced judges, asserted the authority of the judiciary. Testing legal issues by the judges' reason gave the judiciary a marvelously effective weapon for striking down anything found 'unreasonable': actions by government officials, manorial customs which weighed hard on copyhold tenants, restrictive municipal ordinances.[111]

Coke's position reveals that the judiciary relied on its expertise to curb the king's power and official arbitrariness at all levels and differentiate itself from the monarchy and the legislature. This expertise was founded on the reasoning of the common law and the doctrine of precedent, meaning that judges could resolve the vital disputes between citizens and determine their rights in ways that were authoritatively derived from previous decisions.[112] The lawyers defended their expertise and asserted it through their training, which determined the manner in which they approached the study and, in turn, the practice of the law. As we have seen,[113] the 'artificial reason' of the law, its authentic language, was shaped markedly by the reasoning of classical rhetoric, the systematic study of law and the growing appeal of scientific method.

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[110] Ibid.

[111] Boyer, above n 44, 6.

[112] The historical authenticity of this reasoning has been questioned by some jurists. Frederick Maitland, for instance, argued that common law reasoning was unhistorical and revealed the relative insularity of the common law: 'That process by which old principles and old phrases are charged with a new content is from the lawyer's point of view an evolution of the true intent and meaning of the old law … [W]e are tempted to mix up two different logics, the logic of authority and the logic of evidence. What the lawyer wants is authority and the newer the better; what the historian wants is evidence and the older the better': Frederic William Maitland, *Collected Papers*, Vol 1 (Cambridge University Press, 1911) 491.

[113] (1607) 5 James 1.

The lawyers in the courts and the legislature cultivated consent also from another natural constituency, one that was prepared to treat and classify knowledge in scientific and objective ways, on the assumption that universally applicable principles would emerge. The push to limit the power of the monarch found philosophical justification conspicuously in the practices of those Christian groups that embraced the Reformation, such as the followers of the English theologian John Wesley,[114] in whose *Compendium*[115] adherents could find an exposition of the benefits of method and daily routine to a fulsome religious life. For Wesley, method amounted to 'a disposition of the parts of any art or science that the whole may be more easily learned.'[116] This example reflects merely one instance of the reformist philosophical spirit of those faiths that had broken with Rome, and even the established English church, and sought a Christianity that promised more practical orientations for life on earth. A variety of religious groups, concentrated primarily in the non-conformist and independent denominations, propagated for the breaking down of both monarchical and ecclesiastical authority. These growing faith groups demonstrate the importance at that time of not only the Wesleyan focus on method as practical guidance for a pious and busy life. They highlight also the growing influence of the Lutheran concept of a calling for worldly activity and good deeds and the Calvinist doctrine of predestination, by which salvation is divinely predetermined, to justify earthly diligence and honest wealth accumulation.

Not surprisingly, this phenomenon coincided with the growth also of those socio-economic groups in which the English common lawyers were to be found – the gentry, yeomen, burghers and artisans who filled the ranks of the bourgeois middle class of later times. They were crucial in providing the consent and legitimacy required by the new legal class. The links between the various puritan groups and the push for economic liberalism has been the subject of considerable academic attention.[117] Melding worldly realities with other-worldly concerns became a challenging necessity for many constituents of these new social groups.[118] It was the yearning for a synthesis of the spiritual and material benefits of life that led them to embrace the new ways of classifying and understanding the practical world in which they lived and worked. The emphasis on Ramist method and a systematic approach to legal training

[114] John Wesley (1703-1791), founder of English Methodism.
[115] Henry Aldrich, John Wesley and John Sanderson, *a Compendium of Logic* (1756).
[116] Ibid 32.
[117] For a useful discussion of the main contributions, see David Little, *Religion, Order and Law* (University of Chicago Press, 1970).
[118] The synergies evident in the religious ideas of the Reformation and the rise of modern commercial action were, for example, the subject of Max Weber's pioneering sociology classic, *The Protestant Ethic and the Spirit of Capitalism* (first published in 1904).

upon which the inns of courts founded their programs found favour also with constituents of the emerging professions, occupations and trades in the burgeoning towns:

> Ramus' commitment to the ideals of the bourgeois world, shown for example in his desire to found mathematics on the practice of bankers, merchants, architects, painters and mechanics … [favoured] a more empirical and experimental approach to science on the grounds that these last-named occupational groups were dealing with new problems and techniques … Ramus' central and controlling concept of 'method' … can legitimately be called a kind of intellectual commercialism … [in the sense of knowledge] as a commodity rather than a wisdom.[119]

These new and mobile social groups were adapting to the social and economic realities of the rapidly urbanising landscape around them, fuelled by new types of work and communication. They yearned for a greater political voice and were eager to live out their faith commitments in what they saw as more grounded ways, through new denominations and doctrines that focused on worldly deeds and aspirations. They found a common language with the lawyers who were keen to spearhead the politics of change by limiting the arbitrary power of the monarch and establishing a legal order founded on the rule of law.

V Conclusion

This article sought to identify and interpret key social origins of the common law experience of rule of law by reference to a theoretical framework provided by Nonet and Selznick's neo-evolutionary model of law in society. By appreciating the variability of the attributes of legal ordering in context, the model may offer a useful analytical tool for understanding the role that law plays in any given social and political order with flexibility and sociological sensibility. The 'rule of law' is often seen as the high point of legal ordering in the common law context, but the model also cautions us about the potential for the loss of ideals and values in any institutionalised form. Hence, the model's anticipation of a 'responsive' law stage of development.[120]

By focusing on the identity of the legal institutions and the consent that they garnered in early modern common law history, this article sought to

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[119] Ong, above n 58, 159-160.

[120] The 'quest for competence' is the imperative for the 'responsive law' stage of Selznick's model. It is predicated on a qualified reintegration of law and politics, but also on 'sovereignty of purpose', by which the values that are implicit in rules and policies are to be given priority. This is to be achieved through 'civility', which demands respect for the complexity and variability of social facts, and 'competence' which envisages the principal role of courts as administrators of responsive public policy: see Nonet and Selznick, above n 1, Chapter 4.

identify the social and cultural origins of 'rule of law' and its connection to the model's stage of 'autonomous law'. It reflected on the social facts that facilitated the birth of a legal system based on a qualified separation of the organs of law from those of the state. A legitimated and dispassionate judiciary, for so long 'implied by the blindfolded statue of justice',[121] is arguably the most emblematic image of the rule of law. The historical evidence for the social origins of rule of law in the English story seems to indicate a long and complex path embedded and aggregated in the interwoven links of political, social, economic and philosophical movements and events that germinated in the fertile ground of early modern England.

The perspective of 'law and society in transition' offered by Nonet and Selznick may arguably help us also to understand what is required for the development of a genuine rule of law in disparate legal orders today. A considerable part of the discourse on the rule of law in recent years has been concerned with the project of 'exporting' rule of law principles to developing polities. It has frequently been assumed that fundamental aspects of 'the rule of law' are easily discernible as discrete and formalised 'thin' institutional elements that are likely to function in a variety of states once the institutions are set in place.[122] However, this view, which seems to have its roots in the 1960s 'Law and Development Movement' that aimed to introduce rule of law institutions to post-colonial developing countries, has arguably failed to produce visible results as expected in its target countries. There has grown a body of literature directed at both exposing and defending instrumentalist projects

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[121] Robert A Kagan, 'On "Responsive Law"' in Robert A Kagan, Martin Krygier and Kenneth Winston (eds), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Rowman and Littlefield Publishers, 2002) 85, 87.

[122] For example, it is thought by some scholars that, in this way, legal orders in countries such as China and Russia could gradually become less repressive and arbitrary and necessarily more responsive and democratic. For literature on China see for example: Karen G Turner, James V Feinerman and R Kent Guy (eds), *The Limits of the Rule of Law in China* (University of Washington Press, 2000); Albert H Y Chen, 'Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law' (1999-2000) 17 *UCLA Pacific Basin Law Journal* 125; Randall Peerenboom, 'Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China' (2001-02) 23 *Michigan Journal of International Law* 471; Eric W Orts, 'The Rule of Law in China' (2001) 34 *Vanderbilt Journal of Transnational Law* 43; Matthew C Stephenson, 'Trojan Horse behind Chinese Walls - Problems and Prospects of US-Sponsored Rule of Law Reform Projects in the People's Republic of China' (2000) 18 *UCLA Pacific Basin Law Journal* 64. For literature on Russia see for example: Donald D Barry (ed), *Toward the 'Rule of Law' in Russia?* (M E Sharpe Inc, 1992); John M Burman, 'The Role of Clinical Legal Education in Developing the Rule of Law in Russia' (2002) 2 *Wyoming Law Review* 89; Jeffrey Kahn, 'The Search for the Rule of Law in Russia' (2005-06) 37 *Georgetown Journal of International Law* 353; Kathryn Hendley, 'Assessing the Rule of Law in Russia' (2006) 14 *Cardozo Journal of International and Comparative Law* 347.

that promote 'standard menus' for the export of legal systems rooted in western rule of law precepts.[123]

The English story shows that, notwithstanding their often laudable intentions, rule of law export projects have tended to minimise the possibility that sustainable and long-term rule of law in any polity is ultimately a reflection of autochthonous political culture. Addressing the rule of law export movement, Rosa Brooks has eloquently argued that:

> ...[T]his type of formalistic approach fails fully to recognize or acknowledge ... that creating the rule of law is most fundamentally an issue of norm creation. The rule of law is not something that exists 'beyond culture' and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes. In its substantive sense, rule of law is a culture...[124]

Martin Krygier alerts us to the broader contextual underpinnings of the rule of law, rightly pointing out that the rule of law 'thrived best where it was least designed'.[125] This indicates that rule of law attributes, which the rule of law exporters are so concerned to promote, are enabled and secured primarily by social and cultural conditions and factors rather than formal instruments such as constitutions and bills of rights. Instead, such formal enactments are the result rather than the cause. Elsewhere, Krygier points out that analysis of rule of law 'should begin with teleology and end with sociology',[126] meaning that:

> …[W]e start by asking what we might want the rule of law for, ... not external ends that it might serve, such as economic growth or democracy, but ... its *telos*, the point of the enterprise, goals internal to, immanent in the concept. Only then should we move to ask what sorts of things need to

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[123] For a leading critical view of the 'Rule of Law Assistance Standard Menu' see Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Carnegie, 1999). For opposing views on the debate about the law and development movement see David Trubek and Mark Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) 4 *Wisconsin Law Review* 1062; Kevin Davis and Michael Trebilcock, 'The Relationship between Law and Development: Optimists vs Skeptics' (2008) 56 *American Journal of Comparative Law* 895; David Trubek, 'Law and Development: Then and Now' (1996) 90 *Proceedings of the Annual Meeting of the American Society of International Law* 223; Amy L Chua, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' (1998) 108(1) *Yale Law Journal*, 1; Bryant G Garth, 'Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results' (2002-03) 52 *De Paul Law Review* 383.

[124] Rosa E Brooks, 'The New Imperialism: Violence, Norms, and the "Rule of Law"'(2002-03) 101 *Michigan Law Review* 2275, 2285.

[125] Martin Krygier, 'Compared to What? Thoughts on Law and Justice'(1993) *Quadrant* 49.

[126] Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology,' in Palombella and Walker (eds) *Relocating the Rule of Law*, above n 13, 46.

> happen for us to achieve such a state of affairs ... [This] will of course involve legal institutions but it cannot be answered without looking beyond them to the societies in which they function, the ways they function there, and what else happens there which interacts with and affects the sway of law. For the rule of law to exist, still more to flourish and be secure, many things beside the law matter, and since societies differ in many ways, so will those things.[127]

A focus on law as a social and cultural phenomenon leads us to an awareness of the dynamics by which disparate social groups are driven by social and economic realities to define their identities, assert their strategic positions and influence the rules by which they are prepared to exist. These dialectical dynamics will vary across cultures and inevitably involve long and complex processes. Paul Kahn argues for such a perspective:

> Scholars of law and culture focus on the materiality of law, the way in which law simultaneously embodies the interests of particular groups and shapes those interests – and even shapes the identities of those who understand themselves as members of such groups. Law must ... be studied in ways that are historically specific and deeply contextualized. The turn to historical context reveals a dynamic process in which power is contested for the sake of ideas, values, and interests. The contest is often fought within, and over, the terms of legal claims for recognition of identity as well as of particular interests.[128]

The English story leads us to four tentative conclusions about how the rule of law may emerge in developing legal orders. Firstly, it is likely to germinate in a repressive legal order in which the primary preoccupation of law is to assert and maintain order on behalf of a sovereign, state apparatus or political party with whom the law is closely identified. There is usually an official perspective by which 'rulers identify their interests with those of the community'.[129] A primary distinguishing feature of such a legal order is endemic arbitrariness and rampant official discretion. Secondly, the dynamic for change is often sparked by tectonic shifts in the balance of economic relationships, economic adjustments and frequently rapid technological change. These in turn lead to the emergence of new and dynamic aspirational groups that require the accommodation of novel needs, thereby placing major demands on vital and scarce resources. Importantly, such groups may seek inspiration in ideologies, creeds, myths and symbols that are culturally separate from, or even opposed to, the official perspectives of the ruling elites. Thirdly, the repression that is exercised systemically through pervasive legal

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[127] Ibid 46-47.

[128] Paul W Kahn, 'Freedom, Autonomy, and the Cultural Study of Law' (2001) 13 *Yale Journal of Law and the Humanities* 141.

[129] Nonet and Selznick, above n 1, 40.

organs of the state creates a powerful class of legal officials and experts who will in turn seek to assert their authority through a quest for autonomy and legitimacy by way of a qualified institutional separation from their political masters. The lines of demarcation between the legal officials and the new economic groups are often blurred. Central to this process is the professionalisation of an elite class of lawyers who will promote their expertise and unique cultural identity. This in turn facilitates their increasing challenge to the political rulers in the processes by which laws are created, rights extended and citizens' claims asserted. Finally, the lawyers will garner the requisite consent that is required from the key social, cultural and economic groups and constituencies to gain political power and promote the breaking down of the monopoly of the ruling elites. This is accompanied by a qualified liberalisation of the legal order and a gradual institutionalisation of a constitutional compromise between the state and the key actors that is underpinned by popular consent.

These stages are almost invariably accompanied by prolonged conflict and social disruption. They also involve 'not just change, but … *evolutionary* development':[130]

> Some stages have priority over others, not always in time or importance but as stages in successful development. There are basic problems that must be solved by a legal order before more complicated questions are asked of law or at least before law can successfully answer them, before more complex legal responses to social problems can be devised, and before social institutions are robust and sophisticated enough to deliver them. One such is the maintenance of social order. Then another is the curbing of arbitrary power. A third is contributing in competent ways to the solution of complex social problems — and so, repressive, autonomous, and responsive law.[131]

To what extent a cadre or profession of legal experts is vibrant enough to lead a political push for the legalisation of the required freedoms and rights to amount to a genuine 'rule of law' in developing polities is the unknown factor. As is evident in the English experience, a dynamic professional legal cadre proved indispensible. Each developing legal order will inevitably exhibit unique variations. Again, expanding on Nonet and Selznick's argument, Krygier notes that:

> [I]n strong legal orders, such as those of Western liberal democracies … there are large cadres of people trained within strong legal traditions, disciplined by strong legal institutions, working in strong legal professions, socialized to strong legal values. Western legal orders are

[130] Martin Krygier, *Philip Selznick: Ideals in the World,* above n 2, 171.
[131] Ibid.

> bearers of value, meaning, and tradition laid down and transmitted over centuries, not merely tools for getting jobs done.[132]

The English experience provides in many ways an exemplar or paragon of a long and complex path to lasting rule of law that was successfully transplanted to numerous polities around the globe. The intuition, vision and perspective required to interpret and foresee such a complex path may in no small measure be inherent in Nonet and Selznick's developmental model of law in society.

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[132] Ibid 193-94.