Accepted text, to be published in the International Journal of Law in Context

Communal Justice in Shakespeare's England: Drama, Law, and Emotion

By Penelope Geng, Toronto: University of Toronto Press, 2021. 257 pp. ISBN: 9781487508043 $75.00 (hardback)

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Who should give judgment? Does a legal system need a Dworkinian Hercules, a perfectly rational *homo economicus* or something else? According to Geng, in the decades around 1600 this question was answered differently by the formal legal system and wider culture. The legal profession of early-modern England grew dramatically and the formal legal system stressed the role of professionally trained lawyers as judges. A reaction to this emphasised the role of lay people (at the time, invariably laymen), rejecting the claims of professional, book-based, learning as the key skill for judges. Instead conscience and moral feeling were the key attributes of a judge. Justice would therefore be delivered by non-lawyers acting in accordance with their consciences.

In places this book is already aware of its potential relevance to other fields. Geng uses literature to question whether a legal system can truly detect remorse, concluding that it cannot. That conclusion (as she notes) has been reached by scholars in social sciences too (p.143). Nonetheless, people working within legal systems continue to look for remorse when reaching decisions.

Geng argues that the literary sources on which she relies may have more potential to change views. The idea of 'legalities' from law and society scholarship is developed. Legalities are explained as 'the constellation of beliefs, experiences, and feelings that comprise a subject's understanding of the law' (p.128). The premise of this book is that

someone's understanding of the law is informed by cultural presentations of imagined legal situations as much as someone's awareness of genuine legal situations such as court decisions and public displays of the operation of the legal system. These 'imagined legalities' from plays and works of fiction are just as important (perhaps even more so) than the 'embodied' legalities which arise from attending a real court or other interactions with the non-fictional legal system.

In doing this, Geng extends the idea of a 'legality' in a manner that appears intuitively plausible, raising an approach to legalities which should be considered in future scholarship. It is not, after all, from attendance in American courts that people in Britain understand the idea of 'taking the Fifth', but from fiction, and it is possible there is more awareness in Britain of the American right against self-incrimination than the different version which applies in England and Wales. Whether, how, and how far these imagined legalities effect the embodied legal system are interesting questions for further research. Might an imagined legality shape demands for change in the law, or might actors operating in the embodied legal system need to clarify the actual law to those with whom they interact?

However, Geng's book also shows the difficulties in such an approach. If literature informs legalities, why have the difficulties about remorse portrayed in literature not affected the understandings of legal actors either in the early-modern period or in the centuries during which Shakespeare has been a part of the English literary canon?

For Geng, the legal culture of a society was formed as much by non-lawyers as lawyers. The role of artists (especially playwrights) and theologians (in sermons) are stressed in creating the 'imagined legality' of early-modern England. That said, there are important questions and concerns about expanding existing approaches in this way. The most significant is determining where the balance between the 'imagined'

and the 'embodied' in forming the legality of a society lies. Geng stresses the role of literature, the arts and theology, but this raises difficult questions of methodology.

First is whether these imagined legalities are constitutive of someone's understanding of the law, or instead are an expression of an understanding which was already shared by members of the community (and if so, how was that pre-existing legality formed?). For example, when considering communal shaming, Geng considers the public penance of the Duchess of Gloucester in *Henry VI, Part 2*. Geng explains that 'Shakespeare stages the penance because it was part of the collective, communal memory. The story had become too famous not to be staged' (p.130). This may well be correct, but is the play here shaping the legality, or being shaped by it? Second, why should particular forms of expression be privileged over others? A sympathetic account of the duchess was printed in the second edition of Foxe's *Book of Martyrs*, a book which cathedrals, church officials and parish churches were all instructed to purchase and which was extremely influential (Loades, 2011). Sympathy for the duchess may well have been engendered less by the play (with perhaps uncertain reach outside London) and more by protestant polemical history first published several decades earlier. Robust integration the idea of Geng's idea of imagined legalities into scholarship will require consideration of these difficult issues of causation. When using imagined legalities in historical work it is of course possible that a play might be shaped by an existing imagined legality at the time of its writing or provide evidence of such a legality, but also shape the imagined legality of a later period. It will be important to keep these different roles of the play distinct

A major feature of Geng's work is in the cultural legitimacy of non-lawyers as judges and other significant actors in the criminal legal process. Non-lawyer judges continue to feature in legal systems around the world. Lay judges mostly feature in criminal trials, from justices of the peace in England and some former British colonies, to mixed panels of lay and professional judges in civilian jurisdictions such as Germany and

Japan. However, they also play a role in some types of civil disputes in various jurisdictions (see recently Ivković et al, 2021). As Geng rightly notes, such lay participation is in seeming conflict with the dominant professionalisation of legal processes which has occurred over preceding centuries. However, there are arguments that lay participation should be expanded (Owens, 2016), with Taiwan legislating to introduce lay judges into criminal trials from 2023 (Lin, 2020).

Geng's work pushes to consider why non-lawyers should have a role in determining criminal cases. Geng posits that lay participation was justified by non-lawyers' knowledge derived through 'moral, religious, and even emotional faculties' (p.18). The underlying premise is that judgment is more legitimate when not based solely on the deliberately dispassionate application of law, something which may be worth considering not only in relation to the role of lay judges, but perhaps also when considering the appointment of professional judges.

This analysis is predicated on a clear distinction between lawyers and laypeople. The distinction is an obvious and fundamental one in all scholarship on lay judges. However, it is also more difficult than is often assumed. When does someone cross the threshold from lay person to lawyer? How much legal knowledge, legal training, or something else, tips a person from one category to another? For the early-modern period covered by Geng, the justice of the peace poses a significant problem. Geng, quite understandably, struggles with how to accommodate the very broad range of early-modern justices of the peace into her argument. She considers that 'the JP's legal training, relative wealth, and high social credit edged him closer toward the side of the assize judges than the commoners upon whom he passed judgment' (p.36). The evidence for legal training of early-modern JPs is equivocal. Some did attend the Inns of Court, and a smaller proportion were qualified lawyers (Geng cites the statistics for Kent (p.36), a county whose proximity to London may have led to an atypically high proportion of JPs having attended the Inns). Whether all those attending the Inns

actually learned much law is unclear to historians (Prest, 1967). The same issues can arise today and boundaries may shift. It is now possible (although perhaps unlikely) for a legal academic with no experience in legal practice to be appointed to the United Kingdom Supreme Court. A few decades ago such people were not considered to be suitable for a judicial appointment. Geng resolves this by moving to similarities of wealth and social credit to describe JPs as at least 'semi-professionals' (p.61). If we are to take this more class-based approach to distinguish between professional and lay judges to develop the legitimacy Geng suggests, then a more socio-economic assessment of suitability would need to be introduced in appointment processes.

Ideal early-modern (lay) judges were also, importantly, part of the communities they served. The chief justice in *Henry IV, Part 2* is presented as exemplary, a judge who 'walks the streets of Eastcheap' and who used his personal knowledge of the parties to a dispute to inform his decision (p.60). Geng contrasts this to the rhetoric of professional lawyers, who were to avoid the courting of 'popularity' and friendship as a source of corruption (pp.57-8). However, as Geng observes, the chief justice's approach was 'unsustainable' and ineffective (pp.63-4). There may be a warning here for proponents of lay judges – a certain degree of distance from one's community is needed for judges to be effective. The issue is how to be close to the community, but not too close.

On the other side of the coin, it is not clear why lawyers are considered to be apart from these communities. Lawyers attended plays and the Inns of Court were major contributors to early-modern literature and drama at times (Winston, 2016). Geng's analysis of sermons focuses on the assize sermons which the assizes judges certainly attended, and it seems likely that at least some of the lawyers acting at the assizes would have done so too. In light of this, the hard distinction between lawyers and lay people becomes much more complex than the analytical structure used in this book. From a wider perspective it raises questions about quite what it is about non-lawyers

which recommends them as judges over lawyers. On the assumption that aspiring lawyers begin as normal members of their community, what is lost through legal training that is so necessary for doing justice?

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