

Martial Law and English Laws, c.1500-c.1700

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Reviewer:

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Martial law does not have a good reputation. William Blackstone set the tone of modern attitudes in the 18th century. Martial law is 'built upon no settled principles ... entirely arbitrary in its decisions ... no law, but something indulged, rather than allowed as a law' (quoted at p. 251). John Collins convincingly demonstrates that this depiction of martial law is utterly misplaced when considering martial law in England during the 16th and 17th centuries.

This is a wide-ranging and complex book. It is not a narrow history of legal ideas or institutions. Many historians of early-modern England and associated territories should find something of interest in it. Martial law was highly relevant to early-modern politics and empire, as well as a method for dealing with the poor. In doing so, Collins confirms Christopher Brooks' argument that law was a central feature of the early modern state and that legal ideas had very considerable weight, even to non-lawyers.

The structure of the book is broadly chronological, with a slight weighting towards the 17th century in the period covered. Important medieval material is addressed succinctly early on, but still forms a key part of the narrative. The proceedings against Thomas, Earl of Lancaster in 1322 and their reversal in 1327, for example, were a frequent touchstone in early modern material and reappear throughout the book.

Crucially, Collins begins by highlighting an important historiographical error: the tendency to think of martial law in something like modern terms. Moderns tend to make two assumptions in relation to martial law. The first is to distinguish between martial law and military law, in the sense of the special laws governing members of armed forces. In early modern England, the latter were part of the former. The second is to view martial law as something closer to a state of emergency in which law in the usual sense does not apply, Blackstone's non-law exercised by the military over civilians. As Collins demonstrates, this was not the early modern understanding. Martial law was exercised over civilians, but it was an established law. While Collins discusses both of these senses, different parts of the book tend to focus on one meaning or another.

Collins brings out the legal history of martial law in chapters two and three. These chapters are closer to what we might regard as traditional or narrow legal history, a history of legal ideas and institutions. Martial law procedure and proof was similar in many respects to that found in the continental romano-canonical tradition, a type of procedure also used (with variations) in the church courts, Admiralty, Star Chamber and Chancery in England. This meant that defendants could be convicted based on their notoriety, even on 'manifest proof' without further trial. Torture was also permissible for obtaining the best evidence of guilt, a confession. All of these aspects of civilian evidence law were applied in Elizabethan Ireland, although Collins does not try to determine the extent to which torture was used there or elsewhere. However, the adoption of laws of evidence meant that where there was a trial, evidence was taken seriously. Defendants were acquitted when the evidence fell short of that required.

Institutionally, the later 16th century saw the onset of developments which continued into the 17th. There was increasing professionalisation of the personnel applying martial law and a shift from cases tried by the court of the marshal (the commanding officer of the army) to Councils of War. Collins explains this development as a reflection of changing military organisation, together with the ideology of counsel taking before decisions. By the 1640s this change in practice had become normative, with soldiers complaining if they were not tried by a council.

As a body of law, martial law also has an intellectual history, discussed principally in chapter three. It should be stressed that this history relates principally to the law applied to military men by specifically military tribunals, rather than the application of martial law to civilians. Substantively the law applied to civilians does not appear to have been different to the common law. But in the case of soldiers, the articles of war set down specific rules. These articles had to be drawn to a soldier's attention, such that in 1663 soldiers were acquitted of a breach of the articles when they showed they had never heard the articles read.

The articles changed dramatically from the late 16th century, largely determining their content for the 17th century. There was clear influence from continental (especially Spanish) articles of war, together with classical materials. Collins stresses that this influence was not simple borrowing, but a more complex process of reflection and adaptation, although one suspects that those soldiers subject to the Earl of Essex's adoption of Roman decimation practices in 1599 would not have been happier had they known his choice was very deliberate.

Although he does not bring it out, this part of Collins's book should be read by historians of international law and the law of war. However much Gustavus Adolphus may have travelled with a copy of Grotius' *De Iure Belli ac Pacis*, most soldiers would have been much more familiar with the articles of war of their own army. With European armies looking to each other to establish laws and norms, there may be a fruitful line of enquiry in determining points of contact between the high scholarship normally treated in the history of international law and these more mundane texts.

Collins stresses the wide concept of martial law, encompassing both soldiers and civilians, although there were differences between martial law for these groups. Soldiers came to expect a trial in particular form when being prosecuted, but for Collins one of the key indicators of martial law over civilians is summary process, where 'justice' could be dispensed without a trial. The initial justification for this may have been

sound, as the civilians in question were believed to be rebels, but the range of civilians subject to such summary process grew, including 'idell vagabounds', adding further terror to early modern poverty (p. 57).

On other occasions, the full scope of martial law procedure could be applied to civilians. This was not consistently the case, but the availability of martial law could prevent the exercise of normal secular justice (whether criminal or civil). Non-soldiers would have to petition commanders to be able to bring claims which they would normally be entitled to bring as of right, and Justices of the Peace were precluded from proceeding against criminal soldiers, to their frustration. Under James II a major change seems to have occurred, with courts martial being given all jurisdiction over determining petitions, effectively requiring civilians bringing claims against soldiers to proceed through martial law process in a court staffed by soldiers.

In certain times and places, such as London in the 1640s, civilians could be even more directly subject to martial law jurisdiction for activities regarded as undermining a wider war effort. Although Collins does not bring it out, such criminalisation could be interpreted as showing a latent belief that even the civilian population was part of the war effort and unhelpful activities were wrongs akin to those committed when soldiers failed in their duties. Such an attitude was already evident in the military colony of Jamestown (where all planters were also seen as soldiers and so subject to martial law) and colonial militias.

This broad scope highlights a challenge, never really addressed in the book, of what Collins means by 'martial law'. He convincingly shows that 'martial law' was a multi-faceted idea in the early modern period, of much wider scope than a modern reader might expect, but still with some (disputed) boundaries. Collins never really explains where the conceptual boundaries of martial law are for his understanding of the term and so the scope of the book.

But Collins sometimes does seem to have a model in mind and it is not identical to the temporal or geographic boundaries to martial law which he identifies in the early modern sources. Grants of power to proceed by summary process without a traditional trial, such as a power in Ireland against civilians resisting arrest or the Riot Act of 1715, are labelled by Collins as 'martial law'. However, as Collins observes in relation to the Irish power, the language of martial law was missing from these laws. If contemporaries did not label these powers as 'martial law', should we? The problem might be even more acute in relation to the Riot Act. While the Irish rule appointed soldiers as judges, giving some link with more traditional martial law, the Riot Act was implemented by civilian Justices of the Peace over civilians. What is martial about this? The only answer is that Collins sees any type of summary procedure as martial law. This may be an over-compensation for the previous historical trajectory. Where before too little was martial law, now too much is.

This issue does seem to have been spotted in relation to the High Courts of Justice of the Interregnum, beginning with that which was to try Charles I (and in doing so, adding a valuable additional perspective to that trial). Collins is more nuanced, identifying martial law as only one influence on these courts and acknowledges that by the 1650s few military men served as judges in these courts. Again, by this point one has to wonder if it is appropriate to regard these courts as 'martial law' courts, and if so what 'martial law' actually means at this point.

A valuable theme running throughout this book is the use of martial law by the early-modern state. Martial law was a means by which governments could get around the common law when it did not work as they wished while still acting within a legitimate legal framework. For Collins, doing so was part of a policy of 'judicial terror' used to compel obedience and behaviour. Such was the dread of martial law that sometimes the threat of its use would suffice. Most obviously, martial law avoided any use of juries. The unreliability of juries, especially for unpopular governments, was a constant concern, both in specific trials (such as that of John Lilburne) or particular times and places, whether in the north after the Pilgrimage of Grace, Norfolk in the Interregnum or throughout the period in perennially problematic Ireland. Even parliamentarians who had once opposed the use of martial law were willing to relax restrictions as they felt such circumstances demanded.

Restoration Jamaica provides a very full discussion of a different avoidance of the common law. The authorities carefully contrived a state of affairs in which martial law could be justified, doing so on several occasions. The governor could then seize property and compel planters and their slaves to build fortifications, compulsion which could otherwise not be authorised. However, this interference with private property was not absolute. Compensation had to be paid for any property taken. Intriguingly, there is also evidence that 'wages' were paid for slaves' time in these endeavours, presumably to the slaves' owners, suggesting a broader concept of 'property' (stretching to temporary use) than is usually understood in discussions about seizure in the period.

These uses of martial law could be characterised as abuses and another theme of the book is the control of martial law. This is particularly prominent in a discussion of the Petition of Right, a text which became central to the control of martial law for the rest of the 17th century. For those opposed to the use of martial law, boundaries had to be placed, focusing on limiting martial law to war time. Even for these opponents of martial law, however, there were significant differences of opinion in quite what constituted a time of war.

The Petition of Right was not the first attempt to control martial law. The Elizabethan Privy Council had experimented with various techniques to restrain the use of martial law, techniques which Collins demonstrates were replicated when Parliament sought to control martial law in the 17th century. What is much less clear from Collins's discussion is whether these replications were conscious, or merely a product of similar problems. This is important for legal history and for those interested in the role of Parliament: did parliamentarians believe themselves to be developing new policies, or were they consciously taking up solutions, perhaps even a role, from the Privy Council?

This question of intellectual influence reappears in relation to the role of the Petition of Right in the second half of the 17th century. Collins stresses that the Restoration polity adopted ideas about when martial law could be used which can be seen in the parliamentary debates leading to the Petition of Right. He also notes that these debates were not in print. So were these ideas developed independently in the Restoration or was there continuity? This interesting question about the transmission of ideas is not considered by Collins.

Aside from these legal controls on martial law, perhaps more significant were the political controls. Even when martial law was legally legitimate, its unpopularity undermined its utility. This issue recurs throughout the book. Whether in Elizabethan Ireland, Jacobean Jamestown or St Helena under the East India Company, martial law bred dissatisfaction. While martial law could solve immediate problems, it created new ones. Elizabeth was concerned that unhappiness with martial law undermined the Irish imperial project, the Virginia Company found that Jamestown's reputation discouraged the new planters it required. The East India Company's problem was different, in that the new concern was one of governance, with the London Parliament being willing to review the use of martial law in British territories overseas. As Collins notes, by the late-17th century most governors in the empire found martial law 'too dangerous and too controversial to use' (p. 227), whatever its apparent legality.

This imperial context is a final significant theme in the book. The Elizabethan Privy Council brought martial law practices developed in Ireland to England, but in the 17th-century English developments, especially

normative ideas about when martial law was acceptable, shaped practice in the colonies. By the Restoration, the Crown and Privy Council often limited or prevented the use of martial law overseas. Arguments about the acceptability of martial law in the colonies were often based on those seen earlier in England, especially in relation to the Petition of Right. For those scholars interested in imperial governance, the role of law in the British Empire, or Atlantic legal history, there is important material here. Aside from the legal questions, Collins raises points concerning the degree of freedom colonial authorities exercised and their concerns about oversight from London (perhaps following petitions by individual colonial subjects).

Collins covers an impressive swathe of physical, temporal and intellectual territory in this book with the presence of martial law the only real connection. He evidences a deft historiographical touch where required, making readers aware of relevant debates without spending too much time on those which are tangential to his main interests. Nonetheless, specialists in particular fields might disagree with some of his assessments. For my part, describing martial law as a 'judicial terror' with 'speedy trials and mass executions' may over-emphasise the distinction to other criminal proceedings. Common law felony trials were anything but slow to modern eyes, perhaps an average of around 30 minutes and the death penalty was (in theory at least) automatic.⁽¹⁾

The concern with Collins's position here is less with the specifics, but that a book focusing on martial law risks making martial law appear more unique than perhaps it was. I doubt much could have been done about this without creating an unwieldy monster of a volume, but it seems likely that the points where martial law touches on other issues (and there are many) are likely to be those where the work is more vulnerable to criticism.

In other places there is simply an absence of comparison or reference to related fields. This could prove a fruitful line of future research and Collins's diligent work opens up martial law for this purpose. Collins, for example, discusses sentencing practice in martial law trials in various places. Officers were treated more leniently than mere soldiers, receiving lesser and non-corporeal penalties. Punishment was seen as having a wider educative function and mandatory apologies to victims were included as part of the sentence for an offence. To some extent, and with contextual variations, these features can be seen in other early modern courts such as the Star Chamber or church courts. Bringing together research into these various courts might help in revealing wider ideas about sentencing practice and the role of criminal justice, ideas which were not strictly 'legal', but underpinned the work of the legal system.

There is much to consider in this book. Collins demonstrates the importance of martial law to the English and imperial polity. It is telling that most of my criticisms could be reduced to a wish for Collins to have written more and gone further. An excellent book which should be of interest to many historians, Collins has illuminated martial law and the available sources and should provoke further work in the field.

Notes

1. J. S. Cockburn, *Calendar of Assize Records: Home Circuit Indictments Elizabeth I and James I*, Introduction (London, 1985), p. 110.[Back to \(1\)](#)

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