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Chapter 1

Rex and Lex

The Problem of Legislative Sovereignty

Nestled densely in the countryside of seventeenth- and eighteenth-century France lay the largest permanent bureaucracy in Europe: twenty to thirty thousand royal bailiwick and seigneurial benches, dispensing justice to more than 85 percent of the French population.[1] The ordinary crown courts and lords' courts were far more than arenas of litigation in the modern sense. They had gradually become the nexus of local governance by the middle of the seventeenth century, a rich breeding ground for men who both administered and governed the villages and towns. The judges of the common courts were the front line of the French state. They kept the king's peace in thousands of parishes, on that vital border where the public commonwealth met the private realm of families. Yet from their court benches, these same magistrates and officers confidently controlled the law in ways which often expressed a startling independence from royal aims. The baron de Montesquieu put his finger on the central paradox of the French tribunals in his Persian Letters. They were "the sacred treasure of the Nation," he wrote, "and the sole one of which the sovereign is not the master."[2]

To understand this paradox of sovereignty, we need to look in a place that had long lain neglected: the bailiwicks of France, with their local worlds of judges and lawyers, jailers and clerks, and the ordinary men and women who daily beat a path to the assize courts. There we find a world that is both like, and strangely unlike, the state that we have come to know from studies of elites. Far from daily contact with the parlements, intendants, and power brokers that helped to shape urban politics, the bailiwick officers of village and town developed their own brand of governance. In the midst of an apparently centralizing state, they created an increasingly autonomous administration. Here was a judicial world where custom and equity, not the king's law, dominated the law courts; where the king's own officers grew increasingly detached from both the upper magistracy and the crown; and where men who had once been integrated into the governance of province and kingdom were cut adrift from the central state. Local judges grew more

socially and politically isolated from the centers of provincial and national power in the last century of the *ancien régime,* even as they accumulated power and wealth in their own districts.

The men who governed the bailiwicks–principally judges, lawyers, and petty court officials–formed a dense network of authority in the countryside by the late seventeenth century. Their focal points were the local courts: royal *bailliages* and *vicomtés* (in the north), *sénéchaussées* and *prévotés* (in the south), and seigneurial high justices. But through widespread and often illegal accumulation of royal offices, their tentacles spread outward to embrace the fiscal, municipal, parish, and *subdélégué* posts in the countryside. These officers wore the long black robes of judges when they presided over the local assizes; but they also wore hats as mayors and syndics in the municipalities, *élus* and receivers in the tax *élections,* subdélégués in the intendancies, and lawyers and judges in the salt courts. Added to these were the hats they doffed as officials in the hospitals, poorhouses, and church vestries.[3] What made them formidable was not simply the scope of their judicial brief, but the fact that they monopolized so many of the key administrative positions outside of the judiciary.

These cumulative offices made them a far more compact governing class than has often been realized. Indeed, the profile of Norman chief justices of the ordinary courts is strikingly similar to those of English justices of the peace (J. P.s), about whom we have far more information. Like English J. P.s, French judges were typically in charge of police functions and administration,[4] as well as presiding as chief judges, making them rural governors par excellence.[5] French and English magistrates alike were accumulating powerful jurisdictions that had once been exercised by the church or by lesser courts, becoming the repositories of almost all justice that mattered in their bailiwicks. Despite their significantly different political roles on the national stage, both were propertied and privileged men who had assumed the natural leadership of their local communities. Like their gentry counterparts in Albion, French judges had inherited the mantle of order, absorbing much of the direct authority that had been vacated by the titled nobility of France by the late seventeenth century.

The local judiciary was both powerful and politically interesting in the ancien régime because of its unusual position. It straddled the crucial legal border between the public world of the state, and the private world of families. For the political theorist and judge Jean Bodin, the public realm of the commonwealth (*république*) and the private realm of families or households (*ménages*) were necessary corollaries, the front and back of the same political coin. Bodin, following Aristotle's *Politics,* argued that the commonwealth existed for no other reason than to protect the private world, especially property.[6] This vital dividing line between the public and private realms turned out to be one of the most contested borders in early modern French (and

English) politics, and it was a border increasingly policed by the judiciary. They held that border in the strictly legal sense, protecting the realm of *droit privé* (private or civil law) from the incursions of the *droit publique* (or public law) controlled by the king. But they also patrolled that border in a very practical sense, one that mattered deeply to the king's ordinary subjects. The men who sat on the royal bailiwick and seigneurial benches of France held first jurisdiction over the private domains of property and family in every parish. They were also the thin black line of magistrates charged with keeping the king's peace in the wider public commonwealth.

Because we still have much to learn about the daily functioning of the lower court system that served the vast majority of the French population, we have only very incomplete evidence about the practical limits of the crown's claim to legislative sovereignty: that is, the king's ability to make binding law on his subjects, and to dispense justice through the ordinary courts. Legislative sovereignty had meaning only if the king's laws had the power to directly affect his subjects' lives. Some royal laws certainly did, notably those that taxed his subjects; but the compass of the king's law was very circumscribed outside certain islands of competency. The droit publique had a limited writ in most of the kingdom. Administration, finances, crime, and foreign policy were accepted as legitimate fields of action for royal legislation; but their effect diminished quickly the farther one traveled from major urban centers. Custom, usage, and equity, all of which were locally derived, governed the vast majority of French law cases. Moreover, law and governance in the bailiwicks were controlled not so much by abstract codes as by a cohort of officers and gentlemen who had developed a very distinctive identity within the French state. Their interests and the king's coincided, but they were far from identical.

Legislative sovereignty has remained an enduring trope of the historiography of the ancien régime state, despite very incomplete evidence about how the king's law was applied to his subjects outside of criminal cases. "Absolute" power to make positive law defined the essence of "absolute monarchy." It also provided the basis for post-Bodinian theories of sovereignty in France, and by extension has underlain the western European model of modern state building. Yet the activities of the common courts demonstrate that in proclaiming the king's absolute authority to make and impose positive law, theorists often confused prescriptive hopes with political reality.

To a large extent, the wide acceptance of legislative sovereignty as a working description of the French state has simply reflected the nature of the evidence at hand. Until relatively recently, as many historians have noted, the local judicial archives were among the deepest and least explored records in France.[7] Civil cases, which made up the vast majority of the common courts' work, were particularly neglected in favor of criminal dockets. In recent years, some of that neglect has begun to be remedied. Studies of the

functioning of urban sénéchaussées and *présidiaux* have begun to lift the curtain on lower jurisdictions in French cities.[8] The rehabilitation of seigneurial justice is also opening new perspectives on private jurisdictions, while historians of the family have profitably used testaments and contracts to understand private life.[9] For many decades, however, the main line of enquiry into local justice centered on the criminal dockets. A distinguished line of historians has mined the criminal records of the ordinary courts, opening perspectives on the history of crime (or more accurately, on the history of the criminalization of certain acts). Crime and punishment were indeed a part of the king's legislative sovereignty, especially over the poorest or unruliest of his subjects. They demonstrated the crown's power to decide who would be placed outside of civil society, and stripped of privileges, property, or life.[10]

But although colorful and interesting in their own right, crime and deviance were by their nature exceptional events in early modern courts. In the common courts of upper Normandy, more than 86 percent of the cases brought into the assizes were civil, not criminal. The lower judicial system can be fully understood only if we realize that its primary orientation was not toward punishing criminals, but toward ordering civil society. Indeed, civil cases had a far more permanent impact on ordinary people, and expressed the broad interests of the state far more articulately, than the punishment of exceptional crimes could do. As Steven G. Reinhardt has pointed out, what is needed is "a formidable task: to consider the relationship of royal justice to society as a whole."[11]

To bring to light this long-hidden world, then, we need to view local courts in the round, as their clients and officers must have seen them. And that requires us to begin to reconstruct the social and political context of the bailiwicks: the complicated networks of officers, the customary and royal legal codes that were their tools of the trade, and the ordinary clients who brought the community's business to their doors. Above all, it requires us to look at the civil dockets that were the focus of judicial activity. Perhaps the most unexpected influence on justice was hidden away here, in the quiet droning of daily litigation. The very nature of the lawsuits, and of the litigants who spun the wheels of justice as they passed through the assizes, sculpted the entire judicial system. In Normandy these were a true court of common pleas, in which over 94 percent of litigants were commoners, and in which the vast majority of both civil and criminal cases were brought to court by the king's subjects, not by the king's prosecutors. Villagers and townspeople used a full panoply of legal techniques, including witnessing, arbitration, composition, and raising the hue and cry (*clameur de haro*) to make the courts responsive to their needs. ("They are pretty well versed in the quirks of the law," wrote a surprised seventeenth-century English traveler through Normandy, "and have wit more than enough to wrangle.")[12]

Law and justice were not abstractions in early modern communities. They were vital forces, constantly mediated by human vectors, trimmed to fit the needs of local elites or communities, occasionally subverted, or merely ignored. Only by observing the bailiwicks in their daily functions can we begin to understand how legislative sovereignty was understood by early modern contemporaries, and especially by the officers who were charged with applying the laws to the king's subjects. It was here at the retail level, before thousands of benches in the common assize courts, that the public and private realms were joined.

The Public Realm: Bailiwick Administration and Governance

The judges and officers who ran the French common courts are doubly compelling subjects because much of the state administration in early modern France–and almost all provincial and local governance–was conducted through the judiciary. The same men who judged the law in the towns, villages, and bailiwicks of France were also the primary administrators of the local governments. As such, they were responsible for that consummate preoccupation of the early modern state, the maintenance of order. Jean Bodin, the founding theorist of legislative sovereignty, was very clear that sovereignty, in the legal sense, was quite a different power from day-to-day administration and governance. The administration of the kingdom rightly lay in the portfolio of magistrates and officers, he thought, and they should enjoy almost complete independence in those functions.[13]

The size of this judicial-legal class, which administered the countryside, was striking. France had approximately four hundred royal bailiwick and presidial courts by the late seventeenth century, with twenty to thirty thousand seigneurial justices practicing alongside them. The size of the judiciary can be placed within an order of magnitude, if still not precisely measured. In 1665, there were more than eighty-five hundred royal judges in France; when the seigneurial judges are added to the above figures, there was approximately one judge for every four hundred fifty to six hundred of the king's subjects.[14] The ancien régime judiciary was thus considerably larger than its modern analogues are. (Most Western nations, for example, have a ratio of approximately one judge per ten thousand inhabitants).[15] As one observer has pointed out, if France's judiciary had been "deployed on European battlefields, they would have made a considerable army by the standards of the time."[16]

A veritable army was needed, because the responsibilities of early modern judges went far beyond those of the modern judiciary. The separation of powers in modern states has trimmed away the executive functions that were naturally exercised by early modern courts. As Norma Landau has

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