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978-0-521-85035-3 - Law and Representation in Early Modern Drama

Subha Mukherji

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LAW AND REPRESENTATION IN EARLY MODERN DRAMA

This examination of the relation between law and drama in Renaissance England establishes the diversity of their dialogue, encompassing critique and complicity, comment and analogy, but argues that the way in which drama addresses legal problems and dilemmas is nevertheless distinctive. As the resemblance between law and theatre concerns their formal structures rather than their methods and aims, an interdisciplinary approach must be alive to distinctions as well as affinities. Alert to issues of representation without losing sight of a lived culture of litigation, this study primarily focuses on early modern implications of the connection between legal and dramatic evidence, but expands to address a wider range of issues which stretch the representational capacities of both courtroom and theatre. The book does not shy away from drama's composite vision of legal realities but engages with the fictionality itself as significant, and negotiates the methodological challenges it posits.

SUBHA MUKHERJI is Lecturer in English at the University of Cambridge, and Fellow and Director of Studies in English at Fitzwilliam College. She has contributed to *Shakespeare Survey* 49 (Cambridge, 1996), *Shakespeare and Sexuality*, edited by Catherine Alexander and Stanley Wells (Cambridge, 2001) and *Literature, Politics and the Law in Renaissance England*, edited by Erica Sheen and Lorna Hutson (2004). Her work has also appeared in the journals *English Literary Renaissance* and *Essays in Criticism*.

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In memory of 'Dada'
Tarapada Mukherji (1902–1987)

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My most far-reaching debt – at once personal and intellectual – is to my late grandfather, as acknowledged in the dedication.

Glossary

- Common law** The body of laws that emerged in England in the middle ages, developed from arguments and rulings used in actual cases and based on the practice of ‘the law of the land’ rather than written and codified in textual form; taught at the Inns of Courts (professional law schools – and more) until the middle of the seventeenth century, and then left largely to self-help; administered mainly through the central courts of common law, but also through assizes in the counties. So the term also referred to a professional structure, independent of the university law faculties.
- Canon law** The law of the Church of Rome, initially systematised in Gratian’s *Decretum* (c.1140), expanded by the fourteenth century into the *Corpus Juris Canonici*. It continued to be in force in England, even after the Reformation, in ecclesiastical jurisdictions, and was administered through church courts. From 1857 the jurisdiction of church courts was confined to Church matters, but in the sixteenth and seventeenth centuries it was expansive, and covered marriage, bastardy, personal property, sexual morality and spiritual matters, defamation, wills and probate, and church governance. Canon law was taught in the English universities until 1535, the year which marked the formal closure of the separate canon law faculties (and degrees) at Oxbridge. But some study of it seems to have informally survived at the universities under the wider auspices of Civil law. It was in any case heavily influenced by Roman law method and to some extent by Roman law content.

- Civil law** Roman Civil law, codified in the *Corpus Juris Civilis* established by Emperor Justinian in the sixth century. In the Renaissance, this text-based system was still authoritative on the Continent, but England had evolved its own ‘common law’, which was unwritten. Students of jurisprudence at Oxford and Cambridge studied the literature of Civil law, while law students at the Inns of Courts studied the practice of common law. Doctors of Civil law from the universities went on to become practitioners or judges at the English ecclesiastical and admiralty courts till 1857. Civil law could also be occasionally relevant to Council arbitration, and to prerogative and equity court action; but the bulk of secular legal action in England was under common law which rendered Civil law largely academic. Note that in some contexts, the term ‘civil law’ could also be used, in an entirely separate sense, to describe civil as opposed to criminal action: a law that dealt with disputes between private individuals and organisations.
- Dower and jointure** Dower was a widow’s entitlement, for her lifetime, to a third of the real property held by her husband during the marriage. But the law was asymmetrical, for a widower was entitled to all of his wife’s real property for the rest of his life, provided a child had been born, not simply a third. A jointure, on the other hand, was joint tenancy of land, usually agreed upon in the marriage settlement, from which a widow could receive income for her life.
- Depositions** The responses of witnesses and deponents to official court interrogatories; usually written down by clerks of court before a trial and thereafter presented during the trial.
- Elenchus** A maxim or precept, in rhetoric, that contradicts a given ‘colour’ and offers the opposite case. Plural: *elenches*.
- Fact** Alleged deed, usually assumed to be of a criminal nature; but a conjectural entity rather than an established or objective truth.

Glossary

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Feoffment

A grant in fee simple, made by ‘feoffor’ (or ‘feoffer’ or ‘feoffer’) to a ‘feoffee’. This could be an ‘ordinary feoffment’, i.e. a feoffment not involving uses but made upon sale or gift where the feoffor retained the whole interest; in such a case, the trustee would be the legal owner of the property only on the understanding that he would hold it not for his own benefit but for the benefit of beneficiaries. The other kind of feoffment was a feoffment to uses – a product of the arrangement whereby a feudal tenant was bound, by contract or trust, to allow another person – the landowner, or, often, his heirs – to have the beneficial enjoyment of land vested in himself. Yet law could only grant one right – that of the tenant – so there was a conflict between legal right and actual ownership. This practice of granting ‘use’ of land inevitably led to discontents and misuse. So it had to be a matter of mere trust, since the only person entitled to enter on breach after the feoffor’s death was the heir. If the feoffee failed to perform the conditions specified by the feoffer, the land reverted back automatically to the feoffer or his heirs. But it also allowed a feoffor to defer selection of successors to the land until he approached death, since the land would be meanwhile invested in others, while he himself still enjoyed absolute ownership and profits ensuing from the land. Or he could sell it off before such time by simply commanding his feoffees to convey it to his purchaser. Note that by the sixteenth century, feudal land law, originally the province of local civil law and manorial custom, had effectively passed into the jurisdiction of royal justice, and tenancy had become a function of English common law.

Inns of Chancery

Lesser Inns – *hospicia minora* – which, by 1600, were attached to particular Inns of Court. They gave instruction, provided by barristers sent from the Inns of Court as ‘readers’, and moots were held there. Ideally, one was supposed to spend a couple of years in one before proceeding to an Inn of Court – witness

Justice Shallow in Shakespeare's *2Henry IV*, who was at Clement's Inn. Their ruling members were not barristers, but attorneys who had not joined the Inns of Court. A member of an Inn of Chancery could be considered a lawyer if he practised law as an attorney (as many of them did). But most members of the Inns of Chancery, and indeed of the Inns of Court, never studied or practised law, so membership by itself does not indicate a lawyer.

Inns of Court

Professional law-schools of England, established in the fourteenth century, situated in London: Gray's Inn, Lincoln's Inn, Middle Temple and Inner Temple. English common law was not taught at the universities but at the Inns – the reason why they were informally termed the 'Third University of England'. They were also a residential society of lawyers, with their own customs and entertainments, and indeed often used as a finishing school for young men not necessarily intending to join the legal profession.

Interrogatories

A set of questions prepared by the court and put to the witnesses and defendants in a case.

**Inventio or
Invention**

Rhetorical term meaning the finding or amassing of matter, or the matter or idea itself; it was the first 'part' of rhetoric, which was then to be arranged, memorised and delivered to the greatest effect. As the anonymous writer of *Ad Herennium* says of classical rhetoric: 'among the five tasks of the orator, the mastery of invention is both the most important and most difficult of all' (*Ad C. Herennium* 1954, II. I.I, 58).

Paraphernalia

A wife's linen, jewellery and plate, and in some cases her bed – property originally part of her husband's estate which she could claim as a widow.

Pin-money

Early modern equivalent of pocket-money for trinkets so that a woman did not constantly have to pester her husband; held by a married woman as a personal annual income.

Plus quam satis

'More than enough'; a phrase typically applied to charges of incontinency in adultery cases, and possibly linked to impotence in annulment cases.

Glossary

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Seisin

The situation of being in possession in one's capacity of a feudal tenant was called 'seisin', linked often to an act of homage to the lord. 'Disseisin' is the act of divesting him of this possession by the lord through judgement because of some lapse of contractual performance on the part of the tenant. Though seisin was originally a question of the relationship between lord and tenant, over time, and certainly by the sixteenth century, the role of the feudal lord was much reduced: seisin could be roughly equated with possession of freehold land and disseisin with putting someone out of possession, but not necessarily or exclusively by a lord. 'Novel disseisin' was a variation on, and extension of, the action of disseisin.

Separate estate

A specified property belonging to the wife, and at her disposal, during coverture, and held by means of a trust.

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A note on the text

Notes give author and short title. Full title and publication information is provided in the Bibliography.

In transcribing original manuscript sources, old spellings and punctuation have been retained except where there are obvious mistakes that obscure the meaning. Superscripts and contractions have been italicised and expanded.

In the appendix – Swinburne’s *Matrimony* – portions included within angular brackets (< >) indicate text written between the lines with omission marks; folio numbers have been indicated in the margin. Conjectural reconstructions where the ink has faded or the paper is torn have been put inside square brackets ([]), and preceded by a question mark. Marginal annotations in Latin have been omitted as they are not immediately relevant to the present purpose; they are of a similar nature to the Latin marginalia to *A Treatise of Spousals* which has an inclusive modern edition – consisting mostly of summaries of arguments or abbreviated references which are dealt with more fully in the body of the text next to them. References to the appendix in the book are to the original folio numbers, not the page numbers of the book.

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APC	<i>Acts of the Privy Council</i>
BL	British Library, London
Bod.	Bodleian Library, Oxford
BRO	Bedfordshire Record Office
Bullough	G. Bullough, ed., <i>Narrative and Dramatic Sources of Shakespeare</i> , 8 vols. (London, 1957–75)
CCA	Canterbury Cathedral Archives
CJC	Justinian I, <i>Corpus Juris Civilis</i> , ed. Paul Kruger and Theodor Mommsen (Frankfurt, 1968–70)
CRO	Cheshire Record Office
CSPD	<i>Calendar of State Papers, Domestic Series</i>
CUL	Cambridge University Library
	Comm. Ct.: Commissary Court Records
	V.C.Ct.: Vice-Chancellor's Court Records
EDR	Ely Diocesan Records
First Folio	The First Folio of Shakespeare (1623): The Norton Facsimile, prep. Charlton Hinman (New York, 1968)
Q	Quarto edition of Shakespeare's plays
Hawarde	John Hawarde, <i>Les Reportes del Cases in Camera Stellata 1593 to 1609</i>
HL	Huntington Library
<i>Institutio</i>	Quintilian, <i>Institutio Oratoria</i> , ed. Donald A. Russell (Cambridge Mass./Harvard, 2001), Loeb Classics.
LRB	<i>The London Review of Books</i>
LTS	London Topographical Society Publication
<i>Matrimony</i>	Henry Swinburne, <i>Of the signification of diverse woordes importing Matrymony, and whye yt is <rather> named matrimonie than Patrymony</i>
MG	Middlesex Guildhall

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- Murthers* *Two Most Unnaturall and Bloodie Murthers* (1605),
Appendix A, *A Yorkshire Tragedy*, ed. A. C. Cawley and
Barry Gaines (Manchester, 1986)
- NNRO Norfolk and Norwich Record Office Diocesan Records
DN/DEP: Deposition books of the Consistory Court
DN/ACT: Act books of the Consistory Court
- OED* *The Oxford English Dictionary*
- OUA* Oxford University Archives, Bodleian Library, Oxford
- PRO* Public Record Office, Kew, London
ASSI: Assize records
STAC: Court of Star Chamber Proceedings
Req.: Proceedings and Act Books of the Court of
Requests
- Shakespeare* *The Riverside Shakespeare* (Boston, 1974)
- Spousals* Henry Swinburne, *A Treatise of Spousals, or Matrimonial
Contracts*
- Testaments* Henry Swinburne, *A Briefe Treatise of Testaments and Last
Willes*
- t.p. title-page

PLAYS

- Arden* Anon., *Arden of Faversham*
- AW* Shakespeare, *All's Well That Ends Well*
- AYLI* Shakespeare, *As You Like It*
- DLC* John Webster, *The Devil's Law Case*
- DM* John Webster, *The Duchess of Malfi*
- LLL* Shakespeare, *Love's Labours Lost*
- Lear F* *The Tragedy of King Lear* 1623 (in parallel text edition by
René Weis)
- Lear Q* *The History of King Lear* 1608 (in parallel text edition by
René Weis)
- Leir* *The True Chronicle Historie of King Leir*
- MfM* Shakespeare, *Measure for Measure*
- Miseries* George Wilkins, *The Miseries of Enforced Marriage*
- MSND* Shakespeare, *A Midsummer Night's Dream*
- Much Ado* Shakespeare, *Much Ado About Nothing*
- MV* Shakespeare, *The Merchant of Venice*
- RA* Lording Barry, *Ram Alley*
- R&J* Shakespeare, *Romeo and Juliet*

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<i>Shrew</i>	Shakespeare, <i>The Taming of the Shrew</i>
<i>Warning</i>	Anon., <i>A Warning for Fair Women</i>
<i>WD</i>	John Webster, <i>The White Devil</i>
<i>WKK</i>	Thomas Heywood, <i>A Woman Killed with Kindness</i>
<i>WT</i>	Shakespeare, <i>The Winter's Tale</i>