

Canon Law and European Legal Culture*

The influence of canon law on European legal culture is a phenomenon that has received increasing attention. It has been clear for quite some time now that no major presentation of European legal history can do without a substantial discussion of canon law. However, detailed presentations on how canon law and legal scholarship have affected European legal culture in general have been far from numerous. This collection, based on papers given by some of the foremost scholars of the history of canon law at a conference in April of 2008, fills this void. This volume, the first of a three-volume series which will cover the whole spectrum of European legal culture, focuses on civil law and civil procedure. The 18 articles in the book mostly concentrate on the late Middle Ages, which is understandable given that it was in that period, less so before and much less so after, that canon law truly shaped the European legal culture.

The volume is not primarily about the theoretical relations between canon law and other bodies of law, nor about canon law's contribution to *ius commune* in general. The articles by Manlio Bellomo and Peter Landau at the beginning of the book are exceptions, however. Bellomo shows, by way of actual examples, how canon law strictly speaking did not in fact »influence« European legal culture at all. On the contrary, canon law has formed an integral part of that culture, contributing to the fundamental structure and modeling of the European legal culture. Bellomo emphasizes that *ius civile* and *ius canonicum* complemented each other rather than existing in isolation as separate bodies of law. Landau traces the beginnings of the science of procedural law as an independent branch of

literature, such as it appeared in the medieval *ordines iudiciorum*. According to Landau, procedural legal literature was not merely a substantial component of Anglo-Norman canonist scholarship; in fact, the whole branch of legal literature was largely the work of Anglo-Norman scholars.

Most of the articles in the collection deal with the late Middle Ages, the crucial formative period for canon law. Antonio Padoa-Schioppa's contribution of the idea of legality in the material of Gregory the Great is an exception to this. His material consists of papal letters (*epistola*) sent to a host of legal actors such as bishops, *defensores*, and abbots. Padoa-Schioppa shows that the Pope makes frequent allusions not only to the canons of the Councils of Nicea, Constantinople, Ephesus and Calcedonia, but also to customary law and secular legislation, as well as to Justinian's compilation. Perhaps not so surprisingly, most of the papal letters were meant to settle legal matters in the immediate home ground of the pope, the *Patrimonium Petri*.

The articles by Mario Ascheri and Antonia Fiori also belong to the more general part of the volume. Ascheri focuses on the important medieval literary genre of the *Differentiae*, concentrating on the differences and relationship between Roman and canon law. The *Differentiae* emerged in the thirteenth century, first in the writings of Pascipoverus and especially of Iacopinus di Albertinus. Fiori's article is on the canonist theory of legal presumptions mainly in the twelfth century. She shows canon law and *ius civile* in interesting interaction. Theories concerning the different degrees of presumption (for instance: probable, violent, and necessary pre-

* ORAZIO CONDORELLI, FRANCK ROUMY, MATHIAS SCHMOECKEL (Hg.), *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, Bd. 1: *Zivil- und Zivilprozessrecht (Norm und Struktur 37,1)*, Köln, Weimar, Wien: Böhlau 2009. XVIII, 445 p., ISBN 978-3-412-20433-4

sumptions) originated from canon law, whereas civilians developed the teachings concerning the origins of the presumptions (for instance, *praesumptiones facti et legitima*).

In the core area of private law, Mathias Schmoeckel places the terminological predecessors of the German legal term *Stellvertretung* (legal representation). Schmoeckel finds that the notion of legal representation expanded in the late Middle Ages but that no essential difference emerged between legists and canonists in this respect. Neither did any general concept of representation develop. Legal certainty was much better served by meticulously drafted notarial instruments documenting legal representation case by case.

Thomas Duve, in turn, traces the roots of the general theory of contract in the works of the Spanish neo-scholastics. *Pacta sunt servanda*, as is well known, was a medieval canonist invention, although the idea that contracts are binding in general did not gain universal acceptance until the works of the early modern natural law thinkers. Duve shows that the Spanish neo-scholastics – most of them theologians – in fact served as an important link between medieval canonists and early modern natural law thinkers, as far as contract theories are concerned. One of the highlights of the volume is Emanuel Conte's article on the construction of *Gewere* – a legal term referring to ownership and possession – on the basis of medieval canonistic foundations in nineteenth-century German scholarship. Olivier Descamps, in turn, writes on the law of torts and Hans-Georg Hermann on contractual penalties.

Several of the contributions deal with matters of family law, the law concerning persons and of inheritance. Anne Lefebvre-Teillard continues the theme of legal presumptions at a more practical level, explaining how medieval canon

law informed theory on the presumption of paternity. Frank Roumy continues on the different typologies of filiation that emerged in medieval European law and how those typologies were influenced by canon law. Florence Demoulin-Auzary's subject is the institution of *possession d'état*, typical of legal systems with Napoleonic origins. *Possession d'état* is a legal means of establishing filiation, and canon law affected the development of this institution as well.

In his article, Charles de Miramon asks how the law concerning persons appeared in the communal charters drafted by Guillaume de Champeaux at the turn of the eleventh and twelfth centuries. Making use of the legal consciousness studies, the author interestingly advances the idea that Guillaume's theory of law was based on a theory of norms. Privileges in canon law are treated in Clarisse Siméant's text, and Alessandra Bassiani writes on hearsay testimony (*de auditu alieno*) in canon law.

Orazio Condorelli writes on oath-certified wills. In the law of inheritance, the civil law principle according to which wills could always be modified or annulled was challenged by the canonist notion which called for observance of wills certified by oaths. For canonists, a *clausula derogatoria*, prohibiting any future modification of the will, was to be taken seriously. Medieval legal scholars discussed the problem of *clausula derogatoria* at length, but no clear *ius commune* opinion emerged during the Middle Ages or the early modern period. David von Mayenburg's focus is on the canon law foundations of *mortuarium*, a concession awarded to the dead person's feudal lord as a percentage of the deceased's property.

Der Einfluss der Kanonistik auf die europäische Rechtskultur thus offers a well-balanced spectrum of learned, well-written articles on

important questions. If the book leaves something to be desired, it clearly concentrates more on substantive than procedural law. Perhaps the procedural aspect of canon law will receive more attention in the future volume on criminal and criminal procedural law. Another critical point that I would like to raise is that the »Europe« of

the book is geographically rather limited, restricting it to the traditional area of *ius commune* and leaving Northern and Eastern Europe out of the picture. The traditional geographical picture, however, is not even close to the whole picture.

Heikki Pihlajamäki

Processo romano-canonico tra prassi giudiziaria e strategie sociali*

Quale fattore permanente e non occasionale di ridefinizione dei rapporti sociali, il conflitto è un dato fisiologico di ogni società, anche di quella medievale. I metodi compositivi non solo non risolvono la disputa, anzi diventano essi stessi parte integrante del suo svolgimento. Le strategie di composizione giudiziaria sono senza dubbio strumenti dotati di grande efficacia e popolarità – benché siano soltanto uno dei modi possibili di risoluzione dei conflitti – ed hanno prodotto sia in rapporto a fattispecie obbligatorie, che sul versante del penale una documentazione archivistica ricchissima, quale appunto i registri degli atti processuali ad opera dei notai dei giudici. La ridefinizione dei conflitti in sede giudiziale passa attraverso il processo ed il suo formalismo. Le cause devono seguire un iter prestabilito, le cui fasi – dagli atti introduttivi della lite fino alla sentenza e al suo solenne pronunciamento – sono scandite dall’attività scrittoria dei notai, che hanno provveduto alla formazione degli atti, alla loro registrazione e archiviazione, e persino all’acquisizione del ma-

teriale probatorio. La produzione di atti formali richiesti dalle procedure e la loro registrazione, oltre ad avere la funzione di attestare il rispetto delle regole previste per lo svolgimento della controversia, di cui è garante lo stesso giudice, quale presupposto di validità degli atti, consentono di trasferire in termini giuridici la disputa tra le parti, riproducendo il conflitto soltanto nei limiti della sua rilevanza processuale e omettendo proprio il materiale *stricto sensu* antropologico, psicologico e simili.

Nell’ultimo decennio si è assistito ad un rifiorire di studi e di convegni dedicati alla storia della giustizia. L’interesse per la sua amministrazione e le politiche giudiziarie è stato al centro di ricerche comparatistiche, che hanno offerto un quadro d’insieme a livello europeo, al cui interno si collocano in posizione prominente gli atti del convegno avignonese. La prima sezione del volume è dedicata alla documentazione giudiziaria e ai quadri istituzionali cittadini, in Francia (Claude Gauvard, Bernadette Auzary-Schmaltz e Jean Hilaire, Leah Otis-Cour), nelle Fiandre

* *Pratiques sociales et politiques judiciaires dans les villes de l’Occident à la fin du Moyen Âge* (Actes du colloque, Avignon 29 novembre – 1er décembre 2001), études réunies par JACQUES CHIFFOLEAU, CLAUDE GAUWARD et ANDREA ZORZI (Collection de l’École Française de Rome 385), Roma: École Française de Rome 2007, 767 S., ISBN 978-2-7283-0777-7