

ESF Exploratory Workshop on

At the roots of European legal culture: Cross-border influences  
of legal literature in early modern times (ca. 1550-ca. 1750)

Lille (France), 3-6 December 2008

Convened by:

**Sege Dauchy, Ulrike Müssig and Heikki Pihlajamäki**

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**SCIENTIFIC REPORT**

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## 1 - Executive summary

When lawyers and legal historians try to uncover common principles underlying the existing laws across Europe or when they study similarities in dealing with comparative legal problems in the different countries of the European Union, in other words when they seek to identify a common European legal heritage, they often refer to the notion of *ius commune*. Commonly considered as a combination of canon and Roman law, foundation of legal education and of legal thought throughout Western Europe since the rediscovery and reception of Justinian's *Corpus iuris civilis* in the 12<sup>th</sup> and 13<sup>th</sup> centuries, *ius commune* or 'learned law' indeed became a part, arguably even a substantial part, of the legal tradition in Europe until the codification era of the 18<sup>th</sup> and 19<sup>th</sup> centuries, when Roman and canon law were banished to the fringes of legal culture. Today, however, some professional and academic lawyers nevertheless argue that no national code brought about a complete break with the civil law tradition. They consider that many rules deriving from Roman law still apply: these rules were simply integrated into a more coherent system and rephrased in the national language. During the same period, even English lawyers and judges were willing to borrow new ideas and concepts from continental jurists, and thus indirectly from the civil law tradition. *Ius commune* is therefore still seen by contemporary authors as a model for unification of private law in the member states of the European Union. Others, on the contrary, consider that the codification movement, and in particular the influence of the Napoleonic codes throughout a large part of Continental Europe, abolished any direct authority of Roman law in continental Europe. It nevertheless survived until the present day through legal vocabulary, through legal education (although there is no doubt that everywhere in Europe the teaching of Roman Law —and of legal history— is in retreat) and through the methods and procedures which were instrumental in the *ius commune*'s promotion of a 'civilian tradition of legal thinking'.

Whether or not the influence of Roman law on legal thinking and on legal education may have been more persistent than its direct authority and practical applications, *ius commune* is nevertheless commonly considered to have been a major foundation for European legal culture. That view is largely derived from the idea that the practical authority of Roman law and the era of European *ius commune* in an historical sense only came to an end when, towards the beginning of the 19<sup>th</sup> century, several European states either adopted the French model of codification or drafted their own codes. As a foundation for substantive law in Western Europe (with the notable exception of England and a few other countries where the civil law influence remained marginal), the civil and canon law traditions show already a great degree of fragmentation during the last centuries of the *Ancien Régime*. By then, *ius commune* was well past its heydays of the 16<sup>th</sup> century, when the emerging modern states started developing more assiduously their own territorial or (pre-) 'national' law, including customs, statute law and case law from their own jurisdictions in order to pursue unification of law and justice and thus political centralization. During the same period, the 'printing revolution' had a profound effect on the production and dissemination of knowledge in Europe. According to Douglas Osler, some 20,000 editions of legal works have been encompassed for the 16<sup>th</sup> century, and for the 17<sup>th</sup> and 18<sup>th</sup> centuries, the production of legal literature is even more considerable. Although our knowledge on the production of legal books by publishing houses in different European countries during early-modern times is still fragmentary, current research<sup>1</sup> (especially at the Max-Planck-Institut für Europäische Rechtsgeschichte) suggests a review of the traditional ideas on the 16<sup>th</sup> century as a period in its own right, 'the age of legal humanism', and emphasises that it should primarily be seen as a period of transition from medieval to modern legal literature: during that transition, pan-

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<sup>1</sup> Douglas J. Osler (dir.), *A bibliography of European legal literature to 1800* (project of the Max-Planck-Institut für europäische rechtsgeschichte, Frankfurt-am-Main).

European dissemination of the Italian legal science was gradually replaced by a more nationally oriented jurisprudence. Early modern times reveal the emergence of hundreds of jurists working often against the background of *ius commune*, but blending learned Roman and canon law with local customs, procedural styles, statutes, *consilia* of famous lawyers and judges and court decisions into ‘national’ legal systems.

This new approach, which led in the Northern Netherlands to the development of Roman-Dutch law, can be considered as paradigmatic for the major general legal developments in almost every Western-European territory during the period from around 1550 to 1750. The picture presented by traditional historiography suggests that from that period onwards, the European legal culture of the late-medieval and Renaissance period progressively vanished and gave way to a nationally orientated legal literature, the purpose of which was primarily to furnish materials to local practitioners. In order to buttress the point, historians often underline that among the hundreds of publishing jurists during those centuries – especially those writing in their own national language –, very few appear to have gained, from our present point of view, any significant international notoriety (as opposed to their predecessors of previous centuries, both canonists and civilians, who were studied and quoted all over Europe, even in England). Does that traditional picture stand the test of the historical reality? Did the jurists of the early-modern period and their works on the whole remain within the specific area of their own territorial legal system, or did they enjoy a wider dissemination, not only through the reprints of their works in international printing emporia (such as Venice, Lyon, Geneva or Cologne), but also through the use which lawyers and judges made of that literature in the course of their day-to-day practice, and in particular in the supreme courts where they were occupied?

The idea of a workshop on cross-boarder influences of legal literature in early-modern Europe (and on the use of ‘foreign’ legal literature in case law and law reports) came when studying and editing, together with Véronique Demars, Georges de Ghewiet’s *Jurisprudence du parlement de Flandre*, a manuscript of law reports of the court established in 1667 by king Louis XIV<sup>th</sup> in the newly conquered northern territories. Based upon the work of Jacques Pollet, judge of the Flemish sovereign court at the end of the 17<sup>th</sup> century, Georges de Ghewiet did not only complete the published reports with new judgements of the beginning of the 18<sup>th</sup> century; he also wrote down very interesting observations and comparisons referring to local customs, legislation, printed records and reports and legal doctrine, in particular legal literature from the Netherlands and France but even so from several other European countries (Italy, Spain, Portugal, the German Empire and even England). As we are fortunate to possess a catalogue of his book collection (a collection that was sold a few weeks after his death in 1745), we know for sure that he got in his personal library almost all the works he is referring to in his manuscript; over 500 titles covering the period going from the late Middle-Ages until the early 18<sup>th</sup> century.

Our project therefore pursued a double purpose. First, we intended to assess whether law reports (both published and unpublished) of the supreme courts in Europe during the period 1550-1750 referred to such a European legal literature. Secondly, we believed that comparative historical study of the dissemination of legal literature in Europe before the 19<sup>th</sup> century could enrich and change our vision as regards the historical roots and the conceptual foundations of present-day European legal culture. In continental Europe, much emphasis is given to the idea that legal science may incorporate foreign influences. An historical approach could therefore be of great value and guidance to modern jurists who are involved in the integration of national laws into a new European legal system and culture.

## 2 - Scientific content of the event

The starting point of the workshop was our personal experience with law-books. In the Northern and Southern Netherlands, court records and printed reports referred not only to the juristic production of local professors and practitioners but also to “foreign” jurisprudence and to several German, French, Italian or Spanish authors. Is this particular to the Low Countries, on the crossroad of Northern and Southern political and legal influences, or is such a dissemination of a general European legal culture also to be observed in the German Empire, in Scandinavia or in the Iberian Peninsula? In other words, is it possible to recognise a general European pattern that would have been neglected so far, largely because legal history since the 19<sup>th</sup> century has mainly been treated as a subject-matter for national research and scholarship? We therefore asked all participants to present a case-study on a local or national author and his sources, with a particular attention as regards the use of foreign literature, in order to find out and understand why some legal writers and their work remained specific to their national legal system, and why others enjoyed a wider European reputation. To carry out an effective comparative study carried on the different European legal systems, we decided to organize the presentation of the keynote lectures according to different geographical areas: France and Low Countries, Scandinavia, Austro-Hungarian and German Empires, the British Isles and the Iberian Peninsula, including also the South-American colonies. Moreover, most papers approached legal transfers or transplants in Early Modern Europe from a common framework of legal communication, legal education and legal issues dealt with but more specific questions were also tackled as censorship, distribution circuits of printed books, reprints, religious considerations, etc. As to the discussions, they allowed us to confront ideas on the question how learned lawyers communicated with each other, with the judiciaries of different polities and of different levels. They showed the need to have more prosopographical studies on legal authors of the Early-Modern Times: a dictionary of European legal authors, achieved by a network of European scholars, could reasonably be envisaged. Other possible perspectives concern the publication and study of ancient catalogues of law-books (catalogues of University libraries, but also from courts or from the personal library of judges and lawyers) and the mapping of the circulation of legal literature in Europe but also in the colonies (particularly in North and Latin America).

## 3 - Assessments of the results

The old reception research, as valuable it has been in revealing the common features of European legal science, also mainly speaks from the point of view of the core area of Europe (Italy, Germany, France, Benelux) but does not adequately describe the situation in the much larger peripheral areas, such as the British Isles, Scandinavia, and the whole of eastern Europe. As plans for a uniform European law advance in a union of 25 countries, and soon probably more, fresh research as to the early modern roots of European law is desperately needed. The interlocking of local bodies of law (*iura propria*) and universal bodies of law (*ius commune*) is of central interest, and distinguishes the Project sharply from the old reception and *ius commune* research, initiated after the Second World War by researchers such as Francesco Calasso, Helmut Coing and Franz Wieacker, and continued by many others. The older research was mainly interested in finding signs of *ius commune* in different parts of Europe but was less interested in finding out how *ius commune* actually functioned in conjunction with the local normative bodies such as royal and customary law.

The study of legal literature in a comparative approach (a study of the authors: their legal education, their personal and professional experience, their career; but also of their sources: learned law, statutes, case-law) allowed us to give new insight into cross-boarder circulation and influence of legal literature and also opened new research perspectives. We already were

aware that the use of Latin or vernacular languages played a determining part and also that the publisher's or the printing centre's international connexions could be relevant. We also knew that that professors, lawyers and judges were sometimes stating foreign legal literature in order to supplement the silence or gaps in their own national law, or to prove that the law applied was outdated, unsuitable or even unfair. We discovered that legal education (as well the international reputation of the professors as the handbooks that were used played an important role. Scandinavian lawyers and judges, for example, studied in German universities and all Latin-American jurists were trained in Europe. We also learned from the presented case-studies that religious considerations were more important than we thought: Roman Catholic authors were not used or quoted in Protestant universities and, on the other hand, Protestant authors were censored by the Church and by Universities in Roman Catholic countries... which doesn't mean they were unknown by jurists; we often find them in their personal libraries.

The participants to the workshop thus shared a common will to continue and even to intensify research on circulation of legal literature and legal thought in Europe. The exploratory workshop we organised was indeed conceived to be a platform for future collective research in its follow-up: we intended to pave the way for European research programs on the roots and evolution of a European legal culture. It is a fundamental issue whether that culture is to be regarded as founded in medieval *ius commune*, or whether it was rather the result of cross-boarder influences of early modern jurists, a hybrid model receptive to crossbreeding between different local and national models, open to legal innovation and shaped by a wide dissemination of legal literature and legal thought throughout Europe?

In practice, we decided to set up small interactive regional research groups working on legal literature of a determined geographical area: their purpose is to identify all authors of the concerned area, to verify all editions of their work(s) and to identify all quoted foreign sources). This preliminary work should provide the necessary material for further comparative study. We also decided to look for partners in countries or areas that represented during the workshop: in particular Italy, the Baltic countries and Eastern Europe. Finally, we all participants agreed to present an ESF LiU conference project for 2011 directly connected with the new questions that emerged from the workshop and from the panel discussions. This conference, entitled *At the Roots of European Legal Literature in Europe from Gutenberg to the National Codifications (15<sup>th</sup> – early 19<sup>th</sup> century)*, will approach legal transfers or transplants in Early Modern Europe from a totally new framework conceived in terms of legal communication: positive factors encouraging transfers (such as shared language and education) and negative factors discouraging transfers (such as censorship or religious oppositions) and to what extent these factors resulted from conscious action. The conference purpose is also to discover how learned lawyers communicated with each other, with the judiciaries of different polities and of different levels, and how these communication processes enhanced and were related to state-building in early modern Europe.

## 4 - Final Programme

### Wednesday 3 December 2008

14.00 – 20.00 Arrival at the hotel and registration

20.00 Dinner

### Thursday 4 December 2008

#### Session 1

9.00 Welcome and introduction

Presentation of the European Science Foundation (ESF)  
Serge Dauchy in the name of the Standing Committee for the Humanities

9.30 – 10.00 Serge Dauchy, Lille, FRANCE, “*Cross-boarder influences of legal literature in early modern times: presentation and purpose of the project*”.

10.00 – 10.30 Coffee break

10.30 – 11.00 Patrick Arabeyre, Paris, FRANCE, “*The last Bartolists. European legal culture and literature in the 16<sup>th</sup> century*”.

11.00 – 11.30 Jacques Krynen, Toulouse, FRANCE, “*Le droit savant dans la doctrine d’opposition des cours souveraines (France, XVI<sup>e</sup>-XVIII<sup>e</sup> siècle)*”.

11.30 – 12.00 Alain Wijffels, Louvain-la-Neuve, BELGIUM, “*Legal literature and legal practice: references to legal authorities in the law reports of Paulus Christinaeus and Cornelis van Bynkershoek*”.

12.00 – 12.30 Georges Martyn, Gent, BELGIUM, “*Zypaeus’ notitia iuris Belgici (1635) : the first book on Belgian Law?*”.

12.30 – 13.00 General discussion Session 1

13.00 – 14.30 Lunch

#### Session 2

14.30 – 15.00 Mia Korpiola, Helsinki, FINLAND, “*On the reception of Canon and Roman Law in Sweden until 1615*”.

15.00 – 15.30 Per Andersen, Aarhus, DENMARK, “*Elegant Jurisprudence in Seventeenth Century Denmark. Cross-border influences on the authorship of Scavenius, Resen and Bornemann*”.

15.30 – 16.00 Coffee Break

16.00 – 16.30 Heikki Pihlajamäki, Helsinki, FINLAND, “*The reception of continental legal literature in early modern Sweden (ca. 1640-1750)*”.

16.30 – 17.00 Per Nilsén, Lund, SWEDEN, “*The Influence of Foreign Legal Literature in the Works and Teachings of David Nehrman Ehrenstråle*”.

17.00 – 17.30 General discussion Session 2

- 17.30 End of the session  
20.00 Dinner and bar discussion

### **Friday 5 December 2008**

#### **Session 3**

- 9.30 – 10.00 Werner Ogris, Vienna, AUSTRIA, “*Bernhard Walther (1516-1584). Austrian Jurisprudence between Customary Law and Ius Commune*”.
- 10.00 – 10.30 Petra Skrejkova, Prague, CZECHOSLOVAKIA, “*The forms and ways of penetration of roman law into town laws in Bohemia, 16<sup>th</sup> century*”.
- 10.30 – 11.00 Ulrike Mußig, Passau, GERMANY, “*Cross border influence in constitutional legal history: German disciples of Locke and Montesquieu*”.
- 11.00 – 11.30 Coffee break
- 11.30 – 12.00 Gero Dolezalek, Aberdeen, UNITED KINGDOM, “*Scottish lawyers’ use of foreign legal literature, 1540-1640*”.
- 12.00 – 12.30 Andrew Simpson, Cambridge, UNITED KINGDOM, “*The use of foreign legal literature by Scots lawyers in the early eighteenth century*”.
- 12.30 – 13.00 General discussion Session 3
- 13.00–14.00 Lunch

#### **Session 4**

- 14.00 – 14.30 Laura Beck Varela, Sevilla, SPAIN, “*From Lyon to Madrid : printing law books for catholic Europe*”.
- 14.30 – 15.00 Herman Barreto, Diamantina, BRASIL, “*Legal Culture in the Viceroyalty of Peru from the 16<sup>th</sup> Century to the 18<sup>th</sup> Century*”.
- 15.00 – 15.30 Coffee Break
- 15.30 – 16.00 General discussion Session 4
- 16.00 – 17.30 Discussion on follow-up activities and future projects
- 17.30 End of the session and of the workshop
- 20.00 Dinner

### **Saturday 6 December 2008**

- Morning Departure

## 5 - Final list of participants

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## **6 - Statistical information on participants (age structure, gender repartition, countries of origin)**

### **Age brackets :**

20 - 30 years : 1	30 - 40 years : 3	40 - 50 years : 8
50 - 60 years : 2	60 - 70 years : 1	70 - 80 years : 1

### **Gender repartition :**

Females : 4    Males : 12

### **Countries of origin :**

Austria : 1	Belgium : 2
Brasil : 1	Czekoslovakia : 1
Denmark : 1	Finland : 2
France : 3	Germany : 1
Spain : 1	Sweden : 1
United Kingdom : 2	