
SOURCES OF LAW, THE COMPARATIVE LEGAL HISTORY OF A CONCEPT

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1 Introduction

Cum essem Mantuae. With these words the 12th century glossator Placentinus begins his *Summa de Actionum Varietatibus*.¹ And he continues: "When I was at Mantua, where I taught the fundamentals of the legal science to large audiences and where I reflected upon the manifold roots of the law and the civil procedure, suddenly appeared to me a woman *in causis mirifica, legibus imbuta*, wonderful in case law, well educated in Roman law."

There is a lot to be said about this appearance of the woman who turns out to be *lurisprudentia*. No doubt that the description by Placentinus is modeled on Boethius.² Boethius had had a similar meeting with *Philosophia*, also a figure with golden hair, a rosy mouth, ivory teeth, sparkling eyes and a sweet breath, and Placentinus borrows this description in order to depict *lurisprudentia*. *lurisprudentia* draws youngsters nearer by the beauty of her speech. This is *lurisprudentia*, wonderful in case law, well educated in Roman law. Does Placentinus thus make a distinction between two different sources of law, namely case law and Roman law, law in action and law in books? Does the description "*in causis mirifica, legibus imbuta*" indeed reveal two different notions related to the concept of sources of law?

I will dedicate this small contribution to a good friend and colleague from olden days, Eric Pool. We met for the first time in June 1979, remained friends ever since, and even embarked on a common project on the comparative legal history of the concept of "sources of law". One of the first fruits of this project is this article, devoted to the notion of "sources of law" in 12th and 13th century literature. Given this theme and its restrictions it should first be noted that the concept of "sources of law" underwent totally different developments on either side of the Channel. Although the concept itself is alien to the medieval sources, both in Britain and on the Continent, we nevertheless recognize the problems hidden behind the wording. On the Continent the authority of legal

1 *Die Summa: de actionum varietatibus des Placentinus*, ed. Wahmund, *Quellen* IV, iii, of Pescatore, *Placentini Summa cum essem Mantuae sive de actionum varietatibus* [Beiträge zur mittelalterlichen Rechtsgeschichte 5], Greifswald 1897: *Cum essem Mantuae ubique iuris scientiae praecepta pluribus auditoribus traderem et attentius diu quadam de iuris apicibus actionumque multiplicatibus cogitarem, astitit mihi mulier in causis mirifica, legibus imbuta.*

precepts, statutory provisions, customary law and judicial decisions underwent strong influences of Roman (and canon) law, both in study and in legal practice, whereas in Britain Roman law played its role only at the universities, while legal practice was dominated by the requirements of the writ-system and canon law only played its role within the realm of the Roman Catholic church. Consequently a comparative analysis of the notion of "sources of law" has to face different methodological problems.

2 The civil-law tradition

In the civil-law tradition Roman law was only considered to be part of ancient history and classical philology from the 16th century onwards (Humanism and Dutch Elegant School). Before that period, that is from the 12th century onwards, Roman law was taught as a legal discipline. Continental legal scholarship was characterized by a purposive approach to the interpretation of the texts of the *Corpus Iuris Civilis* and of the *Corpus Iuris Canonici*. Until the time of the humanists the historical context of the various texts was rarely scrutinized. Initially in legal education, and later also in legal practice, the Roman sources had a claim to an actualized validity as if they were the condensation of a natural truth. Continental legal scholarship did not question the validity of the texts on the table; they tried to understand the texts as if they referred to actual daily life.

This becomes obvious upon reading the texts which were related to the modern concept of *sources of law*, more specifically the texts in which the glossators recognized contradictions. Such an antinomy is to be found between *Digest* 1.3.32.1 and *Institutes* 1.2.11 on the one hand (where it is said that custom can abrogate statutes), and *Codex* 8.52(53).2, where the contrary seems to be held.

Digest 1.3.32.1 (Iulianus 84 *dig.*):

Inveterata consuetudo pro lege non immerito custoditur, et hoc est ius quod dicitur moribus constitutum. nam cum ipsae leges nulla alia ex causa nos teneant, quam quod iudicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes: nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et

factis? quare rectissime etiam illud receptum est, ut leges non solum suffragio legis latoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.

Institutes 1.2.11:

Sed naturalia quidem iura, quae apud omnes gentes peraeque servantur, divina quadam providentia constituta, semper firma atque immutabilia permanent: ea vero quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege lata.

Codex 8.52(53).2 (Imperator Constantinus):

*Consuetudinis ususque longaevi non vilis auctoritas est, verum non usque adeo sui valitura momento, ut aut rationem vincat aut legem. * Const. A. ad Proculum. * <a 319 D. viii k. Mai. Constantino A. v et Licinio c. cons.>*

Irnerius, the first glossator of whom we have texts in this respect, apparently had a strong opinion about this much disputed contradiction. In his gloss *abrogentur ad Digesta* 1.3.32 Accursius quotes quite a few more glossators who contributed to the solution of the problem that occurs when statutory and customary law conflict. Which of the two should prevail? Every glossator whose opinion is quoted, tried to find a solution. An important role is attributed to the moment of enactment of the statute or the birth of the custom. *Lex posterior derogat legi priori*. A later statute derogates from an earlier one, and why should not the same hold true for customary rules? Irnerius apparently tried to introduce an element of authority into the discussion: If the people have legislative power their customs may have the same force as a formally enacted statute.

Gl *abrogentur ad Digesta* 1.3.32.1:

Abrogentur. Nota per duo corrigi legem. Primo per aliam legem, et hoc planum est. Secundo per consuetudinem, ut Instit. de iure nat. § per [Inst.1.2.11]. Sed contra in hoc secundo C. Quae sit longa consuetu, l. ij [C.8.52.2]. Solutio: distingue, aut est consuetudo generalis, et tunc generaliter vincit legem, ut hic [D.1.3.32.1], aut est specialis, et tunc vincit specialiter, ut infra Communia prae. l. Venditor § Si constat [D.8.4.13.1] et infra Quod cuiusque uni, l. Item [D.3.4.6.pr.], i. respons. in gloss. vel perpetua [gl. vel perpetua ad D.3.4.6] non generaliter, ut

C. e. l. ij [C.8.53.2], quae est contra. Et haec est vera, si consuetudo sequitur legem, nam si praecedat, vincitur a lege, ut infra De sepulch. vio. l. iij § Divus, in gl. sepeliri [gl. Sepeliri ad D.47.12.3.5]. Et hoc quando contra legem est consuetudo ex certa scientia, secus si per errorem, ut infra eod. tit. l. Quod non ratione [D.1.3.39] et in Auth. ut nulli iudi § inf., coll. ix [Nov. 134]. Item si est secundum legem, vel saltem non contra, valet, ut in hac lege [D.1.3.32]. Et hoc secundum Ioan. Alii ut P. et Y. dixerunt hanc ad illam trahi, cum huius legis tempore populus habebat potestatem condendi leges, unde per eius contrariam consuetudinem abrogabantur. Hodie per principem tantum fit utrumque. Item alii distinguunt : an sit talis lex cui possit derogari per pactum, et tunc consuetudo eam vincit, ut hic [D.1.3.32], aut non, et tunc non vincit ut ibi. Quae autem sint leges quibus possit vel non possit per pactum derogari, dicitur Cod. de pactis l. Si quis in conscribendo [C.2.3.39] in gl. Ioan. Alii etiam distinxerunt: aut est lex consuetudo approbata, et tunc ipsa lex vincit, ut ibi, aut non, et tunc consuetudo vincit, ut hic.

In an age in which the legislative power is vested in the people it seems obvious that the people can give or change statutes, even by other means than by casting formal votes. In the 12th century, however, legislative power was vested in the Emperor. Thus the desire of the people to change the law was estimated to be of no importance.

This, however, does not necessarily lead to the conclusion that statutory law is supposed to prevail over customary law. That is even clearer in canon law. In canon law the rather unimportant esteem of customary law is corroborated by the statement of our Lord Jesus Christ, who declared himself the way, the truth and the life: *Ego enim sum via, veritas et vita* (quoted in *Decr. Dist. 8, c. 5*). *Consuetudo* is omitted and at first glance it thus seems as if custom is to be accorded only a very limited meaning.

Decretum Distinctio 8, c. 5:

Si consuetudinem fortassis opponas, advertendum quod Dominus dicit 'Ego sum veritas et vita'. Non dixit 'Ego sum consuetudo', sed veritas. Et certe (ut beati Cypriani utamur sententia) quaelibet consuetudo, quantumvis vetusta, quantumvis vulgata veritati omnimodo est postponenda et usus qui veritati est contrarius, est abolendus.

It is, however, an open question whether we have to read into these statements a hierarchy of norms or a conflict between two sets. In the course of the 19th

century the question was sometimes answered in the affirmative. It was then argued that there is indeed a hierarchy of norms to be found in the first twenty *Distinctiones* of the *Decretum Gratiani*. At the top stands the natural divine law of which the sole interpreter on earth is the *vicarius Dei*, the Pope. Under this natural divine law the *ius positivum* finds its place. It is given by the priests and common to the whole of Christianity. At a lower level we find the legislation enacted by the Emperors, specific statutes and customary law. It is held that the *ius positivum* and customary law are to be applied and respected only in as far as they are compatible with the natural divine law. If indeed we take the words "*usus qui veritati est contrarius est abolendus*" at face value, we would be inclined to read them as if they presuppose a hierarchy of norms. This hierarchy, however, has to face the problem of the exact meaning of the word *abolendus* in this context. On the very same *Distinctio* 8 we find the *dictum Gratiani* which teaches that according to divine or natural law everything is common to everybody and that it is only due to custom or to given law that private property has been introduced.

Distinctio 8 d.a.c.1 (Gratian):

Differt etiam ius naturae a consuetudine et constitutione. Nam iure naturae sunt omnia communia omnibus, quod non solum inter eos servatum creditur, de quibus legitur "Multitudinis autem credentium erat cor unum et anima una" (Acta 4: 32), verum etiam ex precedenti tempore a philosophis traditum invenitur. Unde apud Platonem illa civitas iustissime ordinata traditur in qua quisque proprios nescit affectus. Ius vero consuetudinis vel constitutionis hoc meum est, illud vero alterius.

A conflict between natural law and customary law does not lead to the conclusion that private property should be abolished.³ The example may be extended to quite a number of similar cases. Slavery is contrary to natural law, since all mankind are born free and equal. Slavery finds its roots in the *ius gentium*, but the discrepancy between the two systems does not lead to the abolition of the latter. Slavery as such remained a well established and generally accepted institution throughout the Middle Ages. Notwithstanding the conflict between the *ius naturale* on the one hand, and the *ius gentium* or *ius consuetudinis* on the other hand, neither the canonists nor the glossators of the 12th and 13th centuries reached the conclusion that either of the two should be

3 R. Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (Münchener Theologische Studien III. Kanon. Abt. 26), München 1967, pp. 307-335.

abolished.⁴ On the contrary: In those centuries they rather perceived the fundamental unity of the three. Calasso drew the attention to the preamble of the statutes of the city of Devrio: *Iure tripartite sive triformi reglamur et regimur, canonico videlicet, civili etiam et municipalii*.⁵ According to Calasso it would last until the 14th and 15th centuries before the statutory law of the cities was considered to deviate from the universal *ius commune*. Recently Gérard Fransen commented upon these statements of Calasso and provided them with the necessary nuances. In an article which he had sent to Domenico Maffei just a few months before his death, Gérard Fransen elucidated the nature of the *Decretum* of Gratian.⁶ According to Fransen the *Decretum* can only be understood against the background of the Gregorian Reform. The *Decretum* is much more than just a compilation of thousands and thousands of authorities, council decisions, quotations taken from the works of church fathers and popes. Its aim is the construction of a well composed, systematically arranged body of learning without any internal contradiction. In order to reach that target he does not restrict himself to the quotations, but he also includes *dicta*, which serve the purpose of showing the *Concordia Discordantium Canonum*.⁷ His model might very well have been the *Corpus Iuris Civilis* (which had been partly rediscovered shortly before 1140). Although Gratian makes only restricted use of quotations taken from the *Corpus Iuris Civilis*, he nevertheless includes the secular law as it was laid down in the *Institutes*, the *Digest*, the *Code* and the *Novellae* in his survey of divine law and council decisions. By doing so he laid the foundations for the impressive building of Romano-Canon law which the lawyers were about to develop in the centuries to come. The *Decretum* serves the papal goal of assimilating the secular law into the autonomous supremacy of canon law and papal sovereignty.⁸ Consequently the medieval scholars considered it a challenge to remove contradictions from their sources by using harmonizing exegetic techniques such as formulating general rules that encompass seemingly contradictory texts or by making distinctions. As Placentinus said: "*Quanto magis res omnis distinguetur, tanto melius operatur*."⁹

4 Weigand, *op. cit.*, pp. 259-282.

5 F. Calasso, "Il problema storico del diritto comune" in *Studi di storia e diritto in onore di E. Besta*, vol II, Milano 1939, pp. 461-513; F. Calasso, *Medio evo del diritto I, Le fonti*, Milano 1954, pp. 375-390; E. Cortese, *Le grande linee della storia giuridica medievale* Roma 2000, pp. 396 *passim*.

6 D. Maffei, "Ricordo di Gérard Fransen (1915-1995)" in *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* Kan. Abt. 82 (1996), pp. 470-474.

7 S. Kuttner, "Harmony from dissonance" originally Wimmer Lecture X, 1956, now in S. Kuttner, *The History of Ideas and Doctrines of Canon Law in the Middle Ages* (Collected Studies Series CS 113), London 1980, pp. 1-16.

8 In a nutshell a similar view has already been expressed by F. Calasso, *Medio evo del diritto*, p. 371.

9 Placentinus, quoted by F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, p. 59.

3 The common-law tradition

The development on the other side of the Channel moved along totally different paths. The main instrument was the judiciary, albeit together with the Chancellor, the King's Secretary of State for all departments. The most important modern principles were created by these officials. In England King Henry II (1154-1189) made use of judicial organization and legal procedure as a tool to impose his royal power upon the realm. He created a group of judges who were competent to settle disputes about land. Possession of land was a vital element of medieval society. Consequently jurisdiction over land matters was an increasingly important aspect of royal power. The King introduced trial by jury both in civil and in criminal cases and by doing so he enhanced the social acceptance of the verdicts. The parties to the disputes were obliged to pay a fee for the writs, a sort of ticket obtainable only in the Chancery, the *officina brevium* (in Wienfield's translation: "the writ-shop"). The writ incorporated the privilege to be received in the newly created courts. Each writ resulted in a particular form of action. Litigants were prepared to pay the required sum since the King had power to enforce judgments. Although in principle every nobleman had jurisdiction by way of his *Manorial* or *Borough Court*, quite a few landlords turned out to be unable to enforce the judgments of these courts. The King's Bench exercised the Royal prerogative. Thus jurisdiction became an important tool for legal development. By the time of Henry de Bracton, who was a judge of the King's Bench (*Coram Rege*) from 1248 to 1257 and died in 1268, no one could bring an action in the King's Court without a writ (*non potest qui sine brevi agere*). Moreover, there were as many different forms of action as there were causes of action (*tot erunt formulae brevium quot sunt genera actionum*). In the case law Roman law played hardly any role. Vacarius may have written around the middle of the 12th century a *Liber Pauperum*, which is mainly a textbook on Roman law, but the two earliest treatises on English law deal with the functioning of the King's Courts and with the forms of action and procedure. The first is generally called *Glanvill* and it was written in about 1187-1189, probably by one of the royal justices if not by Ranulf de Glanville himself. The larger treatise with the same title, *De legibus et consuetudinibus Angliae*, appeared in the 13th century. In some versions it bears the name of Henry de Bracton. Recent scholarship suggests that it was mostly written in the 1220s and 1230s, using plea rolls, and then mangled by editors who tried to bring it up to date in the middle of the century. Bracton may well have been one of these editors, but according to John Baker his work was evidently never finished.¹⁰ In Baker's opinion there are, throughout the text, inconsistencies

and broken promises to continue the topics later. The treatment is again heavily based on the writ system. The writ system and the regulation of procedure had indeed already acquired a well established place. During the reign of Edward I (1272-1307) everything became better defined: The Parliament of the three estates, the King's Council and the courts of law. Words became appropriated, as Maitland put it. The King in Parliament could make statutes; the King in Council ordinances, whereas the Court of Common Pleas (*De Banco*), the King's Bench (*Coram Rege*) and the Court of Exchequer gave judgments. By the time of Edward I professional narrators and attorneys existed. The attorneys prepared the case out of court, the narrators presented the case in court. In the course of the 14th century the leading narrators formed their own society, calling themselves Serjeants-at-law. As early as 1268 a serjeant was appointed to the Bench, and this became the usual practice. The remaining narrators established the four Inns of Court. Later on, in the course of the 15th century, the narrators came to bear the title barristers. But if we return to the days of Henry II and Edward I we see that the most important sources of the common law of those days were the Plea Rolls. The Plea Rolls do not only, as their name suggests, record the facts of every case, including the judgment, but often also contain a note with the reasons for the judgment (*ratio decidendi*). The author and later editors, among whom probably Bracton,¹¹ made extensive use of the Plea Rolls for *De Legibus et Consuetudinibus Angliae*. From the turn of the 13th until the 14th century the common law had thus developed a well established judiciary, a well developed writ system and an independent law of procedure long before well educated Continental lawyers, trained in Roman law, were appointed to the Royal and the Ecclesiastical Courts.

However, it might sometimes happen that the common law did not provide the plaintiff with a remedy (or with an inadequate remedy) under the writ system. The King was supposed to be the "fountain of justice" and consequently the practice arose of petitioning the Chancellor, the Keeper of the King's Conscience, to do justice in those matters where the common law turned out to be defective. The stock example seems to be the case of a man who had taken out a money loan and had given a signed and sealed bond in return for the money. When he repaid the sum due he forgot to ask for the bond he had given. Thereupon the creditor brought a claim for a second repayment, which claim was based upon the bond. Since repayment does not constitute a formal defence against a signed and sealed bond at common law, the debtor's only remedy was to apply to the Chancellor. The Chancery then proceeded in *personam et conscientiam* against

11 Until he was deprived of their use in 1258.

the defendant and gave a decree. This relief was not by way of a judgment for damages but by way of an order to the defendant to do something. Refusal to obey the order constituted contempt of the Chancery and was followed by a sanction such as committal to the Fleet or imprisonment. The procedure allowed the defendant three courses of action. He could demur to a bill for want of equity, that is rebut the allegation of the plaintiff by stating that, even if it were true, it did not justify the Chancellor's intervention. The defendant could also put in a plea and raise questions of jurisdiction or he could put in an answer and thus deny the allegations brought by the plaintiff. In that case the plaintiff could require the defendant to give his evidence on oath, with all the consequences attached to that.

The most important contributions to the substantive law of England are to be found in the institutions of the use and the trust. Use is an equitable creation, the predecessor of the *pactum in favorem tertii*.¹² A property owner (feoffor) could transfer property to friends (feoffees to uses) to hold that property to the use (*ad opus, ad usum*) of a beneficiary ("cestui que use"). If the feoffees acted otherwise than in accordance with the use common law would not provide the beneficiary with a remedy. The Chancellor would then intervene – as he would later on grant his assistance to the trustee. Consequently from the second half of the 14th century onwards England knew two types of remedy, in law or in equity.

Therefore the most important distinction of sources of law in the common law is this distinction between law and equity. The examples, however, show that there is not a real conflict between the two sets of norms.

Equity did not come to destroy the law, it came to fulfil and supplement the law where it turned out to be defective. It came *adiuvandi, supplendi et adimplemendi causa*. There is more harmony than dissonance between the two.¹³

12 N.G. Jones, "Trusts in England after the Statute of Uses: A view from the sixteenth century" in R.H. Helmholz & R. Zimmermann, (eds.) *Itinera Fiduciae* (Berlin 1998), pp. 173ff; N.G. Jones, "Uses, trusts and a path to privity" in (1997) *Cambridge Law Journal*, pp. 175-195; N.G. Jones, "Trusts for secrecy: The case of John Dudley, Duke of Northumberland" in (1995) *Cambridge Law Journal*, pp. 545ff; N.G. Jones, "Tyrrell's case (1557) and the use upon a use", in (1993) 14 *Journal of Legal History*, p. 75; N.G. Jones, "The use upon a use in equity revisited", in (2002) 33 *Cambrian Law Review*, pp. 67-99.

13 Unfortunately space and time do not allow me to go into a similar statement made by Richard Helmholz as a result of his research into the relation between the common law of England and canon law before the Reformation. Also Helmholz sees convergence, rather than conflict, between the two legal systems. Cf. R.H. Helmholz, *Canon Law and English Common Law*, London 1983; R.H. Helmholz, *Canon Law and the Law of England. Historical Essays*, London 1987; R.H. Helmholz, *Roman Canon Law in Reformation England*, Cambridge 1990; R.H. Helmholz, *The Ius Commune in England: Four Studies*, Oxford 2001.

4 Conclusion

If we try to read history backwards, we find on either side of the Channel between the 12th and the 14th centuries totally different sets of sources of law. On the Continent the legal historian sees himself confronted with an authoritative text, laid down in the *Corpus Iuris Civilis* and in the *Corpus Iuris Canonici*, with various commentaries on these texts. The texts and the commentaries on them recognize different sets of norms, but these norms are not considered to be conflicting norms, and if there is a certain order to be found, the superiority of one set of norms does not entail the abolition of the other. Natural law does not drive out *ius gentium*, nor *ius civile*. On the other side of the Channel we find two different sets of norms, one in law and one in equity. These two sets of norms coexisted. Neither drove out the other. The two systems continued to be administered separately until the *Judicature Act* of 1873, now repealed and consolidated in the *Judicature Acts* of 1875 to 1910, and the *Supreme Court of Judicature Act* of 1925, which fused the administration of law and equity, and laid down that every judge of the High Court was to administer law and equity alike. As long as the two systems coexisted they were of a supplementary nature. There is not even a serious conflict between a dogmatic, purposive interpretation of the old texts of the common law and the *ius commune* on the one hand, and a historic reading of them on the other. The historical aspect of the text resolves in its "Wirkungsgeschichte" (Gadamer) and that is a harmonizing tendency.

This observation leads to the conclusion that although the notion of "sources of law" has totally different meanings on either side of the Channel, there is nevertheless a measure of convergence to be seen. This convergence stretches out into later ages. The concept of "sources of law" becomes an aspect of legal development, but that is only developed from the 17th and 18th centuries onwards. Neither the common-law lawyers, nor the glossators, had a specific term for this idea.