The Landscape of Medieval Judicial Sources: From Schools and Popes to Councils and Books

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Abstract

This article surveys the judicial landscape of medieval Europe by highlighting transformations in the way that theoretical jurisprudence and the practice of law intersected. After discussing the prominent role of theoretical and normative texts in the development of legal history as a discipline, it focuses on three areas where the contours of medieval judicial sources are especially ripe: the place of education and the unique role of canon law in the legal world of the Middle Ages; the rise of centralized papal government as a driver for the professionalization of law in the thirteenth century; and of church councils as ecclesiastical events that turned into judicial institutions during and after the Great Western Schism (1378–1418). Finally, it discusses the role of the Council of Constance and the Council of Basel in the changing writing practices of the later Middle Ages, and points to the shifts in the relative authority of the papacy over time as a way of organizing the wealth of judicial sources from the Middle Ages into discrete periods.

Keywords: Law; Church councils; Papacy; Jurisprudence; Education; Books

1 The scope of medieval law

The judicial landscape of medieval Europe was predominantly shaped by two deeply intertwined and often competing forces that nevertheless carved out their own niches and left behind an exceedingly broad array of written sources. Although the legal systems of the medieval world encompassed a number of religious traditions, comprised of regional variations and customs, and underwent dramatic changes over time, one of the most wide-reaching domains of judicial activity can be found in the comingling of the canon law of the ecclesiastical sphere and Roman civil law – a pairing that forms the basis for today's

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common law. The scope of these intersecting legal systems in fact constitutes one of the defining features of medieval society, involving nearly every facet of premodern life and establishing a lasting influence on western jurisprudence that continues to today. Understanding the contours and scope of medieval law, in other words, is often more than a purely historical exercise and has had real ramifications for modern court cases. Even the United States Supreme Court has dabbled in medieval law, as it did in 1925 (*United States v. Robbins*) when considering California's community property laws that derived from the legal codes of Visigothic Spain, or the claim of the majority opinion in 2008, contested by professional historians in an *amicus curiae* brief, that an English parliamentary statute from 1328, known as the Statute of Northampton, provided historical precedent for protecting the United States Constitution's Second Amendment "right to bear arms" even beyond the scope of participating in a well regulated militia (*District of Columbia v. Heller*).

2 The study of medieval law

In line with their geographic and temporal breadth, judicial sources are diverse, ubiquitous, and relevant to a number of scholarly disciplines, from literary scholars and theologians to economic historians and archivists. In fact, most medieval primary sources that have survived the perilous journey of transmission and reception can in some way be construed as legal sources or at least bearing the mark of its judicial contexts. But the development of legal history as a distinct branch of the historical profession has tended to emphasize particular types of medieval sources, often those relevant to the history of legal thought, not necessarily the history of legal practice. The German legal historicists of the nineteenth century, for example, put a particular emphasis on the more theoretical, academic writings of medieval jurists and left the archival records of civil courts for others to wade through (Ziolkowski 2004. Other legal traditions, like the constitutional pluralism of Otto von Gierke or F.N. Figgis, also sought inspiration in the historical traditions to be found in medieval and early modern legal thought (Figgis 1907). Foundational legal historians like Friedrich Carl von Savigny (d. 1861) tended to emphasize the sort of commentaries and legal writings that they had ready access to, which in most – though certainly not all – cases meant those that had already been printed and thus existed in parallel to their original manuscript form. This in turn meant that they often overlooked the sort of archival material from civil courts that has more recently been so fruitful for social and legal historians. Court records from England, for example, have proven especially rich for topics not necessarily centred on legal questions, like reconstructing the daily life of peasant in the later Middle Ages (Hanawalt 1986), and the city court records in German speaking Europe, in Zurich for example, have given us surprisingly detailed insights into topics from commodity trade and social structures to medicine and the history of gender and sexuality (Page 2015). But the likes of Savigny, Gierke, and Figgis, though keen to think historically, were historians in search of judicial principles that had mostly been worked out in the lecture halls of the medieval universities, not necessarily those hashed out before judges, secular and ecclesiastical alike.

3 Medieval education and canon law

One approach to the legal history of medieval Europe thus follows closely on the heels of the history of education, especially the development of nascent universities from the twelfth century onwards. It was in the burgeoning academic environment of these earliest

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universities, and Bologna in particular, that central works in the development of medieval legal thought were produced. Chief among these early works of jurisprudence was the so-called *Decretum* of a Bolognese canonist known to us as Gratian (active in the first half of the twelfth century). The *Decretum*, which was composed in at least two versions, or recensions, could also be found with the fitting title of the *Concordia discordantium canonum*, or the "Harmony of discordant canons" (Winroth 2000). Bringing harmony to apparent disharmony was precisely what Gratian sought to do. In his *Decretum*, Gratian attempted to iron out the seeming contradictions of otherwise authoritative sources in the legal traditions of his day – such as conciliar decisions or the writings of the church fathers – by compiling basic legal definitions and, most importantly, composing fictional legal cases that highlighted particularly thorny legal conundrums that he then untangles by showing how the sources that seem to be at odds with one another are in fact reconcilable.

While the *Decretum* on its own was a revolution of dialectical legal thought and represented the first large-scale attempt to transpose into church law the scholastic argumentative method that Abelard had helped codify with his *Sic et Non* ("Yes and No"), its effect could be felt not only in the immediate aftermath of its completion, but in the reception of the work as well. The *Decretum* was, after all, not a reference work per se, but rather a textbook. And, as a textbook, it was most often encountered in the classroom, where professors held lectures that consisted of commenting on Gratian's text. These notes and explanatory matters, known as glosses (and their makers as glossators) were gathered into collections and represent some of the earliest interactions that jurists had with the *Decretum*, most famously through the writings of Huguccio and Johannes Teutonicus. These collections of glosses and commentaries compiled by these so-called "decretists" formed what would eventually become a standardized set of glosses that was copied, and later printed, on the margins around the main text of the *Decretum*, framing, quite literally, what had become the central work of learned legal thought.

4 Papal government and medieval jurisprudence

The world of learned jurisprudence underwent both a qualitative and a quantitative shift in the thirteenth century, in no small part due to the development of a more centralized and bureaucratically sophisticated and powerful papal court, or *curia* (Robinson 1990). Gratian had been working at a time the authority of the papacy was relatively weak, at least in comparison to the worldly powers that later popes would assert. At a practical level, this meant that Gratian compiled his work at a time when the pope was not the court of last resort. The pope's function as an appellate judiciary had in fact not even yet been established.

Much of this changed in 1210, when Pope Innocent III authorized a collection of his own papal letters, or decretals, and sent them to be taught at the University of Bologna, the preeminent institution for legal thought and training in the Middle Ages. In doing so, the pope encouraged the schools to integrate relatively new works, of living authorities into their curricula, in effect giving the decrees of the pope the force of church law. This *Compilatio tertia* thus slowly transformed the papacy into an appellate court of last resort for any number of issues that may have previously been decided on by local courts. The number of these papal letters increased drastically and, now recognized as having broader legal significance than the specifics of the case that the pope spoke to in a given letter, they were commented on in the university classroom. Those who became particularly productive in compiling commentaries of this sort, like Tancred of Bologna (d. 1230/36) or Raymond of Peñafort (d.

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1275), are referred to not as decretists, but as decretalists. The more collections of papal letters there were, the more there was to comment on.

The reach of the new papal bureaucracy was not only felt at a theoretical, academic level, however. At the same time as the role of the papacy in the formation of medieval law was changing, so too were the traditions and logistics of practicing law. The academic profiles of the medieval universities shifted in the thirteenth century, often known as the high point of scholastic culture, with a distinct subset of university students attracted to places like Bologna in order to undertake studies leading to a professional designation as a lawyer. This professionalization of the law depended in no small part on a renewed interest in the foundational texts of Roman law compiled by Justinian in the *Corpus Iuris Civilis*, parts of which had been overshadowed in the early Middle Ages by the so-called "Germanic" or "Barbarian" law codes. Like most areas of documentary life in the high and later Middle Ages, a drastic increase of written material in the legal realm ran parallel to an increasingly complicated system of procedural innovations in courts of every kind. Navigating that complexity required an adequate education, and by the end of the thirteenth century, lawyers were usually required by judges to hold recognized credentials or competencies. The Council of Lyon mandated in 1274, moreover, a procedure of oath-swearing on the gospels before acting as an advocate or proctor in an ecclesiastical court (Brundage 2008: 301), further formalizing the law as a discrete profession with its own customs and rituals. Notaries and others specializing in documents of all kinds also necessitated training. The parallel demand for more practical knowledge on the ground for navigating courts and the increasing complexities of the numerous legal systems and traditions throughout medieval Europe meant that law schools were both more in number, and more frequented, than they may once have been. Indeed, the growth of the universities in Italy, France, England, and later in central and northern Europe, and the records that they either consciously kept or were copied by students and teachers, offer one of the richest windows into the diverse judicial worlds of the Middle Ages. It was far from uncommon to leave the university with no degree, because the practical and financial barriers were often prohibitively high. However, some of the most prolific jurists of the later Middle Ages, like the Florentine Francesco Zabarella (d. 1417), went all the way to becoming a so-called "doctor of both laws" (*doctor utriusque iuris*); that is, someone qualified to teach both canon and Roman law.

The Middle Ages thus produced a wild diversity of sources related to the law, some of which were documentary, bureaucratic, and archival in nature, while others were firmly theoretical or normative works in the fluid world of medieval legal thought. Scholars tend to treat one or the other, since both are subfields of the historical profession that quickly became exceedingly technical, but that division of labor in the contemporary university is far from representative of the interplay between theory and practice in medieval law as it was experienced by contemporaries. One area in which the practical, documentary concerns intersect with the theoretical or academic sort of judicial sources comes in a perhaps surprising place, one that is not the only venue for this intersection, but one which, especially in the later Middle Ages, illustrates the complexity particularly well: church councils.

5 Councils as courts

Church councils – most generally referring to assemblies of church representatives – exploded in number in late antiquity, when competing voices in the churches of the

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Mediterranean world tried to settle on what proper Christianity was in practice and in theory (MacMullen 2006). The religious life of medieval Europe continued the tradition of irregular meetings as venues for solving disputes or determining matters of doctrine, and these early medieval councils – like those held under the Carolingians – formed the bedrock of much early medieval law. These councils, some shorter, some longer, grew in stature and influence, most notably with the Fourth Lateran Council in 1215, overseen by Pope Innocent III. But it was the outbreak of the Great Western Schism in 1378 that began to change the scope and authority of a council. In the era and aftermath of the Great Western Schism, church councils blurred the line between the normative or theoretical jurisprudence and the sources produced by court activity. Although the so-called "general" councils tend to garner the most attention, there were in fact thousands of councils that met across Europe and the Mediterranean, some leaving next to no records behind, and others – like the later councils of Constance and Basel – creating so much material that we still have no real sense of how much is still out there. For example: of the 53 volumes contained in the extended version of Giovanni Domenico Mansi's collection of conciliar texts, going all the way to the First Vatican Council (1868–70), 33 are dedicated to conciliar documents from before the beginning of the Council of Trent in 1545.

The Council of Constance, held between 1414 and 1418 in southern Germany, had a profound effect on the perceived scope and function of a church council. Though most narrowly focused on restoring unity to a splintered church and contested papacy, it dealt with a bewildering range of topics, some more extensively than others. At the top of the agenda at the council was a question concerning the corporate structure of the church. More specifically, it asked whether representatives of the church – the "members" (*membra*) – could ultimately claim to authority greater than that of the pope, i.e. the "head" (*caput*), as he was referred to in the bodily metaphor that canonists so often concocted (Tierney 1968). These were complex legal arguments that pulled out nearly every stop of ecclesiological and constitutional thinking up to that point, but the council also took up more traditional functions, like acting as a court to try suspected heretics in inquisitorial trials like that of Jan Hus (Fudge 2013). The council took up questions about tyrannicide, just war, taxes, gave over two suspected heretics to civil authorities for execution, and effectively became something akin to an international court for four years.

Even after the schism was nominally ended, the role of councils as the juncture of theory and practice continued to develop. In keeping with the conciliar decision at the end of the Council of Constance that councils of a similar sort should assemble in the future at regular intervals for the good of the church (a decree known as *Frequens*), ecclesiastical representatives met again in 1423, and then, more monumentally, for nearly two decades in the city of Basel. Councils prior to Constance had largely been eventful in character, that is, participants tended to experience them as irregular occasions that had a clear beginning and a clear end. The unexpected duration of Constance effectively changed that expectation and, in successfully asserting the broad powers of the council as a corporate body, the larger councils of the fifteenth century increasingly appeared more as institutions than they did as events. At Constance, the council prepared masses of seal-authenticated charters in which the corporate person of the council took the place of a single figurehead, and the Council of Basel later took the corporate imagery one step further. In place of the twin keys of St. Peter representing the empty see that the Council of Constance had used to seal their charters, the Council of Basel had seal matrices made that depicted several figures, conciliar members, who visually represented the authoritative structure of the council. The Council of Basel also

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organized itself in a markedly different fashion from Constance, taking on even more the appearance of an institutional court that asserted the authority to hear petitions and undertake a host of other judicial functions, from canonization of saints to indulgences, marriage disputes, curial administration, and naming diplomatic and notarial officials, to name just a few (Helmrath 1987: 39). The broad "courtification" at the Council of Basel, from the corporate imagery of its seal matrix to the standing committees that effectively acted as legislative and bureaucratic bodies, drew on the more limited, though still quite extensive, organizational reform committees that had worked at Constance (Stump 1994).

All of this courtly activity was writing intensive. The Great Western Schism, and the monumental culture of church councils that it ushered in, also thus also played a central role in the development of new modes of textual transmission, making the rapid distribution of works new and old surprisingly efficient when needed (Hobbins 2009). Legal works, like the commentaries and collections that emerged from both university circles and the papal courts, had traditionally been produced on hardy parchment; animal skins that had been specially prepared for writing and binding. Beginning in the later fourteenth century, the European-wide market for quality and (in relative terms) affordable paper meant that legal commentaries, trial records, small treatises, charters, and any number of other legal writings from the later Middle Ages have a distinct, at times more functional, appearance than the often imposing parchment codices of the high medieval law faculties. As demographically rich meeting points that brought together visitors from every corner of Europe, the Mediterranean, and the Near East, councils like those of Constance and Basel became ripe venues for the later medieval book trade, which dealt in literature as much as it did in law.

6 Conclusion

In many ways, the relative authority of the papacy at any given point in time had a profound effect on the way that the law was conceived of and practiced in medieval Europe. The more restricted functions of the Bishop of Rome in the earlier Middle Ages transformed, for a variety of reasons, into the highly centralized and sophisticated machinery of the papal court around the papacy of Innocent III and the Fourth Lateran Council. An explosion of papal decrees that claimed the status of legal precedence contributed to the professionalization of legal thought, and the increasingly complicated legal structures combining civil and canon law at the universities made technical training a prerequisite for acting in any official function before courts of almost any sort. The crisis of the Great Western Schism, when the corporate conciliarism of the church asserted equality or even dominance over the papal throne, inaugurated centuries of constitutional thought that had a profound influence on the western legal tradition. It was largely in the context of these broad trends in the judicial culture of medieval Europe that allowed for the diverse, local, and highly contingent legal sources that we find today in the historical record.

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