

Book review W. Litewski, Der römisch-kanonische Zivilprozess nach den älteren ordines iudicarii (Kraków, 1999)

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W. Litewski, *Der römisch-kanonische Zivilprozess nach den älteren ordines iudicarii* (Unter dem Lektorat und mit dem Geleitwort von Andreas Wacke), 2 vols., Jagiellonian University Press, Kraków 1999, p. 1-344, ISBN 83-233-1231-1, p. 345-652, ISBN 83-233-1269-9

Civil procedure is one of the most history laden branches of the law. In most countries on the European continent, this procedure still has a distinctively Romano-canonical flavour (in my opinion, this is even the case in Germany, although P.H. Lindblom in a recent article in the *European Review of Private Law* ('Harmony of the legal spheres. A Swedish view on the construction of a unified European procedural law', *ERPL* 1997, p. 11-46) does not seem to agree with my point of view). Consequently, the significance of many contemporary rules can only be evaluated fully by a study of their long history. Strangely enough, most legal historians (just as their colleagues in the area of positive law) have not shown much interest in the study of procedure. As a result, modern treatises on the history of procedure are scarce, especially compared to the number of studies on the history of other areas of the law. Even scarcer are books dealing with the history of procedure from a European perspective. One of the few modern studies (dating from 1973) is the contribution of Prof. R.C. van Caenegem to the *The International Encyclopedia of Comparative Law* (Vol. XVI: Civil Procedure, Chapter 2: History of European Civil Procedure). This contribution gives an overview of the development of civil procedure in Europe from the 5th century to the present day (i.e. 1973). Prof. Litewski's volumes also address the history of procedure from a European perspective. These volumes, however, are different in character from the study by Prof. van Caenegem because they deal with a relatively short period, i.e. the period of the 'birth' of the Romano-canonical procedure. Prof. Litewski's volumes cover the second half of the 11th century until approximately 1234, the year of 'publication' of the *Liber Extra*.

A short glance through the volumes under review will immediately convince modern procedural scholars of their significance for their studies. For them, the procedure from the end of the 11th until the middle of the 13th century will appear to be relatively 'modern'. But even for some legal historians the large degree of similarity of old and modern procedure may come as a surprise.

The subject matter of research are the so-called *ordines iudicarii* (the label preferred by Canonists) or *ordines iudiciorum* (the label preferred by Legists). In theory, these *ordines* should cover the whole procedure (or *processus*, using the term coined in the middle ages), although in practice one also finds *ordines* solely dealing with single procedural institutes. The procedure of the *ordines* is aimed at the determination and realisation of contested rights before a secular court or an ecclesiastical tribunal. It also covers non-contested proceedings. Additionally, the *ordines* address issues of criminal procedure because originally criminal and civil procedure were to a large extent identical. Later, when criminal procedure became a subject of its own, one finds this subject discussed separately. Frequently, issues of substantive law are treated as well, for example (as might be expected) in the sections on *actiones*. Whether the *ordines* were of significance in legal practice is a matter of debate (Prof. Litewski believes they were); they certainly had academic significance as a teaching instrument.

The *ordines* concentrated on are basically the printed ones listed by Linda Fowler-Magerl in her *Ordo iudiciorum vel ordo iudiciarius* (Frankfurt a/ M., 1984). Prof. Litewski has been able to add one additional title to this comprehensive list, being a short treatise by Placentinus (*Quoniam de restitutionibus*). General information on the *ordines* studied can be

found on p. 20ff, whereas a list of them and an indication of their place of publication is printed on p. 593ff.

The early *ordines iudicarii* actually heralded the arrival of procedure as a separate subject of legal studies. Since the *Corpus Iuris Civilis* treats procedure as an integral part of substantive law (at least to a large extent) and not as a separate topic, the science of civil procedure can rightly be called a medieval creation. This creation, however, formed the culmination of a tendency, the origins of which can already be found in Roman law, where the introduction of the *cognitio* procedure resulted in a weakening of the link between substantive law and procedural law.

Prof. Litewski claims that originally Legists and Canonists studied procedure separately, resulting in *ordines* which can either be classified as Romanist or Canonist. This situation soon changed, resulting in truly Romano-canonical treatises and a true *ius commune* in the sense of a common procedure shared by Legists and Canonists. The contribution of northern Italian territorial law was more limited than has been thought. It seems that northern Italian law only contributed to fix some of the problems in the procedural rules expounded in the *Corpus Iuris*, e.g. issues concerning formalities and time-limits. Consequently, few Romano-canonical procedural rules and principles originate in Germanic law.

The procedure of the *ordines* would serve as the basis for later developments and give rise to the Romano-canonical procedure which, at a certain point in time, was used in both secular and ecclesiastical courts. The differences in procedure, which nevertheless could be observed all over Europe, were the result of local deviations from Romano-canonical law. This occurred as a result of the fact that individual courts developed their own 'stile' or 'practick'. However, the basic pattern of the Romano-canonical procedure was the same everywhere, even in places as distant from mainland Europe as Scotland (valuable information on the Romano-canonical procedure in Scotland can be found in J. Finlay, *Men of Law in Pre-Reformation Scotland*, East Linton 2000).

Some striking developments took place in the nearly 200 years covered by Prof. Litewski. One of them is the increasing importance of written documents. As a result of this, procedure, which originally had been public and immediate, slowly changed into the opposite. An outstanding example of secrecy and mediacy is the manner in which witnesses were heard. It became the habit to have them questioned in secret by commissioners without the parties being present. Subsequently, a written report of their depositions formed the basis of the court's decision. Exit immediacy.

Another development is that procedure tended to become more lengthy. This tendency was already part and parcel of the *cognitio* procedure at the time of Justinian, but the situation in the 12th and 13th centuries seems to have been more severe. Various reasons underlay this development. One of them was the manner in which the subject matter of proof proceedings was established by making use of the elaborate procedure of drafting *positiones*. Another was the tendency to allow appeals against interlocutory rulings. Of course, efforts were made to curb the evil of delay, for example, by the imposition of strict time limits for completion of various stages and on the total length of the proceedings. The requirement that dilatory exceptions be presented at once at a single moment is also an example. However, all of this seems not to have been to much avail.

Apart from these more general issues, Prof. Litewski's study contains a wealth of information on the various steps in the procedure. These include the service of the summons by an *exsecutor*, default, defense (including exceptions), counter claims (a subject usually not treated by the oldest *ordines*), and *litis contestatio* (which would occur either as a result of the defendant answering or acknowledging the claim or as a result of silence on the part of the defendant - silence being tantamount to acknowledgment). After *litis contestatio* the parties had to swear the oath of *calumnia* in which they declared that they believed their case to be

well-founded. Thereafter proof-taking could be administered. The proof procedure was a truly medieval creation. Also medieval was the way in which particular pieces of evidence came to be weighed through the system of legal proof. The same held true for the oral pleadings which culminated in the official termination of the proof stage by way of *conclusio in causa*. Finally, all this resulted in a judgment, which, according to both medieval and modern procedural teaching, would have both formal and substantive *res iudicata* effect (the former effect denying all ordinary means of challenging the judgment after the lapse of a specific amount of time and the latter assuring its binding effect on the parties to the case and even on third parties). Also interesting is Prof. Litewski's discussion of the means for challenging the judgment's validity. It may be a surprise to already find the devolutive and suspensive effect of appeal proceedings being mentioned in this early period. As regards enforcement proceedings, the author remarks that most *ordines* say little on this subject. The role of Canon law in this particular area especially seems to have been marginal.

In the final part of the book special proceedings, costs, arbitration and 'self-help' are addressed. On special proceedings it is remarked that summary types of proceeding slowly developed during the period under consideration. This development culminated in the decretal *Saepe* (early 14th century). In this context one often meets the expressions *de plano, sine strepitu iudicii, sine figura iudicii*. Although these expressions can be found in the *Corpus Iuris*, there they were not related to a summary type of proceedings.

Prof. Litewski has written a book which fills an important gap in our knowledge of the early days of the Romano-canonical procedure. It is one of the few modern books on the subject, the majority of the other books dating from the 19th century. Prof. Litewski demonstrates how medieval scholarship contributed to the formation of the new procedure and also indicates to what extent Roman models were followed. The large number of summaries (*Zwischenergebnisse*) inserted in the main text make this study an easy reference work, as do the extensive bibliography and the indices. The summaries and the encyclopedic nature of *Der römisch-kanonische Zivilprozess nach den älteren ordines iudicarii* may explain why the author has chosen to omit a final conclusion.

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