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di Mario Ascheri

IL CAMMINO DELLE IDEE
DAL MEDIOEVO ALL'ANTICO REGIME
Diritto e cultura nell'esperienza europea

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Manuscript Dissemination of Juridical Literature after 1500: Malta, Scotland and Other Small Jurisdictions

by Gero Dolezalek

1. General considerations

Mario Ascheri has justly pointed out that in Italy local diversity in law continued long after the Middle Ages: «particolarismo giuridico-istituzionale prevalente fino a fine del Settecento e talora – come in Toscana – anche nel primo Ottocento»¹. He has also mentioned that not all pertinent juridical literature of these centuries went to the printing press – for instance not all *consilia*². In the following contribution I want to show that his observations should be heeded.

Indeed, manuscript dissemination of literature continued after 1500 on a larger scale than was previously noticed. Literature for small circles of readers was at times mirror-written on copper plates from which etchings were drawn³, or, in the 19th century, written on stencil sheets for various methods of mimeographing⁴, but in most cases outright hand-copying took

¹ M. Ascheri, *Legislazione e società nell'Italia medievale. Per il VII centenario degli statuti di Albenga (1288)*, Atti del Convegno, Albenga, 18-21 ottobre 1988, Bordighera 1990, pp. 55-70: 59.

² M. Ascheri, *I consilia dei giuristi medievali. Per un repertorio-incipitario computerizzato*, Siena 1982 (Edizioni Il Leccio, Saggi 1), 19 line 9.

³ See, for instance, *Statuta civitatis Laudae Pompeiae* (Lodi), of the year 1464, re-disseminated in 1739 in handwritten etchings (398 chart. 272×184 mm). One specimen is preserved in the antiquarian collection of Germany's former *Reichsgericht*, now deposited in the library of the *Bundesverwaltungsgericht* at Leipzig (shelf mark ms 4° R. 6571). An inventory of all manuscripts of this rich collection, taken by me in 2005, is published on the internet: <<http://www.uni-leipzig.de/~jurarom/manuscr/RgMsMatr.html>>. Compare there a German procedural treatise in handwritten etchings: *Process*, by Quirinus Schacher, Lipsiae (s. XVII, ca. 300 chart. 312×200 mm) (ms 4° KU. 3548 pars 3).

⁴ The collection of Germany's former *Reichsgericht* (cit. note 3) contains many specimens of the kind. Most of them disseminate texts from 1866 onward, but there is as well a text from 1831 (shelf mark ms 2° TA 426 vol. 1-3) and another one from 1842 (ms 4° KJ. 2281). A first primitive method of copy-pressing had already been patented in 1780.

⁵ The collection of Germany's former *Reichsgericht* (cit. note 3), for instance, preserves altogether 66 manuscripts of Italian local juridical literature, penned after 1500. Four were penned in the 16th century, 32 in the 17th century, 27 in the 18th century and 3 in the 19th century. The youngest one, penned

place⁵. Similar phenomena can also be observed in Germany⁶ and most probably in all other countries in Europe⁷. Libraries and archives in Europe, taken together, contain more juridical manuscripts from times after 1500 than from the Middle Ages. Only standard literature on canon law and Roman law (= *Jus Commune*) circulated almost exclusively in printed copies.

Legal historians have so far widely overlooked that handwritten copying of literature still continued to play an important role until 1880 when typewriters became common⁸. There existed many works of literature which did not go into print because printers could not trust that they would sell enough copies to cover their costs. This was often the case with juridical literature connecting the *Jus Commune* to particular local custom and legislation, or to statutes and usage of small categories of persons.

Legal historians should be aware of the existence of such literature. It is obvious that legal culture under *Jus Commune* had to accommodate and embed (within the general frame) the legal circumstances of specific categories of persons. Therefore the spread of *Jus Commune* required concomitant literature to this effect. Specific literature for particular circles of readers was a constituent element of *Jus Commune* culture and must thus be taken into account in legal historical research. The fact that much of this literature happens to be handwritten is no reason to overlook it.

2. Malta and the Maltese Knights

Malta is here chosen as an example because just recently, while sojourning at Valletta, I perused the National Library of Malta's inventories⁹ to take notes on juridical manuscripts for the data base «Manuscripta Juridica» of the Max-Planck-Institute of European Legal History¹⁰. It struck me to see that my findings at Malta matched similar observations which I had previously made in Scotland and elsewhere.

in 1879, contains statutes of Piegaro (province of Perugia, Umbria) from 1517 (ms 4° R. 7599). The second youngest contains statutes of Mantova from 1712, penned in 1812 (ms 4° R. 6597).

⁶ See the inventory of manuscripts in the collection of Germany's former *Reichsgericht* (cit. note 3), rubric *Rechtsquellen einzelner deutscher Orte, Landesteile und Staaten und Erläuterungen dazu*, with 82 manuscripts, and higher up a very young ms of the kind: *Sammlung von Entscheidungen Braunschweigischer Obergerichte*, a. 1827-1894 (s. XIX, 352 chart. 331×200 mm) (shelf mark ms 4° KD. 598).

⁷ Examples: the collection of Germany's former *Reichsgericht* (cit. note 3) contains seven such manuscripts from Austria, seven from Switzerland, four from the Netherlands and one from Russia's Baltic provinces.

⁸ The typewriter developed by James Densmore and Christopher Sholes in 1873 was the first such apparatus to go into mass production, and already by 1880 it had become common.

⁹ C. Vassallo, *Catalogo dei codici e dei manoscritti che si conservano nella Biblioteca Pubblica di Malta*, Valletta 1856. Reprinted and continued by the same author to ms 1214, in «Archivio storico di Malta», nuova serie, 10 (1938-1939), pp. 283-380, 11 (1940), pp. 112-176, 271-308. The Library's copy has supplements, typewritten or handwritten, covering mss 1215-1597.

¹⁰ Accessible on the Internet under web address <<http://manuscripts.rg.mpg.de/>>.

In the centuries before 1800, Malta's population was small (less than 130,000). The overwhelming majority of inhabitants subsisted in poverty on small-farming or fishery. This population could probably not afford many professional lawyers. Some Maltese statute texts were printed in the 18th century. Yet, on a more general scale, printed literature on Maltese law only took off after 1800¹¹. This can also be gauged from the small quantity of pertinent manuscripts in the National Library of Malta. There one can find some law repertories¹² and some style books of notaries public – possibly at times employed as court clerks¹³. One can also see that a collection of *Consilia* circulated¹⁴. Statutes from the years 1553-1604 circulated in manuscript¹⁵. Specific sea law applied (*Consolato del Mare di Malta*)¹⁶. Along with it the sea law of Messina was read (*Consolato del Mare di Messina*)¹⁷. Rules of the supreme court of the Kingdom of Sicily were of interest (*Ritus Magnae Curiae Siciliae*)¹⁸. Furthermore, some law students brought lecture notes home from their studies, in particular from universities on the European continent¹⁹.

As mentioned above, however, handwritten juridical literature was only a concomitance to *Jus Commune*. The real *Jus Commune* literature was sufficiently available in printed editions. This clearly comes to the fore if one peruses the National Library of Malta's catalogue of its old holdings of printed books²⁰.

¹¹ See the subject catalogue of old book holdings in the National Library by C. Vassallo, *Catalogo dei libri esistenti nella Pubblica Biblioteca di Malta, compilato per ordine di materie*, Valletta 1843, vol. 3: *Teologia e giurisprudenza*, pp. 131-132, *Diritto Maltese*: eleven publications after 1800, but only three real books before 1800, namely statute books: *Leggi e Costituzioni prammaticali* under Grandmaster Antonio Manoel de Vilhena (Malta, stampatore, 1724); *Del Diritto Municipale di Malta* under Grandmaster Rohan (Malta, nella stamperia del Palazzo di S.A.E. per Fra Gio. Mallia, 1784); *Costituzione per la erezione del Supremo Magistrato di Giustizia*, by Giandonato Rogadeo (Malta, stampatore, 1777). The catalogue adds several pamphlets (Malta, stampatore, 1783) which were sparked by Rogadeo's failed proposals for a wide law reform. The pamphlets respond to Giandonato Rogadeo's polemical invective against Maltese institutions and their lawyers: *Ragionamenti sul regolamento della giustizia e sulle pene (in Malta)*, Lucca, stampatore, 1780.

¹² Mss 154, 449 (by Marcus Antonius Mombelli, anno 1760), 618 n.3 (*Synopsis alphabetica juridica*), 1026.

¹³ Mss 171, 651, 762, 1112-1113, 1243, maybe also 496 *Praxis Inquisitionis*, 18th century.

¹⁴ *Consilia* by Colli, preserved in ms 328 which was copied from ms 554. There are also *Allegationes* by Balzan: ms 671.

¹⁵ Ms 152.

¹⁶ Ms 452, anno 1704.

¹⁷ Ms 443 and ms 709.

¹⁸ Ms 448 n. 1, anno 1770.

¹⁹ Ms 448 n. 2: *Historia iuris civilis*; ms 463: *Lectura Institutionum iuris civilis et canonici* by professor Bernardino Lipari, anno 1770; ms 618 nn. 1-3; mss 718, 1189 and 1265A: all three contain a *Lectura Institutionum iuris civilis*, the latter by professor Fabritius Farugia; ms 1111: *Repetitiones iuris*; ms 1178: *Quaestiones* by Josephus Pulcharellus primarius Pandectarum; ms 1544 and 1547-1551: law lectures at Louvain in the years 1833-1834, 1854-1855 and 1860-1861.

²⁰ Pages 105-130 in volume 3 (*Teologia e giurisprudenza*) of the subject catalogue of 1843, mentioned above in footnote 11.

Many great names of *Jus Commune* literature can be found therein: Abbas Panormitanus, Matthaeus de Afflictis, Andreas Alciatus, Ansaldus de Ansaldis, Antonius Augustinus (*Antiquae collectiones decretalium*), Azo Portius (*Brocardica*), Baldus de Ubaldis (*Opera omnia*), Andreas Barbatia (*Consilia*), Augustinus Barbosa (9 works), Bartolus de Saxoferrato (*Opera omnia*), etc. etc. till Franciscus Zypaeus (*Opera omnia*)²¹.

Other manuscript juridical literature in the National Library of Malta regards the Knights of the Maltese Order of Hospitalers. The Knights ruled over Malta since 1530. Their Grandmaster and central administration seated there. The Order had affluent possessions – also in many regions of Europe. There were excellent lawyers among the Knights. They produced specific juridical literature for the needs of their Order. Manuscript transmission of this literature has so far come to my knowledge as follows:

- *Summa iurium Hierosolymitanorum Equitum* (1661?), by Carolus Micallef, commendator of the Order (7 manuscripts)²²
- Texts of *statutes* of the Order (7 manuscripts known to me, but many more may exist)²³
- Texts of *decrees* of the Consiglio of the Order (1 manuscript)²⁴
- *Councils* of the Order (1 manuscript)²⁵
- *Decisiones Sacrae Rotae Romanae* in litigations regarding the Order and its possessions and privileges (8 manuscripts)²⁶
- *Commentary* in Italian language *on the statutes of the Order*, by Johannes Maria Caravita, Prior Lombardiae of the Order (4 manuscripts)²⁷. The original version of the work was systematically arranged, and it was usually bound in three volumes.
- Alphabetised compend of Caravita's *Commentary*, in Italian (5 manuscripts)²⁸

²¹ The catalogue of 1857 by Cesare Vassallo lists more books than the one of 1843. It has five volumes, subdivided in languages and alphabetised within each language. Pre-1800 books on *Jus Commune* are predominantly found in the Latin section of volume 1. The volume for Italian language is titled *Indice alfabetico dei libri in lingua italiana esistenti nella Pubblica Biblioteca di Malta*, Valletta 1857.

²² Cambridge, MA, Harvard University Library, Houghton Library, Riant Collection, ms 64; Valletta, National Library of Malta (from now on NLM), ms 224, 634, 870, 1025, 1215, 1597.

²³ Riant Collection (as above), mss 103 (anno 1675) and 104 (anno 1705); Rome, Biblioteca Magistrale del Sovrano militare ordine ospedaliero di San Giovanni di Gerusalemme, di Rodi e di Malta (from now on SMOM), ms 245 (compend by Salvatore Imbroli, Prior generalis of the Order); Valletta, NLM (as above), ms 236, 549 n. 1, 598, 941 (statutes of 1357), and many more.

²⁴ Rome, SMOM (as above), ms 103 (anno 1792, collected by Caruso, alphabetised).

²⁵ Valletta, NLM (as above), ms 949.

²⁶ Valletta, NLM (as above), ms 336 (collected by Johannes Maria Caravita, Prior Lombardiae of the Order), ms 487 (collected by Caravita, four volumes), ms 549 n. 2 (probably collected by Imbroli), ms 696 (collected by Imbroli, and with his commentaries), ms 1409, mss 1412-1413, perhaps also ms 1414.

²⁷ Riant Collection (as above), ms 65; Rome, SMOM (as above), mss 9-11 (specimen in three volumes); Valletta, NLM (as above), ms 204 (three volumes), ms 237 (in origin three volumes), mss 534-541 (a series of works by Caravita, probably also comprising his commentary).

²⁸ Valletta, NLM (as above), mss 94, 533, 1463. Probably also ms 73 and 191 contain this work.

- Alphabetised compend of Caravita's *Commentary*, in French (2 manuscripts)²⁹
- *Trattato dei privilegi del Sacro Ordine Hierosolimitano*, by Caravita, in Italian (3 manuscripts)³⁰
- *Trattato delle commende ed amministrazione di esse*, by Caravita, in Italian (6 manuscripts)³¹. This treatise dealt with parcels of property of the Order being enfeoffed to one specific Knight as "commendator", according to rubric 14 of the Order's statutes.
- *Trattato dell'Offizio del Ricevitore e de' Procuratori del Comun Tesoro*, by Caravita, in Italian (6 manuscripts)³². The competences of the Order's "Ricevitore" may loosely be compared to the office of Exchequer or Treasurer elsewhere. The chancery of the "Ricevitore" also functioned as a court – comparable to court functions of similar offices elsewhere (for instance the English Exchequer Court).

Most works by Caravita remained unedited, but two were so eagerly sought after that they were finally committed to printing: namely the *Trattato del Ricevitore*³³, and the alphabetised compend in Italian of his *Commentary on the statutes of the Order*³⁴.

Some juridical works on the Maltese Order went immediately to the printers, however, without having circulated in manuscript before. For instance, the Order's statutes were printed in several editions³⁵. In 1644 a German-speaking Knight published a standard commentary on the statutes and usage of the Order³⁶. In 1792 Antonio Micalleff, law professor at the University of Malta, published lecture notes for his course on the statutes of the Order³⁷.

²⁹ Riant Collection (as above), ms 66; Valletta, NLM (as above), ms 194.

³⁰ Rome, SMOM (as above), ms 43; Valletta, NLM (as above), mss 190, 272.

³¹ Rome, SMOM (as above), mss 6 and 7 and 8; Valletta, NLM (as above), mss 189, 560 n. 2, 600.

³² Riant Collection (as above), ms 59; Valletta, NLM (as above), mss 158, 186, ms 206 (probably contains this work, but titled *Trattato del tribunale della Cancelleria*), mss 509, 560 n. 1.

³³ *Trattato dell'offizio del Ricevitore e de' procuratori del Comun Tesoro fuor di convento e straordinari*, Borgo Novo nel Marchesato di Roccaforte (Sicilia), Antonio Scionico, 1718, e Malta, per d. Niccolò Capaci, 1763².

³⁴ *Compendio alfabetico degli statuti dell'Ordine Gerosolimitano*, Borgo Novo (as above) 1718.

³⁵ Standard bibliography: F. de Hellwald, *Bibliographie méthodique de l'Ordre Souverain de Saint Jean de Jérusalem*, Rome 1885; furthermore B. Waldstein-Wartenberg, *Rechtsgeschichte des Malteserordens* (Wien etc. 1969).

³⁶ Christian von Osterhausen, *Statuta, Ordnungen und Gebräuche des Hochlöblichen Ritterlichen Ordens s. Johannis von Jerusalem zu Malta*, Frankfurt am Main, Johann David, 1644; see W.-D. Barz, *Das Wesen des Malteserordens und die Person des Christian von Osterhausen (...)*, Münster 1995.

³⁷ Antonio Micalleff, *Lezioni su gli statuti del Sagr'Ordine Gerosolimitano nell'Università degli Studi di Malta*, Malta, presso Fr.G.M., 1792. The handwritten model for printing is preserved in the National Library of Malta, ms 489. The text was recently translated into English: Antonio Micalleff, *Lectures on the Statutes of the Sacred Order of St. John of Jerusalem at the University (of Studies) of Malta 1792*, translated from the original Italian by M. Galea, with an introduction and appendices edited by W.-D. Barz and M. Galea, Karlsruhe 2012 (Juris fontes, 2).

3. *Scotland and its Court of Session at Edinburgh*

Scotland may serve as a prominent parallel example for the importance of handwritten juridical literature after 1500. Only little was printed in Scotland, and the reasons why this was so can be compared to similar reasons in Malta. Up to 1700, Scotland had but very few professional lawyers. From 1532 onward there existed a continually sitting central law court, later called the “Court of Session”. Yet, the number of professional lawyers who were active in this court (judges plus advocates counted together) is likely to have remained below thirty persons throughout the 16th century and did not rise far above that number in the 17th century. It was not worthwhile to print books for this small group of persons, as printers would not have sold enough copies to cover their costs.

The circumstances why Scotland had so few professional lawyers can also be paralleled to Malta. Before 1700, Scotland’s population was small (less than 1,000,000) and was thinly spread over a large territory. Most Scots lived in dire poverty and eked out a self-sufficient living on croft farms.

In contrast to England, Scotland had undergone a full reception of *Jus Commune*. The lawyers studied at universities on the European continent, and they resorted to printed literature of *Jus Commune* wherever their domestic legislation or customary law did not expressly regulate the legal problem in question otherwise.

Scotland developed particularly rich genres of concomitant juridical literature to connect the learned law to domestic custom and legislation. Yet, until 1680 almost all of this literature remained unprinted. Even worse: still today the vastly overwhelming majority of works of juridical literature lies unedited, and throughout the last 200 years it was not studied by legal historians.

In the years 2006 to 2009 a systematic “census” of pertinent manuscripts was done³⁸. In a first step, inventories of archives and libraries were perused. It resulted that more than 1,150 handwritten volumes were more or less likely to contain juridical literature from times before 1700. In a second step, 526 of these manuscripts were analysed. They comprised altogether 1,958 transmissions of meaningful texts.

The texts were then screened to sift out those which had been found in a plurality of manuscripts and whose contents were suited to be read by a non-restricted circle of persons. Texts which fulfilled both criteria had obviously circulated as an item of “literature” – in contrast to texts which had only been drawn up for purposes of particular parties.

Among juridical texts, circulation in multiple copies was ascertained for 228 different works – of which only a small percentage had hitherto been noticed as such. It could even be shown that scribes in Scotland in the 16th and 17th centu-

³⁸ G. Dolezalek, *Scotland under Jus Commune. Census of Manuscripts of Legal Literature in Scotland, mainly between 1500 and 1660*, Edinburgh 2010, 3 vols. (The Stair Society, vols. 55-57).

ry continued to use a medieval technique of copying, namely the “*pecia* technique”. The model book to be copied was unbound and divided into portions (*peciae*), and only one portion at a time was then handed out for copying to any particular scribe. In this manner the model book could at the same time be copied by as many different scribes as there were different portions³⁹.

Before the “census”, certain British legal historians had doubted that Scotland had received *Jus Commune* on a significant scale. One main argument was that text passages from 16th and early 17th century law reports, printed in the 19th century by W.M. Morison⁴⁰, hardly ever contain references to *Jus Commune*. After the “census”, however, this argument can no longer be upheld. It is now very clear that in Scotland the reception’s impact was as strong as it was in France, Germany, the Netherlands and other countries on the European continent. Manuscripts of law reports from the 16th and early 17th century are full of *Jus Commune* quotations – implied ones and express ones. They lack in the text passages printed by Morison because he left them out. Even more: he simply skipped all Latin text passages.

Scotland thus furnishes a very prominent example of how important manuscript dissemination of juridical literature after 1500 can be. It remains to be seen which parallels to Scotland and Malta will come to the fore in legal historical research in other countries.

³⁹ *Scotland under Jus Commune* cit., vol. 1 p. 10.

⁴⁰ W.M. Morison, *The Decisions of the Court of Session, from its First Institution to the Present Time, Digested under Proper Heads, in the Form of a Dictionary (...)*, Edinburgh 1801-1804, with various supplements 1815, 1823, 1826 and 1829.