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Ecclesia anglicana vivit iure commune

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recht sowie deren Einbeziehung vor Kaufmannsbis hin zu Schiedsgerichten. Aufschlussreich hätte auch eine verfassungsrechtliche Akzentuierung des ersten Grundrechts, des *ius emigrationis*, sein können, durch das der Konflikt von Gesetz und Gewissen zugunsten der individuellen Gewissensentscheidung und zu Lasten des disziplinierenden Zugriffs von staatlichem Gesetz und Gerichtsbarkeit aufgelöst wurde. Lohnend hätte auch ein Blick in das 20. Jahrhundert sein können, das mit Verfassungsgerichtsbarkeit und -beschwerde das eindimensionale Gesetz durchaus anhand ethischer, überpositiver Aspekte überprüft. Auf der anderen Seite vernachlässigt Prodis herrschaftsorientierter Blick auf die Gerichtsbarkeit die Befriedungsfunktion von Recht wie Gericht. Auch die Fragen nach einer Justiznutzung und Justizakzeptanz durch die Rechtsunterworfenen, ob sich diese also der verschiedenen möglichen Rechtsgänge zu den unterschiedlichen Gerichten aktiv bedienten, müssen daher offenbleiben.

Trotz aller weiteren Wünsche und Anregungen ist dem Historiker Prodi das Beste gelungen, was eine Synthese leisten kann: unsere Sicht zu erweitern, wodurch die westliche Rechtskultur bestimmt ist, und zugleich weitere Forschungen, besonders im Zusammenhang mit der Entstehung eines öffentlichen Strafrechts, herauszufordern. Es ist daher zu begrüßen, dass eine Übersetzung des Werkes in Vorbereitung ist und voraussichtlich noch in diesem Jahr vorliegen wird, in der auch die zahlreichen ärgerlichen Druckfehler bei deutschen Literaturangaben und Zitaten korrigiert werden können.

Susanne Lepsius

Ecclesia anglicana vivit iure commune*

The *ius commune* is a currently fashionable topic. It is clear that much of the interest in it derives from its potential to provide examples that can be used by those who are primarily interested in the future of private law in Europe, some of whom see in an interpretation of the idea of the *ius commune* lessons either in favour of – or against – unification or harmonisation of law in Europe. No such anachronistic or a-historical concerns affect or disfigure Professor Helmholz's meticulous study. He is interested in the historical interaction of the *ius commune* and English law.

The "influence" of Roman law on the common law of England has long been a staple topic – there is scarcely a major historian of English law who has not explored it in one way or another, often following in the footsteps of Maitland and writing on the topic of English law and the Renaissance. No *communis opinio* has yet been established. One suspects it never will be. Helmholz is dissatisfied with these traditional approaches to the issue of England and the learned laws; instead, he has examined areas where there was a significant overlap between the English law and the *ius commune*. This allows examination in detail of the rules of the *ius commune* and equivalent English rules. In particular, as one of the foremost historians of English ecclesiastical law, he has chosen to

* Richard H. Helmholz, The Ius Commune in England. Four Studies, New York: Oxford University Press 2001, XV and 270 pp. (incl. index), ISBN 0-19-514190-3

explore topics involving the law of the church – most certainly a transnational *ius commune* – and its jurisdictions as well as the common law. There can be no doubt about the potential applicability of canon law in England. This means that areas where overlap and divergence occur can hold important lessons for scholars. The areas he has chosen are sanctuary, compurgation, mortuaries (customary offerings made on death to the deceased's parish church), and jurisdiction over the clergy.

Helmholz explores these areas in ways appropriate for each. Thus, he provides a detailed and interesting account of the canon law on sanctuary, which he follows with a discussion of the English law. Here the merits of his approach to the relationship between English law and the learned laws start to appear. Helmholz points out that most writers on sanctuary in England have assumed that "the canon law on the subject played little or no role" (56). Study of the actions of English bishops shows that they generally ignored the dictates of canon law; English practice, for example, gave broader scope to sanctuary and the bishops did not seek to enforce the rules on *casus excepti* and other law of the Decretals. This went perhaps beyond the simple recognition of local variation that the *ius commune* presumed; there was evident disharmony. The account of the English law of sanctuary shows practice where there was striking divergence from the canonical rules. This said, Helmholz shows that the *ius commune* was "the source of some of the ideas expressed by common lawyers in describing their own law of sanctuary or arguing for its restriction" (73). Moreover, while the attack on sanctuary that developed from the reign of Henry VII has traditionally been viewed as deriving from the attack on ecclesiastical jurisdiction, examination of the ecclesiastical law makes that doubtful (73–74). Thus, in 1516, the canon law was used to exclude individuals from sanctuary, thereby restricting the scope of the English law (77). There are other examples. Furthermore, Tudor restrictions on sanctuary, rather than being an attack on ecclesiastical jurisdiction, were if anything, "a slightly tardy 'catching up' with developments on the Continent" (80).

Helmholz has a detailed discussion of compurgation in the canon law and its writers and its careful application in the English ecclesiastical courts. In the royal courts, there is even evidence that common lawyers knew quite a lot about the compurgation of the *ius commune* and could draw on it provisions in discussing wager of law (127). Nonetheless, comparison shows that the two institutions were quite distinct. Thus, in English law, compurgation was used almost exclusively in civil matters; it was the opposite in the ecclesiastical jurisdiction. Helmholz shows that the decline of wager of law in the English common law is paralleled by the decline of compurgation in the *ius commune*; by the sixteenth century, the great Italian writer on procedure, Julius Clarus, had noted its obsolescence, with a few exceptions. The disappearance of this institution in England was part of a general European experience. This is important.

Mortuaries – or their equivalent – were a venerable and common custom in Europe. In England they can be traced back to Anglo-Saxon times. They were always a potential and understandable source of friction between laity and clergy. In England, this friction resulted in the famous and tragic case of Hunne (146–147). For canon law, mortuaries were a potential problem. Although custom was a recognised source of law, not all such customs could be accepted and the *ius commune* developed sophisticated rules on

recognition of custom. Mortuaries, if construed as a compulsory payment for the burial service, were potentially simony. Faced with this problem, English diocesan legislation eventually justified mortuaries as payments for forgotten tithes. The statute was further glossed and explained by the English canonist, William Lyndwood, who tried to reconcile it with the canon law (167–170). Despite the tensions raised by the collection of mortuaries, and their perhaps ambiguous legal status, it is interesting that, so far as we know, no one attempted to challenge their validity under the canon law. Their customary nature was accepted. It is also interesting to note that, in 1529, royal legislation validated them, by commuting their payment from a chattel payment to a money payment, although the statute noted that they could only be exacted where they had customarily been exacted in the past. The ecclesiastical courts and the royal courts both operated together to preserve this traditional income-stream for the clergy.

Discussion about jurisdiction over the clergy in England has focused almost exclusively on criminal jurisdiction, where "benefit of clergy" could be claimed; the issue of civil jurisdiction over the clergy has been largely ignored. In England, in civil matters, the clergy were simply subjected to the jurisdiction of the royal courts enforced by writs. This is in many ways somewhat singular. For example, in Scotland in the 1540s, it is clear that the clergy were generally able to claim exemption *ratione personae* from the (civil) jurisdiction of the College of Justice. In England practice therefore widely diverged from that presupposed by the *ius commune*. Jurisdiction over clergymen was determined not by their clerical status as such, but by the subject matter of the litigation. Helmholz gives an exemplary and informative account of the *privilegium fori* in the classical canon law and the commentaries on it. What is interesting is the way in which the English church faced opposition to assertion of the *privilegium fori*, not even the episode of Henry II and Becket led to its recognition. Bishops disapproved of this: Robert Grosseteste, for example, wrote eloquently and at great length about the iniquity of English practice. Yet, the bishops did not gain their wishes, even though, in 1370, the Rota explicitly rejected the English king's exercise of jurisdiction over clerics in what was probably a test case. While in sanctuary law one can say that English practice was congruous with the *ius commune*, as regards *privilegium fori* it was at direct variance. It amounted to a rejection of canon law. Helmholz admits that it is impossible to provide a definitive explanation of this; all that can be done is speculate. Helmholz's speculation is of course erudite and informed. Failure of *privilegium fori* was ancient in England. Helmholz examines the attitude of a number of bishops to the receipt of a royal writ that required them to take action rather in the manner of a sheriff. If these were writs which required bishops to make a levy on ecclesiastical property, they were, at best, grudgingly reluctant to comply; on the other hand, they were happy to serve writs requiring clerics to appear in front of royal courts. They saw an advantage.

This is an elegantly written and subtle study by one of the foremost historians of English law. He demonstrates the possibilities of treating English law as an aspect of the law of Europe more generally. His exacting and deep scholarship allows a thorough exploration of his topics from which his general themes emerge. He defines the *ius commune* in a pragmatic and straightforward way, as simply consisting of the Roman law and the Canon law – the *utrumque ius*. The *utrumque ius* provided the ingredients, the *ius commune*

was the practice. He does not explore the intellectual content of the concept in detail, though stressing not only that it evolved and changed but also, rightly, that the law varied from country to country in the area of the *ius commune*. He nonetheless is firmly of the view that one can sensibly and meaningfully talk of the *ius commune* as a system, disagreeing with doubters, such as Paul Nève, who consider that one cannot talk of the *ius commune* as one system.[1] For Helmholz, the *ius commune* nonetheless contained a strong measure of continuity at its core from the revival of legal science until the nineteenth century. That continuity was provided by the texts of the Roman and Canon laws, the common education of its practitioners, the commentaries of the law professors, and the common features of its procedural system. He stresses in his conclusion that the idea of the unity of the *ius commune* should not be exaggerated. It held the possibility of long-term disagreement and uncertainty (242). Helmholz's comparative studies of both English law and English ecclesiastical practice, examined in the light of the *ius commune* tell us much. It is an exhilarating and enlightening performance.

John W. Cairns

1 Paul L. Nève, Europäisches Ius Commune und (nationales) Gemeines Recht: Verwechslung von Begriffen?, in: Wirkungen europäischer Rechtskultur. Festschrift für Karl Kroeschell zum 70. Geburtstag, Munich 1997, pp. 871–884.

Kreuz des Nordens*

»We have no history proper to our Law, but some loose unconnected hints«, klagte der Schotte Walter Ross vor zweihundert Jahren; außer einigen von Sir Thomas Craig und Lord Stair en passant gemachten Anmerkungen wisse man eigentlich nichts von der Geschichte des schottischen Rechts.[1] An gelehrten Abhandlungen, die dem abzuhelfen suchten, hat es seither nicht gefehlt, wenngleich der Erfolg dieser Bemühungen unter schottischen Juristen mehr als umstritten ist. Lord Cooper of Culross urteilte, dem schottischen Recht ermangele es so sehr an Kontinuität, dass es an sich unmöglich sei, seine Geschichte zu schreiben: »There is a sense in which it is true to say that Scots law has no history; its story is a record of false starts and rejected experiments«.[2] Abgehalten hat dieses Diktum die schottischen Rechtshistoriker indes nicht davon, es doch zu versuchen, es hat sie ganz im Gegenteil erst recht zu neuen Anstrengungen angespornt. Nachdem die diversen Ansätze in dem 1958 von C. H. Paton herausgegebenen 20. Band der Stair Society, *An Introduction to Scottish Legal History*, erstmals in einer Gesamtschau zusammengefasst wurden, kam es im weiteren zu einer ganzen Reihe von Arbeiten zur schottischen Rechtsgeschichte, die zuletzt in David Walkers sechsbändiger, vom Mittelalter bis ins 19. Jahrhundert reichenden, umfassenden Gesamtdarstellung *A Legal History of Scotland* gipfelten.

Kennzeichnend für die meisten neueren Arbeiten ist das Bemühen, eine durchgängige, bruchlose Geltung römischen Rechts in Schottland seit dem späten Mittelalter nachzuweisen; damit geht eine Neigung einher, sowohl die anglonormannischen Grundlagen des schottischen Rechts als auch das seit dem 19. Jahrhundert in Schottland Einzug haltende common law eher gering zu schätzen. Nicht selten wird das ius

* A History of Private Law in Scotland, hg. von Kenneth Reid und Reinhard Zimmermann, Vol. I: Introduction and Property, Vol. II: Obligations, Oxford: Oxford University Press 2000, Vol. I: lxi, 552 S.; Vol. II: lxxviii, 748 S., ISBN 0-19-829941-9

1 Walter Ross, Lectures on the History and Practice of the Law of Scotland Relative to Conveyancing and Legal Diligence, Edinburgh 1792, xvii.

2 Thomas MacKay Cooper, Select Scottish Cases of the Thirteenth Century, Edinburgh 1944, lxi.