

**Comparative Studies
in Continental and Anglo-American Legal History**

**Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte**

Band 17/I

Case Law in the Making

**The Techniques and Methods
of Judicial Records and Law Reports**

Volume 1: Essays

Edited by

Prof. Dr. Dr. Alain Wijffels



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Herausgegeben von

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und

Prof. Dr. Dr. h. c. Knut Wolfgang Nörr

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Preface

The present volumes (Part 1: Essays; Part 2: Documents) are the sequel to the volume *Judicial Records, Law Reports, and the Growth of Case Law* (J. H. Baker ed.), published as Vol. 5 of the *Comparative Studies in Continental and Anglo-American Legal History* in 1989. While that volume was still at the press, there was a consensus among the contributors that the project ought to be continued. For a while, Prof. J. Hilaire, then Director of the Centre d'Etude d'Histoire Juridique in Paris (C.N.R.S.), kept the flame alive, but eventually, practical considerations led me to act as the general coordinator of the project. From the table of contents and the list of contributors in these new volumes, it will be clear that there is a strong continuity between the present publication and its 1989 predecessor. Most of the contributors to the earlier project agreed to participate in the new project. Except for the municipal *Schöffensprüche* in northern Germany (Prof. F. Ebel's contribution to the previous volume) and for the judicial system in Russia (Prof. W. E. Butler's essay in the same volume), the jurisdictions dealt with in 1989 appear again in the present contributions. Prof. R. Jacob first considered contributing to the present project with a study of local courts in the French territories governed by customary law (*pays de coutumes*); other commitments prevented him from carrying out this plan, but the collaboration nevertheless proved profitable: in September 1993, he organised a successful international conference in Paris on the theme: 'Le juge et le jugement', where several members of the present project also presented papers, and the proceedings of that conference will probably appear shortly before the present publication. Prof. J. Hilaire and Dr. C. Bloch were no longer in a position to contribute to the new project, but the participation of the Centre d'Etude d'Histoire Juridique and of the Centre National de la Recherche Scientifique was ensured by Dr. B. Auzary-Schmaltz and Dr. S. Dauchy, who wrote the essays on the *Parlement* of Paris. For the papers on the Low Countries, young scholars were found ready to support the 'old guard' (Drs. C. Verhas for the Dutch Supreme Court, and Mr. C. H. van Rhee for the Great Council of Malines).

It will also be obvious that our venture was considerably strengthened by the participation of other new members to the project. In the previous volume, Prof. J. H. Baker had not only carried the burden of coordinating the project and editing the volume, but he had also had the task of repre-

senting the English legal tradition on his own. As the general aim and the title of the series in which this work appears suggest, the English system deserves to be approached in more than one contribution. The most striking innovation of this sequel is no doubt that the main historical traditions of the English legal system are now dealt with by different scholars. For the Common Law, Prof. Baker himself focuses specifically on the Year Books, while Dr. D. J. Ibbetson deals with the early-modern reports. For Equity Law, Prof. W. H. Bryson (whose new contribution on Virginia law reports also ensures that the American leg of the project remains represented) kindly accepted to provide an essay, drawing on his expertise and more recent research in Chancery and other Equity records. Finally, the English civil lawyers' practice in the ecclesiastical courts is studied by Prof. R. H. Helmholz. For France, I was keen to include a separate study on at least one 'provincial' *Parlement*; Prof. J. Bart and Dr. M. Petitjean provide us now with new insights in the records and reports related to the *Parlement* of Dijon. Clearly, other territories and legal systems might also have been included in the present collection; I personally miss very much contributions on the courts in some of the major territories within the *Reich*, and at least one contribution on the practice in Spain; Scotland, too, would certainly have deserved a separate paper in a legal-historical comparative perspective, and a similar point could no doubt be argued for early-modern developments in Scandinavian and in Eastern European countries.

At first sight, the approach followed in the different essays may seem very different from one legal system to another. Here again, however, the present essays need to be envisaged with respect to those published in 1989. In some cases, the authors had already provided in their first paper a general survey of the records and of the reports, which made it possible to consider more in detail particular aspects of the specific theme of the new project; whereas in other cases, such a general survey and outline of the court was still needed. For courts which originated or developed only towards the end of the middle ages or later (e.g. the *Reichskammergericht*, the Great Council of Malines, the Dutch *Hoge Raad*), it may have been expedient for the authors to direct their attention to a particular feature of, say, the drafting of a judgment (cf. the Great Council of Malines) or of the *relatio* (cf. the very stimulating and innovative essay on the Imperial Chamber of Justice, in which Prof. F. Ranieri also emphasises the importance of the technique in present-day German legal education). For some of the 'great European courts' which had already acquired a respectable status before the early-modern period (the Roman Rota, the Royal High Court of Sicily, the *Parlement* of Paris), the emphasis is different; for those jurisdictions, the reader will be reminded of relevant institutional developments; in the case of the Roman Rota, Prof. Dolezalek effectively succeeded in pre-

senting an extremely clear and original synthesis of early-modern developments, which will no doubt serve in the future as a work of reference for many students and scholars, and which provides a valuable complement to his essay in the previous volume. For Southern Italy, Prof. G. Vallone somewhat shifted his interest *ratione temporis et loci* from his earlier essay on Matteo d’Afflitto and the court in Naples; while Prof. A. Romano’s substantial contribution on the Royal Court in Sicily forcefully helps to equilibrate a collection which, in general, is still tainted by a Northern European bias. Prof. M. Ascheri’s recent reprint of *Tribunali, giuristi e istituzioni dal medioevo all’età moderna* already addresses some of the central themes of the present volumes, and has the advantage of providing comparative perspectives for the Northern territories of the Italian peninsula; however, even in his present essay, which is more specifically focused on Siena and Tuscany, the author pursues his wider comparative regional approach with some general considerations regarding the practice in Northern Italian ‘Rotæ’.

In spite of these differences in emphasis, a unity of approach was preserved thanks to the active cooperation of all the members of the project. A meeting was held at Leiden on 5 - 6 July, 1993,¹ and it provided an adequate opportunity to discuss both the essential options of the new project and the more practical concept of the two volumes to be produced.

In a comparative collection as the present one, a separate volume containing almost exclusively sample documents is not a luxury. Since the emphasis of the new project was to be on the technical aspects of day-to-day drafting of judicial records and law reports (or their continental counterparts: collections of ‘decisiones’ etc.), which are inevitably solidly embedded in particular ‘styles’ and institution-bound practices, the risks of misunderstandings or plainly unintelligible methods are not small. The risk of confusion is even greater when the authors, each well-acquainted with the court system they present, are writing in their own language, for some terms of art they use – possibly even for referring to very ordinary and

¹ The meeting was attended by B. Auzary, J. H. Baker, W. H. Bryson, J. Th. de Smidt, G. Dolezalek, R. H. Helmholz, D. Ibbetson, R. Jacob, K. W. Nörr, F. Ragnieri, C. H. van Rhee, C. Verhas and A. Wijffels. The organization was greatly facilitated by the support of Dr. F. Egmond. The meeting immediately preceded the 11th British Legal History Conference, held in Exeter, where papers were presented by several contributors to the present volumes. The theme of the conference was closely related to that of our project and Leiden meeting: cf. the proceedings published under the title: *Law Reporting in England (Ch. Stebbings, ed.)* (London/Rio Grande 1995). These proceedings include inter alia a contribution on the High Court of Admiralty in London, which originally had been intended for the present project; thanks to Prof. Helmholz’s study, an additional essay on an English civil lawyers’ preserve in the present collection became redundant.

trivial practices – are so intimately related to the clerical habits of the court in question that the very language used becomes idiosyncratic; needless to say, no translation (barring a system of comprehensive and cumbersome paraphrases) could prevent this pitfall, well familiar to any comparative lawyer or legal historian. Once again, the old scholastic saw that ‘nothing reaches the mind, unless it has gone through the senses’ pointed the way to a practical solution: specific sample documents would illustrate and exemplify the general (and inevitably, to some degree abstract) features and principles developed and presented in the essays. Unquestionably, a printed version of a transcript from an extract of a judicial record is a very pale and inadequate reflection of the real thing! It may be impossible to grasp the materiality of a ‘roll’ in an English judicial record until one has actually seen such a document being unrolled and consulted on a long side-table at the Public Records Office in London; or that of continental ‘registers’ recording the various stages and aspects of the written proceedings inherited from the Roman-canonical procedure, unless one has been granted access to the depots where, literally, hundreds or even thousands of metres of archives from a single court, amassed over several centuries, can be visualised. One of the contributors to the project suggested that a collection of photographs might be more appropriate;² indeed, new publishing techniques which make it possible to gain a computer-steered ‘animated’ access to the most complex source-material make it possible to envisage even more sophisticated data-bases opening up serial judicial archives. In comparison, the present volumes remain very modest and highly conventional. Nevertheless, it is hoped that by providing for each court-system examples of both records and reports, precisely the technical aspects of these documents may be better understood. English Year Books and early reports, even when modern editions are available, are still scarce in continental European libraries, while even popular *ius commune* collections of *Decisiones* are not always readily accessible in specialised academic institutions; when records have been published by a modern author, the aim of the publication has seldom been to highlight the formal aspects of the drafting-technique. In this context, the second volume now published may offer a rudimentary, yet indispensable instrument for understanding the inner working of foreign judicial recording methods. During the discussions, pertinent objections were raised as regards the possibility

² Some photographs of records and reports are reproduced in the lavishly illustrated volume: Frieden durch Recht. Das Reichskammergericht von 1495 bis 1806. (I. Scheurmann ed.) (Mainz 1994), including contributions on German courts, the English central Royal courts, the *Parlement* of Paris, the Great Council of Malines, early-modern Italian supreme courts, Swedish royal courts, and Polish jurisdictions. Again, one will note that among the authors, the present contributors are strongly represented.

of selecting 'typical' or 'representative' samples from the records or reports. Moreover, the problem was exacerbated when I suggested that each contributor might attempt to produce a collation of records and reports relating to the same case. Considering the nature of the source-material or its accessibility in some of the jurisdictions under review, the practical difficulties of such a scheme were deemed to be insuperable. Yet, the discussion itself, which is echoed in several passages throughout the different contributions, where the authors explain why such a collation would have been impractical or vain, or what restrictions they had to take into account, may serve the comparative purpose of the present collection of essays. Also, a general introduction aims to highlight and compare some of the features discussed in the various essays.³

These two volumes appear at a time when the interest of (legal) historians for judicial records, at least in continental Europe, is perhaps much greater than ever before. In England (and Common Law countries in general), the importance of the judiciary in the law-making process means that legal historians have always privileged such sources; and historians have traditionally also regarded legal sources as primary material for their investigations. By contrast, on the European continent, comparable sources have long been neglected and are, even today, only to a limited extent readily available or accessible; the systematic use of forensic records and materials by legal historians is a comparatively recent, and on the whole still marginal phenomenon; for historians at large, the perceived 'threshold' to gain access to legal material is apparently often still too high.⁴ Meanwhile, continental-European initiatives in the area of 'judicial history' have thrived, and one may wonder whether the development of a *histoire de la justice* (*histoire judiciaire*), *Rechtsprechungsgeschichte*, *rechtspraakgeschiedenis* etc. (to mention only a few of the commonly used designations) as a specialised and institutionalised discipline, with its distinct journals, chairs, societies, conferences, and all other attributes of an established academic subject, is fully warranted. Admittedly, the study of judicial historical sources in continental Europe still needs special attention in order to catch up with other, better investigated fields of historical research. However, one should always bear in mind that, in the end, judicial history should not serve an independent purpose, but only makes sense when it is ultimately regarded as a *science auxiliaire* for both histo-

³ I am very grateful to David Ibbetson for accepting to co-write that introduction according to a set plan.

⁴ One of the members of the present project has initiated practical steps to reverse this mentality: cf. *S. Dauchy* (ed.), *Ter overwinning van een historische drempelvrees. De historicus en juridische bronnen. L'historien face aux sources juridiques*. [Iuris Scripta Historica VII] (Brussels 1994).

rians and legal historians in general. The most lasting value of the present contributions may well be that their authors have been keenly aware of that ancillary role of their study.⁵

Easter 1996.

Alain Wijffels

⁵ It is a pleasure to acknowledge the financial support of the Gerda Henkel Foundation (Düsseldorf) and of the Nederlandse Organisatie voor Wetenschappelijk Onderzoek (N.W.O., The Hague), which subsidised the Leiden meeting on 5 - 6 July 1994; the former's support also made possible the present publication. We are much indebted to Prof. K. W. Nörr, whose interest for the project allowed us to consider the two volumes in their present format. Dr. D. Waibel should be thanked for acting as an efficient advisor and intermediary between the editor and the publisher.

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DAVID IBBETSON AND ALAIN WIJFFELS*

Case Law in the Making: The Techniques and Methods of Judicial Records and Law Reports

Any assessment of case law as a source of law, i.e. an authority which contributes to create new law, whether by interpreting existing rules or by formulating a principle which had hitherto not been expressed, depends on the more or less systematically elaborated theory of legal authorities which prevails at any given time in a particular legal system. Every complex legal system is marked by a plurality of different types of authorities and sources. Conflicts of laws not only occur when different systems are involved, but they are also an essential feature of any internal legal system. Indeed, 'external legal history' is to a large extent the history of the emergence and decline of the different sources of law, and of the ever-changing relationship between these sources. 'Internal legal history' (or *Dogmengeschichte*) can only ignore the shifts between legal sources at its peril. Thus, standard text-books on continental legal history are still often widely based on statute law and doctrine, and, when possible and appropriate, on customary law. Comparatively few works attach commensurate attention to judicial decisions.

Admittedly, a theory of legal sources is an elusive concept. It may even be argued that, jurisprudential attempts notwithstanding, accurate systematic elaborations of such theories are more often wanting, and that, both for ancient and modern law, the literature available does not necessarily reflect the prevailing ideas or practice of its time. Even nowadays, both academic jurists and practitioners would usually find it difficult to express such a theory in any detail, assuming that a conscious consensus might be found among the legal profession of a particular legal system. Moreover, the hierarchy of legal authorities, which such theories imply, may differ, depending on the vantage point; one thing is to consider which authority overrules another, another to decide which authorities are required to be referred to

* The introduction and the section on continental European traditions were written by A. Wijffels, the section on the English and American traditions and the conclusion by D. Ibbetson.

in court, or of which authorities judicial notice should be assumed, and for which proof is required, and, if so, how such a burden of proof can be met with. Such practical considerations may fundamentally affect the contribution of any legal source to the development of the law at different times in history.

There may also be a discrepancy between more or less generally acknowledged principles regarding the authority of different sources and the practice both *in scholis* and *in curiis*. Although the continental European cliché is still that the English Common Law developed as a judge-made law, this would hardly have been the view proposed by the medieval and early-modern judges who may have deemed more political to present the role of the judiciary as that of a ‘repository’ of the Common Law. The 19th-century Exegetic School (in France and Belgium) may have on the whole proclaimed, through the mouthpieces of both doctrine and the judiciary, that the only authoritative source of law was ‘*la loi*’, but, at the same time, it produced massive multi-volume commentaries of the codes and, for the first time, systematic and periodical publications of the courts’ judgments.

A recurrent doubt in respect with the authority of precedents is that, for the medieval and early modern periods, the evidence generally ignores or repudiates a firm doctrine of ‘*stare decisis*’; precedents, it is alleged, were not *binding* precedents. Perhaps that view betrays some paradox, for the same stringent test does not always seem to be applied to other sources of law. Yet, it is known that for the proof of controversial rules of customary law, judicial precedents could be required, which could suggest that, per se, the binding authority of such rules was questionable. Even for statute law, the evidence is that, in practice, even when the legislator’s political power (whether a municipal authority, a modern state’s monarch, or the acts of a representative body) was well established, the implementation of its statutes could be imperfect. One does not necessarily need to agree with the commonly held view that frequent repetitions of the same or similar statutory provisions, in particular in continental European systems, reflect the legislative power’s frustrations with the application of these provisions, for the reiteration of previously enacted rules was often part and parcel of the legislative technique. Nevertheless, the approach to statute law in practice often shows how, at various times in history, its binding character was by no means absolute, but depended on the relative authority attributed to the different other sources of the legal system. Moreover, the paradox of case law is that, although the extent of its authority is often questioned, in any political system which tends to abide by the rule of law, the binding character of *any* rule of law largely depends on its enforcement through judicial decisions. Also, the development of a legal system is not the sum total of

formulations of positive rules, but rather the result of incrementally extending sets of rules through various forms of practice, stemming from both official and non-official groups within society.

The following essays reflect the ambiguities and the uneasiness as regards the place of case law in the development of law. In order to facilitate a comparative basis to assess the possible role of case law in various systems, a more pedestrian approach than the jurisprudential question as to the theoretical authority of judicial precedents was opted for. Therefore, the essays focus on the material aspects of how case law (whether normative or not) developed, *viz.* on the prerequisites for the affirmation of legal principles via judicial, or at least litigation-related decisions. They deal exclusively with superior, often supreme courts (in the sense of *cours souveraines*, whose decisions could not be challenged through 'ordinary' remedies) during the later middle ages and the early-modern period.

All these courts developed, sometimes at an early, sometimes at a later stage, some system of records. The essays attempt to set out the recording techniques, insofar as these may shed some light on the purposes of the courts' records. The courts' decisions, generally in the form of a judgment, are of obvious interest for case law, but all other records dealing with the legal aspects of a case, alleging or establishing (whether as part of a creative process or not) legal principles, are also relevant. The crucial question is whether these records can in a way be related to the emergence of case law, *i.e.* whether they can provide a material reference which may be later adduced as evidence or authority *sui generis* of a legal rule.

In the various legal systems and traditions under consideration, the generic term 'reports' is used for a variety of sources which are not entirely homogeneous. The term refers here both to reports in the strict and traditional sense, as it has long been well established in the Common Law system, but also as a convenient shorthand for what is usually referred to (in continental Europe) as *recueils de jurisprudence* (or, in the languages used in the various legal systems referred to in the following essays, *raccolte di giurisprudenza*, *Rechtsprechungssammlungen*, *rechtspraakverzamelingen*), in early modern literature generally published under titles as *Decisiones...*, *Arrêts...*, or more original titles during the later centuries of the Ancien Régime, but forming, on the whole, a fairly established and more or less well-defined category for the purpose of legal-historical research. As the essays and the documents here published emphasize, the object of such publications may nevertheless vary considerably, even within the same tradition. The vexed question regarding this literature pertains to its degree of 'proximity' to the opinions held by the judges of the cases involved, or at least by the intellectual authors of the decisions. When they cling to the cases, old reports may still seem, to a modern lawyer, to tell more about