

AUTHORITIES IN EARLY MODERN LAW COURTS. Ed by Guido Rossi
Edinburgh: Edinburgh University Press (www.euppublishing.com), 2021. Edinburgh
Studies in Law 16. xiii + 299 pp.
ISBN: 9781474451000. £85.

Who makes the law?

This volume considers the question from the perspective of early-modern courts, deliberately departing from a traditional focus on universities. Some chapters cover the sixteenth to eighteenth centuries; others are more limited. There is a clustering in the later-seventeenth and early-eighteenth centuries. Chapters focus on particular places or jurisdictions, from Britain in the west to Poland and Sweden (including Finland) in the east. From Sweden the volume descends to Portugal in the south. There is an impressive and welcome breadth to this collection and helpful introductions to possibly unfamiliar jurisdictions.

Any discussion of “authorities” is faced with the challenge of that word’s meaning. European lawyers would have recognised the argument *ab autoritate* as legitimate within both the logical and rhetorical traditions. But what constituted “authorities” is a much more complex matter. Alain Wijffels warns readers about accepting a nineteenth-century paradigm of a simple hierarchy of authorities, while John Ford’s thoughtful chapter on the Court of Session uses material from the history of ideas to suggest how authorities in a legal system can change.

Ford draws out underpinning ideas of sovereignty and political thought in the views about authorities expressed by late-seventeenth century Scots lawyers. Similar ideas of political authority are evident in various chapters, especially those which explain that the highest courts were not bound by law because of their close connections with the prince. For example, the Senate of Milan was obliged to perform the prince’s obligation to do justice, rather than just apply the law. This meant the Senate was not bound by its own decisions, although its association with the prince’s authority meant that lesser courts were so bound.

The role of any particular case as a possible precedent was something which contemporaries recognised. The chapters on Scotland and France note late-seventeenth century concern about the possibility. However, why such decisions would have precedential effect is much less clear. A judgment might serve to recognise a custom (as in Castile and Belgium) or establish the custom of the court in Scotland. Annamaria Monti’s chapter on the Senate of Milan refers to the role of judgments as “authoritative examples” (p.139), but the original language is “*consuetudo iudicandi*” and might be better understood as similarly about custom. Judgments might serve in some sense as proof of the law, as in Peter Oestmann’s

chapter on the Imperial Chamber Court, which refers to a decision as a “certificate” of the law (p.161) which was recognised as settling the legal problem.

These different views suggest that even if there was a shared tendency to treat prior cases as authorities, there was not a shared understanding of why this should be so. Linking cases to customs, or cases as proof of law, recognised something outside of the case as the law. David Ibbetson’s chapter on England suggests a movement to associate the argument *ab auctoritate* with *praejudicium* (literally, something judged before). Ibbetson bases this argument on Nicolaus Everardus’ *Topica*, a work also mentioned in the chapters on Holland and Belgium. However, the only clear shared feature across jurisdictions is negative: in no jurisdiction in the volume is it clear that any lawyer thought a judgment in a single case could make law.

An alternative methodological approach is taken in several chapters, looking not for the idea of authority but for its practice. Authors identify the material which is cited to or by courts as the authorities in those courts. This approach has a long historical pedigree. As Oestmann observes, in 1643 Hermann Conring claimed that the assessors in the Imperial Chamber Court were bound to obey older decisions. Conring, who had no legal training, described what he saw, rather than what courts said they were doing.

Such a descriptive approach can be useful, but just as Conring’s analysis was not entirely correct, modern legal historians should consider the methodological implications of a purely descriptive analysis. The civilian tradition has long experienced a concern, or tension, about the role of cases. The brocard that *iudicandum est legibus, non exemplis* was meant to remind lawyers to look to the laws, not cases, to decide legal questions. Within this book, Javier García Martín notes a complaint in eighteenth-century Castile that lower courts relied inappropriately on prior cases to resolve those before them. A purely descriptive approach to authorities in a law court struggles to accommodate these concerns.

In an interesting shift, the chapters on Poland and Sweden also consider lower courts, and here the picture looks very different. Both Maciej Mikuła and Heikki Pihlajamäki suggest that lower courts did not refer to the same kind of authorities as the higher courts. Instead, they used particular, sometimes unofficial, texts. This invites the question of whether legal historians should focus their attention, as most chapters in this volume do, on the higher courts (for which there are often better sources). If we really want to understand a European phenomenon of ‘authority’, it would make sense to consider differences between types of court too.

Finally, this book is a self-conscious attempt to shift the focus of European legal history from universities to courts. It seems quite clear from many of the chapters in this volume that there is no such clear distinction. Interaction between cases and

legal scholars is clearly seen in the German practice of *Aktenversendung* and in legal literature. Gustavo César Machado Cabral explains that foreign court decisions were cited in Portugal, but only when incorporated into scholarly legal literature. What is the “authority” here? The prior case, or the scholarship which makes use of it?

This is a stimulating and thought-provoking collection discussing an issue of fundamental concern to lawyers through the ages. It is a testament to the editor that the whole is great than the sum of the valuable individual parts.

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