
THE INFLUENCE OF CANON LAW ON *IUS COMMUNE* IN ITS FORMATIVE PERIOD

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Abstract

In the Medieval period, Roman law and canon law formed *ius commune* or the common European law. The similarity between Roman and canon law was that they used the same methods and the difference was that they relied on different authoritative texts. In their works canonists and civilists combined the ancient Greek achievements in philosophy with the Roman achievements in the field of law. Canonists were the first who carried out research on the distinctions between various legal sources and systematized them according to a hierarchical order. The Medieval civilists sought solutions in canon law for a large number of problems that Justinian's Codification did not hinge on or did it only superficially. Solutions offered by canon law were accepted not only in the civil law of Continental Europe, but also in the English law.

Key words: *Canon law, Roman law, ius commune, Decretum, Corpus iuris civilis*

1. Introduction

Between the 11th and 14th centuries, the Catholic Church was not only the largest and most organized public institution in Western Europe, but it also had the wealthiest intellectual resources and the most efficient legal system (Deanesly, 1969, pp. 121-130). For medieval lawyers, Roman law and canon law formed *ius commune* or the common law. The classical canon law used

the same methods as those of the medieval civilists. The difference between the canonists and civilists consisted in the fact that the canonists used to rely on authorities and sources different from those of the civilists. On the other hand it is interesting to mention the fact that often both the canonists and civilists studied law in the same schools gaining double doctorates, and consequently were conferred the title *doctores utriusque iuris*, i.e. doctors of both laws. Well-known canonists had to know the Roman law because it was the law that was used in ecclesiastical courts in the cases when the canon law sources did not offer an adequate solution (Gordley, 2013, p. 51). For civilists Justinian's *Corpus iuris civilis* texts were authoritative sources which, in spite of being voluminous, were still limited in number; consequently they could be studied even during legal studies at university. These texts were the only important ones and there were no other Roman legal texts that could be taken into consideration. In this way, it was not difficult for a lawyer to find all the texts which dealt with a certain legal issue by referring to glosses, which were notes written in the margin or between the lines of a Roman law text, in which the meaning of a word or sentence was explained (Stein, 1999, pp. 49-52).

2. The main features of the sources of canon law

The canonists did not have the deliberate intention to study Roman law but only those rules which were related to the organization of the church and Christian life (Morris, 1989, pp. 49-50). In the beginning one of the main problems that the canonists were faced with was the knowledge and acquisition of a large number of sources. A lifetime was short for a person only to read all those texts and let alone to study them thoroughly, even if he had access to a well-stocked library. The canonists relied on certain collections which had taken excerpts from these sources (Brundage, 2008, pp. 43-44). Later on Gratian's collection *Decretum* became the most widely used and authoritative source for the canonists. In the course of time other texts were added to this collection and in this way the standard version of *Decretum* was made. By a broad consensus and without any special papal ordinance or by any other church authorities, Gratian's *Decretum* became the fundamental text for students of canon law and also it served as a source for the canonists to continuously refer to whenever they needed to support their opinions (Bellomo, 1995, p. 126).

The texts used by canonists had broad and miscellaneous content and in contrast to Roman legal texts, only a small number of them were written by professional lawyers. They had legal content because they dealt with issues which regulated the church organization and functioning or the realization of

the Christian ideals in practice. However, in the course of writing these texts, their authors did not formulate normative standards in the way lawyers would do. In a large number of cases the sources of canon law had to do with moral issues (Helmholz, 2008, p. 72). They encouraged the doing of good deeds and avoiding bad behaviour. What the canonists were expected to do in this kind of situation was the drawing of legal conclusions out of morally oriented texts, for example an excerpt from a sermon which criticized the sin of greed (Gordley, 2013, p. 54). On the basis of this kind of text, in their works the canonists were expected to make efforts to define in a legal form the limits of the rights of the owner to lawfully utilize it. A different theological text which had to do with promise and its keeping, may have been the subject of treatment. Then the canonists analyzed in a practical way when the promise had to be fulfilled and cases when and why it did not need to be fulfilled and its consequences. This confirms the claim that the canonists drew their conclusions by using texts which did not have legal characteristics (Brundage, 2008, p. 57).

Another difference between the canonists and civilists was the fact that the latter continuously used the same texts. They thought the emperor of the Holy Roman Empire, being considered as a successor of the ancient Roman emperors, was authorized to enact new laws. However, in practice, he rarely exercised this right. On the other hand, the number of the authoritative texts used by the canonists grew bigger and bigger. The decisions made by the frequently held church councils and the numerous decretals enacted by the popes contributed a lot for this growth. Later on there was a possibility for some of them to be included in the large collections of the canon law (Ullman, 1975, pp. 119-122).

3. Decretum Gratiani - Concordia discordantium canonum

The large treatise *Concordia discordantium canonum* (The Harmony of Discordant Canons) by the great monk Gratian from Bologna, published around 1140, represents one of the most distinguished examples of the influence of scholastic dialectics on the formation of the European legal science. This work is not only very voluminous but also it is considered, according to some authors, as one of the earliest comprehensive and systematic treatise in the European legal history and even more widely, if the terms 'comprehensive' and 'systematic' mean the collection and presentation of almost all the law of a certain entity in a single collection in which all the parts interact among them in order to create the whole (Berman, 1983, p. 143).

Before the 11th century no serious effort had ever been made to collect all or most of the Church laws into a complete text. There existed some partial collections in which certain number of legal acts were systematized chronologically. Around 1012 Burchard, the archbishop of Worms, published *Decretum*, which is quite a large collection with about 500 pages (Bellomo, 1995, p. 48). This collection was not based on a chronological systematization that was a characteristic of the earlier canonic legal works, but it was systematized on the basis of various categories such as, churches, monks, baptism, homicide, excommunications, false witnessing, etc. In this work Burchard did not make distinctions between the theological and legal elements, and he did not make any effort to develop a general theory of canon law. He made elementary analyses of the sacred scripture, canons of ecumenical church councils, papal decretals, regulations derived from different texts about penitentials and other church documents (Helmholz, 2008, p. 74).

In 1095 Ivo, the bishop of Chartres, wrote a collection which was similar to Burchard's *Decretum* not only with its title but also in content. Some years later he published another collection entitled *Panorama*. Both of Ivo's works consisted of more detailed commentaries and included a larger variety of legal topics in contrast with earlier texts of canon law. It was for the first time that in his works some contradictory elements were clearly identified in the Sacred Writ and other authoritative texts and at the same time some principles were offered about how to eliminate these contradictory elements (Winroth, 2009, p. 16).

In the course of his compilation of the collection Gratian relied a great deal on Ivo's work. He also had a direct access to the glossator's works which dealt with commenting on the Digests of Justinian. He had close relations with Irnerius, his fellow citizen from Bologna. During Gratian's lifetime the Faculty of Law in Bologna had already functioned for some decades. In this institution Irnerius and his students used to analyze Roman legal texts and formulate general legal principles for their interpretation (Bellomo, 1995, pp. 66-68).

Gratian had a different approach from his canonist predecessors; he used a more different method in the systematization of the subject-matter (Pennington, 2004, pp. 1-2). He was also different from the civilists because he did not have a sole text to comment on but he had to search, select and systematize a large number of written sources. He collected and searched about 3800 canonic texts a considerable number of which belonged to the early period of the Church. These texts were not categorized according to the model of the earlier collections of canon law (ordination, marriage, baptism, etc.) or

according to the model of categorization that was characteristic for the Roman law (persons, things, obligations). His categorization was more comprehensive: the first part of the collection consisted of 101 *distinctiones*; the first twenty of them analyzed and synthesized general opinions regarding the nature of law, the relationships between various types of law and different sources of law (Dougherty, 2011, p. 14).

The other 81 *distinctiones* dealt with issues which have to do with the clergy and other church officials and the church jurisdiction in certain legal relations (Lesaffer, 2008). The advantage of Gratian's categorization in comparison with the earlier categorizations made in the works of the canonists or civilists consisted in its being more functional. In the second part of *Decretum* he has processed 36 complex cases (*causae*), and in each of them he has offered a solution to different legal problems (*quaestiones*). In this case, his analysis was based on the works of early Christian authors, canons of church councils and papal decretals. Furthermore, he made the reconciliation of the contradictions when it was possible to do it, and when it was not possible, he left them unsolved but made some generalizations. The existence of various forms of presentation and resolution of legal problems have had an impact on the symmetry of the work but they have not damaged its integrity as a general collection of law (Winroth, 2009, p. 5).

4. Systematization of legal sources into a hierarchical order

Gratian's methodology of analysis and synthesis were manifested in the best form in the first 20 *distinctiones* in which Gratian presents different types of law: divine law, natural law, human law, ecclesiastical law, royal law, the law of cities, and customary law. He has not only dealt with each of them separately but he has also analyzed the relationship between these different types of law. Nevertheless, Gratian was not the first who identified these categories. A lot earlier the Roman lawyers had acquired and adopted the distinctions made by Aristotle regarding the natural and positive law, the universal and state law, customary and positive law, whereas the distinction between divine law and human law had always existed in the church teachings (Kelly, 1992, pp. 141-143). However, Gratian's main achievement consisted in the fact that he was the first who carried out the research on the legal repercussions of these distinctions and systematized the various legal sources according to a hierarchical order. He put the natural law in between the divine law and human law. The divine law represented the God's will that was manifested in the Bible. Natural law also is a manifestation of God's will, but

in contrast to divine law, it is found not only in the Holy Writ but also in the human reason and conscience (Winroth, 2009, p.146).

Consequently, Gratian arrived at the conclusion that the laws of the kings and other secular authorities could not have superiority over natural law. Also the legal acts of the pope and other church officials could not be in contradiction to the natural law. According to him, *ius* is *genus*, whereas *lex* is a *specie* of it. By studying the natural law, Gratian came to the conclusion that kings have to obey the laws that they themselves have enacted and that they should act according to them (Berman, 1983, p. 145).

This kind of standard in the behaviour of kings was also raised earlier by Ivo and Burchard. In its narrow meaning, the principle that kings are bound by their own laws, was not part of classical Roman law and the Germanic traditions. In some old texts there were fragments which stated that the straight king or prince should obey his laws due to ethical reasons, although legally he does not have to do that. According to the dominant views at the time of Gratian, the ruler could change the old laws and enact new ones but then he had to obey them. According to Gratian the laws of secular authorities (*constitutiones*) should be subordinated to papal decretals and other church legal acts (canon law), whereas customs were subordinated not only to natural law but also to the legal acts of the secular or church authorities (Landau, 2008, pp. 43-45). The principle that natural law is superior to customary law was a novelty and presented one of the canonists' greatest achievements. Until then the customary law had a dominant position in the European law. Written laws were relatively rare and the same were considered only as a confirmation of the unwritten customs and traditions. The new spirit created as a result of Gratian's positions offered the possibility for the elimination of those customs which were not compatible with human reason and conscience. As a consequence, clear criteria were established on the basis of which the validity of a custom either was accepted or refused: duration, universality, uniformity, rationality, etc. The same criteria for the validity of a custom are in use even in 21st century (Pennington, 2004, p. 2).

One of the reasons why Gratian gave so much prominence to natural law and human reason was the impact of the ancient Greek philosophy. *Corpus iuris civilis* also contained quite a few elements related to the natural law and equity. However, these notions had not been treated at a conceptual and systematic level. Although there existed numerous sources in the classical Roman law, the Roman lawyers had not been occupied with their systematization and putting them in a hierarchical order (Tierney, 2008, p. 92). In their activities Roman lawyers did not have a tendency for philosophical

approach, whereas ancient Greek philosophers did not have a tendency for legal approach.

One of the greatest contributions to the European legal science made by the 12th century civilists and canonists was their inclusion in their works the combination of the ancient Greek achievements in philosophy with the Roman achievements in the field of law (Berman, 1983, p. 146). In addition to this contribution they intertwined some concepts taken from Greek philosophy and Roman law such as reason and equity with concepts taken from Christian theology such as conscience and mercy.

In his work Gratian attached a special importance to the distinction between the positive law and natural law which makes the distinctions between *lex* i.e. the acts adopted by church and secular authorities and *ius*, i.e. the general system of justice. In contrast to laws enacted by kings, popes or local councils, the *ius* system, no matter whether it belonged to Roman law or canon law, it was considered to be divine. The individual legal acts should have been compatible with natural and divine law (Dougherty, 2011, p. 19).

The Catholic church, which had the most developed legal system at the time, was obliged to continuously assess its laws in order to see whether they were in accordance with natural law. Gratian wrote: 'Laws, ecclesiastical or secular, if it can be attested that they are in contradiction with natural law, they have to be abrogated' (Lesaffer, 2009, p. 263). Nevertheless, the realization of this principle in practice was an extraordinarily difficult challenge because nobody could oppose the pope's authority as the supreme lawmaker (*plenitudo potestatis*) and as a representative and vicegerent of Christ in the world (*Vicarius Christi*). In the course of the 12th and 13th centuries when the papacy had reached the peak of its force, a good deal of people who served as administrative and court officials in royal and other secular authorities were clerics and consequently part of their loyalty they owed to the pope (Morris, 1989, p. 206).

The dominant position of the natural law over positive law was manifested also in the relation between the church law and secular law and in the coexistence of various secular authorities. Since the Church aspired that its law is nearer to the natural law, it claimed that the laws of secular authorities which were not compatible with it, had to be abrogated (Grand, 2007, p. 116). This position used to cause disagreements with local kings who refused to obey the Church's claim. On the other hand the kings also had aspirations for the superiority of their laws over the other entities such as feudal manors, town councils tradesman guilds, etc. Since there were several legal systems, people

had the possibility of choosing one of them, depending on which of them offered better legal protection of their case (Berman, 1983, p. 147).

5. The relation of canon law to the Roman law

Various researchers have often presented the idea that the system of the classical canon law was created as a result of the influence of the Roman law and that the codification of canon law in the collection *Corpus iuris canonici* was done according to the model of *Corpus iuris civilis*. (Tierney, 1982, p. 13). However, this position needs clarification because the canonical law was not influenced by the Roman law which was in force in the eastern part of the Roman Empire in the 6th century, but it was influenced by the Roman law which, in a modified and transformed version began to be studied in Continental Europe after the 11th century. The canonists often used the Roman law in a larger extent than the biblical law or Germanic customs. The canonists used the same fundamental theories in relation to the nature and function of the law that were used by the civilists. The scholastic method was common for both of them. The canonists borrowed theories and methods from civilists as many as civilists did from canonists (Brundage, 2008, pp. 42-43). Actually, it was not only certain theories and methods that the Medieval Roman law science borrowed from the classical canon law but also a large number of legal notions, concepts and institutions.

One of the main distinctions between the Roman law and canon law during 12th and 13th centuries consisted in the fact that the canon law was the positive law of the Church whereas Roman law was not the positive law of a particular entity. In Western Europe the Roman law formulated in Justinian's Codification was considered to be an ideal law, a written personification of reason, a *ratio scripta*, whose principles had to regulate legal issues everywhere, both in the religious and secular sphere. Lawyers approached Justinian's Codification with the same respect and dedication as the theologians did with the Bible or as the scholastic philosophers approached Aristotle (Landau, 2008, p. 34). Although the emperors of the Holy Roman Empire of the German nation aspired that they were the heirs of the ancient Roman emperors whose innumerable laws were not influenced by Roman law. The norms and institutions of the Roman law gained the status of positive law in the Empire only when through the legislation or lawyers' interpretation became part of the Catholic Church's positive law. Although the Roman law gained the epithet of 'servant of the church law', at the same time it played the role of 'servant' of the law of kings and the newly created cities (Ullmann, 1975, p. 125).

Perhaps the major distinction between Roman law and canon law of the 12th and 13th centuries was the fact that Roman law in general used to be considered as complete and unchangeable and as such it needed reinterpretation and did not need changes. On the other hand canon law (although its origin was from the past), was not complete; on the contrary, it was continuously being remade. According to the canonists' opinion, it had the characteristic of being able to undergo organic development and continuous refinement in the course of time (Helmholz, 2008, pp. 79-82). This feature of canon law gave it somehow irregular image; this made it a less attractive intellectual discipline in comparison to Roman law. However, the existence of the temporal dimension, the movement from the past towards the future, gave the canon law an element of dynamism, such an element that even nowadays continues to be a fundamental characteristic of contemporary western legal systems (Gordley, 2013, pp. 55-57).

The Medieval civilists sought solution in canon law for a large number of problems that Justinian's Codification did not hinge on or did it only superficially. Apart from the civil law of Continental Europe, some solutions offered by canon law were accepted also by the English common law. On the other hand, in order to explain the legal norms which regulated church functioning and Christian life, also the canonists employed Roman law concepts and institutions in the form that was interpreted and modified by the Medieval civilists (Brundage, 2008, pp. 106-107). In this way, they combined two great traditions: Roman law and Christianity.

While Roman law texts dealt mainly with the analysis of the situations when certain legal remedies could be used, the moral principles of canon law could not depend on the fact whether or not Roman law had stipulated any legal remedies in case of their violation. Therefore, in cases when canonists were faced with issues that had not been regulated by Roman legal texts, they formulated new norms and legal remedies. Such norms were accepted in civil law in certain cases. For example, while discussing about ownership, the canonists came to the conclusion that a person may be allowed to use somebody else's thing in cases of necessity (Pierson, 2013, p.88). Roman law did not have general principles for this, although some Roman legal texts allowed the use of another person's thing in discrete situations. A person was allowed to enter in another person's land in order to look for an escapee. In certain situations a person would be allowed to ruin somebody else's thing in order to protect his life or property: for example, a person would be allowed to cause damage to his neighbour's house in order to save his house from fire. The norms of the canon law allowed the captain of a ship to throw the cargo into the sea in order to save the ship. The passengers whose goods were thrown into the sea could request compensation from the passengers whose property

had been saved (Ibbetson, 2013, p. 5). These examples show that the norms of canon law in this area were precursors of contemporary law of the sea.

Another example of acceptance of the principles of canon law in civil law is the principle *rebus sic stantibus*, according to which in case of the existence of altered and unforeseen circumstances, the promise could be broken. This principle did not have its equivalent in the Roman law of contracts (Watkin, 1999, pp. 303-305). Gratian's *Decretum* referred to a text written by St. Augustine in which he analyzed an issue raised by Cicero. A person may give his sword to another person to keep it, whereas the receiver promises to return the sword when requested by the owner. However, if the owner in the meantime had experienced a grave mental disorder or if he intended to use the sword in order to cause damage to another person, should the promise be kept? St. Augustine's answer was that in these circumstances the promise need not be kept (Gordley, 2013, p. 64). The principle of *rebus sic stantibus* from canon law was transferred to civil law by the famous Italian post-glossator Baldus de Ubaldis (Canning, 1987, pp. 7-10).

6. Conclusion

The rediscovery of the Digests of Justinian and the emergence of classical canon law in the 11th century mark the beginning of the European legal tradition. Roman law and canon law jointly formed *ius commune*. In the structure and content of the *ius commune*, Roman law was partly responsible for the legal technique and sophistication whereas canon law for the general principles. From the abundant casuistry of *Corpus iuris civilis*, the medieval jurists drew out a huge mass of legal notions, concepts and institutions. The moral and theological authority of canon law made it a less formalistic and technical compared to the Roman law. The canon law put the needs of justice as its most important feature. Numerous principles of private law that even today form the basis of the continental law systems were in many cases originally developed by canon law. By comparing Roman law with canon law, the medieval jurists acknowledged the disadvantages of the formalistic and often excessively technical Roman law. Canon law offered workable solutions for this problem. This resulted in the eventual incorporation of general principles of canon law into Roman law and the loss of part of the technicality of Roman law. This process was completed by natural lawyers of the 17th and 18th centuries.

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