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List of Abbreviations

AD	– Anno Domini (after Christ)
BC	– before Christ
Can.	– canon
CE	– *Catholic Encyclopedia*, vol. I-[XI], Lublin 1973-[2006]
CL	– *Canon Law*, Warszawa 1958-
DDC	– *Dictionnaire de droit canonique*, vol. I-VII, Naz, R., ed., Paris 1935-65
f or ff	– following page(s)
LHJ	– *Legal and Historical Journal*, Warszawa 1948-52, Poznań 1953-
Lat.	– Latin
MGH	– *Monumenta Germaniae Historica*, Berlin, Weimar 1826-
Mansi	– *Sacrorum Conciliorum nova et amplissima collectio*, vol. I-XXXVIII, Mansi, J.D. [et al.], eds., Firenze 1759-98, Paris-Leipzig 1901-05, Paris 1907-13, Leipzig 1923-27
PG	– *Patrologiae cursus completus. Series graeca*, ed. J.P. Migne, Paris 1857-66.
PL	– *Patrologiae cursus completus*. *Series latina*, ed. J.P. Migne, Paris 1844-55, 1878-1890
praef.	– praefatio (introduction)
pr.	– principium (beginning)
RACh	– *Reallexikon für Antike und Christentum*, vol. I-XII, Clauser, T. [et al.], eds., Stuttgart 1950-90.
RHD	– *Revue Historique de Droit Français et Etranger*, Paris 1855-
RNP KUL	– *KUL Legal Science Annals*, Lublin 1991/92-

List of Abbreviations

SCh. – *Sources chrétiennes*, de Lubac, H., Daniélou, J. [et al.], eds., Paris 1941-

s.v. – sub voce or sub verbo (under the term)

ZSS Kan. Abt. – *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung*, Berlin 1911-44, 1947-

ZSS Rom Abt. – *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, Weimar 1880-1944, 1947-

FOREWORD

The world that the early Church was deemed to face – initially as a small religious community – was the reality markedly shaped by Roman civilisation manifested by a high level of political, social, economic and territorial organisation as well as a well-developed culture of thought. It also comprised the study and comprehension of law. The development of the early Church coincided with the time of the Roman jurisprudence at its height and benefiting from the heritage of former generations. No wonder this period is referred to in literature as the classical period.

In his exhaustive, three-volume work on the Christian Roman law, Italian Romanist Biondo Biondi (1888-1966) wrote that "the Roman tradition and Christianity are two mighty spiritual powers that, although deriving from dissimilar concepts and having different aims, at some point in the history intertwine to head for the same direction".[1] But that "intertwinement" was predated by an embittered encounter of the new monotheistic religion and *Romanitas* which concluded in rejection. *Quid ergo Athenis et Hierosolimis? Quid Academiae et Ecclesiae?* – "What has Athens to do with Jerusalem? What concord is there between the Academy and the Church?" – asked Tertullian emphatically.[2] The adherents of the new religion were either denying or ignor-

[1] *Romanità e cristianesimo sono due grandi forze spirituali, che, partendo da concezioni diverse ed avendo fini diversi, in un determinato momento storico si intrecciano nella medesima direzione*; Biondi, B, *Il diritto romano cristiano*, vol. I, Milano 1952, p. 3.

[2] Tert. De praesc. 7, 18.

ing the political, social and mental order of the time and correspondingly were rejecting its binding law. On the other hand, the Roman state, in principle tolerant of religious worship that remained in concordance with the public order and vital state interests, was reluctant or even hostile towards the new cult, partly because its followers refused to acquiesce to the imperial cult endorsed by Octavian Augustus and his successors.

The year AD 313 saw the revolutionary proclamation by Constantine and Licinius of the Edict of Milan which – according to the report of Eusebius of Caesarea – read as follows:

> When I, Constantine Augustus, and I, Licinius Augustus, came under favorable auspices to Milan and took under consideration everything which pertained to the common weal and prosperity, we resolved among other things, or rather first of all, to make such decrees as seemed in many respects for the benefit of every one; namely, such as should preserve reverence and piety toward the deity. We resolved, that is, to grant both to the Christians and to all men freedom to follow the religion which they choose, that whatever heavenly divinity exists may be propitious to us and to all that live under our government. We have, therefore, determined, with sound and upright purpose, that liberty is to be denied to no one, to choose and to follow the religious observances of the Christians, but that to each one freedom is to be given to devote his mind to that religion which he may think adapted to himself, in order that the Deity may exhibit to us in all things his accustomed care and favor.[3]

With the imperial decision taking effect, all the inhabitants of *Imperium*, including those of Christian persuasion, were granted the freedom of worship. Consequently, there was a shift in the relations between the state and the Church; what is more, there was an apparent transformation in the reference of Roman law to canon law, the latter dating back to and developing since the very origin of the Church.

Emperor Constantine I spearheaded a process which made Christianity a prominent cultural component of the Late Empire. The pronouncement of the Edict of Milan provided an opportunity for the invigorating and inspiring interpenetration of *ius canonicum* and perfected *ius Romanum*. The processes of both Christianization of the empire and Romanization of canon law gained specific momentum. The social and cultural context of the rise of Christendom affected all the spheres of the Church, including the language. This impact must have been particularly tangible in the new juridical order of the Church as one

[3] Schaff, P., ed. *Church History, Life of Constantine, Oration in Praise of Constantine by Eusebius Pamphilius* (A.C. McGiffert, Transl.), New York, 1890, p. 795.

of the tools in the implementation of her fundamental objectives. The borrowing of Roman legal terminology, definitions and structures is unquestionable. Therefore, Roman law was frequently referred to as "the accoucheuse of canon law."[4] On the other hand, when pondering upon the problem of the influence of Roman law over ecclesiastical institutions and canon law, the assessment of its form and size leaves many questions unanswered. Nevertheless, in the areas where this influence is prominent, the question arises whether direct borrowings from Roman law come into play or whether Christian institutions yielded to cultural influence. All the more so, because by taking from Roman law, canon law certainly used other sources: the law contained in the New Testament, some elements of Hebrew (Old Testament), as well as the Visigotic, Saxon, Germanic and Celtic legal traditions spanning thousands of years of human experience.

This work addresses the questions of to what extent and in which areas the Latin Church employed Roman jurisprudence and how Roman law was seen in relation to the ecclesiastical legal system. The study encompasses only some selected facets of this complex and interesting issue. At this stage of studies, it is not practicable to offer a comprehensive and systematic view of the subject; a fundamental hindrance is the extent of the subjects of research undertaken in distinct fields of the history of Roman and canon law.

At the outset, a brief *explicatio terminorum* is needed. The title of this work points to "Church", meaning the Latin Church (*Ecclesia Latina*) known as the Roman Catholic Church or Western Church. A title so phrased accommodates the study of the impact of Roman law exerted upon ecclesiastical juridical order.

The title contains the term "Roman law" whose meaning is manifold. The literature on the subject uses it to denote the law developed and effective in the ancient Roman state from its foundation (BC 753) to its decline (AD 476). Such a law had been applied in the Western Empire until its collapse in AD 476. In the Eastern Empire, the closing date of its application is traditionally the death of Emperor Justinian I the Great (AD 565). Binding in a vast area and throughout many centuries, Roman law was not a uniform body but underwent profound modifications. The literature distinguishes different stages of Roman law development: archaic, pre-classical, classical, post-classical and Justinian. The last mentioned was contained in Justinian's codification. A noteworthy fact is that when referring to Roman law, it is predominantly Roman private law that is meant.

[4] Berman, H.J, *Law and Revolution. The Formation of the Western Legal Tradition,* Cambridge 1983, p. 200.

The development of Roman law – which is a phenomenon in the history of culture – did not cease with the decline of the state and socio-economic formation with which it had originated. Therefore, the term 'Roman law' is invariably used for the law that revived and found application in subsequent epochs on continental Europe and outside as Roman common law (*ius commune*). This term embraces a medieval legal system of international, European character which inspired and influenced the study and practice of law in many European states, thus underlying their legal cultures and transforming them into the family of Latin laws. The notion of Roman law used throughout this work aims to indicate imperial law, codified during the reign of Emperor Justinian, and later modified and adapted to existing needs by the medieval schools of glossators and commentators.

The literature on the subject lists classic monographs on the history of common canon law; the following deserve particular attention: the Latin work by A. Van Hove,[5] and German studies by H. E. Feine,[6] W. M. Plöchl[7] and J.F. Schulte.[8] Some of the definitive monographic studies were written by O. Cassola[9] and A. Gauthier.[10] A separate component of this literature are voluminous papers of international symposiums which explored or mentioned the problem of the influence of Roman law over the codifications of the Western Church; some significant events of this type were the symposiums held in Rome by the Pontifical Institute Utriusque Iuris of the Pontifical Lateran University in 1934[11] and 1978[12] and the congress hosted by the *Internationalis Studio Iuris Canonici Promovendo* in Ottawa in 1984.[13] The works on the European history of the legal culture comprise a seprate component of the literature on the subject. Authors like H. Berman,[14] P. Stein[15] and

[5] *Prolegomena ad codicem iuris canonici,* 2nd ed., Mechliniae – Romae 1945.

[6] *Kirchliche Rechtsgeschichte*, Köln 1964.

[7] *Geschichte des Kirchenrechts,* vol. I-V, Wien 1960-1970.

[8] *Geschichte der Quellen und der Literatur des canonischen Rechts*, vol. I-III, Graz 1956.

[9] *La recezione del Diritto Civile nel Diritto Canonico,* Roma 1969.

[10] *Roman Law and Its Contribution to the Development of Canon Law,* Ottawa 1996.

[11] *Acta congressus iuridici internationalis*, vol. I-V, Roma 1935-37.

[12] *Atti del colloquio romanistico-canonistico*, Roma 1979.

[13] Thériault, M., & Thorn, J. *Le nouveau Code de droit canonique. Actes du Ve Congrès international de droit canonique (= The New Code of Canon Law. Proceedings of the 5th International Congress of Canon Law),* vol. I-II, Ottawa 1984.

[14] Berman, H.J, *Law and Revolution.The Formation of the Western Legal Tradition,* Cambridge 1983.

[15] Stein, P. *Roman Law in European History*, Cambridge 2003.

F. Wieacker[16] explore, to a greater or lesser extent, the province of relationships between Roman law and canon law.

This work has three chapters. The opening Chapter One introduces the background, the causes and areas of interpenetration of the two legal spheres. Initially, it was confined to the territory of the Roman Empire where the Christian Church was conceived (it had not spread beyond the empire until the 5th century). Consequently, after the fall of the Western Empire, when the Church became a cultural heir of ancient Rome, Roman law was 'harnessed' to serve the Church, which began to swell across the states emerging from the former Roman realm.

Of fundamental import for the progress of canon law was the 12th century, called 'the century of law'. It was the time when the regulations of canon law, formerly collected in large compilations, were merged and ordered by Gratian of Bologna in the collection *Concordantia discordantium canonum* (Concord of Discordant Canons). This collection, commonly referred to as *Decretum,* provided a powerful stimulus to the growth of the study of canon law which emancipated from theology. A profound influence on the progress of *ius canonicum* was exerted by Roman law which was received by the Church and recognized as *fons suppletorius.* Gratian's *Decretum* inaugurated a long period of the development of canon law which, for a few centuries, was apparently 'under the allure of Roman law.'[17] The most important causes and effects of the marriage of the two most influential legal systems of the Middle Ages are discussed in Chapter Two.

Later progress of canon law was marked by the codifications of the Latin Church, Pio-Benedictine of 1917 and John Paul II's of 1983. Both of them omit to mention Roman law as an auxiliary source. It does not mean, however, that they sever the many centuries' tradition of Roman law. The impact of this tradition in some selected facets is discussed in Chapter Three. It is merely an endeavour to pinpoint the most conspicuous traces of Roman law in the codifications of ecclesiastical law.

[16] Wiacker, F. A *History of Private Law in Europe with Particular Reference to Germany*, Oxford 1955.

[17] Pawluk, T. *Prawo kanoniczne według Kodeksu Jana Pawła II*, vol. I, Olsztyn 1985 p. 46.

A miniature depicting the beginning of Gratian's *Decretum: Humanum genus duobus regitur...* It shows the representatives of authorities: papal – red cloak and *regnum* on the head, and the king of France – blue cloak and royal crown. According to medieval thought, this is the picture of two swords (Luke 22:35-38; Ephesians 6:18): *gladius materialis* and *gladius spiritualis*. In the legal theories of the time, these were the representations of two *potestates*, secular and spiritual.

Concordia discordantium canonem, University Library of John Paul II Catholic University of Lublin, ms. 1, f. 1.

A miniature of extended composition shows a discussion about the bishop's right to nominate his successor. A bed-stricken hierarch offers benediction to a priest against the law, and the pope, bishop and lawyers deliberate upon the legal weight of this case.

Concordia discordantium canonem, University Library of John Paul II Catholic University of Lublin, ms. 1, Causa VII, f. 122r.

Chapter One

The Areas of Interpenetration

1. Legal Dualism

Christianity emerged in a particular point in time and in a specific geographical area. As regards the latter, it was a phenomenon primarily confined to the Mediterranean zone. However, at the turn of the 3rd century, it spanned the entire *Imperium Romanum*, including the most distant provinces.[18] The territory where the new monotheistic worship spread was well-organized in terms of politics, society, economy and law. The budding Church encountered a high material and spiritual culture. Consequently, the need to seek harmony between the new religion and 'the world', between *sacrum* and *profanum*, between the Church and state was in fact urgent as early as at the very origins of Christianity.

This was even more exigent since the ancient world did not isolate the political and social sphere from the religious sphere. They all overlapped, as in hierocratic states of the East, or were tightly and permanently combined, as in ancient Rome. In Rome, in the legendary period of the kingdom, the king (*rex*), as the head of the family, arbitrator and chief commander, simultaneously wielded the rights and power of a priest. Admittedly, in the Republic, his functions were taken over by bodies of priests, yet long after that, Roman priests occupied the building called Regia in Via Sacra, a former royal

[18] Cf. Esler, Ph. F. "The Mediterranean Context of Early Christianity." In Esler, Ph. F., ed., *Early Christianity World*, vol. I, London, New York 2000, p. 3ff.

seat. This may be seen as a symbol of close affiliation to the Roman state. In the history of religious politics of ancient Rome, there was a crucial decision of Emperor Augustus who, when introducing a new political order (principate), merged the office of *princeps* with the rank of high priest (*pontifex maximus*). From then on, as if by restoring the anterior system, Augustus' successors were the high priests of the new Roman state religion.[19] Due to the close connection between these two spheres, since the foundation of Rome, religion had constituted an area of secular activity and had been regulated by public law, i.e. the branch of law governing the organization and functions of the Roman state. At the turn of the 2nd century, a learned jurist, Ulpian – the first to make a distinction between *ius privatum* and *ius publicum* – wrote that public law was based on "rites, priests and offices."[20]

Christianity appeared as the antithesis of such a monism, allowing for the unity of *sacrum* and *profanum*. Focused eschatologically and propagating spiritual values, Christianity emphasized that in order to respect them, no fusion of religious and political spheres is acceptable. The adherents of the new monotheistic religion manifested their own historical and political awareness. Their teaching revolved around the idea of being separate people of distinctive tradition, customs and characteristic life style. Aristides, philosopher and apologist from Athens active in the times of Emperor Hadrian (117-138), propounded the idea that "there are four types of people in the world: Barbarians, Jews, Greeks and Christians."[21] On the other hand, Tertullian wrote that pagans called Christians *genus tertium* – "third-rate human kind", "a separate tribe."[22] A letter penned by an anonymous apologist and entitled Epistle to Diognetus (2nd half of the 2nd c.) portraying a Christian community merged into the Roman

[19] Cf. Clark G. *Christianity and Roman Sociaty*, Cambrige 2004, p. 8 ff.; Jaczynowska, M. *Religie świata rzymskiego*, Warszawa 1990, p. 112; Rahner, H. *L'Église et l'état dans le christianisme primitif,* Paris 1964, p. 33.

[20] The division of law into private (*ius privatum*) and public (*ius publicum*) is the fundamental distinction introduced by the Roman jurisprudence. Its criteria were given by Ulpian: *publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim* (D. 1,1,1,2) – "Public law involves the relations between the state and the general population; private law involves the legal relations between persons; for some laws are established for the benefit of the public and some for the benefit of individuals"; cf. Dębiński, A. *Rzymskie prawo prywatne. Kompendium*, 2nd ed., Warszawa 2005, p. 28f.

[21] Aryst. Apol. 2.

[22] Spectators crying: "Down with the third kind", as reported by Tertullian (*Tert. Adv. gnost.* 10), was a common occurrence in theatres; see also Simon, M. *La civilisation de l'antiquité et le christianisme*, Paris 1972, p. 121ff.

milieu says that Christians are an isolated group (in terms of religion rather than geographical location or ethic origin) "for Christians are not distinquished from the rest of humanity by country, language, or custom. They live on earth, but their citizenship is in heaven. They obey the established laws; indeed in their private lives they transcend the laws."[23]

The character of the new religion, whose message was addressed to all people, irrespective of their nationality, citizenship or social status, made it independent of *civitas*. As voiced by the Apostle, "There is neither Jew, nor Greek, slave nor free, male or female."[24] It was also the first time in the history when the dualism of secular and religious systems emerged. The sacred scriptures of Christian communes were not intended to outrank the codices of secular law and the commune leaders did not interfere with the matters of *civitas*.[25] The well-known phrase, "Give to Caesar what is Caesar's, and to God what is God's",[26] became the guiding principle of the Christian attitude to the existing social conditions. Yet, Christians wished to be not only stalwart followers of their faith but also state citizens. This dialectic tension and paradox of their situation were expressed by Tertullian for whom Christians were both 'the pilgrims in this world'[27] and also loyal and obedient citizens. He wrote: "We pray continually to God for the welfare of emperors...We pray for all emperors to have a happy and long life, the world at peace, the empire to be safe, the senate loyal, the populace content and for everything they may crave as humans and rulers."[28]

When the first Christian communes were established, the binding law of ancient Rome was in its prime. Along with the periodization commonly adopted in the literature, this stage of development of the science of law (from the beginning of the Principate to the end of the Severan dynasty) is called classical (Lat. *classicus* – perfect, exemplary, model).[29] At that time,

[23] Ad Diog. 5, 1; 9-10. (*The Apostolic Fathers. Greek Texts and English Translations of Their Writings*, J.B. Lightfood and J.R. Harmer, Editors and Translators, Second Edition, Michigen 1992).

[24] Paul. Ad Gal. 3, 28: *non est Iudaeus neque Graecus, non est servus neque liber, non est masculus et femina*.

[25] Sobański, R. *Nauki podstawowe prawa kanonicznego,* vol. I. *Teoria prawa kanonicznego*, Warszawa 2001, p. 24.

[26] Matt. 22,21: *Reddite ergo, quae sunt Caesaris, Caesari et, quae sunt Dei, Deo*

[27] Cf. Tert. De cor. 13, 4.

[28] Tert. Apol. 30, 1; 4.

[29] The literature on the subject distinguishes the following period in the development of Roman private law: archaic period (or old-Roman period) – from the foundation of Rome to the mid-3rd century BC (i.e. the Punic Wars), pre-classical period – from mid-3rd century BC to the fall

besides the relics of customary law (*mores*, *mos maiorum*), a wide-ranging and influential trend of positive law began to surface, its sources being varied. Plebeian assemblies were dwindling but were still operative; their activity during the Republic resulted in enactment of some legal measures (*leges* and *plebiscita*). The sources of law were also prescriptions and bans issued by offices (edicts), in particular by praetors serving justice. They pioneered a separate and flexible branch of law called *ius honorarium* (or *ius praetorium* – praetorian law) with the view to adjusting the rigid, formal and conservative norm of *ius civile* (civil law – a collection of regulations binding only Roman citizens) to current needs. They exerted an influence on the creation of *ius gentium*, a set of rules established to regulate legal matters between citizens (*cives*) and foreigners (*peregrini*). The Senate – increasingly dependent on the will of the *princeps* – enacted statutes called *senatus consulta.* A dominating entity in terms of law-making was the emperor who, if need be, enacted edicts, rescripts, mandates and decrees.

Of significance for the progress of law was the law-making activity of jurists named *iuris consulti* (or *iuris prudentes, iuris periti*); learned lawyers created law by collecting responses (*responsa*) to questions of citizens and officials. The role of the science of law was unquestionable and exceedingly productive. Uniform responses of *iurisprudentes* were conclusive for judges and equal to statutes. Practical, classical jurisprudence displayed a high scholarly level. It developed a method of legal thinking and reasoning, precise and unequivocal terminology and many rules and principles. It refined the legal technique. Learned jurists, who called themselves 'priests of justice' (*sacerdotes iustitiae*),[30] invented an array of basic rules and principles underlying *rationes decidendi.*[31] The literary output of *iuris prudentes* was marked by a high intellectual level and diversity.[32]

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of the Republic, classical period – from the beginning of Principate to AD 235, i.e. the end of the Severan dynasty and post-classical period (last), including the period of Justinian's law – from AD 235 to Justinian's death (AD 565); cf. Kolańczyk, K. *Prawo rzymskie*, 5th ed., Warszawa 2001, p. 34f.

[30] Cf. D. 1,1,1 (Ulpian); cf. Kuryłowicz, M. "Sacerdotes iustitiae", In *Ecclesia et status. Księga jubileuszowa z okazji 40-lecia pracy naukowej profesora Józefa Krukowskiego*, Dębiński, A., Orzeszyna, K., Sitarz, M., eds., Lublin 2004, p. 699ff.

[31] Kupiszewski, H. *Prawo rzymskie. Historia i współczesność*, Warszawa 1988, p. 26f.

[32] The most widespread and typical literary forms were the works compiling case-law decisions (*quaestiones*, *disputationes*, *responsa*, *epistulae*); in these works, jurists presented and settled dubious cases (*casus*), real or fictional. The works contained opinions and legal recommendations to questions raised by private persons and offices. A separate group was the works briefly defining the fundamental principles, rules (*regulae*) and legal terms (*definitiones*). Jurists, mainly for teaching purposes, produced basic legal textbooks for law schools called *institutiones* or *enchiridia*.

The legacy of learned jurists aroused philosophical interests of Stoics owing to its ethical stand on law. The jurists of the time created two renowned legal schools (*sectae*) gathering outstanding legal figures, the Sabinians (also known as Cassians) lecturing in line with the Stoic spirit and subscribing to Aristotle's philosophy of law followed by the Proculeans. A distinguishing feature of the lawyers of the time was the perception and interpretation of law against an ethical backdrop along with – as stated by Ulpian – the principles of good (*bonitas*), equity (*aequitas*) and justice (*iustitia*).[33]

The advanced and refined Roman law of the time did not become 'the law of the Church'; by ignoring or negating the state order, Christians were forming the framework for their own law. It was not intended to be either *ius civile* or *ius gentium,* but a completely independent, new law of Christian communities dispersed within the city [Rome], and later across the vast provinces. It corresponded to the recommendation of Paul the Apostle who advised the adherents of the new religion against settling their disputes before pagan courts; instead, acting out of love and respect to the authority of their bishops, they were urged to resolve their disputes amicably and peacefully.[34] This legal divergence was explained by St. Jerome in his Epistle to Oceanus where he made a notable comment: *Aliae sunt leges Caesarum, aliae Christi: aliud Papinianus, aliud Paulus noster praecipit.*[35]

The legislation adopted by the primeval Church was derived from the Bible, in particular from the New Testament: not only the source of religious

Furthermore, commentaries were made to individual statutes (e.g. to the Law of Twelve Tables), official edicts (*ad edictum*) and works of past jurists (e.g. *ad Sabinum*) as well as monographic studies on distinct legal institutions. Another literary form was *digesta* – relatively voluminious works providing an exhaustive and comprehensive coverge of legal decisions of a given author, commentaries to historical authors with critical remarks (*notae*) and works treating of excerpts (*excerpta*) from past jurists; cf. Litewski, W. *Jurysprudencja rzymska*, Kraków 2000, p. 59ff; idem, *Podstawowe wartości prawa rzymskiego*, Kraków 2001, p. 31ff; Schultz, F. *Geschichte der römischen Rechtswissenschaft*, Weimar 1961, p. 166ff.

[33] Cf. D. 1,1,1 pr.; 1,1,10 pr.

[34] Cf. Paul. 1 Ad Cor. 6:1-8. The early Church had a system of bishop judicature which corresponded to the Roman civil procedure and was established due to the reluctance of the followers of the new religion to recognize Roman legal institutions. An equivalent of legal punishment was penitential discipline which involved, at least in some communities, the obligation of public confession. Excommunication, the most severe penalty, was based on the model of Roman legal sanctions; cf. Cochrane, Ch. N. *Christianity and the classical culture. A study of thought and action from Augustus to Augustine,* Indianapolis 2003, p. 242.

[35] Hier. ad Ocea. (PL 22,691): Caesar's laws are not Christ's: Papinian does not order the same as Paul.

truths but also of guidelines and prescriptions regarding discipline. However, not all norms of conduct were to be found in the Bible; many were passed orally, hence only a few papal rulings have been preserved, besides the Bible sources, from the first three centuries.[36]

The original activity of the Church relied upon the authority of the apostles and their directions pertaining to the Church's discipline. Initially, they were disseminated orally but, after some time, the tradition was written down as the collections of liturgical and legal rules. They were attributed to the apostles but in fact were not their genuine legacy. Scholars refer to them as pseudo-apostolic collections or apocrypha (Greek *apókryphos* – hidden, forged).[37] They are of considerable significance, for they describe everyday life and customs of first Christian communities as well as the ideas, organization and discipline of the early Church. They also offer an insight into the mechanisms of the emerging ecclesiastical law.

The local Christian community (or local Church) headed by a bishop comprised the basic unit of Church's organisation. It gathered a group of Christians dwelling in a specific territory, predominantly a town and its adjacent administrative area. Legally autonomous, the communities constituted a social organism, a commune having its distinctive customs. This sense of community was clearly expressed in *Didache* (The Teaching of the Twelve Apostles), a collection of an unknown author from the end of the 1st century written most probably in Syria or Palestine,[38] "the earliest surviving handbook of Church law."[39] This

[36] One of them is a letter of Pope Clement (92-101) from ca. AD 96 to the Christian commune in Corinth concerning the rebel of the majority of the faithful against presbyters; of Victor I (ca. 189-196/199) of AD 195 concerning the dispute about the Easter day; response of Stephen I (254-257) of AD 255 concerning the validity of baptism administered by heretics; Żurowski, M. "Prawo kościelne". In *Słownik wczesnochrześcijańskiego piśmiennictwa*, Szymusiak, J.M., Starowieyski, M. eds., Warszawa 1971, p. 600ff.

[37] The most important were: *Didache* (The Teachings of the Twelve Apostles), *Traditio apostolica* (The Apostolic Tradition of St. Hyppolytus), *Didaskalia Apostolorum* (The Teaching of the Twelve Apostles and the Holy Disciples of Our Saviour), *Canones Ecclesiastici Sanctorum Apostolorum* (Church Law of Holy Apostles), *Constitutiones Sanctorum Apostolorum* (Constitutions of Holy Apostles), *Canones Apostolorum* (Apostolic Canons); cf. Hemperek, P., Góralski, W. *Historia źródeł nauki prawa kanonicznego*, Lublin 1995, p. 28f; Subera, J. *Historia źródeł i nauki prawa kanonicznego*, 2nd ed., Warszawa 1977, p. 29f; Van Hove, A., *Prolegomena,* p. 123ff. (including references).

[38] The literature on the collection has been compiled by, *inter alia*, Drobner, H.R. *The Fathers of the Church. A comprehensive introduction,* Massachusettes 2007, p. 57; Altaner B., Stuiber A., Patrologie. *Leben, Schriften und Lehre der Kirhenväter*, 9. Aufl. Freiburg 1980, p. 81.

[39] J. A. Brundage, *Medival Canon Law*, London 1995, p. 5.

work of rather small size was divided into sixteen chapters. The chapters of the final section contain some plain disciplinary precepts on the rules of conduct within Christian groups: the provision of apostles and teachers,[40] Sunday services, fasting,[41] alms, appointing bishops and deacons and their duties.[42]

One learns about further organisational development of Christian communities from later literary works, such as *Didache*, produced separately in the 3rd century at the other ends of the ancient world, i.e. in Italy and Syria. One of these literary monuments was *Traditio Apostolica* (Apostolic Tradition) penned in Rome ca. AD 218 by Hippolytus of Rome. The text is in Greek, so that no distortion of the apostolic tradition should take place that might be attributed to the contemporaries.[43] The compilation, like *Didache* of the previous century, embodies prescriptions concerning bishops, presbyters, deacons and other functional groups within the community. Furthermore, the author offers simple guidelines on prayer, fast, celebration of the Eucharist and burial ceremonies. One chapter contains requirements to be met by candidate catechumens considering their profession or occupation[44] as well as their family

[40] As regards itinerants (apostles and prophets), the maintenance of settled prophets and teachers, an unknown author recommended as follows: "Everyone who comes to you in the name of the Lord must be welcomed. Afterward, when you have tested him, you will find out about him, for you have insight into right and wrong. If it is a traveller who arrives, help him all you can. But he must not stay with you more than two days, or, if necessary, three. If he wants to settle with you and is an artisan, he must work for his living. If, however, he has no trade, use your judgment in taking steps for him to live with you as a Christian without being idle." *Didache* 12, (Cyril. C. Richardson, Transl.)

[41] "Your fasts must not be identical with those of the hypocrites, but you should fast on Wednesdays and Fridays;" *Didache* 8, (Cyril. C. Richardson, Transl.)

[42] As regards their appointment, the author, in recognition of apostles' authority, recommended as follows: "You must, then, elect for yourselves bishops and deacons who are a credit to the Lord, men who are gentle, generous, faithful, and well tried." *Didache* 15, (Cyril. C. Richardson, Transl.).

[43] For the literature on the collection, see Drobner, *The Fathers of the Church*, p. 126; Altaner, Stuiber, *Patrologie*, p. 83f.

[44] "If someone is a pimp who supports prostitutes, he shall cease or shall be rejected... If someone is an actor or does shows in the theatre, either he shall cease or he shall be rejected... A charioteer, likewise, or one who takes part in the games, or one who goes to the games, he shall cease or he shall be rejected. If someone is a gladiator, or one who teaches those among the gladiators how to fight, or a hunter who is in the wild beast shows in the arena, or a public official who is concerned with gladiator shows, either he shall cease, or he shall be rejected. If someone is a priest of idols, or an attendant of idols, he shall cease or he shall be rejected. A military man in authority must not execute men. If he is ordered, he must not carry it out... The prostitute, the wanton man, the one who castrates himself, or one who does that which may not be mentioned, are to be rejected, for they are impure. A magus shall not even be brought forward for consideration.

situation; for instance, the author recommends that life in concubinage should be taken into account if one aspires to join the community.[45]

A more voluminous collection was *Didascalia*, that is the Teaching of the Twelve Holy Apostles and Disciples of Our Saviour. The work was created in Syria, most probably at the beginning of the 3rd century. The author, whose name is unknown, might have been a bishop and a medic of Jewish origin converted to Christianity. He displayed high theological culture; his text (originally in Greek but preserved only in Syrian) took the form of recommendations for the clergy and the faithful.[46]

His disquisition in chapters two and three opens with a portrayal of a "model male and female Christian."[47] The description is coupled with some pieces of advice concerning everyday routines, hairstyle and clothing,[48] behaviour in the baths[49] or the choice of literature.[50] He instructed community members on attitude towards the imprisoned or severely punished for adhering to their faith.[51] Much attention was given to bishops, their election,[52] competence, authority and responsibilities.[53]

An enchanter, or astrologer, or diviner, or interpreter of dreams, or a charlatan, or one who makes amulets, either they shall cease or they shall be rejected." *Hypp. Trad. apost.* II, 2, (Kevin P. Edgecomb, Transl.).

[45] "If someone's concubine is a slave, as long as she has raised her children and has clung only to him, let her be accepted. Otherwise, she shall be rejected. The man who has a concubine must cease and take a wife according to the law. If he will not, he shall be rejected." *Hypp. Trad. apost.* II, 2, (Kevin P. Edgecomb, Transl.).

[46] The literature on the collection is extensive; the latest compilation is available in Altaner, Stuiber, *Patrologie*, p. 85.

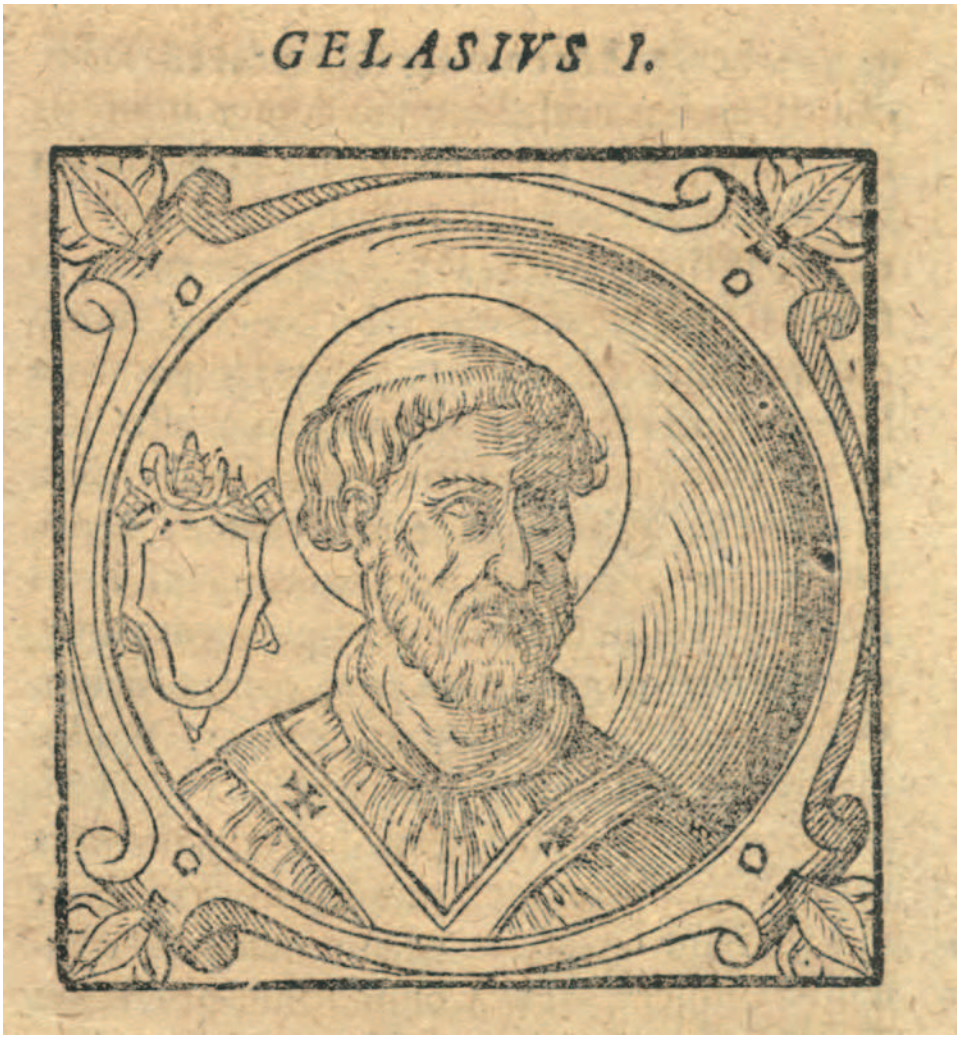
[47] Wipszycka, E. *Kościół w świecie późnego antyku*, Warszawa 2006, p. 119.

[48] As regards the clothing, the author wrote: "In like manner also thou [man] shalt not nourish the hair of thy head, but do thou shear it off ... And thou shalt not comb and adorn it, nor anoint it, lest thou bring upon thee such women as ensnare, or are ensnared, by lust. Neither shalt thou put on fine raiment, nor be shod on thy feet with shoes which are fashioned according to the lust of folly; nor shalt thou put upon thy fingers rings of gold device: for all these things are the wiles of harlotry." *Didascalia*, II, (R. Hugh Connolly, Transl.).

[49] "If you go forth to the market-place and bathe in a bath of men: but not in one of women... And take heed that thou bathe not in a bath with men. For when there is a women's bath in the city or in the village, a believing woman may not bathe in a bath with men." *Didascalia,* II, (R. Hugh Connolly, Transl.).

[50] "And thou shalt not stray and go about idly in the streets and see the vain spectacle of those who behave themselves evilly... And if not, sit at home and read the Law, and the Book of Kings and the Prophets, and the Gospel the fulfilment of these." *Didascalia,* II, (R. Hugh Connolly, Transl.).

[51] "You shall not turn away your eyes from a Christian who for the name of God and for His faith and love is condemned to the games, or to the beasts, or to the mines; but of your labour and



Gelasius I

Pseudo-apostolic collections provide an account of the life of early Christians. They were private and intended only for those communities in which they had been written. Besides the principles of religious life, these works offered guidance on private life that community members should conform to in order to sustain the spirit of apostolic tradition. The authors did not rely on ecclesiastical regulations but followed well-established customs. The collections were held in high esteem (in particular in the east) and the literature names them "the beginnings" of canon law. *Didache* is called *corpus iuris canonici* of the primeval Church, the first – modest and primitive as it may have been – "collection of canon law," yet never recognized as commonly binding.

When composing their own legal system, the followers of the new religion did not seek inspiration in the rules of Roman law. Indeed, they referred to some findings of Roman jurisprudence but only incidentally and superficially. A characteristic phenomenon was the use of some legal concepts and terminology by Christian writers in their theological works. Such attempts date back as early as the 3rd century. For instance, Tertullian, writer, apologist and learned lawyer, when laying foundations to theological Latin copied some Roman legal terms to define a Christian community. He saw it as a union (*coetus*): "We make one body... We make congregations and communities" – *Corpus sumus... Coimus in coetum et congregationem facimus*, as he phrased it in *The Apology*.[54] When defending the new worship, he showed the community as an association of people who, such as a congregation[55] in Roman law,

of the sweat of your face do you send to him for nourishment, and for a payment to the soldiers that guard him, that he may have relief and that care may be taken of him, so that your blessed brother be not utterly afflicted... And you shall not be ashamed to go to them where they are imprisoned. And when you do these things, you shall inherit everlasting life, for you become sharers of their martyrdom; *Didascalia*, XIX, (R. Hugh Connolly, Transl.).

[52] "But if it be possible, let him be instructed and apt to teach; but if he know not letters, let him be versed and skilled in the word, and let him be advanced in years...And thus let him be proved when he receives the imposition of hands to sit in the office of the bishopric: whether he be chaste, and whether his wife also be a believer and chaste; and whether he has brought up his children in the fear of God, and admonished and taught them; and whether his household fear and reverence him, and all of them obey him... And let him be proved whether he be without blemish in the things of the world"; *Didascalia,* IV, (R. Hugh Connolly, Transl.).

[53] "And you the bishops, be not hard, nor tyrannical, nor wrathful, and be not rough with the people of God which is delivered into your hands"; *Didascalia,* XII, (R. Hugh Connolly, Transl.).

[54] Tert. Apol. 39,6.

[55] Roman law did not know the notion and theory of legal person but granted certain rights and obligations to groups (corporations, associations) or volumes of estates (foundations). Accord-

was headed by a 'chairperson' elected by the community, had its own treasury made of the members' contributions and used to support paupers, the elderly, shipwrecked sailors or those held incarcerated.[56] Tertullian spoke of the clergy as *ordo*, the word being also used to denote a municipal curia (municipal council) and municipal councillors (*ordo decurionum*).[57] With the intention to define the relation between a Christian and his or her God (*pater* and *dominus*), once merciful and again severe, the writer of Carthage also used legal terminology.[58] The relations between a sinner and God were compared, which is typical, to the Roman legal notion of legal bond (*vinculum iuris*)[59] between a debtor and creditor. Likewise, in his theological deliberations, Cyprian (3rd c.) took advantage of some legal constructions of Roman law. When describing authority of a bishop, he used the term *auctoritas ac potestas*, which is purely juridical and denotes the power over persons and objects.[60] The lexis borrowed from Roman law (*potestas, auctoritas*) also abounded in the writings of Pope Gelasius to denote a pope's or bishop's power.[61] More-

ing to Gaius (D. 3,4,1,1), corporations, like municipalities, were entitled to have common property legally separated from the property of the members and a common treasure chest. This separation and its consequences were pointed out by Ulpian (D. 3,4,7,1): *Si quid universitati debetur, singulis non debetur: nec, quod debet universitas, singuli debent.* – "Where anything is owing to a corporation, it is not due to the individual members of the same, nor do the latter owe what the entire association does." The corporation was represented by a syndic (*actor sive sindicus*) who also acted as its agent. In order to establish an association as a legal personality, it was necessary to gather at least three persons, as worded in the well-known maxim – *Tres faciunt collegium* (D. 50,16,85); Dębiński, *Rzymskie prawo prywatne*, p. 156ff; Litewski, *Podstawowe wartości prawa rzymskiego*, p. 63ff; Wójcik, M. *Fundacje dobroczynne w rzymskim prawie poklasycznyn*, Lublin 2003, p. 145ff.

[56] "All here is a free-will offering, and all these collections are deposited in a common bank for charitable uses, not for the support of merry meetings, for drinking and gormandizing, but for feeding the poor and burying the dead, and providing for girls and boys who have neither parents nor provisions left to support them, for relieving old people worn out in the service of the saints, or those who have suffered by shipwreck, or are condemned to the mines, or islands, or prisons, only for the faith of Christ; these may be said to live upon their profession, for while they suffer for professing the name of Christ, they are fed with the collections of His Church." Apol. 39,6, (M.W. Reeve, Transl.).

[57] J. Gaudemet, *La formation du droit séculier et du droit de l'Eglise aux IV^e^ et V^e^ siècles*, 2nd ed., Paris 1979, p. 222f.

[58] Tert. Adv. Mar. 5,13.

[59] Tert. De fuga 12; Tert. De an. 25; on legal terminology in Tertullian's works, see Beck, A. *Römisches Recht bei Tertulian und Cyprian*, Halle 1930, p. 39ff.

[60] For example, Cip. *Ep.* 3,1,1; 3,2,1; 4,3,2.

[61] Cf. Fürst, C.G. "Ecclesia vivit lege Romana?", *ZSS Kan. Abt. 61*(1975), p. 17ff; Ullmann, W. *The Growth of Papal Government in the Middle Ages,* 2nd ed., London 1962, p. 20ff.

over, Lactantius frequently relied on Roman legal terms in his apology, *Divinae Institutiones*.[62]

Apparently, no legislative legacy can be traced in the opening period of Christian development; the history of the new monotheistic religion did not commence with the collecting or bequeathing of laws to Christian communes.[63] Their lives were mostly influenced by customs deeply set in the spirit of the Gospel. When written down, the legal matters were perceived from a theological and moral perspective; they comprised merely a facet or reflection when discussing faith. The legal order established by Christian communes was separated from Roman law. This state of affairs was revolutionized at the onset of the 4th century when Christianity was officially recognized by the state.

2. Imperial Legislation Serving the Church

A landmark or even revolutionary step in the relations between the Church and the state, between *Christianitas* and *Romanitas*, was the Edict of Milan in AD 313 issued by Constantine after the victory over Maxentius in the Battle of Milvian Bridge near Rome on 27th December 312. The edict, "one of the most beautiful documents in the history of mankind,"[64] granted Christianity the status of tolerated religion (*religio licita*). It is regarded as a turning point and one of the most pivotal events in history.[65]

[62] When creating his apology, Lactantius referred to the model invented by Roman jurists, as shown in the title where the term 'institutions' is used (*institutiones*). Roman jurisprudence employed this term for textbooks containing some rudimentary legal knowledge; more in Dębiński, A. "Problematyka prawna w *Divinae Institutiones* Laktancjusza", *RNK KUL* 7(1997), pp. 139-151. Christian writers also built on Roman vocabulary when developing their own descriptions of religious worship (*res sacrae, res religisae*) and the cult of the saints; cf. Misztal, H. *Le cause di canonizzazione*, Libreria Editerice Vaticana 2005, p. 20f. More about the meaning of the term '*res sacre*' and its evolution in the Christian empire, see Insadowski, H. *Res sacrae w prawie rzymskim. Studium z sakralnego prawa rzymskiego,* Lublin 1931.

[63] Sobański, "Nauki podstawowe prawa kanonicznego," vol. I. *Teoria prawa*, p. 25.

[64] Krawczuk, A. *Poczet cesarzy rzymskich*, 2004, p. 559.

[65] Cf. Cochrane, *Chistianity and Classical Culture,* p. 196 f.; Markus, R.A. *Christianity in the Roman World*, New York 1974, p.195.

The period of Christian persecution came to a close with the Edict on Toleration issued in Nicomedia on 30th April 311. It was endorsed by Emperor Galerius together with other rulers. The imperial edict read that "that they may again be Christians, and may rebuild the conventicles in which they were accustomed to assemble, on condition that nothing be done by them contrary to discipline."[66] Two years after, in 313, Emperors Constantine and Licinius devised a uniform programme of religious policy during a meeting in Milan. Constantine's vis-à-vis in the eastern part of the empire, Licinius, accepted his policy and authorized the declaration propagating religious freedom of all the imperial subjects. According to the account of Eusebius of Caesarea, it said "that liberty is to be denied to no one, to choose and to follow the religious observances of the Christians, but that to each one freedom is to be given to devote his mind to that religion which he may think adapted to himself."[67] Christians were given unhindered and complete liberty of worship and were returned all confiscated churches and property. The Church obtained legal personality which allowed for the establishment of religious associations, possession of temples and cemeteries; moreover, her financial capacity was confirmed.[68]

With guarded toleration toward old pagan cults, Emperor Constantine's policy was definitely pro-Christian and this approach was continued by his successors. It was already in 315 when the first Christian symbols made their way to Roman coins, a highly effective propaganda tool reaching across and beyond the empire.[69] In 379 Emperor Gratian renounced the title of *pontifex maximus*, and in 382 ordered the removal of the altar of the goddess Victoria from the Roman Senate building. This is how imperial power was officially severed from traditional Roman religion. The ultimate measure was taken by Emperor Theodosius I who "in order to breathe new life into the Roman state sought the help of Christianity."[70] In his edict promulgated in 380 in Thessaloniki, the emperor decided as follows:

[66] Shaff, *Church History, Life of Constantine, Oration in Praise of Constantine by Eusebius Pamphilius* (A. C. McGiffert, Transl.), p. 721.

[67] Shaff, *Church History, Life of Constantine, Oration in Praise of Constantine by Eusebius Pamphilius* (A.C. McGiffert, Transl.), p. 795.

[68] Gaudemet, J. *Institutions de l'Antiquité*, Paris 1967, p. 690.

[69] Rahner, H. *L'Église et l'état*, p. 70ff.

[70] Cochrane, *Christianity and Classical Culture*, p. 350; a newer and more extensive literature on the relationships between the Roman Empire and the Church in the 4th and 5th c. is compiled in: *Empire chrétien et Église aux IV et V siècles. Intégration ou «concordat»?. Le témoignage du Code Théodosien*, ed. J.N. Guinot, F. Richard, Paris 2008, p. 15-68.

> It is our desire that all the various nations which are subject to our clemency and moderation, should continue to the profession of that religion which was delivered to the Romans by the divine Apostle Peter, as it has been preserved by faithful tradition and which is now professed by the Pontiff Damasus and by Peter, Bishop of Alexandria, a man of apostolic holiness. According to the apostolic teaching and the doctrine of the Gospel, let us believe in the one deity of the father, Son and Holy Spirit, in equal majesty and in a holy Trinity. We authorize the followers of this law to assume the title Catholic Christians; but as for the others, since in out judgment they are foolish madmen, we decree that they shall be branded with the ignominious name of heretics, and shall not presume to give their conventiclers the name of churches. They will suffer in the first place the chastisement of divine condemnation and second the punishment out of our authority, in accordance with the will of heaven which we shall decide to inflict.[71]

The edict, known as the *Cunctos populos* from its opening phrase, was of crucial significance. In pursuit of the new foundation for the Roman state, the ruler proclaimed Christianity in its Catholic version (*fides catholica, fides orthodox*a) a state religion – the only genuine and binding for the imperial subjects. The followers of other religions were described in the constitution as unwise and mad (*dementes vesanosque*).

In consequence, the religious policy initiated by Constantine I and his Christian successors led to a new form of collaboration between the Church and the Roman state. Christian emperors did not dispense with their pagan predecessors' claim of divine origin of imperial power. At some point, a tendency surfaced to restore the Monistic concept in the Christian model; later, in the Eastern Empire it assumed the form of cesaropapism.[72] Admittedly, the rulers no longer used the title *pontifex maximus* but they assumed new titles:

[71] C.Th. 16,1,2 (= C.J.1,1,1): *Cunctos populos, quos clementiae nostrae regit temperamentum, in tali volumus religione versari, quam divinum Petrum apostolum tradidisse Romanis religio usque ad nunc ab ipso insinuata declarat quamque pontificem Damasum sequi claret et Petrum Alexandriae episcopum virum apostolicae sanctitatis, hoc est ut secundum apostolicam disciplinam evangelicamque doctrinam patris et filii et spiritus sancti unam deitatem sub pari maiestate et sub pia trinitate credamus. Hanc legem sequentes Christianorum catholicorum nomen iubemus amplecti, reliquos vero dementes vesanosque iudicantes haeretici dogmatis infamiam sustinere, divina primum vindicta, post etiam motus nostri, quem ex caelesti arbitrio sumpserimus, ultione plectendos.*

[72] Cesaropapism, a system of combining the secular power with that of the Church in which the former claims the right to supremacy, became a pillar of the political system in the Eastern Roman Empire and the Byzantine Empire; cf. Krukowski, J. *Kościół i państwo*, Lublin 2000, p. 22; Michalik, P. "Kilka uwag na temat cezaropapizmu w cesarstwie wschodnorzymskim i bizantyjskim." In *Cuius regio, eius religio*, Górski, G., Ćwikła, L., Lipska, M., eds., Lublin 2006, p. 88.

princeps christianissimus, sancte iperator, imperator Christianissime.[73] Christianity became an official, state religion; through their religious policy, emperors intended to revive the former unity of religion and state. Elevated to an official status, Christianity was believed to bind the moral and spiritual unity of the state, as distinct from the superseded polytheistic Roman religion.

The new legal position of Christianity had various consequences, including influence on imperial legislation. One of them was the conferral of privileges for the Church and the clergy. From then on, violation of doctrine fell not only upon the Church's interest but also on the state's. The defense of Christian faith and the Church required the legislator to take a stance on non-Christians, primarily on the adherents of old polytheistic worship and Jews as well as those who defected from the Church and turned into heretics and apostates. The wording of imperial acts was altered; as legislators, the emperors often invoked God. The superb legislative work of Justinian comprising the entire legal legacy of Rome, *Corpus Iuris Civilis,* opens with the invocation: "In the name of our Lord, Jesus Christ" – *In nomine Domini Nostri Jesu Christi.*[74]

In spite of strengthening the Church's position, emperors took the liberty of interfering with her organisation and activity, not excluding doctrinal matters, worship and charitable initiatives. Imperial authority was often conclusive in theological questions and disputes.[75] Emperors would summon synods and

[73] These titles were used by St. Ambrose when addressing Christian emperors, Gratian, Valentinian II and Theodosius I (cf. Amb. Ep. 1;11; 17, PL 1,1001-1006). More about the titles applied by Ambrose and John Chrysostom in letters to Christian emperors in Groß-Albenhausern, K. *Imperator christianianisimus. Der christliche Kaiser bei Ambrosius und Johanes Chrysostomus*, Franfurt am Main 1999, p. 41ff.

[74] An appeal to God is to be found in the constitution *Imperatoriam* dated 21st November 533 through which the emperor validated and approved *Institutions*, a textbook of the rank of statute (*Institutiones Iustiniani sive Elementa*). The constitution opens with an *invocatio*: "In the name of our Lord Jesus Christ" – *In nomine Domini Nostri Iesu Christi.* Less than a month after promulgating *Institutions*, on 15th December 533, by the constitution *Tanta*, the emperor approved *Digesta seu Pandectae*, another part of his codification covering the subjects arranged in the collection of excerpts of jurists' writings. By promulgating the collection as the binding law, the emperor began by referring to God: "In the name of our Lord Jesus Christ" – *In Nomine Domini Dei Nostri Iesu Christi.* A similar appeal was inserted at the beginning of the constitution *Cordi,* by which Justinian validated the second, revised edition of the *Codex* from 16th November 534; more in Bojarski, W. "Invocatio Dei w starożytnych zbiorach prawa." In *Religia i prawo karne w starożytnym Rzymie*, Dębiński, A., Kuryłowicz, M., eds., Lublin 1998, p. 15f.

[75] The emperors themselves determined the boundaries of their own power, yet Constantine in the Council of Nicaea claimed to be merely a bishop for external affairs (*episkopos ton ekso*). Imperial interference in religious matters was justified by the title of high priest (*summus pontifex;*

councils, impose the issues to be discussed as well as frequently chairing the assemblies.[76]

From the 4th through the 6th century, the course of events initiated by Constantine contributed to the enactment of a series of laws (*leges*) that comprehensively regulated religious matters in the empire. Imperial enactments (also called constitutions – *constitutiones principis*) were later compiled into codices, official collections of imperial laws.

In the period of the Late Empire, imperial constitutions were used to consolidate the emperor's supremacy in the domain of law-making; they embraced all areas of public and private life, although state law, administrative law and penal law were given priority. The instruments of the highest importance were called edicts (*edicta*). They contained general regulations (hence their common name *leges generales*) on various branches of law, predominantly on public law. They were binding either for the entire state, or for provinces or municipalities.[77] Imperial enactments on religious matters comprised a separate group.

The first collection of this kind was the *Codex Theodosianus* of 438 issued by the eastern emperor Theodosius II (408-450). The collection gathered enactments on public law and to a lesser extent on private and procedural law.[78] The collection was divided into sixteen books and the books into titles presenting the constitutions in a chronological order. The texts of religious enactments were compiled in the last, sixteenth book. Its material was arranged in eleven titles containing *leges* ordered by date. Imperial compilers titled them in a general manner, yet pertinently enough to help the reader understand their content; they are as follows: Concerning Catholic Faith,[79] Concerning Bishops, Churches and

pontifex maximus) that they would hold in the pagan hierarchy and which was maintained after their conversion to Christianity. The role of Roman emperors in the management of pagan cult was in fact of mush less importance; cf. Van Hove, *Prolegomena,* p. 199; see also the bibliography ibidem, note 32.

[76] It was already Emperor Constantine, at that time still pagan (he was baptized on the eve of his death, which was a common practice), who had a pivotal role in the Council of Nicaea (AD 325): he summoned the council, outlined the subject matter and participated in the debates; cf. Rahner, H. *L'Église et l'état*, 76ff.

[77] Dębiński, *Rzymskie prawo prywatne*, p. 71f; Gaudemet, *Institutions,* p. 732f.

[78] Originally, the commmission established by the emperor was supposed to collect *ius* (the law containe in the writings of jurists) and *leges* (imperial constitutions) into one compilation. In the end, the commission completed only part of the plan and compiled imperial enactments (*leges generales*) from Constantine the Great, the first Christian ruler, to Theodosius II inclusive; more in Gaudemet, *La formation*, p. 44ff; idem, s.v. *Théodosien* (*Code*), DDC, vol. VII, col. 1215f.

[79] C.Th.16, 1: *De fide catholica.*

Clergy,[80] Concerning Monks,[81] Concerning those Leading Religious Disputes,"[82] Concerning Heretics,[83] Concerning Apostates,[84] Concerning Jews, *caelicoli* and Samaritans,[85] That a Jew Should not Have a Christian as Slave,[86] Concerning Heathens, Sacrifices and Temples,[87] Concerning Religion.[88]

It is worth noting that Book Sixteen of the Theodosian Code is not the only one containing religious regulations. Other books also reveal imperial constitutions scattered among different titles and referring to religious matters and institutions, such as judicature of bishops in secular matters,[89] manumission before a Christian community,[90] the property of clerics and monks,[91] the right of asylum in churches,[92] the celebration of Sunday and Christian festivals.[93]

The issuing of the Theodosian Code did not hinder emperors' legislative initiative; new resolutions on the Church and religion were incorporated into laws later compiled in the Justinian Code. Others were placed in private collections, mainly in post-Theodosian Novels (*Novellae posttheodosianae*)[94] and the Sirmondian Constitutions (*Constitutiones Sirmondianae*).[95]

The new codification of imperial enactments, including the religious ones, was directed by Emperor Justinian; as a result, the Justinian Code (*Codex*

[80] C.Th.16, 2: *De episcopis, ecclesiis et clericis*.
[81] C.Th.16, 3: *De monachis.*
[82] C.Th.14, 4: *De his, qui super religione contendunt.*
[83] C. Th. 16, 5: *De haereticis.*
[84] C.Th.16, 7: *De apostatis.*
[85] C.Th.16, 8: *De Iudeis, caelicolis et Samaritanis*.
[86] C.Th.16, 9: *Ne Christianum mancipium Iudaeus habeat.*
[87] C.Th. 16, 10: *De paganis, sacrificiis et templis*.
[88] C.Th.16, 11: *De religione.*
[89] C.Th. 1, 27: *De episcopali definitione* (Concerning bishops' decisions).
[90] C.Th. 16, 4, 7: *De manumissionibus in ecclesia* (Concerning manumission in Church).
[91] C.Th. 5, 3: *De bonis clericorum et monachorum* (Concerning the property of clerics and monks).
[92] C.Th. 9, 45: *De his, qui ad ecclesias confugiunt* (Concerning those seeking shelter in churches).
[93] C. Th 2, 8: *De feriis* (Concerning holidays).
[94] It is a collection of imperial enactments from the years AD 438-468; they were authored by few emperors, from Theodosius II (408-450) to as far as the Eastern emperors, Libius Severus (AD 461-465) and Antemius (AD 467-472); published by: Mommsen, Th., and Meyer, P.M. *Leges novellae ad Theodosianum pertinentes,* Berlin 1905.
[95] It was a private collection of imperial constitutions (16 laws of eastern and western origin published from AD 333 to 425) primarily on religious matters. It was probably compiled in Gaul in the years AD 425-438; it was published for the first time in 1631 by a Jesuit, R.J. Sirmond, hence its name; Gaudemet, *La formation*, p. 73f.

Justinianus) was published in 534 by the constitution *Cordi.*[96] The collection had twelve books divided into titles (with rubrics) containing chronological constitutions. Imperial laws[97] of religious nature were grouped in thirteen titles of Book One of the codex; some were copied from anterior collections, mainly form the Theodosian Code. A noteworthy fact is that Book One of the Justinian Code opens with the title officially defining the dogmas of the Catholic faith; it reads, "Concerning the High Trinity of the Catholic faith, and that no one shall dare to dispute about it publicly."[98]

[96] Through the constitution *Haec* of AD 528, Justinian established the first codification commission (made up of ten members, chiefly higher state officials) whose objective was to create a collection of imperial enactments (*leges*). The collection was published in AD 529 as *Codex*, later referred to as *Codex vetus*. It has not survived until today; after publishing subsequent parts of the codification (*Institutions* and *Digest*), it became clear that it no longer matched the existing legal situation and was repealed. In AD 533 Emperor Justinian appointed a new codification commission headed by an outstanding lawyer Tribonian (the commission also gathered three advocates and a jurist, Dorotheus) which completed the second edition of the Codex (the so-called "*Codex repetitae praelectionis*").

[97] The code has over 4600 constitutions, from the times of Hadrian to the reign of Justinian (up to AD 534).

[98] C.J. 1,1: *De summa trinitate et ut nemo de ea publice contendere audeat.* The remaining titles of Book I containing the enactments regulating religious matters are the following*:* C.J. 1,2: *De sacrosanctis ecclesiis et de rebus et privilegiis earum* (Concerning holy churches, their property and privileges); C.J. 1,3: *De episcopis et clericis et orphanotrophis et brephotrophis et xenodochiis et monachis et privilegio eorum et castrensi peculio et de redimendis captivis et de nuptiis clericorum vetitis seu permissis* (Concerning bishops and the clergy and superintendents of orphanages, foundling hospitals, strangers' inns, hermitages and monasteries and their privileges, and concerning special military property, the redemption of captives and forbidden or permitted marriages of the clergy); C.J. 1,4: *De episcopali audientia et de diversis capitulis, quae ad ius curamque et reverentiam pontificalem pertinent* (Concerning the bishop's court and various matters relating to the right of the bishop and his care and the reverence due him); C.J. 1,5: *De haereticis et Manichaeis et Samaritanis* (Concerning heretics, Manicheans and Samaritans); C.J. 1,6: *Ne sanctum baptisma iteretur* (That the Holy Baptism be not repeated); C.J. 1,7: *De apostatis* (About Apostles); C.J. 1,8: *Nemini licere signum salvatoris Christi vel in silice vel in marmore aut sculpere aut pingere* (That no one shall be permitted to engrave or paint the sign of the Saviour Christ on stone or marble); C.J.1,9: *De Iudaeis et caelicolis* (Concerning the Jews and the worshippers of the heavens (celestials)); C.J. 1,10: *Ne christianum mancipium haereticus vel paganus vel Iudaeus habeat vel possideat vel circumcidat* (That heretic, pagan or Jew does not consider a Christian a slave and does not circumcise him); C.J. 1,11: *De paganis sacrificiis et templis* (Concerning pagan sacrifices and temples); C.J.1,12: *De his qui ad ecclesias confugiunt vel ibi exclamant* (Concerning those who flee to the churches or raise a disturbance there); C.J. 1,13: *De his qui in ecclesiis manumittuntur* (Concerning those who are manumitted in the churches).

Justinian's laws gathered primarily in Book One of *Codex repetitae praelectionis* constitute but a fraction of his legislation on religious matters. Having completed the codification, the emperor issued new enactments – *Novellae* (the Novels). It was current imperial legislation chiefly devoted to public laws, including the life of the Church community. During his reign, Emperor Justinian often championed the cause of religious unity and empowerment of the Church. It was one of his leading objectives – besides codification of law and state unification and reform – when ascending the throne. Accordingly, part of the Novels encompassed current issues of Justinian's religious policy.[99]

A few problem categories may be distinguished within a rather extensive imperial legislation on religion.[100] The first category of enactments was aimed to preserve, disseminate and strengthen the Christian faith. They safeguarded religious unity in the state. It was a pivotal problem, since the emancipation of the Church led to violent disputes on doctrine and discipline, in which the secular authority took an active part. Numerous heresies emerged. The arguments that plagued the Church threatened state unity and at times precipitated social unrest and were perceived as confrontational with the secular authority. Individual imperial constitutions were directed against heresies which proliferated in the period in question. Heresy came to be interpreted as a public offence (*publicum crimen*), penalized under criminal law because – as pointed out in the constitution of Emperor Arcadius of AD 407 – "whatever is committed against divine *religio* rebounds to the detriment of all."[101] The affiliation with non-orthodox groups was qualified by imperial legislation as *sacrilegium.*[102]

[99] Justinian's Novels (*Novellae Iustiniani, Novellae leges*) were published after the codification was completed in the years AD 535-565. They were written mainly in Greek (the knowledge of Latin in Byzantium was not too common), few in Latin and some in both languages. The new Justinian's laws we relevant to public law, primarily administrative law, and church law; on religious issues in the Novels, see Dębiński, *Ustawodawso karne rzymskich cesarzy chrześcijańskich w sprawach religijnych*, Lublin 1999, p. 44ff (including the bibliography).

[100] Dębiński, A. "Problematyka religijna w ustawodawsie rzymskich cesarzy chrześcijańskich," *Kościół i Prawo* 7(1990), p. 73ff.

[101] C.Th. 16,5,40 (407): *Ac primum quidem volumus esse publicum crimen, quia quod in religionem divinam conmittitur, in omnium fertur iniuriam*; more about the enactments against heresies, see: Dębiński, A. *Ustawodawso karne*, p. 59ff. Also, cf. Stachura, M. *Heretycy, schizmatycy i manichejczycy wobec cesarstwa rzymskiego (lata 324-428, wschodnia część Imperium),* Kraków 2000, p. 52.

[102] Cf. Dębiński, A. *Sacrilegium w prawie rzymskim*, Lublin 1995, p. 168ff.

Not so long after the promulgation of the edict of toleration, Emperor Constantine was compelled to counteract Donatists – a schismatic religious group originating in North Africa. Advocating an orthodox approach, the emperor's enactments condemned Donatus and his followers. Constantine's successors issued more statutes against this community. When new heresies appeared in the west (for example, Priscilianism in the second half of the 4th century and Pelagianism at the beginning of the 5th century), the theological resolutions on the matter were passed along with imperial constitutions, both censuring the masterminds and the teachings of the heretics and imposed legal sanctions and different coercive measures on the adherents of the outlawed teaching. Numerous measures were directed against eastern heresies of Arianism, Nestorianism, Monophysitism and other groups which shattered the Church and were a menace to public order and state unity.[103] As for the aforesaid groups, the most effort was put into eradicating Manicheans.[104]

When defending the state religion, imperial legislation defined the status of non-Christians. The enactments collected into separate titles regulated the legal position of Jews. Some confirmed or granted them privileges, such as the recognition the Sabbath and other Jewish festivals. Jewish priests were offered numerous entitlements and personal benefits. Jewish tribunals enjoyed independent jurisdiction in religious matters. As a response to frequent acts of looting and devastation of synagogues, imperial acts, in particular from the turn of the 4th century on, prohibited the destruction of Jewish temples or their conversion to serve secular purposes. Emperors safeguarded Jews against acts of violence. However, besides those favourable constitutions, some legal acts manifested adverse state's policies and disapproval of Judaism. First and foremost, emperors strictly banned proselytism. Conversion into Judaism was

[103] More about heresy as a doctrine threatening the unity of the state, as exemplified by Arianism, see Wójcik, M. "Szaleństwo arian jako przestępstwo godzące w jedność państwa." In *Salus rei publice suprema lex. Ochrona intersów państwa w prawie karnym starożytnej Grecji i Rzymu*, Lublin 2007, p. 357ff.

[104] It was already Diocletian who opposed this group of syncretic views when their teaching spread from Persia to Africa and continued to disseminate in other parts of the empire. The emperor sentenced the Manichean leaders to the stake. A series of anti-Manichean exactments was initiated by Valentinian I. Beginning with Theodosius I, the traditional accusations of witchcraft and immorality were coupled with the crime of heresy; more in Dębiński, A. "Ustawodawstwo chrześcijańskich cesarzy rzymskich przeciwko manichejczykom." *Kościół i Prawo* 8(1991), pp. 195-211 (including the bibliography).

legally defined as sacrilege and the penalty was capital. Imperial law provided for the same penalty for slave-owners who circumcised a Christian slave.[105]

Imperial legislation unambiguously defined the legal status of pagan believers. With a gradually consolidating position of Christianity in the state, imperial constitutions passed against the old, polytheistic Roman religion were increasingly severe. Such an attitude of Roman rulers was manifested by the resolutions that initially limited and ultimately prohibited different forms of worship, pagan sacrifices, sorcery and magic. These bans coincided with the orders of closing and demolishing of pagan temples; often they were adapted to public needs or consigned to the Church. The state's offensive against pagan religion did not spare its priests. As it was the case with the Vestal Virgins, they were deprived of privileges and income; the property accumulated for the maintenance of the pagan cult was confiscated.[106]

The sanctions in question prompted the modification of the existing calendar; pagan festivals were replaced by Christian ones. Traditional games, entertainments and performances related to pagan state and religion were statutorily eliminated from public and social life.

A separate category of *leges* issued by Christian rulers were those regulating the life and organisation of the Christian community. Imperial constitutions contained very detailed instructions concerning the recruitment, selection, order, levels of hierarchy and status of both bishops and other members of the clergy. Some acts posed demands of a moral nature, requiring that clerics fulfill their duties conscientiously and lead a life of decency. Other constitutions regulated monastic life: the establishment, organisaiton and income of monasteries, life of monks and deaconesses. Emperors interfered in Church discipline by regulating particular behaviours; one of the constitutions of Emperor Theodosius of AD 390 prohibited women to enter the church if they dared to cut their hair "against human and divine law." The constitution also provided for sanctions against bishops who allowed them inside the temple.[107]

Another category of constitutions pertained to state and public functions of the Church. It contained imperial decisions on bishops' status with regard to administrative and judicial powers. The legislation defined the principles for

[105] Dębiński, A. "Quelques remarques sur le législation imperiale (IV eme – V eme siècle) contre le proselytisme juife", In *Le droit romain et le monde contemporian. Mél. H. Kupiszewski*, Wołodkiewicz, W., Zabłocka, M., eds., Varsovie 1996, p. 117ff.

[106] More in Dębiński, A. *Ustawodawso karne*, p. 149ff.

[107] C.Th. 16,2,27,1 (390): *Feminae, quae crinem suum contra divinas humanasque leges instinctu persuasae professionis absciderint, ab ecclesiae foribus arceantur*.

the operation of charitable establishments: hospitals, children's homes and orphanages, pilgrims' and itinerants' houses.

All in all, the legislation of Roman emperors following the promulgation of the Edict of Toleration and consequently elevating Christianity to the state religion exerted huge influence on the legal order of the Church. It primarily regulated the Church's activity in various areas of public life and partly consolidated its internal organisation. By exercising their exclusive prerogatives, emperors promoted some resolutions of synods and councils to the rank of statutes in order to expedite their execution or raise effectiveness. Convinced of acting for the public good and the Church, Roman rulers collaborated with ecclesiastical authorities in many fields and issued laws at their request. Bearing this in mind, imperial legislation can be seen as a significant component of the ecclesiastical system, although not yet as its proper law but as the law imposed by public authority on all the imperial subjects. Numerous imperial constitutions contained in the Theodosian Code and the collection *Corpus Iuris Civilis* (mainly in the Justinian Code) were, beginning with the 4th century, referred to by synods and blended into many compilations of canon law.[108]

3. Ecclesiastical Canons and Imperial *leges*

The Church created her law on the basis of legal norms known as canons (*canones*). The laws of secular rulers (*leges*) on religious matters coupled with ecclesiastical canons comprised the entire laws governing all Christians – *ius ecclesiasticum*.[109]

[108] A list of laws of the Theodosian Code which were incorporated into different collections of canon law (4th-12th c.) is provided by Gaudemet, J. s.v. *Théodosien (Code)*, DDC, vol. VII, col. 1237-1245; bibliography, ibidem, col. 1245-1246. The constitutions from the Justinian compilation which were incorporated into the collections of canon law – from eastern, Greek canon law collections to Gratian's *Decretum*, is given by De Clercq, C. s.v. *Corpus Iuris Civilis*, DDC, vol. IV, col. 661- 680; bibliography, ibidem.

[109] The term *ius ecclesiasticum* denoting the entire rules of guidelines regulating Church discipline dates back to the mid-4th century; this phrase is used in a letter of Pope Siricius to Himerius of AD 385 (Siri. Ad Eum.; PL 84, 633). The term *ius,* as proposed in the literature, in relation to Church was first used by Tertullian: "Consequently these Churches, numerous and

The meaning of the word 'canon' in the field of Church law becomes transparent through its etymology. The term derives from the Hebrew word *kaneh* denoting 'a measuring rod.' In Greek the word meant 'pattern', 'measurement' or 'measuring rod.' These rods were used in construction to determine measurements. Greeks widened its use and transferred it to other branches of science in which it designated a simple, finished shape and unfailing measurement for the evaluation of different phenomena. In an ethical context, canon refers to what is just and correct, or to a criterion to apply and conform to; in art canon is a perfect, yet achievable form. In Latin *canon* literally means 'a measuring rod', and figuratively 'a rule', 'principle', 'regulation', 'norm'. In the study of canon law, *canon* is a synonym of norm and a concept equivalent to a regulation of ecclesiastical law.[110]

From the end of the 4th century, the canon was used to denote a resolution of synods and councils.[111] When the Church was freed from oppression, bishops began to assemble for meetings, i.e. councils (general assembly of bishops) and synods, particular or regional, in which they decided on dogmatic and disciplinary issues.

Undoubtedly, the synods and councils of the preliminary Christian period were of utmost significance for the Church's life; not only did they develop doctrinal matters, but also laid the foundations for later ecclesiastical legislation, much of which have survived until today. As the number of regulations grew, they began to be compiled into legal collections. Originally, they were arranged by date and the internal layout hindered their use.[112] Subsequently,

important as they are, form but the one Primitive Church founded by the Apostles; from which source they all derive. So that all are primitive and all are Apostolic; whilst that all are in one Unity is proved by the fellowship of peace and title of brotherhood and common pledge of amity – privileges which nothing governs but the one tradition of the selfsame Bond of Faith." – *Sic omnes prima, et apostolicae, dum una omnes probant unitatem; dum est illis communicatio pacis, et apellatio fraternitatis et contesseratio hospitalitatis, quae iura non alia ratio regit, quam eiusdem sacramenti una traditio*; Tert. De praesc. 20, 7-8.

[110] Cf. Sobański, "Nauki podstawowe prawa kanonicznego", vol. I. *Teoria prawa*, p. 109f; Van Hove, *Prolegomena*, p. 39ff.

[111] The term 'ecclesiastical canon' denoting a collection of Church laws on discipline was used in the resolutions of the First Council of Nicea of AD 325 (Nicae. I, Can. 2 and 5). Emperor Justinian reserved the term '*canon'* for enacments on Church matters (cf. *Nov.* 137) and '*nomos'* for laws on secular matters.

[112] Among the most noteworty there are *Corpus canonum orientale* – A Collection of Eastern Canons and *Collectio Trullana* – Trullan Collection; cf. Góralski, Hemperek, *Historia źródeł*, p. 32f; Subera, *Historia źródeł*, p. 40ff; Van Hove, *Prolegomena*, p. 143ff.

as of the 6th century, the collections published were more systematic – probably following the techniques adopted by Justinian compilers.[113] The norms contained therein were called canons (*canones*) – hence the term 'canon law' underlining the difference in terms between secular law (with *leges* as a source) and canon law (relying on *canones*).[114] Canon law began to emerge as an important element of Christian religious life and also as an independent legal system complementary to the legal system of the late Roman Empire.

Church's participation in the state framework after the Edict of Milan opened the window of opportunity for the inspiring and stimulating encounter of ecclesiastical law and Roman law. The field of Roman influence was unquestionably terminology; the language of Roman law and of the Church was Latin. Roman legal terms were borrowed by the Church to denote the components of its own organisational structure. As pointed out by Peter Damian, the organisation of the Church in Rome "should imitate the ancient Roman curia."[115] Beginning with Leo, popes assumed the title of *pontifex maximus* – certainly of properly adjusted meaning – which was attributed to the emperor in the pagan world. The conventions of Roman clergy headed by the pope were termed papal consistory; apparently, the name referred to imperial *consistorium*, a privy council of the emperor.[116] The seat of the pope and his court, as in the former imperial *sacrum palatium*, was home to the Apostolic Chancery in which – just as in the Imperial Chancellery (*scrinium*) – notaries and scribes (*notarii et scriniarii*) performed their duties.[117] Likewise, the institution of

[113] Inter alia *Collectio sexaginta titulorum* (Collection of 60 Titles), *Collectio quinquaginta titulorum Joannis Scholastici* (Collection of 50 Titles of Jan the Scholastic); cf. Góralski, Hemperek, *Historia źródeł*, p. 33ff; Subera, *Historia źródeł*, p. 44f; more in Van Hove, *Prolegomena*, p. 146ff.

[114] Sobański, *Nauki podstawowe prawa kanonicznego*, vol. I. *Teoria prawa*, p. 109.

[115] *Romana ecclesia, quae sedes est apostolorum, antiquam debet imitari curiam Romanorum*; Petr. Dam. Contr. phyl. 7.

[116] The bishop supervising a Christian community was assisted by a body of presbyters and deacons *(consistorium, concilium*). During the Dominate, the term *sacrum consistorium* was used to mean a privy imperial council gathering the highest official and military figures. The council decided on state matters and debated imperial enactments. Among the members of *consistorium* there were also learned jurists who had a voice in the advancement of legal ideas; Jones, A. H. M. *Le declin du monde antique*, Paris 1970, p. 124f.

[117] In medieval times, the auxiliary administrative apparatus to the Holy See was called *Curia Romana,* which was a reference to ancient Roman tradition. For in Roman public law, the term *curia* (authority, government, court, curia, city council) was applied to denote a unit of division of citizens, army, taxation area as well as the location of the sittings of the Senate in the *Forum Romanum*; cf. Gaudemet, J. *L'Eglise dans l'Empire Romain (IV – V siècle*), Paris 1958, p. 408ff; Ullmann, *The Growth of Papal Government*, p. 310ff.

bishops' assemblies – synods and councils (*concilia*) – adopted the features of the Roman Senate and secular provincial gatherings (*concilia provinciarum*). The sitting of a synod was opened – similarly to that of the Senate – by presenting an issue (*relatio*). Bishops took the floor in a sequence imitating the list of senators and correspondingly were encouraged to freely share their opinions (*agite; dic, qui censes?*). The final conclusion was written as *sentantia*. Making allowances for some doubts and reservations made in the literature and concerning the similarity between ecclesiastical and secular councils,[118] one should not fail to notice some borrowings even in the name itself.[119]

Indisputably, there was some correspondence of ecclesiastical territorial division to that of the Late Empire. The Church often accepted secular territorial partition to improve her own organisation; to a considerable extent, the ecclesiastical division mirrored the structure of regional and local state administration centres.[120]

The reform of state administration was undertaken at the end of the 3rd century by Emperor Diocletian.[121] He divided the country into prefectures and

[118] Gaudemet, *L'Eglise*, p. 451.

[119] Kotula, T. *Zgromadzenia prowincjonalne w rzymskiej Afryce w epoce późnego cesarstwa,* Wrocław 1963, p. 155. Some similarities to Roman regulations are tracable in the procedure of deposition of a bishop unworthy of his office. Bishops' behaviour in such cases resembles the procedure of dismissal of unworthy decurions; Guyot, P., Klein, R. *Das frühe Christentum bis zum Ende der Verfolgungen*, vol. I. *Die Christen im heidnischen Staat*, Darmstadt 1993, p. 468, note 25; 28.

[120] Cf. Pierce Beaver, R. ,"The Organization of the Church of Africa on the Eve of the Vandal Invasion," *Church History* 5(1936), no. 2, p. 168; Weiss, A. "Rola i funkcje prowincji kościelnych w Kościele okresu starożytnego i wczesnego średniowiecza (do VIII w.)," *RTK* 38(1981) issue 4, p. 34. Likewise, Christian communities borrowed some organizational ideas from the then Roman society; the Roman *civitas* was transferred as *ecclesia.* Its *ordo* (the clergy) and its commoners (laymen) corresponded to *curia* and *populus* in *municipium*. A Christian community (*ecclesia*) mirrored *civitas* in other areas too; it implemented a plan of organized aid but, instead of the distribution of provisions (*alimentaria*) in accordance with the Roman pattern, it remained faithful to the Christian commandment of mercy rather than to some economic rationale; cf. Cochrane, *Chistianity and Classical Culture,* p. 242.

[121] After Constantine's death (AD 274-337), the division of the Roman state into the Western and Eastern Empire (with Constantinople and Rome as capitals respectively) was a fact. Gradually, a model of four-level territorial administration was established. The utmost level was composed of four prefectures (Oriens, Illyricum, Italia, Gaul) with prefects as their heads (*praefectus praetorio*). The lower level was the diocese headed by vicars (*vicarius*). Prefects and vicars had supervisory and controlling functions, and in the case of judicature, they were the upper instances to appeal to against the decisions passed at the lowest level. On the other hand, each diocese was divided into few or many provinces (*provinciae*) governed by the officials of different names –

twelve dioceses – each composed of few provinces of numerous cities; from the apostolic times, the cities accommodated first the Christian communities. Consequently, the ecclesiastical division followed, with some exceptions, the secular pattern.[122] Beginning with the 4th century, some greater degree of coordination was visible aimed to achieve a more hierarchical structure. The bishops of former provinces or larger regions elected to be headed by a metropolitan bishop of the largest city in the province. It was already in the 2nd century when he enjoyed superiority to the bishops of provincial towns. Similarly, the bishop of the capital of a civil diocese was a higher metropolitan; councils assigned him priority and jurisdiction over all metropolitans of the provinces within the diocese.[123] After the fall of the Western Empire, civil dioceses and provinces were effaced while ecclesiastical ones survived.[124]

Another perceptible facet of Roman influences was the prohibition of ordination of priests *per saltum* (Lat. by a leap), i.e. promoting to a higher position without following the norms usually prescribed by the Church hierarchy.[125] Parallel rules of promotion applied to the Roman civil service.

A striking similarity can also be seen in the style of papal decretals of the 4th century based on imperial rescripts and decrees.

In the Roman Empire a rescript (Lat. *rescribere* – to write in response), being a type of imperial constitution, was an emperor's written response on a point of law.[126] The petitions were filed by private persons (*preces, libellus, supplicatio*) or officials (*suggestiones*, *consultationes*). The Imperial Chancellery usually responded to the officials in a letter (*epistula*). As regards private persons, the response was an official mention on the petitioner's application (*subscriptio, adnotatio*). The imperial rescript assumed that the filed petition

legats (*legati*), prefects (*praefecti*) or rectors (*rectores*); the officials heading a province were obliged to fulfill basic administrative duties within a territory. In most provinces, they had civil power (in some also military) and acted as judges. The lower level of administrative division was district or commune – *civitas;* cf. Dębiński, *Rzymskie prawo prywatne*, p. 52; Jones, *Le declin*, p. 244f; *Rzymskie prawo publiczne*, Sitek, B., Krajewski, P., eds., Olsztyn 2004, p. 65f; Zabłocki, J., Tarwacka, A. *Publiczne prawo rzymskie*, Warszawa 2006, p. 123ff.

[122] Jones, *Le declin*, p. 244.

[123] Gaudemet, *La formation*, p. 229; Plöchl, *Geschichte des Kirchenrechts*, vol. I, p. 142f.

[124] The diocese (Lat. *dioecesis*) has been retained as the name for a territorial unit of the Western Church in canon law until; more in Claeys Bouuaert, F. s.v. *Diocèse*, DDC, vol. IV, col. 1257f; Feine, *Kirchliche Rechtsgeschichte*, p. 97f; Rybczyński, H. s.v. *Diecezja*, CE, vol. III, col. 1307.

[125] Cf. Gaudemet, *L'Eglise,* p. 11ff.

[126] On rescripts in contemporary canon law, see below, Chapter Three, 9, 3.

contained factual information, which was at times indicated in the response by the words: *si preces veritate nituntur* ("if the petitioner's request is true"). In practice, rescripts – intended to resolve concrete cases – were used in other comparable instances. From the 3rd century on, due to the emperor's authority and the expertise of jurists employed in his chancellery, rescripts were recognized as general legal norms of greater gravity than lawyers' opinions. Rescripts were conducive to accurate and consistent application of law, frequently developing new judicial practices. Rescripts were innovative because the emperor, deciding on instances of legal dubiousness (that surfaced during a judicial procedure), *de facto* interpreted the binding law.

On the other hand, decrees (*decreta*) were judicial decisions issued by the emperor as the highest judge in disputes that were directed to him through supplication (*supplicatio*) or appeal (*provocatio*) of the parties to a lawsuit. Normally, the answers of the Imperial Chancellery stimulated the progress of law because the emperor employed them to introduce new principles and construe law. Admittedly, the resolutions proposed by decrees concerned only individual cases, but, due to the emperor's authority, they were upgraded to be commonly binding conclusions. The content of imperial decisions included in official registers (where their copies were made) made its way into practice. Judges depended on them in similar cases.[127]

The Roman concept of rescripts and decrees was apparently adopted by papal decretals. In canon law, a decretal (Lat. *litterae decretales*, *epistulae decretales*) was a type of papal document. A distinguishing feature of a decretal was that it contained preceptive decisions (dispositions and prohibitions) addressed to individuals or communities and for the most part covering some matters of discipline.

Ecclesiastical decretals date back to the 4th century; the oldest decretal document is attributed to Pope Damasus (366-384). It was the most important form of papal activity in the area of administration, judicature and legislation.[128] As a rule, decretals were not created on the pope's own initiative but

[127] Cf. Gaudemet, J. *Institutions*, p. 583ff; Litewski, W. *Rzymskie prawo prywatne*, 4th ed., Warszawa 1999, p. 62ff.

[128] Decretals were issued in greater numbers in the period when councils convened less frequently (9th-12th c.) and popes had more extensive legislative authority than before. It was already in the early collections of ecclesiastical law when a distinction was made between canons issued by councils and papal decretals, hence separate collections of canon law and decretal law. After the publishing of Gratian's *Decretum* and together with the swelling papal legislation of 12th-14th c., the term *decretales* was commonly used to mean ecclesiastical law (*ius decretalium*).

were responses to different inquiries. Like the emperor, the pope would then issue his decisive answer in writing. It might have been particular (effective only for the petitioners or the issues contained therein) or general (effective in the entire Church). In practice, due to the author's authority, decretals instituted norms that were binding for similar cases. After some time, mainly as a result of being incorporated into the collections of general law, decretals officially became a commonly applied law.[129]

The discussed instances of adaptation of terminology beg the question of whether ecclesiastical law also had recourse to the Roman legal lexis. Strictly speaking, borrowing implies the existence of two heterogenic systems.[130] In the 4th and 5th century, the Church assimilated with the legal culture of the state that it was deemed to operate in. The faithful and Church Doctors, at least in the West, spoke Latin. The use of Roman terminology or legal principles was not merely a borrowing from one system to another but rather the extension of old, formerly valid terminology onto new, budding canonical institutions.

4. Ecclesia vivit lege Romana?

Under the protection of Roman emperors, the Church gradually became overwhelmed by secular power. In the Christian literature of the Late Empire, many warnings can be traced related to the menace of secular control, especially when the state was falling into decline. The doctrine of mutual independence of ecclesiastical and state order – expounded by Ambrosius and Augustine,[131] was recapitulated and authorized by Pope Gelasius I (492-496). In a letter of AD 494 to the eastern emperor Anastasius, he laid out the

After *Corpus Iuris Canonici* decretals were decreasingly important in the Church. Currently, in Church law, they are a rare and solemn form of papal bulls pertaining to the issues of utmost significance; cf. Naz, R. s.v. *Décrétale*s, DDC, vol. IV, col. 1064f; Schulte, J.F. *Geschichte der Quellen und der Literatur des canonischen Rechts*, vol. I, Graz 1956, vol. I, p. 76ff; Van Hove, *Prolegomena*, p. 69ff; 136ff.

[129] Feine, H.E. "Vom Fortleben des römischen Rechts in der Kirche", *ZSS Kan. Abt.* 42(1956), p. 3ff.; Gaudemet, *La formation*, pp. 224-225.

[130] Cf. Gaudemet, *La formation*, p. 222.

[131] The literature on Augustine's opinions concerning Church-State relations is exhaustive; lately, it has been accumulated in Jóźwiak, S. *Państwo i Kościół w pismach św. Augustyna*, Lublin 2004.

teaching about the two powers: "There are two powers, august emperor, by which this world is chiefly ruled, namely, the sacred authority of the priests and the royal power."[132]

Articulating one of the most fundamental principles of Western civilisation, the Gelasian formula was indeed reflected in the legislation of Emperor Justinian,[133] but the dualism of secular and spiritual authority propagated by Christian writers and popes was not easily accepted in the East. This dualistic principle had to yield before the conviction that the unity of the state requires the unity of faith safeguarded solely by the emperor.[134] In consequence, eastern emperors – often with the approval of bishops and owing to internal discord of the Eastern Church, felt compelled to intervene in matters of faith and discipline.[135] This conviction was promoted by Justinian to a binding law. Simultaneously, the emperor acknowledged equal legal validity of ecclesiastical and secular laws.[136] It is the reign of Justinian which – in the relations between Church and state – is regarded as the model period of cesaropapism.[137]

[132] *Duo quippe sunt, imperator auguste, quibus principaliter mundus hic regitur: auctoritas sacrata pontificum, et regalis potestas* (Gel. Ep. 12, 2 (J. H. Robinson, Transl.).

[133] Cf. *Nov.* 6 *praef.*: "The greatest gift among men, made by supernal kindness, are the priesthood and sovereignty, of which the former is devoted to things divine, and of which the latter governs human things and has the care thereof. Both proceed from the same beginning and are ornaments of human life." – *Maxima quidem in hominibus sunt dona Dei a suprema collata clementia, sacerodotium, et imperium: et illud quidem divinis ministrans, hoc autem humanis praesidens ac diligentiam exhibens: ex uno eodemque principio utraque praecedentia, humanam exorant vitam.*

[134] This idea is aptly expressed by Emperor Zeno in *Henotikon* of AD 482 in which the emperor, by his own authority and without the agency of the council, resolved a dogmatic issue by saying: "Being assured that the origin and constitution, the might and invincible defence of our sovereignty is the only right and true faith.... we have united ourselves thereto without hesitation;" Evagr. Schol. HE, 3, 14. According to Van Hove, *Prolegomena*, p. 201, note 1. *Henotikon* of Emperor Zeno was the first act of cesaropapism in terms of dogmatism.

[135] These prerogatives were confirmed by the resolution of the Second Council of Constantinople of AD 553 which read: "Nothing can happen in the Church against imperial order and will." – *Putamus caritatem vestram non ignorare voluntatem et zelum pii imperatoris nostri, quem habet ad orthodoxam fidem nostram: et nihil eorum, quae in sanctissima ecclssia moventur, convenit ferii praeter opinionem et iussum ipsus*; *Contra iussum et voluntatem imperatoris nihil in Ecclesia fieri debet*;" Const. II, Mansi 8, 970.

[136] *Nov.* 6,1,8 [...] *oportere sacras regulas pro legibus valere* – "sacred rules have the same value as laws."

[137] It should be noted that there are numerous texts revealing Justinian's great respect to the Church and profound religious feelings and interest in theology, which does not affect the fact that he would de facto act like the head of the Church; cf. Baker, J.W. *Justinian and the later Roman*

Submissive to secular rulers, the Byzantine Church developed a separate type of mixed collections called *nomocanones*. Within one organic whole, the compilation contained secular (*nomoi*) and ecclesiastical laws (*kanones*). A distinguishing feature of these collections was that the same rubrics combined canon regulations and *leges* – imperial enactments concerning these very ecclesiastical matters.[138]

The situation in the Western Empire was utterly different. Christianity as a state religion survived no more but a year because the state collapsed in AD 476 when the young ruler Romulus Augustulus ("Little Augustus") was dethroned by the Germanic king, Odoacer. In the period of the decline of the empire, which was soon to be transformed into a number of ephemeral barbarian states, the Church remained the only guarantor of stability and unity. Bishops' authority increased and their responsibilities went beyond purely religious functions. When the secular authority failed and was incapable of coping with its duties, or when unsupervised and incompetent bureaucrats were helpless in their doings, bishops assumed responsibility for directing regular life in the dioceses. They handled city matters, problems of citizens and socially underprivileged groups.[139] Furthermore, bishops' interventions in public life were made in times when the Roman Empire was undermined and weak and most of its institutions, which supported the ancient civilization, practically decayed. Owing to their prestige, bishops were able to involve themselves (*intercessio*) effectively in the imperial judiciary. Their goals were to alleviate the existing cruel penalties, to eliminate private vengeance, to protect lower social classes from *potentes* and lawlessness of the administra-

Empire, Madison 1966, p.97; Browning, R. *Justinian and Theodore*, 2nd ed., New York 2003, p. 94; for more, see Amelotti, M. "Giustiniano tra teologia e diritto". In *L'Imperatore Giustiniano. Storia e mito,* Milano 1978, p. 134ff; Capizzi C., *Giustiniano I tra politica e religione*, Messina 1994, p. 25ff.

[138] This type of collections was common in the Eastern Church from the 6th century, i.e. from the publication of the first mixed compilations: *Nomocanon 14 Chapters* and *Nomocanon 50 Chapters*; cf. Góralski, Hemperek, *Historia źródeł*, p. 34f; Subera, *Historia źródeł*, p. 47ff; for more about *nomokanones,* see Van Hove, *Prolegomena*, p. 168ff.

[139] Cf. Gilliard, F. D. "Senatorial Bischops in the Fourth Century," *The Harvard Theological Review* 77 (1984), no. 2, p. 153ff; Lizzi, R. *Vescovo e strutture ecclesiastiche nella città tardoantica (L'Italia Annonaria nel IV-V secolo d.C.),* Como 1989, p. 28ff; Kamienik, R. "Kościół i hierarchia kościelna wobec 'barabrzyńców'. Nowy stosunek do ludów nierzymskich i kształtowanie się 'wspólnoty narodów'." *Acta Universitatis Wratislaviensis* 449(1979), p. 161ff; Milewski, I. "Kilka uwag o roli biskupa w mieście późnoantycznym (na przykładzie prowincji wschodniej)." *Vox Patrum* 21(2001), vol. 40-41, p. 407ff; Mochi Onory, S. "Vescovi e città." *Rivista di storia del diritto italiano* 4(1931), p. 555ff.

tion. To some extent, these goals were accomplished owing to the institution of Church asylum[140] and episcopal courts known as *episcopalis audientia*.[141]

Another bishops' responsibility in the time of invasions and chaos was to provide shelter to refugees, defend a threatened or besieged town (paying the army, mending city defence walls), prevent manslaughter and looting as well as negotiating with barbarian commanders. The painting of the encounter of Pope Leo I, bishop of Rome, and Attila laying siege to the Eternal City is a much-telling example,[142] though not an exceptional proof of the Church's defensive activities. A similar stance during the Hun invasion was attributed to the bishop of Pavia, Epiphanius,[143] St Anian in Orleans, St Lupus in Troyes and many others.

The victorious tribes that annihilated the empire gradually yielded to the civilisation of ancient Rome. The outcome of this process was seen through the law imported by the invaders. Because the then laws of Germanic peoples were personal (*personalitas legum*) and not territorial laws, Roman law, especially the legislation of the Theodosian Code of AD 438, was still binding for the Romans inhabiting the conquered land. Recognizing the superiority of Roman culture, Germanic rulers succumbed to Romanization and published new legal compilations known under an umbrella title *Leges Romanae Barbarorum* (Romano-Barbarian Laws). Published in AD 506 by King Alaric II (482-507), the collection *Lex Romanae Visigothorum* (also known after its legislator as *Breviarium Alarici* or *Alaricianum*) was intended for the Roman inhabitants in the country of Visigoths situated in today's southern France with the capital in Toulouse.[144] The code was effective until the 12th century

[140] Cf.Ducloux, A. *Ad ecclesiam confugere. Naissance du droit d'asile dans les églises (IV-milieu du Ves.*), Paris 1994; Mossakowski, W. *Azyl w późnym cesarstwie rzymskim (confugium ad status, confugium ad ecclesias*), Toruń 2000; about the right of asylum in the legislation of Franconian synods, see Burczak, K. *Prawo azylu w ustawodawsie synodów galijskich w V-VII wieku*, Lublin 2005.

[141] The literature on the establishment, organisation, development and the function of the jurisdiction of bishops (*episcopalis audientia*) is extensive; some collations available from Jaeger, H. "Justinien et *l'episcopalis audientia*", *RHD* 38(1960), p. 214ff; Gaudemet, *L'Eglise*, p. 230ff; Steinwenter, A. "Audientia episcopalis", *RACh*, vol. I, pp. 915-917; Śrutwa, J. "Episcopalis audientia w Afryce Północnej", *RTK* 28(1981) no. 4, p. 183ff; the latest collection of literature on the subject provided by Sadowski, P. "Episcopalis audientia w ustawodawsie Konstantyna Wielkiego." In *Historia prawa w służbie sprawiedliwości*, Sadowski, P., Szymański, A., eds., Opole 2006, p. 81.

[142] LeoMag. Ser. 84, 2 (PL 54, 434).

[143] Enn. VE (MG.AA. VII, 91 i 94).

[144] In Gaul *Breviarium Alarici* was named *Lex romana*; cf. Van Hove, *Prolegomena*, p. 221.

mainly in Aquitaine and Spain. On the other hand, *Lex Romana Burgundionum*, a compilation created ca. AD 500 and ordered by King Gundobad (474-516) was addressed to the conquered Romans in Burgundy, a country lying along the central and upper Rhone. Goths and subjugated Romans received the Edict of Theodoric (*Edictum Teodorici regis*) published in ca. AD 500 by Theodoric the Great (489-526), king of Ostrogoths. The basic input material for the aforesaid collections was the legislation of the Theodosian Code (including the writings of lawyers, above all *Sentences* by Paulus). The collections written in Latin displayed a low quality level and contained a mixture of Roman and Germanic law.[145] Nevertheless, they were considered transitionary between Roman law and the laws of Western Europe, including the law of the Church.

Of crucial importance for the condition of Roman law in the West was the recovery of Italy from Ostroghtots by Emperor Justinian and its reunification with the empire. Having regained control over the western provinces, Justinian, at the request of Pope Vigilius, introduced his codification by way of pragmatic sanction (*Sanctio pragmatica pro petitione Vigilii* of 13th August 554).[146] The annexation of Italy to the empire and temporary reinstitution of the Byzantine order (no later than in AD 568 Italy was conquered by Longobards, the most barbarous of the Germanic peoples) exerted much influence on the progress of European jurisprudence.[147] This fact was also pivotal for the Western Church which, at the decline of the ancient culture and slow emergence of medieval order, became the exclusive inheritor of the ancient legacy.

It was already in the 5th century, in the period of havoc wreaked by the assaults of the barbarians, that Christianity assumed the legacy of classical civilisation and identified itself with the Roman world and culture. When writing his *History against Barbarians*, Orosius used the words 'Roman' and 'Christian' synonymously. When fleeing his country – the Roman Spain – for fear of the Goths and heading for Africa and the Middle East (Bethlehem,

[145] Koranyi, K. *Powszechna historia państwa i prawa*, vol. II, Warszawa 1963, p. 65ff.

[146] *Corpus iuris civilis*, Schoell, K., Kroll, G., eds., *Novellae*, Appendix VII, p. 79; cf. Van Hove, *Prolegomena,* p. 214. During the Late Empire, pragmatic sanctions (*pragmaticae sanctiones*) were types of imperial constitutions deciding on specific issues but of general import. They were issued on request (*preces*) of interested parties; their role was that of resolving controversies, granting privileges or implementing special regulations; Dydyński, T. *Historia źródeł prawa rzymskiego*, Warszawa 1904, p. 129ff. Litewski, *Prawo rzymskie*, p. 87.

[147] Cf. Calsso, F. *Medio evo del diritto*, Milano 1954, p. 83f.

Jerusalem), he wrote: "When escaping from the unrest and upheaval, I seek asylum and everywhere I find my homeland, my law and my religion... As a Christian and Roman I encounter Rome and Christianity."[148] One of the components of Roman culture was law and its rules that the popes of that period habitually referred to; they were particularly Gelasius I (492-496), Pelagius I (556-561) and Gregory the Great (590-604). Roman legal regulations were constructive when editing the resolutions of regional synods, particularly in Gaul.[149]

One of the earliest documents of the close of antiquity testifying to the utilisation of Roman legal rules by the Church was the letter of Pope Gregory the Great to a John Defensor.[150] Not only does the letter show recourse to Roman law, but also reveals the actual role of Roman law in relation to ecclesiastical law.

Gregory I, one of the most powerful ecclesiastical leaders ever, is numbered among those heads of the Church who largely contributed to the consolidation of the idea of preeminence of the Holy See. He was Roman by birth, which is a noteworthy fact in our deliberations. He descended from an old, patrician and senatorial family. He obtained a diligent and profound education; as underlined by chronicles, he was proficient in the legacy of Roman, pagan and Christian culture. He also completed law studies and continued in the public service which he found very rewarding. As a relatively young man, he took the office of prefect of the city of Rome (*praefectus urbi*), which at that time (from AD 552) was under the rule of the Eastern Empire. He was appointed by Emperor Justin II and his term spanned the period of 571-575. As a pope he embarked on a very productive activity in every field of Church life. He also wielded an actual political power in Rome (he made peace with Longobards) and managed local churches located in the former western territory of the empire.[151] He was a very prolific writer, his literary output is

[148] Or. Hist. adv. 5,2: *Mihi autem prima qualiscumque motus perturbatione fugienti, quia de confugiendi statione securo, ubique patria, ubique lex et religio mea est* [...] *quia ad Christianos et Romanos Romanus et Christianus accedo*.

[149] Until the mid-9th century, when ecclesiastical collections quoted Roman law, it was the local law that was referred to. In Italy, Church documents quoted Justinian law known from Justinian's codification; on the other hand, in Spain and Gaul, Theodosian legislation as compiled by Alaric was given precedence (*Breviarium Alaricianum* lub *Lex Romana Visigothorum*); cf. Van Hove, *Prolegomena*, p. 220ff.

[150] (PL, 77, 1292-1301). The epistle of Gregory I is included in *Monumenta Germaniae Historica, Epistolae*, vol. 2, *Gregorii Papae registrum epistolarum*, Berolini 1899, pp. 410-418.

[151] Marcus R.A. *Gregory the Great and his world,* Cambridge 1977, p.3ff.

voluminous.[152] A notable literary genre pursued by the pope was the epistle, which testifies to the wealth of his activities.[153] A noteworthy example is a letter to John Defensor, a papal delegate based in Spain and resolving local disputes.

Little do we know about the addressee,[154] but his nickname *defensor* (defender) is an example of Roman influence on ecclesiastical institutions.[155] The ancient Rome of the Late Empire (4th c.) had the office of 'the defender of the needy' (*defensor plebis, defensor civitatis*).[156] His responsibility was to protect the poor against greed and corruption of bureaucrats, oppression from the mighty and "avariciousness of imperial tax collectors."[157] After some time, this official gained judicial powers and held the duties of a local judge in minor cases.[158] Likewise, in the 3rd century, the Church established a parallel office of the defender of the Church (*defensor ecclesiae*). His aim was to intercede for the poor before the court and safeguard Church property assigned to the needs of the underprivileged. Moreover, as in the case of *defensores plebis*, the defenders of the Church were expected to defend the poor against the domination of the rich and the abuse of administrative officials. Initially laymen, but

[152] Altaner, Stuiber, *Patrologie*, p. 607ff; Marcus, *Gregory the Great,* p.14ff.; *Słownik wczesnochrześcijańskiego piśmiennictwa*, s. v. Grzegorz Wielki I, p. 170ff.

[153] The collection consists of 848 letters that are still extant; it is the largest epistolary compilation of ancient Christianity; cf. Altaner, Stuiber, *Patrologie*, p. 467. The commentary on Roman law texts in the letters of Gregory the Great is given by Conrat, M. *Geschichte der Quellen und Literatur des römischen Rechts im frühen Mittelalter*, I, Leipzig, 1891, p. 9, note 1-5.

[154] Perhaps he might be identified as notary Jan, mentioned in the letter, *Ad Januarium episcopum* (Greg. Mag. ep 49; PL 77,590): *Sed ut veritatem valeamus agnoscere, Joannem sedis nostrae notarium nostra illic praeceptione suffultum direximus, qui partes in electorum compellat adesse iudicio, et sua ad effectum exsecutione, quae fuerint iudicata perducat. Quocirca fraternitatem tuam scriptis praesentibus adhortamur, ut causarum apud se ante debeat merita pertractare. Et si qua se injuste tulisse vel habere cognoscit, ante iudicium, sacerdotii contemplatione restituat.* Similarly in the letter, *Ad Sabinum Defensorem* (Greg. Mag. ep. 36; PL 77, 632): *Quaedam ad aures nostras gravia pervenerunt, quae quoniam canonicam emendationem exspectant, idcirco experientiae tuae praecipimus quatenus una cum Joanne notario, omni excusatione postposita, Januarium fratrem et coepiscopum nostrum summa huc exhibere instantia non omittas, ut eo coram posito, ea quae ad nos perlata sunt subtili valeant indagatione perquiri***;** cf. Gauthier, A. "L'utilisation du droit romain dans la lettre de Grégoire le Grand *à* Jean le Défenseur," *Angelicum* 54(1977), p. 420.

[155] Ibidem, p. 419.

[156] More about the terminology denoting this office, see Frakes, R. M. *Contra Potentium Iniurias: The Defensor Civitatis and Late Roman Law*, München 2000, p.16ff. On the origin of the office, see Mannino, V. *Ricerche sul «Defensor civitatis»,* Milano 1984, p. 13ff.

[157] Łoś, S. *Sylwetki rzymskie*, Warszawa 1958, p. 225.

[158] Jones, *Le declin*, p. 231; Gaudemet, *Institutions*, p. 684; Kaser, M. *Das römische Zivilprozeßrecht*, 2nd ed., München 1966, p. 437f.

later ecclesiastics, were appointed *defensores ecclesiarum* and occasionally performed judicial duties.[159]

It reads in the letter that John Defensor was sent by the pope to Spain in order to decide – as follows from the heading – three cases: of Januarius, bishop of Malaga,[160] of a priest from the same diocese and of a bishop named Stephen.[161] When charging John Defensor with a mission, the pope prepared a detailed and exhaustive instruction. Strictly speaking, the instruction consisted of three separate documents: a letter from Gregory to John Defensor (Capitulary I), a collection of legal texts to guide the papal representative in performing his duties in Spain (Capitulary II) and a copy of a court's decision that might have been an example (*exemplum*) in the case entrusted to the delegate.[162]

The first question to take into account is the cause and the legal basis of Gregory's appointment of a representative to resolve contentious legal issues in Spain. The cause is given in the opening line of the papal letter: "First and foremost, you need to examine the case of a cleric of our beloved brother and bishop Januarius" (*In primis requirendum est de persona presbyteri dilectissimi fratris et coepiscopi nostri Januarii*). However, Gregory's document does not

[159] Jones, *Le declin*, p. 252. *Defonsores ecclesiarum* fulfilled a major role in the time of Gregory the Great; they lost significance after his death; Gauthier, *L'utilisation du droit romain,* p. 419.

[160] Situated in southern Spain, at the foot of the Baetic Cordillera and at the shore of the Mediterranean Sea, the city of Malaga (Lat. *Malaca*) during the Roman rule was an important and flourishing economic centre. The city was located at *Via Herculea* (later *Via Augusta*), a route connecting Cadiz with Barcelona and further with Rome. According to *lex Flavia Malacitana*, Malaga enjoyed the status of a city confederated with Rome and of well-developed self-government (*Municipium Flavium Malacitanum*). From the end of the 3rd century, it was the bishop's seat. In the mid-6th century, the city – together with the entire south coast of the peninsula – was subdued to Byzantium ruled by Justinian; in AD 571 the city was seized by Visigoths. The period that follow was marked by a bitter conflict between the indigenous, Catholic inhabitants and Arian Visigoths; Leclercq, H. s.v. "Malaga." In *Dictonnaire d'archéologie chrétienne et de liturgie,* vol. X, Paris 1931, col. 1277f; Teja, R. s.v. "Malaca". In *The Princeton Encyclopedia of Classical Sites*, 2nd ed., Princeton 1979, p. 546f.

[161] *Epistola XLV seu Capitulare primum. Ad Ioannem Defensorem. Quid in Ianuarii, Malacitani episcopi, cuiusdam illius presbyteri, necnon Stephani episcopi causis inquirendum ac statuendum sit* (Epistle 45 or the First Chapter to John Defensor. What Should be Investigated or Handled by Januarius, Bishop of Malaga, One of His Priests or Bishop Stephen; Greg. Mag. ep. 45; PL 77, 1294.

[162] *Epistola XLV seu Capitulare primum. Ad Ioannem Defensorem; Capitulare II legum imperialium. Pro imumnitate clericorum, Ioanni Defensori eunti Hispaniam; Sententia Ioannis Defensoris. Exemplum sententiae pro Ianuario Malacitano episcopo*; Greg. Mag. ep. 45; PL, 77,1296-1301.

cast any more light on why and on what grounds the presbyter was sentenced. Gregory decided to handle the problem because the bishop of that cleric submitted a request (*petitio*) to the pope demanding a re-investigation of the case. The cleric, who should have been tried by his own bishop, was subject to the jurisdiction of another tribunal. "As for the priest – wrote Gregory to his delegate – we need to admit... that if he had an action brought against him, it should be his bishop to hear the case and not someone else."[163] Hence, there was a procedural impropriety; the papal order worded in one of the Justinian novels was not kept: "If anyone has a right to action against a clergyman, monk, deaconess, nun or ascetic, he shall first inform the holy bishop who has jurisdiction over such a person."[164]

If an action is brought against a member of the clergy, it should – according to the cited novel – be examined by the bishop. If the parties consented to his decision, it was transferred to a secular judge who passed a sentence. If either party failed to consent to the decision, the case was transferred to a local judge.[165] He was supposed to validate the bishop's decision. If he did otherwise, the suffering party had the right to appeal to a higher, secular court which was expected to adjudicate on the case "in compliance with laws" – *secundum legum ordinem.* This principle was violated in the case of the cleric, hence papal intervention.

When it comes to bishops Januarius and Stephen, they complained to the pope about the procedure adopted in their cases. Both, as the letter to Gregory reads, were allegedly unfairly judged by bishops instigated by a Comitiolus, a secular judge. Probably having been deposed from his office, Januarius was forced out of the church in which he sought shelter in some dramatic circum-

[163] *De persona presbyteri hoc attendendum est, quia si quam causam habuit, non ab alio teneri, sed episcopus ipsius adiri debuit;* Greg. Mag. ep. 45; PL, 77, 1296.

[164] *Si quis contra aliquem clericum, aut monachum, aut diaconissam, aut monastriam, aut ascetriam habet aliquam actionem, adeat prius sanctissimum episcopum, cui horum unusquisque subiaceat*; Greg. Mag. ep. 45; PL 77, 1296. According to comtemporary editions, it is Nov. 123; cf. *Novellae, Corpus Iuris Civilis*, vol. III, Schoell-Kroll, ed. The pope referred to Justinian's novel, although former rulers had already granted the clergy the privilege of being subject to ecclesiastical jurisdiction (*privilegium fori*); for more about this privilege, see: Biondi, B. *Il diritto romano,* p. 374ff; Gaudemet, *L'Eglise*, p. 240ff.

[165] Gauthier, *L'utilisation du droit romain*, p. 421, note 10; strange as it may seem, but even in the 12th century the execution of a sentence passed by a bishop was contingent upon the parties' consent. Also in Gratian's *Decretum*, the text of Justinian's novel quoted by Gregory was rendered as follows: *...si quidem utraque pars, his quae iudicata sunt, non adquieverit, iubemus per loci iudicem executioni perfecte contradi*; *Decretum,* 2,11,1,38.

stances.[166] On the other hand, Stephen was sentenced by an 'incompetent' synod of bishops, i.e. of another province.[167]

When delegating his representative to resolve the matter, the pope referred to the enactment that should be taken into account. The same statute was used in the case of the cleric. It was Novel 123. It says that the bishop should be judged by his own metropolitan who should resolve the case in accordance to the 'holy canons' (*secundum sanctas regulas*) and imperial enactments (*et nostras leges*). Since the procedure was violated, the matter was referred to the pope.[168]

From the legal point of view, the mission of John Defensor was not based on ecclesiastical law (Gregory does not make mention of the resolutions of ecclesiastical authorities, pope, councils or synods) but on imperial law. The pope ordered that secular laws be obeyed (*leges*), in particular those of Justinian and other preceding rulers. According to these laws, the matters of the clergy should be heard by ecclesiastical tribunals. Admittedly, in the pope's opinion, the highest tribunal was appointed by the Holy See which – as put by the pope in the document – "is the head of all Churches."[169] Yet, the entire court procedure was in line with imperial standards. It is clearly stated in the

[166] "As for Bishop Januarius, it must be known that he had been treated severly and against the laws, so that he was violently forced out of the Church" (*De persona Ianuarii episcopi sciendum est graviter omnino et contra leges esse actum ut violenter de Ecclesia traheretur*); Greg. Mag. ep. 45; PL 77, 1297; "As for the bishop [Januarius] mentioned above, we must concur that if no criminal action has been taken or proven against him, which is penalized by exile or deposition..." (*De suprascripti vero episcopi persona hoc statuendum est, ut si nulla contra eum criminalis causa, quae exsilio vel depositione digna est, mota sive probata est*). [...] "If, however, the bishops state that they agree to condemnation or deposition of the bishop to his detriment and for fear of the judge..." (*Si autem episcopi in praeiudicium condemnationis vel depositionis memorati episcopi se metu iudicis consensisse*); Greg. Mag. ep.; PL 77, 1294.

[167] "Because Bishop Stephen claims that some facts have been concocted against him and that he has been accused by false testimony and that the procedure has not been kept but his condemnation was unjust..." (*Quia ergo Stephanus episcopus in odio suo quaedam ficta, et de falsis se capitulis accusatum, neque aliquid ordinabiliter factum, sed iniuste se asserit condemnatum*); Greg. Mag. ep.; PL 77, 1295: "As for Bishop Stephen, we must note that he should not be brought before the court against his will nor tried by the bishops of a strange synod." (*De persona Stephani episcopi hoc attendendum est, quia nec invitus ad iudicium trahi, nec ab episcopis alieni concilii debuit iudicari*); Greg. Mag. ep.; PL 77, 1298.

[168] Cf. *Nov*. 123, 22.

[169] "If they said that he had neither a metropolitan nor patriarch, we must note that this case should be heard and decided by the Holy See, which is the head of all Churches." (*Contra haec si dictum fuerit, quia nec metropolitam habuit nec patriarcham, dicendum est quia a sede apostolica, quae omnium Ecclesiarum caput est*). Greg. Mag. ep.; PL 77, 1298.

heading and content of Chapter II: "It further recommends what must be done after collecting imperial enactments [i.e. rules of Roman law]."[170]

The instruction delivered to John Defensor quoted numerous norms of Roman procedural law. One of them was the requirement that the defendant be present at the trial. The pope requested his delegate to examine the cleric's case "profoundly, in his presence and when he gives an account before him [the delegate]" – *subtiliter, ipso presente et pro se rationem reddente*. Similarly, in the case of Bishop Stephen, the pope demanded that his representative find out whether "in his presence a testimony was made against him under oath or was entered into the record, and whether he was offered a right to respond and defend himself" – *Aut si eo praesente sub iureiurando contra eum testimonium dictum est, seu scriptis actum est, vel ipse licentiam respondendi et defendendi se habuit*."[171] In order to provide the grounds for the requirement of the defendant's presence in the trial, Gregory refers his representative to "the novel which says about witnesses in Chapter XVI."[172] Doing this, the pope underscored the principle of obligatory presence of the advocate: "So that no one complains later that the court records were prepared by one party and that the petitioner brought before the court in this town, where he gives his testimony, is summoned by the judge or the advocate to come to court and hear witnesses' accounts."[173]

The principle of defendant's presence in court during a criminal trial was based on Roman classical law, which is confirmed in *Digesta*: "The Divine Trajan stated in a rescript addressed to Julius Frontonus that anyone who is absent should not be convicted of crime;"[174] "The Divine Severus and Antoninus stated in a rescript that no one who is absent should be punished, and it is the present law that absent persons shall not be condemned; for the rule of equity does not suffer anyone to be convicted without being heard."[175]

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[170] *Quid in supradictorum causis sit agendum uberius praescribit, collectis imperatorum legibus*; Greg. Mag. ep.; PL 77, 1296.

[171] Greg. Mag. ep.; PL 77,1295.

[172] *Constitutione novella quae de testibus loquitur*, c. 16; the law quoted by the pope is Nov. 90,9 of AD 539; the pope quoted it in a somewhat altered version from that contained in *Autenticum* and *Epitome Juliani*. Greg. Mag. ep.; PL 77,1295.

[173] *At ne postea obiiciatur eis quia per unam partem gesta confecta sunt, oportet et illum qui impetitur, in ipsa civitate constitutum ubi testimonia dantur, admonitum a iudice sive a defensore advenire, et audire attestationes*; Greg. Mag. ep.; PL 77, PL 77, 1300.

[174] *Absentem in criminibus damnari non debere divus Traianus Julio Frontoni rescripsit;* D. 48,19,5.

[175] *Divi Severi et Antonini Magni rescriptum est, ne quis absens puniatur: et hoc iure utimur, ne absens damnetur: neque enim inaudita causa quemquam damnari aequitatis ratio patitur*; D. 48, 17,1.

When instructing his delegate on Bishop Stephen's case, Pope Gregory stressed the need to give testimony in writing and ordered to verify "whether [...] in his presence and under oath the testimony was given or written in the record."[176] The requirement complied with the rules of Roman procedural law of the postclassical period. *Cognitio* proceedings common in the Late Empire, in partucular under Justinian, laid emphesis on written records.[177] Gregory also reminded that the sentence should be written down – as provided in the Justinian Code, specifically in the constitution of AD 374 issued by Valentinian, Valens and Gratian.[178] Furthermore, Gregory insisted on questioning Bishop Stephen on condition that any testimony in his case is given under oath (*sub iureiurando*).[179] Most probably it was *iusiurandum calumniae*,[180] an oath of the party (usually of the accuser) adopted in *cognitio* proceedings that he will not act *calumniae causa*, i.e. with chicanery (convinced that his activity in the trial is groundless).[181] In Justinian law this obligation bound also legal representatives and advocates.[182] Under Justinian, the oath was extended and the parties swore the good will of witnesses. Even earlier, the constitution of Emperor Constantine of AD 334 required that witnesses swear an oath before testifying.[183]

In his instruction to the delegate concerning the amount of compensation for Januarius and Stephen, the pope stressed the importance of the oath sworn by the bishops: "Honourable Comitiolus will return to the bishop everything that, as corroborated by the bishop under oath, the latter had paid under

[176] *si* [...] *eo praesente sub iureiurando contra eum testimonium dictum est, seu scriptis actum est*; Greg. Mag. ep.; PL.77, 1295.

[177] Litewski, W. *Rzymskie prawo prywatne*, p. 400; Kaser, M. *Das römische Zivilprozeßrecht*, p. 447.

[178] C.J. 7,48,4: *Et in privatorum causis huiusmodi forma servetur, ne quemquam litigatorum sententia non a suo iudice dicta constringat*; cf. Greg. Mag. ep.; PL 77, 1300.

[179] Greg. Mag. ep.; PL,77, 1295.

[180] Gauthier, *L'utilisation du droit ramain*, p. 423.

[181] In Roman law *calumnia* was an intentional bringing of a legal action in a penal or civil lawsuit. In the civil trial, *calumnia* was also purposeful and groundless denial of the plaintiff's claim by the defendant. Moreover, this term covered the filing or abetting to file groundless criminal complaint as well as unjustified denunciation in a criminal case; Kaser, *Das römische Zivilprozeßrecht*, p. 519; Litewski, W. *Rzymski proces karny,* Kraków 2003, p. 109ff; Robinson, O.F. *Penal Practice and Penal Policy in Ancient Rome*, London 2007, p. 89f.; idem, *Criminal Law of Ancient Rome*, London 1996, p. 99ff.

[182] Kaser, *Das römische Zivilprozeßrecht*, p. 519

[183] C.J. 4,20,9: *Iurisiurandi religione testes, prius quam perhibeant testimonium; iamdumdum arctari praecipimus.*

compulsion, violence and anguish or whatever damage he might have suffered;"[184] "Let the honourable Comitiolus return all and compensate for any damage that the bishop, in accordance with his oath, suffered through oppression and violence."[185] The pope's point of view testifies to how much pressure the pope put on an oath taken under Justinian legislation. In classical law, an oath had the weight of proof, especially in cases when money was involved (*certa pecunia*). According to Justinian laws, an oath was used as proof in the entire court proceedings.[186]

With reference to Stephen's case, Gregory demanded that he be questioned in compliance with the rules applying to the accusing party and witnesses: "Accusers and witnesses should be carefully examined: what is their status and reputation; whether they do not suffer privation; whether they did not nurture hostility toward the bishop and whether they testified what they had heard, or that they are acquainted with one another..."[187]

In a brief collection of Roman legal texts, Gregory included a few fragments pertaining to witnesses. The collection "hardly known to anybody," as Gauthier put it,[188] most probably comprises extracts from Title 20 of Justinian's *Digesta* and from Novel 90, *De testibus.*[189]

The title of *Digesta* devoted to witnesses quotes an opinion of a learned jurist of the classical period Callistratus (2nd, 3rd c.) who draws attention to the witness's background when discussing eligibility.[190] Gregory's view on the

[184] *Gloriosus autem Comitiolus quidquid praedictus episcopus per violentiam atque insecutionem ipsius expendisse vel damnum pertulisse dato sacramento firmaverit, eidem episcopo restituere condemnetur*; Greg. Mag. ep.; PL, 77, 1296.

[185] *Sed et quaeque se in persecutionem ac violentiam eius expendisse vel damnum idem episcopus pertulisse iuraverit, idem memoratus gloriosus Comitiolus reddat ac satisfaciat*; Greg. Mag. ep.; PL 77, 1296.

[186] Kaser, *Das römische Zivilprozeßrech*, p. 480f; Litewski, *Rzymskie prawo prywatne*, p. 414.

[187] *Sed et de personis accusantium ac testificantium subtiliter quaerendum est [...];* Greg. Mag. ep.; PL77, 1295.

[188] Gauthier, *L'utilisation du droit romain*, p. 424.

[189] Ibidem.

[190] D. 22, 5, 3 pr. (Callistratus): *Testium fides diligenter examinanda est. Ideoque in persona eorum exploranda erunt in primis condicio cuiusque, utrum quis decurio an plebeius sit: et an honestae et inculpatae vitae an vero notatus quis et reprehensibilis: an locuples vel egens sit, ut lucri causa quid facile admittat: vel an inimicus ei sit, adversus quem testimonium fert, vel amicus ei sit, pro quo testimonium dat. Nam si careat suspicione testimonium vel propter personam a qua fertur (quod honesta sit) vel propter causam quod neque lucri neque gratiae neque inimicitiae causa fit), admittendus est.*

matter is similar;[191] it is very likely that when preparing his instruction the pope was inspired by this attitude.[192] The novel of Justinian also underlines the importance of a witness's reputation using the term *opinio*,[193] mentioned in the text authored by Gregory.[194]

Furthermore, when it comes to Stephen, Gregory requested "to consider carefully whether the process was held rightfully and whether the accusers were not the same as witnesses."[195] This wording of Gregory was in line with the requirement posed in *Digesta* to distinguish the accused from the witness with a view to excluding those witnesses who live in the accuser's house. The pope's opinion corresponds to that voiced by Paulus "that witnesses whom an accuser brings from his own house shall not be examined."[196]

All in all, in his instruction directed to John Defensor, Pope Gregory I liberally relied on Roman law standards that he was well-acquainted with.[197] The papal document *de facto* comprising a brief compendium of the principles of Roman procedural law was incorporated into many medieval legal compilations of canon law. The transfer channel was a collection entitled *Collectio Anzelmo dedicata.* It was a systematic work prepared in Italy (in Milan or its vicinity) ca. 882-896. A specific feature of the content arranged in twelve books has frequent references to Gregory's letters and regulations of Roman law mainly deriving from Justinian's codification. The unknown author of the collection included them as additions to Books 8-10.[198] The letter in question was also attached to Gratian's *Decretum,*[199] which helped it – due to its significance – enter the mainstream of general canon law.

When analyzing the instruction for John Defensor, a question arises of whether it is justified to assume that Pope Gregory as the supreme legislator

[191] Greg. Mag. ep.; PL 77, 1295:... *cuius conditionis, cuiusque opinionis, aut ne inopes sint, aut ne forte aliquas contra praedictum episcopum inimicitias habuissent* – "what is their status and reputation; whether they do not suffer privation; whether they did not nurture hostility toward the bishop."

[192] Gauthier, *L'utilisation du droit romain*, p. 424.

[193] Nov. 90,1 pr.: *bonae opinionis esse oportet testes.*

[194] Gauthier, *L'utilisation du droit romain*, p. 425.

[195] *...quaerendum est primo si iudicium ordinabiliter est habitum, aut si alii accusatores, alii testes fuerunt*; Greg. Mag. ep.; PL 77, 1295.

[196] D. 22,5,24 (Paulus): *Testes eos, quos accusator de domo produxerit, interrogari non placuit.*

[197] As pointed out by Hincmar of Reims, Pope Gregory the Great "again rested his reminders [*commonitoria*] on imperial laws"; similarly, Van Hove, *Prolegomena*, p. 225; cf. Conrat, M. *Geschichte der Quellen,* p. 8, note 5.

[198] Hemperek, Góralski, *Historia źródeł*, p. 59.

[199] *Decretum* 2,2,1,7**.**

in the Church of the beginning of the 7th century officially recognized Roman law as an auxiliary source of canon law (*fons subsidiarius*). This rule was never confirmed in his writings, nor does it ensue from the content of the document. Apparently, the pope employed the rules and principles of Roman law naturally because his right to intervene was based on the privileges granted to the Church by Roman rulers, in particular Emperor Justinian. Gregory became involved as an eligible depositary of power according to the principles introduced by Justinian and of his own will. The norms of Roman law were not treated as a subsidiary law in relation to canon law. Gregory, like other popes of that period, referred to Roman legal standards as if they were the binding secular law. He did not seem to 'canonize' Roman law, i.e. perceive it as a component of canon law.[200] Roman law was used, since it was a major constituent of the Roman culture whose legacy fell on the Church.[201]

This close and natural relation between Church discipline and Roman law was expressed in *Lex Ribuaria*[202] which reads:

> We also prescribe that if a Repuarian Frank or *tabularius* [manumitted in the church *per tabulam*] wished to free their slave in order to save their soul, or for a set price according to Roman law, let them free the salve at church before presbyters, deacons or the entire clergy and people and transfer him to the bishop together with the document; the bishop will order the archdeacon to prepare a document under Roman law by which the Church lives...[203]

The quotation is taken from one of the texts of tribal law of Ripuarian Franks, dwelling along the central Rhine and along the Main.[204] Besides Salian Franks, they were one of the tribes of Germanic Franks which began to settle in

[200] As provided for in the 1983 CCL, Can. 1290 on contracts.

[201] Gauthier, A. *L'utilisation du droit romain*, pp. 417-428. Cf. Van Hove, A. *Prolegomena,* p. 217f.

[202] As said in the introduction to the law (*introductio*), it was known in different codexes (manuscripts) as: *Lex Riboaria, Lex Ripuaria, Lex Ribuariorum, Lex Ripuariorum, Lex Ribuariensis, Lex Ripuarinensis;* Cf. LR 1 § 1 (59 § 1), MGH, LL 3/2.

[203] *Hoc etiam iubemus, ut qualiscumque Francus Ribuarius, seu tabularius servum pro animae suae remedium seu pro pretium secundum legem Romanam liberare voluerit, ut eum in ecclesia coram praesbiteris, diaconibus, seu cuncto clero et plebe, in manum episcipi servum cum tabulis tradat, et episcopus archidiacono iubeat, ut ei tabulas secundum legem Romanam, qua ecclesia vivit, conscribere faciat* [...]; LR 58 § 1 (59 § 1), MGH, LL 3/2.

[204] The collection was edited in the 8th c.; cf. Sójka-Zielińska, K. *Historia prawa*, 9th ed., Warszawa 2006, p. 53.

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Gaul in the 3rd century. Even after creating the Franconian state by Clovis (481-511), no uniform legislation was developed; the laws effective in the country's territory were those of the local tribes which composed Franconian monarchy. These laws (*leges barbarorum* as opposed to *leges romanae*) were predominantly written customary laws of a tribe used in court procedure. The monuments of these laws were saved in Latin, which was often flawed.[205] The above-quoted extract of the list of enactments concerned a well-known issue in the postclassical Roman law of liberation from slavery before the Church (*manumissio in ecclesia*).[206] The law stated that when a Ripuarian Frank or a manumitted in the Church wish to free a slave according to Roman law, they should appear in front of the community and present the bishop with a document prepared in line with the requirements of Roman law – that "the Church lives by." This sentence entered the history of law for good, yet it did not follow naturally that Roman law of the time (i.e. in the 8th c.) played the role of an auxiliary law (*fons subsidiarius*) to canon law. It was merely a manifestation that, in accordance with the principle of personality of law – widely known and applied back in antiquity and in the early Germanic laws – in the period of abundance of tribal laws, the representatives of the Church, including the entire Church community, ought to accept the guidance of Roman law as if it were their own. Most probably this idea referred solely to the clergy of Roman descent and in the issues falling both within the secular dimension and the domain of the Church.[207]

The phrase *secundum legem Romanam, qua Ecclesia vivit* made a long way from the sentence coined in *Lex Ribuaria* to the topos frequently quoted by different authors. Owing to its brevity, the sentence made a perfect catchphrase and permanently entered the legal rhetoric. Irrespective of the fact that all catchphrases and mottoes are exposed to too frequent and unquestioning a citation,[208] it has conveyed the relation of Church law and Roman tradition

[205] More about tribal laws, see Berman, H.J. *Law and revolution*, p. 49ff; Sójka-Zielińska, K. *Historia prawa*, p. 51f.

[206] This manner of manumission was introduced in the Christian empire; an independent *manumissio* was recognized by Constantine the Great (C.J. 1,13,1 (316); C.Th. 4,7,1 (321). Liberation of a slave was an act in law and consisted in the slave's owner making a statement at church, mostly during festivals, before a bishop and Christian community; cf. Kaser, M. *Das römische Privatrecht,* 2nd ed., vol. II, München 1975, p. 133ff. Manumission before a Christian communion was one of the public and legal duties of a bishop; cf. Jóźwiak, S. *Państwo i Kościół,* p. 177.

[207] Van Hove, *Prolegomena*, p. 221.

[208] Cf. Fürst, *Ecclesia vivit,* p. 17f.

ever since. This legal maxim (*paroemia*) is also used to describe the phenomenon of reception of Roman law by the Church in the 12th century.

To conclude, it must be stressed that when applying Roman law the Church perceived it as a state law binding in a territory and not as a law subsiding canon law. At times, Roman law was useful since it offered privileges to the Church and the clergy warranted by the emperors. In other circumstances, the Church had recourse to Roman law with a view to strengthening ecclesiastical enactments, which from then on were effective both in the ecclesiastical and secular dimensions. Furthermore, the laws passed on secular matters were deemed to encompass Church matters, certainly with the exception of those opposing the canons. Roman law so perceived and common for all the imperial subjects implemented numerous principles complying with the most fundamental principles of every community, including Christians.

The problem illustrated in the print is the lack of moderation of the clergy when it comes to the accumulation of wealth, in this case a variety of benefices that they defend against secular tribunals. The print depicts the papal court (left) – the only tribunal having jurisdiction over such matters – as well as a cleric (right) standing by his church (benefice).

Concordia discordantium canonum, University Library of John Paul II Catholic University of Lublin, ms. 1, Causa XXI, f. 185v.

Flanked by cardinals, the pope debates with jurists on the clerics' right to draw up last wills and dispose of the Church's property.

Concordia discordantium canonum, University Library of John Paul II Catholic University of Lublin, ms. 1, Causa XII, f. 145v

CHAPTER TWO

THE ALLURE OF ROMAN LAW

5. The Development of Legal Science between the 11th and 13th Centuries

The prevailing impact of Roman law on the law of the Western Church rose to its climax in the medieval era, the period of mental awakening in Europe coinciding with the revival of Roman law studies and the rise of canon law as a distinct province of law.[209]

The evolution of law in the Middle Ages was contingent upon a number of factors. One of them, but of utmost significance, was the establishment of the first European universities. They were a magnificent corollary of the medieval intellectual culture, "if not for them, the evolution of knowledge and intellectual development of entire societies would have been virtually impossible."[210]

[209] The literature on this epoch, so crucial for the history of Roman law, is vast; it was the classical work by Carl Savigny, *Geschichte des Römischen Rechts im Mittelalter*, vol. I-VII, 2nd ed., Heidelberg 1850 (Nachdruck, Darmstadt 1961) that actually blazed the trail for further studies; contemporary literature on the subject is presented by Haskins, C.H. *The Renaissance of the Twelfth Century,* 5th ed., Cambridge 1971, p. 223 (bibliographical note); P. Stein, *Roman Law in European History*, Cambridge 2007, p. 68 ff.; Berman, *Law and revolution*, p. 582, note 2.

[210] Sondel, J. *Zawsze wierny. Uniwersytet Jagielloński a Kościół rzymskokatolicki*. Kraków 2007, p. 13; cf. Berman H.J. *Faith and Order. The Reconciliation of Law and Religion.* Emory 1993, p. 39. The literature on the beginnings of universities in Europe is relatively vast; literature on the subject is presented by Haskins, *The Renaissance,* p. 397 (bibliographical note).

In the Middle Ages, unjustifiably depicted as the period of stagnation and backwardness, universities enjoyed incontestable authority.[211]

A notable fact is that the first university which opened in Bologna at the end of the 11th century was actually a school of law holding courses in Roman law, referred to as civil law (*ius civile*), and canon law being the most universal and dominating legal systems in Europe at that time. Due to the fact that they underlay legal courses in many universities, these disciplines were commonly known as "learned laws". It was the first time in the history of science that law had been taught as an independent, system-based field of knowledge, which, in general terms, explored individual norms, acts and judicial decisions.[212]

As a scientific centre gathering distinguished professors of "both laws", Bologna attracted knowledge seekers from all over the Europe. The position of the city as the legal centre or "mother of law" was unchallenged. Located in central Italy, it was teeming with teachers and scholars (at the turn of the 11th century Bologna was home to students of twelve nationalities).[213] After some time, scholars discerned the need to establish an organisation that would have helped them defend their rights, in particular before the municipality. On the one hand, city authorities looked favourably on the influx of foreigners; on the other, both sides were very often at variance. When thrown into an unfamiliar setting, the scholars originating from the same regions and speaking the same language established the so-called 'nations' in order to provide one another with mutual assistance. They were bound with their teachers only by a teaching agreement and were supposed to pay for their studies. They were not subject to professors' power, including their court jurisdiction, for professors had no more authority over their students than master artisans over their apprentices and disciples. The constantly growing

[211] Their tremendous influence on medieval life has caused a theory to be advanced that *studium,* besides papacy and the empire, constituted a third universal power. Universities were highly regarded by both popes and emperors who strove for the support of their arguments; cf. Sondel, *Zawsze wierny,* p. 13f. Popes, beginning with Gregory IX who authored the collection, *Decretales Gregorii IX,* when promulgating ecclesiastical collections, would often transfer them to universities.

[212] Berman. *Law and revolution*, 152.

[213] According to contemporary estimates, in 11th and 12th centuries, Bologna University had between 1000 and 10,000 students; cf. Berman, *Law and revoltution*, p. 124. As suggested in Koschaker, P. *Europa und das römische Recht*, 3rd ed., München 1958, p. 69, in the mid-12th century the number of students totalled 10,000.

number of students paid professors for the courses, which escaped the control of the state, ecclesiastical or city authorities.[214] A community of shared goals, the need for mutual aid and safeguarding of one's private interest as well as the distinctiveness of legal circumstances in a strange town gave rise to a concept of commonly shared corporation (*universitas*) or a society of masters and scholars (*universitas societas magistrorum discipulorumque*). The original idea was to have an organisation resembling medieval guilds that gathered independent craftsmen, apprentices and trainees of the same craft or some related specialisations.

The manifestations and consequences of these tendencies were finally worded in the constitution *Habita* by Frederick I Barbarossa (1155-1190), a king and an emperor, published in 1158 at the request of Bologna professors and students of Roman and canon law. Although the document primarily concerned the students from outside Italy, it was general enough to be a milestone in the process of isolating the tutors and the taught as an independent community within the walls of a university town. The document granted everybody involved in the academic life, that is, professors (masters) and scholars, an unrestrained right of arrival and safe residence in the university town. Primarily, the emperor excluded all foreign students from the jurisdiction of city courts in both civil and petty criminal offences. Pursuant to the imperial document, lay students fell under the jurisdiction of their own professor (named *dominus et magister*) and clerical students under the jurisdiction of a bishop, in accordance with the privileges of the priesthood.[215]

The privileges bestowed by the emperor became a point of departure for further development. All medieval universities, regardless of their organisational structure, rested their power and significance on three major privileges: legal autonomy (including the right of appeal to the pope), the right to strike and a monopoly on the conferral of university degrees (bachelor, licentiate, doctor). University diplomas authorised the holder to teach literally everywhere (*licentia ubique docendi*). Bologna University, both because of the established form of organisation and teaching methods, along with Paris Uni-

[214] They were not subject to the exclusive authority of the Church, since the schools of legists and canonists emerged outside the ecclesiastical organism, and scholars were not always members of the clergy; cf. Kurtscheid, H. "De utriusque iuris studio saec. XIII." In *Acta congressus.* vol. II, p. 311ff.

[215] Cf. Coing, H. "Die juristische Fakultät und ihr Lehrprogram." In *Handbuch der Quellen und Literatur der Neueren Europäischen Privatrechtsgeschichte*, vol. I, p. 63f.

versity which boasted a separate system, set a paradigm to follow by other universities of the medieval era.[216]

Another crucial factor inspiring the progress of legal science in the 11th and 12th centuries was the clash between *imperium* and *sacerdotium*.[217] As shown in the literature on the subject, the revival of forgotten parts of Justinian's codifications coincided with a dispute between the papacy and empire commencing in the mid-11th century.[218] It was initiated by Popes Leo IX (1048-1054) and Nicholas II (1058-1061) and continued by their successors with Gregory VII (1073-1085) taking precedence through his ecclesiastical reform. He authored a famous platform document whose brief *exposé* was entitled *Dictatus papae* of 1075. The document proposed twenty seven concise statements of powers of popes intended to grant the supremacy of *sacerdotium* over *imperium.*[219] With the intention of reinforcing their authority, popes ordered that archives and libraries be scoured for texts corroborating that their programme anticipating an increased severity of discipline among the clergy (combating simony and priest marriages), liberation of the Church from secular authority (dukes and lords) and taking hold of the highest power in the Church were by no means

[216] The predecessors of early univeristis were monasteries and cathedral schools. It is worth noting that medieval universities were the institutions of canon law (they would not have been established and run without the Church's support) and hence almost all were subject to papal authority ever since their establishment. The right to teach (*licentia docendi*) at Bologna University was granted by Archdeacon of Bologna with papal authorization (in other Italian towns by the local bishop). The first statute of Paris University was the ordinance of Pope Innocent III of 1215 concerning the course of studies in *artes liberales*. Of similar significance for this university was the bull *Super specula* of Pope Honorius of 1219; for centuries, Paris University was overseen by popes and was governed – besides its own statute approved by the Holy See – by the regulations of canon law; Wielgus, S. "Znaczenie prawa dla życia społecznego, moralnego i dla rozwoju nauki w średniowieczu." In *Prawo. Kultura. Uniwersytet*, Lublin 1999, p. 28; Vetulani, A. *Początki najstarszych wszechnic środkowoeuropejskich*, Wrocław 1970, p. 43ff.

[217] It should be noted that, as pointed out by J. A. Brundage, *Medival Canon Law*, p. 177, most medieval conflicts between the ecclesiastical and secular power, e.g. the dispute between the ruler of the Holy Roman Empire, Henry IV, and Pope Gregory VII concerning the appointment of bishops (investiture); the issue of Thomas Becket, archbishop of Cantenbury, clashing with King Henry II, king of England; a dispute between the rules of the german Hohenstaufen dynasty and the papacy; a dispute between Pope Boniface VIII and Philip the Fair, king of France, were in fact legal disputes. Canonists had a vital role in resolving the disputes, their role being that of collecting and ordering arguments which provided legal and theoretical justitication for the legitimacy and boundaries of the two powers.

[218] Ibidem, p. 133.

[219] Latin text in *Das Register Gregors VII.* MGH Epp. sel. 2.

a *novum* but an attempt to restore former prerogatives resulting from the primacy of the Bishop of Rome as successor to Peter the Apostle. The Gregorian Reform, the first major turning point in the history of Europe[220] spearheaded a new period in the history of ecclesiastical law.

The reformers sought the formulas and authority for the programme in the ancient discipline of the Roman Church and investigated Italian archives in order to prepare collections of papal and council texts. The most rewarding result of this search was the re-discovery of the monuments of Justinian's legislation, partly forgotten in the West. It was allegedly at that time when the most extensive part of Justinian's codifications was found, namely a collection, systematically arranged in fifty books of texts by the most outstanding Roman jurists of the classical period, entitled *Digesta* or *Pandecta*. Sunk into oblivion at the beginning of the 7th century, the collection was brought to light again.[221] Besides, a hitherto unknown, new edition of Justinian's *Novels* was found referred to by legists as *Authenticum*.[222] *Digesta* and *Novels*, together with other previously known collections of Justinian's legislation, i.e. Justinian Code (a collection of imperial acts) and *Institutions* (a concise legal textbook elevated to the status of binding law) became available for legists in the second half of the 11th century.[223] All of them, but primarily *Digesta*, were the focal

[220] Berman, *Law and revolution*, p. 99ff.

[221] One of the oldest and best-preserved manuscripts of *Digesta* is a 6th or 7th century *Littera Pisana.* Until the 7th century, the manuscript was kept in Pisa (hence its name), and in 1406 was transferred to Florence (hence its other name: *Florentina, Codex Florentinus*), where it has been preserved to this day in the Medici Library; cf. Grendler P. F. *The Universities of the Italian Renaissance*, p. 438.

[222] As late as to the 11th century, the only source of Justinian's novels was a collection entitled *Epitome Iuliani* (*Epitome novellarum Iustiniani*)*;* it contains 124 novels from AD 535-540 in Latin arranged chronologically. The collection was authored by Julian, a legal professor associated with the Constantinople school (hence the collection title). Intended for the Western Empire, mainly Italy, the collection was highly valued by glossators. It was later supplanted by a collection called *Authenticum* (or *Liber authenticorum*, *Libri authentici, Authentici*) including 134 Justinian's constitutions from AD 535-556 in Latin (Latin novels were preserved in the original, the Greek only in Latin translation). This collection probably derived from Italy. The name *Autenthicum* refers to the fact that initially Irnerius regarded it to be a fake, but later changed his mind; *Handbuch der Quellen.* vol.I, p. 162f; Gaudemet, *Institutions*, p. 768f; Van Hove, *Prolegomena*, p. 215; Vetulani, A. *Dekret Gracjana i pierwsi dekretyści w świetle nowego źródła,* Wrocław 1955, p. 16.

[223] All Justinian's collections in the West were published after the emergence of universities. The first editor (1583) was a French humanist Dionisius Gothofredus (1549-1622), who named them collectively *Corpus Iuris Civilis* (as opposed to a similar collection of canon law *Corpus Iuris Canonici*).

point of researchers and the object of an in-depth exegesis of the European schools of law, which resulted in rich legal literature and incentivized the progress of legal science. In the works of the Bologna teachers, the wealth and excellence of Roman law gained a new prestige; when interpreting the source texts, the Bologna scholars were so creative as to employ new research methods.

The indisputable father of Roman legal studies in medieval Bologna of the 11th century was Guarnerius (also identified as Gernerius, Warnerius, Wernerius or Vernerius) historically known as Irnerius (died ca. 1125).[224] With utmost certainty, he had some predecessors[225] but, owing to his matchless individuality and a new method of construing legal texts, Irnerius enjoyed great authority and renown, which was reflected in his nickname *lucerna iuris* (the Torch of Law).[226] He managed to gather a number of first-class students, including the so-called Four Doctors (*quattuor doctores*): Bulgarus, Martinus, Ugo and Jacobus. Continuing the work of their master, they consolidated the school's position which was further immortalised by: Placentinus (died 1129), Azo (died 1235), Odofredus (died 1265) and Accursius (1185-1263).

The medieval concentration on Roman law initiated by the activity of glossators had a pan-European impact, especially visible in the territory of the First German Reich. The mounting popularity of this discipline was fuelled by the idea of the continuation of the Roman Empire that emerged during the reign of Otto I, who restored the imperial title to himself. The discipline of

[224] Cf. Kantorowicz, H. *Studies in the Glossators of the Roman Law*, Cambridge 1938 (reprint Aalen 1969), p. 33-65. According to Haskins, C.H. *The Renaissance,* p. 199, Irnerius was the first to draw a dividing line between law and rhetoric by giving it a status of an independent field of research relying not only on extracts and summaries but on the complete text of *Corpus Iuris.*

[225] Europe had older legal centres before Bologna – in Rome, Pavia and Ravenna. These locations in Italy "have been especially claimed as pre-Bolognese schools of law"; Rasdhall, H. *The Universities of Europe in the Middle Ages*, vol. 1, Oxford 1936, p. 105. France also abounded in Roman law experts, which is corroborated by the collections of this law created or circulated in the country and in the compilations of canon law exploring the Roman legal system. The schools of liberated arts established by cathedrals and monasteries also taught law as part of liberated arts, that is: grammar, rhetoric and elocution; Van Hove, *Prolegomena*, p. 457. Bologna before Irnerius saw the activity of Pepo, "a bright and shining light of Bologna;" cf. Berman, Law and revolution, p. 582, note 2; Haskins, *The Renaissance*, p. 23; 199. For more on the schools of law in Ravenna and Pavia, see Leicht, P.S. "Ravenna e Bolonia." In *Atti del congresso internationale di iritto romano,* vol. I, Pavia 1934, p. 277ff; Vaccari, P. "Pavia e Bologna." In ibidem, p. 291ff.

[226] "He was", says Odofredus in the next century, "a man of the greatest renown;" "the lamp of the law and the first to throw light on our science;" Haskins, *The Renaissance*, p. 198.

Boniface VIII

Roman law was looked upon favourably by the rulers of the Holy Roman Empire of the German Nation (Lat. *Sacrum Imperium Romanum Nationis Germanicae*) who considered themselves the successors of Roman emperors, particularly Justinian. Consequently, Roman law recovered its practical character. The experts in this ancient law, called legists, were in demand and highly appreciated during the conflict between the papacy and the empire spanning the entire 12th century. The regulations of Roman law unambiguously gave precedence to the office of Emperor Justinian over the Church; hence, it was harnessed to this struggle. The principles and the reasoning of Roman law turned a significant political tool and furnished a number of arguments to the proponents of imperial interference with the internal Church's affairs. Besides, Roman law strengthened the position of emperors in internal affairs because it underlined the absolute power that the rulers wielded back in Rome.[227] Hence, emperors, ready to implement their universalist aspirations, protected the legists and employed them in their courts and chancelleries.

The learned legists were also supported by the municipality. In Western Europe of the 11th and 12th centuries, besides political and cultural transformation, the social and economic life underwent a significant revival. A material component of social and economic life as well as a driving force of geographical expansion was international and sea trade. Banks, fairs and markets flourished to become fundamental institutions of economy and social life. The thriving trade entailed the growth of craft and manufacture and consequently of guilds. A dynamic growth of towns stimulated consumption and exchange. Their recovery contributed to the economic and social transformation of Western European life.[228] Together with the burgeoning trade and craft, the inhabitants of many Italian cities witnessed improvement in the standard of living, involving the refinement of cultural life.

[227] The ruler's position – superior and dominating – in relation to legal order was determined by two old Roman law principles: *Princeps legibus solutus est* (D. 1,3,31) – "The emperor is not bound by the law", and: *Quod principi placuit, legis habet vigorem* (D. 1,4,1 pr.) – "That which pleases the emperor has the strength of law." The former made an emperor immune from general legal norms. Despite this principle, an emperor's behaviour was not free, at least during the Principate, from legal norms, as stressed by some rulers, e.g. Alexander Severus (cf. C.J. 6,23,3) and Justininan who, relying on the previous opinions of Severus and Antoninus, included in *Institutiones* (Inst. 2,17,8) the following sentence: "Although... we are free from the legal ties, we live according to law." On the other hand, a ruler – as worded in the other principle – had a capacity to amend the law at his discretion.

[228] Cf. Dawson, Ch. *Religion and the Rise of Western Culture*, London 1950, p. 191ff; Le Goff, J. *Time, Work, & Culture in the Middle Ages*, Chicago 1980, p. 107ff.

The economic growth necessitated the implementation of a more universal and wide-ranging law corresponding to the new economic relationships. Roman law would have perfectly sufficed to manage the new precapitalist forms of economy; unfortunately, it was forgotten. The long established (Longobard) law was more of an agrarian character and primarily governed the rights of landowners and regulated feudal relationships; on the other hand, Roman law was perfectly suited to handle the product and financial turnover which was on the constant increase across Italy, especially after the Crusades, and largely contributed to the wealth of city dwellers and greater political sway of Italian communes. Roman law furnished ready-to-use instruments to regulate the new legal relationships, especially in the area of property law and the law of obligations; the principles and methods of Roman law safeguarded the security of any exchange agreements.

Another – besides Roman law – universal legal system playing a significant role in the integration and organisation of medieval Christianity and overwhelmingly influencing the entire legal order of Europe was canon law (*ius canonicum*).[229] Of considerable import for the development of new canon law was the fact that by introducing the programme of an overall revival of its organisation, development of judicature and unremitting struggle for supremacy over the empire under the Gregorian Reform, the Church saw the need for developing its own legal system, isolated and independent from imperial law. The emergence of new canon law was a prerequisite for the centralisation of power in the hands of the pope and the Roman Curia. This objective required the existing sources of canon law to be appropriately ordered, which was no simple task. Throughout the centuries, different ecclesiastical lawmaking institutions (councils, popes, provincial synods, bishops) had issued numerous legal regulations. Emerging in different circumstances and in different regional churches, they addressed dissimilar economic and social conditions at various stages of the development of the state, including slavery and feudal system. They originated in many parts of the Christian world beginning with Asia Minor through North Africa, Greece, Italy, Spain, Germany, France and the British Isles. The ecclesiastical regulations were not only dispersed but also at times contradictory; these contradictions were even reinforced by the texts on disputable dogmatic issues derived from the writings of various Church authors. The

[229] Berman, *Law and revolution*, p. 113ff, stresses that European kingdoms and other communities began to develop their own, secular legal systems in compliance with or in opposition to canon law.

number of canons had been growing through the centuries to be put together into different compilations (collections) of very often private character and localized impact.[230] However, none of these compilations testified to the existence of a conscious legal system. Likewise, none of them aspired to be definitive and commonly binding.[231] Such a state of affairs was counter-productive, since the collections were not sufficient to support a uniform system of an ecclesiastical law to counterbalance the imperial (Roman) law. Its actual establishment and development of binding interpretation rules falls at the end of the 11th and to the 12th centuries, that is, the Gregorian Reform.

In that period, a number of compilations were produced fostering the idea of strengthened papal authority, concentrated papal power and of the validation of the reforms undertaken by Pope Gregory VII. The most important of them was a Rome-published short collection of an unknown author entitled *Collectio 74 titulorum* (Collection of 74 Titles) or *Diversorum sententiae Patrum*. It accumulated both legal and theological texts, the opinions of first popes and councils legally justifying the papal authority over the whole Church and his supreme power, both in relation to the clergy and laymen, including monarchs. This collection became "a superb tool of ecclesiastical reform."[232] Later, some other collections followed which, together with the Collection of 74 Titles, are jointly labelled as the Gregorian Collection. All of them were created in Italy under the auspices of Rome (supposedly, they were all personally inspired by Gregory VII)[233] and constituted a vital stage in the process of the ecclesiastical reform.[234]

After the death of Gregory VII, and before Gratian, many new collections were published, including those ascribed to Ivo, bishop of Chartres, a lawyer, statesman and superb writer. His work of 1090, *Panormia*, popularized in

[230] The most well known was the 1012 collection by Burchard of Worms (*Decretum Burchardi Wormatiensis*), the next work is attributed to Ivo of Chartres and entitled *Collectio Tripartita,* or originating in Fanconia an apocryphal work of the mid-9th century by Pseudo-Isidor (*Collectio Pseudo-Isidoriana*); cf. Hemperek, Góralski, *Historia źródeł,* p. 57ff; Subera, *Historia źródeł,* p. 69ff; Vetulani, *Dekret Gracjana*, p. 5ff.

[231] Cf. Berman, *Law and Revolution*, p. 199ff.

[232] Subera, *Historia źródeł*, p. 74.

[233] Vetulani, *Dekret Gracjana*, p. 11.

[234] This group of collections also include: *Collectio* by Anselm of Lucca (*Collectio Anselmi Lucensis*), *Collectio* by Card. Deusdedit (*Collectio Cardinalis Deusdedit*) and *Capitulare* by Card. Atton (*Breviarium Cardinalis Attonis*); for more on the political purpose of these collections, see: Fournier, P., Le Bras, G. *Histoire des collections canoniques en Occident,* vol. II, Paris 1931, p. 4ff; Van Hove, *Prolegomena*, p. 321; Vetulani, *Dekret Gracjana*, p. 5ff.

France and Germany, was the first endeavour to embrace, in a coherent and non-confrontational manner, the entire body of the ecclesiastical law in line with the spirit of the Gregorian Reform. In his legal writings, Ivo endorsed the idea of the Gregorian Reform but at the same time defied too extensive an interference of popes with the internal affairs of local churches through the activities of papal legates.[235]

This abundance of legal initiatives testifies to the tremendous role that the leaders of the Gregorian Reform attributed to law. This approach was strictly related to the assertion of legislative rights by the papacy. It was the first time when Gregory VII had stated that the pope was authorised to "create new laws in accordance with the needs of the times."[236] These new ecclesiastical statutes, called decretals, promulgated by Gregory and his successors, were not regarded as supplementary to the former canons but as a new law.

The cradle of canon law studies, as distinct from theology, was Bologna University. Concurrent with the Bologna glossators undertaking and extending the research of the source texts of Justinian law, canon law entered its new stage of development. Of groundbreaking influence for the time was the work of a little-known Monk, Gratian, who, just as the legist Irnerius, was based and worked in Bologna at roughly the same time as the latter (Gratian was possibly a little younger than Irnerius).[237] The Master of Bologna left a work dated 1140 and entitled, probably by the author himself, *Concordia discordantium canonum* (Concord of discordant canons), later shortened to *Decreta* or *Decretum*. This collection has remained the most exhaustive compilation of ecclesiastical law ever since. Its primary purpose was indicated in the title – the concord of discordant canons. By applying a scholastic method and Irnerius's method of studying legal texts, Gratian inventively isolated and gathered diverse and rich source material taking account of and aligning old regulations. His aim was to determine the legal principles and substantiate them by including specific texts and presenting relevant legal cases resolved by asking apt questions. Gratian preceded the source texts by his own introductions (*dicta Gratiani*) indicating their origin and trying to explain any existing contradictions. Gratian's *Decretum* put a definite end to the period of miscellany and multitude of canon law collections.

[235] Ibidem, Vetulani, p. 32.

[236] Berman, *Law and Revolution*, p. 202.

[237] Little is known about Gratian; he remains a mysterious figure. Extensive literature on the author of *Decretum* is given by Van Hove, *Prolegomena*, p. 338f. See also Kuttner, S. "Graziano: l'uomo e l'opera." *Studia Gratiana* 1(1953), p. 17ff; Vetulani, *Dekret Gracjana*, p. 29f.

Gratian's work was recognized as a fundamental and definitive exposition of canon law.[238] Beside the source texts of Roman law being the basic focus of research in European schools of law, Gratian's collection would be quoted by popes, councils, synods and ecclesiastical courts as a reliable and authoritative source. The learned monk from Bologna not only managed to compile dispersed and frequently contradictory portions of Church's legislation, but was also the first person to expound and align different texts by following a method. If not for his input, the study of canon law would have never "emancipated" from theology and Roman law.[239]

Gratian's *Decretum* as a methodological treaty scholarly exploring thousands of source texts underlay the teaching and commentaries in schools and contributed to further evolution of canon law. The work was soon interpreted in numerous glosses, commentaries, treaties and monographs; for many years, it remained the exclusive source of knowledge of ecclesiastical law.[240]

The implementation of scholasticism contributed to the development of legal science; it exerted a considerable influence over the research and literary output of medieval scientists. The originator of the scholastic method was Peter Abelard (died 1142), "the first thinker"[241] of the Middle Ages, "first great modern intellectual figure – within the limit of the term 'modernity' in the twelfth century",[242] who expounded his principles in the famous work, *Sic et non* (Yes and No). This work, known as "the medieval Discourse on Method" is a compilation of seemingly contradictory extracts of the Bible and Church Fathers on some important issues, in particular those of theology and philosophy. When it comes to methodology, the most important part is the prologue to *Sic et non* which lays out the rules called the rules of concordance. These principles help to

[238] In Berman's opinion, *Law and revolution*, p. 143, Gratian's work "was the first comprehensive and systematic legal treatise in the history of the West, and perhaps in the history of mankind – if by "comprehensive" is meant the attempt to embrace virtually the entire law of a given polity, and if by "systematic" is meant the express effort to present a work that sees a subject as one coherent body, in which all the parts are viewed as interacting to form a whole."

[239] Cf. Müller, L. "Entwicklung und Stand des Kirchenrechts und der Kirchenrechtswissenschaft in der Lateinischen Kirche." In *Territorialità e personalità nel diritto canonico ed ecclesiastico. Il diritto canonico di fronte al terzo millennio* (= Territoriality and personality in Canon Law and Ecclesiastical Law. Canon Law Faces the Third Millennium, Erd, P. Szab, P. eds., Budapest 2002, p. 32.

[240] Cf. Hemperek, Góralski, *Historia źródeł*, p. 77f; Schulte, *Geschichte der Quellen,* vol. I, p. 46ff; Van Hove, *Prolegomena*, 1945, p. 339ff.

[241] Le Goff, J. *La civilisation de l'occident médiéval*, Paris 1964, p. 557.

[242] Idem, *Intellectuals in the Middle Ages*, Cambrigde 1944, p. 35.

A portrait of St. Thomas, H. Schedel, *Cronica Mundi*, Nurnberg 1493, f. CCXV, University Library of John Paul II Catholic University of Lublin, ref. no. XV.261

remove those apparent contradictions occurring between the quoted texts. Although Abelard is regarded as the originator of the scholastic method, its actual inventors were some earlier canonists, in particular Bernold of Constance (died 1110) and Ivo of Chartres (died 1116). The hermeneutics they applied was pivotal in the early stages of development of the scholastic method.

In his work devoted to the reform and the sources of ecclesiastical law, *De excomunicatis vitandis, de reconciliatione lapsorum et de fontibus iuris canonici* (ca. 1091), and in some other writings, Bernold of Constance pointed to the rules of appropriate interpretation and alignment of different legal texts. He proposed that when interpreting law, the following conditions should be met: examination of the entire context of norms (1), comparison of different norms (2), consideration for place, time and people related to the norms (3), examination of the motives behind established laws (4), deliberation upon the character of a norm, its provisional or permanent validity (5), examination of authenticity of texts (6).[243] Not only did Bernold establish these rules but he also applied them to patristic texts and canon law. Similar principles regarding legal norms are to be found in the collections of Ivo of Chartres.[244]

The juxtaposition of the rules of concordance put forward by Abelard with the rules of alignment of texts established earlier by pre-Gratian canonists unmistakably demonstrates the actual origin of the scholastic method with the rules at its core. It is beyond doubt that the scholastic method was developed and updated later under the influence of the logical writings of Aristotle as well as a new method of debate worked out by the authors interpreting and commenting on these works. Nevertheless, the lawyers based in Bologna University and later in the universities of Padua, Paris and Valencia exerted the greatest influence over this development. They lectured on and interpreted the compilations of canon law produced at that time beginning with Gratian's *Decretum* and later continuing with other collections.[245]

[243] Hemperek, Góralski, *Historia źródeł*, p. 74; Wielgus, *Znaczenie prawa*, p. 20.

[244] The principles were introduced in the preface to *Panormia.* On the other hand, this preface was included in the manuscripts of *Decretum* and *Tripartita*; it was even copied separately as a distinct treaty entitled *Tractatus de consonantia canonum* (Treaty on Conformity of Canons). According to Vetulani, *Decretum Gratiani*, p. 27, this testifies to an extensive interest in the methods of dissolving contradictions in both theological and legal texts by the European intellectual circles.

[245] Shortly after *Decretum Gratiani*, some other official collections of papal legislation were issued: *Decretales* by Gregory IX (1234), *Liber sextus* by Boniface VIII (1298), *Clemeninae* (1317). Furthermore, there were other binding collections gathered at the onset of the 16th century in private collections called *Extravagantes of John XXII* and *Common Extravagants.* All these

The research undertaken by the legal experts of Bologna (and of other, later established universities) culminated in the rise of specific genres of scholarly writing, later accepted and commonly used by all medieval scientists.[246] The first of them were of the so-called glosses (Lat. *glossae, glossulae*), i.e. remarks. Short remarks explaining more complex terminology and expressions, rarely used in medieval Latin, were copied onto manuscripts above a term or expression and between the lines of the source texts; therefore these explanatory remarks were referred to as interlinear glosses (*interlineares*). Explanations that were more extensive were written down on free space on the margins, on either side of the main body of the text. These were the marginal glosses (*marginales*). Initially, only particular terms were explained; later the comments touched upon similar or opposing regulations found in different places of Justinian's codification. The writers delved into the text of a given regulation, formulating general rules of law, explaining actual and seeming contradictions and trying to reconcile them. Some glosses were anonymous; some had their authors indicated by siglums. Those borrowed from the text proper were called authentic glosses (*authenticae*), and those borrowed from the explanations of legal scientists were called teachers' glosses (*magistrales*).[247]

The exegetic-analytical method of glossing the source texts introduced by the Bologna lawyers was not only employed with the texts of Roman law. It was also appropriated by the professors of canon law. The first glossators of Gratian's *Decretum* (e.g. Gratian's disciple, Paucapalea, but also Rolandus Bandinellus, Basianus, Rufinus, Huggucio, John Teutonicus) were named decretists.

The rich output of glossators, legists and canonists was not only confined to glosses but also involved other genres of scholarly literature.[248] A list of glosses used to explain continually the text of a collection or its part based on the

collections were jointly named *Corpus Iuris Canonici* (the edition of this collection was approved by Pope Gregory XIII in 1580).

[246] For the literary genres and teaching methods in medieval legal studies, see Berman, *Law and Revolution*, 127ff; Haskins, *The Renaissance*, p.193ff; Kuttner, S. *Repertorium der Kanonistik (1140-1234)*, Città del Vaticano 1937 (passim); Petrani, A. "Kanonistyka." In *Dzieje teologii w Polsce*, vol. I. *Średniowiecze*, Lublin 1974, p. 373f; Schulte, *Geschichte der Quellen,* vol. I, p. 212ff; Van Hove, *Prolegomena*, p. 426ff; W. Ullmann, *Canonists and Canonistic Scholarschip in Medival Papalism*, London 1949, p. 1ff.

[247] It was a common occurrence that the same handwritten codex contained separate series of glosses; at times, if older ones faded, they were overwritten and updated; Van Hove, *Prolegomena*, p. 426.

[248] Cf. Weimar, P. "Die legistische Literatur der Glossatorenzeit." In *Handbuch der Quellen*, vol. I, p. 140ff.

author's own glosses or those of other authors was called *apparatus glossarum.* The best and most common collections of glosses were named *glossa ordinaria.* A work resembling a concise textbook containing a systematic elucidation of a legal issue, title or the entire codex, with the exception of an exegetic comment, was called summa (*summa*). Furthermore, the learned lawyers pursued the so-called *distinctiones* (distinctions) in which, by dividing and subdividing individual terms and norms, they attempted to establish some notional differences between them. A separate genre was *notabilia* (notes to texts).[249] These notes were introduced by the word *nota* (notice/note), *notandum quod* (it should be noticed that). Very often *notabilia* briefly expressed a legal principle.

For the sake of legal studies, medieval scholars developed the so-called brocards (*brocarda*, also known as *generalia*);[250] these were common legal principles, however, not legally binding; yet, they gained importance owing to constantly added legal texts that provided relevant arguments in favour of or against these principles. Brocards also delivered solutions to contradictions occurring between different legal texts.

Another noteworthy genre of the evolving legal literature was *quaestiones* (questions/issues) which either comprised parts of more extensive works such as *summae*, or were given separately. They revolved around the legal issues that were not clearly defined by law. These questions were resolved by *pro et contra* arguments, which was representative of the method of scholastic thinking. Some questions were collected earlier and some provided by the audience. The question involved an enquiry concerning a specific case, legal action or problem, which was normally vague; after providing the arguments for and against, a solution was offered.[251]

Generally speaking, the structure of the medieval question consisted of: 1. Enquiry (*utrum, an*), 2. Argument (*videtur, quod non*), 3. Counterargument (*sed contra*), 4. Main part of the question (*corpus quaestionis – respondeo,*

[249] Their name was derived from the characters or the word *nota*, which appeared in the margin of a legal text to draw readers' attention to a legal resolution; Kuttner, *Repertorium*, p. 408; Van Hove, *Prolegomena*, p. 440.

[250] The term *brocardia* (originally *procardica*) was supposedly derived from a distorted Latin phrase *pro et contra* (for and against) or from the name of Burchard of Worms; Kuttner, S. "Réflections sur les brocards des glossateurs." In *Mélanges J. De Ghellinck S.J.*, vol. II, Gembloux 1951, p. 767ff; Van Hove, *Prolegomena*, p. 449.

[251] Cf. Kuttner, S. *Repertorium*, I, p. 243ff; Kantorowicz, H. "The Quaestiones disputatae of the Glossators, 'Tijdschrift voor rechtsgeschiedenis'." *Revue d'histoire du droit*, 16(1937-1938), p. 1ff. Van Hove, *Prolegomena*, p. 440.

dicendum), 5. Review of arguments given in favour of the rejected view (*ad primum*, *ad secundum* itd.), 6. Resolution (*recapitulatio*).[252] Not all the mentioned elements were present in every question. Some questions were presented as practical and some as theoretical.

The question arose from university disputations and was intended to mock such a form of discussion. Because such debates resembled an actual trial, the structure of a medieval question presented above was nothing but a copy of particular phases of a trial.[253] A medieval disputation, best mirrored in the structure of *quaestio,* also revealed "the old human predilection to contest, tournament and duelling."[254] Knights, being one of the social classes distinguished by their life style and morals, attended military tournaments. On the other hand, the intellectually independent medieval clerks, clergymen and laymen, university graduates, bachelors and students held disputations in their cathedrals, auditoriums and chapterhouses in which they wielded words and arguments instead of swords, axes and shields. Disputation became a technique of new professions, of the guild of professors and students. The medieval disputation, after a trial or knights' tournaments, had its ritual, structure, rhythm and phases. It opened with the presentation of a legal issue by reading a legal passage and advancing a thesis; subsequently, the problem was gradually elaborated upon. The collected *pro* and *contra* arguments were intended to defend or refute the thesis. The argument continued through an exchange of questions and answers, negations and differentiations, charges and sophistries. The arguments were put forth by both parties, "first all the pros and then all the cons being arranged in two battle fronts."[255] Despite its ritual conventionality, the medieval disputation, originally formed by lawyers, had a fundamental significance for science and research. It required utmost precision, acuteness of judgement and articulation, the wit and ability of immediate rejoinders, easy expression of thoughts and capacity to tell the truth from falsehood. Disputations enhanced the ability to formulate logical premises in defence of a thesis – their content was to verify the proper comprehension of the material taught on the issue. Moreover, disputations taught the spirit of criticism and methodolo-

[252] Wielgus, *Znaczenie prawa*, p. 21.

[253] As pointed out by Kantorowicz, *The Quaestiones disputatae*, p. 23, "The disputans (*disputatione, argumentes, opponens et respondes*) are at first the *actor* ad *reus*; sometimes the arguments of the *reus* are the only ones to follow, because those of the *actor* have been inserted in the casus or the problem."

[254] Ibidem; see also Petrani, *Kanonistyka*, p. 372f.

[255] Kantorowicz, *The Quaestiones disputatae*, p. 23.

gical doubt and elevated the cultural level of polemics to a decent exchange of words and ideas. It was long before Descartes when scholastics mastered the use of the criterion of "clarity and distinctness."[256]

Disputation emerging in legal faculties in the Middle Ages was transferred to other disciplines and was acknowledged as an indispensible component of any science pursued at universities.[257] Thus, owing to the science of law, which so greatly imprinted on the scholastic method and university science in general, Western culture gained suitable education and mental and scientific discipline. This discipline later translated onto the achievements and a brisk progress of modern science.[258]

Overall, law was a paramount factor in the shaping of medieval European culture. It spanned all domains of the Christian civilisation of the time and "acquired the status of a universal and all-embracing regulator of social relations".[259] Because of multifaceted social, political and economic backdrop, the pinnacle of law's development was seen between the 11th and 13th century. Among the causes of those new conditions was the emergence of universities and their particular focus on Roman and canon law. Some other stimuli for the progress of law were the stabilisation of finance and trade in Italy and south-west Europe coupled with the overall civilisation and cultural growth. Likewise, the struggle between *imperium* and *sacerdotium* added to the progression in question; in their dispute, both lay rulers and popes invoked the authority of law. During that period, canon law was divorced from theology and Roman law. However, Roman law remained a significant auxiliary source for canon law that surfaced as a separate discipline.

6. Reception of Roman Law by the Church

Roman law contained in the Justinian codification and transformed at universities by glossators and commentators was accepted by the Church as a supplementary and auxiliary source. The legal literature labelled it a reception, transfer or practical expansion of Roman law; it denotes the acceptance,

[256] Wielgus, *Znaczenie prawa*, p. 22.

[257] Very often studies at other university faculties were concluded with an exam in the form of a disputation; Petrani, *Kanonistyka*, p. 373.

[258] As in: Wielgus, *Znaczenie prawa*, p. 22.

[259] Gurevich, A.J. *Categories of Medival Culture*, London 1985, p. 154.

often after some minor alterations, of a different, alien law to the domestic law. In a broader sense, it also translates onto assimilation, acquisition of teaching methods, interpretation and law-making methods.[260] The essence of the phenomenon of law reception – and it may be observable in various provinces of culture – "is when certain community assimilates a law which originated without that community's involvement."[261]

The term "reception" (from the Latin word denoting "a receiving") was first used in reference to Roman law that, after the decline of the social and political formation that had created it, did not die away but found application as a binding law.[262] The process of reception of Roman law spanned a few centuries; yet, its intensity in different countries was uneven. A relatively broad reception was seen in Italy, south France and Spain, less extensive in England. The most profound assimilation of Roman law occurred in Germany in the period between the 15th and the 19th centuries. Of decisive character for the reception was the act establishing the Imperial Chamber Court (*Reichskammergericht*) in 1495, which stipulated that this tribunal be entirely dependable on "common law", i.e. Roman *ius commune*.[263] The courts of lower instance followed the pattern of the chamber and consequently the Roman legal culture in Germany continued to broaden. The reception of Roman law advanced the introduction of a uniform law and streamlined its application.

[260] Sobański, R. "Recepcja prawa w Kościele." *PK* 46(2003), issue 3-4, p. 3f. The recognition of a foreign law as binding may but does not necessarily entail a political domination of that foreign state. For the literature on the idea of reception in general, see Wieacker, F. *A History of Private Law in Europe*, Oxford 1955, p. 84, 91, note 1.

[261] Sobański, R. "Recepcja normy kanonicznej." *Śląskie Studia Historyczno-Teologiczne* 13-14(1990-1991), p. 79.

[262] Cf. Lesiński, B., Rozwadowski, W. *Historia prawa sądowego. Zarys wykładu.* Poznań 2007, p. 57f. The literature on the impact of Roman law on other legal systems is copious; the latest bibliography has been compiled by Dulckeit, G., Schwarz F. and Waldstein, W. *Römische Rechtsgeschichte*, 9th ed., München 1995, p. 286. Among the studies on the impact of Roman law on the Western European law and civilisation, the most definitive is certainly the work by Koschaker, P. *Europa und das römische Recht*, 3rd ed., München 1958.

[263] The notion of Roman common law – *ius commune* is referred to a legal system of international, European character developed in medieval Europe (11th-14th c.) at Italian universities, chiefly by the school of glossators and commentators. *Ius commune* was a synthesis of Roman legal rules and other legal systems of the time, i.e. canon law, Germanic law and statutory law of Italian cities. For many centuries, this medieval legal system influenced the science and practice of law in numerous European countries; cf. Płaza, S. *Historia prawa w Polsce na tle porównawczym*, part I, Kraków 2002, p. 43. For more about the concept of *ius commune* see Callaso, F. *Introduzione al diritto commune*, Milano 1970, p. 33ff.

By contrast, the reception of Roman law by the Church was not a one-time effort. The practice of referring to Roman legal rules was a continuing process. Beginning with the mid-9th century, Justinian law as the local law (*ius proprium*) of the Church was employed by popes[264], for example, Eugenius II (824-827)[265], Leo IV (847-855)[266], Nicolas I (858-867)[267] and John VIII (872-882).[268]

Another noteworthy source for the permeation of Roman law was canonical collections originating in different regions and compiled on the basis of

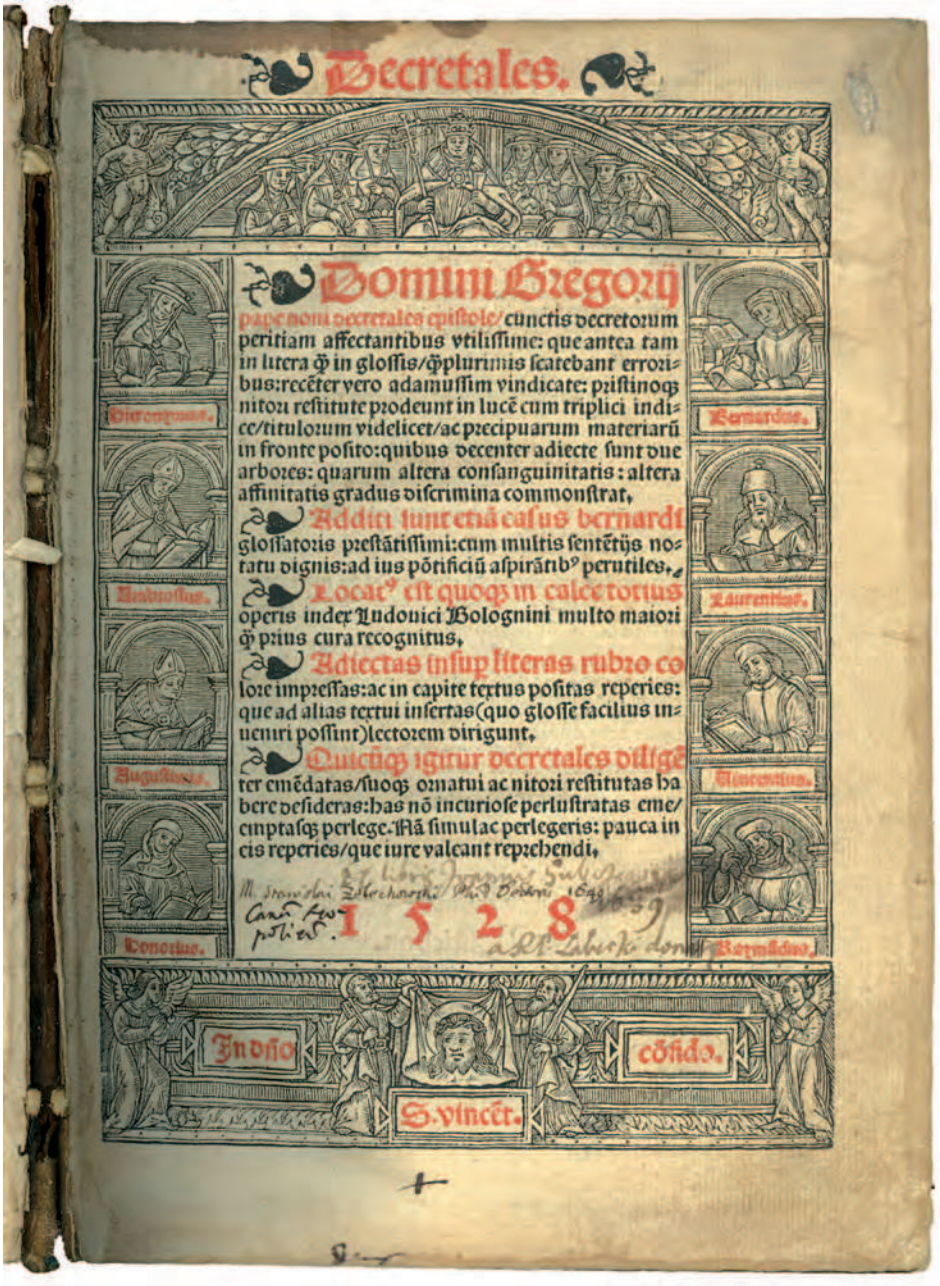
[264] Cf. Conrat, M. *Geschichte der Quellen*, pp. 15-21, 26-29.

[265] In a letter to the bishop of Vienne, the pope informed him that he had found a text of Roman law about a forty years' prescription period [*praescriptio quadragenaria*] concerning venerable places. Furthermore, he acknowledged the legal force of "whatever he found in the Justinian law that conformed to the pope's authority" – *quidquid post auctoritatem romanam (Pontificis) in Justiniana etiam lege comperimus;* Eug. Ep.; Mansi, 14, 414; cf. Van Hove, *Prolegomena*, p. 229.

[266] In a supplement to the 853 synod of Rome concerning the celebration of Sunday, he resolved that "pursuant to Roman statutes, a sentence pronounced on the Lord's Day shall be void and any obligations made on this day shall be rendered null by an imperial ordinance" – *Nam legibus (Romanis) infirmatur iudicium dominico die depromptum, et obligationes eiusdem sacri diei Imperatorum siquidem censura dissolvit*; Leo. Concil.; Mansi, 14, 1013; cf. Van Hove, *Prolegomena*, p. 229.

[267] In a letter to King Charles the Bald dated AD 867 admitting a new instance in the divorce case of King Lothar, the pope demanded that the location be secured "where no violence of the crown should be feared and witnesses or other people can be introduced as required by the holy canons and respectable Roman law on such controversial matters" –*In quo nulla sit vis multitudinis formidanda et non sit difficile testes producere vel ceteras personas, quae tam a sanctis canonibus, quam a venerandis Romanis legibus, in huiusmodi controversiis requiruntur;* Nico. Ep. L; Mansi, 15, 320; cf. Conrat, *Geschichte der Quellen*, p. 16ff; Van Hove, *Prolegomena*, p. 29. A much-telling example of the application of Roman law is a well-known sentence by Nicolas I from the 13th of November 866, addressed to Bulgarians *Responsa ad consulta Bulgarorum (Anno 866)*, in which he states that consent is needed to contract marriage (*consensus*) and this requirement is derived from the statutes [Roman law] – *Ac per hoc sufficiat secundum leges solus eorum consensus, de quorum coniunctionibus agitur. Qui consensus si solus in nuptiis forte defuerit, caetera omnia etiam cum ipso coitu celebrata frustrantur, Joanne Chrysosotomo magno doctore testante, qui ait (hom. 32 in Matth.): Matrimonium non facit coitus, sed voluntas* (Nico. Resp.; PL 119, 980).

[268] The pope frequently referred to Roman law; in a decretal of AD 873, he quoted one Justinian's novel to confirm that as for the Roman Church only a hundred years' prescription period can be used (*praescriptio centenaria*): *Nemo de annorum numero resultandi sumat fomentum, quia sancta Romana (cui Deo auctore servimus) ecclesia privilegia, quae in firma Petri stabilitatis petra suscepit, nullis temporibus angustantur, nullis regnorum partitionibus preiudicantur. Sed venerandae Romanae leges, divinitus per ora principum promulgatae, reum eius prescriptionem non nisi per centum annos admittunt*; *Decretum*, 2 16, 3, 17). Similarly, on the basis of the same law, in AD 879 the same pope resolved that excommunication performed by a bishop or presbyter was not possible before a case was proven: *Quapropter apostolica auctoritate iubemus, ut nemo vestrum eum excommunicet, antequam ad legis examen proveniat* (Ioan. Ep. 208; PL 126,827; Mansi, 17, 112); cf. Van Hove, *Prolegomena*, p. 229.



Title page, *Gregorius IX papa, Decretales epistole cunctis*, Lyon 1528, University Library of John Paul II Catholic University of Lublin, ref. no. Gc.190

Justinian law and intended for the clergy. This group comprised an 8th century collection from south Italy *Lex romana canonice* compta.[269] The work opens with the sentence: "The beginning of the chapters of Roman law with sentences referring to canons" – *Incipiunt cum sententiis suis capitula romanae legis ad canones pertinentia*.[270] While editing, the author used selected extracts of *Institutions*, *Codex*, *Novel 143* and *Epitome Iuliani.*[271] The same period yielded *Excerpta Bobiensia* from Byzantine Italy, Ravenna or Pavia; they comprise imperial constitutions from the Justinian Code and *Epitoma Iuliani* containing regulations on the hierarchical system of the Church, regulars and ecclesiastical property.[272]

Shortly after the death of John VIII, the previously mentioned *Collectio Anzelmo dedicata* was published. It originated in Italy ca. AD 882-896. It quotes 238 chapters of Roman law contained in *Lex Romana canonice compta* or similar sources. In the majority of books of this work, besides two series of canon law rules and decretals of Gregory I the Great, the author added the third part: *capitula legis Romanae* – "chapters of Roman law." The collection spread in the 10th century in Italy and Germany.[273]

Likewise, the 11th century canon collections contained numerous extracts of Justinian's codification; one of them is the collection named *Britannica* produced in Italy around the year 1090. It comprised excerpts of *Institutions* and *Digesta.* In France, of considerable importance for the dissemination of Roman legal standards were the collections attributed to Ivo of Chartres: *Collectio Tripartita* (A Three-Part Collection), *Decretum* (Decree) and *Panormia*. The author took considerable advantage of Justinian's constitutions; the collections quote about 250 fragments of Roman law. Book XVI of the decretal *De officiis laicorum et causis eorundem* – "The obligations and matters of laymen", was almost entirely borrowed from Roman law.

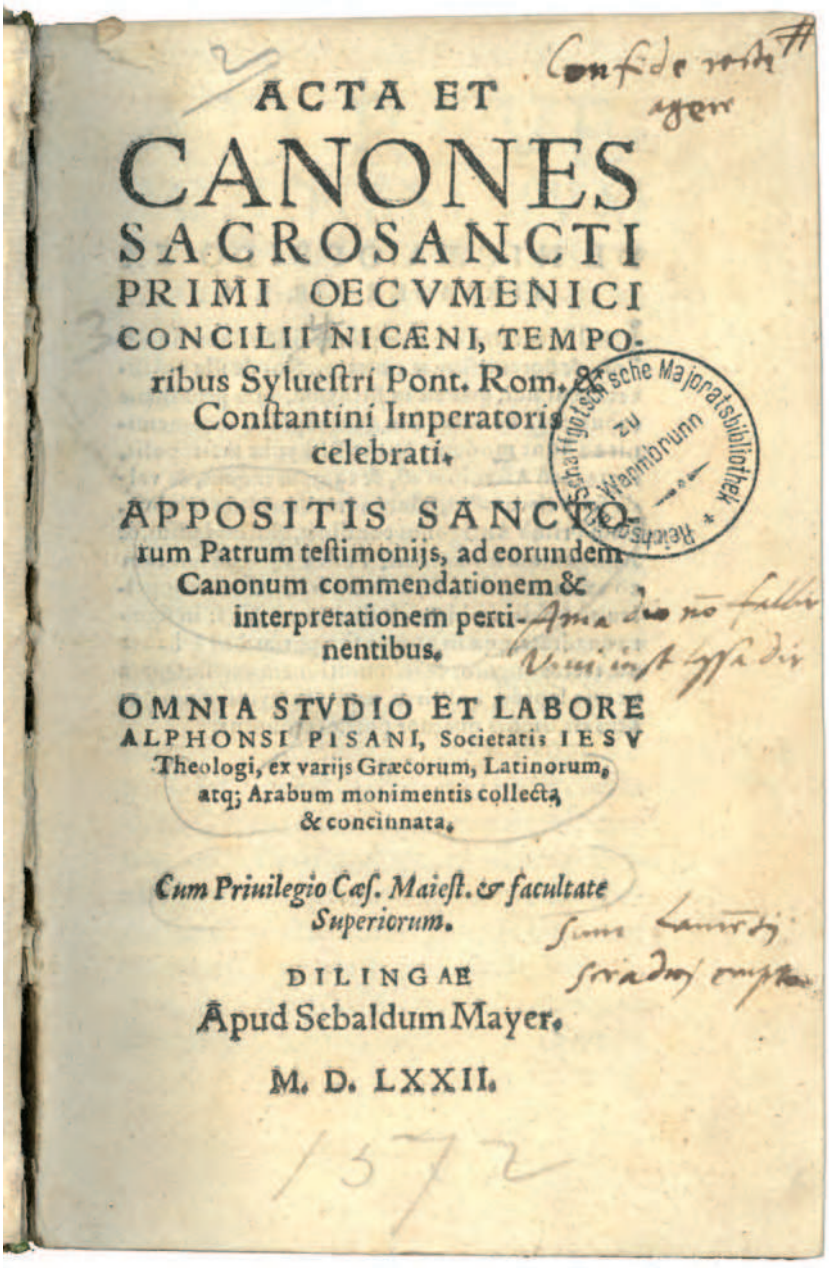
[269] Van Hove, *Prolegomena*, p. 230f. (ibidem, bibliography, note 6).

[270] Maassen, F. *Geschichte der Quellen und der Literatur des canonischen Rechts im Abendlande bis zum Ausgang des Mittelalters,* vol. I, Graz 1956, p. 888.

[271] Texts 1-168 treat of the clergy, 169-308 of laymen, 309-324 of penal law in religious matters; the title *(titulus)* on festivals is also quoted. The laws were ordered in a systematic manner; Fournier, Le Bras, *Histoire des collections,* p. 118f; Van Hove, *Prolegomena*, p. 230; more in Mor, C.G. "Diritto romano e diritto canonico nell'etŕ pregraziana." In *Studi in memoria di P. Koschaker*, vol. II, Milano, 1954, p. 15ff; idem, "Diritto romano e diritto canonico." In *La cultura antica nell'Occidente latino dal VII all'XI secolo,* Spoleto, vol. II, 1975, p. 705ff.

[272] Fournier, Le Bras, *Histoire des collections*, p. 118; Van Hove, *Prolegomena*, p. 231.

[273] Cf. M. Conrat, *Geschichte der Quellen*, pp. 212-215; Fournier, Le Bras, *Histoire des collections*, vol. I, pp. 234-243; Van Hove, *Prolegomena*, p. 219.



ACTA ET
CANONES
SACROSANCTI
PRIMI OECVMENICI
CONCILII NICÆNI, TEMPO-
ribus Syluestri Pont. Rom. &
Constantini Imperatoris
celebrati.

APPOSITIS SANCTO-
rum Patrum testimonijs, ad eorundem
Canonum commendationem &
interpretationem perti-
nentibus.

OMNIA STVDIO ET LABORE
ALPHONSI PISANI, Societatis IESV
Theologi, ex varijs Græcorum, Latinorum,
atq; Arabum monimentis collecta
& concinnata.

Cum Priuilegio Cæs. Maiest. & facultate
Superiorum.

DILINGAE
Apud Sebaldum Mayer.

M. D. LXXII.

Title page, *Acta et cannones sacrosancti primi oecumenici concilii*, Dilingae 1572, University Library of John Paul II Catholic University of Lublin, ref. no. Gc.30

It is worth noting that Roman legal texts were not compiled into uniform, independent collections but were mixed with canonical matter.[274] It should be assumed that the inclusion of Roman legal content in the collections of canon law rendered the former officially binding.

Of significance for medieval legal science was a close relationship between the studies of Roman law and canon law. The reasons for this were many-faceted. First, the studies of both laws were held at the same academic centres.[275] As mentioned above, Bologna, the first university of Christian Europe, cultivated Roman law (*ius civile*) and *ius canonicum.* These subjects were frequently taught by the same professors. The cohesion and symbiosis of both types of law were symbolically expressed by the conferral to the graduates of canon and Roman law of the doctor's degree in both laws (*in utroque iure*).[276] Moreover, both laws were approached using parallel methods. The canonists' reception of the method of Bolognese legists led to the use of the same genres in canonical literature that were created by the school of glossators.[277] Of crucial importance was the fact that the sources of both types of law were edited and reproduced in the same language, namely Latin. It reigned supreme as the language of schools, science, the Western Church, diplomacy and law. What is more, whilst the tongues of particular European countries were of lay character, Latin – the language of *Corpus Iuris Civilis* and *Corpus Iuris Canonici* – to some extent became "a sacred linguistic instrument."[278]

In addition, the legal rules and principles that were incorporated into the rhetoric of both laws were much alike. An example of the use of Roman regulations for the interpretation of ecclesiastical law was the insertion of

[274] Cf. Conrat, M. *Geschichte der Quellen*, p. 210; Fournier, Le Bras, *Histoire des collections*, vol. I, pp. 341-347.

[275] As a matter of fact, civil and canon faculties were often combined into single colleges; in the 13th century it was the case with many universities: in Italy (Padua, Naples, Rome), France (Paris, at least until the constitution of Honorius III *Super specula* of 1219; Orlean, Montpellier), Spain (Valencia and Salamanca) and England (Oxford); Kurtscheid, *De utriusque iuris studio*, p. 313f.

[276] Cf. Carusi, E. "Utrumque ius – problemi e prospettive." In *Acta congressus*, vol. II, p. 539ff; Ermini, G. "Ius commune e utrumque ius." In *Acta congressus,* vol. II, p. 503ff; Kurtscheid, *De utriusque iuris studio*, p. 311ff; Legendre, P. "Le droit romain, modele et langage. De la signification de l'Utrumque Ius." In *Etudes d'histoire du droit canonique dédiées à G. Le Bras.* vol. II, Paris 1965, p. 914ff. Researchers point to Basianus (1197) as the first doctor of both laws who taught civil law as a layman and later canon law as a cleric; cf. Kurtscheid, *De utriusque iuris studio*, p. 33f; Schulte, *Geschichte der Quellen*, vol. I, p. 154; Van Hove, *Prolegomena*, p. 466.

[277] See above, Chapter Two, 5.

[278] Merzbacher, F. "Die Parömie «Legista sine canonibus parum valet, canonista sine legibus nihil»." *Studia Gratiana* 13(1967), p. 281.

a separate column entitled *De regula iuris* in *Liber sextus* of Boniface VIII.[279] It encompasses 88 legal rules, probably compiled by Dinus Muggelanus, a professor of Roman law.[280] Similarly, *Decretals* of Gregory IX contain a column *De regulis iuris* including 11 legal rules. Legal rules embraced in official and common ecclesiastical collections predominantly originated with Justinian's *Digesta* or were prepared based on Roman sources.[281] What follows, "handbooks of civil law for canonists and of canon low for civilians consequently found an eager readership and circulated widely."[282]

Decretists when commenting on Gratian's *Decretum* and decretalists discussing papal decretals had recourse to the terminology and interpretation principles of Roman law. As the study of canon law progressed, the works of decretists and decretalists gathered a multitude of extracts and citations from Roman law, which was not only the manifestation and indication of the authors' erudition, but also constituted an essential element of the accurate and systematic approach to the content of ecclesiastical law. Both laws were interwoven and supplemented each other. In consequence, as put in the Latin paroemia attributed to Anaklet Reiffenstuel (or Ludwig Pontamus), "Legists without the knowledge of canons do not matter much; canonists without the knowledge of constitutions (i.e. Roman law) do not matter at all" – *Sine canonibus legistae parum valent, canonistae sine lege nihil*.[283] Many canonists turned Roman law experts and many legists cultivated canon law.[284] On the

[279] Cf. Bartoccetti, V. *De Regulis Iuris canonici: regularum in Libro VI Decretalium earumque praesertim cum Codice J.C. relationum brevis explanatio*, Rome 1955.

[280] Cf. Bartoccetti, *De Regulis Iuris canonici,* p. 12ff; Falletti, L. s.v. *Dinus Mugellanus*, DDC, vol. IV, col. 1250; Schulte, *Geschichte der Quellen*, vol. II, p. 176; Van Hove, *Prolegomena*, p. 365.

[281] Cf. Bartoccetti, *De Regulis Iuris canonici,* p. 21f. As aptly remarked Brundage, *Medieval*, p. 60, "In a practical sense, as well, the two laws were interdependent. Law students who realistically hoped to make a living as practising lawyers needed to study both laws in order to acquire the skills necessary to assure themselves a livelihood. Short handbooks of civil law for canonists and of canon law for civilians consequently found an eager readership and circulated widely."

[282] Brundage, *Medieval*, p. 60.

[283] Gauthier, *Roman Law*, p. 10; Van Hove, *Prolegomena*, p. 526f. For more on this paroemia, see Merzbacher, *Die Parömie*, p. 275ff.

[284] Many outstanding canonists studied civil law; this group included, for example, Gofred of Trano (his master was Azon), Hostiensis (his civil law teachers in Bologna were Jacob Balduini and Homobonus), Innocent IV (attended the civil lectures of Azon, Jacob Balduini and Accursius), Guido de Baysio (one of his masters was Guidona de Suzaria) and John Andreae (his masters were Martinus Syllimani and Richardus Malumbra). Some canonists were doctors in both laws, for example, Peter of Ancharano [*Petrus de Ancharano*], Anthony of Butrio [*Antonius de Butrio*], John of Imola [*Ioannes de Imola*], John of Barbatia [*Ioannes de Barbatia*] and John of Anania

other hand, Peter Rebuffus (1497-1557), a learned 15th century canonist, advanced an opinion that "Canon law and civil law are so closely combined that one cannot understand one without the other" – *Ius canonicum et civile sunt adeo connexa, ut unum sine altero vix intelligi posit.*[285]

The many centuries' practice of referring to the rules and principles of Roman law by pontiffs, ecclesiastical tribunals and the science of canon law was acknowledged by the Church, which was confirmed in Gratian's words:

> Here is the proof that rulers' constitutions should be ranked inferior to ecclesiastical laws. And where they do not disagree with evangelical and canonical decrees, they should be held in veneration. Augustine says, "If you believe that you should take advantage of the laws of the worldly authority, we do not reprove you [for that]. Paul did so when he testified before his enemies that he was a Roman citizen." And where [imperial constitutions] do not contradict evangelical and canonical decrees, they should be held in veneration.[286]

The Master of Bologna recognized the binding force of those regulations of Roman law that were not contradictory to the Christian doctrine and ecclesiastical regulations. Pope Lucius III (1181-1185) took an official stance on the application of Roman legal norms in the document *Intelleximus* regarded in the literature as the landmark in the reception of Roman law by the Church.[287] It reads:

[*Ioannes de Anania*]. John Teutonicus' master in Roman law was Azon, Vincent the Spaniard's master was Accursius. Stephanus Tornacensis (died 1203) attended civil law lectures held by Bulgarus. Some canonists offered tutoring in canon law and civil law; they were, *inter alia*, Peter Ancharanus, Jan of Imola, Jan of Barbatia, Augustin Beroius, Philippe Decius et al. Many graduates of civil law were ecclesiastics. Roffredus Beneventanus (died 1243), a civilist, mentioned his masters in canon law; cf. Kurtscheid, *De utriusque iuris studio,* p. 333f; cf. Van Hove, *Prolegomena*, p. 465ff. (ibid. bibliography). Robert de Monte wrote about Gratian in 1182, "He was the most excellent teacher of the Bible, decretals and canons, and especially of Roman constitutions" (quated after: Kurtscheid, *De utriusque iuris studio*, p. 333).

[285] Quoted after: Van Hove, *Prolegomena*, p. 527.

[286] *Ecce quod constitutiones Principum ecclesiasticis legibus postponendae sunt. Ubi autem evangelicis atque canonicis decretis non obviaverint, omni reverentia quae digne habeantur. Decretum,* 1,10, 6; *Unde Augustinus ait [...]: Si in adiutorium vestrum iam terreni imperii leges assumendas putatis, non reprehendimus. Fecit hoc Paulus cum adversus iniuriosos civem romanum se esse testatus est; Decretum,* 1,10, 7.

[287] Dębiński, A. "Ecclesia vivit lege Romana. Znaczenie prawa rzymskiego dla rozwoju prawa Kościoła łacińskiego." In *Starożytne kodyfikacje prawa*, Lublin 2000, p. 134; Insadowski, H. "Prawo rzymskie jako źródło prawa kanonicznego." In *Księga pamiątkowa ku czci bpa M.L. Fulmana*, Lublin 1939, p. 113f; Van Hove, *Prolegomena*, p. 461.

Lucius III to the bishop of Padua. We have learned that the trial between our beloved sons, the Prior of St. Cyprian monastery in Venice and the clergymen from Rodigo, concerning the chapel that had been erected by the latter to the detriment of the Costa baptismal church, as reported by the prior, has been entrusted to you, Brother, for settlement in accordance with the canons (*fine canonico terminanda*). After summoning the parties at your presence and hearing the witnesses, you became confident that the aforementioned church of Rodigo began to erect the chapel after a complaint and protest had been filed to us by the owner of the land; therefore, the prior demanded before the court that everything that had been built after the aforementioned complaint and landowner's protest against the illegal construction be demolished. Considering the fact that when settling this case you were in doubt as to whether you should follow the rules of canon law, and since the canons do not provide for a solution to an owner's complaint against a lawless construction in his land, you decided to seek assistance of the Holy See. Because human laws should not restrain from following the holy canons, the same with the holy canons – they shall be supported by the resolutions of ancient rulers, we order you, Brother, by this document to have special consideration that what is erected legally or illegally should be demolished according to the laws after the landowner has laid a complaint against the construction. Because no church should be erected to someone's detriment, after seeking the opinions of prudent people in accordance with the acts and canons and dismissing the appeal, do not delay your settlement of this case. Because we believe that you are proficient in both laws, we decided that the case would be expedited with your aid, for you will be more capable of finding the truth from the testimonies of both parties (*dicta partium*), ownership status (*termini*) and boundaries than we who are not acquainted with the description of the case.[288]

[288] *Intelleximus ex litteris tuis, quod, qum causa, quae veritatur inter dilectos filios nostros, priorem S. Cypriani de Venetia et clericos de Rodigio super capella, quae in praeiudicium baptismalis ecclesiae de Costa ab eiusdem clericis est constructa, sicut nobis eiusdem prioris relatio demonstravit, fraternitati tuae a sede apostolica delegeat fuisset fine canonico terminada, apertibus ad tuam presentiam convocatis, per testes sufficienter tibi innotuit, quod praefata ecclesia de Rodigo eandem capellam post appellationem ad nos factam, et denunciationem novi operis aedificare coeperat, et ob hoc praefatus prior in iudicio postulabat, quicquid in saepe dicta capella post appellationem ad nos factam, et post denunciationem novi operis factam fuerat, penitus demoliri. Super quo discretioni tuae dubium videbatur, utrum ad haec canonico procedi posset iudicio,* [*et*]*, quum nihil post nunciatione novi operis sit in canonibus definitum, duxisti sedem apostolicam consulendam.*

Quia vero, sicut humanae leges non dedignantur sacros canones imitari, ita et sacrorum statuta canonum priorum principum constitutionibus adiutantur, fraternitati tuae praesentibus literis mandamus, quatenus diligenter considerans, quod post denuntiationem novi operis, sive iure sive iniuria aliquid construatur, de legibus debet constitutionibus demoliri. Et quia nulla ecclesia in praeiudicium est alterius construenda, adscitis tibi viris prudentibus, negotium ipsum, secundum legumet canonum statuta appelatione remota non differas terminare. Nam quam te credamus in utroque iure peritum:

The papal document, called *Intelleximus* from the initial word, had the form of a decretal. It was not published on the pope's own initiative, but – as it was often the case with this form of papal writings – inspired by a question directed to him.[289] In the case discussed, it was the bishop of Padua, yet his name is not mentioned. He too was the addressee of the papal letter. The cause of the bishop's request and consequently the cause of the pronouncement of the pope's decision were outlined in the introductory part of the document. It reads that the legal issue with which the bishop turned to the Holy See emerged in the context of a dispute between two ecclesiastical bodies of vague provenance, namely the prior of St. Cyprian monastery in Venice and some clergymen (*clerici*) from Rodigo.[290] According to the description, the argument arose because the clergymen from Rodigo had erected a chapel to the detriment of a baptism church in a place called Costa, probably adjoining Rodigo. The Holy See handed the issue over to the bishop of Padua as a delegated judge. He was ordered to settle the dispute in a canonical manner (*fine canonico terminanda*), that is, according to the rules of canon law.

When ordering the settlement of the problem, the pope justified the choice of the bishop of Padua for the delegated judge. The pope's justification was twofold. Primarily, he accounted for his choice by stressing the bishop's acquaintance of both Roman law and canon law – *Nam quam te credamus in utroque iure peritum*. Next, the pope expressed a conviction that having an opportunity for close examining of the case on the basis of the parties' statements and being able to investigate the ownership status and the boundaries at the location in question, the case could be solved by the bishop far more efficiently than by the Holy See, which did not know the character of the case (*securius duximus, causam per tuam sollictudinem terminari qui per dicta partium et terminos et fines locorum plenius poteris cognoscere veritatem, quam aliquid a nobis ignorantibus qualitatem negotii definiri*).[291]

For our discussion, the first reason that justified the selection of the judge, that is, the bishop's proficiency *in utroque iuris* is of vital importance. This

securius duximus, causam per tuam sollictudinem terminari qui per dicta partium et terminos et fines locorum plenius poteris cognoscere veritatem, quam aliquid a nobis ignorantibus qualitatem negoti definiri; *Decretales*, 5, 32, 1: *De novi operis nunciatione.*

[289] On the papal decretal, see above Chapter One, Two.

[290] Situated in northern Italy, the town of Rovigo (both *Rodigium* and *Rhodigium* in the Latin script) in the Middle Ages has been the seat of the bishop of the Adria-Revigo Diocese since 1920; Długosz, T. s.v. *Adria*, CE, vol. I, col. 109.

[291] *Decretales*, 5, 32, 1

statement additionally underscores what was mentioned above – close and tight relationship between the Roman and canon law studies in the 12th century. For this reason, it should be assumed that the bishop of Padua studied both subjects. In those days, it was not a rare occurrence, especially when it comes to the clergy. The arguments that supported the choice of the bishop of Padua corroborate the thesis that the fluency in both laws was more than desirable when adjudicating for Church tribunals.

The bishop was introduced into the case by summoning both parties to deliver their statements and the witnesses to give testimony. In consequence of the investigation and on the basis of the witnesses' testimonies, it became sufficiently (*suficienter*) lucid to the bishop that "the aforementioned Church of Rodigo began the construction of the chapel after the other party petitioned to us [i.e. the pope] on this matter, and subsequently to a complaint submitted by the landowner." Having argued so, the prior "demanded before the court that whatever has been built in the mentioned chapel after petitioning to us [i.e. the pope] and after filing a complaint by the owner concerning the illegal construction should be demolished."

After preliminary examination of the case by the judge delegate, certain doubts of legal character arose that he decided to report to the pope. The essence of the problem, according to the document, came down to a fundamental question of "whether the dispute can be settled in accordance with canon law" – *utrum canonico procedi posset iudicio*. This important question emerged, as it says, from the fact that "canons do not contain any resolutions on the landowner's objection to illegal construction" – *quum nihil post nunciatione novi operis sit in canonibus definitum*. Through lack of a relevant regulation in ecclesiastical law, the bishop had recourse to the Holy See in order to obtain its opinion (*duxisti sedem apostolicam consulendam*), which resulted in the pope's proclamation of this decretal. Due to the document's character, the pope's response was conclusive.

As mentioned before, the reason for the bishop's recourse to the Holy See was the lack of adequate regulations of the canon law that could aid the settlement of the dispute. By giving the answer to the question raised in connection with a concrete matter, the pope as the highest legislator formulated a general principle that was to be employed in case a suitable Church regulation was absent. This generic principle was expressed in the decretal in the following words: "Since human laws should not restrain from following the holy canons, the same with the holy canons – they shall be supported by the resolutions of ancient rulers..." – *Quia vero, sicut humanae leges non dedignantur sacros*

canones imitari, ita et sacrorum statuta canonum priorum principum constitutionibus adiutantur...[292] Hence, the pope officially determined that should suitable canon regulations be deficient, Roman law – in the decretal named "the constitutions of ancient rulers" – was to be applied. The long-lasting practice of referring to the regulations of Roman law was legally acknowledged.

The publication of the decretal was necessitated by the urgency to settle a specific dispute. By employing such a general principle to specific circumstances, the pope ordered (*mandamus*)[293] that when resolving the argument between the prior and the clerics from Rodigo the judge applied the following legal rule: "What is erected legally or illegally should be demolished according to the laws after the landowner has laid a complaint against the construction" – *quatenus diligenter considerans, quod post denuntiationem novi operis, sive iure sive iniuria aliquid construatur, de legibus debet constitutionibus demoliri.* All in all, the pope resolved that when deciding the case, Roman law should be used concerning *operis novi nuntiatio.*

The pope's decision pertaining to the application of Roman law in lieu of missing regulations of canon law was a universally binding rule. The decretal issued by Pope Lucius III was embodied in *Decretals* of Gregory IX[294] – the first official and general collection of canon law. The papal resolution was effective for over seven centuries until the 1917 *Codex Iuris Canonici* of the Latin Church.[295]

When pointing to the regulation for the bishop to rely on in the dispute, the pope advanced a justification that "no church should be raised that causes

[292] *Decretales*, 5, 32, 1

[293] The Latin term *mandamus* (we mandate) used in the text pointed to the preceptive character of the decretal, which made this form of document distinguished from other papal writings; cf. above, Chapter One, Two.

[294] The text of the decretal *Intelleximus* was included in *Decretals* of Gregory IX in the column entitled *De novi operis nunciatione* (Concerning the Protest Against a New Construction), in the first canon of Title XXXII whose summary elucidating the essence of the pope's decision reads: *Etiam ecclesia aedificata post nunciationem novi operis destruenda est expensis construentis* – "Also a church raised after the landowner had filed a complaint against illegal construction should be demolished at the builder's expense;" *Decretales*, 5, 32, 1

[295] The collection authored by Raymond de Penafort and ordered by the pope was promulgated by Pope Gregory IX on August 5, 1234 by the bull *Rex pacificus*. By virtue of this promulgation, the collection became authentic, common, unique and exclusive; Schulte, *Die Geschichte der Quellen*, vol. II, pp. 3-25; Van Hove, *Prolegomena*, pp. 357-361. The collection incorporated into *Corpus Iuris Canonici* was officially binding until the publication of the 1917 Code of Canon Law; Grabowski, I. *Prawo cywilne a kanoniczne*, Lwów 1920.

damage to other parties" (*nulla ecclesia in praeiudicium est alterius construenda*). The decretal omitted to clarify in detail what damage (*praeiudicium*) was meant.[296] To conclude, the pope obliged the judge not to delay the settlement of the case "after seeking the opinions of prudent people in accordance with the acts and canons" (*secundum legum et canonum statuta*).

When appointing the bishop of Padua as a delegated judge to examine and resolve the issue, the pope ordered him to make use of the regulation in line with *operis novi nuntiatio*; it was one of the instruments serving the protection of ownership.

Ownership (*dominium*, *proprietas*) in Roman law was a chief and predominant substantive law; the entire Roman legal order was centred on the protection of this law. The protection of ownership extended in two directions: first, it secured the owner by allowing him to lodge a claim in order to recover a thing that was in possession of a third party which was not entitled to it; it was an offensive protection of ownership by means of a legal action called *rei vindicatio* (also Publician action). On the other hand, the action-based protection allowed the owner to prevent any interference with his ownership; it was a defensive protection realized by *actio negatoria*. Nevertheless, the owner, apart from the aforesaid claims, had other protective remedies of extraordinary character at his disposal, including, for example *actio aquae pluviae arcendae* (a remedy to ward off rain water), *cautio damni infecti* (an action for damage from the neighbouring land), *actio finium regundorum* (an action to re-delineate obliterated boundaries) and the remedy named by the pope's decree as *operis novi nuntiatio* – a remedy concerning the construction of a new building.

Operis novi nuntiatio was applied in Roman law when the neighbour built a house (*opus novum*) which hindered the use of the adjacent land.[297] The owner of that land was able to file a protestation (*nuntiatio*) against the construction. The protest was made by the landowner either to prevent a possible damage or due to the inability to use the land or when relevant construction regulations were violated. He who received the protesting notice was obliged to cease the construction and if it was completed, demolish it or to give the objector security *(cautio)* that the construction would do no damage. If the builder failed to cease the work and refused to enter a *stipulatio* at the

[296] The equivocal Latin term *praeiudicium* denotes damage or damage resulting from a court's unfavourable decision; Litewski, W. *Słownik encyklopedyczny prawa rzymskiego*, s.v. *praeiudicum*, Kraków 1998, p. 208.

[297] Cf. Kaser, M. *Das römische Privatrecht*, vol. I, München 1971, p. 407f.

objector's request, the praetor might order *interdictum demolitorium*, i.e. the demolition of what had been constructed.

As mentioned elsewhere, the pope's decree contained a statement that the church raised by the clerics of Rodigo caused some damage to the baptismal church in Costa, yet without specifying what the damage might be. The prior of the monastery – as it reads in the document – filed a protestation (*nuntiatio*) against the assembly of the church in Costa but it did not bring the construction to a halt. Given such a state of affairs, the pope ordered the bishop to implement a Roman legal regulation when settling the dispute; it stipulated the demolition of a newly constructed edifice at the builder's expense if the construction took place after the landowner had filed a relevant complaint.

The decretal *Intelleximus* of Pope Lucius III officially recognized the role of Roman law as supplementary (*partes suppletoriae*). Almost all medieval canonists subscribed to the opinion that only Roman law deserves such a status. The opinion was voiced on the grounds that it was the only law approved by the Church. At the same time, this practice displayed certain limitations; their scope was defined by Pope Innocent III in his decretal *Ecclesiae sanctae Mariae* whereby the affairs of Churches should not be resolved in line with secular laws, unless endorsed by the Church.[298] Consequently, Roman law regulations were subordinated to canon law. Whenever the regulations of both laws stood in contradiction, it was canon law that prevailed in the ecclesiastical milieu.[299]

Ultimately, the many centuries' practice of acquisition of Roman legal principles and regulations by ecclesiastical law, albeit uneven in terms of scope and intensity, rendered Roman law an auxiliary source. In accordance with the decretal *Intelleximus* of Pope Lucius III, if a suitable canon law regulation was lacking, Roman law was to be employed. The pope's resolution articulated in the decretal was universal; the document itself was embodied in *Decretals* of Gregory IX – the official and general collection of canon law that remained in force until the proclamation of the 1917 Code of Canon Law.

[298] *Nos attendentes quod laicis etiam religiosis super ecclesiis et personis ecclesiasticis nulla sit attributa facultas, quos obsequendi manet necessitas non auctoritas imperandi, a quibus si quid motu proprio statutum fuerit, quod ecclesiarum etiam respiciat commodum est favorem, nullius firmitatis exsistit, nisi ab Ecclesia fuerit approbatum* – "Considering the fact that the laymen and monks, who are expected to show obedience and not seek the power to rule, should not have entitlements concerning churches and church people, and if they decide something on their own initiative, even if for the benefit of the churches, it has no legal effect if it is not confirmed by the Church;" *Decretales* 1,2, 10 (*Ecclesiae sanctae Mariae,* 1199).

[299] Van Hove, *Prolegomena*, p. 524f.

7. Prohibition of Roman Law Studies from the 12th through the 13th Century

Despite a high esteem held towards the law of ancient Rome, the reception of its numerous regulations by canon law and versatile and tight bonds between the two laws in the Middle Ages, in the 12th and 13th centuries, the popes took a stance that thorough studies of civil law did not fall within the responsibilities of canonists.[300] Roman law as part of a university curriculum – after fulfilling its role in the canonical domain – was prohibited by popes Alexander III and Honorius III to some groups of the clergy as superfluous. Furthermore, through Pope Honorius's decision, the studies of Roman law were banned in Paris University and many chairs of Roman law were dissolved.

The prohibition of the study of Roman law by some members of the clergy was first implemented by Pope Alexander III (1159-1181), otherwise one of the pioneer lawyers among popes of medieval times, an expert in theology and a disciple and commentator of Gratian.[301] The papal decision was announced on the synod in Tours in 1163[302] and subsequently incorporated into *Decretals* of Gregory IX, the official ecclesiastical collection. The pope resolved as follows:

> The envy of our eternal enemy does not very much endeavour to precipitate the downfall of the feeble members of the Church; on the contrary, it strikes the most valuable and demoralizes the chosen ones whom the Scriptures call "the chosen for His feed." He believs that he contributes to the fall of many if his deviousness causes the separation of an important member of the Church. No wonder that as always he turns into the angel of light and leads some monks from their monasteries to lectures of law and exercises in preparing medications under the pretext of bringing relief to

[300] Dębiński, A. "Papiestwo a nauka prawa rzymskiego w XII-XIII wieku." In *Współczesna romanistyka prawnicza w Polsce*, Dębiński, A., Wójcik, M., eds., Lublin 2004, p. 52; Kuttner, S. "Papst Honorius III. und das Studium Zivilrechts." In *Festschrift für M. Wolf*, Tübingen 1952 (= *Gratian and the Schools of Law*, London 1983), p. 79ff.

[301] Pope Alexander III Orlando (Rolandus) Bandinelli (died 1181) was an outstanding theologian and one of the most eminent canonists of his time; he studied and later lectured in Bologna. He penned the commentary to the second part of Gratian's *Decretum* (1148) and to *Sententiae* – a theological study based on the teaching of P. Abelard; Schulte, *Die Geschichte der Quellen*, vol. I, p. 114ff.

[302] The resolution of the synod was included in Canon VIII entitled: *Ut religiosi saecularia studia vitent* (Let the Religious Avoid Secular Studies); Concil. Turon., c. 8; Mansi, 21, 1179.

> the sick or learn honest management of Church's matters. Henceforth, so that no member of the clergy is entangled in lay matters under the alleged reason of seeking knowledge, or becomes weaker in his spirit for the same reason that drives them to help the needy, we, the synod, decide that no one having taken monastic vows or having given profession of faith may attend the teaching of secular law or medicine. If they go and fail to return to their monastery within two months, they shall be avoided by everyone as if there were excommunicated, and shall not be heard even if they wished to supply justification. Those, however, who return shall always be the last in the choir, in the chapter, at a table and in other circumstances, and shall be deprived of any hope of being appointed to offices, unless it is granted by the Holy See.[303]

According to the papal ordinance, the regulars after their holy orders (*post votum religionis*) were not allowed to leave the cloister (*claustrum*) with a view to embarking upon two kinds of studies: medicine, referred to by the pope as *physica,* and Roman law, named secular laws (*leges mundanae*). The papal act made allowances for severe penal sanctions. In the case of monks who unlawfully left the monastery so as to pursue the prohibited studies and did not return within two months, they were subject to excommunication, that is, the penalty of being excluded from the church community.[304] Those monks who returned should – according to the act – assume the position of "the last brothers"(*ultimi*

[303] *Non magnopere antiqui hostis invidia +infirma membra ecclesiae praecipitare laborat, sed manum mittit ad desiderabiliora eius, et electos quoque nititur supplantare, dicente scriptura: «Escae eius electi.» Multorum siquidem casum operari se reputat, ubi pretiosius aliquod membrum ecclesiae sua fuerit calliditate detractum. Et Inde nimirum est, quod in angelum lucis se more solito transfigurans, sub obtentu languentium fratrum consulendi corporibus et ecclesiastica negotia fidelius pertractandi, regulares quosdam ad legendas leges et confectiones physicales ponderandas de claustris suis educit. Unde, ne sub occasione scientiae spirituales viri mundanis rursus actionibus involvantur, et in interioribus ex eo ipso deficiant, ex quo se aliis putant in exterioribus providere, per praesentis concilii assensum statuimus, ut nulli omnino post votum religionis, et post factam in aliquo loco religioso professionem ad physicam legesve mundanas legendas permittantur exire. Si vero exierint, et ad claustrum suum infra duorum mensium spatium non redierint, sicut excommunicati ab omnibus evitentur, et in nulla causa, si patrocinium praestare voluerint, audiantur. Reversi autem in choro, capitulo, mensa et ceteris ultimi fratrum [semper] exsistant, et, nisi forte ex misericordia sedis apostolicae, totius spem promotionis amittant*; *Decretales* 3,50,3.

[304] In church penal law, the penalty of excommunication (*excommunicatio* – exclusion from a community) involved exclusion from the Church community forbidding worshipping, accepting the holy sacraments and occupying church offices and functions. The penalty disallowed the clergymen from obtaining benefices or church dignities and performing any acts of jurisdiction; Jombrart, E. s.v. *Excommunication*, DDC, vol. V, col. 615ff; Krukowski, J. "Sankcje w Kościele." In *Komentarz do kodeksu prawa kanonicznego*, vol. IV, Lublin 1987, p. 164f.

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fratrum) in the monastic community (*in choro, mensa, capitulo et ceteris*) and were basically not admitted to any offices.[305]

The prohibition of Roman legal studies by monks (*religiosi professi)* was introduced to the Church legislation by Alexander III and renewed and rigidified by Pope Honorius III (1216-1227) in the well-known bull *Super specula* pronounced in Viterbo on 22nd November 1219.[306] The bull contained the whole collection of various rulings reflecting the attitude of medieval Church to civil law studies. In the second part of the papal document,[307] whose passage was incorporated into *Decretals* of Gregory IX, the pope expressed an opinion regarding the study of Roman law undertaken by ecclesiastics:

> Our late predecessor Alexander once determined in the Council of Tours that all those who leave their monasteries in order to attend the teachings of law or medicine should be avoided as excommunicated and should not be heard if they fail to return to the monastery within two months. And if they return, they shall always be the last in the choir, in the chapter, at a table and in other circumstances, and shall be deprived of any hope of being appointed to offices, unless it is granted by the Holy See. But because some of them make an excuse by seeking the opinion of other people, thus we, wanting such individuals to be exposed to excommunication for doing so, strictly order and recommend that they be deprived of the right to appeal and be excommunicated by their diocesan bishops and chapters as well as by other bishops who oversee the dioceses in which they study, and that their penalty be made known publicly. And because we desire that the study of theology flourishes so as to "Enlarge the place of the tent... lengthen the cords, and strengthen the stakes" (Is 54:2), and so as to surround the Catholic faith with an invincible wall of warriors thanks to whom it shall be able to counter those who come out against them, we desire and order that the

[305] *Reversi autem in choro, mensa, capitulo et ceteris ultimi fratrum* [*semper*] *existant, et, nisi forte ex misericordia sedis apostolicae, totius spem promotionis amittant*, *Decretales* 3, 50,3.

[306] Potthast A., ed. *Regesta Pontificium Romanorum*, vol. I, Berolini 1873, n. 6165. (p. 539). The text of the bull is cited by Fournier, M. "L'Église et le droit romain au XIII siècle," *RHD* 14(1890), (Appendix I), pp. 115-118.

[307] The papal bull, whose original copies have not been preserved, was divided into three functional parts, each beginning with general remarks of a pastoral nature. The first part covers the measures to be taken in order to facilitate the growth and guarantee the stable financial support of theological studies. The second part contains the repetition of penalties instituted by Alexander III on the Council of Tours (1163) for the monks who left their monasteries in order to study medicine or civil law. The third part prohibits the teaching and studying of civil law at Paris University. The three parts of *Super specula* adopted their ultimate form in *Decretals* of Gregory IX (5th September 1234) abridged by St. Raymond of Penyafort; Ullmann W., *Honorius III and the Prohibition of legal Studies*, In idem, *Law and Jurisdiction in the Middle Ages*, London 1998, p. 178f.; Kuttner, *Papst Honorius III.*, p. 79f.

> ordinance involves archdeacons, deans, provosts, parsons, cantors and other sacerdotal persons holding church offices as well as presbyters if they do not refrain from their activity in due time, and that our order is strictly observer and no appeal granted.[308]

As follows from the document, Pope Honorius III entirely endorsed the resolutions of his predecessor "the late Alexander" publicized almost half a century before during the synod in Tours and concerning the monks departing from the monastery in order to take up Roman law studies or medical studies (*leges vel phisicae*). As his forerunner, Honorius III threatened the monks (*religiosae personae*) infringing on the regulation with similar penalties. Yet, Honorius III altered the ban concerning medical studies and Roman law studies (*leges*) by extending the excommunication penalty over certain classes of the diocesan clergy (*leges*) who, due to their offices and church functions, were obliged to maintain permanent residence and engage in pastoral activities. The pope resolved that this penalty, without the remedy of lodging an appeal,[309] would involve: archdeacons (*archidiaconi*), deans (*decani*), provosts (*praepositi*), parsons (*plebani*), cantors (*cantores*) and other sacerdotal persons holding church offices (*personatus habentes*) as well as presbyters (*praesbyteri*).

The Church laws so worded and proclaimed by popes Alexander III and Honorius III provoke a question for the cause and context of their publication and, in a broader sense, for the approach of papacy towards Roman law. Can these bans reflect the popes' aversion towards Roman law or are they a symptom of antagonism between Roman and canon law?

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[308] [...] *Contra religiosas personas, de claustris exeuntes ad audiendum leges vel physicam, felicis memoriae Alexander praedecessor noster olim statuit in concilio Turonensi, ut, nisi infra duorum mensium spatium ad claustrum redierint, sicut excommunicati ab omnibus evitentur, et in nulla causa, si patrocinium praestare voluerint, audiantur. Reversi autem in choro, mensa, capitulo et ceteris ultimi fratrum exsistant, et, nisi forte ex misericordia sedis apostolicae, totius spem promotionis amittant. Verum, quia nonnulli ex talibus propter quorundam opiniones diversas excusationis aliquid assumebant, nos, volentes, ut tales de cetero ipso facto sententiam excommunicationis incurrant, districte praecipiendo mandamus, quatenus tam a dioecesanis et capitulis ipsorum, quam etiam a ceteris episcopis, in quorum dioecesibus in huiusmodi student, tales sublato appellationis obstaculo excommunicati et praedictis poenis obnoxii publice nuncientur.* [*Quia vero theologiae studium cupimus ampliari, ut dilatato sui tentorii loco et funiculos suos faciat longiores, ut sit fides catholica circumcincta muro inexpugnabili bellatorum, quibus resistere valeat adscendentibus ex adverso: ad archidiaconos, decanos, plebanos, praepositos, cantores et alios clericos personatus habentes, nec non et presbyteros, nisi ab his infra spatium praescriptum destiterint, hoc extendi volumus et mandamus, et appellatione postposita firmiter observari*]. *Decretales* 3, 50,10.

[309] [...] *et apellatione postposita firmiter observari*; *Decretales*, 3,50,10.

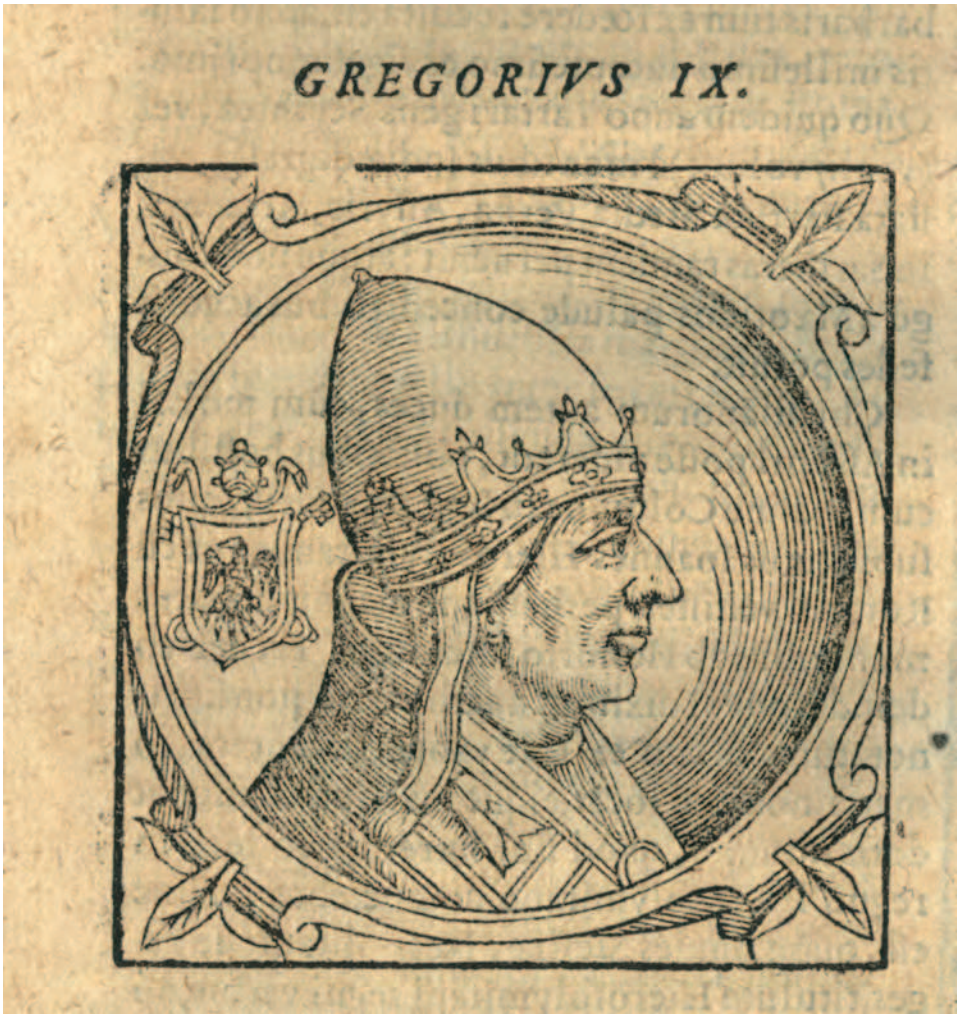
When pondering upon such a controversy, first of all, we should rely on the observation made above that the prohibition of pursuing Roman law studies was not pervasive; it did not concern all the clergy but some specific groups. In the second half of the 12th century, Alexander III prohibited only those monks from studying who were supposed to be devoted to monastic life. Similarly, Pope Honorius III decided to extend the ban of Tours but only for those groups of the clergy for whom medical or civil studies might have been particularly detrimental in terms of neglecting their clerical duties and whom the pope expected to be predominantly interested in theological matters. Other priests, including those preoccupied with ordinary pastoral work, were not confined by this limitation.[310]

When speaking of the motives behind the papal acts forbidding the clergy to engage in medical studies and civil law studies, one cannot overlook that both the resolutions of Alexander III and the passage from the bull *Super specula* by Honorius III in *Decretals* of Gregory IX were included in the column *Ne clerici vel monachi saecularibus negotiis se immisceant* ("Don't let the clerics or monks become entangled in the laymen's matters").[311] This column contains different ordinances issued by synods and popes prohibiting the adoption of certain activities and professions generally referred to as *secularia negotia* or undertaken for profit (*lucri causa*). The column opens with the decisions of the 813 synod of Mainz and lists numerous occupations that the priesthood and monks should abstain from:

> Let us say more about secular life whose integral part is carnal passion of any kind. Loathsome income brings everything that man craves for and goes over the boundary to achieve it: acceptance or offering of filthy activities; hiring someone for some lay work in return for remuneration; drive for argument, squabble and dispute; acting as a counsel in secular trials, unless the defendant is an orphan or widow; acting as a plaintiff [*conductores*] or procurators [*procuratores*] in secular affairs; bantering with words or actions or pursuit of lay mockery; passion for dice; joining with people unsuitable for one's community; desire for life among pleasures; indulgence in gluttony and drinking; possessing incorrect measures and weights; working dishonestly (however, just occupation required by different necessities shall not be frowned upon because we read that the Holy Apostles took up various jobs [cf. 1 Thes 2:9], and the rule of St. Benedict

[310] It was so resolved by Clement IV; cf. *Liber Sextus* 3, 24. 1. Likewise, in 1255 Alexander IV revoked the ban regarding the clergymen but sustained it for the regulars studying at Salamanca University. Moreover, there was an alternative of obtaining individual dispensation from the official prohibition; more in Kurtscheid, *De utriusque iuris*, p. 340.

[311] *Decretales*, 3,50, 10.



Gregory IX

> recommends that those who manage the affairs of the monastery should be assisted [cf. *Regula s. Benedicti* 48,1; 57,1]); go hunting with hounds and birds and take part in superfluous activities. Such things and similar are prohibited to the servants of God's altar as well as the regulars mentioned by the Apostle, "No soldier on service entangleth himself in the affairs of this life." [2 Tim 2:4][312]

In consequence, the resolution of the synod debarred the clergy from many activities and unpriestlike behaviours. The quoted extract of the Church norm did not however allow for any sanctions for its violation.

The list of activities in question was broadened in successive decretals contained under the same title. First, Pope Eugenius decided that clergymen should not be advisors (*ministri*) or procurators (*procuratores*) to laymen; if they assumed such functions against the Canon and were disclosed, they would never be able to seek remedy in the Church.[313] A cleric who accepted the office of general procurator (*generalis procurator*) or justiciar (*iusticiarius)* to a secular ruler should be relegated from his office; when he was a religious, he was to be penalized.[314] Decretals also prohibited the clergy – under the penalty of

[312] *Multa sunt negotia saecularia, de quibus pauca perstringamus, ad quae pertinet omnis carnalis concupiscentia. Quicquid plus iusto appetit homo, turpe lucrum est munera iniusta accipere vel etiam dare, pro aliquo saeculari quaestu pretio aliquem conducere, contentiones, vel lites, vel rixas amare, in placitis saecularibus disputare, excepta defensione orphanorum aut viduarum, conductores saecularium rerum aut procuratores esse, turpis verbi vel facti esse ioculatorem, vel iocum saecularem diligere, aleas amare, ornamentum inconveniens proposito suo quaerere, in deliciis vivere velle, gulam et ebrietatem sequi, pondera iniusta vel mensuras habere, negotium iniustum exercere. Nec tamen iustum negotium est contradicendum propter necessitates diversas, quia legimus, sanctos Apostolos negotiatos fuisse, et in regula B. Benedicti praecipitur provideri, per quorum manus negotia monasterii procurentur. Canes et aves sequi ad venandum, et omnibus quibuslibet causis superfluis interesse*, *ecce talia et his similia ministris altaris Domini, nec non et monachis omnino contradicimus, de quibus ait Apostolus: «Nemo, militans Deo, implicat se negotiis saecularibus»; Decretales,* 3,50,1.

[313] *Eugenius Papa Lucanensi Episcopo. Sacerdotibus autem et clericis tuis denuncies publice, ne ministri laicorum fiant, nec in rebus eorum procuratores exsistant. Quod si postmodum facere praesumpserint, et occasione ipsius administrationis propter pecuniariam causam deprehendantur in fraude, indignum est eis ab ecclesia subveniri, per quos constat in ecclesia scandalum generari; Decretales* 3,50,2 – "Pope Eugenius to the bishop of Lucania. Announce it publicly to your clergy that they should not become advisors or plenipotentiaries in laymen's affairs. And if they wish to do so in the future and their activity comes to light due to financial fraud, the Church shall not come to their relief, for they have corrupted Her."

[314] *Sed nec procurationes villarum aut iurisdictiones etiam saeculares sub aliquibus principibus et saecularibus viris, ut iustitiarius eorum fiat, clericorum quisquam exercere praesumat. Si quis autem adversus haec venire tentaverit, quia contra doctrinam Apostoli, dicentis: «Nemo, militans Deo, implicet se saecularibus negotiis» saeculariter agit, ab ecclesiastico fiat ministerio alienus pro eo,*

losing a benefice – from holding the office of a notary (*tabellionatus*);[315] they were forbidden to run businesses for profit (*lucri causa*),[316] pronounce capital punishment and become involved in effecting such a penalty.[317]

quod, officio clericali neglecto fluctibus saeculi, ut potestatibus [*saeculi*] *placeat, se immergit. Districtius autem decernimus puniendum, si religiosorum quisquam aliquid praedictorum ausus fuerit attentare*; *Decretales* 3,50,4 – "But let no one dare to oversee villages or hold secular jurisdictions under some secular rulers or other persons and become their justiciar. If someone acts against it, and this is secular work against the teaching of the Apostle who says, "No soldier on service entangleth himself in the affairs of this life" [cf. 2 Tim 2:4], he shall be removed from the Church service because he has neglected his spiritual duties and immersed himself into the waters of this world in order to adulate the lay authority. Furthermore, we propose that more severe penalty be imposed if a religious attempts one of these things."

[315] *Innocentius III. Esculano Episcopo. Sicut te accepimus referente, quum venerabilis frater noster Hostiensis episcopus olim per tuam transiens civitatem tibi dederit in mandatis, ut presbyteros, diaconos* [*et subdiaconos,*] *quos ibidem invenit passim tabellionatus officium exercentes, excommunicationis vinculo innodares, et eos, qui ab illis publica reciperent instrumenta, tu, licet id feceris, ex mandato* [*tamen*] *episcopi dicti dissimulasti postmodum de subdiaconis, donec qualiter contra ipsos et alios in sacris ordinibus constitutos deberes procedere, sedem duceres apostolicam consulendam. Quocirca Fraternitati tuae per apostolica scripta mandamus, quatenus clericis in sacris ordinibus constitutis tabellionatus officium per beneficiorum* [*suorum*] *subtractionem appellatione postposita interdicas*; *Decretales* 3,50,8. – "Innocent III to the bishop of Esculano. We have learnt from your account that, as our honourable brother, bishop of Hostia, ordered you, while passing through your town, to excommunicate presbyters, deacons and subdeacons who, as he put it, had assumed the function of notaries as well as those who received public documents from them, you did it following the bishop's instruction but postponed the decision on subdeacons until you ask the opinion of the Holy See as to how you should proceed with them and those who had been ordained, therefore, we recommend you, brother, in this apostolic epistle to prohibit the ordained clergy from assuming the duties of notaries under penalty of taking away their benefices without the right of appeal."

[316] *Secundum instituta praedecessorum nostrorum sub interminatione anathematis prohibemus, ne monachi vel clerici causa lucri negotientur, et ne monachi vel a clericis vel a laicis suo nomine firmas habeant, neque laici ecclesias ad firmam teneant*; *Decretales* 3,50,6. – "In accordance with the resolutions of our predecessors, we prohibit, under the pain of anathema, that monks or priests run businesses for profit, take out a lease (*firmae*) from other members of the clergy or from laymen on their own behalf, and that churches are leased to laymen for possession."

[317] *Sententiam sanguinis nullus clericus dictet aut proferat, sed nec sanguinis vindictam exerceat, aut ubi exerceatur intersit. Si quis autem huiusmodi occasione statuti ecclesiis vel ecclesiasticis personis aliquod praesumpserit inferre dispendium, per censuram ecclesiasticam compescatur. Nec quisquam clericus literas dictet aut scribat pro vindicta sanguinis destinandas, unde in curiis principum haec sollicitudo non clericis, sed laicis committatur. Nullus quoque clericus ruptariis vel ballistariis, aut huiusmodi viris sanguinum praeponatur, nec ullam chirurgiae artem subdiaconus, diaconus vel sacerdos exerceat, quae adustionem vel incisionem inducit. Nec quisquam purgationi aquae ferventis vel frigidae seu ferri candentis ritum cuiuslibet benedictionis aut consecrationis impendat,*

The prohibition of law studies to the clergy was founded on the antagonism between secular and spiritual sciences, which was reflected in the placement of the extracts of Alexander III's and Honorius III's law in the column *ne clerici vel monachi saecularibus negotiis se immisceant.* Yet, it would be unjustified – as Kuttner points out – to surmise that it was a manifestation of aversion between Roman and canon law (the latter being regarded as the fruit of theology). Since the bull *Super specula* did not question the validity or the value of legal systems, but covered the studies of ecclesiastical sciences, and the sole fact that medical sciences and civil law (*leges vel physica*) were both juxtaposed with theology should suffice as proof that thinking about hostility of the Curia towards one of these disciplines would be a bit of an exaggeration.[318] Still, it does not imply that this opposition in a sense assumed unfavourable judgement of *leges* and *physica*; but it was a relative judgement that should be seen against the backdrop the aforementioned bans concerning activities and professions to which monks and priests should never devote themselves. Only with reference to *scientia Domini* and only in the context of the considerations referring to the value of these sciences for the clerics – whose primary duty was to mind only spiritual issues – secular sciences were collated with "deceptive grace" and "a vain housemaid."[319]

The prohibition of pursuing legal studies, as well as other lay disciplines, was justified by the clergy's inattention to theology. Legal studies became "particularly fashionable", even more so because the expansion of Church administration and jurisdiction promised the would-be lawyers propitious career and the ensuing financial gains. For broad groups of the clergy *scientiae lucrativae* posed a considerable temptation. They evaded theology "avid for

salvis nihilominus prohibitionibus, de monomachiis sive duellis antea promulgatis; *Decretales* 3,50,9. – "Let no clergyman pass or pronounce capital punishment, effect capital punishment or be present at execution. If someone decided to do so in an attempt to harm churches or church people, he shall be restrained by Church censorship. Let no clergyman dictate or draw up a document related to capital punishment – this is a duty of laymen in royal courts. Likewise, no clergyman shall be in charge of those who break bones (*ruptarii*) or operate instruments of torture (*ballistarii*) or similar bloodstained people; nor shall a subdeacon, deacon or priest dabble in the art of surgery which involves making incisions or cauterizing. Let no one perform a rite of blessing or sacrifice for purgation [by means of] boiling or icy water, or searing iron; the previously made ban of solitary fights of duels is sustained."

[318] Kuttner, *Papst Honorius III.*, p. 86.

[319] The introduction to the second part of *Super specula* (*Decretales*, 3, 50, 10) reads: *Sane licet fallax sit gratia ceterarum scientarum et vana etiam pulchritudine,* [...] *et illicite se convertunt ad pedissequas amplectendas quo plausum desiderant populorum* [...].

lush benefices and lucrative offices in the Church administration."[320] Therefore, in order to level the emerging disparities, theological studies were to be expedited and so framed as to entail some material benefits. Thus, the decree of the Third Council of Lateran summoned by Alexander III resolved that in every university chair a benefice for a tutor be established in order to help exempt the needy students from tutoring fees. His responsibility was to *clericos eiusdem ecclesiae et scholares pauperes gratis docere*[321] – teach without collecting any remuneration from students. On the other hand, through the bull *Super specula*, Honorius III established beneficiary stipends and legal security for theology professors and students – their idea was to enable the secular clergy to stay at university away from their benefices.[322] Apparently, the new regulations provided for the economic security of the clergy in the first place and subsequently banned some classes of the ecclesiastics from studying civil law and medicine "in order for theological studies to expand... so as to surround the Catholic faith with an invincible wall of warriors thanks to whom it would be able to counter those who come out against them" – *Quia vero theologiae studium cupimus ampliari* [...] *ut sit fides catholica circumcincta muro inexpugnabili bellatorum, quibus resistere valeat adscendentibus ex adverso*.[323]

Thus, the fundamental argument in support of the papal restrictions pertaining to the studies of Roman law by monks and priests was anxiety about the quality of theological studies.

With his bull *Super specula* of 1219, Honorius III not only forbade some groups of the clergy to study civil law, but also inhibited the teaching of this law at Paris University. The passage from the papal document that was incorporated into *Decretals* of Gregory IX reads:

> It is righteous that the Holy Church does not reject the usefulness of secular laws, which you may well recognize if you follow the path of justice; but because in France and some

[320] Vetulani, A. "Średniowieczny Kościół polski w zasięgu łacińskiej kultury prawniczej." In *Księga tysiąclecia katolicyzmu w Polsce*, vol. I, Lublin 1969, p. 401;

[321] Mansi, 22, 228.

[322] All prelates and chapters should appoint suitable seminarians to study theology and support them financially when in need; the one who taught and studied at theological faculties was able to procure unlimited income from benefices (he was statutorily exempt from the obligation of residency), professors when conducting classes at university, students for five years; Kuttner, *Papst Honorius III.*, p. 85, note 26.

[323] The text of the bull contains numerous references to the Bible and many allegories which justify the leading theme i.e. care for the appropriate level of theological education for the clergy; more in Kuttner, *Papst Honorius III.*, p. 84f.

> other provinces, the laymen do not apply the laws of Roman emperors and ecclesiastical matters that may not be resolved by canon law are few, and in order to fulfil the words of the Scriptures "and the disciples of Elisha shall sit by the generous waters like doves if they find no steps before the door where they can rest their feet" (cf. Deut 5:12, Is 60:8), we firmly prohibit and strictly forbid that neither in Paris nor in adjoining towns or in the countryside anybody dared to teach or attend the lectures on civil law. The one who does otherwise shall be not only temporarily refused the right to defence but shall be excommunicated without the right to appeal to the local bishop. [You brothers and sons observe this avidly and make others do the same so that you might be regarded as true friends of the Groom, etc.]. Issued in Viterbo, on the 7th day before the first day of December, in the fourth year of our pontificate, 1219].[324]

In accordance with the document, the pope "firmly prohibited and strictly forbade that neither in Paris nor in adjoining towns or in the countryside anybody dared to teach or attend the lectures on civil law." This ruling having a value of a binding ecclesiastical law poses a question for its *ratio legis*. Can it be explained by intrachurch disciplinary and pastoral measures; or rather some political considerations were of a decisive value for its issuing and subsequently blending into a commonly binding, official collection of decretals? This question has been widely discussed, especially since the end of the 19th century. Savigny[325] and Hinschius[326] opted for the first explanation. Their opinion was shared by a number of later authors, for example, M. Fournier,[327] B.V. Kurtscheid,[328] A. Van Hove,[329] S. Kuttner.[330] This opinion, frequently without broad-

[324] Super specula (*Et infra:* [*cf. c.* 5. *de mag. V*. 5.]) *Sane, licet sancta ecclesia legum saecularium non respuat famulatum, quae satis aequitatis et iustitiae vestigia imitantur: quia tamen in Francia et nonnullis provinciis laici Romanorum imperatorum legibus non utuntur, et occurrunt raro ecclesiasticae causae tales, quae non possint statutis canonicis expediri, ut plenius sacrae paginae insistatur, +et discipuli Helisei liberius iuxta fluenta plenissima resideant ut columbae, dum in ianuis scalas non invenerint, ad quas divaricare valeant pedes suos, Firmiter interdicimus et districtus inhibemus, ne Parisius, vel in civitatibus seu aliis locis vicinis quisquam docere vel audire ius civile praesumat. Et qui contra fecerit, non solum a causarum patrociniis interim excludatur, verum etiam per episcopum loci appellatione postposita excommunicationis vinculo innodetur. [Vos autem, fratres et filii, sic diligentius praescripta servetis et faciatis studiosius ab aliis observari, quod veri amici sponsi possitis merito comprobari, etc. Dat. Viterbii VII. Kal. Dec. Pont. nostr. Ao. IV. 1219.]*; *Decretales*, 5, 33, 28.

[325] Savigny, *Geschichte des römischen Rechts*, vol. III, 2nd ed., p. 364ff.

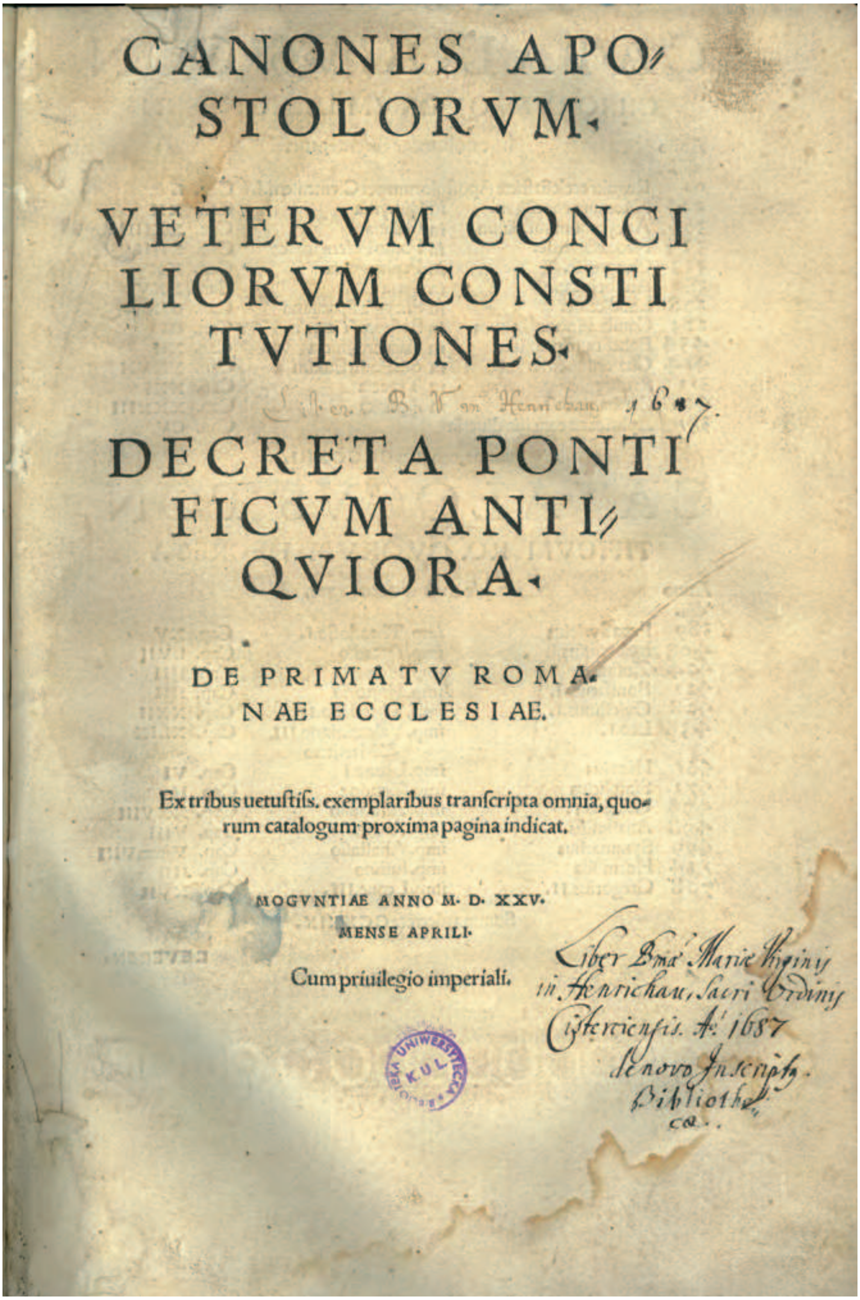
[326] Hinschius, P. *System des katholischen Kirchenrechts*, vol. I, Berlin 1869, p. 139f, 140, note 4, p. 777, note 1.

[327] M. Fournier, *L'Église,* p. 100ff.

[328] Kurtscheid, *De utriusque iuris*, p. 339.

[329] Van Hove, *Prolegomena*, p. 446.

[330] Kuttner, *Papst Honorius III*., p. 79ff.



CANONES APO-
STOLORVM.

VETERVM CONCI-
LIORVM CONSTI-
TVTIONES.

DECRETA PONTI-
FICVM ANTI-
QVIORA.

DE PRIMATV ROMA-
NAE ECCLESIAE.

Ex tribus uetustiss. exemplaribus transcripta omnia, quo-
rum catalogum proxima pagina indicat.

MOGVNTIAE ANNO M. D. XXV.
MENSE APRILI.

Cum priuilegio imperiali.

Liber B.mae Mariae Virginis in Henrichau, Sacri Ordinis Cisterciensis A.o 1687 de novo inscriptus Bibliothecae.

Title page, *Canones Apostolorum*, Meinz 1525, University Library of John Paul II Catholic University of Lublin, ref. no. Gc.88.

er corroboration, is accepted by many historians.[331] On the other hand, many authors opposed such an interpretation. They underlined the political character of *Super specula* and suspected it of being a manifestation of the hostility of the Curia towards Roman law.[332] Still others, mainly drawing attention to the closing part of the bull concerning Paris, considered conscious papal support for the French objection to the process of Romanization of customary law (*droit coutumier*).[333] Moreover, there are authors who attribute the issuing of the bull *Super specula* to the efforts of the French king Philip II Augustus who, with the object of emphasising that his kingdom was not subdued to the superior imperial power, urged the publication of a document forbidding the studies of Roman law at Paris University.[334] With such motives being genuine, this would imply – by a well-known medieval identification of Roman law with the emperor's authority – a clear anti-imperial overtone. "From there" – as Kuttner points out – "but a small step from the world of great politics and regarding *Super specula* as a curial instrument in the struggle between *sacerdotium* and *imperium.*"[335]

When deliberating over the effects of the ban in question, it should be noted that the restriction was of limited scope and was in force solely in Paris University. The bull specified that the ban was effective only "in Paris and the neighbourhood."[336] A crucial circumstance to mention at this point of the discussion was the fact that the pope did not comment on the binding force of the imperial law, but he merely stated that "in Ile-de-France[337] and some other provinces, the laymen do not apply the laws of the Roman emperors" – *in*

[331] Cf. Grzybowski, S. *Dzieje prawa*, Wrocław 1981, p. 88; Rechowicz, M. "Początki i rozwój kultury scholastycznej." In *Dzieje teologii katolickiej w Polsce*, vol. I. *Średniowiecze*, Lublin 1974, p. 47.

[332] So in Schulte, *Geschichte der Quellen* vol. I, p. 105; vol. II, p. 72f. Cf. also Kuttner, *Papst Honorius III.*, p. 82, note 12.

[333] Ibidem, p. 83

[334] So in Naz, R. s.v. *Droit romain*, DDC, vol. IV, col. 1503f; Vetulani, *Średniowieczny Kościół polski,* p. 401; idem, *Początki najstarszych wszechnic*, pp. 152; 245.

[335] *Und von da ist man mit einem Schritt in der großen Politik, so daß Superspecula zu einem kurialen Instrument im Kampf zwischen sacerdotium und imperium wird*; Kuttner, *Papst Honorius III.*, p. 83.

[336] Expanding the binding power of the ban on Roman law studies onto other regions of France and England, Scotland, Spain and Hungary allegedly attributed to Innocent IV in 1253-54 by the bull *Dolentes* is commonly negated by scientists, for, as corroborated by Digard, G. *La papauté et l'étude de droit romain an XIII siècle*, Paris 1890, p. 381ff, the bull is not authentic.

[337] The word *Francia* used in the bull denotes Ile-de-France, and not France (Gaul).

OPERA

D. INNOCEN-

TII PONTIFICIS MA-

XIMI, EIVS NOMINIS III. VIRI ERV-

ditiſſimi ſimul atq; grauiſſimi, quæ quidem hactenùs obtineri potuerunt omnia, ad diuerſa, antiqua fideq; digna exempla-ria, ſedulò, ſtudioſeq; caſtigata, & partim iam primùm in lucem edita, & in vnum volumen congeſta.

Quorum Elenchum verſa pagina inuenies.

Floruit, vniuerſaliq; catholicæ Eccleſiæ præſedit anteannos CCCXLV.

Cum memorabilium ſententiarum Indice locupletiſſimo.

FESTINA LENTE

Bibliotheka Henr. Badeni S. Nr.

Coloniæ excudebat Ioannes Noueſianus. Anno M. D. LII.

Title page, *Opera D. Innocentii pontificis*, Köln 1552, University Library of John Paul II Catholic University of Lublin, ref. no. Gc. 237

Francia et nonnullis provinciis laici Romanorum imperatorum legibus non utuntur. A neutral phrase was used here, namely "do not apply" – *non utuntur*.[338] Consequently, the pope managed to evade the comments on the validity or invalidity of the imperial law, i.e. Roman law if we consider the standards of the time. Moreover, he did not take a stand as regards the disparity between the local laws applied in practice and *ius civile* taught at universities. No remarks or obscure mentions concerning the relation between Roman law and the imperial ideology can be traced in the papal document.

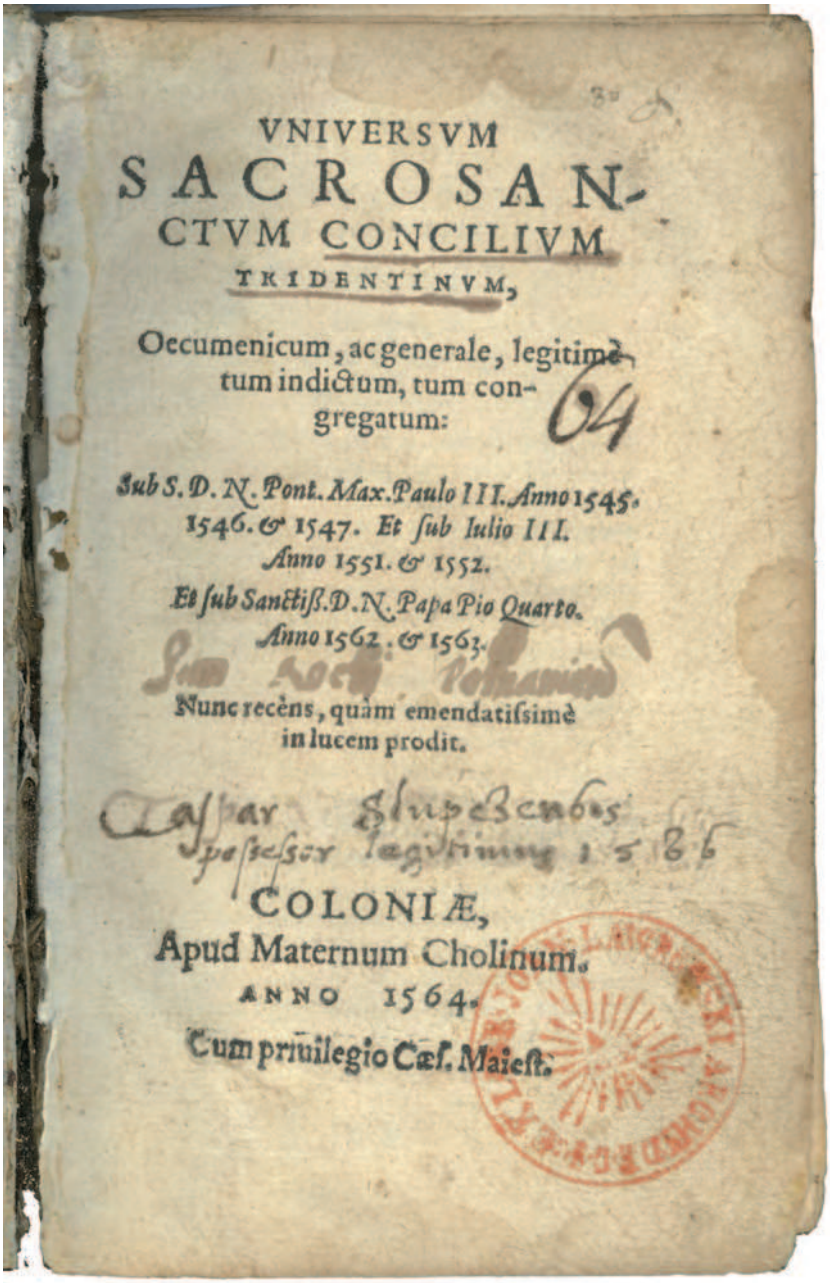
A noteworthy fact is that the successor of Honorius III, Gregory IX, while upholding the constraint on the study of Roman law in Paris, just a few months later, on 17th January 1235, consented to the teaching and studying of civil law at Orleans University (excluding those under canonical ban),[339] which became the principal beneficiary of *Super specula.* Hence, Kuttner is actually right saying that if we assume the existence of political motives behind the proclamation of the bull *Super specula,* Gregory IX's approval of civil law studies in a budding legal school in Orleans ought to be seen as papal inconsistence or mitigation of the political stance (assuming it was there) adopted by his predecessor.[340]

When pondering upon the reasons of the prohibition on studying Roman law in Paris, one cannot disregard the then scientific trends in the Church. A conspicuous feature of the period under discussion was a considerable decline of interest in theology that yielded to the study of law, both civil and canon. Permeating the entire Church, this phenomenon was primarily contingent upon a long period of struggle between *imperium* and *sacerdotium.* What follows, legists – the Roman law experts – were exceedingly appreciated. Roman law, whose regulations affirmed the superiority of the position of Emperor Justinian over the Church, was a material political tool in this conflict, furnishing the supporters of the royal interference in ecclesiastical issues with sound arguments. Roman law consolidated the imperial position in state policy, because it emphasized the absolute power wielded by emperors. For this reason, emperors were not only anxious to protect *iuris prudentes* but also used their skills at their own court; in the 12th and the following centuries, the number of lucrative positions in different chancelleries and courts rose,

[338] Kuttner, *Papst Honorius III.*, p. 83, is right to suppose that if the pope had stated *legibus non ligantur* or *leges respuunt*, it would have certainly meant taking a definite stand concerning the validity or invalidity of Roman law.

[339] Naz, R. s.v. *Droit romain*, DDC, vol. IV, col. 1505; Stein, *Roman law*, p. 67.

[340] Kuttner, *Papst Honorius III.*, p. 98f.



VNIVERSVM
SACROSAN-
CTVM CONCILIVM
TRIDENTINVM,

Oecumenicum, ac generale, legitimè tum indictum, tum congregatum:

Sub S. D. N. Pont. Max. Paulo III. Anno 1545. 1546. & 1547. Et sub Iulio III. Anno 1551. & 1552.
Et sub Sanctiß. D. N. Papa Pio Quarto. Anno 1562. & 1563.

Nunc recèns, quàm emendatissimè in lucem prodit.

COLONIÆ,
Apud Maternum Cholinum.
ANNO 1564.
Cum priuilegio Cæs. Maiest.

Title page, *Universum Sacrosanctvm Concilivm tridentinvm*, Köln 1564, University Library of John Paul II Catholic University of Lublin, ref. no. P.XVI.282

especially for those lawyers who operated as advisors, advocates, notaries, judges, administrators and drafters of imperial laws. Indeed, by the thirteenth century lawyers had became prominent figures in the medieval society and were active almost everywhere in civic affairs. A great demand for the jurists' services, high income and social prestige that they enjoyed helped the "legal" universities, especially Bologna University – the centre gathering renowned professors of both Roman and canon law, be a magnet for vast numbers of knowledge-thirsty learners from all over the Latin Europe.[341] These students were very well informed as to what discipline and where to study in order to acquire suitable remuneration for their high qualifications and professional services.[342] No wonder a great number of students in the 12th and 13th centuries were attracted to a legal career. In such circumstances, the interest in other fields, especially long, arduous and at the same time costly theological studies was on the decrease. The competitive studies of civil law contributed to the decay of theological studies and consequently, in a sense, rendered the Church vulnerable in the ideological dispute with formidable heresies, first Catharism. The Catharist movement and similar heresies posed a considerable threat to Christendom in the 13th century. The area predominantly exposed to the menace was the south of France where Cathars had favourable conditions to organize themselves and broaden their sphere of influence.

These conditions certainly bore upon the prohibition on studying Roman law at Paris University. This university subscribed to slightly different principles than northern Italian universities and was concentrated on other scientific disciplines with theology taking the lead, preceded by logic as the introduction to philosophy. In the mid-12th century, Paris became the intellectual capital of Christendom. Of significance for the development of the university was the

[341] Studies in Bologna had indubitable kudos. The title of 'doctor' was regarded as an unquestionable proof of intellectual ennoblement and enjoyed extraordinary prestige. According to Dawson, *Religion and the Rise,* p. 225, a doctorate of Civil Law of Bolognia University was commonly seen as the highest academic degree in the world. The high social status of doctors of law was manifested among others by the burghers raising monuments in their honour in public places of Italian university cities. Some such monuments are still present in front of St. Francisco church in Bologna; cf. Kuryłowicz, *Prawo rzymskie*, p. 98.

[342] It was well reasoned, yet somewhat overdone by Roger Bacon to complain around 1271 about a great number of lawyers who did not confine themselves to "the holy canons" but turned to civil law. In his opinion, "Every one clever and excelling at theology and philosophy was fleeing to civil law the moment he realized lawyers got wealthy and were respected by all prelates and rulers". "The greedy faculty of civil law", he said "attracts a multitude of the clergy;" cited after Kurtscheid, *De utriusque iuris,* p. 341.

protection of popes and their involvement in the curriculum. In the period of vivid philosophical and theological discussions that took place in those times, the issues of the purity of faith and law-abiding of the advocated doctrine had great magnitude for the Church. It was the Parisian masters of liberated arts and theology who trained the students from the then entire Christian world; these students afterwards returned to their homelands to pass the gained knowledge. The first statute of the Parisian *Studium generale* was the ordinance made by Innocent III in 1215. It regulated the curriculum of *artes liberales* treated as introductory to theological studies and the programme of theological studies. Of importance for establishing the scientific fields of interest for the disciplines cultivated at Paris University was the above-mentioned bull of Honorius III from 1219, banning the lectures on *ius civile*. As a result, Roman law as an independent discipline was effaced from the curriculum in the Parisian *Studium generale.*[343] The only law left was canon law that was regarded as having stemmed from theology and being the most appropriate practical application of theological findings.[344] Students who wished to gain a licentiate or doctor's degree in civil law had to enrol for other French and Italian universities.[345] Consequently, Pope Honorius III's ban on the teaching

[343] Thus, in Paris of the 13th and 14th century, there was only the Faculty of Canon Law where, however, according to its old Charter, nobody could gain a scientific degree if he did not, besides the canon law, pursue civil law studies in a different *Studium generale* for three years; Savigny, *Geschichte,* vol. III, p. 373. At other universities in the 13th century, many scholars who were devoted not only to canon law studies but also to civil law were clerics. At Orleans University, where in the year 1235 Gregory IX openly allowed participation in lectures and teaching of Roman civil law – excluding the ecclesiastics who had the status of or fulfilled pastoral duties, all scholars and all professors were clergymen. In 1285 at the University of the Roman Curia, Pope Honorius IV acceded to all clerics, except for bishops, abbots and monks, attending Roman law tutorials. A similar privilege for Bologna University was issued in 1310 and upheld in 1321; Kurtscheid, *De utriusque iuris*, p. 340ff.

[344] Wielgus, *Znaczenie prawa,* p. 27. Gratian, who is mistakenly attributed to have isolated canon law from theology, called canon law *teologia practica externa;* Hemperek, Góralski, *Historia źródeł*, p. 176; Van Hove, *Prolegomena*, p. 345.

[345] Also at Kraków University, where in the Middle Ages Roman law was not cultivated, with legal studies being limited to canon law only; its founder (1364), King Casimir the Great besides five chairs of canon law founded five chairs of Roman law. Regrettably, they were not chaired and their work was initiated neither during the king's reign nor during the revival of the university by the Jagiellonian dynasty. The teaching of this discipline in Kraków began no sooner than in 1518; the first chair of Roman law was created in 1533 by bp Piotr Tomicki (1523-1536), a graduate of Bologna University. This condition, as assumed in the literature, probably emerged due to the lack of qualified experts of Roman law, but we cannot rule out the impact of the decision of Honorius

of Roman law at Paris University, which led the way in theology, was aimed to sustain interest in the study of the divine.

Overall, the prohibition of the study of Roman law by some members of the clergy issued by Alexander III and Honorius III was not intended as a manifestation of aversion toward this discipline but was aimed to prevent the lowering quality or even departure from theological studies. The plausible rationale behind this ban at Paris University, introduced by the bull *Super specula* of Honorius III (1219), has been discussed ever since. The analysis of this document as well as its broader context fail to unambiguously determine whether the motives were purely political (the hostility of the Curia toward *ius civile* perceived as imperial law and the endeavours made by the French king Philip Augustus) and resulted from a lasting struggle between *imperium* and *sacerdotium*. Important as they might have been, the decision of Pope Honorius III should rather be seen as instigated by the concern with intrachurch discipline and pastoral care.

III regarding the studies of Roman law at Paris University, which was a role model for the Kraków school. This fact can certainly be related to inadequate reception of Roman law (perceived as imperial law) in Poland in the Middle Ages. Similarly, the *legum* department was not lauinched at Prague University; Petrani, *Kanonistyka*, p. 370; Sawicki, W. "Udział Kościoła w organizacji i admnistracji państwa polskiego do rozbiorów." In *Księga tysiąclecia katolicyzmu w Polsce*, vol. III, Lublin 1969, p. 195.

The miniature shows a process between canons and merchants. The former lent money to the latter, who were supposed to invest it for profit. The scene reflects a common problem of nascent capitalism in medieval Italy. Money becomes a commodity and a catalyst of progress; one of the major investors was the Church, especially canon communities and monasteries.

Concordia discordantium canonum, University Library of the John Paul II Catholic University of Lublin, ms. 1, Causa XIV, f. 158v.

The picture represents a dispute between two clergymen before a secular judge commented on by the pope and a lawyer.

Concordia discordantium canonum, University Library of the John Paul II Catholic University of Lublin, ms. 1, Causa XI, f. 1358r.

Chapter Three

A Respectful Reserve

8. Law Codifications of the Latin Church

The codification trend dating back to the 18th century Enlightenment and blended with the then social and economic transformation inspired the ordering of law applicable by the Church. The need was urgent and compelling; Church legislation gathered in the old *Corpus Iuris Canonici* no longer met either the internal needs and position of the Church or social and economic demands of budding capitalism. Since the publication of the first authentic collection of ecclesiastical laws by Gregory IX in 1234 (*Decretales*), supplemented by a successive codification of Boniface VIII of 1298 (*Liber sextus*) and a collection of Clement (*Clementinae*) of 1317 – comprising part of *Corpus Iuris Canonici*, numerous Church statutes had been announced. Theoretically speaking, they all derived from two separate sources – popes and councils. However, considering the fact that the source of the council's authority was the pope, the entire law of that epoch should be referred to as pontifical law.[346] Papal decrees and legal norms contained in council resolutions were dispersed in numerous and versatile collections, often incomplete and internally contradictory, requiring standardization, systematization and supplementation. Many statutes were obsolete or supplanted by new regulations. Some became invalid and failed to respond to the needs of evolving society and economy. Although

[346] Subera, *Historia źródeł*, p. 111.

invalid, they were invariably incorporated in usable collections. This condition urged a demand to compile the entire Church law into a modern and systematized code. It was not an easy task and some believed it to be doomed to fail, since there were scores of regulations from all the fields of Church life to be unified and incorporated into one code of the universal Church operating in many countries, cultures and nations. The codification could not only refer to one state organism based on uniform social and economic relations. The codification of canon law posed a challenge, for it was not intended to embody one branch of law but all legal provinces as well as legal and public institutions, Church offices and administration, the legal process, penal law and relations under private law. Moreover, the codification was seen as having to incorporate the norms and institutions exclusively pertaining to the Church, doctrine and religious worship.

The agenda for the codification of canon law was prepared in the second half of the 19th century and coincided with the preparatory work on the First Vatican Council. The council participants were aware of the fact that there had been a surplus of Church regulations amassing throughout the centuries. One of them, archbishop of Naples, Cardinal R. Sforza (1810-1877) complained: "a caravan of camels would be needed to carry all the volumes of canon law."[347] No doubt, he meant the countless collections (private and public) of documents furnished by popes, councils, particular synods and rulings of the Dicasteries of the Roman Curia, i.e. congregations, tribunals and offices.

The new stage of the codification was initiated by Pope Pius X, who, on 19 March 1904, in *motu proprio* entitled *Arduum sane manus* appointed a codification commission chaired by Cardinal P. Gasparri (1852-1934), canon lawyer, diplomat in the Roman Curia and signatory of the Lateran Pacts. The pope also appealed to metropolitans to gather bishops' opinions regarding some greatly required changes and invited the collaboration of Catholic universities. The burden of work undertaken by the commission aimed to adjust the universal ecclesiastical law to contemporary requirements. The original idea consisted in isolating those regulations of the existing legal collections that were still applicable in relation to Church discipline and compartmentalize them into concise, uniform and transparent collection of canons.

[347] Cf. Abraham, W. "Nowy Kodeks Prawa Kanonicznego." *Polonia Sacra* 1(1918), p. 6; Gaudemet, J. "Collections canoniques et codifications." *Revue de droit canonique* 32(1983), p. 98; Hemperek, Góralski, *Historia źródeł*, p. 124.

The commission's activity involved individual episcopates and canon law schools. Yet, not all scholarly circles were enthusiastic about the idea. Largely sceptical were some outstanding law historians from the German Protestant environment, including P. Hinschius (1835-1898) and E. Friedberg (1837-1910), the publisher of *Corpus Iuris Canonici.* The latter anticipated the failure of an effective codification of canon law. In 1908, referring to the afore-mentioned sentence of Cardinal R. Sforza, he was explicitly ironic and sarcastic to advise that one extra camel should be hired to carry the sources of canon law.[348]

The codification took eight years and resulted in a definitive legal text, unprecedented in the history of Catholicism, the Code of Canon Law (*Codex Iuris Canonici*) promulgated by Pope Benedict XV, the successor of Pius X, by the bull *Providentissima mater Ecclesia* on 27th May 1917 with binding force until 19th May 1918.

The new collection was an exclusive, i.e. authentic and complete codification of the law of the Latin Church. It was not a compilation like the former compilations (it rejected the casuistic form of decretals; individual regulations were taken in abstract terms ordering or prohibiting without providing the rationale) but a well-organized collection of law, a *sensu stricto* code following the patterns of modern state codices. It was marked by the clarity of expression, provided for all new achievements of the legal practice, and complied with the requirements imposed by legal theoreticians upon the codifications of the time. The code was evaluated as successful and was highly praised by lawyers not only for its approach to the legal material of many centuries but first of all on account of the adoption of a clearly defined model of the Church. However, it was not free from faults; one of them was the distribution of legal material in particular books (particularly in Book Three – *De rebus*).[349] Some reservations were also made regarding terminology, repeatedly lacking precision and consistency. Furthermore, the editing was frowned upon as imperfect as well as some references made to the interpretation of extra-codex laws.[350] The code terminated an epoch of progress of canon law and marked the beginning of a new period in the legal history of the Latin Church.

[348] Cf. Abraham, *Nowy Kodeks*, p. 8; Hemperek, Góralski, *Historia źródeł*, p. 126.

[349] It was jokingly called "a sack" because it accumulated everything that did not fit into other books; cf. Shannon, P. "Kodeks prawa kanonicznego." *Concilium. Miedzynarodowy Przegląd Teologiczny* 1966/67, Pallotinum 1969, p. 496ff; E. Sztafrowski, *Podręcznik prawa kanonicznego*, vol. I, Warszawa 1985, p. 81.

[350] Cf. Hemperek, Góralski, *Historia źródeł*, p. 130f; Sztafrowski, *Podręcznik prawa kanonicznego*, vol. I, p. 81.

The code of 1917, referred to in literature as Pio-Benedictine, together with numerous acts passed after its promulgation were superseded by the new Code of Canon Law, emanating from the general revision and reform of ecclesiastical law. It was promulgated by John Paul II on 25th January 1983 by the apostolic constitution *Sacrae disciplinae leges* and became effective on 27th November 1983. It was, as pointed out in the literature on canon law, "the fruit and completion"[351] of the Second Vatican Council. Having been published, the new collection crowned another stage of ecclesiastical legislation.[352]

The first Code of Canon Law issued in 1917 omitted to mention the resolution of Pope Lucius III about the application of Roman law as a subsidiary law in case of insufficient canon law regulations. Setting the rules of procedure in case of the absence of express prescripts of acts, Canon 20 recommended referring to the legislation issued on similar matters (*analogia legis*), general rules of law (*analogia iuris*) in conformity to canonical equity (*aequitas canonica*) as well as to the approach and practice of the Roman Curia. Therefore, canon law, as in the solutions adopted in the 19th century state legislations, renounced any binding force of Roman law.[353] Consequently, the introduction

[351] Pawluk, *Prawo kanoniczne*, vol. I, p. 122.

[352] Cf. *Recepcja Vaticanum II w prawie posoborowym,* Tymosz, S. ed., Lublin 2005; Hervada, J. "El nuevo Código de Derecho Cnónico: visión de conjunt." In *Vetera et nova*, vol. II, Pamplona 1991, p. 893ff; Stickler, A. M. "Der Codex iuris canonici von 1983 im Lichte der Kodifikationsgeschichte des Kirchenrechts." In *Le nouveau Code de droit canonique: actes du Ve Congrès international de droit canonique* (= The new Code of Canon Law: Proceedings of the 5th International Congress of Canon Law), Thériault, M., Thorn, J., eds., vol. I, Ottawa 1984, p. 97ff, 131ff.

[353] The practical reception of Roman law in Europe was *de facto* completed with the promulgation of national codifications in the 19th century. At the beginning of 1900, four years after its development, the new German Civil Code came into force for the entire Reich (*Bürgerliches Gesetzbuch – BGB*), thus overruling the pandect law (Roman law). Of similar significance for Austia was the promulgation of the Austrian Civil Code in 1811 (*Allgemeines Bürgerliches Gesetzbuch-ABGB*), and for France of the civil code in 1804, referred to as *Code de Napoleon*. After the first wave of civil codifications that crowned the era of Enlightenment, Roman law was presumed to leave the stage of history as an antiquated phenomenon. However, the codification trend proved that Roman law could not be totally abandoned; thus, it was maintained as an elementary codification component. The application of everything that was right and complying with natural law in Roman law was seen in the development of the Austrian Civil Code. Similarly, in the French Civil Code, Roman legal tradition was reconciled with the local customary law. In Germany as a mainstay of the reception of Roman law, the programme of codification of the entire civil law in the 19th century revolved around and within the German Historical School divided into Romanists (opposing the codification) and Germanists and in the second half of the same century among legal positivists and Pandectists. Shortly after becoming effective, the German Civil Code (BGB) was recognized as "the embodiment of Pandectists' theory", due to its Romanist character.

of the first codification put an end to the direct and official application of the received Roman law in the Latin Church.[354] Likewise, the code of 1983 that also failed to acknowledge Roman law as a subsidiary law which might have been invoked by a judge (or other law enforcement body) if canon law was deficient on certain matters.[355]

Although overshadowed by both codices, Roman law was not abandoned by the Church in its many centuries' canonical tradition. Roman law was reinstituted as a material codification component in the two codices of the Latin Church, Pio-Benedictine of 1917[356] and John Paul II's of 1983.[357] When analyzing the system, legal precepts, definitions, terminology as well as the construction of some institutions (in particular in matrimonial law and judicial law) espoused in the codifications, the solutions developed by the Roman jurisprudence prove solid and timeless.

Hence, it is justified to claim that the codifications of the Enlightenment were emerging in opposition to Roman law and the codes were intended to supersede its application; still, Roman law was the dominating substance of civil codices; cf. Giaro, T. "Roman law always dies with a codification." In *Roman Law and European Legal Culture*, Dębiński A., Jońca M., eds., Lublin 2008, p. 15 ff; Sójka–Zielińska, K. "Rola prawa rzymskiego w pracach kodyfikacyjnych wieku Oświecenia", *CPH 27.1* (1975), p. 109ff.

[354] Insadowski, *Rzymskie prawo*, p. 123.

[355] Canon 19 of the 1983 code fails to mention the regulations of Roman law as a source that should be referred to in case of legal ambiguities.

[356] Cf. Boucaud, C. "Relationes inter ius romanum et Codicem Benedicti XV." In *Acta congressus iuridici internationalis*, vol. IV, Rome 1937, p. 43f; Deutsch, B.F. "Ancient Roman Law and Modern Canon Law." *The Jurist* 27(1967), p. 297ff; 28(1968), p. 23ff, 149ff, 449ff; 29(1969), p. 10ff, 265ff, 30(1970), p. 182ff; 31(1971), p. 478ff. The problem of the influence of Roman law over the 1917 Code of Canon Law was debated during a scientific conference held in Rome in 1978; the vast conference material was published in: *Atti del colloquio romanistico-canonico*, Romae 1979.

[357] CF. Gaudemet, J. "Influences romaines sur la codification canonique latine." In *Proceedings of the International Congress of Canon Law. The Meeting of Eastern and Western Canons,* Coppola, R., ed., Bari 1994, vol. I, p. 193ff; Gauthier, A. "La part du droit romain dans le code de droit canonique de 1983." In *Le nouveau Code de droit canonique: actes du Ve Congrčs international de droit canonique* (= The New Code of Canon Law: Proceedings of the 5th International Congress of Canon Law), Thériault, M., Thorn, J., eds., vol. I, Ottawa 1984, p. 131ff; idem, *Roman Law and Its Contribution to the Development of Canon Law*, Ottawa 1996, p. 4ff; Imbert, J. "Le Code de droit canonique de 1983 et de droit romain." *L'Année Canonique* 27(1984), p. 4ff.

9. The Influence of Roman Law on Law Codifications of the Latin Church

1. Systematics

In legal science, systematics (Gr. *systematikos* – constituting a system) is a manner of ordering, dividing and arranging legal norms in line with some specific rules. It is of significance for not only legal education or research, where much pressure is put on transparency and intelligibility, but also for practical application. Unsystematic and disorderly collection of norms requires continual interpretation by legal experts; it does not foster either the process of law-making or the elevation of legal culture within a society abiding by a specific legal corpus.[358]

The methods of systematization of canon law varied depending on the historical stage of its evolution. Pioneer collections were chronological and gathered regulations by the date of issuing. Later, as of the 6th century, first systematic compilations appeared reflecting a logical and subject-oriented layout. A common approach in the medieval ecclesiastical collections was that of Bernard of Pavia (died 1213), an excellent canonist, first student and then lecturer of the Bologna school.[359] In a collection of his own authorship, *Breviarium Extravagantium*,[360] at the turn of the 12th century, he arranged the entire material – which was a novelty of the time – into five consecutive books: hierarchy – process – clergies – matrimony – penal law. Glossators entitled the books as follows: *iudex* (judge, legislator), *iudicium* (court), *clerus* (the clergy), *conubia* (matrimony), *crimen* (crime). Book One covered the material on sources of law, hierarchy and ecclesiastical authority. Book Two discussed procedural law, except for the penal process. The norms pertaining to ecclesiastical persons and duties of clerics comprised Book Three. Book Four covered matrimonial law, Book Five penal law, crimes, penalties and the penal process.[361] For many

[358] Cf. Wołodkiewicz, W. "Systematyka Kodeksu Napoleona." *Palestra* 3-4 (2005), p. 149.

[359] Cf. Schulte, *Geschichte der Quellen*, vol. I, p. 76ff.

[360] The commonly used name *Compilatio prima* is actually later; it was coined by the school of Bologna, which assigned consecutive numbers to recognized compilations; cf. Góralski, Hemperek, *Historia źródeł*, p. 91; Stickler, A. M. *Historia iuris canonici latini*, vol. I, *Historia fontium*, Torino 1950, p. 229ff; Subera, *Historia źródeł*, p. 94f.

[361] Cf. Gaudemet, *Collections canoniques*, p. 93; Góralski, Hemperek, *Historia źródeł*, p. 92; Van Hove, *Prolegomena,* p. 356ff.

centuries, as late as until the outset of the 20th century, this division was used in the systematization of canon law.[362]

A different systematics was introduced by the proponents of the 1917 codification. The layout of the code also provided for five books but definitely departed from the approach of Bernard of Pavia in favour of the division acknowledged in Roman law.

In ancient Rome, the idea of organising legal texts according to a system evolved together with the progress of legal science. Attempts at a systemic approach were impeded due to the casuistic character of law.[363] Furthermore, a comparatively limited number of legal acts comprehensively framing the entire body of law did not stimulate any endeavours in this regard. Yet, it does not naturally follow that Roman jurisprudence was negligent about the division of legal material. A preliminary systematization is present as early as in the Law of Twelve Tables of the mid-5th century BC (*Lex duodecim tabularum*), the oldest collection of Roman law[364] and in the praetorian

[362] Cf. Gaudemet, J. *Collections canoniques*, p. 92. The division of Bernard of Pavia found application in a number of medieval collections, including the official *Decretals* of Gregory IX, *Liber Sextus* of Boniface VIII and *Clementinae;* cf. Burczak, K. "KPK z 1983 r. na tle innych zbiorów prawa kanonicznego Kościoła łacińskiego." In *Inspiracje i wpływ na Kodeks Prawa Kanonicznego z 1983 r.*, Lublin 2006, p. 167ff.

[363] A distinctive feature of Roman law was aversion toward positive law. The statutes of plebeian assemblies (*leges*), the fundamental and most important source of law in the Republic, were relatively sparse. Later and more comprehensive acts of the Senate and imperial legislation (constitutions) offered only partial regulation of selected areas of social life. Edicts of Roman magistratures, in particular of the city praetor, only moderately supplemented legislative gaps, yet not systematically but rather incidentally. The law-making activity of jurists – of utmost significance for the progress of private law – was casuistic (Lat. *casus* – event, legal case). The learned jurists excelled at giving advice, responses and legal opinions on exclusive cases and kept the general systematics and definitions at bay. As a result, the Roman legal order grew in the everyday practice in close relation with existing social and economic needs, which did not stimulate any action in favour of the systematization of law; cf. Kolańczyk, *Prawo rzymskie*, p. 26f; Kuryłowicz, *Prawo rzymskie*, p. 67f. Litewski, *Podstawowe wartości*, p. 14f.

[364] To reconstruct this systematics is troublesome, since no original text of the law has been preserved. Some attemtps at the reconstruction, including the adopted systematics, were made in the 16th century following the accounts of ancient authors. The character of this collection is that of association; it is based on linking, sometimes flexible and incidental, of similar regulations. The most probable division of the material might have been as follows: civil procedure (Tables I-III), family law, inheritance law (Tables IV-V), property law (Tables VI-VII), penal law (Tables VIII-IX), sacred law (Table X), supplement (Tables XI-XII). The systematics of *The Law of Twelve Tables*, despite high respectability of the collection, did not play an important role in the later advancement of Roman law; cf. Łoś, S. *Sylwetki rzymskie*, p. 237ff; Zabłocka, M. *Ustawa XII tablic.*

edict.[365] Of highest importance was the systematics adopted in known Roman legal textbooks called *Institutions* (*Institutiones*), in Gaius' *Institutes* and Justinian's *Institutions*.

Gaius, a jurist of the late classical period, at the opening of his *Institutes*,[366] expounded a triple systematics of law by concluding, "The entire law that we use concerns either people, or objects or actions."[367] Thus, his division of private law involves law on persons (*personae*), law on things (*res*) and law on processes (*actiones*).

Gaius' systematics played a pivotal role in the history of law. When in the 4th century, Justinian made a landmark decision about the codification of laws and ordered the preparation of collections entitled *Corpus Iuris Civilis*; furthermore, he ordered that a textbook be produced adjusted to the needs of the time and entitled *Institutiones* (Institutions) (AD 533). As a matter of fact, it was a revised and updated version of Gaius' manual; Justinian's *Institutions* imitated Gaius' systematics. By assuming Gaius' triad *personae – res – actiones* as an underlying principle of division in his *Institutions*, Justinian marked its unwavering position for the coming years. Justinian's *Institutions* was seen as an eminent piece of work in the Roman Empire and later in the Byzantium and earmarked for a textbook in law schools, including the most prominent ones in Constantinople and Beirut. The book was commonly used throughout the

Rekonstrukcja doby Renesansu, Warszawa 1998; Zabłoccy, M. J. *Ustawa XII tablic, Tekst – tłumaczenie – objaśnienie*, Warszawa 2000.

[365] Although difficult to reconstruct in detail, the layout of the edict corresponded to a civil trial. It contained five chapters: Chapter I – regulations defining the scope of a praetor's capacity and trials before him; Chapters II–III – particular actions to be brought before the praetor to satisfy one's plea; Chapter IV – execution of judgement; Chapter V – extrajudicial protective measures (praetor's interdicts, exceptions and stipulations); cf. Lenel, O. *Das edictum perpetuum*, 3rd ed., Lepzig 1927. The organisation of a praetorian edict – unclear as it might be – was not scientifically justified but emerged from practice. The systematics of the edict, though vague, found broad application in legal literature. Moreover, it was useful when assembling the legal collections of the Late Empire, in the Theodosian Code, *Digesta* and the Justinian Code.

[366] The text is dated ca. AD 160 and was most probably based on Gaius' lectures. The work has been preserved almost in full, in the original version and without later interpolations on the so-called Palimpsest of Verona (a manuscript on which two or more successive texts have been written, each one being erased to make room for the next; Gaius' *Institutes* were overwritten by St. Jerome's epistles) discovered in 1816 by a German historian and philologist Barthold Niebuhr (1776-1831), and partly on pieces of papyrus found in Egipt in 1927 and 1933. Cf. Kunderewicz, C. "Wstęp." In *Gaius. Instytucje,* Warszawa 1982, p. 5ff; Rozwadowski, W. "Gaius i jego dzieło." In *Gai Institutiones*, Warszawa 2003, p. XIff.

[367] G. 1,8. *Omne* [...] *ius, quo utimur, vel ad personas pertinet vel ad res vel ad actiones.*

Middle Ages and its division applied in canonical literature beginning with *Institutiones* of G.P. Lancelotti (1522-1590)[368] publish at the request of Pope Paul IV in Prugia. The division adopted in this "most widespread of all canon law course books"[369] was borrowed into many works written for young legal students, as it was the case with the ancient *Institutiones* prepared – as Emperor Justinian put it – for legal knowledge-thirsty youth – *cupidae legum iuventuti*.[370] The layout of Gaius' and Justinian's *Institutions* – just as in the great 19th century codifications of civil law[371] – was retained in the first code of canon law.

Based on the systematics of Roman law, the architects of the 1917 codification of canon law divided the entire material of 2414 canons into five books. Thus, the basic unit of division was the book (*liber*), common in both imperial codices (the book-based division was used in the Theodosian Code and in the Justinian Code), and medieval canon law collections (e.g. *Compilatio Prima* of Bernard of Pavia, *Decretales* of Gregory IX, *Liber sextus* of Boniface VIII). The books of the code contain: general norms – *Normae generales* (I), concerning persons – *De personis* (II), concerning things – *De rebus* (III), concern-

[368] *Institutiones iuris canonici, quibus ius pontificium singulari methodo libris quattuor comprehenditur*, Perugia 1563. Lancelotti arranged the entire material in four books: *personae, res, iudices, crimina*. Ever since its publication, *Institutiones* had become the elementary curriculum of canonical lectures; cf. Gaudemet, *Collections canoniques*, p. 102; Schulte, *Geschichte der Quellen*, vol. III, p. 451ff.

[369] Petrani, A. *Nauka prawa kanonicznego w Polsce w XVIII i XIX wieku*, Lublin 1961, p. 147.

[370] *Constitutio Imperatoria*, 23 December 533.

[371] Gaius' systematics was officially mirrored in the Napoleonic Code of 1804 created after the French Revolution (first entitled the Civil Code of the French); it its time, it was regarded as "the masterpiece of the art of legislation;" it contained three books: Concerning persons (*Des personnes*), Concerning property and different limitations of ownership (*Des biens et des différentes modifications de la propriété*), Concerning different means of acquiring ownership (*Des différentes manières dont on acquiert la propriété*). The three-part systematics formally referring to the Gaius-proposed division was intended to legitimize three major spoils of the Revolution – personal freedom (Book I), inviolability of private property (Book II) and liberty of contracts (Books III). This is how the code implemented the guidelines on personal freedom, property and contracts ensuing from natural law in order to provide a durable foundation for the emerging capitalist economy. Likewise, Gaius' tripartite system was employed in the Austrian Civil Code of 1811 created by the absolute and feudal monarchy (*Allgemeines Bürgerliches Gesetzbuch*); it covered three sections: personal law (Von dem Personenrechte), property law (Von dem Sachenrechte), law common to personal and property law (Von den gemeinschaftlichen Bestimmungen der Personen- und Sachenrechte); cf. Jędrejek, G. "Prawo rzymskie a systematyka prawa prywatnego w Polsce w XIX-XX wieku." In *Starożytne kodyfikacje prawa,* Lublin, p. 214ff; Lesiński, Rozwadowski, *Historia prawa*, p. 174; Sójka – Zielińska, *Historia prawa*, p. 236ff.

ing the process and other types of procedures – *De processibus* (IV), concerning offences and penalties – *De delictis et poenis* (V).[372] Apparently, the codification commission isolated the norms (canons) pertaining to people, things and legal activities on the basis of the systematics known from Gaius' and Justinian's works.

The reference to the Roman system of division of law in the development of the 1917 code was not only an expression of deference to Roman tradition. The rationale for this choice is broader. It was the reception of the Church, which at that time was regarded by theologians and canonists as the "next to perfect community." The code of this community was soon to be ranked among state codifications of modern times, hence its internal layout similar to those adopted in those collections. [373]

Another systematics is to be found in the 1983 code; its underlying principle was derived from the Second Vatican Council. Summoned by Pope John XXIII with a view to contemporizing (*aggiornamento*) the Church, the council redefined her tasks and objectives and underlined that they had no longer corresponded to the tasks and objectives of secular states. The states aspire to create the best institutions and welfare for their citizens in this world, while the Church's aims are supernatural. Consequently, the codification process was not actually intended to amend and modernize the former code, but was rather expected to embody the new spirit of the council and its fundamental findings. This idea is to some extent mirrored in the layout of the 1983 codification.

Similar to the 1917 code, the new one retained its legal character; it is primarily a collection of legal norms and not the listing of theological rules. For this reason, the collection opens with the general rules on the sources of law, the status of physical and judicial persons, ecclesiastical offices, prescription and reckoning of time. To assemble these basic regulations required the committee to draw up Book I (the book-based division was preserved) entitled as in the former code – *De normis generalibus* – General Norms. The legal character of the new code justified the addition of Book VI covering the canons on ecclesiastical penal law (*De sanctionibus in Ecclesia*) and Book VII regulating procedural law (*De processibus*). The division of the code also provides for the norms of property, which enables the Church to become

[372] Furthermore, individual books were divided into titles grouped in *partes* and *sectiones*; there were 107 titles. Some were sorted into chapters (*capita*) and further into articles. If more lengthy, individual norms (*canones*) were split into paragraphs.

[373] Imbert, *Le Code*, p. 4.

involved in social and economic life. Eventually, Book V covering this matter was entitled *De bonis Ecclesiae temporalibus* – The Temporal Goods of the Church; the title was taken from Book III of the 1917 code that, as mentioned above, on this matter relied on Gaius' and Justinian's *Institutions*. As seen from the domains regulated by the norms contained in these books, the ecclesiastic community does not differ from others; in the parts in question, the systematics of the Code of Canon Law of 1983 does not deviate from the systematics of secular codices by all means influenced by the Roman legal tradition.[374]

The supernatural character of the Church and its activity, focused more on spiritual rather than worldly matters, caused the severance of Book II, which in the 1917 code – in accordance with the systematics of Gaius and Justinian – was devoted to the law concerning persons (*de personis*). The argument regarding the embodiment of the ecclesiology of Vaticanum II caused Book II of the old code to be replaced by three separate books treating of the three fundamental pastoral duties of the Church, i.e. sanctifying, teaching and management of God's people (Book II *De populo Dei* – The People of God; Book III, *De Ecclesiae munere docendi* – The Teaching Office of the Church; Book IV, The Sanctifying Office of the Church – *De Ecclesiae munere sanctificandi*).

That is why the division of the 1983 code discarded the long-lasting canonistic tradition founded on Gaius' triad *personae – res – actiones.* Yet, technically speaking, the systematics of the new code retained the borrowings from Roman law, which – due to the juridical character of the collection – were unavoidable.[375] All in all, the organisation of the new codification was tailored to the nature of the Church's objectives specified by the Second Vatican Council.[376]

2. Legal Rules and Principles

The discussion about the rich legacy and tradition of Roman law would not be complete if the notion of paroemia were omitted. Paroemia was a concise

[374] Ibidem, p. 5.

[375] Cf. Gauthier, *La part du droit romain,* p. 134; Imbert, *Le Code*, p. 5.

[376] Cf. Sobański, R. "L'ecclésiologie du nouveu Code de droit canonique de 1983." In *Le nouveau Code de droit canonique: actes du Ve Congrčs international de droit canonique* (= The New Code of Canon Law: Proceedings of the 5th International Congress of Canon Law), Thériault, M., Thorn, J. vol. I, Ottawa 1984, p. 250.

legal maxim encapsulating the basic legal rules and solutions. They were conceived by Roman jurists, medieval lawyers, glossators and commentators as well as contemporary law following the Roman source texts. These precepts often conveying universal and ageless ideas are regarded as an essential component of legal axiology. Used in judgements and justifications of legal opinions they have always been a vital ingredient of legal rhetoric. Since the Middle Ages, paroemias have been employed as a ready *instrumentarium* in law-making; they were referred to when new legal institutions were developed or codifications made.[377] Their key advantage is universality; most of them are intelligible by lawyers, irrespective of their nationality or legal system in which they operate.[378]

Paroemias originated in different epochs of the evolution of Roman law; they comprise an interpretation of entire laws or constitute an excerpt of a lawyer's opinion on some specific legal case. This approach was manifested in Justinian's *Digesta* where a separate title was included, headed: *De diversis regulis iuris antiqui* – Concerning Diverse Rules of Law.[379] This trend continued in medieval times. The official collection of canon law issued by Pope Gregory IX in 1234 contained a title, *De regulis iuris* – Concerning the Rules of Law, encompassing 88 rules of canon law largely based on the Roman legal sources.[380] Likewise, *Liber sextus*, a collection of Pope Boniface VIII of 1298, incorporated a title, *De regulis iuris* – Concerning the rules of law, listing 11 concise legal dicta.[381] The Middle Ages brought certain *novum* as regards the matter in question. Legal rules were assembled in separate collections instead of being implanted in selected books of more general works. An example of

[377] Cf. K. Burczak, A. Dębiński, M. Jońca, *Łacińskie sentencje i powiedzenia prawnicze*, Warszawa 2007; Schmidlin, B. *Die Römischen Rechtsregeln,* Köln 1970: Stein, P. *Regulae iuris: From Juristics Rules to Legal Maxims,* Edinburgh 1966; *Łacińskie paremie w europejskiej kulturze prawnej i orzecznictwie sądów polskich*, Wołodkiewicz W., Krzynówek, eds., Warszawa 2001.

[378] Various institutions and entities take Latin legal maxims (*paroemia*) – often conceived by ancient authors or created if need be – as their mottoes; this shows how influential their message is. Also today, universities and law faculties across Europe, even those newly established, use Latin catchphrases and thus consciously and purposefully build on two thousand years of tradition. This lasting trend has also been manifested in Warsaw, Poland, where in 1999 the new edifice of the Supreme Court was decorated with 86 inscriptions of Latin maxims conveying ageless ideas and values; cf. *Regule Iuris. Łacińskie inskrypcje na kolumnach Sądu Najwyższego Rzeczypospolitej Polskiej*, Wołodkiewicz, W., Warszawa 2006.

[379] D. 50,17. See above, Chapter Two, 2.

[380] *Decretales* 5, 41. See above, Chapter Two, 2.

[381] *Liber sextus* 5, 6.

this is a 13th century work *Regulae canonicae* – Canonical Rules[382] by a canonist named Damasus. As in other medieval compilations, this work also takes great advantage of the solutions worked out by the ancient Roman jurisprudence.

Countless Roman legal rules found direct or indirect application in the codifications of the Latin Church. Some were used to prepare General Norms, the opening books of both Latin codices, demonstrating the rules and principles governing all the codex regulations. These rules may not be explained without recourse to the Roman legal tradition.[383]

One of the Roman legal rules commonly recognized in antiquity was the principle of personality of law. It said that every citizen, regardless of his location, was subject to the private law of his *civitas*. Hence, Roman citizens, and only they, dispersed all over the huge territory of the empire came under *ius civile* (law of citizens). Similarly, non-citizens fell under their own domestic law whatever their whereabouts.[384] The contemporarily accepted rule of territorial jurisdiction was less important.

The new code accepted the principle of personality of law for all laws of the Latin Church and provided that it bound only those who belong to the Church.[385] Similarly, this principle was used toward all personal communities and some particular acts.[386]

No doubt, the general codex ordinances concerning ecclesiastical laws and contained in Title I, *De legibus ecclesiasticis* are rooted in Roman tradition. One of them expressed in the canon reads: "Laws concern matters of the future, and not those of the past, unless provision is made in them for the latter byname – *Leges respiciunt futura, non praeterita, nisi nominatim in eis de preteritis cavetur*."[387] Thus, the Church legislator assumed that ecclesiastical laws might naturally involve only future activity undertaken as of their effective date; it may not affect past events.[388] A law may exceptionally

[382] Damasus, *Regulae canonicae*, In Azo, *Brocadica sive generalia iuris*, Basileae 1567. See above, Chapter Two, 2.

[383] C. Lefebvre, "Diritto romano e diritto canonico." In *Atti del colloquio romanistico-canonico,* p. 33.

[384] The division into *ius civile* and *ius gentium* was rendered ineffective after the AD 212 edict of Emperor Caracalla which provided that all free inhabitants of the Roman state were granted citizenship; Dębiński, *Prawo rzymskie*, p. 30ff.

[385] CCL 1983, Can. 11.

[386] CCL 1983, Can. 13 § 1; cf. also Lefebvre, *Diritto romano*, p. 36.

[387] CCL 1983, Can. 9; the quoted canon is a copy of CIC 1917, Can. 10.

[388] Cf. Krukowski, J., Sobański, R. *Komentarz do kodeksu prawa kanonicznego*, vol. I, Poznań 2003, p. 58.

concern the effects of past action if it is explicitly (*nominatim*) stated. This acknowledged and crucial rule of non-retroaction or protection of acquired laws, currently a pivotal principle of the rule of law, was developed by the Roman jurisprudence of the classical period. It was confirmed *expressis verbis* in the law of Emperor Theodosius II of AD 439: *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari nisi nominatim etiam de praeterito tempore adhuc pendentibus negotiis cautum sit* – "There is no doubt that laws and constitutions may apply only to future and to past events, unless it is explicitly reserved that they concern pending issues of the past."[389]

Of Roman origin was also the regulation about revoking or amending a law: "Later law abrogates the former – *Lex posterior abrogat priorem*."[390] In Roman law, this rule (of somewhat different wording: *Lex posterior derogat legi priori* – "Later law derogates former law" was formulated following the texts of the jurists of classical period, Modestine[391] and Paulus.[392]

The initiators of both codices had recourse to the Roman rules governing the legal effects of ignorance or error by accepting the norm that said that ignorance or error in laws (*ignorantia vel error circa legem*) did not frustrate their effects.[393] The canons contained in both codices echo the views of Roman jurists, predominantly Paulus' who stated at the turn of the 2nd century: *Regula est iuris quidem ignorantiam cuique nocere facti vero ignorantiam non nocere* – "It is a rule that the ignorance of law harms everybody, unlike the ignorance of

[389] C.J. 1,14,7. The rule of non-retroaction, so widespread in judicature, was coined in a succinct interpretation precept: *Lex retro non agit* – "Law does not work backwards." Frequently quoted in the Polish doctrine and judicature, this rule was expressed in Roman sources in a different form; it was coined much later, yet on the basis of legal decisions recorded in these sources. As W. Wołodkiewicz has it in "Lex retro non agit", in *Łacińskie paremie w europejskiej kulturze prawnej i orzecznictwie sądów polskich*, Wołodkiewicz, W., Krzynówek, J., eds., Warszawa 2001, p. 154-155, in the Polish doctrine of Roman law, this phrase was used by Stanisław Wróblewski (*Zarys wykładu prawa rzymskiego*, Kraków 1916, p. 221f.). In Polish law, the rule is contained in, for example, Article 3 of the Penal Code: The act is not retroactive, unless it follows from its wording or object.

[390] CCL 1983, Can. 20; a similar instruction was given in the Pio-Benedictine code (CIC 1917, Can. 22).

[391] D. 1,4,4 (Modestine): *Ahi metagenesterai diataceis isxuroterai twn pro autwn eisin, id est, Constitutiones tempore posteriores, potiores sunt his, quae ipsas praecesserunt.*

[392] D. 1, 3, 28 (Paulus): *Sed et posteriores leges ad priores pertinent, nisi contrariae sint, idque multis argumentis probatur*.

[393] CCL 1983, Can. 15; this instruction is a copy of a norm of the 1917 code (cf. CIC 1917, Can. 16).

facts.[394] This rule was restated in *Liber sextus* by Boniface VIII.[395] Likewise, the notion of ignorance – gross or intentional (*crassa vel supina*) – present in both codices[396] was taken from Ulpian's words written down in *Digesta.*[397]

The tradition of Roman law is also adverted to in the canon providing that if, under certain circumstances, the effect of logical and linguistic interpretation was obscure, the legislator recommends strict interpretation. Such a stance should be taken (as listed by the legislator) toward laws which prescribe penalty, restrict free exercise of rights or contain an exception to the law.[398] The canon offering the auxiliary interpretation rule is based on a common canonical principle from *Liber sextus* by Boniface VIII: *Odia restringi, et favores convenit ampliari*[399] – "It is right that what is acute should be interpreted strictly, and what is a privilege should be interpreted broadly." It is worth noting that this medieval principle transferred into the law of decretals was formulated in texts of classical jurists, Pomponius,[400] Paulus[401] and Gaius.[402] It is then justified to conclude that the codex-makers, when deliberating upon a codex norm, referred indirectly – through the principle articulated by medieval canonists – to the tradition of Roman law.

The authors of both Latin codices evidently employed the rule of equity (*aequitas*) that, albeit not directly inscribed in the Roman legal norms, was a pivotal part of the Roman "intellectual armoury."[403] It was understood as a criterion of just application of a general legal norm in a specific case. This notion emanated from philosophy. In Aristotle's reflection, especially in Nicomachean Ethics, equity (*epieikeia*) was distinct from justice. The Stagirite saw it as complementary to positive law, which, due to its general character and

[394] D. 22,6,9 pr.

[395] *Liber sextus* 5,13,13.

[396] CIC 1917, Can. 2229; CCL 1983, Can. 1325.

[397] D. 22,6,6 (Ulpian): *Nec supina ignorantia ferenda est factum ignorantis, ut nec scrupulosa inquisitio exigenda: scientia enim hoc modo aestimanda est, ut neque neglegentia crassa aut nimia securitas satis expedita sit neque delatoria curiositas exigatur.*

[398] CCL 1983, Can. 18.

[399] *Liber sextus* 5, 13, 15.

[400] *Quotiens dubia interpretatio libertatis est, secundum libertatem respondendum erit* (D. 50,17,20) – "Each time there is free interpretation in doubtful cases, the judgement should not confine the person's freedom."

[401] *In poenalibus causis benignius interpretandum est* (D. 50,17,155,2) – "In criminal cases, laws should be interpreted more beningly."

[402] *Semper in dubiis benigniora praeferenda sunt* (D. 50,17,56) – "In doubtful cases, milder judgements should be preferred."

[403] Kelly, J.M. *A Short History of Western Legal Theory*, Oxford 1992, p. 53.

diversity of regulated matter, fails to cover all, especially exceptional and individual situations. In his opinion, what was marked by equity was actually just, yet not necessarily according to law.[404]

In ancient Rome, the idea of *aequitas,* much propagated by Marcus Tullius Cicero, was often evoked by classical jurists in the first place. This notion was a material component of legal education. In his famous definition given by Ulpian, Celsus, a lawyer from the classical period, defined law as good and equitable art (skill).[405] On the other hand, Paulus, also representing the late classical stage of Roman law development, and later Emperor Justinian reckoned that equity should be taken into account, especially in law.[406] Roman *aequitas* "was an absolutely central element in Roman administration of justice" and its significance is by far substantial.[407] An official and most effective way of its institution was *ius honorarium,* a level of Roman law created by Roman magistratures (offices), above all the praetor equipped with judicial powers and the right to issue edicts (*ius edicendi*). By exercising his adjudicative right, he introduced additions and amendments governed by equity and justice to the severe and authoritative *ius civile.*[408] *Aequitas* was readily invoked in the constitutions of Christian emperors beginning with Constantine's.[409]

Aequitas met with generous acceptance in the theory of canon law. The notion expressed in the Christian doctrine by other equivalent terms (*relaxatio, temperantia, misericordia, liberatio, venia, indulgentia*) found favourable conditions. The Fathers of the Church spoke of equity as a means of mitigating law during its application.[410]

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[404] Ibidem, p. 49. For more, see Robleda, O. "L'equitá in diritto romano." In *Atti del colloquio romanistico-canonico*, p. 62ff.

[405] [...] *ut eleganter Celsus definit, ius est ars boni et aequi* (D. 1,1,1 pr., Ulpian) – "As Celsus aptly put it, law is the art of applying of what is good and right."

[406] *In omnibus quidem, maxime tamen in iure, aequitas spectanda est* (D. 50,17,90) – "The rule of equity should be taken into account in all, especially in law."

[407] Kelly, *A short history*, p. 54.

[408] A praetor's role in the institution of the rule of equity in judicature and, consequently, in substantive law was recapitulated in the 2nd century BC by Papinian: *Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam* (D. 1,1,7,1) – "A praetor's law is the law introduced by praetors with a view to supporting, supplementing or correcting civil law for public usability." According to Kelleg, *A short history*, p. 78, these words "seem to contain an echo of Aristotle's explanation of *epieikeia*."

[409] Cf. Pringsheim, F. "Römische Aequitas der Christlichen Kaiser." In *Acta congressus,* vol. I, p. 119ff.

[410] Sobański, "Nauki podstawowe prawa kanonicznego." I. *Teoria prawa*, p. 98f.

Aequitas canonica conveys a fundamental and ultimate criterion that is a means "for the system of canon law to resolve all its problems for the last time."[411] The codices of the Latin Church make numerous mentions of *aequitas canonica* in various parts of collections. However, besides these references, the legislator adverts to the principle of equity and provides that should a loophole present an obstacle, the case would be resolved "in consideration of... general legal principles with the observance of canonical equity."[412] In present-day literature, the principle of canonical equity is defined as a requirement to take account of all circumstances (e.g. people, places and times) so that the judgement of ecclesiastical judicial bodies would correspond to the requisite of justice and spirit of ecclesiastical law. However, it goes far beyond a mere complement of a loophole, since "it is a substantial attribute of ecclesiastical law and sets the direction of canonical hermeneutics." In this approach, it is a tool aimed not to rectify the spirit of law – as it was often the case in Roman law – but intended for "positive law-making."[413] Regardless of these differences concerning the role of *aequitas*, its goal was invariable – to implement the ideal of justice and equity.

Another example testifying to the Roman influence on the legal solutions adopted in the codification of canon law is a canon governing the construction of law. The system of legal construction or interpretation (Lat. *interpretatio* – "elucidation" from "explain", "elucidate") was known in different epochs of legal development. [414] At times, the rules of legal construction, revealing the concern over authority and uniformity of binding law, were created in the conditions of scepticism toward judges or excessively liberal a doctrine. Such trends were discernible in the system of legal interpretation in the Rome of the imperial period when the paroemia attributed to Justinian was coined: *Eius est interpretari leges, cuius est condere* – "Law can be interpreted by the one who makes it."[415] This idea was also incorporated by Justinian in a law of AD 529 by means of "strikingly proud and arrogant words:"[416] "If currently law-making falls only to the emperor, only the emperor is worthy of its interpretation" – *si enim in praesenti leges condere soli imperatori concessum est, et leges interpretari*

[411] Fedele, P. "Aequitas canonica." In *Atti del colloquio romanistico-canonico*, p. 97.

[412] CCL 1983, Can. 19; this canon is its quoted part and is a repetition of the norm of the Pio-Benedictine code (cf. CIC 1917, Can. 20).

[413] Krukowski, Sobański, *Komentarz*, p. 74.

[414] P. Frezza, "La interpretazione del diritto nella storia della giurisprudenza romana." In *Atti del colloquio romanistico-canonico*, p. 41ff.

[415] C.J. 1,14,12, 3-5; *Constitutio Tanta* 21.

solum dignum imperio esse oportet.[417] The Roman concept of legal construction is reflected in a canonical norm which "entrusts the power of authentic interpretation" to the legislator.[418]

Roman jurisprudence laid the foundations for the theory of custom as a source of law; an indication of this theory is evident in Book I of both codices. At the outset, it is mandatory to remark on the significance of custom and its rudiments as a source of law. The 1983 code recognizes "the force of law" of only such a custom that has been "introduced by a community of the faithful" – *a communitate fidelium introducta.*[419] The norm so phrased points unequivocally to the practice of the faithful when establishing a custom.

The canonical concept of custom clearly corresponds to the one adopted in Rome. Julian, a Roman jurist of the classical period, in an otherwise known text, stated that, "a deeply rooted custom is equal to law; what has been introduced by customs is law. For, if laws bind us only because they have been approved by the people, it is true that the customs approved by the people without any written consent should bind all."[420] Similarly, Ulpian stressed, "Customs are a tacit consent of the people fossilized owing to a long-time habit."[421]

Without a doubt, the science of canon law accepted the requirement of approval of customs by Church authority relatively early. The new code is more detailed to say that the approving body is the legislator;[422] such a wording is a deviation from Roman tradition. It is a manifestation, as put by J. Gaudemet, of the non-democratic character of canon law. On the other hand, the specific phrasing of the canon did not discard the former people's concept of custom completely.[423]

The connection between custom and law, as expressed in the code,[424] is also marked by Roman influences. In accordance with canonical regulations, the

[416] Gaudemet, *Influences romaines*, p. 202; for more, see idem, "L'Empereur interprète du droit." In *Festschrift für E. Rabel*, Tübingen 1954, p. 169ff. (= *Etudes de droit romain*, vol. I, Camerino 1979).

[417] C.J. 1,14,12,3.

[418] CCL 1983, Can. 16.

[419] CCL 1983, Can. 23; cf. also Can. 25.

[420] D.1,3,32 (Julian): *Inveterata consuetudo pro lege non immerito custoditur, et hoc est ius quod dicitur moribus constitutum. Nam cum ipsae leges nulla alia ex causa nos teneant, quam quod iudicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes.*

[421] *Mores sunt tacitus consenus populi,* Reg. Ulp. 1,4.

[422] CCL 1983, Can. 23

[423] Gaudemet, *Influences romaines*, p. 200.

[424] CCL 1983, Can. 24 § 2; 26.

custom *contra* or *praeter ius* (a custom opposing canon law or not applicable to it) has no legal force, except for the cases provided for by the legislator.[425] This idea resembles Constantine's constitution that reads that the significance of custom is not negligible "but not so important as to be able to invalidate a law or inherent common sense."[426] The reference to Roman law transpires in the code's requirement that the custom be "reasonable" (*rationabilis*).[427] The new code reads, "Custom is the best interpreter of laws" – *Consuetudo est optima legum interpres*[428] – beyond doubt, this is a repetition (in a slightly altered order) of Paulus' phrase from the beginning of the 3rd century: *Optima enim est legum interpres consuetude*.[429]

3. Definitions and Terminology

A noteworthy element of the legacy of Roman jurisprudence is the notions and definitions of institutions used throughout different epochs and political systems that are invariably relevant in legal systems despite their advanced age. One of the prominent examples of the implementation of terminology and categories of Roman law in the new Code of Canon Law is certainly the definition of marriage.

For a theologian, marriage is a sacrament. To scour for Roman law influences on matrimony in the domain of theology would be fruitless. Similarly, the indissolubility of marriage introduced by the Church's doctrine and morality was a *novum* if compared with the Roman legal concept of a nuptial bond. And even though the society of ancient Rome treasured the stability of marriages and highly esteemed the loyalty of a wife who refused to remarry (*univira*) for the reminiscence of her departed husband, it was as early as in the Republic when the idea of liberty of dissolving marriages was deeply entrenched.[430]

[425] CCL 1983, Can. 36.

[426] *Consuetudinis ususque longaevi non vilis auctoritas est, verum non usque adeo sui valitura momento, ut aut rationem vincat aut legem*; C.J. 8,52,2 (Constantine).

[427] CCL 1983, Can. 24 § 2.

[428] CCL 1983, Can. 27; this canon faithfully repeats the norm of the 1917 code (cf. CIC 1917, Can. 29).

[429] D. 1,3,37.

[430] It is explicitly set forth in a fragment of the AD 223 constitution of Alexander Sever: *Libera matrimonia esse antiquitus placuit, ideoque pacta ne liceret divertere non valere* – "It has been maintained for a long time that there is liberty of married life and therefore agreements prohibiting divorce are not valid" (C.J. 8,38,2); for more about divorce in Roman law, see Insadowski, H.

Roman law always permitted the dissolution of conjugal life, even during the Christian empire. Moreover, the mutual consent of the spouses was not required. Besides the dissolution of the bond by mutual parties' consent (*divortium*), unilateral repudiation of the spouse was commonplace (*repudium*).

Notwithstanding these fundamental differences between the Roman concept of marriage, surprising as it may seem, deriving from pagan Rome, and the idea of marriage endorsed by Christian doctrine, the code's definition of matrimony and the relevant regulations reveal conspicuous traces of Roman legal tradition.

The canon opening the title on marriage in the new code defines marriage as a "covenant, by which a man and a woman establish between themselves a partnership for their whole lives" – *foedus, quo vir et mulier inter se totius vitae consortium*.[431] By asserting that marriage is a covenant of two persons, a man and a woman, and a partnership for their whole lives, the ecclesiastical legislator clearly adverted to the teaching of the Second Vatican Council pertaining to matrimony.[432] In canonists' opinion, this element of the code's definition of marriage converges with the fragment of a known definition of *matrimonium* given by Modestin, a Roman jurist of the classical period, who wrote that "marriage is a relationship between a man and a woman, a union for life, a community of the divine and human law" – *Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae divini et humani iuris communication*.[433]

It is worth noting that, when discussing marriage, the 1917 code used the term *contractus matrimonialis*.[434] In the new code, the legislator defines mar-

Rzymskie prawo małżeńskie a chrześcijaństwo, Lublin 1935, p. 279f. For more about the assessment of divorce in early Christian doctrine, see Gajda, E. "Adulterium a trwałość małżeństwa we wczesnym Kościele." In *Rodzina w społeczeństwach antycznych i wczesnym chrześcijaństwie. Literatura, prawo, epigrafika sztuka,* Jundziłła, J. ed., Bydgoszcz 1995, p. 265ff; Pałubicki, W., Iluk, J. *Małżeństwo i rodzina w starożytnym chrześcijaństwie*, Gdańsk 1995, p. 246ff; Myszor, W. "Małżeństwo i rozwód w ocenie pisarzy chrześcijańskich II i III wieku." In *Rodzina w społeczeństwach antycznych,* p. 241ff.

[431] CCL, Can. 1055 § 1. The Code of Canon Law of 1917 omitted to provide the definition of marriage.

[432] Cf. GS 47-52. For more, see Góralski, W. *Kościelne prawo małżeńskie*, Płock 1987, p. 7ff. Nieckarz, F. "Recepcja soborowej nauki o małżeństwie i rodzinie w Kodeksie Prawa Kanonicznego z 1983 roku." In *Recepcja Vaticanum II w prawie kanonicznym,* Tymosz, S., ed., Lublin 2005, p. 162ff; Sztychmiler, R. *Doktryna Soboru Watykańskiego II o celach małżeństwa i jej recepcja w Kodeskie Prawa Kanonicznego z roku 1983*, Lublin 1993, p. 205; idem, "Pojęcie małżeństwa chrześcijańskiego", *RNP KUL* 1-2 (1991-1992), p. 29ff.

[433] D. 23,2,1.

[434] CIC 1917, Can. 1012.

riage after the council constitution *Gaudium et spes* as "a covenant" (*foedus*)[435] and abandons the notion of "matrimonial contract." Thus, a notion of clearly Biblical connotation replaced the legal term *contractus.* Such a solution is perceived not only as recourse to theological terminology, but also as approximation to Roman tradition, since Roman jurist of the classical period did not qualify marriage as a contract. In Roman law, *matrimonium* was an actuality and not a legal condition. Yet, it was a unique actuality that law was interested in due to its significant legal and social effects. The Roman contract system was restricted and rigid; it involved a number of individual contracts of a strictly, legally defined scope of application and protected by similar actions. Admittedly, Roman jurists use the terms *contrahere matrimonium*,[436] *contrahere nuptias*,[437] but not *contractus matrimonialis.* It was the medieval Roman law experts who promoted the theory of marriage as a contract and introduced the notion of *contractus matrimonialis*. Canonists followed in their footsteps.[438] As a consequence, terminological modifications of the new code reflecting the teaching of the Second Vatican Council brought the definition of marriage closer to the tradition of Roman law.[439]

Likewise, the concept of entering into marriage formulated in the code is based on the Roman legal output. Certainly, the definition of the form of entering into marriage by the Council of Trent (decree *Tametsi* of 1563) and the causes of its nullity has very little in common with the tradition of Roman law.[440] Nevertheless, giving precedence to the essence of marriage over the form, canon law readily accepts and possesses the idea of Roman consensual-

[435] GS 48.

[436] Cf. D. 23,2,34,1; 35.

[437] Cf. e.g. D. 23,2,10; 12,1.

[438] Cf. Gaudemet, *Influences romaines*, p. 217f.

[439] The code of 1983 also uses the Latin term *contactus* with reference to marriage (Can. 1055§ 2), which should be interpreted as a reflection of the old concept of marriage; as in Sitek, B. "Koncepcja małżeństwa w rzymskim prawie klasycznym a kultura prawna Europy. Uwagi o małżeństwie w oparciu o tekst Modestyna D. 23.2.1", *CPH* 50(1988), issue 1, 26.

[440] In ancient Rome, contracting a marriage was a private, informal and secular act; there was no obligation of either a secular or a religious representative to be present; the state did not keep a register of marriages; Dębiński, *Prawo rzymskie*, p. 185f. For more about the essence of Roman law, see Rozwadowski, W. "Nowe badania nad istotą małżeństwa rzymskiego." *Meander* 4-5(1987), p. 246ff; idem, "Istota małżeństwa w starożytnym Rzymie." *Gdańskie Studia Prawnicze* 14(2005), p. 773ff; Zabłocki, J. "Consensus facit nuptias." In *Marriage: Ideal – Law– Practice,* Służewska, Z., Urbanik, J., eds., Warsaw 2005, p. 235ff; "Zgoda małżeńska w prawie rzymskim." In *Honeste vivere. Księga Pamiątkowa ku czci Profesora Władysława Bojarskiego*, Toruń 2001, p. 301ff.

ism. Canon 1057 § 1 of the new code – repeating the wording of the 1917 code[441] – provides that "A marriage is brought into being by the lawfully manifested consent of persons" – *matrimonium facit partium consensus*. This phrase is more than faithful to the Roman principle *Nuptias non concubitus, sed consensus facit* that underscores the parties' will as an essential and even the exclusive requirement of marriage. This principle was borrowed from Ulpian's opinion contained in *Digesta.* Significantly firm are Ulpian's distinguished words given in *Digesta*: *Nuptias non concubitus, sed consensus facit* – "Marriage arises from consensual declaration of will and not from married life as such."[442]

In ancient Rome, as with other ancient peoples, the contracting of marriage was accompanied by many traditional, rich ceremonies of religious and social character. First, they were held in the house of the soon-to-be wife and next in her husband's (a central ceremony was the transferral of the bride to her husband's home in a wedding procession (*deductio in domum mariti*). However, these customary rites, as contemporary literature on the subject assumes, did not have any legal weight but merely a religious and moral value (possibly might have been treated as evidence of the beginning of marriage). As a vital component of marriage, Roman law prioritizes consensual declaration of parties' will. It is the same in canon law (although canon law developed a theory of marriage as a sacrament). Strictly consensual and in line with the Roman concept, the character of marriage under canon law deserves particular attention, the more so because such an approach is original, distinct from other legal systems and contains a trait of Roman legal thought. The principle taking the role of the parties entering into a relationship as conclusive and the fact of cohabitation as inferior have become the foundation of the concept of marriage in European culture ever since; this principle is given priority by the ecclesiastical legislator when determining the cause of marriage.[443]

[441] Cf. CIC 1917, Can. 1081.

[442] D. 35,1,15 (Ulpian): *Cui fuerit sub hac condicione legatum si in familia nupsisset, videtur impleta condicio statim atque ducta est uxor, quamvis novum in cubiculum mariti venerit, nuptias non concubitus, sed consensus facit;* cf. also D. 50,7,30.

[443] A consensus-based manner of entering into marriage in ancient Rome enabled absent parties to contract marriage (*inter absentes*), although the absent party might only have been the man (cf. Paul. Sent. 2,19,8; D. 23,2,5). Currently, in accordance with Polish civil law (Article 6, Family and Guardianship Law), and canon law (CCL 1983, Can. 1105 § 1,1-2), either party may enter into marriage by a proxy. For more about *principium* of consent and its implications in ecclesiastical matrimonial law, see: Zubert, B.W. "Consensus sacrmentalis facit nuptias?" In *Przymierze małżeńskie*, Góralski, W., Sztychmiler, R., eds., Lublin 1993, p. 9ff.

Ecclesiastical matrimonial law identifies other, new employments of the principles of Roman law. One example is the adoption of the calculation of the degrees of consanguinity. The new codification provides that: *Consanguinitas computatur per lineas et gradus. In linea recta tot sunt gradus quot generationes, seu quot personae, stipite dempto. In linea obliquo tut sunt gradus quot personae in utraque simul liena, stipite dempto*.[444] By this disposition, the ecclesiastical legislator reinstated the simpler and more transparent Roman method of establishing consanguinity, also in the collateral line.[445] This principle is expanded by the modification of marriage impediments due to consanguinity and affinity. This change resembles the law of the Roman classical period. That law always prohibited the marriage between relatives in the direct line[446] and to the third degree of consanguinity in the collateral line.[447] By upholding the impediment of marriage "between those related by consanguinity in all degrees in the direct line, whether ascending or descending, legitimate or natural," and in the collateral line "up to the fourth degree inclusive,"[448] the new code did not depart much from the classical Roman principle.[449]

As regards affinity, Roman regulations outlawed only the marriage of those being in affinity in the direct line.[450] From this perspective, by introducing the

[444] "In the direct line, there are as many degrees as there are generations, that is, as there are persons, not counting the common ancestor. In the collateral line, there are as many degrees as there are persons in both lines together, not counting the common ancestor;" CCL 1983, Can. 108 § 2-3.

[445] The 1917 code used Germanic computation adopted in canon law in the 11th century; cf. CIC 1917, Can. 96 § 3. Roman computation introduced by the 1983 code is used by Eastern Churches and, as a rule, secular legislations, for example, Polish; cf. for example Ignatowicz, J., Nazar, M. *Prawo rodzinne*, 2nd ed., Warszawa 2006, p. 24.

[446] *Nuptiae consistere non possunt inter eas personas quae in numero parentium liberorumve sunt, sive proximi sive ulterioris gradus sint usque ad infinitum* (D. 23,2,53, Gaius) – "No nuptial bond can exist between parents and children, between closest relatives and relatives in a more distant degree without limitations."

[447] G. 1,62: "Niece can be taken as a wife. This rule was applied first time when divine Claudius married Agrippina, his brother's daughter. However, the sister's daughter will not be taken as a wife."

[448] CCL 1983, Can. 1091.

[449] Cf. Gauthier, *La part du droit romain*, p. 137.

[450] *Fratris vel sororis filiam uxorem ducere non licet* (Inst. 1,10,3) – "Brother's or sister's daughter will not be married;" *Adfinitatis quoque veneratione quarundam nuptiis abstinere necesse est. Ut ecce privignam aut nurum uxorem ducere non licet, quia utraeque filiae loco sunt. Quod scilicet ita accipi debet, si fuit nurus aut privigna: nam si adhuc nurus est, id est si adhuc nupta est filio*

impediment of affinity in any degree of the direct line, the new code re-established the classical principle of Roman law in its entirety.[451]

Ecclesiastical matrimonial law fully adopted the principles of Roman law when it comes to the legal status of a child.[452] In order to prove a man's paternity, it used two known presumptions (*praesumptio iuris*). The first assumed that a child born in marriage is the mother's husband's child. It was expressed by Paulus' principle: *Pater is est, quem nuptiae demonstrant* "The father is the one designated by marriage."[453] The ecclesiastical legislator repeats this rule by saying, "The father is he who is identified by a lawful marriage" – *Pater is est, quem iustae nuptiae demonstrant.*[454] The other presumption developed by Roman law and based on medical evidence defined the shortest and longest period of pregnancy, which was already demonstrable in antiquity. It was assumed that legitimate children (*liberi legitimi*) are those who were born no earlier than in the seventh month of pregnancy after contracting marriage[455] (180-182 days), and no later than nine months after the dissolution of marriage (300 days).[456] Such a presumption was adopted by the Church

tuo, alia ratione uxorem eam ducere non poteris, quia eadem duobus nupta esse non potest (Inst. 1,10,6) – "Out of respect for affiliation, it is necessary to restrain from marriage with certain women. Therefore, a stepdaughter or daughter-in-law may not be taken as a wife, since they take the place of a daughter. Certainly, this is not the case with former stepdaughter or daughter-in-law. For until she is a daughter-in-law, i.e. is in a relationship with your son, you may not take her as a wife for other reason – the same woman may not be married to two men.

[451] Cf. CCL 1983, Can. 1092. According to the 1917 code (Can. 1077) the impediment was affiliation in a collateral line to the second degree inclusive (in Roman computation to the fourth degree).

[452] Canon law, in the opinion of Żurowski, M. *Kanoniczne prawo małżeńskie Kościoła katolickiego*, Katowice 1987, p. 384, "received the principles of Roman law as regards the position of legitimate and illegitimate children."

[453] Paulus, D. 2,4,5 pr.

[454] CCL 1983, Can. 1138 § 1. The quoted fragment of the canon is a repetition of CIC 1917, Can. 1115 § 1.

[455] D. 1,5,12 (Paulus): *Septimo mense nasci perfectum partum iam receptum est propter auctoritatem doctissimi viri Hippocratis: et ideo credendum est eum, qui ex iustis nuptiis septimo mense natus est, iustum filium esse* – "Invoking the authority of the learned man, Hippocrates, a child born in the seventh month of pregnancy is thought to be a mature foetus. Therefore, it should be assumed that one who was born in the seventh month of pregnancy and was born legitimate is a lawful son."

[456] D. 38,16,3, 11-12 (Ulpian): *Post decem menses mortis natus non admittetur ad legitimam hereditatem. De eo autem, qui centensimo octogensimo secundo die natus est, Hippocrates scripsit et divus Pius pontificibus rescripsit iusto tempore videri natum, nec videri in servitutem conceptum, cum mater ipsius ante centensimum octogensimum secundum diem esset manumissa* – "A child born ten months after the father's death must not be admitted to intestate succession. On the other hand,

legislator who provided that "Children are presumed legitimate who are born at east 180 days after the date the marriage was celebrated, or within 300 days from the date of dissolution of conjugal life."[457]

Canon law also appropriated the Roman institution of legalisation of illegitimate children by means of legitimation (*legitimatio*), i.e. the fathering of a biological child born in concubinage and offering it the status of a child born within marriage.[458]

The institution of legitimation was introduced by Christian emperors during the Dominate under the influence of the Christian doctrine opposing extramarital partnerships. Beginning with Constantine (4th c.), various legitimation methods developed in the imperial legislation. One of them was *legitimatio per subsequens matrimonium*; the father of an illegitimate child entered into marriage with its mother.[459] As a result of marriage, children born in concubinage became legitimate and fell under their father's authority. Another method was *legitimatio per rescriptum principis* (legitimation by an imperial rescript), which consisted in granting a concubinage-born child the status of legitimate by way of an imperial ordinance. This method sponsored by Justinian was used when marriage with a concubine was not practicable (e.g. because of her death, loss or if some impediments to marriage occurred).[460]

In canon law, legitimation of a child is done by the force of law by subsequent marriage of its parents (*per subsequens matrimonium parentum*) or by a papal rescript (*per rescriptum Sanctae Sedis*).[461] Legitimated children are

a child who was born in the period of up to 182 days after the father's death is born in a lawful time, according to Hippocrates and divine Pius. It will not be considered born in slavery, since the mother was manumitted before the 182nd day of its birth."

[457] CCL 1983, Can. 1138 § 2; in CIC 1917, Can. 1115 § 2, the same conjecture was worded in a somewhat different – in terms of editing – manner: *Legitimi presumuntur filii qui nati sunt saltem post sex menses a die celebrati matrimonii, vel intra decem menses a die dissolutae vitae coniugalis* – "Legitimate children are those who were born at least six months after entering into marriage, or within ten months from the day of dissolution of marriage life."

[458] In Roman law, the legal status of children was uneven and was contingent upon whether they were born in a lawful marriage (*liberi legitimi*), or outside marriage (*filii illegitimi*). The latter are further divided into natural children (*filii naturales, liberi naturales*), if born in concubinage, and children born in casual relationships of free persons (*spurii*, *vulgo concepti*). Children born outside marriage did not fall under *patria potestas* and acquired the mother's status; for more about this issue, see: Kuleczka, G. *Prawo rzymskie epoki pryncypatu wobec dzieci pozamałżeńskich*, Wrocław 1969, p. 50ff.

[459] For more, see: Insadowski, *Rzymskie prawo małżeńskie,* p. 258ff.

[460] Ibidem, p. 260ff.

[461] CCL 1983, Can.1139.

equivalent to legitimate children as far as canonical effects are concerned, unless it is otherwise provided by the law.[462]

Another example of the effect of Roman thought on canon law is the theory of rescript. The 1983 code provides that a rescript is an administrative act, issued in writing, by which "a privilege, dispensation or other favour is granted."[463] It points to the circumstances and motives of granting a favour. The response of the competent authority is given without verifying the justification but only for the cases that are identified by the requesting party. Naturally, the favour granted by a rescript is justified only if the motives laid out in the request are true.[464]

Such requisites concerning rescripts were mandatory in Roman imperial law. Hence, as it reads in the constitution of Zeno from 447, a rescript is valid "if the request is based on truth" – *si praeces veritate nituntur.*[465] The same principles underlie the canonical norm that invalidates a rescript issued subsequent to the act of subreption (*subreptio*) or obreption (*obreptio*)[466]. The ecclesiastical legislator adopted the Roman distinction and terminology used by imperial constitutions against *subreptice* rescripts in which "the truth is concealed"[467] and *obreptice* rescripts based on giving false information.[468]

A central role in the shaping of the Roman legal tradition in canon law has been assigned to the culture of the Latin language (*lingua Latina*). Latin, the mother tongue of Romans, became the official language of the entire Roman Empire and supplanted other local vernaculars such as Oscan (spoken in southern Italy) or Umbrian (used in ancient Umbria). After the decline of the Imperium Romanum and revival of local dialects as legal languages, Latin remained the international language and the language of the Western Church.[469] Despite the admission of national languages into the

[462] CIC 1917, Can. 1140. CCL of 1917 excluded the legitimization of children of a cardinal (Can. 232 § 2 n. l), a bishop (Can. 331 § l n. l) and an abbot or independent prelate (Can. 320 § 2). These limitations were lifted in the CCL of 1983.

[463] CCL 1983, Can. 59.

[464] Cf. CCL 1983, Can. 63. Cf. also Krukowski, Sobański, *Komentarz*, p. 122ff.

[465] C.J. 1,23,7 pr.

[466] CCL 1983, Can. 63.

[467] Cf. C.Th. 12,6,1;13,11,10; 14,3,20.

[468] C.Th. 16,1,4;16,10,8; C.J. 3,6,3.

[469] Supranatational by nature, the Church recognized Latin as her own language and made it a tool of unity and evangelization. It caused Latin to disseminate rapidly. The Western civilisation, whose Christianity emanated across entire Europe, was steeped in the Latin culture. "For in medieval times, everything was written in Latin: law, judgements, official letters, books;" Sondel, J. *Słownik łacińsko-polski dla prawników i historyków*, Kraków 2006, p. IX.

liturgy (Second Vatican Council), Latin is invariably the one and official language of the liturgy of the Western Church.[470] Latin is also the official language of documents issued by the Holy See and its dicasteries. Latin is the language of both Western codifications of canon law. They contain new Latin legal vocabulary used for the construction of concepts and legal precepts and for the definition of many canonical institutions. Both codices display a high degree of adaptation of the terminology of Roman law, which was a secular law and for the most part developed in the pagan world. By employing this *instrumentarium,* some terms gained a new meaning in ecclesiastical law. It was, as J. Gaudemet put it, "the slipping in" of new senses of words (*glissement de sens des mots*).[471] This measure appeared convenient when discussing the ecclesiastical authority. To illustrate the point, it should suffice to call attention to the existence in both codices of the terms of Roman public law: *potestas, auctoritas, iurisdictio.* Each of these has a long history in both the tradition of Roman and canon law;[472] in ancient Rome, these words were the basic selection of terms denoting power. The canonical doctrine adopted them relatively early. Noticeable in canon law as early as in the times of medieval glossators, they were integrated into both codices of the Latin Church. The codices borrowed, yet with an altered content, the notion of *potestas.*[473] The 1917 code assembled in separate titles the canons pertaining to the highest power in the Church (*De suprema potestate*)[474] and the power

[470] Ioann. Paul. II, Alloc. (26 November 1976): *Ecclesia, quae Latina vocatur, quamvis propter utilitats pastorales in Liturgiam etiam sermone vulgaris induxerit, tamen a principio, ex quo linqua eius propria est latina, non discedit.*

[471] J. Gaudemet, *Influences romaines,* p. 196.

[472] Cf. Gangoiti, B. "I termini ed i concetti di «Auctoritas, potestas, iurisdictio» in diritto canonico." In *Atti,* p. 220ff; Fabbrini, F. "«Auctoritas», «potestas», e «iurisdictio» in diritto romano." In *Atti,* p. 151ff. Gaudemet, *Influences romaines*, p. 197ff.

[473] In Roman law, the term *potestas* (authority, power, might) denoted authority, in both public and private law. In public law, this word was used to mean the authority of magistratures, in which *potestas* was sometimes distinguished as inferior from *imperium* – a higher authority. During the kingdom, *potestas* fell to kings (*potestas regia*). It was also the attribute of people's tribunes (*tribunicia potestas*). The term was also taken as the owner's control of property (*potestas dominica*) or paternal authority over the subordinate family members (*potestas patria*); cf. Berger, A. *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953, s.v. *potestas*, p. 640; Heumann, H., Seckel, E. *Handlexikon zu den Quellen des römischen Rechts*, 9th ed., Jena 1907 (reprint Graz 1971), s.v. *potestas*, p. 443f; Litewski, *Słownik encyklopedyczny*, s.v. *potestas*, p. 205; Sondel J., *Słownik łacińsko-polski dla prawników i historyków*, Kraków 206, p. v. *potestas*, p. 766f.

[474] CIC 1917, liber II, titulus VII.

of bishops (*De potestate episcopali*).[475] Similarly, the code of 1983 has a title comprising norms on the power of governance (*De potestate regiminis*).[476] In both codices, in the canons concerning the bishop of Rome, the power of the pontiff was detailed as "supreme, full, immediate and universal" – *suprema, plena, immediata et universalis potestas*[477]. The term *potestas* is used in the new code in connection with the College of Bishops and bishops.[478] In the canons covering the organisation of the Church, both codices use the term *auctoritas*.[479] It appears, for example, in the name of the section (*sectio*) entitled The Supreme Authority of the Church (De *suprema Ecclesiae auctoritatae*)[480] and in the canons devoted to the Roman Pontiff and the synod of bishops who are available to him in the exercise of his office.[481] Of unquestionable Roman descent is the term *iurisdictio* – often used in both codices.[482] It was adopted by canon law back in the Middle Ages to designate the power of governance in the Church.[483] The 1983 code reserved it to the judiciary and process matter. The canons of Book VII *De processibus* mention this word at least sixteen times.[484] In the new code, this term (*potestas iurisdictionis* – "the power of jurisdiction") was used only once to denote the power of govern-

[475] CIC 1917, liber II, titulus VIII. Outside Book VII, the new code uses the terms: *potestas regiminis, regimen, regere, gubernare, gubernatio;* Krukowski, Sobański, *Komentarz*, p. 213.

[476] CCL 1983, Book I, Title VIII; the expression *potestas regiminis* was removed from the law of the sacraments.

[477] Cf. CIC 1917, Can. 218; CCL 1983, Can. 331.

[478] Cf. CCL 1983, Can. 336; Can. 337 § 1- 2; Can. 339 § 2.

[479] An equivocal Latin term *auctoritas* (authority, gravity, prestige, competence, authorization) covered more of a social and moral than a legal category; it was used when *auctoritas* of the people was meant (*auctoritas populi*) as well as of the emperor (*auctoritas principis*), of jurists (*auctoritas prudentium*), of offices (*auctoritas magistratuum*, *auctoritas municipiorum, auctoritas civitatum*). In sacral law this word denoted *auctoritas* pontifices (*auctoritas pontificum*), augurs (*auctoritas augurum*), bishops (*auctoritas episcoporum*, *auctoritas Romani pontificis*), cf. Berger, *Encyclopedic Dictionary*, *s.v. auctoritas*, p. 368f; Heumann, Seckel, *Handlexikon zu den Quellen*, s.v. *auctoritas*, p. 43f; Litewski, *Słownik encyklopedyczny*, *s.v. auctoritas*, p. 26; Sondel J., *Słownik łacińsko-polski*, s.v. *auctoritas*, p. 92. For more, see: Fabbrini, *«Auctoritas»*, p. 136ff.

[480] CCL 1983, Book II, Part II, Section I.

[481] CCL 1983, Can. 344.

[482] Derived from the Roman civil trial, the term *iurisdictio* (jurisdiction, power to judge, process) denoted both the judiciary and its relevant activity; cf. Berger, *Encyclopaedic Dictionary*, s.v. *iurisdictio,* p. 523f; Heumann, Seckel, *Handlexikon zu den Quellen*, s.v. *iurisdictio*, p. 229f; Litewski, *Słownik encyklopedyczny*, s.v. *iurisdictio*, p. 132; Sondel J., *Słownik łacińsko-polski*, s.v. *iurisdictio*, p. 540. For more, see: Fabbrini, *«Auctoritas»*, p. 183ff.

[483] Gauthier, *La part du droit romain,* p. 135.

[484] Gaudemet, *Influences romaines,* p. 197.

ance.[485] It favours the term *potestas regiminis* and the use of the term *iurisdictio* meaning "power" is scarce. To indicate the entitlements, previously known as *iurisdictio*, the norms of the new code prefer the term *facultates* (faculties).[486] The desistance of Roman terminology used in this sense since the Middle Ages may be seen as a manifestation of certain distance toward "the power of jurisdiction" and a preference for "service" in the Church. It further corroborates the adherence to the teaching and language of the Second Vatican Council.

4. Legal Procedure

Church legal procedure is a branch of canon law that has always been largely influenced by Roman law.[487] By accommodating it to her spirit and needs, the Church developed its fundamental components mainly relying on the principles and regulations of Roman law.[488]

It was already in antiquity, particularly since Constantine, when the first instances of the use of the procedural rules *cognitio extra ordinem* by bishops and synods, held in high esteem by the Christian community, appeared; from the chronological viewpoint, it was the last Roman process developed in the time of the Roman Empire for the resolution of the Church's disciplinary issues.[489] Some regulations of this process were applied during the convention of Catholic bishops and the followers of Donatism in Cartagena in AD 411.[490]

[485] CCL 1983, Can. 129 § 1.

[486] Cf. for example CIC 1917, Can. 872ff; CCL 1983, Can. 966ff; cf. ibidem CCL 1983, Can. 882-885; 1111 § 2; Gaudemet, *Influences romaines,* p. 197f.

[487] Gauthier, *La part du droit romain,* p. 138.

[488] Cf. F. Bączkowicz, *Prawo kanoniczne*, vol. III, Opole 1958, p. 8; Imbert, *Le code*, p. 9; Płodzień, S. *Dowód z opinii biegłych w procesie kanonicznym*, Lublin 1958, p. 41. Wilanowski, B. *Rozwój historyczny procesu kanonicznego,* vol. I. *Proces kościelny starożytności chrześcijańskiej*, Wilno 1928, p. 114f, advanced an opinion that the ecclesiastical process derives from the Jewish process and was under its influence for first three centuries of Christianity, i.e. until it was subject to the impact of Roman law. This view did not find favourable ground in canon law studies. Many authors, including Steinwenter, A. "Der antike kirchliche Rechtsgang und seine Quellen", *ZSS Kan. Abt. 23*(1934), p. 1f; idem, "Der Einfluss des römischen Rechtes auf den antiken kanonischen Prozess." In *Atti del congesso internationale di diritto romano*, vol. I, Pavia 1934, p. 227ff, show that the institutions of the early Christian process materially differ from the equivalent Jewish institutions.

[489] The followers of the new religion were able to observe the practice of the Roman civil and criminal process on a daily basis. Some outstanding people of the episcopate were Roman law experts; from the times of Constantine, all bishops performed arbitration that was officially

An extensive recourse to the regulations of Roman law was seen in the Middle Ages, especially in the 9th century, owing to a fake collection of *Decretals of Pseudo-Isidor.*[491] Moreover, the canon process of the close of the 12th century was based on the Roman process; the overlapping concerns mainly the legal procedure. The second part of Gratian's *Decretum* offers an abundance of procedural regulations, including those of Roman descent.[492] Although some of them were accepted after the Pseudo-Isidorian sources, yet a considerable number of source texts pertaining to procedures were taken by Gratian directly from *Corpus Iuris Civilis.* Sizeable portions of *Decretum* regarding witnesses were edited after *Digesta* and the Justinian Code.[493] *Ordines iudicorum* of that time containing a description of the process, regardless of their authorship by canonists or legists, were basically created in compliance with the Roman

recognized by the state (*episcopalis audientia*). After the proclamation of the Edict of Milan in the Roman Empire, the organisation of the Church and the development of law in criminal and disciplinary matters were intertwined with the state judiciary. However, it was the imperial legislation that set the boundary between the ecclesiastic and secular administration of justice. Emperors encroached on the Church's judicial procedure in many ways. So much had Roman law and ecclesiastical law in common that the Church – whose scope of responsibilities had that she grown so much since Constantine the Great that she needed a legal procedure in order to maintain discipline among the growing number of clergy – felt compelled to satisfy the emerging demand for new legal norms by reaching for the most readily accessible source, i.e. Roman legal solutions. Hence, there is much evidence that beginning with the 4th century there must have been a much greater permeation of the official Roman procedural law into the legal body of the Church than before; Steinwenter, A. "Der Einfluss." In *Atti del congesso internationale di diritto romano*, vol. I, Pavia 1934, p. 229ff.

[490] Steinwenter, A. "Eine kirchliche Quelle des nachklassischen Zivilprozess." In *Acta congressus iuridici internationalis,* vol. II, Rome 1935, p. 125ff.

[491] The source relied on the sources of Roman law via *Breviarium Alarici* and *Lex Romana Visigothorum.* In the texts of Pseudo-Isidor (Hinschius, P., ed., *Decetale pseudo-Isidorianae et Capitula Angilramni, Lipsiae* 1863; reprint Darmstadt 1963), from among the source material concerning the procedure, priority was given to the rules and regulations on the eligibility of persons involved in a trial, the judge, the accuser and witnesses; Gauthier, A. *Roman Law and Its Contribution to the Development of Canon Law*, Ottawa 1996, p. 92.

[492] The second part of *Decretum* treats of the jurisdiction of ecclesiastical judicature, legal procedure, Church property law, monastic law and matrimonial law. Much space was devoted to penitentiary regulations, i.e. the treaty on penance (*tractatus de poenitentia*), probably penned by another author and is a later insertion. In part two, Gratian included 36 cases (*causae*) studying fictitious or actual situations or legal cases that needed resolution. The description of each case was arranged into questions (*quaestiones*) leading to solutions which were founded on source texts (*capita* or *canones*).

[493] Litewski, W. "Les textes procéduraux du droit de Justinien dans le Décret de Gratian." In *Studia Gratiana* 9(1966), p. 67ff.

sources.[494] Moreover, a large number of the titles of Book Two and Five of *Decretals* by Gregory IX,[495] in which the pope revised the ecclesiastical civil and penal process in the 13th century, was taken from Book Three, Four and Seven of the Justinian Code. As a consequence, the classical ecclesiastical process was named Roman-canon, from its two fundamental sources.[496] Its distinguishing principles were: the principle of free exercise by the parties of their rights,[497] the principle of contestability (contradictoriness)[498] and the principle of written proceedings.[499] The hearing of evidence was based on the so-called legal theory of proof. The parties had the right to appeal – deriving from the Roman process;[500] the execution of judgement was official (it was done by a court official authorized by the court).

The Roman-canon process was divided in two stages separated by *litis contestatio* ("introduction of the issue", "confirmation of the process", "join-

[494] Gauthier, *Roman Law,* p. 93.

[495] As mentioned elsewhere, see Chapter III, 9,1, the legal material of *Decretals* was classified by the words *iudex, iudicium*, *clerus*, *conubia*, *crimen*. According to this classification, the regulations concerning the contentious trial were included in Book Two, and those concerning the penal process in Book Five.

[496] For the latest research on this process, see: Litewski, W. *Der römisch-kanonische Zivilprozeß nach den älteren ordines iudiciarii,* vol. I-II, Kraków 1999.

[497] The Roman-canon process was action-based; the rule of fee exercise by the parties of their rights determined that the process was initiated only by the party's will. The judge might have commenced the process only after petitioning by the plaintiff. The rule was expressed by the paroemia: *Nemo iudex sine actore* – "There is no judge without the plaintiff;" *Nemo invitus agere cogitur.* – "Nobody is forced to file a petition against his will;" Lesiński, Rozwadowski, *Historia prawa sądowego,* p. 125; Sójka – Zielińska, *Histora prawa*, p. 201.

[498] The principle of contradictoriness stated that the parties were themselves responsible for collecting and submitting evidence material to the court. The judge's role was passive; he was not capable of acting *ex officio* but only at the request of the party, which was expressed by the rule: *Ne procedat iudex ex officio* – "The judge should not proceed *ex officio*." The judge relied only on the material collected by the parties; at the same time, he was compelled to adhere to the plaintiff's claim (he could not adjudicate beyond what the plaintiff claimed – *ultra petitium*); Lesiński, Rozwadowski, *Historia prawa sądowego,* p. 125; Sójka – Zielińska, *Histora prawa*, p. 201.

[499] The Roman-canon process consisted mainly in the exchange of pleadings between the parties; all the major activities in connection with the process were to be confined to writing; Lesiński, Rozwadowski, *Historia prawa sądowego,* p. 125; Sójka – Zielińska, *Histora prawa*, p. 202.

[500] Appeal (*appellatio*) – made by submitting, by either of the parties, a request to the court of higher instance for re-examination of the case (*libellum appelationis*); the higher court did so and passed a new judgement – developed in the Roman cognitio proceeding, no later than in the 2nd century AD; Kolańczyk, *Prawo rzymskie*, p. 71f; more in Litewski, W. *Wybrane zagadnienia rzymskiej apelacjji w sprawach cywilnych*, Kraków 1967.

der of the issue"). The first phase of the process began with the bringing of an action by the plaintiff (*citatio*) together with a written complaint (*libellus actionis*).[501] If the complaint met the formal requirements, the judge summoned the other party to file a written defence against the plaintiff's claims by raising objections (exceptions).[502] The plaintiff might reply to the respondent's defence and the respondent was entitled to respond to the defence (duplication). If the respondent denied the claim, the joinder of the issue was effected (*litis contestatio*).

Having momentous effects, *litis contestatio*[503] initiated a new stage of the process involving the assessment of proofs and settlement of controversy by the judge. The most powerful proof was the confession of guilt.[504] Moreover, witnesses' testimonies, parties' oath and documents were allowed as proofs. The onus of the proof rested, in accordance with the Roman rule, upon the person who made a claim (an allegation), and not the person who denied.[505]

The Roman-canon process was practiced in Italian communes and ecclesiastical judicature, the latter facilitating its dissemination in other countries. At the onset of the modern era, it underlay the progress of modern civil lawsuit. It was also conducive to the formulation of the canon process in the 1917 code revised by the 1983 code.

The contemporary canon process, less formal and much simplified by the 1983 Code of Canon Law, still remains under the strong influence of Roman law. To prove this point, one can detect with no trouble many process rules and institutions, in the penal and civil processes, of unambiguously Roman origin

[501] According to glossators' doctrine, it should contain: the plaintiff's name (*quis*), subject matter (*quod*), competent court (*coram quo*), legal basis (*quo iure*) and respondent's name (*a quo*); Sójka – Zielińska, *Histora prawa*, p. 201.

[502] Exceptions (*exceptiones*), developed in Roman law as additional clauses favouring the respondent, in Roman and canon process were called declinatory (released from litigation), peremptory (rejected plaintiff's claim) or dilatory (temporary dismissal of the case); Sójka – Zielińska, *Histora prawa*, p. 202.

[503] Its effect was the joinder of the issue before the court; from then on, the parties in a trial were not able to withdraw without the judge's and adversary's consent. Also the terms of controversy could not be altered, which was expressed by a canonical rule: *Lite pendente nihil immoventur* (D. 49, 7, 1; Ulpian); *Decretales* 2, col. 16; *Liber sextus* 2, col. 8 (Bonifacius VIII). "If the trial is suspended, nothing new can be brought in." Sójka – Zielińska, *Histora prawa*, p. 202.

[504] It was contained in the rule: *Confessio est regina probationum*. "Confession of guilt [or *cognovit actionem*] is a material evidence."

[505] *Ei incumbit probatio, qui dicit, non qui negat* (D. 22, 3, 2; Paulus). "The burden of evidence rests with the one who claims, not the one who denies."

and Roman naming conventions. The provisions of Book VII *De procesibus* are literally "saturated" with Roman legal terminology, for instance, the notion of action, competence of the court, *litis contestatio* or *restitutio in integrum* typical of the contentious trial. A much-telling example of similar derivation is the principle of the onus of proof (*onus probandi*).

In the Roman civil process, *actio* was understood as complaint or action brought by a plaintiff with a view to executing his basic right.[506] According to the familiar definition of Celsus, "*Actio* (complaint, action) is no more but the right to claim what is due to somebody at court."[507] A similar definition was adopted by the Justinian legislation,[508] and subsequently by canon law.[509]

Contemporary canon law, based on the Roman legal sources, defines action as a right to enforce basic rights at court.[510] The terminological relation between the Roman and canon interpretation of *actio* was reflected in the code's norm, "every right is reinforced... by an action" – *Quodlibet ius* [...] *actione munitur*.[511] This phrasing is a borrowing, albeit in a modified word order, from the definition of action given by Celsus.[512] Regardless of various present-day theories of the notion of action in the canon procedural law, the position of the Roman tradition as underpinning this process institution is unquestionable.[513]

Not only did canon law adopt the Roman notion of *actio*, but also the typification of actions. A distinguishing feature of the Roman ordinary civil trial was the absence of general principles of granting legal protection to every justified claim; one *actio* could not be used to assert every right. The civil process (in particular formulary procedure) developed a system of particular

[506] Kolańczyk, *Prawo rzymskie*, p. 117f; for more, see: Pugliese, G. "Actio-litis contestation." In *Atti del colloquio romanistico-canonistico*, p. 337ff.

[507] *Nihil aliud est actio quam ius quod sibi debeatur, iudicio persequendi;* D. 44,7,51 pr.

[508] *Actio autem nihil aliud est quam ius persequendi iudicio quod sibi debetur*; Inst. 4,6.

[509] Roberti, F. *De processibus*, vol. I, 4th ed., Rome 1941, p. 60.

[510] Cf. Bączkowicz, *Prawo kanoniczne*, vol. III, p. 62; Roberti, F. *De processibus*, vol. I, p. 59ff. Action so understood should be distinguished from pleading which contains the requirement of legal protection and may also be called an action. Cf. CCL 1983, Can. 1501-1506; cf. also Pawluk, *Prawo kanoniczne,* vol. IV, Olsztyn 1990, p. 228. In contemporary canon law – in accordance with the binding rule: *Nemo iudex sine actore* – a judge cannon initiate a process *ex officio*. He may only examine a case at the request of the plaintiff. The plaintiff may be a person whose rights have been violated or need legal protection. In some cases, the request may be filed by the promoter of justice (CCL 1983, Can. 1501); cf. also Pawluk, *Prawo kanoniczne,* vol. IV, Olsztyn 1990, p. 233.

[511] CCL 1983 Can. 1491.

[512] Gaudemet, *Influences romaines*, p. 205.

[513] Ibidem.

actions, pertaining only to specific kinds of claims. In consequence, a trial might have been initiated only if there had been an *action* corresponding to the violated right.[514]

Medieval canonists and glossators created "an endless series of actions"[515] of clearly Roman origin that they attempted to incorporate into canon law and process. Also, the 1917 code listed a catalogue of actions that resembled some Roman complaints, e.g. *De actionibus ex novi operis nuntiatione et damno infecto* (action for a new construction and action for the securing of claims for possible damage), *De actionibus rescissoriis et de restitutione in integrum* (action for rescission and reinstatement), *De actionibus seu remediis possessoriis* (actions for possession, i.e. protection of possession).[516] Individual canonical actions, besides the rights of the plaintiff, also defined a special procedure – as in Roman law – to be observed in order to assert one's right by a judge's intervention.

The 1983 code modified the canons regulating actions. It did not preserve the catalogue of actions of the former code but listed the action (*actio possessoria*) safeguarding possessions.[517] It is an institution of Roman jurisprudence.[518] Without clarifying the means and effects of implementing this ac-

[514] About the classification of actions in Roman law in Dębiński, *Rzymskie prawo prywatne*, p. 117ff; Wołodkiewicz, Zabłocka, *Prawo rzymskie*, p. 304ff.

[515] Ochoa, J. "«Actio» e «contestatio litis» nel processo canonico." In *Atti Atti del colloquio romanistico-canonistico*, p. 365f. The notion of action in the Roman-canon process has been discussed in Litewski, *Der römisch-kanonische Zivilprozeß,* vol. I, p. 187ff.

[516] Cf. Liber IV, titulus V *De actionibus et exceptionibus;* for more about the classification of actions in the 1917 Code of Canon Law, see Bączkowicz, *Prawo kanoniczne*, vol. III, p. 63ff; Roberti, *De processibus*, vol. I, p. 571ff.

[517] CCL 1983, Can. 1500.

[518] In Roman law, the legal measures for protection of ownership (protection of possession) were interdicts; by way of interdicts, praetor prohibited lawless infringement of possession or ordered that lawlessly seized possession be returned to the former possessor. Such a protection under extrajudicial protection was called protection of possession. To determine in the interdictory proceedings who will hold the possession was of importance for possible claim of ownership (petitional action) where the controversy about ownership was to be resolved. The one who gained the upper hand in the the interdictory proceedings (held possession), was privileged in the claim of ownership (petitional) as a respondent. The best known interdicts were: *interdictum uti possidetis* (protection of the owner of property, especially buildings and land); *interdictum utrubi* (protection of the possession of movables), *interdictum unde vi* (restoration of possession of property by the lawful possessor who had been dispossessed by force), *interdictum de precario* (granted against a precarist if he fails to return the possessor, despite being requested, the property given to him for revocable use), *interdictum quod vi aut clam* (special legal remedy against the

tion, the ecclesiastical legislator provided that "in matters concerning the nature and effects of an action for possession, the provisions of the civil law of the place the thing to be possessed is situated are to be observed."[519] Action for possession common in secular legislations was adopted from Roman law. The ecclesiastical legislator's recourse of to secular laws as regards "the nature and effects" of this action is an indirect invoking of the Roman-canon legal tradition.

Canon law accepted generous terminology, the notion and issues of court competence from Roman law. Roman jurisprudence recognized that a given contentious issue should be head by the proper judicial body. To indicate the court and the scope of its competence, the term *forum* was used (marketplace, square and a place where trials were held). This word denoted both the tribunal deciding a case and the boundary of its competence (*forum competens)*. While determining which court is competent to hear a case, two types of competence were examined: competence by reason of the venue of an issue (*ratione loci*), and competence by reason of subject matter of an issue (*ratione materiae*). As regards the local competence, it was expressed in an acknowledged rule formulated after Roman legal sources, *Actor sequitur forum rei*[520] – "Plaintiff follows the forum of the respondent." Thus, the plaintiff should sue the other person in the court where that person (the adversary) resides.

Among various types of competence, canon law accepted the idea of local competence. In ecclesiastical law, competence is established by the temporary or permanent place of residence (*ratione domicilii vel quasi domicilii*).[521] A decisive factor is the place of domicile of the respondent, which is corroborated by a provision included in both codices: *Actor sequitur forum rei.*[522] Hence, when deciding on local competence, the ecclesiastical legislator opted for the medieval principle dating back to the Roman sources.

Roman law permitted other criteria of competence of a court of law. In post-classical law, the competent court was the one in the venue of controversy

breach of possession); cf. Dębiński, *Rzymskie prawo prywatne*, p. 218ff; Wołodkiewicz, Zabłocka, *Prawo rzymskie*, p. 154ff.

[519] CCL 1983, Can. 1500; in Polish law, the regulations concerning possession are to be found in Articles 336-352 of the Civil Code, and concerning an action for possession in Articles 478-479 of the Code of Civil Procedure; cf. Pawluk, *Prawo kanoniczne,* vol. IV, Olsztyn 1990, p. 231f.

[520] Dam. *Reg.* 65; cf. C.J. 3,19,3 (Theodosianus I), 3,13,2 (Dioclecianus), *Fragmenta Vaticana* 325; 326 (Dioclecianus), C.Th. 2,1,4 (Valentinianus I).

[521] CCL 1983 Can. 1408; cf. Pawluk, *Prawo kanoniczne,* vol. IV, Olsztyn 1990, p. 176.

[522] CIC 1917, Can. 1559 § 3. The code of 1983 contains a somewhat modified version of the Latin precept: *Actor sequitur forum partis conventae*; Can. 1407 § 3.

(*forum rei sitae*),[523] the venue of contract (*forum soluti contractus*)[524] or the venue of committing a tort (*forum delicti commissi*).[525] Contemporary canon law identifies this kind of competence as alternating, established either by way of the location of the subject matter (*ratione rei sitae*), venue of entering a contract or executing a contract (*ratione contractus*).

Competence by reason of subject matter (*res litigiosa*) means that a party can be brought to trial before the tribunal of the place where the subject matter is located if the matter concerns the subject matter or unlawful deprivation of possession.[526] On the other hand, competence by reason of contract means that a party to a contract may be brought before the tribunal of the place where the contract was made or where it must be fulfilled, unless the parties agree to a different tribunal.[527] If the issue concerns obligations arising from a different title, the party may be brought before the tribunal where the obligation was made or should be fulfilled.[528] Similarly, ecclesiastical law adopts a Roman idea of competence by reason of the venue of committing a tort (*ratione delicti*).[529]

As in Roman tradition, the Roman-canon process[530] is governed by *litis contestatio*, a central part of the contentious process under canon law. The Roman institution of *litis contestatio* arose from an old legal procedure of the period of the Republic.[531] The then process (under law of actions, formulary) was divided into two phases (stages): *in iure* and *apud iudicem*. The first was held before a competent magistrature, mainly the praetor. It was of a preliminary character. *Magistratus* was introduced into the dispute and offered the

[523] C.J. 3,19,3 (Gratianus, 385) *Actor rei forum, sive in rem sive in personam sit actio, sequitur. sed et in locis, in quibus res propter quas contenditur constitutae sunt, iubemus in rem actionem adversus possidentem moveri*; cf. Roberti, *De processibus*, vol. I, p. 190ff.

[524] Cf. D. 42,5,4; 44,7,21; cf. also D. 46,7,21.

[525] Cf. D. 9,4,43; C.J. 3,16,1.

[526] Cf. CIC 1917, Can. 1564; CCL 1983, Can. 1410.

[527] CCL1983, Can. 1411 § 1. As Pawluk assumes in *Prawo kanoniczne,* vol. IV, Olsztyn 1990, p. 177, by reason of contract, the plaintiff does not have to but may bring an action before the tribunal of the place in which the contract was made or must be fulfilled. The action may concern the existence of the contract, its execution, termination, voidance or compensation for non-fulfilment or improper fulfilment.

[528] CCL1983, Can. 1411 § 2.

[529] CCL 1983, Can. 1412. The tribunal of the place in which the offence was committed is competent to handle a penal case, even if the effect of the offence occurred elsewhere, or the perpetrator fled the scene; cf. Pawluk, *Prawo kanoniczne,* vol. IV, Olsztyn 1990, p. 178.

[530] Litewski, *Der römisch-kanonische Zivilprozeß,* vol. I, p. 321ff.

[531] Dębiński, *Rzymskie prawo prywatne*, p. 112ff; for more, see Kupiszewski, H. *Litis contestatio*, CPH 15(1963), p. 243ff.

parties available remedies (*actiones*, *exceptione*), and, as requested by the parties, appointed a judge selected by them. The second phase was held before the judge, who was a private person; this stage of the trial was conclusive. The judge heard the parties, assessed proofs and passed judgment.

The effects of the proceedings during the *in iure* stage held before magistrature were gathered in the process formula; its content was determined by the praetor with the parties participating. Simultaneously, at the end of this phase, the joinder of the issue was effected (*litis contestatio*). It was an act in the process in which the content and basis of the plaintiff's claim as well as the nature and value of the subject matter were determined. Consequently, the act comprised the entire contentious matter and important legal issues to be settled by the judge in the consecutive phase of the process. Accompanied by the praetor, the plaintiff handed the respondent a ready formula in writing, elucidating the controversy; the respondent accepted the formula (*accipere iudicium*). Through *litis contestatio* – indispensible for the continuation of the process – the parties subjected to the court, which was supposed to pass a judgement in accordance with the course of action approved in the formula by a judge in the second phase of the proceedings.

The act of *litis contestatio* entailed grievous effects, especially in the formulary procedure. One of them was *consumptio litis* (the most important effect of an action). Having entered *litis contestatio*, the plaintiff was not able to bring up the same action in the future, since his right (entitlement), underlying the original action, expired after *litis contestatio*. This important effect of the process was expressed in a principle warranting legal protection, "Let there be no second trial of the same issue."[532]

Cognitio proceedings retained *litis contestatio* but its position and effects were altered; the act was transferred to the preliminary stage of the process, after the presentation of a claim by the plaintiff (*narratio*) and the reply of the respondent (*contradictio*). *Litis contestatio*, as opposed to the formulary procedure, did not result in *consumptio litis*, but was merely a stage in the proceedings. Septimius Sever's constitution reads, "An issue is assumed to be joined when after the presentation of the case, the judge commences the hearing."[533] Such an approach to *litis contestatio* is present in the norms of the new code that says, "The joinder of the issue occurs when the terms of

[532] *Bis de eadem re ne sit actio*; cf. G. 4,107.

[533] C.J. 3,9,1: *lis enim tunc videtur contestata, cum iudex per narrationem negotii causam audire coeperit.*

controversy, as derived from the pleas and replies of the parties, are determined by a decree of the judge."[534] The determination of the subject matter entails material legal effects.[535]

In the Roman law of the Late Empire, *litis contestatio* did not ultimately define the scope of the issue, which was subject to change. The new Code of Canon Law offers a similar solution by admitting the modification of the scope of controversy due to some grave reason and at the request of the parties; the ecclesiastical legislator only required a judge to issue a relevant decree.[536]

Another example of the use of the legacy of Roman jurisprudence by Church legal procedure is to be found in the canons regulating the application of a legal remedy referred to as reinstatement – *restitutio in integrum*.[537] This is an institution of Roman origin of the classical period of law. It was an extrajudicial and extraordinary means of legal protection granted exceptionally by the praetor at the request of a person who, as a result of a legal situation (act in law), suffered damage. It was a means for a praetor to rectify the harshness of old *ius civile* and thus shape the quality of the society toward being more sensitive to justice than to severe law. This remedy aimed to restore the original (former) condition. This extraordinary recourse was attainable for some people due to their legal status or age; *restitutio in integrum* was available to mature but inexperienced persons below 25 years of age. Furthermore, this remedy was offered in certain circumstances, such as deceit (*dolus*) or menace (*metus*).[538] These circumstances were taken into consideration by the magistrature if they caused that an unfavourable legal deed was concluded or there

[534] CCL 1983 Can. 1513 §1.

[535] The object of controversy must be expressed by the formulation of the doubt, which the judge must resolve in his judgement. After the joinder of the issue, the possessor of another's property ceases to be in good faith. If the judgement is that he or she must return the property, they must also return any accrued profits (from the date of the joinder) and compensate for damages (CCL 1983, Can. 1515); cf. Pawluk, *Prawo kanoniczne,* vol. IV, Olsztyn 1990, p. 239.

[536] CCL 1983, Can. 1514: "Once determined, the terms of the controversy cannot validly be altered except by a new decree, issued for a grave reason, at the request of the party, and after the other parties have been consulted and their observations considered."

[537] Cf. CIC 1917, Can. 1905-1907 and CCL 1983, Can. 1645-1648.

[538] D 4,1,1 (Ulpian): *Utilitas huius tituli non eget commendatione, ipse enim se ostendit. Nam sub hoc titulo plurifariam praetor hominibus vel lapsis vel circumscriptis subvenit, sive metu sive calliditate sive aetate sive absentia inciderunt in captionem* – "The usefulness of this title [*restitutio in integrum* – A.D.] does not call for justification, for it points to itself. It authorizes praetor to provide assistance to those who made mistakes or were victims of deceit and suffered because of fear, trickery, young age or absence."

was a loss of some entitlements, e.g. the right to file a complaint due to prescription. If *restitutio in integrum* was applied, the legal effects were regarded as if never occurring; simply speaking, this remedy allowed the application of the rule of equity in legal relations.[539]

The medieval canon law appropriated this remedy;[540] likewise, by accepting Roman terminology and construction, both codices accommodated reinstatement. Yet, the scope of its application varied. The Roman *restitutio in integrum* was not a remedy against judgement in the first place. The codes of canon law resolved it differently; both the 1917 code and the 1983 code provided that the request for reinstatement can be made against a judgement – *adversus sententiam*,[541] "provided it is clearly established that the judgement was unjust."[542] Consequently, from the viewpoint of legal construction, the canonical *restitutio in integrum* had noting to do with a praetor's intervention (this republican office was alien to canon law). Furthermore, the case provided for by the 1983 code (Can. 1645) was absent in Roman law. Hence, no reception of a legal institution took place; instead, it was exclusively the borrowing of terminology (the same word).[543] However, irrespective of these differences, the introduction of *restitutio in integrum* – in both Roman and canon law – was legitimized by the same and unchangeable argument – to repair injustice.

Church law refers to the achievements of Roman jurisprudence in matters of proof. Admittedly, Roman law failed to develop a theory of proof but formulated important principles in this regard. They were not always explicitly stated by Roman jurists but provided an input for the medieval theory of evidence. One of the important process rules included in both codices was a known axiom from Paulus' text: *Ei incumbit probatio, qui dicit, non qui negat* – "The onus of proof rest upon the one who claims and not the one who denies" incorporated in *Digesta*.[544] This crucial process rule was included in both codifications of canon law. What follows, in present-day canon process, and in line with Roman thought, the principle that the onus of proof rests upon the

[539] Dębiński, *Rzymskie prawa prywatne*, p. 129. For more, see: Bojarski, W. "In integrum restitutio w prawie rzymskim," *RTK* 10(1963), p. 15ff.

[540] Cf. Litewski, *Der römisch-kanonische Zivilprozeß,* vol. II, p. 525ff.

[541] Cf. CIC 1917, Can. 1905 and CCL 1983, Can. 1645 § 1. About *restitutio in integrum* in canon law, see: Kiwior, W. *Przedmiot restitutio in integrum w kodeksie prawa kanonicznego z 1983 r. oraz w orzecznictwie trybunałów apostolskich w latach 1984-1995*, Warszawa 2001, p. 27ff.

[542] CCL 1983, Can. 1645 § 1; cf. Pawluk, *Prawo kanoniczne*, vol. IV, Olsztyn 1990, pp. 304-305.

[543] J. Gaudemet, *Influences romaines*, p. 196.

[544] D. 22, 3, 2 (Paulus).

one who makes an allegation: *Onus probandi incumbit ei qui asserit* invariably holds true.[545]

The discussion of the influence of Roman law on the codifications of the Latin Church, concise and cursory as it may be, permits some general conclusions to be drawn. *Primo facie*, the codifications of the Latin Church embody numerous components originating in the Roman legal tradition. It was underlined by Pope Benedict XV in the promulgation of the 1917 Code of Canon Law by the bull *Providentissima mater Ecclesia* where he made mention of Roman law. By identifying different stages and sources of development, the pope, the supreme ecclesiastical legislator, noted, "Roman law is alive as a monument of past wisdom and was rightly named a written rational reason (*ratio scripta*)."[546]

The impact of the achievements of Roman jurisprudence is primarily noticeable through the terminology (a grid of terms) and definitions used in both codifications. They constitute clear mental links that bridge the distance between modern Church law and ancient Roman law. Similarly, the systematics adopted in the Church codifications, above all in the 1917 code, relies upon the principles devised by Roman jurists.

[545] CIC 1983, can. 1748 § 1; CCL 1983, Can. 1526 § 1.
[546] Const. Prov. Mater Ecc. (27 May 1917).

Conclusion

As one of the most pivotal components of ancient culture, accompanied by Greek philosophy and Judicial-Christian ethics, Roman law exerted material influence on the shaping of the cultural quality of the contemporary world. When inquiring into the future shape of geographically and institutionally expanding Europe, concerning its legal, political and social order, and the sources of her cultural identity, one must refer to Roman law, a phenomenon in the history of culture. Its uniqueness is validated by the fact that it survived the decline of the social and political system that had created it. After the fall of Imperium Romanum, Roman law did not die away but in its "posthumous life"[547] found application as a binding (received) law and as "a source of everlasting inspiration."[548]

The Church played a central role in the dissemination and preservation of Roman legal sources. Ever since her foundation, the Church has been exposed to the influence of the culture and law of ancient Rome. The problem of the relations between Roman and canon law is multi-faceted; the question of the degree of interplay of *ius Romanorum* and ecclesiastical institutions and law of the Western Church should be debated with special thought given to individual institutions and historical periods.

The first three centuries after Christ saw only scarce familiarization of Roman law limited to terminology. Beginning with the 4th century, after the

[547] Grzybowski, S. *Dzieje prawa*, Wrocław 1981, p. 82.
[548] Kupiszewski, H. *Prawo rzymskie. Historia i współczesność*, Warszawa 1988, p. 215.

Edict of Milan allowing the inhabitants of the empire to follow the religion of their preference, imperial legislation was accommodated as a significant component of ecclesiastical order, yet not as her own law but as instituted by public authority for all the subjects of the emperor. For this reason, numerous imperial laws were borrowed by Church canons and incorporated into various collections of Church law. In the case of the development of wholly ecclesiastical institutions, we should speak more of some influence of the Roman spirit than of the appropriation of secular law. As an example of absorbing the qualities of the Roman milieu, some similarities may be noticed in the Church's territorial division (dioceses) to that established in the Late Empire. Thus, many Church solutions followed secular examples; nevertheless, a slavish imitation of the Roman system of administration should be ruled out. On the other hand, some borrowings are present in the style of papal decretals of the 4th century, which resembled imperial rescripts and decrees.

The provisions and principles of Roman law were used by the Church after the fall of the Western Empire; some popes adverted to them, as for example Gregory I in his writings from the beginning of the 7th century. When applying Roman law, popes regarded it as a secular law, binding in a given territory. However, they may not be assumed to have "canonized" Roman law, i.e. recognize it as an integral element of canon law. The view of canon law "adopting" or "receiving" Roman law in that period is dubious.

The recourse to Roman law by popes and synods began to rise from the beginning of the 9th century (it was called *leges imperatorum Romanorum* or *ius civile*). The many centuries' practice (varied in terms of scope and intensity) of Church's referring to Roman law and the overwhelming influence of the legal education of the time rendered Roman law an auxiliary and supplementary source to canon law (*fons suppletorius*). By an ordinance of Pope Lucius III (1181-1185), if an appropriate provision of canon law was absent, relevant regulations of Roman law were to be applied. As worded in this decision, the Church canons were the primary source. Roman law was intended to support the law of the Church (*canones legibus adiuventur* – resolved the pope) if conformed to Christian principles. The papal ordinance was a universal norm. Included in *Decretals* of Gregory IX – an official and general collection of Canon law – it had the force of universal law and remained officially binding until the promulgation of the 1917 Code of Canon Law.

The central role of Roman law is also evident in the column *Regulae iuris* of *Liber sextus* by Boniface VIII (1298); the majority of 88 legal principles contained in the work had been borrowed from Justinian's *Digesta*.

Widespread and growing application of Roman law began to be perceived as a menace to the Church. As a result, Roman law was banned as a university subject for some clerics in a series of Church decisions in the 12th and 13th centuries. In 1219, Pope Honorius III issued a bull entitled *Super specula* in which he prohibited Roman legal studies at Paris University. The rationale behind this ban is still debatable. The analysis of the content and context of the document casts enough light to exclude purely political motives. Its publication should be explained by some Church-internal reasons – the reduction of the number of Roman law students among the clergy was intended to cease the departure from theological studies and, as a consequence, the lowering of their quality.

The process of official reception of Roman law came to a close with the first codification of canon law. The Code of Canon law of 1917 failed to include the ordinance of Pope Lucius III concerning the subsidiary role of Roman legal regulations if relevant canon law norms were absent. Similarly, the revised code of 1983 makes no mention of Roman law as an auxiliary source to be referred to by a judge (or another law enforcing body) if no applicable regulations are available. Nevertheless, the lack of explicit acknowledgment of Roman law in the two codes did not mean the Church's rejection of the many centuries' canonical tradition. Quite the contrary, Roman law was employed as a crucial codification component. An evident example of this role was the application of the systematics used in Gaius' and Justinian's *Institutions* in the 1917 code. Still, the adopted systemic layout, previously experimented with by Lancelotti in *Insititutiones Iuris Canonici* (1563) and his many followers, was not the most noteworthy Roman "trace" in the 1917 code. When performing a general analysis of the areas of the 1917 and 1983 codes that were most visibly marked by the Roman legal influence on the Latin Church, the surfacing categories are: terminology (a grid of terms), matrimonial law, principles governing broadly understood court competence and legal procedure.

The influence of Roman law over the 1983 Code of Canon Law seems less evident. However, it not only preserves a number of Roman elements of the 1917 code but also employs Roman notions and terminology in many issues, for instance, in the definition of marriage as *totius vitae consortium* (Can. 1055).

Finally, the principle attributed to Ludwig Pontanus (*seu* Romanus) should be quoted: *Legista sine canonibus parum valet, canonista sine legibus*

nihil.[549] This maxim aptly and concisely communicates the importance of Roman law as seen by medieval canonists. It aimed to serve as a tool of interpretation, confirmation or supplementation of canon law. Today, this sentence may be seen as a truth that the knowledge of Roman law is a tool for embracing the legal order of the Latin Church and a requisite for apprehending the legacy that had a vital impact on the accomplishments and spiritual values of European culture.

[549] "Legists without the knowledge of canons do not matter much; canonists without the knowledge of constitutions do not matter at all." This maxim is attributed to Ludwig Pontanus (*seu* Romanus) by A. Reiffenstuel; cf. Gauthier, *Roman Law*, p. 10

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