

Canonical Jurisprudence and other Legal Systems in the Medieval and Early Modern Periods

Ken Pennington

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Legista sine canonibus parum valet, canonista sine legibus nihil.¹ Students of canon law learn that maxim early on in their study of canon law. Nobody has ever doubted that Roman law was crucial for the development of canon law. Prospero Fagnani († 1678) captured the general early modern and modern understanding of the relationship of the two laws in his commentary on Pope Honorius III's decretal *Super specula* (1219) that forbade the teaching of Roman law in Paris:²

The most just laws and the sacred canons sprung forth from one womb or source. Consequently, the laws are supported by the canons, and the ambiguities of the canons are resolved by the law, just as the glosses of both laws richly reveal and as Ludovico Pontano stated in his *Singularia* 'A civil lawyer without a knowledge of canon law is worth little, a canon lawyer without a knowledge of Roman law is worth nothing'.

I would pose the question, is that a correct understanding about the relationship of the two laws as their jurisprudence developed in the first half of the twelfth century and beyond?

As Gratian revised his *Decretum* Roman law was crucial for his analysis of several different areas of law. As he added texts to his final recension over a period of years that had circulated as appendices to earlier recensions, Gratian inserted over one-hundred texts taken from all parts of Justinian codification and his later legislation, the *Novellae*.³ There are small pieces of evidence

¹ Frederick Merzbacher, 'Die Parömie "Legista sine canonibus parum valet, canonista sine legibus nihil"', *Collectanea Stephan Kuttner* (Studia Gratiana 13; (1967) 275-282 and Stephan Kuttner, 'Some Considerations on the Role of Secular Law and Institutions in the History of Canon Law', *Studies in the History of Medieval Canon Law* (Aldershot 1990) X.

² Prospero Fagnani, *Commentaria* (Cologne 1703) to X 3.50.10: 'Quoniam justissimae leges et sacri canones ex uno utero vel fonte divino processerunt. Vnde leges firmantur canonibus et canonum ambiguitates legibus resolvuntur, sicut ex discursu glossarum utriusque juris loculenter apparet. Huic dicebant Romanus *Singularia* 654: "Legista sine canonibus parum valet, canonista sine legibus nihil." Several early modern jurists authors refer to Ludovico Pontano Romanus' († 1439) discussion of the maxim in his *Singularia*; he was the first jurist to coin the maxim. However, his formulation was in Italian not Latin: 'Io ti dico che legista senza capitolo vale poco, ma lo canonista senza lege vale niente', *Singularia* (Venice 1496) fol. 18va (not numbered), (Pavia 1501) fol. 22vb (numbered 654), (Paris 1508) unfoliated, numbered 656. The earliest jurist I have found who translated the vernacular maxim into Latin was Hendrik Zoesius († 1623) in his Praefatio to the *Decretales Gregorii IX* (Cologne 1668) 2. I shall discuss the later the canonist's misinterpretation of Pontano's Italian maxim in another essay.

³ Melodie Harris Eichbauer, 'From the First to the Second Recension: The Progressive Evolution of the *Decretum*', *Bulletin of Medieval Canon Law* 29 (2011-2012) 119-167; Anders Winroth, *The Making of Gratian's Decretum* (Cambridge Studies in Medieval Life and Thought, 4th Series, 49; Cambridge 2000) 133-135 had argued that the additions to the manuscripts were made after the Gratian's final recension began to circulate. Eichbauer's analysis

that Gratian knew and used Roman law in the earliest recensions of his text.⁴ However, the most important Roman law excerpts were not from Justinian but from Irnerius' translations and adaptations of texts from Justinian's *Novellae* that were inserted into the margins of the *Institutes* and the *Codex*.⁵ Irnerius had carefully crafted these texts to adapt the legislation in the *Codex* to twelfth-century society. Gratian saw that they were also very important for his project and inserted thirty 'authenticae' into his *Decretum*. Although there is no debate today that Gratian used Roman law and that the glossators of the *Decretum* had frequent recourse to Justinian's legacy, there are differing opinions on when, how and to what degree Gratian and the early canonists bowed to the authority of Roman law.⁶

Very little work has been done on the influence of canon law on Roman law in the early twelfth century. To put the question slightly differently, when did the current begin to flow in the opposite direction, when did jurists who were not canonists begin to use and cite canonical texts in their work? Two manuscripts of working jurists that contain primarily Roman law texts in Torino, Biblioteca Nazionale Universitaria D.V.19 and also to a lesser extent, Paris, Bibliothèque Nationale de France lat. 4709, give us intriguing evidence that provide some answers to that question. Two other early twelfth century manuscripts, Florence, Biblioteca Laurenziana Plut. 29.39 and Biblioteca Apostolica Vaticana reg. lat. 535 also provide proof of canonical jurisprudence's usefulness to jurists who were primarily interested in Roman law.⁷

The Torino manuscript is the most important witness to the relationship of canon law for a Roman law jurist. More than one hundred years ago Fitting described the manuscript as a 'highly interesting and rich' manuscript.⁸ He called attention to the texts of canon law in the manuscript, but the manuscript remained of greater interest to scholars of Roman law than to historians of canon law. Canonists did not pay much attention to it. In 1895 Emil Seckel analyzed the texts in a collection of texts that he demonstrated were taken from the canonical

demonstrates that they were included before not after. The most important conclusion is that there was a significant amount of time between Gratian's recensions.

⁴ E.g. C.2 q.6 c.28, C.15 q.3 c.1,2,3,4. Also quotations of Roman jurisprudence: Antonia Fiori, *Il giuramento di innocenza nel processo canonico medievale: Storia e disciplina della 'purgatio canonica'* (Studien zur europäischen Rechtsgeschichte 277; Frankfurt am Main 2013) 229-236 who noted a textual borrowing from Cod. 3.31.11 in the earliest recensions. Also see Pennington, 'Roman Law, 12th Century Law and Legislation', **Errore. Solo documento principale.** *Von der Ordnung zur Norm: Statuten in Mittelalter und Früher Neuzeit*, ed. Gisela Drossbach (Paderborn-München-Wien-Zürich: Ferdinand Schöningh, 2010) 17-38 for examples of Gratian's use of the language of Roman law in his pre-Vulgate recensions at 29-35 and "The Big Bang": Roman Law in the Early Twelfth Century', *Rivista internazionale di diritto comune* 18 (2007) 43-70 at 53-68.

⁵ Pennington, 'The Beginning of Roman Law Jurisprudence and Teaching in the Twelfth Century: The Authenticae,' *Rivista internazionale di diritto comune* 22 (2011) 35-53.

⁶ Pennington, 'Big Bang' 43-45.

⁷ The Florence manuscript is discussed by Emmanuele Bollati in his translation of Savigny's *Geschichte des römischen Rechts* as *Storia del diritto romano nel medio evo* (Vol. 3; Torino 1857) 105-106 and the Vatican manuscript is examined by Jacqueline Rambaud-Buhot, 'Le Décret de Gratien et le droit romain: Influence d'Yves de Chartres', *Revue historique de droit français et étranger* 4th series 35 (1957) 290-300; Rambaud-Buhot thinks the chapters came from Gratian or Ivo's *Decretum*. The *Tripartita* and *Panormia* seem to be a more probable sources. However, the text must be examined more closely.

⁸ Hermann Fitting, *Juristische Schriften des früheren Mittelalters aus Handschriften* (Halle 1876) 16-24.

collection, *Panormia*, or a related source.⁹ Scholars have not been unanimous in dating the manuscript. Most of dated it to the second half of the twelfth century. The scripts in all the parts of the manuscript are fairly consistent. They all note the diphthong ‘ae’ and the lower case ‘d’ is uniformly written with a vertical ascender. The script cannot be later than 1150. Glosses are, however, a better guide to the date of a text.¹⁰ The format of all the glosses in the manuscript push the back date to the period before 1140. Justinian’s *Digest* is cited as ‘in digestis’ and the *Decretum* as ‘in decretis’, which is typical of the first half of the twelfth century.¹¹ Especially striking are the glosses to the *Arbor consanguinitatis* on fol. 50r. The glosses cite the *Epitome Iuliani* but not the *Authenticum*, which is evidence of the glosses’ and the manuscript’s early date that must have preceded the circulation of the *Authenticum*. The same glosses are found attached to different texts in other manuscripts of the *Petri exceptiones*.¹²

All the texts in the manuscript were useful for a practicing jurist. The two most important Roman law texts were Justinian’s *Institutes* and the *Petri exceptiones*. Uta-Renata Blumenthal’s thorough examination of Lleida, Arxiù Capitular RC_0021 that Martin Bertram discovered has definitively established the Lleida text as the oldest surviving text of the *Petri exceptiones*.¹³ She dates this text convincingly to the ‘late 1120’s or early 1130’s’ which is further proof that the manuscript cannot be dated to the second half of the twelfth century.¹⁴ The canonical texts further underlined the jurist’s interest in practical problems. Folia 47r-48v contains a list of Gratian’s 36 *causae* that could have been taken from either the earlier versions of Gratian’s text ca. 1135 or his last recension ca. 1140. The case of each *causae* is omitted, but the series of questions that Gratian posed to each case are given exactly. This is odd until one sees that every question is provided with an interlinear gloss that gives a short answer to it. Question one: ‘Is it a sin to buy spiritual things?’ ‘Yes’. Question four: ‘Is he guilty if he did not know his father had bought an office?’ ‘Non’. Question five: ‘Is it permitted to a cleric to be in a church and to be ordained in a church which has received money from his father?’ ‘It is permitted if the cleric

⁹ Emil Seckel, ‘Acten der Triburer Synode 895: Zweite Abhandlung’, *Neues Archive der Gesellschaft für ältere deutsche Geschichtskunde* 20 (1895) 289-353 at 323-327.

¹⁰ See Pennington, ‘The *Constitutiones* of King Roger II of Sicily in Vat. lat. 8782’, *Rivista internazionale di diritto comune* 21 (2010) 35-54 at 42.

¹¹ The format of glosses in legal manuscripts is a valuable piece of evidence for the date of a text; see Gero Dolezalek, **Errore. Solo documento principale**. *Repertorium manuscriptorum veterum Codicis Iustiniani* (2 vols. Ius Commune, Sonderhefte 23; Frankfurt am Main 1985) 1.461-485 at 466-468 and Pennington, ‘*Constitutiones*’ with photos to illustrate glosses ca. 1140.

¹² Torino, Biblioteca Nazionale Universitaria D.V.19 fol. 50r, s.v. *Nec deinceps ulla lateralis persona*: ‘In n<ovella> c. Reliquum est ut dispiciamus de tribus ordinibus’. A citation to the *Epitome Iuliani* Constitutio 109 (110).3, ed. Piero Fiorelli (1996) 164, no. 395 = *Authenticum* 118.3; s.v. *Sed illarum rerum quae pervenerunt*: ‘In n<ovella> c. Si filius descendens in testamento suo (Epitome Iuliani 36[37].31) et in C. lib. ii.(sic) tit. Ad senatus consultum Tertullianum Mater que defuncto filio’ (Cod. 6.56[55].5). Cf. Hermann Fitting, *Glosse zu den Exceptiones legum Romanorum des Petrus aus einer Prager Handschrift zum ersten mal herausgeben und eingeleitet* (Halle 1874) 33 for same glosses to *Petri exceptiones* 1.16.

¹³ Uta-Renate Blumenthal, ‘Dating the *Exceptiones Petri*’, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Kan. Abt. 101 (2015) 54-85.

¹⁴ *Ibid.* 66.

is of a good life'.¹⁵ This text is, as far as I know, unique. It provided the non-canonist with the answers to all of Gratian's questions in a format that was easy to consult. The answers were most for the non-canonist in the procedural and marriage *causae* (*Causae* 2-6 and 27-36). In *Causa* six Gratian asked: Question five: 'If the accuser fails to prove his case, must the defendant render a proof of his innocence?' 'Non.'¹⁶ The Torino also used Gratian's own words (*dicta*) to explain the complicated process of appeals to higher courts. Appeals were becoming a part of the judicial landscape in both ecclesiastical and secular courts. The rules governing appeals were nowhere laid out as clearly in the *libri legales* of Roman law as they were in *Causa* two question 6 of the *Decretum*. A jurist stitched together six of Gratian's *dicta* to create a small treatise on appeals.¹⁷ Torino also contains a tract labelled on witnesses. This section contained canons drawn from a pre-Gratian decretal collection called the *Panormia* that was compiled ca. 1120.¹⁸

A single folio is devoted to the oaths that we to be taken by the pope, emperor, archbishops, and legates when they assumed their offices.¹⁹ The Gregorian canonist Deusdedit recorded similar oaths in his canonical collection and stated that he took them from a *Liber diurnus* (*Liber Romanorum pontificum*) in the papal curia.²⁰ None of the 'professiones', however, matches the texts in Deusdedit or any other eleventh, twelfth, or later source. There are similar oaths in the thirteenth-century *Liber censuum* for the archbishop and legate.²¹ The oaths of the pope and

¹⁵ Torino, Biblioteca Nazionale Universitaria D.V.19 fol. 47ra: 'In qua primo queritur an sit peccatum emere spiritualia (est)? Quarto, an ille sit reus criminis quod eo ignorante pater commisit (non)? Quinto, an liceat ei esse in ecclesia uel fungi ea ordinatione quam paterna pecunia est assecutus (licet si bone uite est)?' Interlinear glosses are in parathenses.

¹⁶ Ibid. 'Quinto. Si in probatione deficit accusator an sit reus cogendus ad probationem suę innocentie? (non)'. Gratian had not constructed this *quaestio* well and there was doubt about his conclusion. See Pennington, 'Gratian and Compurgation', *Bulletin of Medieval Canon Law* 31 (2014) 253-256.

¹⁷ Ibid. fol. 90ra-90rb; the author of this tract included one canon. The rest of the text was C.2 q.6 d.p.c.33, d.p.c.35, d.p.c.36, d.p.c.37, d.p.c.38, and d.p.c.39.

¹⁸ Ibid. fol. 87r-87va: 'De testibus in iudicio'. The first seven canons deal with witnesses; the remaining canons taken from the *Panormia* deal with a variety of issues to fol. 88r. The *Panormia* was formerly attributed to Ivo of Chartres because it was dependent on Ivo's *Decretum*. For information about the collection, see Lotte Kéry, *Canonical Collections of the Early Middle Ages (ca. 400-1140): A Bibliographical Guide to the Manuscripts and Literature* (Washington, D.C. The Catholic University Press, 1999) 253-260, where the collection is still attributed to Ivo; on the authorship see now Christof Rolker, *Canon Law and the Letters of Ivo of Chartres* (Cambridge Studies in Medieval Life and Thought, 4th Series, 76; Cambridge 2010) 265-284, 248-256, 148. Rolker dates the *Panormia* to ca. 1120 (p. 278-279).

¹⁹ Ibid. fol. 89v.

²⁰ Deusdedit (†1098-1099), *Die Kanonessammlung des Kardinals Deusdedit*, 1. *Die Kanonessammlung selbst*, Victor Wolf von Glanvell (Paderborn 1905) 2.110 and 3.145. See Kéry, *Canonical Collections* 228-233 and Hans Hubert Anton, 'Der Liber Diurnus in angeblichen und verfälschten Papstprivilegien des früheren Mittelalters', *Königtum, Kirche, Adek: Institutionen, Ideen, Räume von der Spätantike bis zum hohen Mittelalter: Dem Autor zur Vollendung des 65. Lebensjahres*, ed. Hubert Anton and Burkhard Apsner (Trier 2002) 71-94.

²¹The oaths in the Paul Fabre, *Le Liber censuum de L'Église romaine* (Vol. 1; Paris 1889) 313, an oath of senator with sentences similar to the legate's oath and 417 an oath of a bishop receiving the pallium, also with similar sentences. See Steven A. Schoenig, *Bonds of Wool: The Pallium and Papal Power in the Middle Ages* (Studies in Medieval and Early Modern Canon Law, 15; Washington DC 2016) 341-347. My thanks to him for references to the *Liber censuum*.

emperor are found nowhere else. These texts, however, are important for evaluating geographical origins of the manuscript. These texts must have been taken from materials in the Roman Curia. A transalpine source for the texts is not possible in the first half of the twelfth century.

From the perspective of canon law the most important text is at the end of the manuscript. It bears the title *Tractatus de iure et eius speciebus* and had the incipit ‘Humanum genus duobus regitur, naturali videlicet iure et moribus’. Hermann Fitting first drew attention to the text. He thought the text was not an abbreviation of the first distinctions of Gratian’s *Decretum* because it was a carefully constructed and unified text. He concluded that the text was a source of Gratian and not an abbreviation.²² If true that would have been an extraordinary discovery. The text itself is a stitching together of texts from Isidore of Seville from the first three distinctions of the *Decretum* and Gratian’s dicta from distinction one to distinction fifteen. Soffietti published a simple transcription of the text without a critical apparatus. He concluded that it was an incomplete abbreviation that included two texts taken from the *Summa* of Stephen of Tournai.²³ Soffietti argued that the borrowing from Stephen proved that the text must have been written after ca. 1165. However, even a rudimentary comparison of the texts demonstrates that one was not copied from the other, neither Torino from Stephen nor Stephen from Torino.²⁴ The two texts deal with the Rhodian law of the sea in much more detail than Isidore or Gratian. No one has asked the simple question, why were these texts added by Stephen and the anonymous compiler? The most obvious answer is that both were writing in Italy and living near port cities where the issue was important.²⁵ The main point is that the text is not an abbreviation, incomplete or otherwise. It is a tract on the three most important laws for secular jurists: natural law, custom, and statutes. It omits almost everything in Gratian’s *De legibus* on ecclesiastical law. Coupled with the inclusion of Isidore’s *Tractatus de legibus* on folia 75ra to 78rb of the Torino manuscript is good evidence that the compiler/author of these texts was as involved with the question of defining law as much as Gratian was.²⁶ It is tempting to conclude with Fitting that it was Gratian’s first draft of his *Tractatus de legibus* but that would be pressing the evidence too far. It does, however, underline the importance of natural law for jurists working in the first half of the twelfth century. One might argue that Gratian’s embrace of natural law was one of canonical jurisprudence’s most significant contributions to European jurisprudence. The Torino manuscript proves that Gratian was not alone.

Canonical jurisprudence made another surprising contribution to European secular law by providing a key text to the nascent feudal law.²⁷ A letter of Bishop Fulbert of Chartres (1006-1028) that Gratian had included in his *Decretum* became a key text for the first books of feudal

²² Hermann Fitting, *Juristische Schriften* 24.

²³ Isidoro Soffietti, ‘Il tractatus de iure et eius speciebus del codice D V 19 della Bibliotheca Nazionale di Torino,’ *Rivista di storia del diritto italiano* 52 (1979) 102-112 at 104-105

²⁴ *Ibid.* 104.

²⁵ An edition with notes will be published in the *Bulletin of Medieval Canon Law* 34 (2017).

²⁶ Isidore of Seville, *Etymologies* Book 5 chapter 1-27.

²⁷ For a detailed account of what follows see my essay “Feudal Oath of Fidelity and Homage,” *Law as Profession and Practice in Medieval Europe: Essays in Honor of James A. Brundage*, edited by Kenneth Pennington and Melodie Harris Eichbauer (Ashgate 2011) 93-115

law. He would have understood that the reference was not just to Fulbert's letter but to the canonistic glosses and commentaries that circled the letter in the margins of manuscripts. He would have known that Fulbert's letter was incorporated into the *Libri feudorum*, the standard text of feudal law for the next four centuries.²⁸ The canonists, especially Huguccio and Tancred wrote extensive commentaries on Fulbert's letter that shaped the jurisprudential doctrines governing the feudal oath for centuries. That fact might seem remarkable to us but not to our canonists. In their world legal systems had very permeable borders. The most significant point is that because the canonists interpreted Fulbert's letter in great detail, later jurists did not spend a lot of time interpreting the letter. The canonists had done the job. Petrus Beneventanus continued to connect canon law to feudal law by devoting a title in his decretal collection to *De feudis*. Raymond de Peñafort accepted Petrus' innovation.²⁹

Over the past twenty years Richard Helmholz has drawn attention to the connections between canonical jurisprudence and the great document in English legal history, *Magna carta*.³⁰ He has argued that many of the provisions in *Magna carta* resonate with canonical jurisprudence. If we look at the manuscript tradition of *Magna carta*, we can also find a striking connection with canon law. A Rouen manuscript that had resided in the archive of the Lepers' Hospital of Pont Audemer contains the only French translation known to exist of *Magna carta*. The place it occupies in the manuscript is adjacent to the canons of the Fourth Lateran Council of 1215.³¹ We may ask what was the interest of an ecclesiastical institution in the *Magna carta*? First, of course, Pont Audemer had until recently been under English-Norman rule. More importantly, I think, was the fact that the procedural chapters in *Magna carta* and the procedural canons in the Fourth Lateran complemented each other in several ways. I have argued that the purpose of Innocent III and of the English barons was reform.³² There were also other important ways in which canonical jurisprudence influenced *Magna carta*. Chapter 9's regulation of the "fideiussor's" obligations is a particularly striking example.³³

Finally, I cite Richard Helmholz again who recently argued that the canonists' jurisprudence on natural law influenced *Magna carta*.³⁴ We have already seen how important Gratian's first distinctions were for the incorporation of natural law into canonical jurisprudence. Helmholz observed that 8 different chapters of *Magna carta* could have been and probably were inspired by concepts of natural law.

One last point: the Latin Maxim, "legista sine canonibus parum valet; canonista sine legibus nihil" has been heard in the classrooms of canon law for centuries. Ludovico Pontano Romano († 1439) first coined a version of it in Italian, and Hendrik Zoesius († 1627) seems to

²⁸ K. Pennington, *Law, feudal, Dictionary of the Middle Ages, Supplement 1* (New York 2004) 320-323.

²⁹ 3 Com. 3.16 and X 3.20.

³⁰ Richard H. Helmholz, "Magna carta and the ius commune," *The University of Chicago Law Review* 66 (1999) 297-37.

³¹ Rouen, Bibliothèque municipale Y.200, fol. 81r-87v contains *Magna carta*; fol. 69r-77v contains the canons of the Fourth Lateran Council. See my essay for some of what follows, "Reform in 1215: Magna Carta and the Fourth Lateran Council," *Bulletin of Medieval Canon Law* 32 (2015) 99-127.

³² Pennington, "Reform in 1215" 120-123.

³³ Pennington, "The Ius commune, Suretyship, and Magna carta," *Rivista internazionale di diritto comune* 11 (2000) 255-274.

³⁴ Richard H. Helmholz, "Magna carta and the Law of Nature," *Loyola Law Review* 62 (2016) 869-886.

have been the first to give it clothing in learned Latin.³⁵ Canonists have long recognized the importance of Roman law jurisprudence for shaping canonical jurisprudence from Gratian on. The contribution of canon law at the dawn of European jurisprudence was not as significant. However, as I have tried to show, its influence was not trivial and became much more important in many different areas of jurisprudence in the next centuries. Perhaps we should forget the maxim and coin a more accurate one to describe the relationship of the two laws: *Legista e canonista, siamo fratelli e suori!*

TESTO PROVVISORIO

³⁵ Pontano, *Singularia* (Venice 1496) fol. 18va (not numbered), (Pavia 1501) fol. 22vb (numbered 654), (Paris 1508) unfoliated, numbered 656 and Zoesius, Hendrik Zoesius, *Commentarius paratitularis in decretales epistolas Gregorii IX* (Cologne 1668) 2b.