

## OUTLINE — LECTURE 8

# The Revival of Academic Law—The Canonists

### Main outlines of the development of canon law and church institutions:

Ivo of Chartres, c.1040–1115—three canonical collections are attributed to him: *Tripartita*, *Panormia*, and *Decretum*. The prologue to the *Panormia*, repeated in the *Decretum*, is of fundamental importance.

early 1130s—Possible date of the first recension of Gratian's *Concordance of Discordant Canons*, later known as the *Decreta*, still later as the *Decretum*, at Bologna. The second recension may be more firmly dated to the mid- or late 1140s.

1159–1181—Pope Alexander III; Third Lateran Council (1179); development of the institution of papal judges delegate; large number of decretal letters

1198–1216—Pope Innocent III; Fourth Lateran Council (1215); foundation of Franciscan and Dominican orders; decretal letters continue unabated

1227–1241—Pope Gregory IX; official collection of *Decretals* published (1234); further production of decretal letters declines

c.1250—Establishment of organized ecclesiastical courts in virtually every Western diocese

1243–1254—Pope Innocent IV; deposes the Emperor Frederick II at Council of Lyons (1245)

1294–1303—Pope Boniface VIII; struggle with Philip the Fair of France (1285–1314) ends with the pope's death; the papacy now becomes subject to the power of France

### Canonists, General:

Kuttner, Stephan. *Repertorium der Kanonistik (1140–1234): Prodromus Corporis Glossarum*, Studi e Testi, 71 (Vatican City: Biblioteca Apostolica Vaticana, 1937) (fundamental)

### Decretists:

a. Gratian (d. c. 1140)—the *Concordance of Discordant Canons* consists of three parts of which the first two are by far the longest and the greater part of which are indisputably by Gratian: 1st part: 101 *Distinctiones* (cited 'D.1 c.1'); 2d part: 35 *Causae* (hypothetical cases), each subdivided into *Quaestiones* (cited 'C.1 q.1 c.1'); 3d part: 5 *Distinctiones*, principally on liturgical law (cited 'De cons. [for *De consecratione*] D.1 c.1')

In E. Friedberg (ed), *Corpus Juris Canonici* vol. 1.

- b. Paucapalea
- Rolandus
- Rufinus
- Stephen of Tournai
- Huguccio

*Summae* of all these except for the last were edited in 19th-century editions of varying quality.

c. Ordinary gloss: Johannes Teutonicus (1215 X 1217); revised Bartholomeus Brixienis (c. 1245)

The standard edition of Gratian is still E. Friedberg's, in *Corpus Juris Canonici* vol 1.

### Decretals and Decretalists:

a. *Compilatio Prima* (1 Comp.) — Bernardus Papiensis p. 1191  
*Compilatio Secunda* (2 Comp.) — Johannes Galensis, covers 1187–1198, but was compiled after:

*Compilatio Tertia* (3 Comp.) — Petrus Beneventanus, covers 1198–1210, promulgated by Innocent III in 1210

*Compilatio Quarta* (4 Comp.) — ?Johannes Teutonicus, covers 1210–1216, including Lateran IV (1215)

*Compilatio Quinta* (5 Comp.) — ?Tancredus, covers 1216–1226, promulgated by Honorius III in 1226.

These are all analyzed by E. Friedberg in *Quinque Compilationes Antiquae*.

*Liber Extra sive Decretales Gregorii Noni* (X) — Raymond of Peñafort, promulgated by Gregory IX in 1234

*Liber Sextus* (VI) — promulgated by Boniface VIII in 1298

*Clementinae* (Clem.) — promulgated at Council of Vienne (1312)

*Extravagantes Johannis Vicesimi Secundi* (Extrav. Jo.)

*Extravagantes Communes* (Extrav. com.) — Jean Chappuis (c. 1500) gave this and the Extrav. Jo. their current form; the material in both is largely 14th century.

All of these are in E. Friedberg's *Corpus Juris Canonici* vol 2.

- b. Goffredus de Trano, *Summa* (1242 X 1243)
- Sinibaldus Fliscus (Innocent IV), *Commentaria* (c. 1251)
- Henricus de Segusio (Hostiensis), *Summa aurea* (1250 X 1253)
- Bernardus Parmensis, *Glossa ordinaria* (c. 1263)
- Henricus de Segusio, *Commentaria* (1268 X 1271)
- Johannes Andreae, *Commentaria novella* (p. 1338)
- Johannes Monachus (Cardinalis), *Commentaria in Sextum* (a. 1301)
- Johannes Andreae, *Glossa ordinaria in Sextum* (p. 1303)

All of these are available in early printed editions, of which at least one has been reprinted, except for the ordinary gloss on the *Liber extra*.

### Types of literature:

Are basically the same as the civilians with some variants in terminology.

### Gratian, Causa 27:

“A certain man who has taken the vow of chastity espoused [*desponsavit*] a wife; she, renouncing the previous match, betook herself to another and married him; he seeks after her to whom he was previously espoused.

The first question is whether there can be marriage between those who have taken a vow of chastity?

Second, is it permitted for one who is espoused to leave the one to whom she is espoused and marry another?”

[The answer to the first question ends with a distinction: a solemn vow of chastity, such as that taken in religious profession, bars subsequent marriage, but a simple vow does not.]

**[quaestio 2] Part 1. Gratian:** The second question follows in which we seek to discover whether a girl espoused to another man can renounce the previous match and transfer her vows to another. First, we shall see whether they are married, second whether they can depart from each other.

[We have already seen that the Christian tradition was firmly committed to the indissolubility of marriage, but logically, and indeed in the Roman secular world, the two questions were not the same, and Gratian's analytic technique here provides the first clue as to how he is going to come

out. Gratian's answer is going to be that the couple are married when they were espoused but the marriage was not indissoluble until they had sexual intercourse.]

That they are married is easily shown by the definition of marriage and by the authority of many. ... Again John Chrysostom on Matthew [an anonymous author of a collection of homilies on Matthew, Homily 32]:

[**Canon 1.**] Coitus does not make a marriage, but will does. ...

[**Canon 2.**] Again, Pope Nicholas [I, Response to the Bulgarians (866), c.3]:

According to the laws, consent alone between the parties suffices when the question is whether parties are married. If that alone is lacking, anything else, even if accompanied by coitus, is frustrated.

[This is followed by thirteen canons to the same effect.]

[Gratian's answers to these texts, which seem to constitute a powerful objection to his thesis, does not come until the *dictum post* canon 45 (*Mats.*, p. VIII–10), too long to be included in the outline. The answers seem to boil to two arguments: (1) in context these quotations do not support the view that marriages without intercourse are indissoluble, and (2) there's a distinction between necessary and sufficient conditions. Gratian does not offer these arguments at this point. Rather, having gathered together 15 canons that do not seem to support his position, Gratian then offers two that to his mind do:]

**Canon 16:** [Attributed to Augustine]

There is no doubt that a woman who has not had intercourse is not a married woman.

**Canon 17:** Again Pope Leo [to Rusticus of Nabonne, Ep. 167, 458–9].

Since the partnership of nuptials was so instituted from the beginning that it does not have in itself the sacrament of the nuptials of Christ and the Church unless there has been a mingling of the sexes, there is no doubt that that woman does not pertain to marriage in whom it is learned that there was not nuptial mystery.

[The core, however, of Gratian's argument does not rest on these questionable texts. It rests rather on what he deems to be church practice in five different specific areas, summarized below.]

Canons 18–27: A married man or woman may not espouse the religious life without the consent of his or her spouse, but that rule does not apply if the marriage has not been consummated.

Canons 28–34: These deal, somewhat confusedly with the following problems: (1) impotence, (2) the prohibition against a clergyman to marry a widow, (3) penalties for incest, and (4) *raptus*. We deal here only with the first: The ancient discipline of the church on frigidity or impotence was also not completely clear. (d.p. c.28) Some authorities held that “in sickness and in health” meant just that; others seemed to make an exception for this kind of sickness. Like the question of the entry into the religious life, while none of them mention the pre-intercourse, post-intercourse distinction, they can be made to be consistent if one employs that distinction.

The problem of the marriage of the Blessed Virgin is scattered throughout the question. Gratian's difficulty is that wants to maintain that Mary and Joseph were truly married, but they did not have intercourse.

At the end of question Gratian turns to authorities that seem to forbid an espoused person from marrying someone else.

**What lies in the background of Gratian?**

1. *Roman law* made a sharp distinction between engagements, which they called espousals, promises of marriage, and nuptials, the marriage itself. Nuptials were characterized by the exchange of consent between the bride and groom and the exchange of consent of their fathers if either or both of them were in their power, and, almost everyone who had a living father was in power. Whether anything more was required is controversial, but there are a number of texts in the *Digest* that seem to require some form of ceremony, or at least some form outward manifestation of the consent, which in Roman wedding ceremonies took place when the bride was led to the house of the groom, the so-called *deductio in domum mariti*, the leading of the bride into the house of the groom. Intercourse was not required. An unconsummated marriage was still a marriage. Any marriage was, of course, dissoluble. Roman law freely allowed divorce.
2. The *Germanic law* of marriage, to the extent that it may be said to exist, is even less well known than the Roman, but it seems to have a number of characteristics that differentiated it from the Roman. Unlike Roman law, Germanic law seems to have placed more emphasis on the initial exchange of consent, engagements were more like marriages and less like the Roman espousal, and more emphasis on intercourse; until the parties had had intercourse, they were not fully married. Indeed, some customs suggest that they were not fully married until the birth of a living child.

### **Gratian's Resolution**

1. Gratian's resolution is to separate the definition of marriage from the characteristic of indissolubility. Marriages are made by consent but they are not indissoluble until the parties have intercourse. We have already suggested that this resolution is consistent with the Christian tradition, because the sayings in the New Testament on the indissolubility of marriage seem to make it depend on husband and wife having become one flesh, and the sacramental character of marriage, the relationship between Christ and the Church that we see in the letter to the Ephesians seems to depend on the same thing.
2. Gratian's resolution, however, cannot be made exclusively on scriptural grounds. Gratian is writing in the 12th century not the 2d, and there's a lot more there he has to reconcile in order to get where he wants to go.
  - a. There are a large number of quotations, mostly from ancient authors writing in a Roman milieu, that say, or imply, that intercourse does not make a marriage. Gratian offers a number of distinctions all of which seem to boil down to one of two arguments: (1) in context these quotations do not support the view that marriages without intercourse are indissoluble, and (2) there's a distinction between necessary and sufficient conditions. Of course, intercourse without consent doesn't make a marriage, it makes concubinage, or fornication or worse.
  - b. The ancient discipline of the church, as we have seen in 74T, is quite clear that married couples could not espouse the religious life without mutual consent. There were, however, a few authorities that seemed to make an exception. Although none of these authorities specifically say that the exception is where the couple have not had intercourse; they are open to that interpretation, and this is the way that Gratian interprets them.
  - c. The ancient discipline of the church on frigidity or impotence was also not completely clear. Some authorities held that "in sickness and in health" meant just that; others seemed to make an exception for this kind of sickness. Like the question of the entry

into the religious life, while none of them mention the pre-intercourse, post-intercourse distinction, they can be made to be consistent if one employs that distinction.

- d. I will leave it to you to work out the examples of so-called bigamous clerks (the prohibition on clergymen to marry twice or to marry a widow), the ancient penalties for incest, and *raptus* (which frequently means abduction rather than rape in the modern sense).
- e. Gratian's most difficult case is unique, the marriage of the Blessed Virgin Mary. By the 12th century it had become clear that as a dogmatic matter the church was holding both that Mary and Joseph were true husband and wife and that they never had intercourse. Gratian reconciles this by saying that it is perfectly true that they were married, just that it wasn't an indissoluble marriage.
- f. After this the rest of the authorities are a piece of cake. Of course, one ought to marry one's espoused, and if one hasn't and especially if the espousal has been a solemn, church authority can forbid another marriage. But that's not the issue. If such a marriage takes place, what then? Unless the espousals have been consummated, Gratian says, the subsequent marriage is to prevail.

### **Peter Lombard on the Formation of Marriage**

Dealing with many of the same texts as Gratian, the Lombard came to a different conclusion: indissoluble marriages are formed by exchange of words of present consent. Sexual intercourse has nothing to do with it. Promises to marry, however, are dissoluble. The Lombard's ideas are derived from Hugh of St. Victor (about a generation earlier) who espoused the idea of a dual sacramentality of marriage.

The canonic *Summa Parisiensis* (1150s) and the canonic *Summa Coloniensis* (1160s) argue that this conflict between the Parisian view on this topic and the Bolognese view is not good for the unity of the Church.

### **Alexander III on the Formation of Marriage**

It would seem that Alexander went through at least three, and perhaps four, stages, in arriving at his ultimate resolution.

1. The first stage is illustrated by *Veniens . . . B* (*Mats.*, p. VIII–16), decided sometime in the 1160s. In it Alexander seems to be holding that any espousal, whether or not accompanied by intercourse, is binding and prevails over a second espousal. If this is the holding of this case, it conforms neither to Gratian's nor to Lombard's theory, and may represent the ancient discipline of the Roman church (compare Nicholas I to the Bulgarians).
2. The second stage is illustrated by *Sicut Romana* (p. VIII–16), written to a French archbishop in 1173 or 1174. This decretal does not say that the unconsummated marriage that was to prevail over a second marriage was one of the present tense, nor is it completely consistent with the Lombard's thinking because it makes the issue of entry into religion dependent on whether the woman has had intercourse. It seems, however, to reflect the influence of Lombard's thinking with its focus on the type of consent. There is one other decretal (*Sollicitudini*, VIII–19), which probably belongs to this period, that shows the same.
3. The third stage might be called the "solemnity period". If Alexander was heading in the direction of the Lombard's thinking in the early 1170s he changed his course very briefly in the mid 1170s. Both *Ex litteris* (p. VIII–16) and *Licet preter solitum* (p. VIII–17) hold that an unconsummated present consent marriage will prevail over a subsequent one

accompanied by intercourse, but both require (*Ex litteris* so holds in the strict sense) that the present consent be accompanied by the solemnities customary in the area.

4. At the end of his pontificate Alexander abandoned the solemnity requirement (something that he held only briefly, see *Quod nobis*, p. VIII–19). Two decretals from after 1176 (one certainly so, one probably so), *Significasti*, p. VIII–18, and *Veniens ad nos*, p. VIII–19), come up with the following rule scheme:
  - a. Present consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, unless prior to their having sexual intercourse one of the parties chooses the religious life.
  - b. Future consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, if that consent is followed by intercourse.
  - c. With few exceptions any Christian man is capable of marrying any Christian woman, so long as they are of marriageable age, not in higher orders or solemn vows, and not too closely related to each other.

The extraordinary thing about these rules, which prevailed throughout the West until the council of Trent in 1563, is not what they require but what they don't require. No solemnity or ceremony of any sort was necessary to make an indissoluble marriage; no parental consent was required; there were no class barriers to marriage. We will have occasion to ask later how these rules were received by a society in which arranged marriages were the norm, cross-class marriages were uncommon, and ceremonies accompanied every important aspect of life.

#### **Why Did Alexander III Decide as He Did?**

1. Christian marriages once fully formed were indissoluble.
2. Alexander was committed, as was the church of his time, to incorporating as many people as possible within the realm of orthodox Christianity.
3. Twelfth century thought, both religious and secular, puts a heavy emphasis on individual choice.
4. Within this context, a consensual system of marriage has obvious attractions.
5. As these principles emerge as the principles all else tends to fall by the wayside.

#### **How Does Accursius React to Alexander's Decisions? (*Mats.*, pp. VIII–21 to VIII–22)**

1. As a practical matter, marriage was not a topic that belonged to the civilians in the 13th century.
2. The civilians seem to have reinterpreted their texts to keep things in line with the canonists.
3. But they did not drop the parental consent requirement for children who are in the power of their fathers. Justinian had said that those in power “must have the consent of the parents in whose power they respectively are, the necessity of which, and even of its being given before the marriage takes place, is recognized no less by natural reason than by law.” Accursus glosses this passage (Gloss 8) to say “otherwise, it [the marriage] is not valid.”
4. The only suggestion that he is aware of the problem does not come until later where he is glossing the passage that describes Justinian's ruling that the child of father who is insane may marry if the child obtains the consent of the father's curator (Gloss 17): “But by the law of the canons the consent of those whose matrimony is at stake suffices; but this perhaps is understood for others, not for children in power, or I believe that this is corrected because it is also an honest thing like going into a monastery.” Here what he says at the end

suggests that he may countenance the proposition that the canons have “corrected” the civil law. This passage probably does not mean that the whole law that he has just explained has been corrected. It may mean that just the law about lunatics has been corrected. What he may, also, be suggesting is that the consent cannot be unreasonably withheld.

5. Having won the war, Accursius prepared to concede the battle (Gloss 8). The father is deemed to consent unless he expressly forbids the marriage.
6. The fact that the civilians were willing to bend their texts to make them fit the canonic requirements shows us that another drive toward unity was operating in the system. If the canonists’ complaints about the lack of unity in the customs of the churches on the basics about marriage reflect the strong drive toward unity that they felt as religious matter, the fact that the civilians were willing to bend their texts to make them fit the canon law shows that legal unity as well as religious unity were thought to be important. It is then all the more interesting that in this one important area, parental consent, the civilians, by and large, refused to budge. Their holding on this issue remained largely in the realm of the academic. It did, however, remain as a kind of time bomb ready to go off whenever anyone was ready to challenge the exclusive jurisdiction of the church over the question of the formation of marriage. As we will see, that will happen in the 16th century.