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WAS THE ROMAN CATHOLIC CANON LAW STUDIED IN EIGHTEENTH-CENTURY ENGLAND?

(Summary)

Establishing of the Anglican Church by Henry VIII and its protestantisation achieved by his children Edward VI and Elizabeth I did not cause an absolute denial of the Catholic customs and traditions in England. Despite other Protestant communities, the Anglican Church maintained a developed legal order which was a continuation of a heritage of medieval canon law.

The final victory of the Anglicanism over the Catholic sentiments was achieved in the eighteenth century. In the article, however, the question is asked whether that same mechanism worked in the sphere of the teaching of canon law in England in the aforementioned epoch. It is worth remembering that the canon law could not be taught openly and for this reason, it was often clothed in the form of the lecture of the history and the reception of Roman law.

The article contains the conclusions drawn from the analysis of the popular eighteenth-century textbooks of Roman law and Anglican ecclesiastical law. The references to Roman canon law were sought in them, as well as the modes of expressing the statements regarding the Catholic Church and its law were evaluated.

Keywords: canon law; Catholic Church; Anglican Communion; eighteenth-century

1. Introduction

In his renowned book *Roman Canon Law in Reformation England*, Richard H. Helmholz noticed that the works of leading continental civilians as well as of the Catholic canonists were still being used by the sixteenth- and seventeenth-century English legal writers who were members of the established Church of

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England. It may be even more curious that English specialists in ecclesiastical law were eager to refer to the decrees of the Council of Trent[1]. Indeed such quotations can be seen as odd in view of the Reformation in England, but it needs to be admitted that the picture of religious life in the aforementioned centuries is not an easy one to present in a clear coherent way. It seems that a state of some uncertainty was characteristic of the broad mass of English society. It can be well seen through the existence of the so-called "Church papists" i.e. the *de facto* members of the Church of England who still, however, held to many of the Catholic traditions and ways of living. Their situation was rather peculiar. For the orthodox Catholics the Church papists were heretics who adhered to the Protestantism. For the Church of England, on the other hand, they were still immersed in the "idolatrous superstitions" of the Catholics[2]. The position of the established Church did not stabilise finally before the late seventeenth and early eighteenth century when the "Catholic peril" was at last staved off.

Further discussion about the study of canon law in eighteenth-century England is pointless, however, without at least a short explanation of its condition at the time of the Reformation. Due to its specific development, the law of the Church always formed an important part of the English legal system. The medieval ecclesiastical tribunals retained a relatively broad jurisdiction over such areas of the law as: marriage, bastardy, testate and intestate succession to personal property, punishment of mortal sins (fornication, adultery, gluttony), Church land, property free from the feudal obligations, breach of faith and the torts: "laying violent hands on a clerk" and defamation[3]. Although the scope of the abovementioned number was the subject of juridical disputes and the reason for creating the writ of prohibition[4], the importance of the ecclesiastical courts in England had never been disregarded.

The Reformation period brought many important changes in the sphere of Church-State relations, primarily by the creation of the Church of England that gained a national character (the established Church). It is important to remember, however, that King Henry was predominantly interested in obtaining an annulment of his marriage with Catherine of Aragon. The doctrinal and

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1 **R.H. Helmholz**, *Roman Canon Law in Reformation England*, Cambridge University Press, Cambridge 1990, p. 146.

2 See especially: **A. Walsham**, *Church Papists. Catholicism, Conformity and Confessional Polemic in Early Modern England*, The Boydell Press, Woodbridge 1999, pp. 5–21.

3 More details see **J.H. Baker**, *An Introduction to English Legal History*, 4th ed., Oxford University Press, Oxford 2002, p. 129.

4 *Ibidem*, pp. 128–129.

theological issues were less important for him, or it can be said that they were important in so far as they could be used as an argument in the papal court[5]. The Protestant flavour of the Church of England was a result of the policy followed during the reigns of Henry's two children – Edward VI and Elizabeth I. Henry VIII's ambivalent attitude allowed the ecclesiastical law in England to survive.

From a legal perspective, the change of faith from Catholicism to Protestantism did not impact on the Church's structure as much as might be expected at first. The pre-Reformation diocesan system was pretty much unchanged. The liturgy, at least during the Henry's reign, was not altered. Finally the structure of ecclesiastical courts remained untouched.

Relatively quickly, however, king's decision influenced the future character of these tribunals. Henry VIII abolished the study of canon law at Oxford and Cambridge[6]. Instead, he elevated the importance of Roman (or civil) law studies by the creation of the two Regius Chairs of Civil Law – one at Oxford and the other at Cambridge. It became obvious that the new adepts in civil law would also oversee canonical issues in the ecclesiastical courts. The main reason for that was their knowledge of the so-called Romano-canonical procedure. Despite the intentions of the king, the canon law was still a subject of interest among the English civilians[7].

As mentioned at the beginning of this article, the religious uncertainty of the sixteenth and the seventeenth centuries may explain the use of Catholic sources by the English civilians and canonists. It is interesting, however, that the practice survived until the eighteenth century. The hint is given again by R.H. Helmholz, who noticed that Francis Dickins, the Regius Professor of Civil Law at Cambridge from 1714 until 1755, used to organise his lectures in the following manner: he started with an analysis of the Roman law sources and then he swiftly moved to a discussion of the relevant canonical provisions. Later, R.H. Helmholz adds that: "Dickins thus made frequent reference to the texts of the *Decretum* and the Gregorian Decretals, even mentioning the decrees of what he called *Synodus Tridentina* in discussing the law of marriage"[8].

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5 For the brief description of the circumstances of Henry's VIII attempts to obtain the annulment of his marriage with Catherine see *ibidem*, pp. 493–494.

6 The story of the last academics who studied canon law in Oxford and Cambridge was presented by **P. Barber**, *England's Last Bachelors and Doctors of Canon Law*, Ecclesiastical Law Journal 2005/8, pp. 80–83.

7 Doctors' Commons, a professional corporation of trained civilians was even named by the Puritans as the "seedbed of popery", see **R.H. Helmholz**, *Roman Canon Law*..., p. 146.

8 **R.H. Helmholz**, *Roman Canon Law*..., p. 153. More about F. Dickins see **Ł.J. Korporowicz**, *Wykładowcy prawa rzymskiego w Oxfordzie i Cambridge w XVIII wieku*, Opolskie Studia Administracyjno-Prawne 2017/15.1, pp. 95–97.

It is intended in this article to find an answer to two questions. First, whether Dickins's method was unique or whether it was common in the teaching of civil law in eighteenth-century England. Secondly, was the Roman canon law within the scope of interest of English specialists in ecclesiastical law during the same period.

2. Canon law as a part of civil law lectures

The poor condition of civil law teaching at Oxford and Cambridge in the eighteenth century mirrored the generally poor status of university studies in that period. This is the reason why it is difficult to reconstruct the shape of civilian teachings. The surviving lecture manuscripts – like that of F. Dickins – are rather exceptional sources. Nevertheless it is possible to observe some tendencies through the analysis of the textbooks on Roman law published in the period. Three manuals examined below are: Thomas Wood's *A New Institute of the Imperial or Civil law*, published for the first time in 1704, John Taylor's *Elements of the Civil Law*, originally published in 1755 and Samuel Hallifax's *An Analysis of the Roman Civil Law* which was published for the first time in 1774. It is worth mentioning, however, that only the last mentioned was a Regius Professor of Civil Law. The two other authors delivered their lectures privately.

2.1. Thomas Wood's *A New Institute of the Imperial or, Civil Law*

Thomas Wood was an Oxonian. He entered the University in 1678. He matriculated at St Alban Hall. In 1679 he became a fellow of New College. He devoted himself to the study of civil law. In 1687 he obtained the degree of Bachelor of Civil Law (B.C.L.) and in 1703 the doctorate (D.C.L.). It is quite surprising that T. Wood merged his interests in civil law with common law. In 1694 he was admitted to Gray's Inn, but he only became an honorary barrister-at-law. Apart from the aforementioned textbook on civil law, he is also the author of another work entitled *Institute of the Laws of England or the Laws of England in Natural Order*. Due to this last work he is commonly regarded as the forerunner of William Blackstone who delivered the first fully-academic lectures on English law half a century later[9].

[9] **A.W.B. Simpson**, *Wood, Thomas*, in: **A.W.B. Simpson** (ed.), *Biographical Dictionary of the Common Law*, Butterworths, London 1984, pp. 548–549; **R.B. Robinson**, *The Two 'Institutes' of Thomas Wood: A Study in Eighteenth Century Legal Scholarship*, American Journal of Legal History 1991/35, pp. 432–458.

In 1704 T. Wood published his *A New Institute of the Imperial or, Civil Law* for the first time. It gained much popularity and obtained their final form in 1721 when the third edition was published[10].

As to the usage of canon law by T. Wood it is necessary to start by indicating that the legal system of the Church is mentioned in the full title of the book which reads: *A New Institute of the Imperial or, Civil Law. With Notes Shewing in some Principal Cases amongst other Observations, How the Canon Law, the Laws of England, and the Laws and Customs of Other Nations differ from it*.

Interesting remarks on the relationship between English law and canon law can already be found in the preface to T. Wood's book. After a short description of the different European legal systems, including the Italian, German, Dutch, Danish, Swedish, French, Spanish, Portuguese and Scottish, Wood moved swiftly to the laws of England. He noticed that their primary sources were customs and Acts of Parliament, but "some of these customs have been taken from the Civil and Canon laws". Instantly, however, he added that the rules of these two legal systems were rejected when they "contradict the *Jus Coronae*, the *Common Law*, or our *Acts of Parliament*"[11]. For T. Wood the law of England was created solely to govern temporal affairs in times of peace. That "defect" was supplied, however, by the use of the civil and canon law. Thomas Wood termed that use as "auxiliary"[12]. He explained also that "part of the *Canon* Law has been receiv'ed in our *Ecclesiastical* Courts for the Government of the Church"[13].

Before he moves to the proper content of his scholarly deliberations (divided according to the Institutional scheme – persons, things, actions), T. Wood equipped his book with the two "explanations": (1) "of the Marginal Quotations from the Civil Law" and (2) "of the Method of Citing from the Canon Law". The presence of the first list of abbreviations is a natural consequence of the subject of the textbook. The second one, however, shows the scale of the importance of the canonical provisions for the English legal writer. He explained in detail

[10] It was the last edition published during T. Wood's lifetime. The last edition of *A New Institute* was published in 1730. All quotations of T. Wood's textbook in the remainder of the article are to its third edition.

[11] **T. Wood**, *A New Institute of the Imperial or, Civil Law. With Notes Shewing in some Principal Cases amongst other Observations, How the Canon Law, the Laws of England, and the Laws and Customs of Other Nations differ from it*, 3rd ed., printed by W.B. for Richard Sare at Gray's Inn Gate in Holborn, London 1721, pp. vi–vii. See also **D.R. Coquillette**, *Ideology and Incorporation III: Reason Regulated – The Post-Restoration English Civilians, 1653–1735*, Boston University Law Review 1987/67, p. 346.

[12] **T. Wood**, *A New Institute*..., p. vii.

[13] *Ibidem*.

the meaning and the method of quoting all the divisions of the *Corpus Iuris Canonici* naming them as follows: *1ma Pars Decreti*, *2da Pars Decreti*, *3a Pars Decreti*, *Decretales*, *Sextus Decreatal*., *Clementinae*, *Extravagantes*.

In the remainder of the textbook, all the references to the canon law are made by T. Wood in "notes", a type of gloss inserted amid the main corpus of the text. The main aim of the scholar's actions was to compare the corresponding legal solutions of Roman law and canon law and also quite frequently of the common law and the law of nations. In the case of canon law references, T. Wood comments on their appearances in his notes in the following manner: "what alterations have been made in the Canon law etc. that our young Gentlemen may be led to compare the Equity and Polity of each". He added also that the knowledge of the canon law regulations "may not be useless to young Divines, there being very often good directions to determine Cases of Conscience"[14].

The number of such notes regarding canon law is over thirty-five. Their greatest accumulation can be detected in the fourth book of the textbook that deals with the specific provisions of procedural law. That is a natural consequence of the importance and direct use of the Romano-canonical procedure in various English courts, including the ecclesiastical courts, the Admiralty and university courts.

To show the methodology of T. Wood's work, it is necessary to give a few examples of the aforementioned notes.

In the second chapter (*Of a Person in its Civil Capacity…*) of the first book of *A New Institute*, T. Wood explains, among the other things, the legal condition of issue born to slave women. Based on the rules in Justinian's Institutes[15], he points out that the children follow the condition of the mother: "for if a Bondwoman be married to a Freeman, the Children shall be bond; and if a Bondman marrieth a Freewoman the Children shall be free"[16]. Immediately after that statement, the author inserted a gloss. First, he noted that the laws of England proclaimed the rule of following the condition of the father instead of the mother (the scholar referred to the treatise of John Fortescue *De laudibus legume Angliae*). Then he shortly acknowledged that "by the Canon Law Slaves may marry" and he pointed out that the basis for that statement can be found in the title *De Coniugio Servorum* of the *Liber Extra*[17].

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14 *Ibidem*, p. xii.

15 I. 1, 4, pr.

16 **T. Wood**, *A New Institute*..., pp. 39–40. Using the term "marriage" in relation to a slave, however, is somewhat of a great exaggeration and it opens a discussion concerning the true quality of T. Wood's knowledge of the law of the Romans.

17 X. 4, 9.

Another interesting example is the comment concerning nude agreements during his analysis of donation. After pointing out that a gift may be perfected by bare consent[18], T. Wood explained that the canon law legalises nude agreements and he referred to the decree *Quicumque* of the Fourth Council of Toledo (633 AD) inserted in Gratian's *Decretum*[19].

The last illustrative example to be given is the deliberation over the term *interdictum*. In the main corpus of the text, T. Wood explains that the interdict was an "extraordinary action" concerning possession or *quasi*-possession[20]. The scholar's explanation is not correct because an interdict could never be treated as an action, not even an extraordinary one. Nevertheless, in the notes the English civilian admitted that the term is also used by the canon law to name one "Ecclesiastical Censure, by which Persons or Places are prohibited Divine Service or Burial till they obey the Commands of the Church". Again, T. Wood's statement is supported by source evidence i.e. the decretal *Si sententia interidicti* issued by Boniface VIII and included in *Liber Sextus*[21].

This short depiction of T. Wood's method of utilising canon law sources reveals its three characteristics. First of all, the scholar used canon law solely as a comparative device. Secondly, he was not referring to the ecclesiastical law of the Church of England but to the law of the medieval Catholic Church. Thirdly, T. Wood was not willing to openly admit the Catholicism of the sources he used. He used them knowing, and most probably also knowing that all his readers knew, about their provenance, but he avoids connecting them directly to the Catholic Church. His efforts, however, misfire on at least three occasions, when T. Wood speaks about the Pope's appellate jurisdiction[22], there being no appeal from a Pope's decisions[23] and the Pope's authority[24].

2.2. John Taylor's *Elements of Civil Law*

Another popular textbook for the study of Roman law was published in 1755 by John Taylor – a Cambridge civilian and a member of Doctor's Commons and then ecclesiastical official (Chancellor of the diocese of Lincoln)[25]. Like

[18] **T. Wood**, *A New Institute*..., p. 132.
[19] C. 12, q. 2, c. 66.
[20] **T. Wood**, *A New Institute*..., p. 373.
[21] VI 5, 11, 16.
[22] **T. Wood**, *A New Institute*..., p. 379.
[23] *Ibidem*, p. 380.
[24] *Ibidem*, p. 390.
[25] **P.G. Stein**, *Taylor, John*, in: **A.W.B. Simpson** (ed.), *Biographical Dictionary of the Common Law*, Butterworths, London 1984, pp. 501–502.

Wood, Taylor was a private scholar and he was not associated with the Regius Chair. The origins of his textbook are quite unusual. The *Elements* were at first a set of private lectures delivered by Taylor – as a tutor – for the grandsons of the Earl Granville. Another oddity of the book is its selective character. The textbook was not designed as a full scale lecture on Roman law, but rather as an introduction to certain of its subjects. It looks more like a collection of essays than a real student's book[26].

The number of references to the canon law is rather limited. Nearly all of them were contained in the lengthy essay on marriage. The authority of canon law was mentioned on the margins of two convergent subjects: affinity[27] and the Roman and canonical computations[28].

Three instances of reference to the canon law, however, deserve closer attention. First of all, when Taylor is enumerating instances of the use of Roman law by English courts, he specifies also the "Ecclesiastical or Spiritual Courts". He points out that these courts use "a mixed Form of Civil and Canon Law"[29]. Although the statement is naturally correct, its adamant character may be at first surprising. To the popular mind, the ecclesiastical courts of the time practised the ecclesiastical law or the canon law with some elements of the civilian procedural tradition. Instead, Taylor's account emphasizes the amalgamative character of the legal system used by the aforementioned courts.

The second interesting fragment of the textbook concerns the deliberation over the doctrine of dispensation from matrimonial impediments. The scholar's way of talking about it seems to satisfy the anti-Catholic feelings of eighteenth-century English society. He qualifies the doctrine as "fruitful and lucrative"[30]. The objection is reminiscent of the frequent Protestant accusation against the Catholics regarding the practice of granting indulgences and collecting fees for them.

Finally, Taylor, while discussing the affinity impediment, recalls its evolution in the "old Canon Law, and the early Decretals"[31]. He finishes this short section of the text by referring to the fourth degree prohibition of marriage settled at the

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[26] **W.S. Holdsworth**, *A History of English Law*, vol. 12, Methuen & Co. Ltd, London 1938, p. 644.

[27] **J. Taylor**, *Elements of the Civil* Law, 3rd ed., printed for Charles Bathhurst, Bookseller, in Fleet Street, London 1786, pp. 320, 338.

[28] *Ibidem*, p. 330.

[29] *Ibidem*, p. 138.

[30] *Ibidem*, p. 330.

[31] *Ibidem*, p. 331.

Fourth Lateran Council 1215[32]. Although, the scholar is evoking the authority of the pre-Reformation canon law, he ceased to use original sources. Instead of quoting an appropriate decree of the Council, he based his knowledge on fragments of Simon van Leeuven's *Censura Forensis theoretico-practica* and Benedikt Carpzov's *Jurisprudentia ecclesiastica seu consistorialis*.

John Taylor's attitude to the canon law is very different from Thomas Wood's. First of all his exploitation of the canonical sources is infrequent. He does not classify them in a comparative perspective. Additionally, it seems that Taylor was more of an anti-papist scholar than T. Wood had been.

2.3. Samuel Hallifax's *An Analysis of the Roman Civil Law*

In the second half of the eighteenth century the condition of the English universities as well as that of the Regius Chairs of Civil law started gradually to become better. The lectures were delivered much more regularly than in previous decades. One of the fruits of those lectures was the textbook written by Samuel Hallifax in the 1770s.

Like most of the English civilians of the time, Hallifax was a devoted clergyman of the Church of England. He was rector of Warsop, then king's chaplain and finally in 1781 he was appointed Bishop of Gloucester.

The textbook is closely based on the course of lectures read publicly by Hallifax at Cambridge. Although the content of the book is mostly classical lectures on Roman law, Hallifax is eager to make some remarks on the parallel institutions of English law. In the preface, however, he noticed also that: "in few cases I have remarked what seemed worthy of notice in the Roman Canon Law: some parts of which are very necessary to be adverted by an English lawyers[33]". This statement is important, especially from the perspective of the previously analysed textbooks. The scholar is not avoiding directly admitting that he is referring to the canon law of the Catholic Church. It is an attitude that would have beggared belief in the age of T. Wood or Taylor.

The canon law also became part of the introductory discussion that formed the content of the first chapter of the first book ("Of the Rights of Persons"). The chapter is entitled "Of the Roman Civil and Canon Laws, and their

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[32] X. 4, 14, 8 (*Non debet reprehensibile iudicari*).

[33] **S. Hallifax**, *An Analysis of the Roman Civil Law; in which a Comparison is, Occasionally, Made Between the Roman Laws and those of England: Being the Heads of a Course of Lectures, Publickly Read in the University of Cambridge*, 2nd ed., printed by J. Archdeacon Printer to the University, Cambridge 1775, p. vi.

Authority in England". The plural form "canon laws" is not an omission or mistake, but an intentional intervention by the author. After a short description of Roman law in its two evolutionary phases – pre-Justinianic and Justinianic, Hallifax acknowledges the existence of the "Ecclesiastical or Canon Law" and then "the Canon Law of England". As in the preface, he does not hesitate to admit the existence of the Roman canon law as a separate system of law, different from the legal order of the Church of England. He explains that the main sources of the canon law are: (1) the *Decretum* divided into three parts, i.e. distinctions, causes and a treatise concerning consecration, (2) the decretals which comprised in three collections: "Gregory's Decretals in Five Books", "the sixth Decretal" and "the Clementine Constitutions", (3) the Extravagantes of the Pope John XXII and other "Novel constitutions" issued by the other popes[34]. Additionally in a footnote, Hallifax explained at length to his students the method of quoting particular sources. Every source was larded with numerous examples[35].

Furthermore, the English scholar pointed out that the pre-Reformation sources of the canon law, including legatine and provincial constitutions are valid according to the law of England, unless there are evidently in opposition to it[36].

Indeed, Hallifax spent relatively a lot of space on his presentation of the Romano-canonical sources, for they are not largely exploited by him in the rest of the textbook. In fact, he just recorded briefly the Roman Catholic law in the margin of his discussion of the degrees of consanguinity[37] and in the case of the abolition of the right to appeal to the Pope or See of Rome from the reign of Stephen until the reign of Henry VIII[38].

To sum up, it is necessary to note that Hallifax's attitude to the Romano-Catholic legal sources is very different than the one presented a few decades earlier by Taylor. This is certainly connected with the general change of attitude to the Catholic Church by the higher classes of English society. Nevertheless, the scholar does not regard the canonical solutions as an interesting field of comparative study.

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34 **S. Hallifax**, *An Analysis*..., p. 2.
35 *Ibidem*, pp. 2–3, n. †.
36 *Ibidem*, p. 4.
37 *Ibidem*, pp. 52–53.
38 *Ibidem*, p. 118.

3. The use of the Roman canon law by the ecclesiastical lawyers

As was mentioned earlier, the English civilians since Reformation were occupied not only in civil law studies, but many of them were avidly interested in matters of Church law. It may be said in fact that for at least some civilians the ecclesiastical law, although always closely related with the civil law, was their primary focus of attention. The canonical literature of the epoch is very diverse. The earlier works were produced by practising lawyers, while the later were written usually by self-appointed specialists who were trained more in divinity than ecclesiastical law. The remainder of this discussion will be based on the analysis of four popular works on English ecclesiastical law: Edmund Gibson's *Codex Juris Ecclesiastici Anglicani*, John Ayliffe's *Parergon Juris Canonici Anglicani*, Thomas Oughton's *Ordo Judiciorum*, and Richard Burn's *Ecclesiastical Law*.

3.1. Edmund Gibson's *Codex Juris Ecclesiastici Anglicani*

The first example was written by Edmund Gibson. His *Codex Juris Ecclesiastici Anglicani* was published in Oxford in 1713, and then posthumously in 1761. Edmund Gibson was not a trained ecclesiastical lawyer, but only a specialist in divinity. Nor was he involved in the teaching or practice of law[39]. His *Codex* is a collection of the sources relevant for the legal history of the Church of England.

Due to the specific character of Gibson's work his direct references to the canon law of the Catholic Church are not numerous. Nevertheless, some references may be found in the comments appended by the author to the collected sources, e.g. while commenting an *Act for the Ordering of Ecclesiastical Ministers* issued by Edward VI in 1549, Gibson noticed that "The Bishop, employed by Pope Innocent the Eight, to revise and correct the Roman Pontifical [...]"[40]. It is interesting also that an author was willing to cite the actual passages from the Roman Pontifical[41].

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[39] See **W.S. Holdsworth**, *History*..., pp. 607–610; **J.H. Baker**, *Monuments of Endless Labours. English Canonists and Their Works, 1300–1900*, The Hambledon Press with the Ecclesiastical Law Society, London and Rio Grande 1998, pp. 95–107.

[40] **E. Gibson**, *Codex Juris Ecclesiastici Anglicani: or the Statutes, Constitutions, Canons, Rubricks and Articles of the Church of England*, Clarendon Press, Oxford, p. 116.

[41] *Ibidem*, pp. 175–176.

And after quoting Henry VIII's *Act concerning Restraint of Payment of Annates to the See of Rome*, Gibson enumerated the specific papal bulls and other instruments upon the basis of which the Roman bishops were levying annates on the pre-Reformation Church in England[42].

Edmund Gibson showed also one of the typical beliefs regarding the Catholic Church while commenting on one of the liturgical documents of the Church of England. He noticed that the words "uncertain stories and legends" used in the *Preface concerning the Service of the Church* was associated with "such a number of Saints in the Church of Rome, few days are free from the Legendary Tales they relate of them"[43].

Finally it needs to be said that most of the quotations of pre-Reformation sources were linked closely with the history of the Church in England. In this manner they are not termed "Roman", even if they were considering the pre-Reformation law or the constitution of the Church. It is possible to list for example many quotations of documents issued by the archbishops of Canterbury, including Saint Edmund of Abingdon (1233–1240)[44], Boniface of Savoy (1241–1270), John Peckham (1279 –1292)[45], Simon Mepeham (1327–1333)[46] or John de Stratford (1333–1348)[47].

Edmund Gibson's attitude towards Roman canon law is hard to unequivocally evaluate. He is not quoting the Catholic sources as such at all, but rather they seem to be connected with his whole idea of the book as a collection of English sources for the ecclesiastical law. Even when he is referring to the pre-Reformation canon law he is considering it as the canon law of England in particular. It is possible also that his lack of professional legal training caused Gibson to avoid using the *Corpus Iuris Canonici* and other Catholic canonical sources from the medieval period.

3.2. John Ayliffe's *Parergon Juris Canonici Anglicani*

The next book was written by John Ayliffe, a brilliant Oxford alumnus and scholar. In 1710 he obtained the degree of Doctor of Civil Law. According to some authors he was one of the most accomplished English Romanists ever[48].

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42 *Ibidem*, p. 122.
43 *Ibidem*, p. 298.
44 *Ibidem*, p. 9.
45 *Ibidem*, p. 440.
46 *Ibidem*, p. 16.
47 *Ibidem*, p. 18.
48 **P.G. Stein**, *Ayliffe, John*, in: **A.W.B. Simpson** (ed.), *Biographical Dictionary of the Common Law*, Butterworths, London 1984, p. 25. See also **J.H. Baker**, *Monuments*..., pp. 87–88.

Due to his controversial book on the history of the University of Oxford, however, he was deprived of all his degrees and he lost his fellowship at New College. To earn his living he became a practising ecclesiastical lawyer. His new occupation resulted in the publication in 1726 of a book entitled *Parergon Juris Canonici Anglicani: or a Commentary By Way of Supplement to the Canons and Constitutions of the Church of England*[49].

The compendium written by Ayliffe was divided into two parts. The first is a broad historical introduction, while the second is an alphabetic exposition of the most common and pivotal terms used in ecclesiastical law.

The avoidance of Catholic references, characteristic of purely Roman law textbooks and their authors of the same period, was impossible to achieve in the case of ecclesiastical law books. This is the reason why Ayliffe refers to the Roman canon law, but he is representing simultaneously an anti-Catholic (or "anti-popery" as it would be named at the time) approach, typical of his contemporaries. In his historical introduction he describes the Catholic Church or its practices in the following manner: "the crafty purposes of the Church of Rome"[50], "such things are preach'd and written by Hereticks, or Schismaticks, the Catholic and Apostolick Church of Rome"[51], "being the Invention only of the aforesaid Pope for aggrandizing the Power of the See of Rome"[52]. These statements illustrate Ayliffe's negative view of Catholicism. While, however, he was writing the history of the canon law, it seems inevitable that he was unable to depreciate every aspect of the Church of Rome's activity. It appears that whenever the scholar was writing about specific events in the history of canon law, its development or the publication of the sources that eventually formed the *Corpus Iuris Canonici*, his attitude underwent a change. It is hard to say that he became positively prejudiced towards the Catholics, but at last he was becoming more sensible in forming his opinions.

Before turning to the second proper part of his compendium, Ayliffe inserted a detailed explanation of the marginal quotations of the civil law sources as well as the canonical sources. It is interesting that the author described them in an unprecedented order – first the decretals collections, i.e. *Liber Extra*, *Liber Sextus* and *Clementines*, than *Extravagantes and Extravagantes Communes*

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49 **J. Ayliffe**, *Parergon Juris Canonici Anglicani: or a Commentary By Way of Supplement to the Canons and Constitutions of the Church of England*, 1st ed., printed by the Author, by D. Leach, London 1726.

50 *Ibidem*, p. iv.

51 *Ibidem*, p. v.

52 *Ibidem*, p. xxiv.

and at the end the *Decretum*. This last source, however, was divided into three separate parts, i.e. distinctions of the first part of the *Decretum*, causes and the distinctions of the third part of Gratian's opus[53]. Even a brief skim through the *Parergon* attests an extensive use of classical canon law sources by the English scholar as well as his referring to the early Christian councils.

As to citing the authority of Roman Catholic law in the compendium itself, it should be said that J. Ayliffe did so quite freely. It is possible, for example, to find entries devoted to certain specific issues presented in an historical manner, including its pre-Reformation history, e.g. *Of Accusations, and the Course of it*[54]. On another occasion, the scholar included entries solely relating to the Catholic Church, e.g. *Of Cardinals, their Rise and Power in the Church*[55] or *Of the Knights Templars, Hospitallers, &c.*[56]

Generally speaking, Ayliffe's compendium is full of Roman Catholic references, some of which are not even properly covered. The only direct sign of Ayliffe's support of the popular social attitude against Catholics may be seen in the historical introduction to his book. It seems odd that such a book was published in the 1720s in England. It may be regarded as another aspect of Ayliffe's controversial behaviour due to which he was deprived of his degrees and fellowship at Oxford.

3.3. Thomas Oughton's *Ordo Judiciorum*

Another English ecclesiastical lawyer who enriched his contemporaries with an important systematic work regarding Anglican canon law was Thomas Oughton[57]. He was a practitioner who worked in the Court of Arches as a proctor and as a deputy Registrar at the High Court of Delegates. In 1728 he published a monumental two volume work entitled *Ordo Judiciorum*. The first volume bore the subtitle *Sive Methodus Procedendi in Negotiis et Litibus in Foro Ecclesiastico-Civili Britaniico et Hibernico*, while the second volume's subtitle was *Seu Formularium in Negotiis et Litibus in Foro Ecclesiastico-Civili*[58]. The

53 *Ibidem*, p. xliv.
54 *Ibidem*, pp. 22–27.
55 *Ibidem*, pp. 142–144.
56 *Ibidem*, pp. 328–330.
57 **W.S. Holdsworth**, *History*..., pp. 616–618; **P.G. Stein**, *Oughton, Thomas*, in: **A.W.B. Simpson** (ed.), *Biographical Dictionary of the Common Law*, London 1984, p. 394; **J.H. Baker**, *Monuments*..., pp. 89–94.
58 **T. Oughton**, *Ordo Judiciorum*, vol. 1–2, Impsensis Authoris, London 1728.

book is chiefly designed as a guide to ecclesiastical procedural law and the set of procedural formularies. Although the book was written in Latin it gained much popularity. A century later, in 1831, the first volume of the *Ordo Judiciorum* was translated into English by James Thomas Law. Even then the book was very popular and it reached another edition in 1844[59].

As to the use of Roman canon law, T. Oughton turns out to be a much more orthodox writer and member of the Church of England than Ayliffe. The whole book of around one thousand pages does not reveal any material reference to the law of the Roman Catholic Church. Individual arguments used in the text have simply a comparative character.

3.4. Richard Burn's *Ecclesiastical Law*

The final book which is interesting for this analysis was published in 1763. It was the *Ecclesiastical Law* by Richard Burn. The author himself was not a professional ecclesiastical lawyer. He graduated from the University of Oxford. Just one year before the publication of the *Ecclesiastical Law* he obtained the Doctor of Civil Law degree. As J.H. Baker noted, most of the book was written "without benefit of law degree or court experience, and perhaps the clarity of an outsider's vision was an advantage"[60]. In its final form the *Ecclesiastical Law* was divided into four volumes[61].

As to the use of the Roman canon law it has to be said that even at first glance its authority was invoked much more often than in the previous examples. In the preface to the whole work it is possible to find a rather narrow definition of the canon law. The author stated that "the canon law sprang up out of the ruins of the Roman empire, and from the power of the Roman pontiffs"[62]. The Catholic history of the canon law is not concealed as it was earlier. Later, Burn discussed briefly the elements of the *Corpus Iuris Canonici*. He described also the legatine and provincial constitutions. He expressly mentions, however, the legates mission as representatives of the papacy[63].

A further part of the book was planned by Burn, similar to Ayliffe's compendium. The deliberations on the Catholic legal practice of the medieval

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59 **W.S. Holdsworth**, *History*..., p. 617.

60 **J.H. Baker**, *Monuments*..., p. 118.

61 The first edition was divided into two volumes.

62 **R. Burn**, *Ecclesiastical Law*, vol. 1, 1st ed., printed by A. Straham and W. Woodfall, London 1763, p. vi.

63 *Ibidem*, pp. viii, 399.

period was referred to *inter alia* in the following entries: *appeal*[64], *appropriation*[65], *bishops*[66], *bull*[67], *church*[68], *convocation*[69], *courts*[70], *exorcist*[71], *intrusion*[72], *marriage*[73], *mortuary*[74], *oaths*[75], *ordination*[76], *peculiar*[77], *Peter-pence*[78], *plurality*[79], *popery*[80], *residence*[81], *supremacy*[82], *visitation*[83], *union*[84].

The scholar mentioned also some events in the common history of Roman Church and England before the Reformation, e.g. in the entry on the *Arches*, R. Burn mentioned the enactment of new statutes for the Court of Arches issued by Pope Alexander III for archbishop Robert Kilwardby[85].

A quite outstanding feature of Burn's compendium is the explanation of certain terms, already mentioned, relying solely on the Catholic Church, including *Peter-pence* or *popery*. Still, it is possible to observe the classical "anti-popery" attitude of the time in Burn's own words. While commenting on the ancient rites of baptism, he wrote "the abuse [...] by the church of Rome, doth not take away lawful use of it[86]". In another place, in the entry concerning

64 *Ibidem*, pp. 41–42.
65 *Ibidem*, pp. 53–54.
66 *Ibidem*, pp. 145–146.
67 *Ibidem*, p. 185.
68 *Ibidem*, p. 234.
69 *Ibidem*, p. 402.
70 *Ibidem*, pp. 412–418.
71 *Ibidem*, p. 558.
72 *Ibidem*, p. 620.
73 **R. Burn**, *Ecclesiastical Law*, vol. 2, 3rd ed., printed by A. Straham and W. Woodfall, London 1775, p. 401. It is worth mentioning that in the very long entry dedicated to the subject of marriage (pp. 390–449), Burn referred directly to the Roman canon law only once.
74 *Ibidem*, p. 498.
75 **R. Burn**, *Ecclesiastical Law*, vol. 3, 3rd. ed., printed by A. Straham and W. Woodfall, London 1775, pp. 16–18.
76 *Ibidem*, pp. 23, 26.
77 *Ibidem*, pp. 71–72.
78 *Ibidem*, p. 82.
79 *Ibidem*, p. 93.
80 *Ibidem*, pp. 106–178.
81 *Ibidem*, pp. 280, 284, 289.
82 *Ibidem*, pp. 347, 349, 351.
83 **R. Burn**, *Ecclesiastical Law*, vol. 4, 5th ed., printed by A. Straham and W. Woodfall, London 1788, p. 14.
84 *Ibidem*, p. 32.
85 **R. Burn**, *Ecclesiastical Law*, vol. 1…, p. 70.
86 *Ibidem*, p. 81.

deans and chapter he wrote about the "usurped authority of the see of Rome"[87]. Similar in its character is the comment on the marriage impediments which were "invented by the court of Rome [...]. But now by this act [i.e. 32 Hen. VIII, c. 38 – Ł.J.K.], all persons are declared to be lawful to contract matrimony, that be not prohibited by god's law to marry"[88]. These accounts are clearly pejorative and characterised by strong feelings[89].

The number of references to Catholic canon law is small in comparison to the size of the work, but it is possible to find relatively more of them than in any of the other ecclesiastical publications discussed above. It is interesting that on many occasions Burn based his knowledge of Roman canonical practice on the works of Ayliffe, Gibbson or T. Wood. Nevertheless he was the one who pointed out the "Catholicism" of the issues discussed.

4. Conclusions

Roman canon law forms an important part of the legal ecclesiastical tradition of the Church of England. It may be said that it was and still is one of the peculiarities of the Church of England in comparison to other Protestant ecclesiastical communities which generally rejected the systematic law of the Church.

That Catholic heritage of English ecclesiastical law is quite probably unknown to most of the ordinary members of the established Church. That is a consequence of the very vivid antagonism, during the seventeenth- and eighteenth-centuries, against so-called "popery". In the textbooks and compendiums published throughout the eighteenth century, however, it is possible to observe a slow change in this anti-Catholicism attitude. In the earlier works the Roman canon law is mentioned only occasionally or indirectly. Edward Gibson in his 1713 book quoted numerous pre-Reformation sources, but he is never keen to describe them as Catholic. In his eyes, he discussed sources regarding the legal history of the Church of England, or more precisely for the medieval period – the Church *in* England. Thomas Oughton's attitude is even more negative. He does not mention the Roman Catholic Church at all. He explained the procedure used in the ecclesiastical tribunals through

[87] *Ibidem*, p. 457.

[88] **R. Burn**, *Ecclesiastical Law*, vol. 2…, pp. 401–402.

[89] For the others see *ibidem*, p. 470, **R. Burn**, *Ecclesiastical Law*, vol. 3…, pp. 226, 229 (it is direct quotation of Gibson's passage about the stories and legends regarding saints).

his own experience without wider historical remarks. In the light of these facts, the work published by J. Ayliffe in 1726 is truly exceptional. It may be conjectured, however, that this approach can be attributed to the unorthodox, even controversial, outlook of the scholar.

Comparable observations may be witnessed in the case of civil law textbooks published in the same epoch. The references are still very sparse. Both T. Wood in 1704 and Taylor in 1755 mentioned the canon law of the Catholic Church when forced to do so.

A more open attitude can be observed from 1760s onwards. Both Hallifax and Burn in their books are losing the previous "shyness" and they refer directly to the Catholic canon law, although they are not free from prejudice against the Church of Rome. The reason for this gradual change can be attributed to the first steps towards the emancipation of Catholics, first in the British Empire and then in Great Britain itself. Since 1763 Canada was attached to the Empire. As a former French colony, most of its inhabitants were Catholics who technically came under the British penal laws enacted against Catholics following the Reformation. In practice, however, that was impractical for the British rulers who were striving to secure the loyalty of the colonists. Finally in 1774 the Quebec Act[90] was promulgated that among other things guaranteed freedom for the Catholic faith in Canada. With time the emancipation movement became an important part of the internal politics of Great Britain that eventually led to the enactment of the Papist Act 1778[91] for England and Wales[92].

To conclude, it is required to answer the two questions posed in the introduction. As to the F. Dickins's method of teaching Roman law it has to be admitted that the method was not unique; it was in use before him and was continued by one of his successors in the Chair of Civil Law in Cambridge – S. Hallifax. The notion of its uniqueness may be attributed simply to his quotation of decrees of the Council of Trent. Such references cannot be found in any other book examined.

As to the second question concerning the knowledge of the Roman canon law among ecclesiastical lawyers, it seems that in the first half of the eighteenth century the phobia regarding Catholicism prevailed over the simple recognition

[90] 14 Geo. 3, c. 83.

[91] 18 Geo. 3, c. 60.

[92] **J. Connel**, *The Roman Catholic Church in England 1780–1850. A Study in Internal Politics*, American Philosophical Society, Philadelphia 1984, pp. 49–74. For the later history of the movement see **J. Derek Holmes**, *More Roman than Rome: English Catholicism in the Nineteenth Century*, Burns & Oates Patmos Press, London – Shepherdstown 1978, pp. 19–52.

that the canon law of the Catholic Church was the historical basis for the law of the established Church. The change of the attitude observed, as was mentioned above, was closely connected with the process of emancipation of English Catholics and the political decisions undertaken in the relation to it.

Discussed treatise

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CZY RZYMSKOKATOLICKIE PRAWO KANONICZNE BYŁO STUDIOWANE W OSIEMNASTOWIECZNEJ ANGLII?

(Streszczenie)

Ustanowienie przez Henryka VIII Kościoła anglikańskiego i jego protestantyzacja dokonana za rządów jego dzieci, Edwarda VI oraz Elżbiety I nie doprowadziły do zupełnego zanegowania katolickich zwyczajów i tradycji w Anglii. Wbrew innym wspólnotom protestanckim Kościół anglikański zachował rozbudowany porządek prawny, który stanowił dziedzictwo średniowiecznego prawa kanonicznego.

Ostateczne zwycięstwo anglikanizmu nad katolickimi sympatiami dokonało się w osiemnastym stuleciu. W artykule stawiane jest jednak pytanie, czy ten sam mechanizm zadziałał także w obrębie nauczania prawa kanonicznego w Anglii we wspomnianej epoce. Warto pamiętać, iż wprost prawo kanoniczne nie mogło być nauczane, stąd ubierane było ono często w formę wykładu historii i recepcji prawa rzymskiego.

Artykuł zawiera wnioski z analizy popularnych osiemnastowiecznych podręczników prawa rzymskiego oraz anglikańskiego prawa kościelnego. Poszukiwano w nich zarówno odwołań do prawa rzymskokatolickiego, jak również oceniono sposób formułowania wypowiedzi o Kościele katolickim i jego porządku prawnym.

Słowa kluczowe: prawo kanoniczne; Kościół katolicki; Wspólnota anglikańska; osiemnasty wiek