Western European legal history

Section B: Interactions of Roman and local law: twelfth–sixteenth centuries

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Chapter 2: The consolidation of Roman law: the Glossators

Introduction
This chapter explores the consolidation of the scholarship of Roman law in the hands of the first generation of scholars at Bologna.

Learning outcomes
By the end of this chapter and the relevant readings you should be able to:

- demonstrate the importance of the work of the Roman law scholars of the twelfth century
- discuss in outline the background to the teaching of Roman law
- account for the enthusiasm with which Roman law was thereafter studied and applied
- illustrate the way in which Canon law and Roman law interacted
- state the major personalities involved in the consolidation of Roman law.

Essential reading

Useful further reading
The study of Roman law at Bologna

The study of Roman law in Bologna probably started around 1120. The traditional view, which associates the creation of the law school with Irnerius who died in 1125, naturally dated the founding of the law school to around 1100. But the prevailing view is that the two dominant members of the group known as the Four Doctors, Bulgarus and Martinus Gosia, were not so much pupils of Irnerius as fellow teachers. Although nothing prevents our accepting that Irnerius was an elder member of the first group of Roman law teachers at Bologna, the realisation that he is probably not the author of many of the early glosses previously attributed to him, leaves a less significant figure that he was once considered to be (see Chapter 2.2 below).

The method of teaching developed at Bologna gave primacy to the text of the Roman law. The two main works studied, after introductory sessions on the Institutes, were the Code and the Digest. Although the modern student of Roman law takes the Digest as his primary text and the Code as a secondary authority this is because the tendency in modern Roman law scholarship is to stress the importance of the classical Roman period (ca 100–230 AD) when the jurists and their writings were the main source of law. The earliest texts in the Code are from the very end of this period. For the medieval student, however, Roman law was a living law because it was authorised by the Roman emperor. The Code, containing the words of imperial enactments was the primary source: the Digest, albeit authorised by Justinian, was of secondary importance.

First the lecturer, a word meaning 'the reader', would read a portion of the text. He would then comment on its language, pointing out and elucidating any difficulties in the way of understanding its meaning. He would then proceed to explain the legal meaning of the text, drawing attention to its interrelation with similar texts and contrasting it with apparently conflicting texts. The medieval scholars took seriously Justinian's claim in the introductory constitution to the Code, C. Tanta, that all contradictions had been eradicated and that those seemingly remaining could be resolved by a subtle mind. They accordingly devoted a considerable amount of attention to this task. The technique employed was that of dialectic logic developed in the grammatical and theological schools of the eleventh century. The scholarship of the glossators was characterised by clarity of exposition and the minutely detailed study of particular issues to the exclusion of non-jurisprudential considerations.
Chapter 2: The consolidation of Roman law: the Glossators

Activity 2.1
Imagine the manner in which the texts of the *Corpus Juris* were studied in Bologna. Are lectures a useful way of teaching once everyone can have access to a text?

Feedback: see page 19.

2.2 The literature of the glossators

Essential reading


Useful further reading


The Roman law school at Bologna probably began as an oral school in which the teachers sought to inculcate into their pupils’ memories as much of the Roman law as possible. There were two reasons for this: for countless generations culminating in the Lombard law school at Pavia (see Section A, Chapter 4.2) legal learning had been transmitted orally. Written texts of German law existed and were certainly studied but were not the sole source of law. Secondly, written texts were very expensive: both the materials used, predominantly animal skins, and the labour of the copyist made them so. However Roman law was different. It only existed as a written text, there was no oral tradition to support or undermine it. In consequence, and despite the expenditure of resources involved the teachers of Roman law developed a written literature to sit beside their continued oral exposition in lectures. Students increasingly made use of texts of the Roman law, often partial collections of extracts (*peciae*) relevant to their current study.

The earliest and most characteristic type of literature generated by the glossators was the gloss. This was the written equivalent to the explanatory comments made by lecturers and probably originated in notes made by both teachers and students on their texts. There were broadly three types of gloss. The simplest just drew attention to an important passage; the second gave cross references to similar and apparently different texts; the third, explanatory type, of gloss sought to explain and justify the meaning and to locate it within the field of knowledge built up from other texts. It is this third type of gloss which came to dominate the pages of the medieval versions of the Roman law texts. The simpler kinds of gloss might be made
interlinearly, between the existing written lines of the text, but the more complex explanatory glosses spread into the margins and to the top and bottom of the page, in some cases completely overwhelming the text commented on. Subsequent copyists of the text would have to decide how much of the gloss to copy into their new text, and how much room to leave for the addition of yet more glosses by subsequent users.

From the time of Bulgarus onwards it became usual to indicate the source of a particular gloss. This was done by adding an indication, usually an initial: Bulgarus was indicated by a ‘b.’. There is some evidence that the earliest such indications did not so much indicate that Bulgarus was the author of such a gloss, rather that he accepted it as correct and that it was to be found in his own copy of the text. For a long time it was considered that some of the earliest glosses, bearing the siglum ‘y’, were to be attributed to Irnerius. Indeed it is almost certainly the supposition that they derived from him which contributed to the notion that he was the founder of the Bologna school. But it is now recognised that the ‘y’ is probably only a paragraph mark, used in the earliest manuscripts to separate the text of the Roman law from the following gloss. It is of some importance in this connexion that whereas the later sigla, like ‘b.’ invariably follow the glosses which they authenticate, ‘y’ is found at the beginning of those glosses which carry it.

Although study of the text of Roman law remained the main characteristic of the glossatorial school other literature developed as more and more specialists became so cognisant of the texts that knowledge of it could be taken for granted in exposition. Collections were made of glosses on particular topics or a particular title of the Code (apparatus) and from these developed summaries of the law contained in whole sections of the Code or Institutes (summae). A specialised type of apparatus were the distinctions or Distinctions which were lists of various classifications of legal notions. More interesting to the modern reader are the collections made of disputed questions, dissensiones dominorum, issues which produced divided views from the teachers of the law.

### 2.3 The University of Bologna and its personnel: Bulgarus and Martinus

**Essential reading**


The University of Bologna was the first such institution in Europe (though there were medical schools, notably at Salerno and the cathedral schools of the early twelfth century, especially in Paris where Abelard taught from around 1115, were of considerable
distinction). The universitas was the group of students who were together responsible for the employment of their teachers. Law was the only subject taught at first, though the Canon law joined the school of Civil law during the mid-twelfth century. An important stage in the establishment of the university was the decision of the emperor Frederick I at the Diet of Roncaglia in 1155 to give exclusive legal jurisdiction over its members to the university authorities. This feature of university administration (which was to become standard in subsequent university charters), enabled the university to manage its affairs free from interference from the local secular and ecclesiastical authorities. So important was this legislation that the law teachers introduced the constitution Habita (as it was known from its opening word) into their texts of the Roman law after the last entry in Code title 4.13 – the Code was after all a repository of imperial legislation and Frederick was Roman Emperor, albeit in succession to Charlemagne and scarcely recognised as such by the emperors at Constantinople.

We have seen that Irnerius probably did not play the central role in the founding of Bologna formerly attributed to him. Rather the dominant role was played by Bulgarus (ca 1090–1166). He was joined by two of his early pupils, Hugo (or Ugo, ca 1110–ca 1170) and Jacobus (ca 1115–1178). It has recently been recognised that a text of Wilhelmus de Cabriano, the so-called Casus Codicis, is a summary of the Code based upon Bulgarus’s teaching in the 1150s. Wilhelmus, who was a pupil of Bulgarus, subsequently became a bishop. In the subsequent Bologna tradition Bulgarus, Hugo and Jacobus were known collectively, along with Martinus Gosia, as the Four Doctors (of law). Whereas Bulgarus and his pupils represented the main stream tradition, Martinus, who was a contemporary and not a pupil of Bulgarus, carved out a different path. The disagreements between the followers of Bulgarus and Martinus and his followers represent a large proportion of the so-called dissensiones dominorum (see Section A, Chapter 5.3).

**Activity 2.2**

Consider the relationship between the work of the glossators and their teaching. What were they trying to achieve?

Feedback: see page 17.

## 2.4 The spread of the glossatorial tradition and its consolidation

**Essential reading**


The fame of the Bologna school led to the establishment of similar law schools elsewhere, notably in southern France. The work of scholars in these French schools identifies them as followers of Martinus: typical is an anonymous *summa* of the Institutes produced in Die in the Rhone valley as early as the mid-twelfth century. Rogerius, who may have been a pupil of Martinus at Bologna, was teaching in the Rhone valley before 1180 and Placentinus, the founder of the important law school at Montpellier moved from Bologna after 1160, though his links with Martinus are less obvious. It seems probable that the strength of the orthodox Bulgarus tradition at Bologna forced those who differed from it to establish themselves elsewhere. The area of Provence, southern France, was attractive because the local customary law still drew heavily upon the Roman law tradition. A summary of the *Code* exists from this time in the local Provençal language, *Lo Codi*. There were probably other practical and political factors at work attracting scholars to the area which cannot now be traced.

Other students from Bologna travelled even further. Vacarius was in England, probably teaching Roman law at Lincoln, in the 1160s. He promoted a selection of Roman texts for the use of his students, the *liber pauperum* or Poor Students' Handbook, and wrote a commentary on the Institutes which probably represents his teaching.

The second generation of Bologna scholars, chiefly represented by Johannes Bassianus, Bulgarus's principal pupil after Hugo and Jacobus who was teaching in the last quarter of the twelfth century, seem to have been content to continue their masters' tradition. There appears to be little novelty in their contribution to the exposition of the texts. Bassianus's main work lay in the development of the literature on courts and procedure, which was to become of considerable importance in the *ius commune* (see Chapter 2.5). In this Bassianus was developing work by Bulgarus. It was particularly difficult as few of the principles involved were expressed in the Roman texts. By contrast their students, who include the great Azo, contributed significantly to the development of Roman law scholarship. The increasing number of glosses attached to the texts posed a problem inasmuch as depending upon the sources relied upon different traditions of interpretation developed. A move towards standardisation culminated in the Great Gloss attributed to Accursius. Although he contributed some important glosses of his own Accursius's achievement lay in the gathering of the most influential and important glosses into one text of the *Corpus Juris Civilis* which thereafter became the standard source, well into the age of printing.
2.5 Canon law and Roman law

**Essential reading**


**Useful further reading**


As we have seen in the previous chapter the scholarship of the medieval Canon law received a considerable boost in the work known as Gratian’s *Decretum* (see Chapter 1). Recent work by Winroth has demonstrated that the final form of Gratian’s work was produced in a context in which the Roman law was being studied in detail. The influence which the revived scholarship of Roman law had upon the beginning of Canon law studies is difficult to overestimate. Gratian’s text is above all a text for study: there were already more complete and accurate sources of Canon law available. But it was Gratian’s work which stimulated the establishment and rapid growth of a school of Canon law studies which emulated the achievements of the Roman law school. Most canonists started their legal training in the Civil law school and their thinking continued to be influenced by Roman law ideas. There were various reasons for this. Many Canon law texts had been created in a late antique world itself dominated by Roman law and consequently contained or relied upon Roman law concepts and ideas. Furthermore, unlike Roman law, the Canon law sources were largely statutory in nature. The casuistry of the Roman law material in the *Digest* provided a context for the exposition of rules essential to the smooth running of a legal system. The Canon law taught at Bologna contributed to the establishment of the ecclesiastical court system, based upon the court of the bishop, which obtained a monopoly of jurisdiction in many areas of private law, including marriage and succession. The rules of the Canon law system were insufficient alone to supply solutions to many of the problems which arose in practice. Although on many points of detail Canon law differed from Roman law there were equally large areas in which Roman law provided arguments of both principle and detail to underpin the Canon law system.

The combination of Roman and Canon law rules came to be known as the common law, the *ius commune*. The phrase seems always to have had a number of meanings. It expressed the common ground between the two learned laws, Canon law and Roman law;
although in many details they differed, they shared this common set of rules and principles. As such even in relation to the rules of secular legal systems a presumption arose that in cases of doubt the principles of the *ius commune* should apply. This tendency was increased whenever the lawyers involved had been trained in universities as it was the *ius commune* which formed the fundamental principles of what was taught both in schools of Roman and of Canon law.

**Activity 2.3**

Compare the texts of the Canon law and of the Roman law. Do their differences account for the differences between canon and civil lawyers?

Feedback: see page 19.

**Reminder of learning outcomes**

By this stage you should be able to:

- demonstrate the importance of the transformation of the study of Roman law in the twelfth century
- discuss in outline the background to the transformation of Roman law
- account for the enthusiasm with which Roman law was thereafter studied and applied
- illustrate the way in which Canon law and Roman law interacted
- talk about the major personalities involved in the transformation of Roman law.

**Sample examination questions**

**Question 1** What was the effect of the glossators’ work?

**Question 2** What was the motivation for the formation of the great Gloss of Accursius?

Feedback: see pages 18–19.

**Advice on answering the questions**

**Question 1** The early glossators were faced with a colossal task of making comprehensible a vast array of legal material which had not been completely deployed in legal discussion in the West since the sixth century. They were ignorant of much of the social and political context which caused some misunderstandings. But so extensive was their study that they were frequently able to illuminate a dark corner of one text by references to others elsewhere in the Corpus. Their isolation from the whole of the rest of the Roman juridical tradition (as Justinian had intended) caused them to regard the *CIC* as a complete answer to any legal question. As a consequence it became possible to give Roman answers to all manner of legal questions, answers which were not only justifiable by reference to official, imperial, authority, but which were ex hypothesi consistent with one another. This in turn created the notion of Roman law as ‘written reason’ and contributed to the success of Roman solutions to local judicial problems, first among the Italian city states and then further afield.
Question 2 We are accustomed to regard the gloss of Accursius incorporated in most glossed copies of the complete Corpus Juris Civilis in the late medieval period and then printed in the early printed editions down to the middle of the sixteenth century (the last edition being that printed in Lyon in 1627), as definitive. It is in fact merely a compilation of a particular series of glosses going back to those of Irnerius and his fellow workers. Although Accursius contributed many glosses of his own, his gloss is as important for those he preserves from earlier generations. There were many variations originating in the work of individual scholars and perpetrated by copying in the days of manuscript. Accursius’s gloss was important first because of its widespread circulation and secondly because it was the only one which achieved the accolade of printing.

Feedback to activities: Chapter 2

Activity 2.1 Lectures are literally readings and the best lectures are not read — which is why the modern French for a lecture is ‘conférence’. The lecture started as a way of communicating the text of law (or Bible) which was for study. Once everyone had a copy it could be analysed. The analysis took the form of an investigation of the words used. A listener who had copied the text of the law read out could benefit from the analysis by noting it on his text. In effect the analysis is a series of glosses. The same result can be achieved by publishing the text of the law together with its attendant glosses. So long as copying manuscript texts remained an expensive business students preferred to make their own — though a practice of providing unbound copies of relevant texts, known as pecia, for sale made up for the lack of lecture handouts.

Activity 2.2 Look at the answer to Sample examination question 1 above.

Activity 2.3 The Civil law texts were an official compilation of the sixth century, the major components of which were the enactments of the emperors (the Code) and the writings of the jurists (the Digest). The Canon law sources were, on the one hand the unofficial compilation of Gratian amalgamating sources as diverse as the Bible, Church councils and writings of theologians and on the other the successive collections of papal decretals. The latter are comparable to the Code (and Novels) in that they were undoubted law in both form and content. Gratian’s material, aside perhaps from his own editorial comments, are not in form comparable to the Digest. Whereas the early glossators had to work hard to understand much that they found in the Roman law the canonists glosses were largely concerned to further understanding of the contemporary issues addressed by the decretals. The canonists work is closer therefore to the so-called Commentators on the civil law.