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Law as *ratio scripta*

A b s t r a c t: The paper examines the relationship between law and rationality from multiple perspectives. As early as the Middle Ages, the canonist Gratian attempted to reconcile conflicting legal provisions using rational criteria in his monumental work. The humanist legal theorist Hugo Grotius referred to the ancient codifications of Roman law issued by Emperor Justinian as "written reason." Grotius also identified "the dictate of right reason" within natural law. Civil law codifications of the 19th and 20th centuries, beginning with the Napoleonic Code, drew upon both Roman and natural law, aspiring once again to perfect rationality. The Catholic Church joined this endeavor by organizing canonical material into the first *Code of Canon Law*, promulgated in 1917. The ecclesiastical legislator further adopted Justinian's division of matters into persons, things, and actions. The current *Code of Canon Law* also operates with rationality, exemplified by its requirement that a custom must be "reasonable." What contravenes natural law is deemed irrational, for example the ecclesiastical legislator establishes the impediment of consanguinity as a norm of natural divine law. As an example of irrational law, the article highlights the Slovak legislator's requirement that a petition for the recognition of a new church or religious society by the state must be accompanied by more than 50,000 signatures. It is evident that no unregistered religious society could meet this requirement, nor could the majority of churches already recognized by the state.

K e y w o r d s: natural law, Roman law, canon law, civil law, legislator, code, codex, statute, custom, church, rationality

Philosophical Foundations of Law

The ancient authorities, as they were received and recognized in the Middle Ages, suffered a major blow with the rise of the Humanist movement. Aristotle's barren "Organon" was replaced by Francis Bacon's (1561–1626) *The New Organon* (*Novum organum*). What happened in the realm of philosophy was also reflected in relation to law. In the Middle Ages, the rediscovered Justinian codifications were commented upon in a rather uncreative fashion (*non glossant glossas sed glossarum glossas*),

while Humanism discussed Justinian's great work with the use of historical-critical methods. The ancient codifications, thus, lost the aureole of authoritative and inviolable sources. Nevertheless, they were not discarded. Even under these new circumstances, Roman law had earned a special respect expressed by its designation as "written reason" (*ratio scripta*).[1] Grotius's (1583–1645) theoretical grasp of modern international law was also based on reason. Indeed, through natural law as derived from reason Grotius completed the whole construction of international law.[2] In natural law, Grotius sees the dictates of right reason (*dictatus rectae rationis*).

The great modern European codifications of civil law, starting with Napoleon's *Civil Code* (1804), were inspired not only by the old Roman private law but also by natural law thought. This synthesis was regarded as 'written reason'. For example, this is also the case of the Austrian General Civil Code (*Allgemeines bürgerliches Gesetzbuch* – ABGB, 1811), which was valid on the territory of the present-day Czech and Slovak Republics.[3] The explicit manifesto of natural law can be found in the famous provision of this code (§ 16), the first part of which states that "everyone has inborn rights, known already by reason alone, and is to be considered a person."

However, this does not mean that in the Middle Ages one would not seek rationality in law. According to Thomas Aquinas (1225–1274), rationality is a conceptual feature of law itself. This proves his famous definition of law: "*Ordinatio rationis ad bonum commune, ab eo qui curam communitatis habet promulgata*."[4] Moreover, about a century before St. Thomas, the canonist Gratian had already concluded that true rationality in law cannot be achieved if different legal rules concerning the same subject matter are contradictory. Therefore, in his "Decree", he uses the method of *concordantia discordantium canonum* (c. 1140), which gave the name to his entire

[1] "If in this view the Justinian code lost its authoritative halo, the same cannot be said of the Humanist view of Roman law. On the contrary, the more this relationship loosened on the one hand, the more it gained strength on the other. Roman law was thus becoming the very embodiment of certain intrinsic values, beginning to appear as good and reasonable law. The content of the Justinian codification was simply something that captured this law, it was, in a word, 'written reason' (*ratio scripta*)." Valentin Urfus, *Historické základy novodobého práva soukromého* (Praha: C.H. Beck, 1994), 55.

[2] "He shook the domain of Roman texts whenever they were not suited to actual decisions. They form a law partly Roman, partly customary and partly deduced from reason. It forms a new legal system based on reason." Alexandra Krsková, *Dejiny politickej právnej filozofie* (Trnava: Universitas tyrnaviensis, 2011), 298.

[3] "These codes – but not only them – which used to be generally regarded as the written expression of natural law (in Austria the ABGB was regarded as *ratio scripta*, i.e. written reason), brought about a situation in which the codification activity was abandoned for a long time and replaced by exegesis, i.e. essentially a mindless interpretation of the legal text as a linguistic expression of natural law. The efforts to understand the law and its social development in legal science were thus curtailed." Viktor Knapp, *Velké právní systémy: úvod do srovnávací právní vědy* (Praha: C.H. Beck, 1996), 120–121.

[4] *Summa theologica* I–II, q. 90, a. 4.

monumental work, and forms the first part of the volume of legal sources, later referred to as the "*Corpus iuris canonici*" (published in 1582).

In terms of the scope, Gratian is already close to a historical-critical approach, but his method is primarily scholastic-dialectical, similar to the one developed in the field of philosophical and theological research by Abelard (1079–1142) in his compendium "*Sic et non*" ("Yes and No"). Gratian arranged the various norms on the basis of key rational criteria: in terms of meaning (*ratio significationis, spiritus normae*), time of origin (*ratio temporis*), territorial scope (*ratio loci*) and, finally, the possibility of dispensation (*ratio dispensationis*). Gratian, though an ecclesiastical jurist, was no stranger to the heritage of the old Roman civil law, which tended to attract the ever-increasing attention in his times.[5]

The Need for a Clear Canonical Codification

Although Gratian produced a rationally structured and comprehensively conceived legal corpus, the later increase in the production of canon law sources in the Middle Ages and, subsequently, in the modern period made them highly opaque and unadaptable. It is not surprising, therefore, that at a time when the culture of civil codes had already been flourishing throughout the world, the desire for complexity, stability, clarity and rationality in legal regulation also reached the Catholic Church. At the turn of the 19th and 20th centuries, the Catholic Church still had a highly fragmented legal order based on the medieval collections contained in the *Corpus iuris canonici*. Thus, a need arose to organise the entire body of law into a single and clear legislative act.

The opportunity to propose the adoption of such a legal instrument came at a moment when Pope Pius IX (1846–1878) was summoning the First Vatican Council. When the bishops started to respond to the papal letter convening the Council (from 1865 onwards), many of them expressed their desire for a clear and uncontroversial regulation of canon law. The bishops of France aptly expressed the possible dangers of legal chaos and nihilism which could negatively impact the atmosphere in the Church: "It is obvious and already known by everyone and proclaimed everywhere that some revision or reform of canon law is necessary and even urgent.

[5] "Although several scholarly conclusions suggest that the assimilation of civil Roman law into canon law was only extended with the later commentators on the Decree, some of Gratian's knowledge of Roman law may be evidenced by his *dicta*." Vojtech Vladár. *Dejiny cirkevného práva.* (Praha: Legeas, 2017), 278.

Indeed under such serious circumstances and in light of the changes within human society, many laws, including useless ones, are impossible to observe or [are possible to observe, but only with] great difficulty. There is ambiguity about countless canons as to whether or not they are still in force. And finally with the passage of the ages, the number of ecclesiastical laws has increased, and more laws are still being added to various Collections of law, so that we can say in a certain sense: We are weighed down by law. All of this results in inextricable difficulties in determining the limits of the study of canon law and allows controversies and protracted procedures to occur; this gives rise to a thousand crises of conscience and drives one toward contempt for law."[6]

The codification work, however, was left to wait until the coming 20th century. It is no coincidence that by the early 1900s, the German Civil Code (*Bürgerliches Gesetzbuch* – BGB) came into force. This fact, too, must have been one of the important stimuli for the increased legislative efforts in the Church, and would influence the title of the planned legal collection. It was also decided that the new comprehensive codification of canon law would not be called a *corpus*, but a *codex*. Pope Pius X (1903–1914) in order to investigate the need for a new codification, convened the curial cardinals. Having heard their opinions, he issued the *motu proprio Arduum sane munus* (*De Ecclesiae legibus in unum redigendis*).[7] With the publication of this document in 1904, the codification commission began its operation, led by an outstanding canonist Cardinal Pietro Gasparri.

As regards the structure of the Code, the reminiscences of Roman law, as well as the structure of *personae-res-actiones* were again evident. These three parts form the title and content of the second to fourth books of the Code (Book Two: *Persons*; Book Three: *Things*; Book Four: *Various Proceedings*). The volume is framed by Book One on general norms (*Normae generales*) and Book Five on crimes and punishments (*De delictis et poenis*).[8] Thus for the early twentieth-century church legislator the Roman civil law still represented written reason (*ratio scripta*).

The subject matter of ecclesiastical law is, however, in many respects very different from civil law, especially because the scope of ecclesiastical law is not only

[6] Quoted from the English translation of the 1917 Code of Canon Law available online at https://cdn.restorethe54.com/media/pdf/1917-code-of-canon-law-english.pdf.

[7] *Acta Sanctae Sedis* 36 (1903–1904), 549–551.

[8] "In fact, the old Pio-Benedictine Code abandoned the medieval division of canon law material based on the systematics introduced by the so-called first ancient compilation (*Compilatio antiqua prima*) of Bernard of Pavia († 1213) of 1198 and replaced it with a much older systematics originating in the very early Institutions of Gaius (2nd century) and which was later adopted in *Institutiones seu Elementa* (533) of the Emperor Justinian." Ignác Antonín Hrdina and Miloš Szabo, *Teorie kanonického práva* (Praha: Karolinum, 2018), 200.

facts and relationships formed "in the natural order", but also phenomena based on spiritual values and religious beliefs. Their focus thus goes beyond the normative intention of civil legislators. While the civil legislators moved to a new systematization of civil law based on civil law jurisprudence,[9] in the third book of the *Code* (*De rebus*) the ecclesiastical legislator attempted to bring together quite incommensurable issues: in addition to the Church's movable and immovable property, also, for example, the discipline of the administration of the sacraments or the legal rules for the propagation of the faith.

Since the first *Code* of the Catholic Church was published at a time of heightened interest in scholastic, especially Thomistic thought (after the publication of Leo XIII's encyclical "*Aeterni patris*" on the renewal of Christian philosophy in 1879),[10] one would expect the inclusion of the statutory definition of law itself according to Thomas Aquinas. Necessarily, this would have emphasized the rational character of law. However, the legislator correctly assessed that this was not sufficiently suitable for a definition specifically applicable to canon law.[11]

The Rationality of Customary Law

The requirement of reasonableness, however, can be found in relation to the rules on customary law. Customary law is not a mere custom. Should customs acquire the legal binding force and enforceability, legal theory requires their long use (*usus longaevus*) and the conviction of the necessity to observe them (*opinio iuris sive necessitatis*).[12] For the validity of a custom, however, the canonical legislator

[9] "Today's basic classification into the general part, the rights *in rem*, the law of obligations, the law of the family (matrimonial) and the law of inheritance, as we know it from various textbooks of civil law, but also from textbooks of Roman law, is a product of German Pandectist from the early 19th century. A. Heise, who published it in 1807 in the book *Grundriß eines Systems des gemeinen Civilrechts zum Behufe von Pandektenvorlesungen*." Viktor Knapp, *Velké právní systémy*, 127–128.

[10] *Acta Sanctae Sedis* 12 (1879), 97–115.

[11] "This definition expresses some elements that are not peculiar to law but are shared with other normative systems. Moreover, it applies only to positive law, not to natural or eternal law; to these, it can be applied by analogy. It is not, however, a definition of ecclesiastical law; rather, it can be applied to political decisions within civil society." Julio García Martín, *Le norme generali del Codex Iuris canonici* (Roma : Ediurcla, 1996), 48.

[12] "*Usus longaevus* is the sign whose fulfilment gives rise to a custom. This does not mean, however, that such a custom has a legal character. It still requires *opinio iuris*, i.e. the awareness within the society that it is a legal custom. We can also speak of the recognition of a legal custom by the state

establishes an additional condition, namely its reasonableness, thus placing the custom on the level of law. Nevertheless, he does not explicitly speak of the reasonableness of law in the spirit of St Thomas's definition: "A custom that is expressly reprobated (*expresse reprobatur*) in law is not reasonable."[13] The 1917 Code required a forty-year period for the establishment of a custom and its "reasonableness": "A custom beyond the law (*consuetudo praeter legem*), if it has been knowingly observed by a community with the intention of obliging itself, leads to law, if the custom was equally reasonable and legitimately observed for forty continuous and complete years."[14] The 1983 Code of John Paul II requires not a forty-year, but only a thirty-year period of retention.[15]

Both codes, however, require formal confirmation of the custom by the legislator.[16] An example of a custom approved by the legislator is the 2002 implementing provision of the Archbishop of Prague on the issue of clerical dress: "On the territory of the Archdiocese of Prague, diocesan clergy is obliged to wear ecclesiastical clothing on festive occasions or at official meetings where they speak on behalf of the Church, or whenever it seems beneficial to the apostolate, the prime goal of this provision. For this reason, therefore, in our circumstances and on the basis of the proven experience of the past decades, it is also necessary to respect, as a reasonable custom, the less conspicuous dress of the clergy; this has made it easier to approach people, often those who are non-believers, and to proclaim the Gospel to them, without causing in them any negative prejudice in advance. Let apostolic benefit therefore be the main motivation. In doing so, one must refrain from controversies, uncultured and scandalous conduct, as well as ostentation."[17] Such an assertion of ecclesiastical authority makes this custom, which is otherwise inaccurately also called "unwritten law", into written reason (*ratio scripta*); thus it *de facto* becomes a law.

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and its subsequent enforcement by state power. This feature causes the custom to become part of the valid law, creating subjective rights and, if necessary, it can also be claimed by way of a legal claim (*actio*)." Jaromír Harvánek, *et al.*, *Teorie práva* (Plzeň: Aleš Čeněk, 2008), 263.

[13] CIC/1917, can. 27 § 2; cf. CIC/1983, can. 24 § 2.

[14] CIC/1917, can. 28.

[15] Cf. CIC/1983, can. 26.

[16] Cf. CIC/1917, can. 25; CIC/1983, can. 23.

[17] "Usnesení České biskupské konference o oděvu duchovních. Prováděcí ustanovení arcibiskupa", in *Sbírka právních norem arcidiecéze pražské z let 1945–2009* by Marie Kolářová (Praha: Arcibiskupství pražské, 2009), 300.

Aspects of Rationality in Code Law

In John Paul II's *Code of Canon Law*, we find the qualification of the authentic authority of the Church, which is distinct from the "divine and catholic faith" whose object is the dogmas of the Church itself. It is a doctrine which the Pope and the bishops continually proclaim without definitively declaring it as immutable. "Although not an assent of faith, a religious submission of the intellect and will (*religiosum intellectus et voluntatis obsequium*) must be given to a doctrine which the Supreme Pontiff or the college of bishops declares concerning faith or morals when they exercise the authentic magisterium, even if they do not intend to proclaim it by definitive act; therefore, the Christian faithful are to take care to avoid those things which do not agree with it."[18] Here we already encounter the theme of the rational grasp of faith, which the same Pope John Paul II develops in his encyclical *Fides et Ratio*. [19] The very search for the truth about God and the Church is bound up with the rational effort and knowledge of the individual: "All are bound to seek the truth in the matters which concern God and his Church; when they have found it, then by divine law they are bound, and they have the right, to embrace and keep it."[20]

According to the encyclical *Fides et Ratio*, the exclusion of rationality from speculative thought in many modern philosophical movements hinders this authentic search for faith: "In the wake of these cultural shifts, some philosophers have abandoned the search for truth in itself and made their sole aim the attainment of a subjective certainty or a pragmatic sense of utility. This in turn has obscured the true dignity of reason, which is no longer equipped to know the truth and to seek the absolute."[21] It is no surprise, therefore, that seminarians in seminaries and theological faculties are to be taught, above all, a philosophy that allows the mutually enriching encounter between faith and human thought: "Philosophical instruction must be grounded in the perennially valid philosophical heritage (*patrimonium philosophicum perenniter validum*) and also take into account philosophical investigation over the course of time. It is to be taught in such a way that it perfects the human development of the students, sharpens their minds, and makes them better able to pursue theological studies."[22]

[18] CIC/1983, can. 752.
[19] *Acta Apostolicae Sedis* 91 (1999), pp. 5–88.
[20] CIC/1983, can. 748 § 1.
[21] *Fides et Ratio* 47,3.
[22] CIC/1983, can. 251.

The Code of Canon Law itself contains norms of divine law, both positive, divinely decreed, and natural, inscribed by God in nature, intelligible to men even without the divine "decree."[23] Natural divine law, transformed into canonical norms, exhibits its rational character which is the work of the Creator Himself. Thus, for example, the canonical impediment of blood kinship, explicating the norm of natural divine law, is formulated by the norm prohibiting the granting of dispensation: "A dispensation is never given from the impediment of consanguinity in the direct line or in the second degree of the collateral line."[24]

Rationality of Law

The rationality of legal system and law as a normative legal act also includes the capacity of a legislator to come up with a generally formulated norm. In its application, the rationality of the text of a statutory norm intersects with the rationality of the entity which applies the general law to a particular case, be it a judicial or administrative body. However, this balance may be skewed, particularly in favour of the law itself. This was the case during the French Revolution, when the importance of the legal acts as fundamental sources of law increased enormously, overshadowing the active interpretive role of judges.[25] Already before the Revolution, in the Age of the Enlightenment, law had become the expression of the general will of the people (*volonté générale*). This position was articulated in the legal philosophy of Jean-Jacques Rousseau (1712–1778). Thus, *cum grano salis*, it can be said that the law was no longer 'written reason' but 'written will'. However, the role of interpretation of the law while applying should not be underestimated. After all,

[23] "At a certain stage of self-knowledge, man discovered that his being consists of something which no law may 'touch', and he called it *physis*, *natura*, nature. Thus he obtained the third starting-point for moral reasoning (the development thus went from *ethos* through *nomos* to *physis*)." Jiří Skoblík, *Přehled křesťanské etiky* (Praha: Karolinum, 1997), 70.

[24] CIC/1983, can. 1078 § 3.

[25] "The law becomes omnipotent because, as a matter of fact, it determines the legal status of persons. In relation to the law, the importance of the judge also decreases, whose role is henceforth limited to a more or less mechanical application of the legal text. Comprehensive legislation should include all standards. A judge has no choice but to open the code where he is to find immediate guidance on how to resolve the legal cases before him. There is no longer to be any place in clearly laid down rules of law for judicial discovery of the law or for its loose interpretation, as was the custom before the Revolution." Kolektiv Autorů Právnické fakulty UK: *Dějiny evropského kontinentálního práva* (Praha: Leges, 2018), 290.

one of the auxiliary rules of statutory interpretation is to ascertain what the intention of the legislator was. This principle presupposes reasonableness, i.e. *ratio legis*. The interpretation of legal norms guided by this method is called historical interpretation.[26]

It was another French Enlightenment thinker, Charles Louis de Montesquieu (1689–1755), who formulated the theory of the division of power into its legislative, executive and judicial branches. Such a concept presupposes the autonomy and independence of each of the three powers. In this context, the American constitutional theory speaks of a system of *checks and balances*. If, for example, legislation is extended into the executive, the law loses its generally normative character and deals directly with individual cases.

Clearly, it is not rational to lay down the resulting solutions instead of the general rules. Moreover, such legislation may contain errors, the correction of which is far more challenging in the realm of legislation than in the judiciary or the executive. An example, albeit excusable given the revolutionary time of its issuance, is the Czech restitution "first aid" law passed in the year 1990, after 40 years of communist injustice. It returned to religious orders at least some properties confiscated by the totalitarian regime to allow the communal form of life (*vita communis*) thrive. Since 1950, this form of life was completely denied to male religious orders in communist Czechoslovakia. The enumerated restitution law, however, sets out lists of ready-made solutions instead of general parameters, and an unfortunate factual error has entered the text of the law itself. [27]

[26] "It is used to ascertain the meaning of a statute in relation to the intention of the legislator. The legislator is supposed to articulate the aims of the legislation normatively and directly in the text of the law. From this point of view, the general provisions of the law are particularly important in terms of interpretation, possibly including the basic principles of interpretation of specific provisions, as well as the preamble (usually in the case of constitutional laws, international treaties)."Aleš Gerloch, *Teorie práva* (Plzeň: Aleš Čeněk, 2004), 150.

[27] "A Czech example may be found in Act No. 298/1990 Coll. declaring certain immovable property to be the property of religious orders and congregations or of the Archbishopric of Olomouc. The ownership relations are determined in the supplement of the law by individual signs (i.e., property by cadastral numbers of land and descriptive numbers of buildings, individual orders by their names as well as the previous owners and users of the property). Thus, instead of setting rules, the law directly contains the actual individual solutions. An error in the documents used in the preparation of the law meant that by law the property of the Order of St. Ursula of the Roman Union was erroneously declared to be the property built for the National Theatre. The question of a legislative remedy was challenging, last but not least in view of the protection of property guaranteed by Article 11 of the Charter of Fundamental Rights and Freedoms." Jiří Boguszak, Jiří. Čapek, and Aleš Gerloch, *Teorie práva* (Praha: ASPI, 2004), 47–48.

The Legislator Makes Mistakes

It is thus obvious that in a "revolutionary" period, i.e. when a totalitarian state is being transformed back into a democratic one, mistakes and "unreasonableness" in the law can occur in a sincere effort to help subjects previously subjected to adversity and discrimination in an oppressive regime. This was also the case with the state recognition of new churches and religious societies through registration with the Ministry of Culture. In order to register a new religious society, a 1992 Act of the Czech National Council (*Česká národní rada*)[28] set the minimum number of applicants to 10,000 adults residing in the Czech Republic. In addition, however, it also stipulated that in the case of member churches or religious societies of the World Council of Churches, mere 500 persons would suffice. However, a brief analysis shows that such a situation practically could not occur.[29]

If, in the above case, the legislator did not consider that the provisions of the Act on member entities of the World Council of Churches were practically inapplicable, the 2017 amendment to the Slovak Act on Churches could be cited as a deliberately inapplicable and thus completely unreasonable law. The amendment was adopted under pressure because of the concerns regarding the then ongoing migration crisis and the fear of the uncontrollable spread of Islam. The original – already high – numerical census of 20,000 adhering to the new religious society was raised to 50,000,[30] which is effectively one percent of the entire population of the Slovak Republic. Most of the churches registered in Slovakia today would fail to reach this number of adherents.[31] However, only a law which could be implemented by at least some of them may be considered reasonable (in this case I refer to a law provid-

[28] Zákon č. 161/1992 Sb., o registraci církví a náboženských společností.

[29] "It hardly ever happens that any of the foreign national churches that are members of the WCC have more than 500 adult members on the territory of the Czech Republic. If the members of several such national churches of the same denomination join together to form a new church in the Czech Republic, then this church may have more than 500 adult members, but it will not yet be a member of the WCC, which accepts churches as members only after the number of members reaches 10,000. And if such a new church in the Czech Republic is formed by splitting off some of its members from an existing church in the Czech Republic, it may not be admitted to the WCC immediately." Jiří Rajmund Tretera, *Stát a církve v České republice* (Kostelní Vydří: Karmelitánské nakladatelství, 2002), 73, note No. 107.

[30] Zákon č. 39/2017 Z. z.

[31] "The amendment, as its authors admitted, was motivated by fear that the Muslim community would get registered. However, the explanatory memorandum states that its aim is to eliminate speculative registrations of alleged churches and religious societies with the main objective of registration, i.e., obtaining financial contributions from the state." Lucia Grešková, "Náboženstvo, štát a slovenská spoločnos", *Dingir. Religionistický časopis o současné náboženské scéně* 4 (2017), 129–131.

ing certain authorisations to relevant subjects of legal rights). An analogue of this requirement is the canonical provision on privileges, which are practically "private laws" (*lex privata*).[32] Indeed, every privilege is to be interpreted in such a way that "the beneficiaries of a privilege actually obtain a certain favour."[33]

At other times, on the contrary, the legislator seeks to facilitate the enforcement of its provisions. Given that the Czech Law on Property Settlement with Churches and Religious Societies established, among other things, the conditions for restitution of church property, the legislator also demanded the considerate helpfulness of all relevant authorities and other entities that will participate in restitution processes. Thus, one can speak of "a favour in favour of restitution" (*favor restitutionis*): "In applying this law, its purpose, which is to alleviate the property injustices caused to registered churches and religious societies during the given period, must be respected. The public authorities shall provide assistance to the persons entitled, in particular by providing them, without undue delay and free of charge, with extracts and copies of records and other documents which may contribute to the clarification of their claims."[34] This clear order of the legislator was unfortunately not taken heed of, and the Catholic Church in particular was constantly confronted with various obstructions by state authorities, the formalistic approach of the courts and the reluctance of the entities obliged to hand over the property.[35]

[32] "Privilege (from *lex privata* – 'private' law, also 'privilege') is an advantage granted by a special individual legal act (as in the case of dispensation), which as a rule also consists in permission to behave differently than the legal norm stipulates, but without the necessity of immediate spiritual benefit ('favour'). Thus, the privilege cannot be granted by the executive alone, but only by the legislator (the Pope, and within the limits of his competence, the diocesan bishop)." Ignác Antonín Hrdina, Miloš Szabo, *Teorie kanonického práva*, 171.

[33] Cf. CIC/1983, can. 77.

[34] Zákon č. 428/2012 Sb., § 18 odst. 4.

[35] "Thus, from 2013 onwards, churches and religious societies in the process of property restitution could hope that the legislation and the relevant case law of the Constitutional Court were on their side and that after two decades of waiting for the redress of the wrongs of the communist era, the chapter of 'restitution of stolen property' would be closed within the first or at most the second year. Very soon, however, they were to see that the reality would be quite different. Almost daily, churches and religious societies were discovering how difficult these processes of requesting, supplementing, appealing or even suing for the return of property could be, and how the general climate and political pressures […] were not conducive to a sympathetic administration." Marián Bartoloměj Čačík, "In favorem restitutionis – teorie a praxe," *Revue církevního práva* 3 (2019), 84.

Conclusion

The issue of the rationality of law and its normative provisions is themetised both in legal doctrine as well as in applied legal practice. The historical heritage of canon law jurisprudence highlights Thomas Aquinas's definition of law. He understands the rationality of law as its fundamental and defining element. In the periods of Humanism and the Enlightenment, the requirements on law's rationality were further intensified. In particular, the French Revolutionary concept of law expected the legislature to produce truly perfect rational law which could be applied accurately and easily by judges, without the excessive use of the tools of creative interpretation. The prime example of rational law is undoubtedly the meticulously drafted civil codes, starting with Napoleon's Civil Code. The Catholic Church took the comprehensive civil law codifications of the 19th century as attractive models to be emulated in its own canon law. Indeed, this is how the idea of the *Code of Canon Law* came to exist. It was put into practice twice in the course of the 20th century, namely in 1917 and in 1983. Moreover, the *Code of Canon Law* itself manifests that not only the law but also the ecclesiastical custom as a source of law should exhibit rational character if they are to match the efficacy and legal force of law. However, neither the ecclesiastical nor the civil legislator can possibly avoid a situation in which the legislation, which is being enforced, lacks rationality. However, this cannot be seen as an argument against the rationality of law, quite the contrary: the continuous process of law-making makes it possible to remedy it in such a way that the law continues to serve the public good (*bonum comune*)[36] in civil law and the eternal salvation (*salus animarum*) of its addressees in the case of canon law.[37]

[36] "Unlike *familiae*, where the goal was assumed to be the welfare of the individual, the ordered *societas naturalis* aims – at least in theory – at the general welfare. If the *bonum commune*, or *salus publica*, is at the forefront of the aspirations of a purpose-formed natural society, it is an organized society with a territorial base." Jan Pinz, *Přirozenoprávní theorie a moderní právní stát* (Nymburk: OPS 2009), 73.

[37] Cf. CIC/1983, can. 1752.

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Zákon č. 39/2017 Z. z., *ktorým sa mení a dopĺňa zákon č. 308/1991 Zb. o slobode náboženskej viery a postavení cirkví a náboženských spoločností v znení neskorších predpisov*.

Rev. Stanislav Přibyl

Le droit en tant que *ratio scripta*

Résumé

Cet article examine la relation entre le droit et la rationalité sous plusieurs angles. Dès le Moyen Âge, le canoniste Gratian a tenté de concilier des dispositions juridiques contradictoires à l'aide de critères rationnels dans son ouvrage monumental. Le théoricien humaniste du droit Hugo Grotius qualifiait les anciennes codifications du droit romain promulguées par l'empereur Justinien de « raison écrite ». Grotius identifiait également « le diktat de la raison droite » dans le droit naturel. Les codifications du droit civil des XIX^e^ et XX^e^ siècles, à commencer par le Code Napoléon, s'inspiraient à la fois du droit romain et du droit naturel, aspirant une fois de plus à la rationalité parfaite. L'Église catholique s'est jointe à cet effort en organisant le matériel canonique dans le premier Code de droit canonique, promulgué en 1917. Le législateur ecclésiastique a en outre adopté la division des matières en personnes, choses et actions proposée par Justinien. Le Code de droit canonique actuel fonctionne également selon le principe de rationalité, comme en témoigne son exigence selon laquelle une coutume doit être « raisonnable ». Ce qui contrevient au droit naturel est considéré comme irrationnel. Par exemple, le législateur ecclésiastique établit l'empêchement de consanguinité comme une norme du droit naturel divin. À titre d'exemple de loi irrationnelle, l'article souligne l'exigence du législateur slovaque selon laquelle une demande de reconnaissance d'une nouvelle Église ou communauté religieuse par l'État doit être accompagnée de plus de 50 000 signatures. Il est évident qu'aucune communauté religieuse non enregistrée ne pourrait satisfaire à cette exigence, pas plus que la majorité des Églises déjà reconnues par l'État.

Mots-clés : loi naturelle, droit romain, droit canonique, droit civil, législateur, code, codex, statut, coutume, Église, rationalité

Rev. Stanislav Přibyl

Il diritto come *ratio scripta*

Sommario

Il documento esamina il rapporto tra diritto e razionalità da molteplici prospettive. Già nel Medioevo, il canonista Graziano tentò di conciliare disposizioni giuridiche contrastanti utilizzando criteri razionali nella sua opera monumentale. Il teorico giuridico umanista Hugo Grotius definì le antiche codificazioni del diritto romano emanate dall'imperatore Giustiniano come "ragione scritta." Grotius identificò anche "il dettato della retta ragione" all'interno del diritto naturale. Le codificazioni del diritto civile del XIX e XX secolo, a partire dal Codice Napoleonico, attinsero sia dal diritto romano che dal diritto naturale, aspirando ancora una volta alla perfezione della razionalità. La Chiesa cattolica si unì a questo sforzo organizzando il materiale canonico nel primo Codice di Diritto Canonico, promulgato nel 1917. Il legislatore ecclesiastico adottò inoltre la divisione di Giustiniano delle materie in persone, cose e azioni. Anche l'attuale Codice di Diritto Canonico opera con razionalità, come dimostra il requisito che una consuetudine debba essere "ragionevole." Ciò che contravviene al diritto naturale è considerato irrazionale, ad esempio il legislatore ecclesiastico stabilisce l'impedimento della consanguineità come norma del diritto naturale divino. Come esempio di legge irrazionale, l'articolo sottolinea il requisito imposto dal legislatore slovacco secondo cui una petizione per il riconoscimento di una nuova chiesa o comunità religiosa da parte dello Stato deve essere accompagnata da oltre 50.000 firme. È evidente che nessuna comunità religiosa non registrata potrebbe soddisfare tale requisito, né potrebbe farlo la maggior parte delle chiese già riconosciute dallo Stato.

Parole chiave: legge naturale, diritto romano, diritto canonico, diritto civile, legislatore, codice, codice, statuto, consuetudine, chiesa, razionalità