RICHARD HOOKER AND THE EUROPEAN *IUS COMMUNE*

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Placing Richard Hooker (d 1600) within the history of European thought has never been easy. The work of this Elizabethan defender of the English Church seems to defy exact categorisation.[1] Publication in the Folger Library Edition of Hooker's complete works has, however, made knowledge about him easier to acquire than it once was,[2] and in particular it makes possible a more accurate assessment of a question of interest to readers of this Journal. How much did he know about the *ius commune*, the amalgam of Roman and canon laws that governed practice in the tribunals of the Church? More than that, because the Folger Edition includes all Hooker's surviving writing—even his sermons and autograph notes—it is possible to discover more about the ways in which Hooker made use of the legal sources at his disposal, including those from the Roman and canon laws.

To judge from probabilities, the odds *against* Hooker's having had anything more than a distant knowledge of this subject seem great. Hooker was not a lawyer by training or profession. He had not studied law at Oxford, where in any event the canon law faculty had been closed fifty years before and where the civil law faculty had itself reached a low ebb during the years when he was an undergraduate and subsequently a fellow of Corpus Christi.[3] Hooker did serve as Master of the Temple in London for six years from 1585, but this position would have brought him into close contact with common lawyers more than it would have with civilians. For a time he also held a cathedral dignity to which a court was attached—the prebend of Netheravon in the diocese of Salisbury—during the first half of the 1590s, but the indications are that this court was presided over by a commissary.[4] Hooker himself wrote that he had 'not much been conversant' with the civil law during the course of his career. Although he commended its study 'for the singular treasures of wisdom therein contained, as also for the great use we have thereof in the courts of the Church and in relations with other nations, he himself claimed no expertise.[5] It is

[1] See W. J. Torrance Kirby, *Richard Hooker's Doctrine of the Royal Supremacy* (Leiden 1990) pp 5–29.

[2] *The Folger Library Edition of the Works of Richard Hooker*, W. Speed Hill ed, 7 vols (Cambridge, Massachusetts, and Tempe, Arizona, 1977–98). (Citations given hereafter by volume and page number of *Works*, with references to the original text following in parentheses. The spelling of Hooker's text has been modernised throughout.) In citing the texts of the *Corpus iuris civilis* and the *Corpus iuris canonici*, I have used the following abbreviations:

Dig 1.1.1	*Digestum Justiniani*, Lib 1, tit 1, lex 1
Cod 1.1.1	*Codex Justiniani*, Lib 1, tit 1, lex 1
Inst 1.1.1	*Institutiones Justiniani*, Lib 1, tit 1, lex 1
Dist 1 c. 1	*Decretum Gratiani*, Distinctio 1, can. 1
C 1 q 1 c 1	----------, Causa 1, quaestio 1, can. 1
X 1.1.1	*Decretales Gregorii IX*, Lib 1, tit 1, cap. 1
Sext 1.1.1	*Liber sextus*, Lib. 1, tit 1, cap 1
Extrav	*Extravagantes* (in *Corpus iuris canonici*)

[3] J. L. Barton, 'The Faculty of Law,' in *History of the University of Oxford*, vol 3, James McConica ed (Oxford 1986) pp 271–272.

[4] See Pamela Stewart, *Diocese of Salisbury: Guide to the Records of the Bishop, the Archdeacons of Salisbury and Wiltshire and other Archidiaconal and Peculiar Jurisdictions* (Bradford-on-Avon: Wiltshire County, Council, 1973) pp 25, 100.

[5] 1 *Works*, p 41 (*Lawes*, Preface 8.4). See, however, Izaak Walton, *The Lives of Dr John Donne, Sir Henry Wooton, Mr Richard Hooker, Mr George Herbert, and Dr Robert Sanderson* (1825 ed) p 180, noting that Hooker had studied 'the Philosophers, Casuists, and Schoolmen; and with them the foundation and reason of all Laws, both Sacred and Civil.'

only natural, therefore, that modern accounts have very little to say about what may seem to be the more technical side of Hooker's attitude towards the law of the Church.[6] When they have traced the medieval antecedents of Hooker's thought, they have looked to theologians, primarily Thomas Aquinas, and through him to Aristotelian traditions. Scholarship has pretty much excluded attention to the actual law of the Church, the *ius commune*, and works of commentators upon it.[7]

HOOKER'S KNOWLEDGE OF THE ROMAN AND CANON LAWS

Given these probabilities, it must come as a surprise to discover how much Hooker knew about the *ius commune* and how regularly he made use of its resources. But that is what the evidence from the Folger Edition shows. *Of the Lawes of Ecclesiastical Polity* contains citations to all parts of the Roman law: the *Institutes*, the *Codex*, the *Digest*, and the *Novels*, and similar citations are not absent from Hooker's other writings.[8] He took the occasion of delivering a sermon on the sin of pride to refer to a text from the civil law.[9] In his great work, Hooker also referred to imperial decrees found in the *Codex Theodosianus*.[10] He must have made something of a study of the civil law. It is significant that he cited these texts according to the forms of abbreviation used by the professional civilians of his time, thus using the 'absurd and incomprehensible mode of quotation' upon which Gibbon was later to pour scorn.[11] Gibbon may have scored a point, but Hooker's knowledge makes an impression. It is the kind of use of civilian sources that could only have been made by a writer with more than a passing familiarity with Roman law and the habits of the civilians.

Hooker's familiarity with the other half of the *ius commune*, the canon law, is no less remarkable. *Of the Lawes of Ecclesiastical Polity* contains citations to texts found in Gratian's *Decretum* (c 1140), the *Decretales* of Pope Gregory IX (1234), and Boniface VIII's *Liber sextus* (1298).[12] His marginal notes make reference to the *Extravagantes* assembled from the later medieval councils and papal decretals that were placed with the earlier collections.[13] Hooker knew how to make use of the *glossa ordinaria* to clarify the meaning of particular texts,[14] and he sometimes fell into the habit—entirely typical of the canonists and civilians, and indeed all but inevitable given the lack of availability of many sources—of quoting the decrees

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[6] See eg W. David Neelands, 'Hooker on Scripture, Reason and "Tradition"', in *Richard Hooker and the Construction of Christian Community*, Arthur S. McGrade ed (Tempe, Arizona, 1997) pp 75–94, esp pp 77–78; Paul E. Forte, 'Richard Hooker's theory of Law,' 12 *Journal of Medieval and Renaissance Studies* (1982) pp 133–157.

[7] See eg W. D. J. Cargill Thompson, 'The Philosopher of the "Politic Society"': Richard Hooker as a Political Thinker,' in *Studies in Richard Hooker. Essays Preliminary to an Edition of his Works*, W. Speed Hill ed (Cleveland and London 1972), pp 3–76, describing at pp 21–22, Hooker's debt to scholastic theologians without any mention of any debt to scholastic lawyers. See also Peter Munz, *The Place of Hooker in the History of Thought* (London 1952); A. P. D'Entrèves, *The Medieval Contribution to Political Thought: Thomas Aquinas, Marsilius of Padua, Richard Hooker* (New York, 1959); John Marshall, *Hooker and the Anglican Tradition* (Sewanee, Tennessee, 1963), pp 66–74.

[8] 3 *Works*, p 424 (*Lawes* VIII:8.3) (Inst 4.17 pr); 3 *Works*, p 254 (*Lawes* VII:18.2) (Cod 1.4(7)34); 3 *Works*, p 349 (*Lawes* VIII:3.4) (Dig 1.2.2.11); 3 *Works*, p 268 (*Lawes* VII:20.4) (Nov 6 pr). There is a fuller list in the Folger Edition's Index: see 7 *Works*, pp 65–66.

[9] 5 *Works*, p 335.

[10] 2 *Works*, p 276 (*Lawes* V:62.10) (Cod Th 16.6).

[11] See eg 'Hooker's Autograph Notes' in: 3 *Works*, pp 463–538. The rude comment is found in Edward Gibbon, *Decline and Fall of the Roman Empire*, ch 44 (Everyman ed 1910) vol 4, p 374.

[12] eg 2 *Works*, p 313 (*Lawes* V:65.14) (d p Dist 63 c. 28); 3 *Works*, p 394 (*Lawes* VIII:6.8) (X 2.1.13); 3 *Works*, p 418 (*Lawes* VIII:7.5) (Sext 1.6.3–4).

[13] 2 *Works*, p 79 (*Lawes* V:20.10) (Extrav Johannis XXII 7.1).

[14] eg 3 *Works*, p 470 (Autograph Notes) (*gl ord* ad X 2.13.13).

of popes, councils and Church fathers from the versions given in the *Corpus iuris canonici*.[15] By the word 'Lawes' in his title, Hooker clearly did not mean specific canons. To have done so would in fact have been contrary to normal practices of his time. On the other hand, he did not ignore those canons. He referred to them often, treating them as shedding light on what the English Church's law was in fact and indeed what it should be.

Hooker's knowledge of the European *ius commune* extended beyond the texts of the Roman and canon laws. He made regular use of many of the learned commentaries on the two laws, sometimes in his text, more often in the *marginalia* or sidenotes, where such references were often put at the time. Examples appear throughout the Folger Edition. Among the medieval commentators, there is at least one citation (and usually more) to works by medieval jurists: Azo (d 1230), Guido de Baysio (d 1313), Hostiensis (d 1271), Innocent IV (d 1254), Joannes Andreae (d 1348), Raphael Fulgosius (d 1427), Panormitanus (d 1453),[16] and also, of course, the English canonist whose commentary on the provincial constitutions of England proved of such lasting value in the ecclesiastical courts, William Lyndwood (d 1446).[17] Among jurists from the sixteenth century, Hooker made some use of the works of Jean Bodin (d 1596), Franciscus Duarenus (d 1559), Joannes Paulus Lancellotus (d 1590), Andreas Tiraquellus (d 1558), and Petrus Costalius (fl 1550).[18] He also regularly cited English authors who had incorporated learning in the European *ius commune* into their own works, Most notable of these was Bracton,[19] but Hooker also cited to works of Sir Thomas Smith (d 1577) and Christopher St German (d 1540).[20] He even made one reference to the work of the Byzantine jurist, Constantine Harmenopoulos (d 1383), that had been translated into Latin as *Promptuarium iuris civilis* in the 1580s.[21]

The accumulation of references like these is far from making Richard Hooker a civilian. For one thing, his legal citations were far outnumbered by citations to the Scriptures and to the writings of Church Fathers.[22] Moreover, comparing the range of his citations to the civil and canon law and commentators on them with those of, say, Henry Swinburne, Hooker's contemporary and author of English works on the law of testaments and marriage, makes that fact quite evident. Swinburne cited a much broader range of learned commentaries and did so much more often.[23] This disparity was of course what we should expect. Swinburne was a civilian; Hooker

[15] eg 3 *Works*, p 520 (Autograph Notes) (Pope Innocent I from C 9 q 3 c 13); 3 *Works*, p 31 (*Lawes* VI.4.7) (St Augustine from De Pen Dist 1 c 85).
[16] 2 *Works*, p 266 (*Lawes* V.61.4) (Azo); 3 *Works*, p 482 (Autograph Notes) (Guido de Baysio commonly called Archidiaconus); 3 *Works*, p 470 (Autograph Notes) (Hostiensis and Innocent IV); 3 *Works*, p 482 (Autograph Notes) (Joannes Andreae); 3 *Works*, p 538 (Autograph Notes) (Fulgosius); 2 *Works*, p 42 (*Lawes* V.9.1) (Panormitanus).
[17] His *Provinciale (seu Constitutiones Angliae)* was mentioned numerous times in Hooker's writings: see the list in 7 *Works*, p 170.
[18] 3 *Works*, p 397 (*Lawes* VIII.6.9) (Bodin); 3 *Works*, p 417 (*Lawes* VIII.7.5) (Duarenus); 2 *Works*, p 250 (*Lawes* V.58.3) (Lancellotus); 2 *Works*, p 37 (*Lawes* V.7.3) (Tiraquellus); 3 *Works*, p 417 (*Lawes* VII.7.5) (Costalius).
[19] See A. S. McGrade, 'Constitutionalism Late Medieval and Early Modern—*Lex Facit Regem*: Hooker's Use of Bracton,' in *Acta Conventus Neo-Latini Bononiensis: Proceedings of the Fourth International Congress of Neo-Latin Studies*, R. J. Schoeck ed (Binghamton, NY, 1985) pp 116–121.
[20] 6 *Works*, p 353–354 (Smith); 3 *Works*, p 486 (St German).
[21] 1 *Works*, p 325 (*Lawes* IV.12.7).
[22] This point was made by A. S. McGrade in an editor's footnote in W. Speed Hill, 'Richard Hooker in the Folger Edition: An Editorial Perspective,' in *Richard Hooker and the Construction of Christian Community* (above note 6), p 18, n 41. Hill's contribution accorded greater weight to Hooker's use of Roman and canon law sources than McGrade would have allowed.
[23] There is a list in J. Duncan M. Derrett, *Henry Swinburne (?1551–1624) Civil Lawyer of York* (York: Borthwick Institute, 1973) pp 34–47.

was not. Swinburne was writing for practising lawyers; Hooker was attempting to convince men unlikely to be impressed by an accumulation of opinions from medieval canonists. What the evidence of Hooker's citation of those texts and opinions shows, therefore, is only that he possessed a sufficient familiarity with the texts of the Roman and canon laws, and also the most important commentaries on them, so that he could employ the ample resources of the *ius commune* effectively and correctly, when he saw a need to do so.

HOOKER'S USE OF THE ROMAN AND CANON LAWS

In what circumstances did he see that need? As a general matter, there was a considerable variety of uses to which a Reformation controversialist could put learning from the canon law and the *ius commune*. Perhaps the most frequent in general practice was to show the emptiness of Catholic claims. This meant taking parts of the canon law and seeking to prove that they in fact gave support for the arguments on the Protestant side—in other words, to convict the papists out of their own mouths, as would have been said at the time. There is a little of this in Hooker's work, but it was not his normal method, at least in part because his principal opponents were men who urged a more thorough-going reformation of the English Church, not those who urged return to papal allegiance. Most of what use of this kind there is in Hooker's discussion also served other purposes. For example, Hooker did cite the canon law to show the compatibility with the rule of law of rooting out abuses from the life of the Church, such as those as he believed had grown up in medieval England.[24] And he did cite the example of current practice in Spain to show that the popes could not legislate unconstrained by the laws and customs of the temporal government even in lands where the papal writ ran.[25] But in the first, he was applying a principle from the canon law to the needs of the English Church, and in the second, he was drawing a parallel between the then current situation in England and that which prevailed on the Continent. He was not simply using the canon law to score a debating point against his opponents.

For the most part Hooker drew upon the resources of the *ius commune* for the twin purposes—complementary as they would have seemed to him—of defending ecclesiastical jurisdiction in England and defining the role of law in the life of the Church.

(a) Defence of the jurisdiction of the English Church

Some of the harshest criticism of the Elizabethan Settlement was aimed at the tribunals of the Church the Reformation had left intact. The tribunals established under royal authority, the Court of High Commission exercised in its several branches, were also an especial target of objection. Such criticism was not altogether new. But it was now more frequent, and it could claim some support from the courts of the common law. To the bishops, it seemed urgent that these attacks be answered on the Church's behalf, and Hooker was one of several writers who undertook the task. He argued that a system of ecclesiastical jurisdiction was necessary 'to provide for the health and safety of men's souls.'[26] In making this argument, he called upon the *ius commune* in three particular ways.

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[24] eg 2 *Works*, p 313 (*Lawes* V.65.14) (citing the *Decretum*, d p Dist 63, c 28, in which the canons allowing the emperor a role in the election of bishops were reformed, or rather abolished, because the practice was said to have led to abuses and the selection of unworthy pastors).
[25] 3 *Works*, p 394 (*Lawes* III.6.8).
[26] 3 *Works*, p 6 (*Lawes* VI.3.1).

First was to show that the Church might exercise coercive legal jurisdiction in ways that could not be found in the Scriptures. Roman law was particularly apt for this argument. It was older than the canon law, its intrinsic juristic merit was commonly recognised, and no one could say that it simply mouthed the aggrandising claims of a clerical order. It was therefore quite relevant that the Roman law recognised the need for the Church to ordain canons and laws, and also to change the Church's law when established institutions proved unsuitable for current needs. A homely example like Roman law's treatment of the ability of clerics to act as executors of a will or guardians of minors provided Hooker with ammunition to show that the New Testament could not possibly serve as the arbiter of all legal questions. There was law on the subject, and there had been change in it; it would be vain to search the Scriptures for authority in favour of either result on the question. The matter must therefore be left to the teachings of experience and the needs of the time to decide whether clerics could act in these capacities. The Roman law showed this was true.[27] It had recognised the need for new law in the Church and the impossibility of finding that law in the Scriptures. Hooker maintained that the situation had not changed in any fundamental way. Natural law itself authorised the Church to 'make laws and orders for her children,'[28] and, fully considered, it was 'by instinct of the Holy Ghost [that] they have been made.'[29]

Second was to show that the existing institutions of the canon law were consistent with God's plan for mankind and with the institutions of natural law. Here again the Roman law was particularly relevant, because it offered a verification of the legitimacy of many features of the canon law from without. For example, Hooker found support for the special legal protection afforded to consecrated property and the consequent ecclesiastical law against sacrilege by citing a provision from Justinian's *Institutes*.[30] Likewise, he used texts from the *Digest* to support the marriage law of the Church.[31] In pointing to the dangers of schism by English separatists and the consequent necessity for coercive ecclesiastical jurisdiction to secure conformity, Hooker called upon a text from the Roman law *Codex*.[32] That the Church had the right to appoint holy days during which no work should be conducted and to enforce that rule by ecclesiastical sanctions, Hooker claimed to be proved by imperial decrees found in the same *Codex*.[33] He drew upon the canon law, too, as in showing the necessity of drawing a distinction between temporal and spiritual jurisdiction and demonstrating the importance of each side's respecting the other's rights.[34] It would have been a civilian's opinion that on this point the two laws were congruent in general outlook, although they might be discordant in some specific conclusions. This seems also to be the line Hooker took.

Third was the attempt to justify the specific aspects of English ecclesiastical law that were, or at least appeared to be, out of line with legal principles found in the formal canon law or the observances of the 'best churches' on the Continent. In fact, here Hooker might be thought of as following the footsteps of William Lyndwood

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[27] 3 *Works*, p 241 (*Lawes* VII. 15.14).
[28] 3 *Works*, p 386 (*Lawes* VIII.6.1).
[29] 1 *Works*, p 235 (*Lawes* III.8.16) (citing C 25 q 1 c 5). I have sought to explore this question in 'The Canons of 1603: The Contemporary Understanding,' in *English Canon Law: Essays in Honour of Bishop Eric Kemp*, Norman Doe, Mark Hill, and Robert Ombres eds (Cardiff 1998), pp 23–35
[30] 2 *Works*, p 458 (*Lawes* V.79.14) (Inst 2.1.7).
[31] 2 *Works*, p 405 (*Lawes* V.73.7) (Dig 25.7.4; Dig 32.1.49.6; Dig 39.5.1).
[32] 2 *Works*, p 276 (*Lawes* V.62.10) (Cod 1.6.2).
[33] 2 *Works*, p 381 (*Lawes* V.71.9) (Cod 3.12.3, 9).
[34] 3 *Works*, p 508–509 (Autograph Notes) (C 2 q 7 c 41). See also 3 *Works*, p 394 (*Lawes* VIII.6.8) (X 2.1.13).

(d 1453), whose *Provinciale* sought, among its several goals, to bring English legal practice into theoretical harmony with the general law of the Western Church.[35] Foremost was the English Church's probate jurisdiction. Critics attacked its legitimacy, alleging reasonably enough that there was nothing particularly 'spiritual' about succession to chattels, and noting that the texts of the canon law themselves asserted only a supplementary jurisdiction residing in the bishops. Hooker's defence was that custom could be a legitimate source of law and that this particular custom, which was both reasonable and long established, was such a custom. Scripture did not point one way or the other on the question, and in this circumstance, 'the very, inveterate observance [...] was a law sufficient to bind all men.'[36] Both the Roman and canon laws authorised the exercise of jurisdiction based upon custom.[37]

Probably the most contentious such use of the learned laws was Hooker's attempt to show that the laity, in particular the monarch, rightly played a part in the making and execution of the Church's law. Roman law was again particularly apt. Many imperial laws regulated and bound the clergy.[38] But Hooker used the canon law too. For example, he cited Gratian's *Decretum*, the Gregorian Decretals, and the *glossa ordinaria* to the former to show that the maxim *Quod omnes tangit ab omnibus tractari et approbari debet* should be applied to ecclesiastical legislation and required giving the laity a voice in the enactment of laws.[39] In fact there was a measure of support in the texts of the canon law for Hooker's view. The conclusions drawn by the medieval canonists had been to minimise their significance and to minimise the laity's role in the governance of the Church. But, like many Protestants, Hooker 'looked beyond' their conclusions to the original texts. His overall success on this point is open to doubt. That he sought and found support in the *ius commune* is not.

(b) His understanding of the nature of law

Of the Lawes of Ecclesiastical Polity is more than a defence of the English Church. It is a description of the role of law and legal institutions in the governance of the Church and its people. It was Hooker's effort to demonstrate that some law was necessary in a Christian community. The errors of antinomian religion and the dangers of private judgment were his theme.[40] In developing that theme, and coupling it with consideration of the inherent function of legal rules, he called upon the resources of the *ius commune* in three ways.

First, and perhaps most immediate to Hooker's purposes, was in defining the basic nature of law. It seemed important to begin on the level of general principle. So he did, finding aid in the *ius commune*. For example, his definition of natural right was taken in part from Gratian's *Decretum*, and his understanding of equity was informed by a text from the *Digest*.[41] He adopted the canon law's distinction between acts that were unlawful and void and those that were merely unlawful.[42] Similarly, Hooker used the Gregorian Decretals to show that, for law to be administered aright, judges must have both knowledge of the law and coercive power that had

[35] See Brian Edwin Ferme, *Canon Law in late Medieval England: A Study of William Lyndwood's 'Provinciale' with particular reference to Testamentary Law* (Rome 1996), and id 'Lyndwood and the Canon Law,' in *English Canon Law* (above, note 29), pp 13–22.
[36] 1 *Works*, p 165 (Lawes 11.5.7).
[37] 3 *Works*, pp 475–476 (Autograph Notes) (citing Lyndwood, the *Codex*, and the Gregorian Decretals as well as English authorities).
[38] See eg, 3 *Works*, p 507 (Autograph Notes).
[39] 3 *Works*, p 393 (*Lawes* VIII.6.7–8) (citing Dist 96.1-16; X 5.31.1—18; *gl ord* ad Dist 96.4).
[40] eg 2 *Works*, pp 79–80 (*Lawes* V.20.10) (citing Extrav Johannis XXII 7.1).
[41] 1 *Works*, p 119 (*Lawes* I.12.1) (Dist 1 c 1); 2 *Works*, p 258 (*Lawes* V.60.5) (citing Dig 1.3.18).
[42] 2 *Works*, p 270 (*Lawes* V.62.4) (citing Inst 1.21.1 and Dig 6.1.9).

been granted by, legitimate authority.[43] Likewise, natural reason dictated equal and consistent treatment for all litigants of equal condition, and Hooker supported this fundamental principle of fairness with texts drawn from the *Digest* and the *Codex*.[44]

In none of these definitional matters were texts from the *ius commune* the only sources he cited. References to the Bible, Church Fathers and reformed theologians also served his purpose. However, a contemporary civilian would not have seen any necessary contradiction between citation of theological sources together with those of the *ius commune*. Indeed, he would have thought it natural that there should be an underlying harmony among them, because all grew out of natural law and ultimately of God's ordering. There could be no fundamental contradiction, although there could often be differences of purpose among different expressions of that ordering.[45] That seems also to have been Hooker's approach.

A second use for the principles found in the *ius commune* arose at an intermediate level of generality: striking a balance between law's mutability and its need for stability. This was a recurring theme in Hooker's work. He was challenged on the left by those who maintained that the Church of England had changed too little and by those on the right who contended that it should not have changed at all. On an abstract level, it seemed undeniable to Hooker that the law should guarantee a measure of consistency to those who were bound by it. Otherwise, it would be blown this way and that by every change of opinion. On the other hand, law could not be frozen. There must always be room for reform.[46] In approaching this traditional question of law's character, Hooker found help in the *ius commune*. It recognised a distinction between natural law, which bound all men, and the positive law of the Church, which was subject to alteration. Hooker adopted the distinction, and in fleshing out its implications for his subject, he regularly looked to both Roman and canon law. Thus, the *Decretum* held that what has been established by the necessities of one time may give way before the necessities of another.[47] Commentators, and indeed the canon law itself, recognised that some matters of importance to the cure of souls, like appointing pastors for vacant churches, would not change over time, but the precise means by which the principles were put into practice might vary.[48] Even in sermons Hooker drew upon both the canon and Roman laws in making the point.[49] For him the canons themselves suggested the need for reform, as in the precise form of the general requirement that men about to be ordained be examined as to their life and learning, one that Hooker described as in need of greater vigilance.[50]

The third use Hooker found for the texts of the *ius commune* lay in exploring and explaining detailed provisions of the law currently in force in England. To defend those laws it was necessary to understand them, and it was natural that the Roman and canon laws should be called upon for the task. They were the foundations of the Church's jurisdiction. Thus the Roman law *Digest* supplied Hooker with support for

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[43] 3 *Works*, pp 469–470 (Autograph Notes) (citing X 2.1.4; X 5.1.32).
[44] 1 *Works*, p 88(1 *Lawes* I.8.7) (citing Cod 3.28.11 and Dig 43.24.1.1).
[45] A parallel expression by a common lawyer is found in John Doderidge (d 1628), *The English Lawyer* (1631) p 158, finding harmony between civil law and common law maxims entirely natural, because 'all laws are derived from the law of Nature and do concur and agree in the principles of Nature and Reason.'
[46] See C. M. A. McCauliff, 'Law as a Principle of Reform: Reflections from Sixteenth-Century England,' 40 *Rutgers Law Review* (1988) pp. 429–65.
[47] 1 *Works*, p 241 (*Lawes* 111.10.2) (C 1 q 1 c 41).
[48] 3 *Works*, pp. 507–508 (Autograph Notes (citing X 1.6.41 as well as theological treatises by Thomas Stapleton and Wolfgang Musculus).
[49] See eg 5 *Works*, pp 335–336 (Sermons).
[50] 3 *Works*, pp 221–222 (*Lawes* VII.14.6) (Dist 24 c 5 ad fi).

the rule that infant baptism was effective despite moral defects in the minister or in the parents.[51] He called upon the Commentaries on the Decretals by Panormitanus to help explain the force of a plea of necessity in the ecclesiastical courts.[52] The characteristic is observable above all in Hooker's 'Autograph Notes' that have been found at Trinity College, Dublin. These Notes, written between 1593 and 1599, seem to suggest an intention to write a detailed descriptive defence of the existing ecclesiastical courts, along the same lines as Cosin's *Apologie* or Ridley's *View*.[53] In their editor's view, however, it is likely that they were preparatory to the last three books of Hooker's great work,[54] and in any event Hooker wrote no detailed work like Cosin's. Whatever their purpose, they were filled with references to the Roman and canon laws. Among many aspects of ecclesiastical law, Hooker dealt with matrimonial causes, ecclesiastical censures, testamentary jurisdiction, and qualifications for judicial office. All of these subjects were appropriate for citation of the *ius commune*, in addition to references to the Bible, English law, and commentaries upon them. Hooker supplied that citation.

CONCLUSION

In an article like this one, devoted to a special aspect of learning of a great man, there are evident dangers of exaggeration. To no one are those dangers more evident than to the article's author, and to him it seems appropriate to conclude with a disclaimer. The article does not assert that Hooker's thought was dominated by the *ius commune*. Nor does it (in intention at least) suggest that he simply repeated the *communis opinio* of medieval jurists within those traditions. Indeed, some of the use he made of the medieval laws was quite creative (or distorting from one point of view), and citations of the Roman and canon laws in Hooker's work were always 'outnumbered' by citations of other sorts. This being said, it remains true that Hooker *could* make use of the European laws and also that he *did* make use of them. In attempts to place Hooker within the history of European thought, these facts seem worthy of note.

[51] 2 *Works*, p 283 (*Lawes* V.62.16) (citing Dig 39.1.5.5 [*recte* si plurium] and Dig 28.5.45).
[52] 2 *Works*, p 42 (*Lawes* V.9.1) (citing Panormitanus, *Commentaria* ad X 3.13.8).
[53] Richard Cosin, *Apologie for sundrie proceedings by Iurisdiction Ecclesiastical* (1st ed 1591) and Thomas Ridley, *A View of the Civile and Ecclesiasticall Law* (1st ed 1607).
[54] See A. S. McGrade, 'The Three Last Books and Hooker's Autograph Notes,' in 6 *Works*, pp 233–246.