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Traditions

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DAVIDE GIANTI

COMPARING PARADIGMS: “AEQUITAS” AND “CONSCIENCE” AT THE BIRTH OF CIVIL LAW AND COMMON LAW TRADITIONS

Abstract The birth of continental and common law traditions was influenced by Christian theology and canon law in various ways and through unexpected channels. This circumstance is shared by both and should not be overlooked because of the distinctions between them. On the one hand, the propensity to equate canon law to Roman law that was rediscovered in the early Middle Ages is inaccurate, while the exaltation of the originality of the “common law legal genius” underestimates the primacy of belonging to a common matrix of Christian thinking. In both cases, canon law’s significance is reduced to obscurity; however, above all, an understanding of the role played by theology in creating new paradigms is prevented. This article aims to show how theology and classical canon law, as they were understood between the eleventh and fourteenth centuries, represented the common background used to create two new legal-theological paradigms on the continent and in England: *aequitas* and *conscience*.

Keywords: comparative law, equity, conscience, civil law, common law, legal theory, theology

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1. Law and theology: a unique epistemic field for creating new nomic spaces

There is often a tendency to summarise the legal phenomenon¹ in which medieval continental legal scholars operated as the direct result of centuries of elaboration of Greek-Roman notions in the political and legal spheres. This is because they seem to have merely appropriated the Justinian Corpus.

However, on a closer look, the juridical phenomenon of which they made themselves interpreters and creators turns out to be the product of the fusion between a Greek-Roman antiquity and an equally vital and important millenary tradition, such as the Jewish-Christian tradition, conveyed throughout the Mediterranean basin through the spread of the Gospel message from the first century after Christ.²

This phenomenon, which progressively produced the fusion of monotheistic Jewish doctrines with those of the Hellenised Roman pagan world, must not be underestimated at all. This led, albeit in an uninterrupted continuity of forms and traditions, to a true epistemic paradigm shift that took the form of the overlapping and reciprocal influence of categories and concepts. If initially glanced, these forms may seem to overlap with those of the past; on the contrary, they gave rise to conceptual shifts that changed the way social, political, and legal phenomena were understood by individuals and new communities. This happened because they revolutionised the meaning of words, categories, and paradigms used to think about the reality of the world by proposing a comprehensive Christian interpretation that also had deep repercussions on the legal phenomenon.³

At the beginning of the second millennium of the Christian era, continental jurists constructed a new overall legal system using theological concepts to support individual constructions around the legal notions inherited from Roman law, which they rediscovered from the Justinian compilation. The first step of this enquiry is to reconstruct how they acquired this theological knowledge before establishing how much it influenced their work. We need to trace the channels through which philosophical and theological knowledge reached the legal class to prove its influence in the legal field.

The essential link between the study of liberal arts and the study of law has always been emphasised by historians, but it has also been rightly emphasised that in the

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² BELLINI P., *‘Res publica sub Deo’. Il primato del Sacro nell’esperienza giuridica dell’Europa preumanistica*, Firenze, 1981; QUAGLIONI D., *‘Civilis sapientia’. Dottrine giuridiche e dottrine politiche fra medioevo ed età moderna*, Rimini, Maggioli, 1989.

³ GIANTI D., *La Legge dei privati. Genealogia dei paradigmi continentali del contratto*, Mimesis Editore, 2017.

Middle Ages, the study of the arts was, above all, an indispensable preliminary to the correct reading and understanding of Holy Scriptures.⁴

In Christian Europe, knowledge of the relationships that link the metaphysical-theological plane with contingent earthly experience was the first and most urgent concern of every scholar. This explains why glossators were so interested not only in rediscovering the law contained in Justinian’s “sacred” texts but also in identifying the foundations on which the legal phenomenon rests. In pursuit of this goal, they turned precisely to insights into theological metaphysics, understood as the search for the root cause of all things.⁵

In the eleventh century, theological reflection vibrated in transalpine countries. Centres of study, such as the monastery of Bec, the school of Laon, the school of Chartres, and that of Caen, developed the fruit of acculturation programs developed during the Carolingian era, now attracting young scholars from all over Europe. Italy’s episcopal and monastic schools still focused on practical teaching and lacked metaphysical reflection; therefore, students sought successful experts from across the Alps. By the twelfth century, cathedrals in France had excellent regular schools, including Tournai, Angers, Reims, Bourges, and Paris, which were attended by students from all over Europe.

We do not have conclusive evidence of the first Italian law students attending French philosophy schools, but we do have evidence of the reverse. Those who were trained in science outside Italy came to study the law in Bologna. This evidence shows that the cultural centres of the time were closely related and shared a scientific method. The connection between the philosophical schools of Paris, Chartres, and Bologna’s juridical school was lively and productive.⁶ Evidence of this phenomenon can be found in the crossover that glossators made between concepts belonging to more traditional Augustinian Platonism and the thought of Scottus Eriugena. This result had no precedent in French theology and must be recognised to the glossators as an autonomous and original fruit of their reflection.

While it is known that the dominant philosophical current of this period was Platonism conveyed through Augustine’s thought,⁷ the philosophy of John Scottus Eriugena was rediscovered and enjoyed a golden age precisely in the twelfth

⁴ MC INERY R., *Beyond the Liberal Arts*, in WAGNER D. L., *The Seven Liberal Arts in the Middle Ages*, Bloomington, Indiana University Press, 1983; CAPRIOLI S., ‘*Modi arguendi*’. *Testi per lo studio della retorica nel Sistema del diritto comune*, Spoleto, Centro Italiano di Studi sull’Alto Medioevo, 2006; PIANO MORTARI V., *Dogmatica e interpretazione. I giuristi medievali*, Napoli, Iovene, 1976.

⁵ PADOVANI A., *Perché chiedi il mio nome? Dio, natura e diritto nel secolo XII*, Torino, Giappichelli, 1997; FASSO’ G., *I glossatori e il giusnaturalismo medievale*, in ID., *La legge della ragione*, Milano, Giuffrè, 1999.

⁶ PETTI BALBI G., *Le università medievali*, in TRANFAGLIA N., FIRPO M., *La storia. I grandi problemi dal Medioevo all’Età Contemporanea. I. Il Medioevo. I. I quadri generali*, Torino, Utet, 1988, p. 581 ss.; BELLOMO M., *Saggio sull’università nell’età del diritto comune*, Roma, Il Cigno Galileo Galilei, 1992.

⁷ VASOLI C., *La filosofia medievale*, Milano, Feltrinelli, 1980.

century. The study of Eriugena's theology began in France and spread to Germany and England through the schools of Chartres and Paris, while Italian schools simultaneously did not excel in studying and sharing Eriugena's ideas.⁸ Italian students were required to visit France to improve their studies. Both these trends of theology, as we shall see, profoundly influenced the production of the first scholars of law competing in the cultural scene of this period.

2. The theological-juridical paradigm of “aequitas” at the birth of civil law tradition

2.1 Theorising aequitas: glossators and Augustinian Platonism

The most influential concept that the eleventh century legal rebirth on the European continent brought with it is represented by the pivotal doctrine of *aequitas*. During this period, this simple word was transformed into a new paradigm. It made up the guiding star of all medieval legal reflections and represented the means through which radically new legal solutions were elaborated in terms of assumptions from Roman sources in Justinian texts. The concept of *aequitas* informed the legal constructions of both civilians and canonists and can only be understood in its juridical meaning if it is placed within Christian theological speculation that matured during the early medieval centuries.

In the period in question, the metaphysical philosopher of reference for Christian scholars was Plato, because his doctrines could easily be made to agree with the fundamental dogmas of Christian religion. There is no coincidence that Augustine was the most influential philosopher in the early Middle Ages. In fact, his thought was organised around the nucleus of Platonic philosophy.⁹ In the eleventh century, Anselm of Aosta reconstructed Augustine's work into a compact and original system, becoming the main interpreter and exponent of his ideas. Before his arrival, Augustine's Platonism had been the primary source of authority in theological matters for all centuries of the early Middle Ages, but his thought did not continue. Thus, Anselm was also a cultural vehicle that brought Augustine's knowledge to the jurists' attention.

The fundamental work used to Christianise Plato was the “*Timaeus*”, a dialogue in which tools were found that allowed Christian thinkers a deeper understanding of

⁸ JEAUNEAU E., *Le renouveau érigenien du XII siècle*, in BEIERWALTES W., *Eriugena redivivus. Zur Wirkungsgeschichte seines Denkens im Mittelalter und im Übergang zur Neuzeit*, Heidelberg, 1987; MORAN D., *The Philosophy of John Scottus Eriugena. A Study of Idealism in the Middle Ages*, Cambridge-New York-New Rochelle-Melbourne-Sidney, 1989.

⁹ CHENU M. D., *La teologia come scienza nel XIII secolo*, Milano, Jaca Book, 1985; MARCHESI A., *Dal “Logos” greco al “Logos” cristiano*, Parma, Zara, 1994.

the mystery of creation and the order of the world.¹⁰ The Platonic ideas placed in the hyper uranium thus become the ideas of the divine word that constitutes the formal causes of all creatures, while God's Word itself, which coincides with the person of the Son, contains all archetypes and intelligible forms of creation. Thus, the corollary is that in the Father is found the subject that thinks of the ideas, and in the Holy Spirit, the one who communicates them into the world. Given these presuppositions, it becomes clear that God creates and orders the world by drawing on his own eternal nature that contains all things and that the final creatures are pale imitations of the originals in divine wisdom, the true ultimate cause of the existence of all things.

Based on these assumptions, human beings cannot, therefore, limit themselves to observing the perceptible forms of things in this world to understand it and all things that exist in it. They must attempt to make a backward journey towards what constitutes the origin and foundation of reality. This gnoseological path also concerns the legal phenomenon, and for civilians, it could be explained precisely through the concept of *aequitas*.

It is often assumed that what *aequitas* meant or what it was about a rule that made it *aequa* to glossators remained under-theorised,¹¹ but a legal-theological enquiry can shed more light on this issue. In his gloss to a passage in the Digest, Irnerius argues that "*aequitas in rebus ipsis percipitur*"¹², openly showing how he believes things reveal a precise mode of being. This can be shown precisely by the term *aequitas*, which refers to the providential plan through which God conceived and created the cosmos. A pupil of Irnerius, Martinus Gosias, goes even further and arrives at equating the concept of equity with God himself, affirming that "*nihil enim aliud est equitas quam Deus*."¹³ This equating of equity and God, in fact, makes *aequitas* one of the names that can be attributed to divinity, which allows human beings to relate to the Absolute Being. In fact, the latter, in its inexpressibility, differs from any other reality and yet must have some form in common with the real because otherwise it would not be thinkable in any way.¹⁴

¹⁰ GIBSON M., *The study of the “Timaeus” in the Eleventh and Twelfth Century*, in *Pensamiento. Revista de investigación e información filosòfica*, 25, 1969, pp. 183-194; GILSON E., *La filosofia nel medioevo dalle origini patristiche alla fine del XIV secolo*, Milano, Rizzoli, 2011.

¹¹ MANISCALCO L., *Equity in Early Modern Legal Scholarship*, Brill Hijhoff, Leiden-Boston, p. 19.

¹² D. 1.1.1.1 « *Ulpianus 1 inst. Cuius merito quis nos sacerdotes appellet : iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes* ».

¹³ BESTA E., *L'opera di Irnerio* (contributo alla storia del diritto italiano), Torino, Ermanno Loescher, II, 1896.

¹⁴ SCHEEBEN, M. J., *I misteri del Cristianesimo*, Brescia, Morcelliana, 1960; AUER J., *Il mistero di Dio. II*. Assisi, Cittadella Editrice, 1982.

A problem arises when one considers that Augustine in "*De doctrina christiana*" uses a different term: *aequalitas*. He specifies that "*in patre unitas, in filio aequalitas, in spiritu sancto unitatis aequalitatisque concordia*"¹⁵, testifying how already Christian thinkers sometimes preached certain names regarding God as a whole, but much more often were inclined to attribute them to each of the three persons that make up the Holy Trinity to better describe it and better understand its reciprocal internal relationships.

However, the problem of Augustine's use of a different term cannot be avoided but must be brought back into the framework of a complete theoretical reconstruction. In the years in which the glossators began their reflections on *aequitas*, the Chartres School rediscovered the notion of *aequalitas* during the analysis of the persons of the Holy Trinity, thanks to the work of Gilbert de la Porrée.¹⁶ Because of the prevailing neo-platonic matrix, it is obvious that God can only be a perfect, simple, eternal, and immutable unity; consequently, the term *aequalitas*, identifying the Person of the Son, first represents the equality of what is generated regarding what is generating in the Trinitarian relationships. This equivalence places the person of the Son as the source of proportions and inequalities regarding the things that have been created by divine wisdom in a project where nothing is random, but all things are bound in a harmonious whole.¹⁷

Nature produces things invariably and without confusion because the divine mind maintains the *unitatis aequalitas* of things, while the form imprinted in them to bring them into existence simultaneously limits and circumscribes them.¹⁸ The function of *aequalitas* that we see emerging above all others from this picture has a clear normative character of imposing a certain form; in fact, the law itself can be thought of as the form that is imprinted on the behaviour of those who live within the community.

The Word of God is therefore the form of the world in which it is possible to find the true and immutable law of the world. The reflection begun by Augustine and brought to completion by the scholars of the School of Chartres arrives at the substantial equalisation between *aequalitas* and *aequitas*. Since similar results in speculation were reached also by Peter Lombard in the "*Summa Sententiarum*",

¹⁵ SANCTI AURELII AUGUSTINI, *De doctrina christiana*, Turnholti, 1962, 1.5.5, p. 9.

¹⁶ CHATILLON J., *D'Isidore de Séville à saint Thomas d'Aquin. Etudes d'histoire et de théologie*, London, Variorum Reprints, 1985; GREGORY T., *Anima mundi. La filosofia di Guglielmo di Conches e la scuola di Chartres*, Firenze, Sansoni, 1955; MAIOLI B., *Gilberto Porretano. Dalla grammatica speculativa alla metafisica del concreto*, Roma, Bulzoni, 1975.

¹⁷ DU ROY O., *L'intelligence de la foi en la Trinité selon Saint Augustin. Genèse de sa théologie trinitaire jusqu'en 391*, Paris, Études augustiniennes, 1966; HARING N., *Two commentaries on Boethius (De Trinitate and De hebdomadibus) by Thierry of Chartres*, in *Annales d'histoire doctrinale et littéraire du Moyen Age*, 27, 1960, pp. 65-136.

¹⁸ CILENTO V., *Medio Evo monastico e scolastico*, Milano-Napoli, Ricciardi, 1961, p. 217 ss.

theologians and glossators made their own teaching whereby *aequalitas* identified the Son-Word in the Trinitarian economy and equated it with *aequitas*, contained in the mind of man and capable of guiding his actions according to the perfect and providential plan willed by God.

2.2 Theorising *aequitas*: the relation between “*naturalis aequitas*” and “*naturalis iustitia*”

The syntagma *naturalis aequitas* was very often declined in parallel with that of *aequitas constituta*, a dichotomy already foreshadowed by Cicero in the “*Topica*”¹⁹ and which had been taken up again in the “*Liber de diffinitione*” attributed throughout the Middle Ages to Boethius. It is doubtful that medieval jurists, even though they quote these pagan sources, extensively borrowed the concepts underlying the reflections of these authors.

It is much more probable that the expression *naturalis aequitas* with all its background of theological-metaphysical connotations was borrowed from the version of Plato's “*Timaeus*” commented by Chalcidius. This is testified because Peter Abelard and the canonists borrowed many legal terms from this work, especially the syntagm *ius positivum*, which they then had the merit of spreading to other fields of knowledge.²⁰

Chartres thinkers, strongly influenced by the above-mentioned Platonic dialogue, eventually arrive at the result of equating in a single reality *naturalis aequitas* and *naturalis iustitia*, which are revealed in the providential order God has bestowed on the world and are common to both God and human beings.²¹ Thus, these thinkers come to configure a single reality that is referred to by different names depending on the perspective from which it is viewed, but which can be summed up in the equivalence between *naturalis iustitia*, *naturalis aequitas*, and the thought of God himself.

In this conceptual construction, the adjective *naturalis* merely emphasises that the order of things is conceived and willed by divinity. In this way, *aequitas*, which in the works of both civilians and canonists become the distinctive character of the reason of God and of the reason of man, coincide at the same time as *ius naturale*, which represents nothing other than one way of identifying the perfect unity of divine “logos”. From a theological-legal perspective, God as sovereign reigns over

¹⁹ CICERO, *Topica*, 23 : « *Quum autem de aequo et iniquo discernitur, aequitatis loci colliguntur. Hi cernuntur bipertito, et natura et instituto. Natura partes habet duas, tributionem sui et ulciscendi ius* ».

²⁰ KUTTNER S., *Sur les origines du terme “droit positif”*, in *Revue historique de droit français et étranger*, 15, 1936, pp. 728-740.

²¹ CORTESE E., *La norma giuridica. Spunti teorici nel diritto comune classico*, I, Milano, Giuffrè, 1962, p. 289 ss.

the cosmos through the *lex aeterna* already identified by Augustine, which is recognised and implemented by the rationality of man created in the image and likeness of the divine.²²

However, the glossators entered these reflections by noting the consubstantial legal ambiguity of equating equity and justice; therefore, they attempted to distinguish the areas and functions of the two concepts. Irnerius clearly states that "*bonum et equum vocat hic iusticiam differt autem equitas a iusticia; equitas enim in ipsis rebus percipitur et, cum descendit ex voluntate, forma accepta fit iusticia*"²³ and, in this way, reiterates that, even if it is a single entity, the two terms are considered from two different perspectives. *Aequitas* shows what eternal and immutable precepts of conduct emanate from God that man must follow, while justice identifies the act of will through which these precepts are realised. This act of will is a predicate of the third person of the Trinity, namely the Holy Spirit, which is characterised by the will of good and also the will of justice, and who becomes comprehensible to the human mind in the aspiration to goodness towards creation.²⁴ The Holy Spirit, therefore, takes on himself the task of realising the divine plan that has been predetermined by Son's rationality, and from this, it follows that justice assigns to everyone what *aequitas* has established he is entitled to.

One might think of such a way of belonging to God alone, but one must not forget that, in theological reflection, man is created in the image and likeness of God; in fact, even man's soul can be conceived in the threefold guise of memory, intellect, and will in the model of the Trinitarian economy.²⁵ Therefore, the individuality of the soul, rationally knowing what is good and acting accordingly, can transform *aequitas* into *iustitia*. The relationship established between God and man is only a resemblance given the substantial ontological difference between the two entities. Therefore, the justice to which man can aspire can only be finite, precarious, and transitory, awaiting true justice that can only be administered by God.

Irnerius's positions on equity were also taken up by his pupil, Martinus Gosia, who found in the processes of the human soul the same movements that proceed into the Trinity, whereby *aequitas* ideally precedes justice because the soul determines action only after having designed its characteristics. The followers of the school of Martinus went even further by stating that "*aequitas est rerum convenientiam que cuncta equiparat et paria iura desiderat.*" The term *convenientia* originally belongs to the domain of logic and physics, where it describes the similarity that allows things

²² CARON P. G., «*Aequitas*» romana, «*Misericordia*» patristica ed «*Epicheia*» aristotelica nella dottrina della «*Aequitas*» canonica. *Dalle origini al Rinascimento*, Milano, Giuffrè, 1971, p. 45 ss.

²³ BESTA E., *L'opera di Irnerio*, cit., p. 1.

²⁴ CORTESE E., *La norma giuridica*...cit., p. 4 ss.

²⁵ BELL D.N., *Esse, vivere, intelligere: the noetic Triad and the Image of God*, in *Recherches de Théologie Ancienne et Médiévale Louvain*, 52, 1985, p. 19 ss.

to be related in kinds and species. This classification is made possible by the presence of a form in every object of reality and the simultaneous capacity of human rationality to abstract it from sensible contingencies through a procedure that shows its power precisely within the field of legal knowledge.

Indeed, applying the same mechanism of likeness of things to the domain of the juridical, one finds that factual situations that are similar because they are governed by the same *ratio iuris* must be governed analogously.

Moreover, the similarities between situations are certainly not the result of chance for medieval thinkers, but the result of a superior rationality that orders all things. It is precisely for this reason that glossators can argue that all creations must be catalogued according to the division into genus and species. Therefore, *aequitas*, besides a transcendent sense that equates it with God in the second person of the Trinity, is also an immanent entity and can be perceived in the relationships of proportion and harmony between things contained in the divine plan that unfold in creation.²⁶

The Holy Spirit represents the ultimate guarantor of this relationship of similarity in two respects: first, between the original causes, the divine ideas, and the individual entities in which these are substantiated according to the divine will, and second, between the relationships that exist, at a lower level, in the sensible realities organised according to genres and species.²⁷

These considerations added innovative ideas to Augustine's teachings, especially regarding *aequitas*, which would prove fundamental to medieval law. Theological speculation enriched the notion derived from Justinian sources by adding a metaphysical meaning that refers to the order of creation originating from God's reason. Thus, a legal concept originally reported only as a hermeneutic criterion for interpreting various cases could be configured as a concept encompassing the relationship between God and justice and making it possible for people to know what is right and good through reason and conform to it naturally.

2.3 Theorising aequitas: Eriugena and the transformation process from “aequitas rudis” to “aequitas constituta”

The above shows that theorising *aequitas* was made possible by the theological background of the glossators. The result configured this new paradigm as a dual

²⁶ ROTA A., *Il tractatus de aequitate come pars tertia delle Quaestiones de iuris subtilitatibus e il suo valore storico e politico*, in AGS, 146, 1954, p. 75 ss.; FITTING H., *Quaestiones de iuris subtilitatibus des Irnerius*, Berlin, 1894.

²⁷ GREGORY T., *Mundana sapientia. Forme di conoscenza nella cultura medievale*, Roma, Edizioni di Storia e Letteratura, 1992.

order present in a transcendent sense in divine reason and in an immanent sense as a necessary law consubstantial to created beings that unfold in their reciprocal relations.

At this point, a second duality in the notion of *aequitas* can be identified in glossators' works. It emerges in their writings from the continuous juxtaposition of this term with the word "matter", which in medieval languages not only means the object of a particular study but also represents a philosophical concept.²⁸

An analysis of the works of glossators shows that jurists of the period sometimes accompany the term *aequitas* with the adjective *rudis* to indicate equity that is not yet concretised by the will, and sometimes accompany it with the participle *constituta* to indicate the same entity at the second manifestation stage. The first is the stage in which equity is shaped by the act of volition, and the second is when equity becomes a true positive law.²⁹ The use of adjective *rudis* was unknown to the theological reflection of the period, and the only authors to use it were Bernardo Silvestre and Peter Lombard.³⁰ The use of this term by glossators derives more from their knowledge of certain Latin classics in which it is commonly used. For example, in Ovid³¹ and Lucan³², it always indicates an inert and original matter waiting to come to life through the forms impressed by divinity.

However, a problem arises from the theoretical perspective. It must not be forgotten that in Augustinian thought that permeated the epistemic fields of the time, there is an inalienable distance between God and Matter because the former is an active creative power, while the latter is a passive power created from nothing. This insuperable hiatus would therefore seem irreconcilable with the doctrine expressed by glossators, establishing the possibility of the transformation of *aequitas* from *rudis* to *constituta*. The solution was found in the thought of Scottus Eriugena, another great Christian thinker who posited the relationship between God and Matter in a quite different and fascinating manner.³³

²⁸ KANTOROWICZ H., *Studies on the glossators of the Roman law: newly discovered writings of the twelfth century*, Cambridge, Cambridge University Press, 1938.

²⁹ DE ZULUETA F., *The Liber pauperum of Vacarius*, London, Quaritch, 1927, p. 69 ss.

³⁰ MACCAGNOLO E., *Il divino e il megacosmo. Testi filosofici e scientifici della scuola di Chartres*, Milano, Rusconi, 1980, p. 457 ss.

³¹ PUBLIO OVIDIO NASONE, *Metamorfosi*, Torino, Einaudi, 2015, I. 5-9 : « Ante mare et terras et, quod tetigit omnia, caelum/unus erat toto naturae vultus in orbe/quem dixere chaos, rudis indigestaque moles, /nec quicquam nisi pondus iners congestaque eodem/non bene iunctarum semina rerum ».

³² MARCO ANNEO LUCANO, *Bellum civile*, Napoli, Loffredo, 2009, II. 7-12 : « Sive parens rerum, cum primum informia regna/materiamque rudem flamma cedente recepit/fixit in aeternum causas qua cuncta coerces/se quoque lege tenens et saecula iussa ferentem/fatorum immoto divisit limite mundum/sive nihil positum est... ».

³³ CRISTIANI M., *Itinerari e potenzialità del pensiero cristiano in età carolingia: la teologia trinitaria di Giovanni Scoto*, in LEONARDI C., MENESTO' E. (a cura di), *Giovanni Scoto nel suo tempo. L'organizzazione del sapere in età carolingia*, Atti del XXIV convegno storico internazionale dell'Accademia Tudertina e del Centro di studi sulla spiritualità medievale (Todi 11-14 ottobre 1987), Spoleto, Cisam, 1989, pp. 337-367.

Eriugena brought together a new synthesis of the text of Holy Scripture, the thought of Augustine, and that of the Greek Church Fathers. The theology developed by this thinker is based on the presupposition that every predicate of God has a meaning that exceeds that it possesses in the language of men because its ordinary object is only of a contingent and finite character. The purpose of noting this consubstantial inadequacy of language is not to prevent all forms of knowledge of divinity by stripping it of the attributes that man seeks to preach but to prevent the supreme essence of God from being limited and bridled by the word of man.³⁴

Eriugena even reaches the apparent paradox whereby the nature of God is unknown to the divinity itself because reason can only fully know what is finite and determined. The supreme being is infinite, cannot be named, and therefore, as the negation of all existing reality, can only be defined as nothingness³⁵. To understand himself, God must make himself other than himself; for this reason, he expresses himself in primordial causes and in the trinitarian economy, which represents the first manifestation of an eternal and unattainable truth in a symbolic form whose understanding, however, escapes us.

The Trinity is not only functional to man's attempts at knowledge, as it certainly corresponds to reality, but the supreme being remains a perfect unity, where the different moments represented by its various persons are summed up in a single act. God, therefore, begins to know himself in the first ideas, but in creating an inferior reality, such as that of the sensible world. God somehow in the work of creation emerges from mysterious indistinction to know himself completely³⁶.

The same process that we have seen as belonging to the supreme being also characterises man's thought, which is constructed in his image and likeness. Until man does not think, he is nothing, indistinct, and purely potential, whereas he begins to exist when he begins to think of something different from himself. Initially, this takes the form of what he imagines, but immediately afterwards, the thought is expressed in language, and what was previously only obscure becomes manifest.

Eriugena's theories had a profound influence on medieval glossators as evidence by the fact that they often argue that *aequitas* is born "*de occultis naturae finibus*" and, in fact, the law is nothing other than a form that moulds man's behaviour, drawing it

³⁴ CORVINO F., *Giovanni Scoto Eriugena e la scuola di Auxerre*, in DAL PRA M., *Storia della filosofia. La filosofia medievale: dal secolo VI al secolo XII*, Milano, Vallardi, 1976, p. 80 ss.

³⁵ GIOVANNI SCOTO., *De divisione naturae libri quinque*, P.L. 122, I. 13, 455C, SW 66., II.28: «*Deus itaque nescit se, quid est, quia non est quid, incomprehensibilis quippe in alio et sibi ipsi et omni intellectui [...] non [...] Deum seipsam ignorare, sed solummodo ignorare, quid sit, et merito, quia non est quid. Infinitus quippe est*».

³⁶ GIOVANNI SCOTO, *De divisione naturae*, cit., III.23: «*creatur enim a seipsa in primordialibus causis, ac per hoc seipsam creat, hoc est, in suis theophaniis incipit apparere ex occultissimis naturae suae sinibus volens emergere in quibus est sibi ipsa incognita, hoc est, in nullo se cognoscit quia infinita est et supernaturalis et superessentialis [...] descendens vero in principiis rerum ac veluti seipsam creans, se ipsam in aliquo inchoat nosse*».

out of primordial indistinct chaos. The gloss of Irnerius states that "*cum descendit ex voluntate, forma accepta fit iustitia*," an expression taken from the work of Boethius but perfectly in line with the thought of Eriugena, who was well acquainted with the Boethian doctrine.³⁷ The ideas proper to the Word also contemplate the models of intelligible realities represented by the ideal forms of legal transactions studied by jurists in their common life of relations.

Therefore, from the beginning, it was a common heritage for glossators to think of the legal phenomenon as an understanding of the world through fundamental concepts that found their keystone in God. This shows why the legal epistemic field also represents a window-wide open field in metaphysics, one of the fundamental elements of the divine project that regulates the world.

Glossators adhere in all respects to this metaphysical approach to reflection on equity and certainly consider this entity a formless matter from which all other concepts proper to legal science are substantiated through progressive specifications. On the one hand, the relationship between equity and justice can be modelled in an Augustinian sense as an economy of intra-trinitarian relations. On the other hand, Eriugena's thought becomes the means through which we understand how it is possible to generate equity itself, drafted in precepts starting from a rough and shapeless original matter to regulate complex historical relations. In this way, *aequitas rudis* is posited as an ineffable reality coinciding with God, from which all legal norms are produced in a descending motion of manifestations through specification. The *ius* can become *strictum* precisely because of these specifications that substantiate it in a defined form, while *aequitas* itself seems to be like perfect divine unity before it acquires self-consciousness with creation.

Every manifestation of God's nature is important for new theophanies of the real, and thus *aequitas rudis* and justice are also capable of giving substance to various legal norms. In glossators' analysis, first comes rude equity and then justice, from which positive law springs at a lower level. For them, this process (and it differs from the thought of Eriugena in this conclusion) can only occur thanks to the work of the Christian prince or jurists delegated by him, who constitutes a real bridge between the divine and humans. The Christian emperor is invested in by Grace, and his delegates function as instruments for the announcement of the juridical by divine Providence itself.³⁸ Thus, it is possible to explain how the law already exists in the original divine thought, but to become comprehensible, it must manifest itself in the lower form of *aequitas constituta* which is limited by the limitations of

³⁷ GILSON E., *L'essere e l'essenza*, Milano, Massimo, 1988.

³⁸ KANTOROWICZ E. H., *The King's two Bodies. A Study in medieval political Theology*, Princeton, Princeton University Press, 1957.

language to become closer to man but inevitably moves away from divine perfection.³⁹

The jurists of the French School, known as ultramontanes, operating between the 13th and 14th centuries, detached from the explanations that referred to the imperial role in matters of law. Despite this, they still faced the issue of linking the divine origin of the juridical to the world of men. Thus, they once again found fertile ground in Eriugena's theories, and in their works the metaphor of "rude" equity as the shapeless material that is skilfully shaped by the artist to bring the *ius scriptum* to light frequently recurs⁴⁰.

From the beginning of the thirteenth century, civilian legal doctrine began to conceal the theological matrix of some concepts to progressively emancipate itself from philosophy and theological reflection, which deeply influenced the formation of new paradigms and the creation of a scientific method. Authors such as Giovanni Bassiano, Accursius and Azo claimed the role of a proper form of autonomous philosophical knowledge for *iurisprudencia*, and it is no coincidence that the affirmations that everything could be found in the Justinian corpus became increasingly frequent⁴¹.

At this stage, the legal phenomenon began the translation of the meaning of concepts originally of a clear theological matrix that gradually led to the secularisation of the discourse around the law.⁴² However, the legacy of theology was irreversible and profoundly influenced the theoretical ideas of both civilians and canonists.⁴³ When Accursius put his hand on the texts of his predecessors to

³⁹ ROTA A., *La concezione irneriana dell'equitas*, in *Rivista internazionale di filosofia del diritto*, 26, 1949, p. 241 ss.; CALASSO F., *Medio Evo del diritto. I. Le fonti*, Milano, Giuffrè, 1954, p. 477 ss.; KANTOROWICZ E. H., *Studies in the Glossators of the Roman Law*, cit., p. 282 ss.; GROSSI P., *L'ordine giuridico medievale*, Bari, Laterza, 1995, p. 176 ss.

⁴⁰ PIERRE DE BELLEPERCHE, *Lectura Institutionum*, Bologna, Forni, 1972: «*Dicunt doctores, et bene, quanta est differentia inter speciem et remotissimam materia, eadem est hic differenti. Scitis, antequam species formam recipiat, oportet per materiam remotam accipere, que per multas rei alterationes ad formam reducitur. Ita est, eodem modo, antequam rigor iuris esset, semper reperiebatur equitas, verumtamen, quia equitas latebat, plures ideo principes equitatem ad formam reducerunt et ad formam elimatam per iuris consultos et per principes et eius proceres et istud, tamquam bonum et equum, factum est lex*»; CINO DA PISTOIA, *In Codicem et Digestum Vetus Commentaria*, Frankfurt am Main, Vico, 2007: «*tanta est enim differentia inter ius et equitatem quanta est inter cyphum argenteum et materiam argenteam. Equitas enim latebat in suis occultis finibus et propter eliminationes et disputationes prudentium eliminatur et reducitur in speciem iuris [...] sicut et materia argenti trahitur de minera et purgatur et eliminatur antequam specificetur. Deinde fit species aut cyphi aut alterius vasis* ».

⁴¹ ACCURSIUS, *Glossa Magna*, Augustae Taurinorum, ex Officina Erasmiana, 1969 : « *sed nunquid secundum hoc oportet, quod quicumque vult iuris prudens vel iurisconsultus esse, debet theologiam legere ? Respondeo, non. Nam omnia in corpore iuris inveniuntur, ut C. de summa trinita et fide catholica et de sacrosan. eccle. et de episc. et cleri. (C. 1.1.2,3) et in auth. in multis titulis ubi de divinis tractatur* ».

⁴² DE LAGARDE G., *Alle origini dello spirito laico. I. Bilancio del XIII secolo*, Brescia, Morcelliana, 1961, p. 203 ss.; PARADISI B., *Diritto canonico e tendenze di scuola nei glossatori da Irnerio fino ad Accursio*, in *Studi medievali*, 6, 2, 1965, p. 155 ss.

⁴³ GARANCINI G., *Diritto naturale e storicità del diritto. La riflessione medievale sul diritto naturale. Ricerche di storia del diritto. I. Alcuni presupposti teorici*, Milano, Giuffrè, 1981, p. 110 ss.

draw up the definitive Gloss to the Justinian corpus, although he looked with distrust in the legacy of his predecessors, he could not conduct his reflections by eliminating their legacy and therefore preferred to correct it in light of the new theological acquisitions that had been developing in the meantime. Thus, he adopted the equation between God and *natura naturans*, finally separating what is prior to creation and the creation itself, the ideas present in the divine mind, and their contingent realisation.⁴⁴

2.4 Theorising *aequitas*: the elaboration of “*aequitas canonica*”

The medieval notion of *aequitas* harmonised various sources of influence that came to meet during the first centuries of the second millennium. The above demonstrates how the Roman notion of *aequitas* was reconceptualised by glossators through the lenses of Christian philosophy and theology. Now, the aim is to demonstrate the enrichment of the meaning of *aequitas* delineated by medieval canonists using Christian concepts of *caritas* and *miser cordia*. Through this process, a new paradigm was created, which would become, with the formation of the *ius commune*, the basis on which different civil-law countries eventually developed their own ideas on the nature and role of equity.

The flourishing of Christian theology and philosophy, the rediscovery of the Digest, and the emergence of glossators represented the intellectual background for the development of classical canon law starting from Gratian's compilation of the “*Decretum*” and served as the backdrop against which medieval canonists interpreted the idea of *aequitas canonica*.

Medieval canonists first addressed the relationship between *aequitas* and natural law. In dealing with natural law, canonists cannot avoid taking their starting point from the definition in the Justinian text, which reports a fragment of Ulpian⁴⁵ that is well known by glossators. However, they prefer to refer to biblical texts and the writings of the Church Fathers rather than indulging in broader legal-theological reflections and disputes to substantiate their positions.

This approach was also due to the choice made by the Gratian text in defining what natural law comprises. He limits himself to recall the *auctoritas* represented by the Mosaic law and the Gospel, affirming that “*ius naturale est quod in lege et evangelio continetur, quo quisque iubetur alii facere, quod sibi vult fieri et prohibetur alii inferre,*

⁴⁴ TIERNEY B., *Natura id est Deus: a case of juristic pantheism?*, in *Journal of the History of Ideas*, 24, 1963, p. 307 ss.

⁴⁵ D. 1.1.1.2 «*ius naturale est quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam, istius iuris peritia censeris*».

quod sibi nolit fieri”⁴⁶. When Gratian must describe the origin of the divine commandments that have been transfused into the sacred texts, he takes up only the patristic and Augustinian tradition that wants them to be a manifestation of the divine will itself and expunges any reference to *ratio*, the ordering rationality of creation that instead constitutes a fundamental element in the glossators' reflection on the concept of natural law.

The first Christian thinker to arrive at an expressly original equivalence between *ius naturale* and *ratio* was Peter Abelard, acknowledged as having theorised it in his “*Dialogus inter Philosophum, Iudaeum et Christianum*”.⁴⁷ Overall, however, first decretists who confronted Gratian's text, particularly those with an Italian background, seemed to show less theoretical thrust than that revealed by contemporary glossators and, in part, by canonists from beyond the Alps. The canonist reflection that followed Gratian and first decretists overcame rigid voluntarism and, through abelardian insights, accepted the point of arrival already reached by glossators, who recognise the rational substance of *ius naturale*. However, the attention of great canonists, such as Paucapalea and Huguccio, never rose to investigating the most pregnant metaphysical aspects of this issue, relying on the theoretical strength of the acquisition of the Christian tradition.

This approach, still tied to the stylistic features of monastic schools rather than being open to the innovations of contemporary theological schools, prevented more in-depth theoretical reflections. Contrary to what one might expect, the glossators were more influenced by nascent theological rationalism and the possibilities of Platonic metaphysics on this topic.

Despite a jungle of different opinions on the meaning to be attributed to the concept of natural law, which often boils down to a sterile listing of uncoordinated definitions, canonists eventually arrived at the development of a hierarchy within this notion, ranging from the movement of inanimate nature and animal instinctiveness to human rationality and the salvific plan drawn up by God for his creatures. In this way, they definitively sanctioned the subordination of all other customary human legislation to natural divine law, which becomes the yardstick of evaluation for the rationality of all positive legislation.

The most satisfactory syntheses of the debates of the canon law doctrine on the distinctions inside natural law are found only in the middle of the thirteenth

⁴⁶ D. 1. pr.

⁴⁷ PIETRO ABELARDO, *Dialogus inter Philosophum, Iudaeum et Christianum*, in P.L. 178, col. 1656BC: «oportet autem in his quae ad iustitiam pertinet, non solum naturalis, verum etiam positivae iustitiae tramitem non exercendi. Ius quippe aliud naturale, aliud positivum dicitur. Naturale quidem ius est quod opere complendum esse ipsa quae omnibus naturaliter inest ratio, persuadet, et idcirco apud omnes permanet, ut Deum colere, parentes amare, perversos punire, et quorumcunque observantia omnibus est necessaria, ut nulla unquam sine illis merita sufficiant».

century in the works of William of Auxerre and William Vasco, which sketch a complete picture that inextricably links human experience and divine reality.⁴⁸ At this stage of reflection, natural law can be distinguished into three different types, whereby next to the *universalissimum*, which is found in all things and corresponds to the Platonic natural justice described in the "*Timaeus*", there is the *universalius* one, dictated to all animal beings and which corresponds to the conception of Ulpian, and the *speciale* one, characteristic only of human rationality.

This different understanding by canonists of what is being understood by natural law obviously means that it also changes the definition of what the content of the notion of *aequitas* is. Reflections on the content of *aequitas* were addressed by Ivo of Chartres before Gratian, Albertus Magnus, and Thomas Aquinas. He cannot define equity but can show many of the factors that are subsequently considered in defining the concept of *aequitas canonica*. Thus, he frames the issue as surrounding its nature: he emphasises the contrast between *rigor* and *indulgentia*, as well as between *iudicium* and *misericordia*.⁴⁹

Several chapters of Gratian's "*Decretum*", which was written in 1140, address the issue of *aequitas*. Gratian cites old scholars, such as St. Isidore of Seville and his illustration of the two scales⁵⁰ and asserts that no one is required to follow a judgment if it is unjust.⁵¹ From that moment on, *aequitas* is contrasted with *rigor* and *ius strictum* by first decretists, and the distinction between *aequitas* and *misericordia* becomes even more hazy because of the canonical opposition to *rigor* in favour of the more religious concept of *misericordia*.⁵² First decretists immediately identified *naturalis aequitas* (or *iustitia*) with *ius* referred to by the Roman jurist Ulpian, and considered it to be the immanent and necessary law that governs the existence of all creatures.

Cardinal Hostiensis was active in the thirteenth century, when the classical canon law was already in effect. Despite not being novel, his concept of *aequitas* became the most popular in the late Middle Ages. He maintains that *aequitas* is derived from natural law and that it supersedes both the *rigor canonicus* and *ius strictum*. Moreover, he describes *aequitas* as justice tempered by the sweetness of mercy, something that the judge must always remember.⁵³ The first corollary of this reflection is that *aequitas* is described in much the same way as the *aequalitas* of the Chartres School, that is, as the highest idea of all that presides over both the

⁴⁸ FASSO' G., *La legge della ragione*, Bologna, Giuffrè, 1964.

⁴⁹ ROLKER C., *Canon Law and the Letters of Ivo of Chartres*, Cambridge, Cambridge University Press, 2014.

⁵⁰ D.45 C.10

⁵¹ C.11 C.90

⁵² CARON P., *Aequitas romana, misericordia patristica ed epicheia aristotelica*, cit.

⁵³ GALLAGHER C., *Canon law and the Christian Community: the role of law in the Church according to the Summa Aurea of Cardinal Hostiensis*, Roma, Università Gregoriana, 1978.

foundation of things and the maintenance of relations between them. The second corollary is that custom, which is recognised as manifesting man's natural tendencies, derives the criterion for its own validity from its possible *recta ratio*, that is, conformity to the truth in Christian revelation.⁵⁴

The notion of *misericordia*, which the canonists inherited from patristic works, can now help clarify the content provided by canonists to *aequitas*. Through the concept of *misericordia*, they could set aside or mitigate the severity of certain texts that called for more stringent regulations or punishments, considering other, more lenient declarations.

Several *Summae* discuss *aequitas* in opposition to *ius scriptum* and show the influence of Roman law sources throughout the twelfth century, as the study of Roman law acquired importance. In the first moment, this opposition was underdeveloped, and it is unclear what *Summae* made of the distinction between *aequitas* and *misericordia*. However, by the end of the twelfth century, canonists had become familiar with the conflict between *aequitas* and *rigor*.

Most scholars agree that Tornacensis was the first canonist to identify *misericordia* with *aequitas*⁵⁵ and several canonists in the thirteenth century continued to associate *aequitas* with the concept of *misericordia*, which was strongly linked with atonement and Christian sympathy. Teutonicus' gloss on Gratian's "*Decretum*" clarifies that the legists employed Roman law materials in a comparable context, and that these sources impacted how *misericordia* and *aequitas* were assimilated. Teutonicus uses the *lex Placuit* (C.3.1.8) which states that *aequitas* should take precedence over *rigor* to prescribe that "*potius debet iudex sequi misericordiam quam rigore*".⁵⁶

Finally, *aequitas* was described by Hostiensis as "*iustitia dulcore misericordiae temperata and motus rationabilis regens sententiam et rigorem*" in the mid-thirteenth century. Later, canonists, legists, and moral theologians all found great favour with this definition of *aequitas*, which settled canonists' contention on the connection between *aequitas* and *misericordia*. In this regard, *aequitas* of canonists developed a special connection with the ideas of moderation and relaxation of the harshness of rules in the name of Christian commiseration. Even if it was indistinguishable from that of legists in terms of its operation, as opposed to *rigor*, *aequitas canonica* was born and already vital.

⁵⁴ GROSSI P., *L'ordine giuridico medievale*, cit. ; MICHAUD-QUANTIN P., *Etudes sur le vocabulaire philosophique du Moyen Age*, Roma, Edizioni dell'Ateneo, 1970.

⁵⁵ LANDAU P., "Aequitas," in *Corpus Iuris Canonici*, 20, *Syracuse Journal of International Law and Commerce*, 1994, p. 95.; CONKLIN G., *Stephen of Tournai and the Development of Aequitas Canonica*, in *Proceedings of the Eighth International Congress of Medieval Canon Law*, 1988, p. 380, n. 19.

⁵⁶ See the ordinary gloss ad '*causae*,' C. 1 q.7 c.17 in *Corpus Iuris Canonici*, vol. 2 (1582), col. 802.

3. *The theological-juridical paradigm of “conscience” at the birth of common law tradition*

3.1. *Penetrations routes of canonical doctrines: the birth of ecclesiastical courts in England*

Before the Norman conquest, although the Saxon Church in Saxon England paid homage to and obeyed Rome, control over the canons remained in the hands of its own customs. To resolve conflicts between the Church and secular power, laypeople and ecclesiastics collaborated closely. It was traditional for the king's “witan”, an aristocratic assembly made up of the great and wise of the realm, to confirm that the legislation passed by Saxon provincial councils and members of the clergy were present in both the king's council and the courts of the various shires.⁵⁷

After the Norman conquest in 1066, when law-making and decision-making were concentrated in the Royal Court, common law started to develop. It is likely that the King's Court possessed much discretionary power in its early years. But once a judgment was made, it became a precedent, and over time, the “rigour of the law” emerged. Since the common law was governed when making choices for the first time with no precedent, some authors contend that the concept of “equity” in a broad sense must have had some impact on the common law from the beginning⁵⁸. Indeed, before the Battle of Hastings, the Church had already been firmly entrenched in the British Isles for several centuries, having a tremendous impact on all facets of culture as well as legislation. Moreover, as demonstrated above, in early medieval times, the Christian Church was the only institution that considered the concept of *aequitas*. Thus, we must consider that for five centuries, from William the First's conquest to Henry the Eighth's “Act of Supremacy”, England was a kingdom that clearly belonged to the Christian world and consequently came under the Papacy to varying degrees at various points in its history. Under this set of conditions, the total absence of legal-theological Christian influence would be surprising.

The first Norman king, William I, wanted to create a feudal country that was powerful, highly centralised, and where the crown held absolute control. Consequently, the well-established Christian Church within Saxon society hampered William's objectives. To respond to new needs and change power relations within the kingdom, a novel approach was established with the Roman

⁵⁷ KEETON G. W., *The Norman Conquest and the Common Law*, Benn, 1966; DAVIES W. and FOURACRE P. (eds), *The Settlement of Disputes in Early Medieval Europe*, Cambridge, Cambridge University Press, 1986, p. 215.

⁵⁸ MOSER J., *The Secularization of Equity*, in *Capital University Law Review*, 26 1997, pp. 483, 487; TUDSBERRY F., *Equity and the Common Law*, in *Law Quarterly Review*, 29, 1913, pp. 154, 156.

Church, and a new type of relationship was promoted between bishops and laypeople. Following 1066, William the Conqueror strengthened the Church internally, while limiting its political influence to ensure the independence of the new monarchy. To accomplish this, he strengthened the authority of ecclesiastical courts while forbidding bishops from interfering with the administration of justice in secular affairs.

From that moment, ecclesiastical courts represented the first established avenue for canon law to influence English law. Even though canon law was used by English ecclesiastical tribunals up to the sixteenth century, the situation did not change significantly following the schism brought on by Henry VIII. According to William Holdsworth, the monarch succeeded the pope as the source of the ecclesiastical courts' power, but canon law was enforced in the same way. The same was true of procedural law, which remained canonical, and this was the case with substantive law.⁵⁹ The reason for this, according to Langdell, is that since the same people could not simultaneously practise law in both legal sectors (common law and ecclesiastical law), magistrates and advocates in ecclesiastical courts were schooled in their own system and were scarcely impacted by common law.⁶⁰

Because of William I's plan, the bishops and archdeacons could not participate in the shire courts' adjudicative process or present issues involving ecclesiastical affairs to secular courts for resolution in accordance with temporal laws. The bishops and archdeacons were forced to hold their own Christian courts, where the clergymen themselves served as judges, to hear about both criminal and civil issues involving ecclesiastical matters. Unlike shire courts, which were governed by English customary law, the new ecclesiastic courts were governed by canon law. However, since William I's division of the legal system into Christian and temporal courts, it was customary for ecclesiastical courts to also hear cases brought by laymen under a rule known as "benefit of clergy". Initially, most people believed that because the Church was autonomous, its ecclesiastical courts rendered judgments fairer than the royal courts. Thus, to overcome this issue of competition, starting from the reign of Edward I (1239-1307), the King's Bench was given the authority to exert jurisdiction over ecclesiastical courts using the "writ of prohibition" that gave anyone sued in a Christian court over a secular problem the opportunity to challenge canon jurisdiction.

⁵⁹ See HOLDSWORTH W.S., *The Ecclesiastical Courts and their Jurisdiction*, in *The Association of American Law Schools, Select Essays on Anglo-American Legal Tradition*, vol. 2, Frankfurt, 1968, p. 298; HELMHOLZ R.H., *Canon Law and English Common Law*, (Selden Society Lecture), London, 1983.

⁶⁰ LANGDELL W.S., *The Development of Equity Pleading form Canon Law*, in *Select Essays on Anglo-American Legal Tradition*, vol. 2, pp. 777-778.

During these first centuries, there is little doubt that royal common law courts would have understood that laymen should no longer need to seek judgment within ecclesiastical courts if the same standards of fairness were applied by secular courts, as centralising the English court system was one of the major goals of the kings. Achieving this goal would have significantly diminished the influence of the Church. Thus, a jurisdictional system was developed to ensure that the Church progressively lost control over fairness and the distinctive qualities of the equitable ideals.⁶¹ By adopting these, royal courts grew increasingly and endangered the role of ecclesiastical courts by progressively substituting them.

3.2 Penetrations routes of canonical doctrines: the legal-theological influence on Chancery

The second avenue via which canon law made its impact influenced English law was the evolution of Chancery and the development of its jurisdictional powers. The analysis conducted thus far shows that ecclesiastical judges in medieval England should have some attitude towards considering *aequitas* when rendering rulings in ecclesiastical issues. However, the crucial element is that the same ecclesiastic personnel also served in the Chancery, and so there was no reluctance to consider them suitable to exercise such discretionary powers. It is well known that writs were the crucial procedural component of common law, and the king traditionally granted them through the Chancellor.⁶² It is conceivable that through these paths, they eventually came to utilise equitable ideas inside the king's bureaucratic apparatus if they were urged to apply the equitable standards used by the ecclesiastical courts.⁶³ Through the expertise and background of the chancellors, the value of *aequitas* might have been appreciated as a significant tool that secular courts may silently utilise to administer fairness in cases brought before them.

This hypothesis is also supported by other factual data. First, the monk Lanfranc of Pavia, who was well versed in Roman and canon law, served as William I's principal legislative advisor. Second, the first two systematic treatises on common law (composed, respectively, in the twelfth and thirteenth centuries) were written by men with some Romanistic training and thus the canonical implications that went along with it at the time. The reference is to Ranulf Glanvill and Henry Bracton, the

⁶¹ STUBBS W., *Seventeen Lectures on the Study of Medieval and Modern History and Kindred Subjects: Delivered at Oxford Under Statutory Obligation in the Years 1867-1884* (reprint 1993), Clarendon Press, 1887, p. 348.

⁶² MAITLAND F. W., *The forms of Action at Common Law* (reprint), Cambridge, Cambridge University Press, 1954.

⁶³ HOGUE A. R., *Origins of the Common Law*, Liberty Fund, 1986, p. 167.

latter of whom also gave canon law lectures at Oxford University for a while, in accordance with Gratian's “*Decretum*”.

In this way, the Chancery, which was initially tasked with writing royal charters and letters, quickly emerged as a legal entity in and of itself. As will be seen, the Chancery adopted the principles of equity to establish itself as the only venue in the common law court system through which equitable remedies could be granted. However, the method by which Chancery became an effective court of adjudication is unusual. Even though every king since William I had appointed a chancellor to guard the king's seal, the chancellor's responsibilities grew over time to make him the head of the king's entire secretariat. As a result, the chancellor and his clerks were later given the title of Chancery. Nevertheless, because of the nature of the job, the chancellor and his clerks were typically clerics and in charge of maintaining the state's records and creating the king's royal writs.

The real turning point was in 1285, when the Statute of Westminster II was enacted. The Chancery clerks were given the freedom to make their own decisions regarding whether to issue a plaintiff's writ, delay the case until parliament's next session, or craft a new writ. A careful examination of the records kept before the act reveals that the Chancery clerks were primarily in charge of managing court petitions. Giving the Chancery clerks discretion in legal questions is therefore significant. Indeed, some legal historians have concluded that it was through such discretionary power that equitable practice was institutionalised inside the king's courts. When a plaintiff had no legal options available to them and the writ system of common law became so inflexible that it was difficult to dispense justice in several cases, it was vital to find remedial actions for these positions. They could only be discovered outside of common law thanks to a judicial decision made by the Chancellor.⁶⁴

Since the monarch was the source of justice for the kingdom, he may be asked to exercise his prerogative of mercy on behalf of someone who could not seek justice through regular courts. The Chancellor, a member of the King's Council and the one who issued writs, represented the king in the exercise of this power. In fact, the Chancellor was also known as the “king's conscience” and decided issues only based on equity, free from any restraint from common law⁶⁵. Thus, what is of most interest here becomes the jurisdiction of the Court of Chancery.

It developed from the King's Council's authority to manage bills of complaint. In the second part of the fourteenth century, most petitioners started to send their petitions directly to the Chancellor. Once the writ categories were closed, the sole

⁶⁴ PEARCE R.R., *A History of the Inns of Court and Chancery*, R. Bentley, 1848.

⁶⁵ RAVA T., *Un'esperienza di interpretazione comparativa: origini e struttura delle fonti nella 'common law' inglese*, in *Rivista di Diritto Civile*, 1974, p. 215.

general remedy was to submit the bill to the Parliament, hoping that legislation was passed. However, the Chancellor might oversee the situation *ad hoc* and issue a decree granting a specific remedy that only bound the parties to the lawsuit. Such orders were initially issued on the council. Initial complaints were made to the Royal Council on behalf of the King and afterwards by the Court, but as time went on, the Lord Chancellors, who had canon law training, became the final arbiters of "petitions for grace."⁶⁶ and in the fifteenth century the Chancellor started making orders in his own name.⁶⁷

Thus, progressively, the Lord Chancellor's authority to consider complaints from persons for whom common law had failed rose. The assumption of the research claims that the powers of the Chancellor did not create equity, but that the decisions of the Chancery led to equity guided by a new paradigm. The Chancellor decided on disputes using only the concept of *aequitas* as a reflection of the type of justice that must be applied to each unique situation.

The Lord Chancellors' background distinguished them from common law judges. Nearly all Lord Chancellors in medieval times were clergymen, even senior bishops, who were required to have canon law training, and so knew the canonical conception of *aequitas* very well.⁶⁸ Only a few laypeople had been named Chancellor until the time of the Chancellor Wolsey, whereas roughly 160 Churchmen had held that position. As noted by Scrutton, all of England's Chancellors from 1380 to 1488 were clergymen, and a string of lay Chancellors with common law training were chosen only from 1530 with Thomas More.⁶⁹ When we consider that the ecclesiastics' overall dominance in that position spanned the period between "the creation of equity" and its consolidation as a separate jurisdiction in the Court of Chancery, their influence becomes even more substantial. These were the years that set the foundation for the new system, one that would be unaffected by subsequent events⁷⁰.

In view of these historical elements, there is no doubt about the impact of Christian theology and canon law on the birth of the notion of English equity.⁷¹ Although there was no direct transfer of the ecclesiastical courts' substantive and procedural

⁶⁶ HASKETT T.S., *The Medieval English Court of Chancery*, in *Law and History Review*, 14, 1996, p. 245.

⁶⁷ BAKER J.H., *An Introduction to English Legal History*, 3d ed., London, 1990, p. 117. For a reassessment of the Chancellor's figure through the analysis of its relationship with the King, see COSTANTINI C., *Equity Breaking Out: Politics as Justice*, in *Polemos*, 1, 2008, pp- 9-20.

⁶⁸ CALASSO F., *Medio Evo del Diritto*, cit., p. 326; FEDELE P., *L'equità. canonica*, in *Discorsi sul Diritto canonico*, Roma, 1973, pp. 69 ff.

⁶⁹ SCRUTTON T.E., *Roman Law Influence in Chancery, Church Courts. Admiralty and Law Merchant*, in *Select Essays on Anglo-American Legal Tradition*, vol. 1, p. 228.

⁷⁰ HOLDSWORTH W.S., *The Relation of the Equity administered by the Common Law Judges to the Equity administered by the Chancellor*, in *Yale Law Journal*, 1, 1916-17; ADAMS, *Continuity of English Equity*, in *Yale Law Journal*, 26, 1916-17, p. 550.

⁷¹ COSTANTINI C., *Millenaristic Equity. Theological Order and Legal Faith*, in *Polemos*, 10(2) 2016, pp. 329-355.

rules to the Chancery, there were some striking parallels. The bishop chancellors did not need to invent principles guiding their work in court.

Some authors have expressed doubts regarding the influence of canon law and claim that there is still some debate on the influence of canon law relative to Jewish and Roman influences⁷²; however, this influence is unquestionable. The demonstration is provided by the rise of a new and incredibly significant legal-theological paradigm. Considering the medieval connection between the Court of Chancery and the religious element, theology and canon law can help us better understand the original paradigm of "conscience" that appeared in that moment.

3.3. *Theorising English equity: the avenues for creation of a new paradigm*

The definition of "conscience" was a clerical invention⁷³ and represents the new legal-theological paradigm through which canonical doctrines penetrated the English legal world. The medieval petitions themselves referred to the Chancellor's religiosity. In addition, the pleas frequently mentioned God and Jesus. Hence, it is highly likely that chancellors brought into court their education and training in canon law and drew their inspiration from this area of knowledge. This theological-religious foundation of English equity aids in illuminating both its substantive and procedural standards.

Unlike the common law form of actions, which only seek to correct a legal wrong by (mainly) compensating financially, the jurisdiction of Chancery focuses on the more general moral concerns of right and evil. It aims to improve the wrongdoer's character and embody virtue ethics. Of course, the victim of the injustice receives compensation, but the goal of equitable remedies is to calm the guilty party's troubled conscience⁷⁴. When attempting to grasp equitable rights and remedies, misunderstandings result from failing to recognise an essential point. They do not aim to compensate for the harm done. They aim to justify the perpetrator ethically. According to Simpson, in medieval equity, the term conscience "*connoted what we now call the moral law as it applied to particular individuals for the avoidance of peril to the soul through mortal sin.*"⁷⁵ A crucial factor in this is that the bishops who served as medieval chancellors were interested in the defendant's soul since they were priests. One cannot ignore the fact that the chancellors' mindset and background influenced the development of English equity. Therefore, it is possible to affirm that

⁷² COING H., *English Equity and the Denunciatio Evangelica of the Canon Law*, in *Law Quarterly Review*, 71, 1955, pp. 223, 238; KAGAN K.K., *Three Great Systems of Jurisprudence*, Stevens & Sons, 1955, p. 33.

⁷³ SPENCE G., *The Equitable Jurisdiction of the Court of Chancery*, vol 1, Lea and Blanchard, 1846, p. 410.

⁷⁴ See *Norton v Rely* (1764) 2 Eden 286, 288; 28 ER 908, 909.

⁷⁵ SIMPSON A.W.B., *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, Oxford University Press, 1975, p. 398.

canon law impacted medieval chancellors because they were ecclesiastics, but it is also necessary to specify through which channels this influence was possible. Although religious connections are frequently mentioned, the means through which this happened have rarely been scrutinised.

The idea of *aequitas canonica*, which unifies the medieval world of theology and is entrenched in the entire judicial order, comprising both legal regulations and doctrinal expositions, is the most direct inspiration for the essence of English equity. The structure of *aequitas canonica* was Roman, but it had a canonical soul. Therefore, the chancellors looked to the comparable concept of *aequitas*, which unquestionably permeated all canon law, to orient their jurisdictional activity rather than to the specifics of ecclesiastical law. Hazeltine and Maitland have already anticipated that English equity could build on canonical principles and develop unique traits adapted to the social reality of England.⁷⁶

The first element of their legal-theological background that influenced chancellors can be deduced from the fact that they were confessors. Therefore, they were perfectly familiar with the *summae confessorum*, which were genuine manuals for confessors, providing concrete rules and guidance in deciding cases in accordance with conscience. It is highly likely that they would turn to well-known sources on the subject if they needed help in deciding on cases submitted to their attention.

The second element that influenced chancellors was the widespread belief that canon law was equitable. It was known variously as "the mother of exceptions", "the epitome of the law of love", and "the mother of justice", according to late medieval canonists and it was clear that *aequitas canonica* did not involve the judge's own subjective notion of what is equitable but was conceived as being *informata a jure*, based on stated principles.⁷⁷

The third element of influence on chancellors belonging to their canonical background is procedural and can be derived from analysing the similarities between Chancery practice and the *denunciatio evangelica* process. It offers a more detailed examination of the potential impact of canon law, both procedural and substantive, on English equity. A passage of the New Testament (Matthew 18:15–17), which describes a process for Christians whose "brother" insulted them, is the biblical basis for the *denunciatio evangelica*. The evangelical "procedure" is: first, speak privately to the offender. If this does not avail him, speak to him in the presence of one or two witnesses. If he still does not listen to you, you may complain to the Church. By bringing a person's crimes to the attention of the ecclesiastical

⁷⁶ MARTÍNEZ-TORRÓN J., *Comments on the Influence of Canon Law on the Common Law Legal Tradition*, in *Revue générale de droit*, 20 (1), 1989, pp. 5–30.

⁷⁷ LEFEBVRE C., *Natural Equity and Canonical Equity*, in *Natural Law Forum*, 8, 1963, pp. 122–36.

authorities so that they may take measures to reform the sinner and save his soul, *denunciatio* is involved in the third stage.

The Church's judgment was a command to the culprit to atone to sin in its most basic form. However, occasionally overcoming sin required more than just repentance and reformation, and it also frequently required financial compensation. The purely repentance operation acquired a legal character at this point, as previously stated. Instead of the sin's inherent characteristics, what separates concerns of justiciable conscience from problems of merely private conscience may be the influence that the sin has on other persons that can be made right. The issue at hand is whether the defendant committed a sin which had to be decided under the moral teaching of the Church, based on the *lex divina* and the *lex naturalis*.

One aspect is common to *summae confessorum*, the equitable nature of canon law, and *denunciation evangelica*: the idea of attentively evaluating facts, particularly what a person knows or can be recalled. For example, the confessor was expected to enquire distinctly and methodically into the alleged fault.⁷⁸ The practice of Chancery had a similar concept and was conducted *secundum conscientiam*, with a thorough investigation of the facts and a focus on testing the parties' consciences (bound by oaths) to help them accept what they internally know to be the truth. Although going *ad conscientiam* required a more thorough investigation of the facts, we must be careful not to imply that this investigation was unfettered. This did not imply that there were no restrictions based on proving or inferring facts. The distinction between public and private conscience made by Lord Nottingham much later shows that, even though the Chancellor's conscience may be guided by more liberal means, those means may not include his own purely personal knowledge or imaginations. Therefore, in fifteenth-century Chancery, the request that the defendant be examined was a common element of petitions to the Chancellor, and a claimant may satisfy his conscience by telling the truth and then by acting in a way that was almost obvious to be proper.

3.3 Theorising English equity: the paradigm of "conscience" as a means of introducing Christian doctrines in England.

The canon law itself gave rise to the legal-theological new paradigm of "conscience". Therefore, it is not a leap to suggest that this new English paradigm takes shape and contains the ideas held by theologians of the Middle Ages. There

⁷⁸ TENTLER T., *The Summa for Confessors as an Instrument of Social Control*, in TRINKHAUS C. and OBERMAN H.A. (eds), *The Pursuit of Holiness in Late Medieval and Renaissance Religion*, Leiden, 1974, pp. 103–25.

was much philosophical and theological thought about conscience during the medieval age.⁷⁹ Moreover, the entire society and cultural environment of the Middle Ages were familiar with the unbiased concept of conscience⁸⁰, and so, whether intentionally or not, undoubtedly guided the Chancellor's legal thinking.

The claim is that ecclesiastical chancellors developed English equity through the scholastic concept of “conscience”. The rational mind's role in early Christian theology may have been the most significant when it came to conscience. In various respects, it serves as a direct conduit to God. It takes the voice of God and conscience to prevent people from stumbling.

In the early Christian tradition, St. Paul defined conscience as “*human capacity to know and choose the good, the mind thinking morally and the will acting responsibly.*” Most importantly, he accentuated that conscience was not “*some special faculty different from the rest of human thinking and choosing nor is it some secret wisdom given only to the few.*”⁸¹ Evidently, it was already considered crucial for the logical mind to function.

Augustine of Hippo was the most influential theologian until Scholasticism, and his understanding of conscience was centred on a person's relationship with God. According to Augustine, man can find God through introspection and because conscience is “*conscience before God,*” Augustine believed it to be “*the most reliable witness*” to the “*integrity and truthfulness*” of our deeds⁸². Finally, according to a theory advanced for the first time by Jerome⁸³, “conscience” (conscience in the wide sense) was split into two separate processes known as “synderesis” and “conscience” (in the restricted sense).

Around 1235, Philip the Chancellor penned the first treatise on conscience,⁸⁴ which laid the foundation for subsequent works on this topic. Inspired by Jerome, he created a line between synderesis, which is aware of universal moral principles, and conscience, which puts these principles into practice through specific actions. After his work, St. Thomas Aquinas adopted this distinction, which broadly summarises the scholastic view of conscience⁸⁵. According to scholastics, the process of moral

⁷⁹ POTTS T.C., “Conscience” in KRETZMANN N., KENNY A. and PINBORG J. (eds.), *The Cambridge History of Later Medieval Philosophy*, Cambridge, 1982, pp. 687–704.

⁸⁰ HASKETT T.S., *Conscience, Justice, and Authority in the Late-Medieval English Court of Chancery*, in MUSSON A. (ed.), *Expectations of the Law in the Middle Ages*, The Boydell Press, 2001, p. 159.

⁸¹ See Romans 2:15-16 and 2 Corinthians 4:2.

⁸² AUGUSTINE OF HIPPO, *The Confessions of St Augustine* (Rev E Pusey tr, John Henry Parker 1838) 182.

⁸³ St. Jerome, *Commentary on Ezekiel*, 1.7.

⁸⁴ PHILIP THE CHANCELLOR, *Summa de Bono*; POTTS T., *Conscience in Medieval Philosophy*, Cambridge University Press, 1980, p. 12.

⁸⁵ THOMAS AQUINAS, *Summa Theologica*, 1a. lxxix 12

reasoning is conscience, and *synderesis* and *conscientia* are fundamental elements used by all scholastics to define conscience itself.⁸⁶

In his writings, Aquinas specifically discusses innate moral principles that we can understand only through reason. He established a more direct line of thought when separating *synderesis* from conscience: *synderesis* contains moral standards. Conscience applies these rules to specific circumstances. *Synderesis*, a repository of premises and precepts, and *conscientia*, an active witness which applies those principles to specific instances, engage in a syllogistic conversation to form the "scholastic conscience". Moral judgment is based on conscience (in the wide sense) and the duality between *synderesis* and conscience (in the limited sense).

This doctrine adheres to the academic tradition of prioritising reason. Thus, the best way to understand the scholastic conception of conscience is as a component of reason and part of the rational mind. Morality is known by conscience, first by reason, and then additionally taught by outside forces. Scholastics believe that morality is objective or social because reason is something that everyone can share. Everyone is aware of this, and church teaching provides equal assistance to everyone in cultivating their conscience.

In general, the concept of natural law, often referred to as the law of reason, was also connected to moral reasoning. The instrument of reason is used to disclose natural law. The focus of moral reasoning through natural law is on those moral principles that are inherent in all people and can only be understood through reason itself. These principles are supplemented by further learned and more precise rules. This suggests that there is a shared, objective, or social sense of morality among a group of individuals, and the content of this morality can be easily found in the Gospel. The New Testament heralded the tenet of charity, connoting love and compassion for one's fellow human beings, as the realisation of the fraternity of the Prophets of the Old Testament.⁸⁷ Therefore, community and compassion became at the core of Christian conscience. These assumptions made it possible to establish a factual foundation from which one could judge whether someone had acted morally and transform conscience into a practical legal tool.

These theological elements that characterise the notion of conscience were therefore fundamental to the jurisdictional activity of the Lord Chancellors. First, these principles showed how conscience is an objective content in the minds of medieval people. They also offered explanations of the theoretical framework surrounding the new legal paradigm, which was largely accepted and persisted throughout the sixteenth and seventeenth centuries to some extent. In addition,

⁸⁶ EARDLEY P., *Medieval Theories of Conscience*, in ZALTA E.N. (ed.), *Stanford Encyclopaedia of Philosophy*, 2021.

⁸⁷ NEWMAN R., *Equity in Comparative Law*, in *International Comparative Law Quarterly*, 17, 1968, pp. 807, 808.

they justified the circumstance that conscience has normative and fact-apprehending dimensions. Finally, they highlighted that observing pertinent facts is an essential component in the operation of conscience, together with choosing proper norms. The benchmark for conscience became something external to it, which was also approachable. Again, the relevance of this paradigm in the legal dimension is that it makes the law coherent with conscience, which is objective, constant, and unbiased.

The way of reasoning of the Lord Chancellors on legal issues found a solid basis in this new legal-theological paradigm that could provide a method to find new legal solutions. The human ability or inclination that corresponds to the objective of external moral law was identified in *synderesis*. This is what enables people to understand the law. Aquinas claims that because of this, "*the human mind has a natural disposition concerned with the fundamental principles of behaviour, which are the general principles of natural law.*" In contrast, *conscientia* entails the application of knowledge provided by *synderesis* to specific circumstances. It is an act, or an "actualisation", in Aquinas's terminology. *Synderesis* comprises rules (or, more precisely, our understanding of rules), but *conscientia* is concerned with their application (including misapplication).

3.4 Theorising English equity: "conscience" and the rise of equity operational rules

What has been said so far shows that the paradigm of "conscience" comprises factual (minor premise) and normative (major premise) components. Conscience provides both the guiding principle and the relevant circumstances (past, present, or future) that must be considered. This nuanced definition of conscience supports its use in referring to the Chancellor's application of the principle of right as well as the procedure for obtaining facts by requiring a party to recall them or confess, and for requiring that the facts be sufficient to satisfy the conscience of the court.

Synderesis could not be incorrect because it was (usually) considered "a form of knowledge" in medieval times. This leaves three potential points of error: failing to understand the relevant factual context, failing to understand the correct derivative moral precept, and applying the precept incorrectly to the facts. Therefore, it makes sense that any of these potential areas of error could be addressed when the Chancery was engaged in conscience correction.

The Court of Chancery had a "confessional" component because it claimed to be able to learn information that could otherwise only be known by the parties themselves. This was in line with the medieval conception of conscience, which emphasised that a third party, the priest, could influence a person's conscience. However, as we have previously seen, the power of the Chancery ended there if that

was not admitted. The Chancery was more concerned with what the parties understood about external facts than about their own internal dispositions, even when seeking this confessional information.

Although the scholastic notion of conscience cannot be traced in clear terms, its presence can be inferred from the characteristics of judgments rendered by the Court of Chancery. References to the ideas that conscience is an act of reason and that it is something common, objective, and shared by all participants are present and testify that the development of equity did not begin from the opinions of either judges or parties to a dispute⁸⁸.

Conscience was the defining characteristic of medieval Chancery, even more so than in the subsequent era. Consideration should be given to what exactly is meant by "medieval" in this situation. According to Robert Palmer, the Black Death gave the chancellor's court of conscience momentum and allegedly began operating in 1370.⁸⁹ According to J.L. Barton, the first-time conscience was brought up in relation to chancery was in 1391.⁹⁰ Although some variation of the phrase "*for the love of God and in the way of charity*" was widespread throughout the period covered, a brief glance at the cases documented by Baildon reveals that, as the fifteenth century advanced, appeals to conscience increased in frequency. The fifteenth-century Chancery, and the later fifteenth-century Chancery, is the medieval Chancery that we can refer to.⁹¹

Description of an Exchequer case from 1453 under the heading "Conscience" in Nicholas Statham's (d. 1472) "*Abridgment des libres annals*" is a notable exception to the overall lack of evidence on the term in medieval courts.⁹² Sir John Fortescue (1394-1476) famously stated, "*nous ne sum[us] an arguer ley en ce cas mez la conscience,*" and there are at least hints as to the possible concepts that underlie the paradigm of conscience.⁹³ After this statement, Fortescue continues to address conscience in more generic terms. The word "comes from con and scioscis," he claims. Together, they form the phrase "to know with God", which means to be as close to knowing God's will as is humanly possible. This observation is important

⁸⁸ HASKETT T., *Conscience, Justice and Authority*, cit., p. 159.

⁸⁹ PALMER R. C., *English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law*, The University of North Carolina Press, 2001.

⁹⁰ BARTON J.L., *Equity in the Medieval Common Law* in NEWMAN R. A. (ed.), *Equity in the World's Legal Systems*, Brussels, 1973, pp. 139–55, p. 146

⁹¹ See cases cited by KLINCK D.R., *Conscience, Equity and the Court of Chancery in Early Modern England*, London, Routledge, 2016, p. 14.

⁹² *Statham's Abridgment of the Law*, trans. KLINGELSMITH M. C., Boston, Boston Book Company, 1915, pp. 392–4.

⁹³ HEDLUND R., *The Theological Foundations of Equity's Conscience*, in *Oxford Journal of Law & Religion*, 4, 2015, pp. 119-140.

for several reasons, chiefly because it prompts one to use conscience judgments to understand and conduct God's purpose.

This strongly grounds conscience in God's law and implies that the judge of conscience is striving to know as God knows. Fortescue, who was not a priest, added that *"a man can have land by our law, and by conscience he shall be damned..."* to his closing statement. He does not distinguish between the conscience that may condemn a person and the conscience he is using in the case; in other words, he does not seem to consider juridical conscience to differ greatly from confessional conscience.

Therefore, the theological aspect must be considered, at least for this initial phase, to conceptualise conscience as a new legal paradigm. The conscience that was allegedly aroused does not appear to have been particularly that of the litigant or the Chancellor, but the impersonal and objective legal-theological paradigm well-known by clerics. If anything can be inferred from such statements, it is not an individual's subjective sense of right and evil that is at stake. A similar conclusion might be drawn from the identification of conscience with, or even its substitution for, ideas like "law," "reason," and "justice,"⁹⁴ that originally, we have seen also characterised the continental paradigm of *aequitas*.

Sadly, there are few records from the Medieval Chancery Court. Judgments were typically not documented or widely known because they were personal and did not establish a wider precedent. However, certain judgments were recorded in the Year Books, which were annual summaries of Chancery proceedings starting in the fifteenth century, and the notion of scholastic conscience is mentioned in some petitions. The Selden Society's published petitions containing the oldest mention of conscience, which dates from between 1420 and 1422⁹⁵.

Conscience seems to have received little attention before the 1420s, but, as already stated, scholastic conscience was strictly linked to moral judgment and natural law. Natural law itself was referred to as the law of reason because it is where objective morality may be found. Considering this, previous or contemporary references to "right" or "reason" do not suggest something significantly distinct from "conscience."⁹⁶ There is no distinction between claiming that someone acted against "good conscience", "reason", or "what is right" in the theological framework of the Middle Ages in England. Although the same objective moral norm was formerly referred to as God, charity, right, reason, or justice, it does not bear on the overall usage of conscience as a legal theological standard. This is the same

⁹⁴ See cases cited by KLINCK D.R., *Conscience, Equity and the Court of Chancery*, cit., p. 17.

⁹⁵ BAILDON W. P. (ed.), *Select Cases in Chancery A.D. 1364 to 1471*, London, Quaritch, 1896 (Publications of the Selden Society vol. 10), (n 17) Case 121, p. 119.

⁹⁶ BAILDON W. P. (ed.), *Select Cases in Chancery*, cit., (n 17) Case 19, p. 23.

paradigm that is used under different names. According to the petitions, "as conscience demands", "as right demands", and "as reason demands" are the formulas often used, and they refer to the objective Christian morality that could be found in culture and society. It was up to the Lord Chancellor to apply this morality to the facts of the case. This makes it obvious that when the term "conscience" is used, it refers to something objective, which in this case would have been the natural law⁹⁷.

It could also be inferred that requests for conscience-based official juridical interventions were widespread in settings other than chancery trials. In fact, invocations of conscience in Chancery may have merely been examples of the standard format used at that time in all petitions. This does not lessen the value of conscience as a paradigm of justice but may also make it prudent to exercise caution when presuming that Chancery was the only venue where conscience could be applied to the justification for righting wrongs. In fact, juridical conscience in the fourteenth century differed from notions in more modern times and implied what is now known as the moral code, as it related to specific people to prevent danger to the soul from fatal sin.

An analysis of the procedure developed by Chancery to solve cases brought to its attention reinforces this thesis. If we compare St. Germain's dialogues with the *Summa Hostiensis*, it can be assumed that Chancery's procedure was also influenced by a typical canonical procedure, the *imploratio officii iudicis per modum denunciationis*, or, in other words, the *denunciatio iudicialis privata*. Two characteristics of the latter exactly match the chancellor's practice, as opposed to that of common law courts.

First, an *imploratio to the officium iudicis*, which was limited to outlining the unlawful act, served as the first step in the process, while in the common law courts a hearing could not start until the plaintiff had already received a special writ for the case.

Second, a sentence was required to compel the defendant to stop engaging in illegal actions, whereas conventional common law courts acted *in rem* and not *in personam*. The goal of *denunciatio privata* was to stop illicit activity in addition to serving private interests. In this way, it was like the Court of Chancery's role, which went beyond the common law courts' limited role of deciding disputes between parties to either prevention or protection.

In conclusion, grasping the true meaning of the paradigm of conscience requires drawing attention to three elements. First, the Chancellor had a confessional role,

⁹⁷ ROUGHLEY F., *The Development of the Conscience of Equity*, in GLEESON J.T., WATSON J.A. AND HIGGINS R.C.A., *Historical Foundations of Australian Law*, vol. 1, The Federation Press, 2013, p. 158.

and this fact included the likelihood that his practice was influenced by canon law's principles and procedures. Second, the influence exercised by the legal theological paradigm of *aequitas canonica* was developed by canon law and conveyed through the background of Lord Chancellors and clerical staff. Third, theoretical or theological accounts of conscience provided the Chancellor with an unstated framework for understanding this concept and creating original operational rules.

3.5 *The secularisation of the paradigm and the shift from “conscience” to “equity”*

Lord Chancellors Worsley and More represent the last phase of medieval Chancery.⁹⁸ The perception of the role of Chancery and the view of the paradigm of conscience changed, but the operativity of the latter never disappeared.⁹⁹ The conceptual shift was marked by a progressive change in emphasis from the epistemic paradigm of “conscience” to the use of the word “equity” to identify an entire legal mechanism belonging to the system of common law¹⁰⁰. The first author who reconfigured conscience in the form of equity was St. Germain, with his famous work “*Dialogue in English between a Doctor of Divinitie and a Student in the Laws of England*”, which was written just before the English Reformation. This imaginary dialogue between a “doctor” of theology and a “student” of English common law deals with law, equity, the authority of the English courts and its author sought to disprove assertions that canon law was morally superior by demonstrating that “the common law had a parallel and equal relationship with conscience and divine law.”¹⁰¹ Therefore, although this work can be unquestionably considered the first book on modern English equity¹⁰², the treatise contains a long reflection on conscience and ideas about the relationship between conscience and equity, considered equivalent to Aristotle's *epieikeia*, as interpreted by Aquinas and Jean Gerson.

⁹⁸ METZGER F., *The Last Phase of the Medieval Chancery*, in HARDING A. (ed.), *Law-Making and Law-Makers in British History*, London, 1980, pp. 79–89.

⁹⁹ ENDICOTT T.A.O., *The Conscience of the King: Christopher St. German and Thomas More and the Development of English Equity*, in *University of Toronto Faculty Law Review*, 47/2, 1989, pp. 549–70.

¹⁰⁰ See BAKER J.H., *An Introduction to English Legal History*, 4th edn, London, 2002, pp. 105–108; HASKETT T. S., *The Medieval English Court of Chancery*, cit., p. 268.

¹⁰¹ BAKER J., *The Oxford History of the Laws of England, Volume VI: 1483–1558*, Oxford, Oxford University Press, 2003, p. 502; HELMHOLZ R.H., *Christopher St. German and the Law of Custom*, in *The University of Chicago Law Review* 70, no. 1, 2003, pp. 130–131.

¹⁰² BARTON J.L., *Equity in the Medieval Common Law*, cit., p. 154; GUY J.A., *The Development of Equitable Jurisdictions 1450–1550*, in IVES E.W. and MANCHESTER A.H. (eds.), *Law, Litigants, and the Legal Profession*, London, 1983, pp. 80–86, p. 85; VINOGRADOFF P., *Reason and Conscience in Sixteenth-Century Jurisprudence*, in *The Collected Papers of Paul Vinogradoff*, 2 vols., Oxford, 1928 (reprinted London, 1964),

Analysing St. Germain's discussion about conscience, a radical break from medieval ideas does not appear; rather, his considerations remain medieval and canonical.¹⁰³

It is important to emphasise this because it serves as a reminder that St. Germain was responsible for continuing the old paradigm, as he was subsuming it into a new one. He presents conscience under accepted scholarly practice and outlines how equity functions, explaining that it serves as a remedy for flaws in the strict common law system. The meaning he attributes to equity is taken from the traditional definition of *aequitas canonica* stated in *Summa Hostiense*, which has been attributed to a variety of authors, including Juan Andrés and Gulielmus Durantis. This definition reads, "*Aequitas est iustitia pensatis omnibus circumstantiis particularibus dulcore misericordiae temperata.*"¹⁰⁴

It is well-known that Jean de Gerson, also known as "Doctor Christianissimus" and "Doctor Consolatorius," who served as the Chancellor of the University of Paris in the fifteenth century, is the author from whom Saint Germain drew many of his concepts and nearly all his method.¹⁰⁵ Following Gerson, St. Germain affirms that conscience (in a strict sense) is the duality that unites *synderesis* with reason. *Synderesis* commands us to do what is "good",¹⁰⁶ reason informs us of what is "good",¹⁰⁷ and finally conscience performs what is "good".¹⁰⁸ St. Germain emphasises that conscience must always be grounded in some kind of law, so that it can have an objective foundation because it is guided by law. The law of reason, the rule of God, and the law of man are the three types of laws that he identifies as potential grounds for conscience.¹⁰⁹ The following corollaries can be deduced from this tripartition and make up a substantial portion of St. Germain's fundamental thesis. The foundation and compass of conscience are frequently positive human laws, either concurrently with or apart from other laws. Obviously, there are issues that the positive law does not address. This shows that there are some

¹⁰³ DOBBINS S., *Equity: The Court of Conscience or the King's Command, the Dialogues of St German and Hobbes Compared*, in *Journal of Law and Religion*, 9, 1991–2, pp. 126–7; ALLEN C.K., *Law in the Making*, 6th edn, Oxford, 1958, p. 390; DOE N., *Fundamental Authority in Late Medieval English Law*, Cambridge, Cambridge University Press, 1990, p. 134.

¹⁰⁴ *Summa Hostiensis*, Lugduni, 1537, book 5, title. "De dispensationibus", n. 1, fol. 289 r.

¹⁰⁵ VINOGRADOFF P., *Reason and conscience* cit., pp. 196 ss.; De Luca has also demonstrated that Saint Germain's structures are significantly impacted by Angelo Carleto de Clavasio's *Summa angelica de casibus conscientiae* (for example when discussing contractual issues).

¹⁰⁶ ST. GERMAIN C., *St. German's Doctor and Student*, PLUCKNETT T.F.T. and BARTON J.L. (eds.), Selden Society, 1974, 81 (*synderesis*): "a naturall power or motive force of the *rational* soule sette *always* in the highest parte therof / mouynge and sterryngge it to good / & abhorrynge euyl".

¹⁰⁷ ST. GERMAIN C., *St. German's Doctor and Student...cit.*, 85 (reason): "that power of the *rational* soule / that *deliberates* and *dyscerneth* bytwene good and euyl".

¹⁰⁸ ST. GERMAIN C., *St. German's Doctor and Student...*, cit. 89 (conscience). "no thyngge els / ... but an applyngge or an ordering of any scyence [or knowledge] to some partyculer acte of man ..."

¹⁰⁹ ST. GERMAIN C., *St. German's Doctor and Student...cit.*, 111: "conscyence muste be orderyd by that *human lawe* / (as long as it remains in strength and force) in every way as it muste be in the *proper cases* vpon the lawe of god / and vpon the lawe of reason".

circumstances in which the laws of reason and God must complement or provide further justification for conscience beyond what is suggested by positive law. St. Germain does not eliminate the conflict between conscience and the law or the connection between Chancery and conscience; rather, he remains linked to the discussion about the paradigm of conscience but at the same time plays a significant role in the transformation of Chancery from a strict "court of conscience" (which, perhaps in various ways freely applied the natural law as the chancellors understood it) to a "court of equity", which was established to follow, supplement, and fill gaps in the common law rather than to conduct a more thorough examination of conscience.

It has already been underlined as St. Germain's perspective "constitutes rather a shift of emphasis from the concern for the spiritual health"¹¹⁰ of the accused. Instead, interpreting common law and ensuring that parties did not insist on legal claims became fundamental issues. This is because of Saint Germain's explanation of the foundation of reason. The conversation was released during a period when opposition to the Court of Chancery was on the rise, with one claim being that using one's conscience and following natural law arbitrarily interfered with the due course of common law jurisdiction.

According to St. Germain, conscience was built on human rules because reason is grounded in or informed by them and "common law rather than the decrees of the Church" determines if something is unconscionable¹¹¹. St. Germain upheld the scholastic perspective that positive legislation was legitimate as long as it did not conflict with the laws of reason or God. Thus, reason and positive law were combined to contribute to the paradigm of conscience.

St. Germain also had a significant impact because, among other things, explained canon law notions at the basis of equity in words familiar to those who practiced law in England, and in fact, his writings were exceptionally well known on his day. This fact was especially important because the text was published during a period when lay chancellors ruled over the clergy, implying that the canon law precepts that served as the theoretical foundation for conscience would still maintain their role in equity.

However, Chancery did not exercise the restraint that some believed it to be. It never stopped applying canon law principles. If the moral principles of natural law were applied and interpreted by the Church in medieval equity, now they were undoubtedly embedded in equity. As a result, equity and conscience began to reside in the same place rather than coming from theology and canon law. Natural law

¹¹⁰ KLINCK D.R, *The Unexamined “Conscience” of Contemporary Canadian Equity*, in *McGill Law Journal*, 46, 2000–1, pp. 571, 581.

¹¹¹ DOBBINS S., *Equity: The Court of Conscience or the King’s Command*, cit., pp. 113, 125.

and moral principles remained within equity, even when equity and the Church were officially split.

One argument endorsing this thesis is the analysis of the famous *Earl of Oxford case* (1615), a significant equity ruling¹¹². Lord Ellesmere's statement that Chancery's function is to correct men's consciences is part of the opinion that is frequently quoted. However, this is not the judgment's only significant utterance. Additionally, according to Lord Ellesmere, "*Equity speaks as the Law of God speaks.*" It is important to note that the Earl of Oxford's case was resolved in 1615, well after the Protestant Reformation (but prior to events that would have had a significant impact on religion following the Civil War). The law of God served as a reminder of the religious ethos promoted by early ecclesiastical Lord Chancellors and the fact that English equity has roots in Christian theology and canon law.¹¹³

A century later, Lord Nottingham still outlined the characteristics of equity's conscience in the case of *Coke v. Fountaine* (1733)¹¹⁴. He expressly stated that the conscience by which he proceeded was merely *civilis et politica* and was bound to specific measures. According to him, the notion of conscience *naturalis et interna* has nothing to do with court.¹¹⁵ According to Klinck, the word "measures" here refers to laws that "set standards or criteria" against which conscience is assessed. Once more, "scholastic conscience" exists in nature and is subject to an external immutable moral code. In previous decisions, it was observed that there was a difference between the conscience that equity supports and that which leaves individuals up. As a result, Lord Nottingham did not make a distinction; rather, he was "*declaring what had become of the established doctrine of the Court.*"¹¹⁶

Moreover, the same distinction between the relevance of private and public conscience has a clear theological matrix. This distinction was evident in medieval canon law. Ecclesiastical disputes involving "conscience" were governed and heard in two distinct forums: the confessional, which was considered "internal," and the canon law court, which was considered "external." The maxim "*de occultis non judicat ecclesia,*" the fundamental ecclesiastical principle that the Church did not judge secret matters, served as the focal point of this discussion. Canon law did not apply to certain private acts of conscience. The ecclesiastical court could only hear cases involving public acts of conscience.¹¹⁷ Given the strong connection between

¹¹² The *Earl of Oxford's Case* [1615] 21 ER 485, 486 (Lord Ellesmere LC); IBBETSON D., *The Earl of Oxford's Case (1615)*, in MITCHELL C. and MITCHELL P. (eds.), *Landmark Cases in Equity*, Hart Publishing, 2012, p. 20.

¹¹³ BRAY S. L. and MILLER P. B., *Christianity and Equity*, in WITTE J. Jr. and DOMINGO R. (eds.), *Oxford Handbook of Christianity and Law*, Oxford University Press, 2023.

¹¹⁴ *Cook v Fountaine* (1733) 36 ER 984, 990 (Lord Nottingham).

¹¹⁵ 36 Eng. Rep. 984, 990 (1676).

¹¹⁶ KLINCK D.R., *Lord Nottingham's "Certain Measures"*, in *Law and History Review*, 28, 2010, pp. 711, 714.

¹¹⁷ HELMHOLZ R. H., *Conflicts between Religious and Secular Law: Common Themes in the English Experience*, in *Cardozo Law Review*, 12, 1990–1, pp. 707, 709.

medieval Chancery and canon law, it is not surprising that Chancery would identify the same division. The scholastic understanding of conscience and the influence of medieval theology and canon law were still evident after the establishment of equity jurisdiction and the Reformation. There was no need to refer to an external moral norm because equity had already internalised it.