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The Relationship between Civil and Canon Law in the Eastern Orthodox Tradition*

Abstract

Theodore Balsamon, a 12th-century Constantinopolitan canonist, famously said: "Civil law punishes, canon law heals". This paper tries to understand that statement by studying the relationship between civil law and canon law in the Eastern Orthodox tradition. From the 4th century onwards, the Roman imperial administration gave exequaturs to episcopal judicial decisions. In his *novellae*, Emperor Justinian considered the canons of the ecumenical councils as *nomoi*, which also implied that he could change canons by enacting imperial legislation. As of the 6th century, canon and imperial laws were published together in so-called *nomokanones*. At the end of the 9th century, Patriarch Photios formulated – for the first and last time in Byzantine legal history – the division of competences between Emperor and Patriarch. This paper argues that, though civil and canon law were separate fields with their own specific aims, the executability of their sentences remained crucially different.

Key words: legal history, civil law, canon law, ecclesiastical law, Byzantium, Eastern Roman Empire, nomokanones, canons, Patriarch of Constantinople, Theodore Balsamon, church-state relations, ecclesiastical court, Edict of Thessaloniki, The Code of Justinian, Justinian I, Theodosius the Great, Leo VI the Wise, Basil I.

Słowa klucze: historia prawa, prawo cywilne, prawo kanoniczne, prawo kościelne, Bizancjum, Wschodnie Cesarstwo Rzymskie, nomokanon, kanony, patriarchat Konstantynopola, Teodor Balsamon, relacje państwo–Kościół, sąd kościelny, edykt tesalonicki, kodyfikacja Justyniana, Teodozjusz Wielki, Leon VI Mądry, Bazyli I.

Introduction

Theodore Balsamon is one of the most-known Constantinopolitan canonists. He was born in the late 1130s. At a fairly young age, he was ordained deacon and served as

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nomophylax – the head of a law school – and *chartophylax* – an archivist, notary and main assistant of the Patriarch.[1] He became titular Patriarch of Antioch around 1185, but always remained in Constantinople. The Emperor Manuel I Komnenos and Patriarch Michael III of Anchialos asked him to write a commentary of the "Nomokanon of Fourteen Titles", which he probably completed around 1177–1180.[2] His work is often cited in the discussions on the relationship between civil law or *nomos* on the one hand and canon law or *kanon* on the other hand.

In that regard, two elements are frequently referred to. First, there is Balsamon's sentence "Civil law punishes, canon law heals". Indeed, according to Balsamon, canon and civil law often deal with the same facts, but from a different perspective. Canon law applies *epitimia*, healing remedies, in order to induce those who committed delicts to repent. The Church would not have recognized physical punishments, although it did – according to Balsamon – hand over some criminals to the imperial jurisdiction for physical punishment.[3] Secondly, as far as the relationship between the Emperor and the Patriarch of Constantinople was concerned, Balsamon would have supported the imperial prerogatives over the Church. It is said that this had to do with Balsamon's ambition and his dependency of the Emperor for promotion.[4]

For a worthy understanding of these debates, it is necessary to study the longer history of the relationship between civil and canon law in the Eastern Roman Empire. In what follows, we will first discuss the pre-Justinianic situation, especially the so-called 'Edict of Thessaloniki' and an important 452 *novella* of Valentinian III. Afterwards, the Justinianic legislation will be dealt with. In a third step, this paper will briefly address the *nomokanones* and the *Basilika*, dating from the end of the 9th century. Fourthly, we will examine in somewhat more depth the *Eisagoge*'s treatment of the relationship between the Patriarch and the Emperor, between canon and civil law. Finally, we will return to Balsamon.

Edict of Thessaloniki – Imperial chancery describes the criteria for an exsequatur of decisions by Church courts

The first fragment of the *Codex Justinianus*, the *lex Cunctos populos* (C.1.1.1), is said to be a resume of the edict of Thessaloniki of 27th February 380. The compilators of Justinian's Code would have taken it from the Theodosian Code. According to the tra-

[1] Although it is unclear whether the concept of a professional canonist applies to the Byzantine world, a *chartophylax* can be considered a *de facto* canonical expert. A *nomophylax* was an expert in civil law. See: D. Wagschal, *Law and Legality in the Greek East: The Byzantine Canonical Tradition, 381–883* [*Oxford Early Christian Studies*], Oxford 2015, p. 80–82.

[2] R.J. Macrides, *Nomos and Kanon on paper and in court* [in:] *idem*, *Kinship and Justice in Byzantium, 11th–15th Centuries*, Aldershot 1999, p. 68–69, 73; S. Troianos, *Byzantine Canon Law from the Twelfth to the Fifteenth Centuries* [in:] *The History of the Byzantine and Eastern Canon Law to 1500*, eds. W. Hartmann, K. Pennington, Washington D.C. 2012, p. 180–181.

[3] R.J. Macrides, *Nomos…*, p. 82–83.

[4] *Ibidem*, p. 74.

ditional understanding, Emperor Theodosius the Great enacted that edict in order to install Christianity as the state religion in the Roman Empire.[5] Interestingly, however, the Leuven Romanist scholar Laurent Waelkens has recently been very critical towards this classical understanding. Waelkens proposes an alternative reading of the fragment, which might shed additional light on the relationship between the ecclesiastical and temporal jurisdictions in the 4th-century Roman Empire, thus also affecting Eastern Christianity.[6]

In the young Christian communities of the first centuries A.D. the bishops held audiences to decide upon conflicts amongst Christians. However, they lacked executive power and depended on the willingness of both parties to accept the judgment. If the decision was not accepted, one of the parties could file the case before the imperial courts. This was cumbersome, as it required a new procedure, where everything started all over again. However, as of the reign of Emperor Constantine, in some cases, the imperial courts could give an *exsequatur* to episcopal judicial decisions, without entering into a factual reconsideration of the case.[7] Of course, until further investigations corroborate this view, some caution is needed, as Waelkens' interpretation is in contradiction with the traditional legal historical opinion on the intrinsic link between Church and Empire from the Constantinian and certainly the Theodosian era onwards.[8]

According to Waelkens, the Edict of Thessaloniki must be understood in the context of *exsequatur*. In the case of *Cunctos populos*, the imperial chancery refused to grant an *exsequatur* to the decisions of monophysite bishops. The Emperor did not want to enforce judgments of any ecclesiastical body without distinction: he needed some uniformity and decided that he would only give an *exsequatur* to judgments of those bishops that adhered to Orthodox trinitarian doctrine that was followed by the pontiff Damasus as well as by Peter of Alexandria. Those bishops were called Catholic Christians (*hanc legem sequentes christianorum catholicorum nomen iubemus amplecti*). The judicial decisions of other non-Orthodox bishops, like the monophysites, were not executable in the imperial courts.[9]

This understanding of *Cunctos populos* gives an insight into the relationship between civil and canon law. Canon law – or in this context more precisely ecclesiastical law[10] – consists of rules that are applied by church authorities to cases between Christian faithful. Sanctions under canon law are often of an intra-communional nature: like excommunication, refusal of sacraments, and so on. These were enforceable without imperial intervention. However, very often, bishops also imposed obligations to pay indemnities or to provide for a *restitutio in integrum*, or occasionally maybe even physical punishments. To enforce these judgments to unwilling Christians, they could invoke the assistance of the imperial judges. The imperial jurisdiction would only check whether the correct procedure had been followed and whether the competent authority had decided

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[5] For instance: J. Gaudemet, *L'Eglise dans l'Empire romain (IVe – Ve siècles)*, Paris 1958, p. 13–14.

[6] L. Waelkens, *L'hérésie des premiers titres du Code de Justinien. Une hypothèse sur la rédaction tardive de C.1, 1–13*, "Tijdschrift voor Rechtsgeschiedenis" 2011, Vol. 79 (2), p. 261–273.

[7] C.Th. 2.1.10; L. Waelkens, *Amne adverso*, Leuven 2015, p. 90–91.

[8] This traditional opinion is expressed, for instance, in: S. Troianos, *Nomos und Kanon in Byzanz* [in:] *idem*, *Historia et ius*, II. *1989–2004*, Athens 2004, p. 206.

[9] L. Waelkens, *L'hérésie…*, p. 271.

[10] 'Ecclesiastical law' is understood here as a broader notion than 'canon law', where 'canon' refers to the *canones* of councils or synods.

upon the case. If so, they granted an *exsequatur*, which allowed the winning party to enforce the judgment on its counterparty.

Two constitutions of Valentinian III

In a constitution by Valentinian III and Marcian of 12th November 451, which we can find in the *Codex Justinianus* 1.2.12.1 – but which also appears in Deusdedit's collection 1,317 and 3,166 and which returns in the *collectio Caesaraugustana* 7,25 – all pragmatic sanctions that were contrary to the sacred canons and that had been conceded by way of privileges, were nullified.[11]

Novella 35 of Valentinian III (452) would become a very influential text on the relationship between the ecclesiastical and imperial authorities, again linked to the practice of *exsequatur*. According to Valentinian, ecclesiastical jurisdiction remained voluntary and could only be used where clergy is involved or as far as typical ecclesiastical matters were concerned, whereas all other cases must be dealt with by the imperial courts.[12]

Justinian on the relationship between nomos and kanon – Two earlier enactments

Emperor Justinian I of the Eastern Roman Empire was one of the most influential lawgivers in history. The study of his *Corpus iuris civilis* dominated the Western legal practice and science until far in the 18th century. In the Eastern Roman Empire as well, Justinian's codification had a significant impact. It has been commented upon by jurists in *scholia* and formed an important source of inspiration for the *Basilika*, a 9th-century compilation of imperial and ecclesiastical laws.

Some of Justinian's enactments are especially important for the relationship between *nomos* and *kanon*, between civil and canon law. Firstly, in a constitution of October 530, Justinian stated that the sacred canons were as legally binding as imperial decrees.[13]

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[11] *Codex Iustinianus* [*Corpus iuris civilis editio stereotypa nona*. Vol. 2], ed. P. Krüger, Berlin 1915, p. 13 (C.1.2.12.1): *Omnes sane pragmaticas sanctiones, quae contra canones ecclesiasticos interventu gratiae et ambitionis elicitae sunt, robere suo et firmitate vacuatas cessare praecipimus*. S. Troianos, *Nomos…*, p. 202. For the references to Deusdedit and the *Caesaraugustana*, see: L. Waelkens, *L'hérésie…*, p. 284.

[12] Nov. Val. 35 in *Theodosiani Libri XVI cum constitutionibus Sirmondianis et Leges novellae ad Theodosianum pertinentes*, eds. T. Mommsen, P.M. Meyer, II, Berlin 1954, p. 142–148; L. Waelkens, *L'hérésie…*, p. 259; *idem*, *Amne adverso*, p. 91.

[13] C.1.3.44(45).1: […] *nostrae vero leges sacros canones non minorem vim quam leges habere volunt*; C.1.3.44(45).4: *Quod enim sacri canones prohibent, id etiam nos legibus nostris vetamus.* Similar enactments can be found elsewhere in the *Corpus iuris civilis*, see: J.A. Bueno Delgado, *La legislación religiosa en la compilación justinianea*, Madrid 2015, p. 194–195; W. Kaiser, *Authentizität und Geltung Spätantiker Kaisergesetze. Studien zu den Sacra privilegia concilii Vizaceni*, München 2007, p. 141; U. Wolter, *Ius canonicum in iure civili. Studien zur Rechtsquellenlehre in der neueren Privatrechtsgeschichte*, Cologne 1975, p. 25–27.

According to Troianos, a scholar in Byzantine legal history, this constitution could only have had a declaratory character, as it did not foresee any procedures in case of conflicts of a *nomos* and a *kanon*.[14] That is true, but at the same time not surprising: most constitutions in the *Codex Justinianus* are indeed decisions of the imperial chancery in concrete cases. Generally, they did not expand on the issues that were not essential to the solution of the case-at-hand. Secondly, the opening words of novel 6 point to the Emperor's important role both in secular and in church matters.[15] The concept of symphony (Lat. *consonantia*) mentioned in this novel became an important way of describing the relationship between Church and State in the Byzantine Empire.[16]

Justinian's Novella 131st

Despite the importance of the previous two references, the *novella* that is most often discussed in these contexts, is Justinian's 131st one. In that *novella*, Emperor Justinian declared the canons enacted by the ecumenical councils of Nicea, Constantinople, Ephesus and Chalcedon to be legally effective, to have the force of law, to be considered *nomoi*.[17]

For future conciliar canons to attain the force of law, legal historical scholarship deems a new imperial enactment to be necessary.[18] This might be true, but, in light of my previous discussion of the specific nature of imperial constitutions as judicial decisions by the chancery in concrete cases, it could also be argued that this decision could be applied analogously by lower courts to later conciliar enactments. Private parties could appeal always, though, to the imperial chancery in Constantinople which could

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[14] S. Troianos, *Nomos…*, p. 202.

[15] Nov. 6*pr.* in the Latin translation of *Novellae* [*Corpus iuris civilis editio stereotypa quinta.* Vol. 3], ed. R. Schoell, Berlin 1928, p. 35–36: *Maxima quidem in hominibus sunt dona dei a superna collata clementia sacerdotium et imperium* […]*: quorum ex uno eodemque principio utraque procedentia humanam exornant vitam.* […] *Nos igitur maximam habemus sollicitudinem circa vera Dei dogmata et circa sacerdotum honestatem.* The novel mainly concerns an imperial enactment on the appointment of bishops. Nov. 6.1.8 (p. 38) adds: […] *et a praecedentibus nos imperatoribus et a nobis ipsis recte dictum est oportere sacras regulas pro legibus valere*. See also: J.H.A. Lokin, *The Significance of Law and Legislation in the Law Books of the Ninth to Eleventh Centuries* [in:] *Law and Society in Byzantium, Ninth–Twelfth Centuries*, eds. E.L. Angeliki, D. Simon, Washington D.C. 1992, p. 75; W. Kaiser, *Authentizität…*, p. 142.

[16] Nov. 42 refers to the same concept. See also: J.A. Bueno Delgado, *La legislación…*, p. 192–193. For a longer discussion, see: M. Baccari, *All'origine della sinfonia di sacerdotium e imperium: da Costantino a Giustiniano*, "Diritto@Storia" 2011–2012, http://www.dirittoestoria.it/10/memorie/Baccari-Sinfonia-Sacerdotium-Imperium.htm (access: 31.01.2016).

[17] Nov. 131.1 in the Latin translation of P. Krüger, *Codex Iustinianus*, p. 654–655: *Sancimus igitur vicem legum obtinere sanctas ecclesiasticas regulas, quae a sanctis quattuor conciliis expositae sunt aut firmatae,* […]*. Praedictarum enim quattuor synodorum dogmata sicut sanctas scripturas accipimus et regulas sicut leges servamus.* A similar claim can be found in a novel of Justinian from 29th October 542, as edited by W. Kaiser, *Authentizität…*, p. 38: *Semper nostrae serenitati cura fuit servandae vetustatis maxime disciplinae, quam numquam contempsimus, nisi et in melius augeremus; praesertim quotiens de ecclesiasticis negotiis contingit quaestio, quae patrum constat regulis definita* […]*. Hinc est quod in Africanis quoque conciliis illa volumus reservari, quae antiquitas statuit et sequentium oboedientia custodivit atque in nostrum usque saeculum intemerata perduxit.* For an interpretation hereof, see: W. Kaiser, *Authentizität…*, p. 136–155.

[18] S. Troianos, *Nomos…*, p. 202–203.

then change its opinion. *Princeps legibus solutus*: the Emperor is not bound by his own judicial precedents.

Legal historians have been discussing the nature and meaning of *novella* 131st. According to Macrides, this *novella*'s main goal was to secure the Emperor's role as universal legislator. If the enactments of those councils were just *nomoi* (or *leges* in Latin), the Emperor himself was not bound by them. *Princeps legibus solutus est*, is the famous maxim, which is commonly interpreted as meaning that the Emperor is not bound by the laws.[19] Although some canonists, like Balsamon, and some legal historians suggest that this *novella* also might have implied that the Emperor was not bound by the canons (*Princeps canonibus solutus*), this principle has never been stated explicitly in any official legislation.[20] Consequently, it remained their private opinion.[21] Other canonists even vehemently protested against such an interpretation.[22]

On the other hand, this declaration could also mean – as suggested by another anonymous scholiast – that canon law was of a higher nature than imperial laws, as the latter were only enacted by the emperors, whereas canon law would be enacted both by the holy Fathers of the Church and by the Emperor.[23] Balsamon effectively stated that canon law prevailed over civil law. Nevertheless, if those *kanones* were to be considered *nomoi*, they could also be interpreted by means of the rules of interpretation under civil law, especially according to the principle *lex posterior derogat priori*, giving priority to later enactments over older ones.[24] Thus, an anonymous 13th-century canonist replied to the abovementioned *scholion* of Balsamon and pleaded for the application of the *lex posterior*-principle, if a *nomos* and a *kanon* were clearly contradictory.[25]

By not including rules on a conflict of laws in the *novella*, canonists enjoyed a greater scope for interpretation, at least theoretically. If the canons were considered at the same time part of divine revelation, they were binding in conscience, thus decreasing the room for manoeuvre. Given the many contradictions between the canons, however, the practical room for juridical creativity remained quite large.[26]

The Austrian legal historian Beck established that church authorities regularly remained silent, when the Emperor intervened in ecclesiastical matters and infringed older canons. Sometimes, they even asked the Emperor to intervene. Probably, this is a consequence of the practical dependence of the church hierarchy from the Emperor.[27] On a theoretical level, however, the precise status of the Emperor within the Church remained unclear.

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[19] R.J. Macrides, *Nomos…*, p. 65.

[20] S. Troianos, *Kirche und Staat. Die Berührungspunkte der beiden Rechtsordnungen in Byzanz* [in:] *idem*, *Historia et Ius*, I. *1969–1988*, Athens 2004, p. 500.

[21] H.G. Beck, *Nomos, Kanon und Staatsraison in Byzanz*, Vienna 1981, p. 58.

[22] *Ibidem*, p. 14. J.A. Bueno Delgado, *La legislación…*, p. 116–130 and 194–195, only refers to the juxtaposition of civil and canon law with equal binding force, suggesting that also future conciliar enactments will be considered later as *leges* (especially p. 123).

[23] R.J. Macrides, *Nomos…*, p. 65.

[24] *Ibidem*, p. 65; S. Troianos, *Nomos…*, p. 203. This *lex posterior*-principle was not always used in a consistent manner: D. Wagschal, *Law and Legality…*, p. 9.

[25] S. Troianos, *Nomos…*, p. 220–221.

[26] H.G. Beck, *Nomos…*, p. 9.

[27] *Ibidem*, p. 58.

First collections of canon law included imperial legislation – Nomokanones

The intricate mix of canon and civil law within the Eastern Roman Empire remained in force. From the 6th century onwards, so-called *nomokanones* were composed, including both *nomoi* and *kanones* on ecclesiastical issues. This kind of legislative codifications shows the complex relationship which existed between both sources of law.[28] Indeed, sometimes contradictions between both classes of rulings existed.[29]

The 9th-century *Basilika*, an Eastern Roman codification of imperial and canon law, includes a lot of references to the Justinian *corpus*. This enactment had an important influence on the interpretation of the relationship between civil and canon law. Indeed, *Basilika* 5.3.2 refers, like the abovementioned *novella* 131, to the canons of the ecumenical councils, including the Council of Trullo (692), as *nomoi*. By the mid-12th century, the common opinion of Byzantine jurists was to accord exclusive validity to the *Basilika*-codification. As the *Basilika* literally repeated many of Justinian's constitutions, the *lex posterior*-principle implied that most of Justinian's constitutions prevailed over the older canons of the ecumenical councils.[30]

Emperor and Patriarch under the early Macedonian dynasty – Eisagoge and Procheiros nomos

Basil I, the Macedonian, reigned as the Eastern Roman Emperor between 867 and 886. He is considered the founder of the so-called Macedonian dynasty. The Macedonian emperors wanted to 'cleanse the laws': they wished to restore the old law and to do away with all later adaptations. The *Eisagoge*, previously known as the *Epanagoge*, was the first legislative text to pursue this aim. It is said to have been written by the Patriarch Photios. It is famous for its defense of the primatial position of the Patriarch of Constantinople over the other patriarchal sees.[31] This question, however, does not interest us in this paper.

Nevertheless, this legislative text has also been widely studied, because it was the first and only time that the relationship between the Emperor and the Patriarch was so clearly set out. The *Eisagoge* proposes a theory of two authorities, the Emperor and the Patriarch as the two most important authorities within the state, as body and soul of the Eastern Roman Empire, both expressing the indivisible concept of one Christendom.[32] Empire and Church must be in full concord and harmony, because the Empire forms,

[28] R.J. Macrides, *Nomos…*, p. 66–67.

[29] J.M. Hussey, *The Orthodox Church in the Byzantine Empire* [*Oxford History of the Christian Church*], Oxford 1986, p. 305–306.

[30] S. Troianos, *Nomos…*, p. 221–222.

[31] *Ibidem*, p. 209.

[32] S. Troianos, *Byzantine Canon Law from the Twelfth…*, p. 150–151; *idem*, *Kirche…*, p. 497.

like a human being, one body and soul, with the Emperor and the Patriarch as its most important members (Eis 3.8).[33] The Byzantine Empire conceived of itself as a universal Empire, and saw itself as the earthly image of the Kingdom of God: a real theory on the relation between the Empire and the Church as two different entities did not exist.[34] In the *Eisagoge*, however, the functional separation between Emperor and Patriarch is clearly stressed.[35] Nevertheless, it remained a question of persons, not of institutes.[36]

The Emperor is also called to be truly Christian. According to title 2, chapter 4 of the *Eisagoge*, he is to vindicate and preserve, in the first place, everything which is written in Divine Scripture, as well as the *dogmata* that have been defined in the seven sacred councils and the enacted Roman laws.[37] The Emperor must excell in orthodoxy and piety and be respected for his divine zeal for the *dogmata* as regards, among others, the Trinity and the two natures of Our One and Only Lord Jesus Christ (Eis 2.5).[38] The Patriarch, in his turn, is described as the living and animated image of Christ and represents the divine Truth by his actions and words (Eis. 3.1).[39] This is clearly a more favourable description than the Emperor's. Whereas the Emperor has to preserve the Christian faith and is bound by the canons, the Patriarch is representing Christ himself in the world. Therefore, the author of the *Eisagoge* was clearly convinced that the Patriarch prevailed over the Emperor.[40] Yet, he decided to first describe the position and function of the Emperor before that of the Patriarch. Indeed, although the author was convinced that the Patriarch had a higher position, the primacy of honour was accorded to the Emperor.[41] Sometimes, it is therefore said that Photios did not really intend to set up an order of primacy, but wanted more to clarify the respective areas of competence.[42]

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[33] We use the Spanish translation by: J. Signes Codoñer, J. Andrés Santos, *La Introducción al derecho (Eisagoge) del Patriarca Focio* [*Nueva Roma 28*], Madrid 2007, p. 292: *El Estado se compone de partes y miembros, del mismo modo que el hombre, y sus partes más necesarias e importantes son el emperador y el patriarca. Por esto la paz y la prosperidad en el cuerpo y el alma de los súbditos reside en la total concordia y armonía del imperio y el sacerdocio.*

[34] C.G. Pitsakis, *La 'synalleilia'. Principe fondamental des rapports entre l'Église et l'Etat (Idéologie et pratique byzantines et transformations contemporaines)*, "Kanon" 1991, Vol. X, p. 20.

[35] S. Troianos, *Byzantine Canon Law from the Twelfth…*, p. 151–152.

[36] C.G. Pitsakis, *La 'synalleilia'…*, p. 21.

[37] J. Signes Codoñer, J. Andrés Santos, *La Introducción…*, p. 288: *Al emperador le corresponde vindicar y preservar, en primer término, todo lo que está escrito en la Divina Escritura, luego los dogmas que han sido definidos en los siete santos concilios y también las leyes romanas que han sido sancionadas.*

[38] *Ibidem*, p. 289: *El emperador debe destacar por su ortodoxia y su piedad, y ser reconocido por su fervor divino tanto en los dogmas establecidos acerca de la Trinidad, como en lo que, a propósito del gobierno de la Iglesia, determinó de forma clara y precisa el propio gobierno de Nuestro Señor Jesucrito hecho carne, es decir, preservando el carácter indivisible e inalterable de la co-esencialidad propia de las tres sustancias de la divinidad, la unidad sustancial de las dos naturalezas en un único Cristo, como Dios perfecto, indivisible e inconfundible, y como hombre perfecto a la vez, y lo que de ello se sigue, siendo a la vez paciente y no paciente, incorruptible y corruptible, invisible y visible, intangible y tangible, indescriptible y descriptible, así como la duplicidad de voluntades y potencias sin contradicción entre ellas, y lo representable y no representable.*

[39] *Ibidem*, p. 291: *El patriarca es la imagen viviente y animada de Cristo y representa la verdad con sus obras y palabras.*

[40] A. Schminck, *'Rota tu volubilis'. Kaisermacht und Patriarchenmacht in Mosaiken* [in:] *Cupido Legum*, eds. L. Burgmann, M.T. Fögen, A. Schminck, Frankfurt am Main 1985, p. 213.

[41] *Ibidem*, p. 214.

[42] S. Troianos, *Nomos…*, p. 208–209.

The Emperor's role was to take care of the material well-being of his subjects and to bring victories to the Byzantine Empire (Eis 2.2).[43] The Patriarch must primarily take care of the spiritual well-being of the faithful that God himself has entrusted to him (Eis 3.2), a divine entrustment which has no counterpart in the *Eisagoge*'s title on the Emperor. Of course, the Patriarch is also called to defend the orthodoxy and ecclesial unity against all heretics, that is to say all those who are not in communion with the universal ('Catholic') Church (Eis 3.2).[44] In line with his spiritual care, the salvation of the souls entrusted to him should lead the Patriarch's actions (Eis 3.3).[45]

Some important statements regarding the relationship between civil and canon law can also be found in this legislative document. A *nomos* is described as a common precept, as a decision of prudent men, as a common agreement. At the same time, it is called a divine invention (Eis 1.1).[46] The science of justice (*sofia nomou* in the *Basilika*, *sofia dikaiosuneis* in the *Eisagoge*) deals indeed with both divine and human issues (Eis 1.6).[47] The Emperor must interpret the *nomoi* of the ancestors and decide by analogy on questions for which no clear *nomos* exists (Eis 2.6).[48] He has to interpret them in light of the binding customs (Eis 2.7.1).[49] In case of doubt, he must choose the most favourable option (Eis 2.8)[50] and apply the rules of analogy (Eis 2.10).[51] Remarkably, however, the Emperor is never called the exclusive interpretor of the *nomoi*. This is remarkable, as according to the *Eisagoge* the Patriarch alone is allowed to interpret the *kanones* (Eis 3.5).[52] This implies that the Emperor is prohibited from interpreting the canons as defined by the holy Fathers and the sacred councils, thereby again stressing the Patriarch's primacy over the Emperor. It does, however, not exclude that the Emperor enacts *nomoi* in the area of ecclesiastical government, as long as these fundamental canons are respected.[53]

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[43] J. Signes Codoñer, J. Andrés Santos, *La Introducción…*, p. 288: *La función del emperador es salvaguardar y proteger, gracias a su bondad, los recursos actualmente existentes, recuperar los perdidos gracias a sus cuidados y desvelos, y adquirir aquellos de los que ahora se carece gracias a su sabiduría y a sus justas empresas y victorias.*

[44] *Ibidem*, p. 291: *La función del patriarca es, en primer lugar, preservar con la piedad y la nobleza de su vida a las personas que Dios le confió; luego, hacer volver, en la medida de sus posibilidades, a la ortodoxia y la unidad de la Iglesia a todos los herejes (son llamados herejes por las leyes y los cánones quienes no comulgan con la Iglesia católica) y, finalmente, hacer seguidores de nuestra fe a a los no creyentes, impresionándolos a través de sus acciones brillantes, extraordinarias y admirables.*

[45] Ibidem, p. 291: *El patriarca tiene como fin la salvación de las almas a él confiadas, el vivir de acuerdo con Cristo y crucificarse en el mundo.*

[46] *Ibidem*, p. 287: *La ley es precepto común, decisión de hombres prudentes, corrección de delitos voluntarios e involuntarios, común acuerdo del Estado. También es invención divina.*

[47] *Ibidem*, p. 287: *La ciencia de la justicia es ocuparse de los asuntos divinos y humanos y de lo justo y lo injusto.*

[48] *Ibidem*, p. 289: *El emperador debe interpretar lo que legislaron los antiguos y decidir por analogía sobre las cuestiones para las que no existe una ley.*

[49] *Ibidem*, p. 289: *Al interpretar las leyes se debe prestar atención a las costumbres de la Ciudad.*

[50] *Ibidem*, p. 290: *El emperador debe interpretar las leyes con benevolencia, pues en los casos dudosos nos inclinamos por la interpretación favorable.*

[51] *Ibidem*, p. 290: *Acerca de los asuntos en los que no existe ley escrita, se debe preservar el uso y la costumbre. Pero si no existen éstos, es preciso acudir a lo que sea análogo al asunto en cuestión.*

[52] *Ibidem*, p. 292: *Sólo el patriarca debe interpretar los cánones que establecieron los antiguos, lo que definieron los santos padres y lo que aprobaron los santos concilios.*

[53] S. Troianos, *Nomos…*, p. 211.

Very important – but at the same time – controversial is the second paragraph of title 2, chapter 7 of the *Eisagoge*: "A 'nomos' that transgresses the 'kanones' is not admitted as a model".[54] At first sight, this seems to imply that the *kanones* are deemed of higher authority than the *nomoi*. However, caution in interpreting this paragraph is essential. Although some legal historians effectively suggest that *kanones* should be interpreted as 'canons' in the canonical sense, other historians do not agree and refer instead to the similar passage in the Justinian codification (Digest 1.3.14), where one speaks of *contra rationem juris*, thus referring to the rule of law in general.[55] The same author Troianos, however, states elsewhere that it follows from *Eisagoge* 2.4 that the Emperor was not allowed to legislate against the ecclesiastical canons.[56]

A final *caveat* should be mentioned with regard to the *Eisagoge*. It has long been controversial whether this document has in fact been in force. According to some, the *Eisagoge* had never been officially enacted. More recent research has shown, however, that it had indeed been applied as 'law'.[57] Moreover, Troianos writes that only 20 to 30 years later, in 907, this *Eisagoge* lost its legal force and was replaced by the *Procheiros Nomos*, enacted by Emperor Leo VI, the Wise. Leo had been a pupil of Patriarch Photios, but didn't like his ideas. The first three titles of the *Eisagoge* – precisely those which have been dealt with in this paper – have not been taken over by the *Procheiros Nomos*.[58] Other Byzantinists, however, are convinced that the *Procheiros Nomos* preceded the *Eisagoge*.[59]

Novels of Leo VI, the Wise

Leo VI is not only known for the *Procheiros Nomos*. A number of his novels have been published, too. He had a clear view on ecclesiastical government: the Patriarch or a synod could decide on ecclesiastical issues, like the date of baptism of newly born children or the admittance of mothers of newly-born children to Holy Communion. Nevertheless, as an Emperor, he was allowed to do so as well. At times, the Emperor even enacted legislation on the demand of the ecclesiastical authorities.[60]

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[54] J. Signes Codoñer, J. Andrés Santos, *La Introducción…*, p. 289: *Lo introducido contra las reglas de derecho ('kanones') no se admite como modelo.*

[55] S. Troianos, *Nomos…*, p. 210, footnote 32, states that it is not about the transgression of canon law, but of the law in general. In the Digest, it is stated as *contra rationem iuris*.

[56] S. Troianos, *Die Beziehungen zwischen Staat und Kirche in Griechenland* [in:] *idem*, *Historia et Ius*, II. *1989–2004*, Athens 2004, p. 181: *Durch diese Formulierung wurde dem Kaiser die Verpflichtung auferlegt, die alte Gesetzgebung richtig anzuwenden, bzw. auszulegen und kein neues Gesetz zu erlassen, das gegen die kirchlichen Kanones verstoße.*

[57] S. Troianos, *Byzantine Canon Law from the Twelfth…*, p. 153.

[58] S. Troianos, *Die Beziehungen…*, p. 182.

[59] Th.E. Van Bochoven, *The Eisagoge and the Legislation of the Macedonian Emperors* [in:] *The Prooimion of the Eisagoge. Translation and Commentary*, eds. W.J. Aerts *et al.*, "Subseciva Groningana" 2001, Vol. 7, p. 136.

[60] S. Troianos, *Nomos…*, p. 215.

The Patriarch's plea to the Emperor might also be motivated by something we discussed earlier. Because the *Basilika* referred to the canons of the ecumenical councils and other general synods, including the *Trullanum*, the *lex posterior*-principle meant that a later *nomos* could derogate from those canons. The only solution for the Church to give its own canons derogatory force over imperial legislation, was, therefore, to ask the Emperor to repeat its content in a new legislative act, a new *nomos*.[61]

Theodore Balsamon

This final section of the paper returns to Theodore Balsamon, with whom our discussion started. "Civil law punishes, canon law heals." He used this statement in an effort to solve a contradiction between civil and canon law on the issue of the distinction between manslaughter and murder. According to the *nomos*, self-defence could be a justification of killing, whereas the *kanon* considered every taking of a human life as amounting to murder. According to Balsamon, the prescriptions of civil and canon law were complementary. Although the taking of life out of self-defence did not constitute a crime, it did constitute a sin, which fell within the ambit of canon law. The Church was, however, also entitled to hand over a criminal of murder to the imperial authorities to receive a secular punishment.[62] It comes close to the early practice of *exsequatur*, which we described above. The ecclesiastical jurisdiction was not able to enforce its own decisions in a physical way; for that, it relied on the cooperation of the imperial jurisdiction.

Balsamon's position towards the relationship between Emperor and Patriarch, between Empire and Church, is complex. Thus, we briefly mentioned in a previous section that Balsamon seemed to agree that the Emperor was not bound by the canons,[63] but he also appears to have argued that canon law prevailed over civil law.[64] In a discussion of canon 12 of Antioch on the right of appeal of bishops and clergymen to higher courts, except for the Emperor's, Balsamon stresses that those who appeal against the Patriarch to the Emperor will be punished, because there is no appeal possible against the Patriarch's decision.[65] On the other hand, in many cases, he seems to have argued in favour of the Emperor's position and power, as he depended on him for his promotion.[66]

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[61] *Ibidem*, p. 216.

[62] M. Angold, *Church and Society in Byzantium under the Comneni, 1081–1261*, Cambridge 1995, p. 104.

[63] For some examples of changes of canons by imperial legislation that were self-evident to Balsamon, see: C.G. Pitsakis, *La 'synalleilia'…*, p. 22–24.

[64] See the translation of Balsamon's comments at "Nomokanon in 14 Titles" by P. Rodopoulos, *Sacred Canons and Laws*, "Kanon" 1991, Vol. X, p. 12: *The canons overrule the laws. For the former, that is the canons, promulgated and supported by the emperors and the holy Fathers, are accepted as Holy Writ, while the laws were accepted or composed only by the emperors, and therefore have no power over Holy Writ, nor over the canons.*

[65] R.J. Macrides, *Nomos…*, p. 79; R. Darrouzès, *Documents inédits d'ecclésiologie byzantine* [*Archives de l'Orient chrétien*], Paris 1966, p. 81–84.

[66] H.G. Beck, *Nomos…*, p. 19.

From our current perspective, his views are indeed confusing and at times entirely contradictory.[67] He might himself have understood – as we saw in the manslaughter-example – canon and civil law as two areas of the law which start from different perspectives but are complementary, not contradictory.[68] Nevertheless, at times, he confesses that he is himself very confused. In his *scholion* on canon 16 of the *Prima-Secunda*, he states the following:

> It has been decided that the canons prevail, but I am still in doubt. As far as it concerns an ecclesiastical issue, I agree to those who state that the canons prevail. Given, however, that the Basilika were cleansed after the enactment of the nomokanon and this particular canon, I follow the contrary position.[69]

In later times, the Emperor has also been described by the monastic concept of *epistemonarches*, originally a monk that had to keep order amongst his fellow monks, for instance during mealtime or common prayers. Others describe the Byzantine Emperor as the Defender of the Faith.

Conclusion

As has become clear from this paper's discussion, the relationship between *nomos* and *kanon* in the Eastern Orthodox tradition is multifold and at times ambiguous. Originally, canon law was to be applied amongst the Christian faithful that agreed to the treatment of their cases by their bishops. If they did not agree, they could restart the procedure before the imperial courts. However, from the 4th century onwards, the Roman imperial administration started to give *exsequatur*s to episcopal judicial decisions that had been decided according to a good procedure and by the competent bishop. The Emperor only agreed to do so as far as the 'Catholic' Church was concerned; decisions by monophysites could not be executed.

In his *novellae*, Emperor Justinian considered the canons of the ecumenical councils as *nomoi*, as civil laws, which also implied – according to the common understanding – that the *lex posterior*-principle was applicable. Thus, the Emperor could change those rules by enacting imperial legislation or judicial decisions. As of the 6th century, the profound mix of canon and imperial laws on ecclesiastical issues, became clear from the so-called collections of *nomokanones*, combining both canons and imperial *nomoi* on issues

[67] S. Troianos, *Nomos…*, p. 217–218.

[68] R.J. Macrides, *Nomos…*, p. 82–83. This ambiguity is characteristic to Byzantine legal thought on the relationship between *nomoi* and *kanones*. Wagschal describes it as a 'conceptual messiness'. *Nomoi* and *kanones* do, however, constitute two distinct, but not fundamentally different *Rechtsmassen*. See: D. Wagschal, *Law and Legality…*, p. 130–133, 146 and 278.

[69] For this translation, I followed a German one by S. Troianos, *Nomos…*, p. 219: *Es ist also beschlossen worden, dass die Kanones eher den Vorzug haben sollen; aber ich bin immerhin im Zweifel. Sofern es sich um eine kirchliche Frage handelt, pflichte ich denjenigen bei, die behaupten, die Kanones hätten den Vorzug; in Betracht dessen aber, dass die Basiliken nach der Anfertigung des Nomokanon und dem Erlass des vorliegenden Kanons bereinigt wurden, schließe ich mich der anderen Meinung an.*

related to the Church. The 9th-century *Basilika* reinforced Justinianic legislation, including the comparison of canons of ecumenical councils or some general synods to *nomoi*.

Patriarch Photios formulated – for the first and last time in Byzantine legal history – the division of competences between the Emperor and the Patriarch, but the legal force of that document is doubtful. Slowly, the view seems to have prevailed that in order to enforce canon law, it was useful – or even necessary? – to convince the Emperor to enact its content as a new *nomos*, in order to circumvent the *lex posterior*-principle.

Precise rules on the conflict of a *nomos* and a *kanon* did not exist, as has become clear from Balsamon's doubts. At the same time, often, no contradictions existed: civil and canon law were regarded as two areas of law that started from different perspectives. Canon law dealt with sin, civil law with crimes. "Civil law punishes, canon law heals." Nevertheless, the difference as far as the executability of some sentences was concerned, remained crucial. If physical enforcement was needed, the imperial jurisdiction had to intervene.

Of course, the Eastern Orthodox tradition continued after the fall of the Eastern Roman Empire under the Ottomans and later in the different Orthodox churches. To include a discussion of those later developments, would, however, exceed the limits of this paper. Nevertheless, a brief look on current practices in Greece – for instance, the oath of the Prime Minister on the Bible – or Russia points at the still important links between Church and State in the Orthodox tradition.

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