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Differentiae iuris civilis et canonici
The methodological premises of an early modern German legal genre*

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Abstract
The legal genre *differentiae iuris canonici et civilis* underwent significant changes at the threshold of the 17th century, compared to its form in the late Middle Ages. One of the markers of this change was a growth in the methodological insights of the authors of *differentiae*. The benchmark in this respect is Konrad Rittershausen's *Differentiarum libri septem*. In the vast introduction to this work, he discusses various theoretical aspects of the relations between canon law and civil law. The most subtle methodological premise of his work are *regulae generales,* which explain when each of the two bodies of law may and should be applied on the opposite forum. These rules may be seen as a doctrinal tool applicable for resolving the conflict of norms typical for legal pluralism. His rules are excerpted from earlier legal writings and founded on the broad basis of references to the then recent jurisprudence, with particular attention paid to the *consilia* and *responsa* of the authors important for German scholarship (Mynsinger, Wesenbeck, Pistoris). Rittershausen's work influenced the later developments in *differentiae* as there were no examples of more elaborated general rules for the application of canon law on the civil forum than the ones he proposed. The emergence of methodological notions in *differentiae* may be seen as an example of distinctive feature of modern jurisprudence, namely the search for a legal method.

Keywords
canon law, Roman law, legal method, comparative law, legal pluralism

Summary: 1. Introduction. 2. Konrad Rittershausen's *Differentiarum libri septem* in context. 2.1. Medieval heritage: c. *Intelleximus,* the medieval *differentiae* and the relations between the two laws. 2.2. *Differentiarum libri septem* as a point of reference. 3. Rittershausen's general rules. 3.1. *Regulae prima et secunda*. 3.2. *Regulae tertia et quarta*. 3.3. *Regulae quinta et sexta.* 3.4. Rittershausen's general rules – a summary. 4. *Differentiae* – how to apply the two bodies of law? 4.1. Short methodological notes. 4.2. Alternative examples of general rules. 4.3. Elaborate methodological introductions. 4.4.

* The contribution of the authors is as follows: Piotr Alexandrowicz – 75%, Maria Kola – 25%.

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The working catalogue of the early modern *differentiae iuris civilis et canonici* is available for use and open for comments here: https://bit.ly/differentiaeiuris.

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Differentiae – the theoretical approach to legal pluralism. 5. Conclusions and perspectives. Sources. Bibliographical references

1. Introduction

The early modern legal landscape was marked by the growing significance of new legal methods adequate for meeting the challenges of modern law and society. One of the outcomes of this phenomenon was the vast number of legal genres that arose and were dedicated to tackling the relevant issues of legal theory. Among them, we can include *differentiae iuris*, a legal genre dedicated to collating the differences between various laws or, conversely, to grasping the similarities between them. This approach to law was first developed in the late Middle Ages[1]. From the 12th century, the interest of canonists and civil lawyers in comparing the two pillars of the common law of Europe was growing. Then a few *differentiae* treatises were written in the 14th and 15th centuries. This genre, which had been developed by medieval lawyers, underwent essential changes at the dawn of modernity. The 16th century brought new challenges to law, which had to be addressed by both the state and the Church. These challenges arose from various events, such as the discovery of the New World, the Reformation and Counterreformation, and the dynamic development of the market, to name only a few. The Church meanwhile lost its unity, so the complexity of religious legal regulations grew in the immediate aftermath. These and other circumstances led to the need for reshaping *differentiae* literature, in order to ensure its applicability to current affairs[2]. The rise of this new type of comparative literature was one of the signs that a new *ius commune* had been born; one which was based on legal science instead of one particular body of laws[3].

In the plethora of legal books that appeared in the early modern period, there are many which are still waiting for proper scientific treatment, including those which address *differentiae*[4]. The scholarship on the early modern *differentiae* does not seem to be broad, as it is no easy matter to determine the number of works pertaining to this

[1] See e.g. Portemer, J., *Recherches sur les Differentiae juris civilis et canonici au temps du droit classique de l'Eglise*, Paris: Jouve, 1946; Portemer, J., "Bartole et les différences entre le droit Romain et le droit canonique", *Bartolo da Sassoferrato, studi e documenti per il VI centenario*, vol. 2, Milano: Giuffrè, 1962, pp. 399-412; Horn, N., *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. 1: *Mittelalter (1100-1500): Die gelehrten Rechte und die Gesetzgebung* (H. Coing, ed.), München: C.H. Beck, 1973, pp. 345-347, 361; Ascheri, M., "Differentiae inter ius canonicum et ius civile", *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, vol. 1: *Zivil- und Zivilprozessrecht* (O. Condorelli *et al.*, eds.), Köln: Böhlau, 2009, pp. 67–73.

[2] Berman, H.J., *Law and Revolution*, vol. 2: *The Impact of Protestant Reformations on the Western Legal Tradition*, Cambridge: Cambridge University Press, 2003, p. 431.

[3] Berman, H. J., Reid, C.J., "Roman Law in Europe and the ius commune: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century", *Syracuse Journal of International Law and Commerce* 20 (1994), pp. 25-26.

[4] There are many more early modern legal genres that have been barely examined, as proved by the recent approach of Christoph H.F. Meyer to *abbrevationes* of Roman and canon law books – see Meyer, C.H.F., "Putting Roman and Canon Law in a Nutshell: Developments in the Epitomisation of Legal Texts between Late Antiquity and the Early Modern Period", *Knowledge of the Pragmatici. Legal and Moral Theological Literature and the Formation of Early Modern Ibero-America* (T. Duve, O. Danwerth, eds.), Leiden: Brill, 2020, pp. 40-88; Meyer, C.H.F., "Römisches und kanonisches Recht kurz und bündig. Zur Epitomierung lateinischer Rechtstexte zwischen Spätantike und Moderne", *Rechtsgeschichte – Legal History* 28 (2020), pp. 31-66.

genre, or even to formulate a sound definition of *differentiae*[5]. Here we will focus only on a subsection of the works dedicated to a comparison of the two laws, namely on *differentiae iuris civilis et canonici*[6]. One of their distinct features (apart the predefined contents) was the fact that they were oriented towards harmonization but their outcomes were never legally implemented, while the works dedicated to the comparison of Roman law and local law paved the way for codifications.

Our objective is to present the methodological premises of these works, such as they were. These premises may be seen as a doctrinal tool developed to address the conflict of norms typical for legal pluralism. The focus will be put on the works from German jurisprudence but scarce sources of different origins were not excluded. It seems that the attempt to explain the method behind simple listing and solving differences was the landmark of the early modern *differentiae*, when compared to their medieval predecessors. We will firstly try to examine the methodological approach of the *differentiae* authors by examining in detail the most renowned work of this kind, i.e. the treatise written by Konrad Rittershausen (1560-1613) – a protestant German lawyer and scholar[7]. Secondly, we will outline the broader picture by referencing other exemplary *differentiae*. With this end in mind, it is justified to limit the scope of our

[5] The most important research on this kind of legal writings (i.e. *Differentienliteratur*) comes from German scholars, see Stobbe, O., *Geschichte der deutschen Rechtsquellen*, vol. 2, Braunschweig: C.A. Schwetschke und Sohn, 1864, pp. 155-157; Söllner, A., "Zu den Literaturtypen des deutschen usus modernus", *Ius Commune* 2 (1969), pp. 185-186; Schnitzer, H., "Differentienliteratur zum kanonischen Recht. Eine unbekannte Literaturgattung als Beleg zur dialektischen Kraft des kanonischen Rechts in der Privatrechtsentwicklung der Neuzeit", *Walter Wilburg. Zum 70. Geburtstag. Festschrift*, Graz: Leykam, 1975, pp. 335-353; Wolter, U., *Ius Canonicum in Iure Civili: Studien zur Rechtsquellenlehre in der neueren Privatrechtsgeschichte*, Köln: Böhlau, 1975, pp. 55, 68-69; Söllner, A., *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. 2: *Neuere Zeit (1500-1800). Das Zeitalter des gemeinen Rechts, part 1: Wissenschaft* (H. Coing, ed.), München: C.H. Beck, 1977, p. 555; Mohnhaupt, H., "Die Differentienliteratur als Ausdruck eines methodisches Prinzips früher Rechtsvergleichung", *Excerptiones iuris: Studies in Honor of André Gouron* (Duran, B., Mayali, L., eds.), Berkeley: Robbins Collection, 2000, pp. 439-458; Dolezalek, G., „Differentienliteratur", *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. 1 (A. Cordes, *et al*., eds.), Berlin: Erich Schmidt Verlag, 2008, col. 1059-1061; Mohnhaupt, H., "Formen und Konkurrenzen juristischer Normativitäten im »Ius Commune« und in der Differentienliteratur (17./18. Jh.)", *Rechtsgeschichte – Legal History* 25 (2017), pp. 123-124; yet, some insights were also contributed by other legal historians, see Prosdocimi, L., "Il diritto canonico di fronte al diritto secolare nell' Europa dei secoli XVI-XVIII", *La formazione storica del diritto moderno in Europa: Atti del terzo Congresso Internazionale della Società Italiana di Storia del Diritto*, vol. 2 (B. Paradisi, ed.), Firenze: L.S. Olschki, 1977, pp. 433-436; Birocchi, I., "La questione dei patti nella dottrina tedesca dell'Usus modernus", *Towards a General Law of Contract* (J. Barton, ed.), Berlin: Duncker & Humblot, 1990, pp. 146-155; Feenstra, R., "Canon Law at Dutch Universities from 1575 to 1811", *Canon Law in Protestant Lands* (R. H. Helmholz, ed.), Berlin: Duncker & Humblot, 1992, pp. 123-134; Szabó, B.P., "Differentiae und collatio – Arbeiten aus dem 17. Jahrhundert über die Vergleichung des römischen Rechts mit den einheimischen Rechten in Ungarn", *Internationale Konferenz zum zehnjährigen Bestehen des Instituts für Rechtsvergleichung der Universität Szeged* (A. Badó, *et al*., eds.), Potsdam: Universitätsverlag Potsdam, 2014, pp. 277-289.

[6] Hereafter the term *differentiae* will always refer to *differentiae iuris civilis et canonici*.

[7] Many authors will be mentioned throughout this paper and many of them are scarcely known. Lifespan dates are given in the brackets in most cases (if known) and some basic biographical data (if available) is provided for the authors of *differentiae*. As most of the authors were of German origin, information on nationality was given only in the case of non-Germans. We did not manage to determine at this stage the denomination of all the authors so this data is also missing, however the majority of German authors were certainly not Catholics. The most useful resources for the identification of these authors were digital databases: Bio-Bibliographical Guide to Medieval and Early Modern Jurists, the Consortium of European Research Libraries (CERL) Thesaurus, Deutsche Biographie online, Enciclopedia Treccani online.

research to the introductions to *differentiae*, as these initial pages tended to contain some general insights of the authors. It is necessary to add that we will not address the confessional context of the analysed sources in greater detail. This would require determination of *differentiae* authors' denomination (which is not always a simple task) and a deeper examination of sources with reference to the broad scholarship on Protestant law and theology[8].

2. Konrad Rittershausen's *Differentiarum libri septem* in context

2.1. Medieval heritage: c. *Intelleximus*, the medieval *differentiae* and the relations between the two laws

Civil law and canon law have a long, shared history, and since they changed over the centuries it is extremely difficult to grasp the complex interactions and mutual influence between these two bodies of law[9]. However, this is not our aim here. What should be stressed before focusing on the early modern *differentiae* is that they were preceded by medieval jurisprudence, which paid some attention to creating a theoretical frame suitable for organizing the relations between the two laws. This can be easily shown on the basis of two exemplary notes, which will serve to introduce the early modern *differentiae*.

Even though the Church made extensive use of Roman law, from its very beginnings through to the late Middle Ages, there was no precise legal explanation of the nature of this phenomenon. It seems that one of the crucial sources for the development of the doctrinal interpretative attitude of canon law toward Roman law was the decretal *Intelleximus* of Pope Lucius III issued in 1185[10]. The pope was asked about the application of Roman law in a dispute between ecclesiastical entities involving the Roman institution known as *novi operis nuntiatio*. Before agreeing to apply Roman law to this case, Lucius III reiterated the passage from Justinian's constitution *sacras et*

[8] See e.g. Witte, J., Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation*, Cambridge: Cambridge University Press, 2002; Berman, *Law and Revolution*, pp. 29-197; Schmoeckel, M., *Das Recht der Reformation: Die epistemologische Revolution der Wissenschaft und die Spaltung der Rechtsordnung in der Frühen Neuzeit*, Tübingen: Mohr Siebeck, 2014.

[9] From the vast literature on the relations between the two laws in the Middle Ages, see e.g. Gottschalk, G., *Ueber den Einfluss des Römischen Rechts auf das canonische Rechts resp. das canonische Rechtsbuch*, Mannheim: K. Wittwer, 1866; Kuttner, S., "Some Considerations on the Role of Secular Law and Institutions in the History of Canon Law", *Scritti di sociologia e politica in onore di Luigi Sturzo*, Bologna: N. Zanichelli, 1953, vol. 2, pp. 351-362 (=*idem*, *Studies in the history of medieval canon law*, Aldershot: Variorum, 1990, VI); Feine, H.E., "Vom Vortleben des römischen Rechts in der Kirche", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 52 (1956), pp. 1-24; Legendre, P., *La pénétration du droit romain dans le droit canonique classique de Gratien à Innocent IV (1140–1254)*, Paris: Jouve, 1964; Le Bras, G., "L'Église médiévale au service du droit romain", *Revue historique de droit français et étranger* 44 (1966), pp. 193-209.

[10] Arella, G.I., *Nuntiatio novi operis in ecclesiastical legislation*, Roma: Pontificia Università Gregoriana, 1959, pp. 20-24, 52-56, 65-68; Dębiński, A., *Church and Roman Law*, translation by K. Szulga, Lublin: Wydawnictwo KUL, 2010, pp. 90-96; Alexandrowicz, P., "Leges non dedignantur sacros canones imitari: Canonical Reinterpretation of Justinian's Novel 83,1 (=Authen. 6.12.1) in Lucius III's Decretals", *Bulletin of Medieval Canon Law* 35 (2018), pp. 185-214; Alexandrowicz, P., *Znaczenie dekretału Intelleximus (X 5.32.1) w procesie recepcji prawa rzymskiego w XIII-wiecznej kanonistyce* [*The Significance of the Decretal Intelleximus (X 5.32.1) in the Course of Roman Law Reception in the 13th Century Canon Law Jurisprudence*], Poznań-Kraków: Wydawnictwo «scriptum», 2018.

divinas regulas, quas etiam nostrae sequi non dedignantur leges[11] and added his own contribution: *sicut humanae leges non dedignantur sacros canones imitari, ita et sacrorum statuta canonum priorum principum constitutionibus adiuvantur*[12]. This general statement was a starting point for canonists, who gradually built on it the complex doctrine explaining the relations between the two laws. Apparently, for canonists c. *Intelleximus* served as an instrument to confirm the precedence of canon law over civil law and even to the declaration that civil law is a servant of canon law[13]. One of the major achievements of this doctrine was the formulation of some basic rules supporting judges in the event that the canons were cited on the civil forum, or the statutes on the ecclesiastical forum. Bernardo da Montmirat (ca. 1225-1296) proposed in this respect some clear scholastic divisions allowing a proper balance between the two laws to be found, e.g. he stated that if *leges* are not expressly contrary to *canones* they should be applied jointly, to the greatest possible extent[14]. The medieval canon law jurisprudence noticed the significance of a theoretical framework that would be suitable for explaining the relations between the two laws and for resolving tensions of medieval legal pluralism. Alas, it lacked methodological basis and was scattered throughout the vast commentaries to canon law collections.

Besides, there was no developed method contained in the late medieval *differentiae* either. Although the very concept of *differentiae* grew gradually in the medieval jurisprudence, the examples of the best-known collations of *differentiae* show that the most they achieved was a long list of points over which canon law and civil law lacked accord. The works of Galvano da Bologna (ca. 1335-ca. 1395), Prosdocimo Conti (1370-1438), Battista da Sambagio (ca. 1425-1482), Gerolamo Zanettini (?-1493)[15], to name but a few late examples, are basically lists of *differentiae*. Except minor passages where the authors add some general observations, it is obvious that the formulation of the method for *differentiae* was not their objective.

2.2. *Differentiarum libri septem* as a point of reference

There were at least a few dozen *differentiae* written between 1500 and 1800, but only a couple of them were sufficiently known to be recognized by the prominent legal scholars in the early modern period. The treatise written by Konrad Rittershausen (1560-

[11] Nov 83.1 (=Auth. 6.12.1).

[12] X 5.32.1.

[13] As claimed by Hostiensis (ca. 1200-1271) see Henricus de Segusio, *Lectura sive Apparatus domini Hostiensis super quinque libris Decretalium*, Argentini, 1512, ad X 5.32.1, fol. 317ra, s.v. *adiuvantur*. See Alexandrowicz, "Leges non dedignantur...", pp. 202-204.

[14] Bernardo da Montmirat, *Super quinque libris Decretalium lectura aurea certe ac brevi resolutione iuris ambagens enodans, Perillustrium doctorum tam veterum quam recentiorum in libros Decretalium aurei commentarii*, Venetiis, 1588, fol. 2r-152r, ad X 5.32.1, fol. 143va, s.v. *legalibus*. See Alexandrowicz, "Leges non dedignantur...", pp. 204-206.

[15] Galvano da Bologna, *De differentiis legum et canonum*, *Tractatus Universi Iuris*, vol. 1, Venetiis, 1584, fol. 189ra-190rb; Prosdocimo Conti, *De differentiis inter ius canonicum et ius civile*, *Tractatus Universi Iuris*, vol. 1, Venice, 1584, fol. 190rb-197vb; Jean-Baptiste de Saint-Blaise, *Tractatus Insignis, et rarus Contradictionum Iuris Canonici cum iure Civili*, *Tractatus Universi Iuris*, vol. 1, Venetiis, 1584, fol. 185ra-189ra; Gerolamo Zanettini, *De differentiis inter ius canonicum et civile*, *Tractatus Universi Iuris*, vol. 1,Venetiis, 1584, fol. 197vb-208va. These early modern editions from *Tractatus Universi Iuris* often contain various additions from later authors but they are still merely lists of *differentiae*.

1613) is the most influential example of the *differentiae* genre. Rittershausen received a broad education in classics and in law, he was a pupil of Hubert van Giffen (Giphanius, 1533-1604), he taught law in Altdorf, and he wrote several legal works which were appreciated due to the fine application of humanist textual criticism[16]. An objective indicator of the popularity of his work is the fact that *Differentiarum iuris civilis et canonici seu pontificii libri septem* was edited four times, which was unusual for *differentiae*. All the editions were printed posthumously, and the first two editions were printed thanks to the effort of the author's sons[17]. Furthermore, an examination of the legal history scholarship on this topic shows that *Differentiarum libri septem* is acknowledged as the most important example of *Differentienliteratur*. This does not mean, however, that Rittershausen was not criticized for his attitude toward canon law, even centuries after his death[18].

What made his work so important? The answer is not obvious, but at least three preliminary arguments may be listed. Firstly, it was a rather early example of *differentiae* written after 1500. Before 1616, the year the first edition of *Differentiarum libri septem* was published, there were a few works which may be included in the same legal genre but none compared in terms of profundity and breadth. Even a brief examination of the works published before 1600 indicates that *Differentiarum libri septem* was a treatise of a new kind[19]. These works resemble the late medieval *differentiae* and for this reason it may be accurate to claim that they are not comparable to the later examples of this genre[20]. Secondly, it seems that the erudite and informative style of Rittershausen's work contributed to its success. The style in which he depicts the complexity of controversies between the two bodies of law, and afterwards elegantly proposes his solutions, is a reminder of his humanist education and horizons. Thirdly, he offered his audience something more than a simple set of useful solutions. Rittershausen's ambition was also to provide a methodological toolkit for an

[16] Stintzig, J.A.R. von, *Geschichte der Deutschen Rechtswissenschaft. Erste Abtheilung*, München: R. Oldenbourg, 1880, pp. 414-419; Eisenhart, A.R. von, "Rittershausen, Konrad", *Allgemeine Deutsche Biographie*, vol. 28, Leipzig: Duncker & Humblot, 1889, pp. 698-701; Duve, T., "Konrad Rittershausen", *Neue Deutsche Biographie*, vol. 21, Berlin: Duncker & Humblot, 2003, pp. 670-671.

[17] Here we used the last edition, Argentorati, 1668, as a source text.

[18] Rosshirt, C.F., *Dogmengeschichte des Civilrechts*, Heidelberg: Mohr, 1853, p. 435: *Sehr zerrissen und principlos tritt das canonische Recht in dem bekannten Buche des Rittershusius hervor, denn der sogen. usus modernus hat dem canonischen Rechte nur eine casuistische Billigkeit, die vorübergehende Wärme eines Strohfeuers, hinterlassen.* On the other hand, we can also find authors praising his legal skills, see e.g. Birocchi, I., "Tra tradizione e nuova prassi giurisprudenziale: la questione dell'efficacia dei patti nella dottrina italiana dell'età' moderna", *Towards a General Law of Contract* (J. Barton, ed.), Berlin: Duncker & Humblot, 1990, pp. 249-366, p. 255: *Come notava Konrad Rittershausen, tra i più lucidi osservatori dell'esperienza giuridica del passato e al contempo giurista sensibile alle nuove tendenze […]*.

[19] See Oldendorp, Johann, *Collatio iuris civilis et canonici maximam adferens boni et aequi cognitionem*, Coloniae, 1541; Zachaeus, Petrus, *Legum civilium et sanctionum canonicarum collationes ac differentiae, secundum titulos codicis D. Iustininani sacratissimi principis directae*, Basilea, 1566; Anonymus, *Differentia iuris utriusque civilis et canonici*, Theodor Straitmann, *Harmonia titulorum utriusque iuris*, Coloniae Agrippinae, 1571, pp. 313-327; Sturio, Wilhelm, *Praestantia iuris civilis iustinianei, prae canonico pontificio: centuriam differentiarum ex divinae legis et aequi praescripto demonstrata*, Basileae, 1594. Only in Zachaeus's work is there a *littera dedicatoria* that touches on some general issues, but not in a comprehensive manner.

[20] See Schnitzer, "Differentienliteratur", p. 337, note 10a on the early modern *Differentienliteratur*: *Sie ist der mittelalterlichen Differentienliteratur nicht vergleichbar*.

independent reader. This is evident from his introduction to *Differentiarum libri septem*, on which we can now shed some light.

In *Proemium*, Rittershausen compiles several notes that are loosely connected and have varying significance for the main body of his work. Firstly, he provides the reader with some explanation concerning the scope of the bodies of law that are the subject of his investigation, *ius civile* and *ius canonicum*. He does not refrain from a critique of mundane actions of the popes which were aimed at broadening the temporal jurisdiction of the Church. It seems that Rittershausen agrees with such authors as Marsilio da Padova (1275-1343), Giovanni Pietro de Ferrari (1400-1499) and Albert Kranz (1448-1517), whom he recalls in *Proemium*. Nevertheless, the author decides to depict canon law in greater detail. He describes canon law with use of three criteria, i.e. the very name of this law, the authors of canon law, and the parts of canon law together with their history and content. This part of *Proemium* is written in a more didactic manner and even provides the reader with an introduction to the referencing system of canon law source texts. It is followed by some critique of canon law and its *absurditates* in general, with a remark concerning the famous burning of canon law books by Martin Luther in 1520[21]. His main point of critique responds to the historical and textual abuses of canon law towards its very sources[22].

The most important is the last part of the introduction, where Rittershausen offers some general elucidations on the application of canon law in the civil forum, even after the Reformation. According to him, there are two levels which must be acknowledged. Firstly, there are general rules established by learned authors which constitute a theoretical frame for the application of canon law (these will be discussed in the following paragraphs). Secondly, there are particular legal areas in which it is more likely that canon law should be followed. Rittershausen lists eleven types of such issues, and they comprise the chapters of his work. He also lists the recent authors who were of the greatest importance for his solutions on *differentiae* in the German context: Joachim Mynsinger von Frundeck (1514-1588), Andreas von Gail (1526-1587), Bernhard Wurmser (?-1521), Hartmann Hartmann (1523-1586), Johann von Fichard (1512-1581), Matthaeus Wesenbeck (1531-1586), and Modestinus Pistoris (1516-1565)[23]. He ends his introduction with one more belittling remark when he claims, after Jaques Cujas, that whatever is clearly stated in canon law is in fact inspired by civil law. Furthermore, he adds quotations from two classics (Horace and Livy) and he cites the famous proverb *legista sine canonibus parum valet, canonista sine legibus nihil*[24]. Finally, he expresses the hope that his readers are ready to follow his elaborate study on *differentiae*.

Among various interesting points made by Rittershausen in this introduction, it seems that the *regulae generales* regulating the application of canon law on civil and reformed fora are the most sophisticated indication of the rise of a new methodological approach. This part of his *Proemium* has already attracted some attention amongst legal

[21] Rittershausen, Konrad, *Differentiarum iuris civilis et canonici seu pontificii libri septem*, Argentorati, 1668, Proemium, p. 8.

[22] Wolter, *Ius Canonicum in Iure Civili*, pp. 63-64.

[23] Rittershausen, *Differentiarum libri septem*, Proemium, p. 10.

[24] On the origin and reception of this proverb, see Merzbacher, F., "Die Parömie »Legista sine canonibus parum valet, canonista sine legibus nihil«", *Studia Gratiana* 13 (1967), pp. 275-282; Pennington, K., "Legista sine canonibus parum valet, canonista sine legibus nihil", *Bulletin of Medieval Canon Law* 34 (2017), pp. 249-258.

historians[25]. Moreover, we claim that this set of rules is the most elaborated methodological premise of the early modern *differentiae*[26]. For these reasons, the *regulae generales* will be examined in detail below, to see how Rittershausen managed to extract from the contemporary literature both guidelines for and examples of the application of canon law. Later on, they will also serve us as a point of reference for the examination of other examples of *differentiae.*

3. Rittershausen's general rules

3.1. *Regulae prima et secunda*

Quoties res obscura aut dubia est iure civili, iure autem canonico clare definita, standum esse canonibus, et quidem in utroque foro[27].

Rittershausen begins with the most crucial formula allowing the application of canon law on a secular forum. He constructs this rule from various sources and it is not an exaggeration to claim that it is woven from the reiterated phrases of the three main authors: Giasone del Maino (1435-1519), Mynsinger and Alessandro Tartagni (1424-1477). The rule is founded on the two first canons from the title *De novi operis nuntiatione* in the Decretals, i.e. the abovementioned c. *Intelleximus* (X 5.32.1) and c. *Quum ex iniuncto* (X 5.32.2)[28]. They are not discussed in detail, but they serve as a criterion for the selection of doctrinal texts supporting the first rule, as they appear in all the passages to which Rittershausen here refers. As the very source of the phrase Rittershausen uses, mention should be made of a piece of commentary to the Code of del Maino: *nam quando aliquid est dubium de iure civili, et clare decisum de iure can. statur iuri canonico, etiam in foro civili*[29]. To this he adds a reference to the words of del Maino's pupil, Filippo Decio (1454-1535) – most probably to the words *attenditur decisio iuris canonici etiam de iure civili*[30]. In both cases, these are marginal remarks added by the famous civil lawyers to their broad commentary on the Code. They are

[25] Schnitzer, "Differentienliteratur…", pp. 337-339; Mohnhaupt, "Die Differentienliteratur…", p. 452; Schmoeckel, *Das Recht der Reformation*, pp. 73-74.

[26] It should be again stressed, however, that we are focusing here on *differentiae iuris civilis et canonici*. On the (comparative) method in *differentiae* in general, see Mohnhaupt, "Die Differentienliteratur…"; Mohnhaupt, H., "Aufklärung, komparatistische Beobachtung und Entstehen der Rechtsvergleichung", *Transactions of the Ninth International Congress on the Enlightenment*, vol. 3, Oxford: Voltaire Foundation, 1996, pp. 1183-1186; Mohnhaupt, H., "Europäische Rechtsgeschichte und europäische Einigung. Historische Beobachtungen zu Einheitlichkeit und Vielfalt des Rechts und der Rechtsentwicklungen in Europa", *Recht - Idee - Geschichte. Beiträge zur Rechts- und Ideengeschichte für Rolf Lieberwirth anläßlich seines 80. Geburtstages* (H. Lück, B. Schildt, eds.), Köln: Böhlau, 2000, pp. 666-667; Mohnhaupt, H., "Europäische Rechtsgeschichte und europäische Integration. Kulturelle Bedingungen europäischer Rechtseinheit und vergleichende Beobachtungen", *Europäische Rechtsgeschichte und europäische Integration* (K.Å.S., Modéer, ed.), Stockholm: Institutet för Rättshistorisk Forskning, 2002, pp. 37-38; Mohnhaupt, H., "Historische Vergleichung als Erkenntnismethode. Die vergleichende Beobachtung von Recht und Staat im 18. Jahrhundert", *Právněhistorické studie* 51/1(2021), pp. 43-45.

[27] Rittershausen, *Differentiarum libri septem*, Proemium, p. 9.

[28] On the long history of dispute behind this case, see Arella, *Nuntiatio novi operis*, pp. 25-41.

[29] Del Maino, Giasone, *In Primam Codicis Partem Commentaria*, Venetiis, 1589, ad C. 1.22.2, num. 23, fol. 44vb.

[30] Decio, Filippo, *Admiranda commentaria nova et vetera super prima et secunda Codicis*, Venetiis, 1524, ad C. 2.1.3, num. 1, fol. 14ra.

followed by a reference to Mariano Soccini il giovane (1482-1556) as well as three other decretals (X 2.6.5; 2.2.10; 4.17.13), but it is not entirely certain that there is no mistake in this referral[31]. Socini and the decretals are reiterated by Rittershausen from the second crucial source for his first rule, i.e. from Mynsinger. He gives the rationale for this general rule, claiming that by the application of the pope's decision it is possible to appease the discrepancies between the legists[32], and it is almost verbatim copied by Rittershausen. After the presentation and justification of the first rule, Rittershausen supports it with six other references. They are various sentences extracted from legal literature focused on practice, namely two *consilia* of Wesenbeck[33], two points from Giacomo Menochio (1532-1607)[34], and two more *consilia* – one of Pietro Paolo Parisio (1473-1545)[35] and the other of Tartagni[36]. In all these texts it is stressed that there is a possibility of applying canon law in the civil forum when the former is clear and the latter is dubious. Particularly important is the *consilium* of Tartagni, where the jurist admits that the general rule allowed application of clearly defined provisions of canon law in the event of dubious cases on the civil forum, even when it is civil law that should formally solve the case. This however is not the case in his *consilium*, as he argues that there is no uncertainty in civil law and for this reason that it is not possible to refer to canon law. For Rittershausen, the argument of Tartagni serves as a basis for adding a final reservation to his first rule: *Nisi statutum aliquod iubeat iudicare secundum ius civile*. Interestingly, his reservation is stricter than the original one. He does not restrict

[31] It seems that Rittershausen referred to the commentary of Socini to X 2.6.5 without precise numbers, and there is hardly any phrase fitting the argument in this source. To this reference were added two other canons. Interestingly, it was in Socini's commentary on X 2.2.10 that we find a passage referring to c. *Intelleximus*, which is suitable for Rittershausen argument, see Socini, Mariano, il giovane, *Super Decretales tractatus*, Lugduni, 1547, ad X 2.2.10, num. 14, fol. 92vb: *Si tamen reperitur illud ab ecclesia determinatum, sequendum est et in foro seculari. Tu dic, quod si iudex potius volet adire Principem, est in facultate sua: sed si non vult, debet sequi quod determinatum est a iure canonico*.

[32] Mynsinger von Frundeck, Joachim, *Responsorum iuris, sive consiliorum decadem decem, sive Centuria integra*, Basileae, 1580, dec. 9, res. 85, num. 3, col. 626: *Quoties res lege civili dubia existit, iure autem canonum clare definite, standum esse canonibus in utroque foro […] quia per decisionem Pontificis censetur legistarum varietas sopita esse*.

[33] Wesenbeck, Matthaeus, *Tractatuum et responsorum, Quae vulgo consilia iuris appellantur*, Wittebergae, 1633, vol. 1, cons. 6, num. 202, col. 324: *Et etiamsi haec dubium haberent iure civili: tamen cum canonibus expresse decisum sit, ut possint ordinarii recusari […] merito huic est standum in foro civili […] et sequendum, ut in eo quod iure civili definitum non sit, sed controversum*. *Ibid.*, vol. 1, cons. 43, num. 58, col. 1093: *Cum igitur haec res non inveniatur iure civili aperte decisa, et per canones expressim atque in terminis definita sit […] concludo, hac in parte etiam in foro civili ius canonicum esse attendendum*.

[34] Menochio, Giacomo, *De arbitrariis iudicum quaestionibus et causis centuriae sex*, Coloniae Alloborgum, 1671, lib. 1, q. 30, num. 2-3, p. 37: *non est inter utrumque ius ex tam levi causa constituenda differentia […] cum in foro civili, si casus est dubius, iuri Pontificio standum sit*. *Ibid.*, lib. 1, q. 74, num. 53, p. 102: *quando aliquid est iure Pontificio clarum, standum est iuri Pontificio, etiam in foro civili*.

[35] Parisio, Pietro Paolo, *Consiliorum Petri Pauli Parisii Patricii Consentini*, part 3, Venetiis, 1580, cons. 27, num. 10-11, fol. 44vb: *Nec obstabit, si dicatur, de iure civili adhuc esse dubium, et quoniam istud aperte decisum est in iure canonico, etiam in foro civili standum erit iuri canonico*.

[36] Tartagni, Alessandro, *Consiliorum seu responsorum Alexandri Tartagni Imolensis I.C. celeberrimi*, Venetiis, 1610, vol. 2, cons. 142, num. 15-16, fol. 124ra: *Et sic non habet obstare, quod ubi de iure civili super aliquo vertitur probabile dubium, quod stari debeat dispositioni iuris canonici clare decidentis etiam in locis, in quibus servari deberet ius civile: quia (ut dixi) ius canonicum nil novi providet circa casum, de quo vertitur quaestio […] Et sic patet, quod non potest dici esse probabile dubium in casu nostro de iure civili. Et per consequens non videtur, quod servari debeat decisio canonistarum in locis, in quib. servari debeat ius civile*.

himself to asserting it is valid only for dubious cases, but for any case that should be judged according to civil law.

Therefore, we may notice that the first rule is compiled and derived from quotations taken from del Maino, Mynsinger and Tartagni, supported with references to the canon law sources (apparently less important), and the random opinions of other recent authors on the issue in question. The credit nevertheless goes to Rittershausen, as he remains independent in the final wording of his rule and in shaping its limitation.

Quando aliquid est iure civili definitum, et non iure canonico, standum est iuri civili etiam in foro canonico[37].

The description of the second rule does not make as broad reference to source texts as the previous one. Its core is copied from Menochio's *casus*[38] and expresses the condition that if something is determined by civil law and not by canon law, then the first one also applies on the second forum. Menochio – and Rittershausen after him – points out one limitation, namely that there must not be a difference in the *ratio* of the two laws in such a case. The simple second rule may be therefore seen as opposite and complementary to the first one.

This is also supported by the following reference to Wesenbeck's *consilium*, which combined these two rules into one[39]. Whenever one of the two laws is explicit and the other lacks clarity, the former should be valid on both fora. The central premise of the first two rules is that each of the two laws supplements the other. Additionally, Rittershausen refers to *Libri Feudorum* to support his claim, where it is declared that when a clear provision of feudal law is lacking, *lex scripta* should be applied[40]. For Rittershausen this means that when feudal law is not clear, common law should be applied, and that is why it is similar to his second rule.

We may notice that to support the second rule Rittershausen does not cite as many sources as he does to explain the first rule, yet they should be treated as complementary formulas. Moreover, these two fragments from works by Menochio and Wesenbeck contain a handful of examples, amounting to a dozen sources in Wesenbeck's book, and they accordingly serve as a solid foundation for the second rule and the overarching observation of Wesenbeck.

[37] Rittershausen, *Differentiarum libri septem*, Proemium, p. 9.

[38] Menochio, *De arbitrariis iudicum*, lib. 2, cas. 185, num. 12, p. 383: *quia quando aliquid est iure civili diffinitum, et non iure canonico, stamus iuri civili etiam in foro canonico [...] Verum haec ratio non est statis solida, quoniam tunc iuri civili stamus etiam in foro canonico, quando differentiae ratio assignari inter utrumque ius minime potest: secus econtra [...] sed hic patet differentia, quam supra retuli, nempe ratione publicationis differentis.*

[39] Wesenbeck, *Tractatuum et responsorum,* vol. 1, cons. 1, num. 20, col. 12: *Notum est enim, quoties alterutro iure quid expressum est, quod in altero sit controversum, toties eam definitionem expressam in utroque foro valere [...]. Alterum enim ius suppletur per alterum [...].*

[40] *Libri Feudorum, Corpus Iuris Civilis Iustiniani, Volumen Legum paruum, quod vocant in quo haec insunt: tres posteriores libris Codicis D. Iustiniani Sacratissimi Principis*, vol. 5, part 1, Lugduni, 1627, lib. 2, tit. 1, col. 38: *Strenuus autem legisperitus, sicubi casus emerserit, qui consuetudine feudi non sit comprehensus, absque calumnia uti poterit lege scripta*.

3.2. *Regulae tertia et quarta*

Cum ius civile et canonicum inter se pugnant, ius civile servari debet in foro Imperii, ius canonicum vero in terris Ecclesiae[41].

The third rule clearly states that if there is no accordance between the two laws, they should keep their autonomy and be observed on their respective fora. Again, Rittershausen takes the expression of this rule verbatim from Mynsinger's *consilium*[42], however, the most important source text from *corpora iuris* is the introductory note to the famous second *regula iuris* from the Liber Sextus: *Possessor malae fidei ullo tempore non praescribit* (VI 5.13.2). The prerequisite of initial or long-lasting *bona fides* is an example of a sharp discord between the two laws. On the margin to this rule the jurisprudence established various concepts important for understanding the relations between *ius civile* and *ius canonicum*. To the gloss and *consilium* of Mynsinger, Rittershausen adds numerous other references supporting this rule. Two passages from the works of Decio are a simple confirmation of this rule[43]. More complex is a paragraph from del Maino's commentary to the Digest, as there appears the important point regarding the necessary differentiation concerning the spiritual or temporal matter of a case. It is followed by the notion that it is not desirable to exacerbate the differences between the two laws[44]. The last two sources Rittershausen provides at this point come from Bartolo da Sassoferrato (1313-1357), but they are somewhat misguided, as the first one is an introduction of the differentiation similar to the one given by del Maino[45], while the other one lacks any link to canon law apart following the opinion of Innocent IV on *quarta productio*[46]. The third rule is supplemented with a clarification that it should only be preserved when *utrumque ius est rationabile* and there is no danger for a soul involved. It was inspired by the *consilium* of Pistoris[47], together with two more references reiterated after him. One is from Niccolò de Tudeschi (Panormitanus, 1386-

[41] Rittershausen, *Differentiarum libri septem*, Proemium, p. 9.

[42] Mynsinger von Frundeck, *Responsorum iuris*, dec. 9, res. 85, num. 6, col. 627: *Secundo propter regulam, qua traditur, cum ius civile et canonicum pugnant inter se, ius civile servandum esse in foro Imperii, ius canonicum vero in terris ecclesiae [...].*

[43] Decio, Filippo, *Super Decretalibus*, Lugduni, 1559, ad X 2.1.8, num. 1, fol. 177va: *Primo no. quod leges non dedignantur sacros canones imitari […] Et hoc intelligitur in materia pertinente ad ecclesiam: secus essset in materia indifferenti: quia leges in foro seculari, et canones in foro ecclesiastico attendi debent*. Decio, Filippo, *Consilium sive Responsorum, Tomus Secundus*, Venetiis, 1575, cons. 452, num. 6, fol. 113ra: *in terris ecclesiae canones attenduntur*.

[44] Del Maino, Giasone, *In Primam Infortiati Partem Commentaria*, Venetiis, 1589, ad D. 24.3, rubr., num. 31, fol. 3va: *quando aliquid est clare decisum de iure civili, et non reperitur expressum de iure can. stamus iuri civili, etiam in fo. can. nisi esset materia spiritualis, aut peccati […] Secundo, quia non detur induci discordia inter ius civile, et ius can. quando non invenit expressum*.

[45] Bartolus de Saxoferrato, *In primam codicis partem commentaria*, Augustae Taurinorum, 1577, ad C. 1.2.12, num. 2, fol. 14ra: *Quaero ergo quando lex contradicit canoni, vel econtra, cui sit standum […] Tu dic, aut loquimur in spiritualibus et pertinentibus ad fidem, et stamus canoni […] aut loquimur in temporalibus et tunc aut in terris subiectis ecclesiae, et sine dubio stamus decretalibus. Aut in terris subiectis Imperio, et tunc, aut servare legem est inducere peccatum […] Aut non inducit peccatum, et tunc stamus legi*.

[46] See *ibid.*, in Auth. ad C. 4.19.19, num. 10, fol. 136va.

[47] Pistoris, Modestinus, *Consilia, Consilia sive Responsa Trium Saxoniae Iureconsultorum celeberrimorum*, vol. 1, Lipsiae, 1596, cons. 41, num. 6, p. 470: *et quando ius canonicum et civile discrepant, et utrumque est rationabile, et potest sine periculo animae servari, servatur utrumque in foro suo*.

1445)[48] and the other one from the gloss to VI 1.22.2[49]. It seems that both of them support the point on the *rationabilitas* of a statute which results in the exclusion of the application of canon law in temporal matters that fall outside ecclesiastical jurisdiction.

The fourth rule is a nuanced continuation of the former one. When there is no accordance between the two laws (as in the third rule) but the case involves sin or conscience, it is better to follow canon law not only where the ecclesiastical jurisdiction reaches but throughout Christendom, i.e. also in imperial lands, as in this case *leges* step aside *canones*[50]. The rule is mostly taken from the *consilium* of Pistoris, with the additional remark of Rittershausen asserting that Pistoris followed Bartolus and Panormitanus[51]. In *consilium*, as well as in almost all the following references, the jurists expressed noteworthy observations on the margin of issues involving the proper judgment of *mala fides* in *preascriptio*. This reference is followed by mentions of Del Maino[52] and Mynsinger[53], who both followed the opinion that *mala fides* breaks *praescriptio* as it is stated by the canons and that it should therefore be accepted on the civil forum because there is a sin involved. Next Rittershausen points out that his mentor, Giphanius, wrote him in a letter about the erroneous opinion of de Ferrari, who reportedly claimed that aside from *praescriptio* there is no need for civil law to step aside for canon law. The reference to de Ferrari, however, is unfortunately not accurate[54]. Rittershausen supported his point with a long list of references. Firstly, he mentions two *consilia* of Rolando della Valle (16th century) similarly point out that in matters involving sin canon law should prevail on any forum[55], and after him he

[48] Niccolò de Tudeschi, *Commentaria in Quartum et Quintum Decretalium Librum*, Venetiis, 1571, ad X 5.32.1, num. 7, fol. 175ra: *Si vero lex non deficit, et tunc aut canon, et leges sibi contradicunt (licet. n. utraque sit rationabilis in se: tamen propter varias rationes possunt sibi contradicere) et tunc quaelibet lex servanda in foro suo*.

[49] *Glossa ordinaria, Liber sextus Decretalium d. Bonifacii papae VIII, Corpus iuris canonici emendatum et notis illustratum. Gregorii XIII. pont. max. iussu editum*, part 3, Romae, 1582, ad VI 1.22.2, sv. lex civilis, col. 305: *Sed quid dices, nunquid servabitur haec decret. in foro seculari? Dic qoud non, in locis quae non sunt in temporali iurisdictione ecclesiae*.

[50] Rittershausen, *Differentiarum libri septem*, Proemium, p. 9: *Aliud est, si tractetur de peccato vitando, et de casibus conscientiae. Tunc enim quando est discrepantia inter ius canonicum et civile, potius tenendum esse aiunt constitutionem iuris canonici, non solum in terris Ecclesiae, sed etiam in toto orbe Christiano, atque ita etiam in terris Imperii: quasi ibi cedant LL. Impp. sacris canonibus.*

[51] Pistoris, *Consilia*, cons. 49, num. 11, p. 524: *Dieweil auch auß dieser ration zuerschen/ quod hic tractetur de peccato, so wil auch folgen/ das solche constitutio iuris canonici nicht allein in foro canonico oder in terris Ecclesiae, sondern auch uberall wo Christen sein/ et ita etiam in terris imperii, zu halten sey. Quia quando tractatur de peccato, leges Imperatorum cedunt sacris canonibus [...] dum ibi dicit Imperator, leges civiles non dedignari imitari sacros canones, idque eo magis in casu nostro, in quo etiam ll. civiles fatentur, peccare eum. qui cum malam fidem habuerit*.

[52] Del Maino, Giasone, *In Primam Digesti Novi Partem Commentaria*, Venetiis, 1589, ad D. 41.2.3.21, num. 18, fol. 75va: *Ultimo per istum tex. [...] quod cum de iu. can. cui standum est etiam in foro civili, cum tractetur de peccato, superveniens mala fides interrumpat praescrpitionem*.

[53] Mynsinger von Frundeck, *Responsorum iuris*, res. 41, num. 13, col. 342: *censeo ego, ius canonicum, quo ad praescriptiones, etiam in foro seculari obtinere, et iuxta illud iudicandum esse. quia in praescriptionibus dicitur tractari de peccato: et quando tractatur de peccato, statur iuri canonico, etiam in foro civili*.

[54] Rittershausen refers to *n. 40*, but it would seem that there are only 35 paragraphs in the mentioned section. The most fitting passage is the following: de Ferrari, Giovanni Pietro, *Practica aurea*, Coloniae, 1576, Forma responsionis rei conventi, sv. Praescriptionis, num. 31, pp. 114-115: *in respicientibus fidem, et animam, non dedignantur leges sacros canones imitari*.

[55] Della Valle, Rolando, *Consilia sive responsa*, Francofurti ad Moenum, 1584, vol. 3, cons. 99, num. 23, p. 345: *Nam ubi tractatur de materia peccati, semper standum est iuri canonico in omni foro*.

reiterates references to Tartagni[56] and Antonio da Budrio (ca. 1360-1408)[57]. Secondly, he adds four more sources, i.e. a treatise on *praescriptio* written by Giovanni Francesco Balbo (before 1480-after 1518)[58] and three *consilia* of Wesenbeck[59]. All of them express the view that in spiritual matters or when the danger of sin is present canon law should be followed even on the civil forum.

The third and fourth rules are supplemented with some exceptions. Unsurprisingly, these exceptions arise from many of the sources mentioned earlier by Rittershausen. He says that when there is a conflict between the two laws in *materia peccati et conscientiae* it is more secure to follow canon law. The reason behind this statement is that canon law cares about the salvation of souls which should always precede the mundane purposes of civil law. This is especially significant when there is a statute contrary to canon law and in accordance with civil law. Such a statute has to be declared void as it is an incentive for sin[60]. These exceptions – or rather explanations – are described by Rittershausen as commonly accepted by *Doctores*, mentioning André Tiraqueau (1480-1558), alas ambiguous one, and to the *consilium* of Parisio, who expressed it in similar manner[61].

Ibid., vol. 4, cons. 72, num. 13, p. 248: *ubi tractatur de materia peccati, semper est standum iure canonico in omni foro*.

[56] Rittershausen indicates the second volume of *cosilia*, but with support from della Valle we can correct it as the third volume: Tartagni, *Consiliorum*, vol. 3, cons. 34, num. 1, fol. 39vb: *ista opinio. servari debet nedum in foro ecclesiastico, sed etiam in seculari: quia incurreret peccatum, si cum mala fide vult se exceptione praescriptionis tueri, etiam attentat dispositione iuris civilis […] et ubi agitur de peccato debet servari ius canonicum in utroque foro*.

[57] The source apparently misses the danger of sin in cases involving *praescriptio* – see Antonio da Budrio, *Consilia seu responsa*, Venetiis, 1575, cons. 45, pp. 176-183.

[58] Balbo, Giovanni Francesco, *De praescriptionibus tractatus*, Coloniae Agrippinae, 1573, prooemium, num. 1, p. 2: *Tenet igitur haec materia iuris utriusque mixturam: magisque canonica, quam civilis censeri debet. Etenim in praescriptione nedum lucrum et pecuniarium commodum, verum etiam peccatum et animae periculum versatur: prout ex infrascripto tractatu diffuse patebit*.

[59] Wesenbeck, *Tractatuum et responsorum*, vol. 1, cons. 2, num. 38, col. 97: *praesertim iure Canonico […] quod in praescriptionibus, utpote materia peccati et conscientiae etiam in foro civili servatur*. *Ibid.*, vol. 1, cons. 44, num. 37, col. 1151: *cum hic agatur de matrimonio, hoc est, de re spirituali, et de materia peccati ac fornicationis, merito hac in re standum est canonibus*. *Ibid.*, vol. 2, cons. 60, num. 9-10, col. 149: *potissimum ex iure canonico […] quod in hac peccati materia etiam in foro civili servandum est*.

[60] Rittershausen, *Differentiarum libri septem*, p. 10: *Sit igitur haec notabilis Exceptio ad tertiam nostram regulam vel etiam separata quaedam et IV. Regula, nempe, quoties tractatur de materia peccati et conscientiae, si pugnet ius civile cum canonico, potius sequenda est dispositio iuris canonici quam civilis, etiam in foro civili. De cuius Regulae, ut et praeced. exemplis infr. dicetur. Ratio eius haec est, quia principalis intentio iuris can. est consulere saluti animarum, ut ait A. Tiraq. Animae autem salus omnibus rebus est anteponenda. Hic illud quaeri posse video. Quid ergo iuris sit, si quod extet in tali casu statutum iuri canon. contrarium et iuri civili concordans? Respondent Dd. Etiam tunc praeferendum omnino esse ius canonicum et nullius momenti esse tale statutum, utpote nutritium peccati (Sic enim loquuntur) id est, invitans ad delinquendum*.

[61] Parisio, *Consiliorum*, cons. 66, num. 99, fol. 110ra: *Et verum est in praesenti materia ratione peccati standum esse iuri canonico, et eius dispositioni, reiecto ordine iuris civilis […] Quae conclusio nedum procedit in praescriptione inducta de iure communi, sed etiam in illa inducta virtute alicuius statuti. Non enim valet statutum, si praescriptionem induceret cum mala fide, ex quo esset nutritivum peccacti*.

3.3. *Regulae quinta et sexta*

Si diversum ius statuatur in foro seculari et canonico, Iudex secularis servat suum ius, et spiritualis quoque suum. Sed si in altero foro ius illud sit aequius, tunc etiam ad aliud forum deducendum est[62].

Regula quinta is a direct citation taken from Johann Sichard's (1499-1552) work[63]. If there is any discrepancy between the two laws, then secular and ecclesiastical judges should apply their law. And so *iudex secularis* follows secular law and *iudex spiritualis* uses canon law solutions. In other words, such law should be applied which is established in that particular legal order. Then judges are advised to use accordingly either *ius civile* in *foro seculari* or *ius canonicum* in *foro canonico*. Rittershausen merely quotes Sichard's words and does not mention any other examples. Sichard refers to the Code (C. 3.1.8) regarding the judgements. It is said that the principles of justice and equity should be observed before the strict rules of law. *Quinta regula* concerns also equity which should be considered as adjudicative in legal solutions. Following Sichard, the content and presented examples mainly illustrate the advantage of equity. Hence, it is essential to consider equity when arbitrating which one of the two laws should be chosen.

In dubio non debet fieri differentia inter ius canonicum et civile[64].

The last rule is a general recommendation to avoid differences in dubious cases. The sixth rule is based on Decio's *consilium*[65] and three texts therein which are reiterated by Rittershausen. Decio's book mentions, among others, Pier Filippo Corneo (ca. 1420-ca. 1493)[66] and Ludovico Pontano (ca. 1409-1439)[67]. There are some slight inaccuracies in Rittershausen *Proemium* regarding quotation[68], but bearing in mind the fact that Decio's text is basic, it is possible to identify Pontano's *singularium* and *consilium*. It seems that both Pontano's texts present the view that an oath precludes the possibility of justification of any delay while providing two textual sources as examples: one

[62] Rittershausen, *Differentiarum libri septem*, Proemium, p. 10.

[63] Sichard, Johann, *In Codicem Iustinianeum Praelectiones*, Francofurti ad Moenum, 1586, ad C.3.1.8, num. 3, p. 111: *Praeterea scimus, quod si diversum ius statuatur in seculari foro et canonico, quod secularis iudex servat suum ius, spiritualis quoque suum. Sed si in altero foro ius illud sit aequitas, tunc deducendum quoque est ad illud forum.*

[64] Rittershausen, *Differentiarum libri septem*, Proemium, p. 10.

[65] Decio, Filippo, *Consilium sive Responsorum*, *Tomus Secundus*, Venetiis, 1575, cons. 452, num. 15, fol. 113va.

[66] Corneo, Pier Filippo, *Consiliorum sive responsorum*, *Volumen Primum*, Venetiis, 1582, cons. 121, fol. 133ra. The reference is to Corneo's *consilium* as a whole, but it seems that its subnumber is 3, due to Decio's mentioning of Baldus and the Code (C. 9.1.3). The following comes from Corneo's *consilium*: *Nec ob per dicit Baldus [...], quia loquit sine iure et ratione ex sui capitis sententia, non probant iura per eum adducta. Nam dictus canon apud misericordem, loquitur in foro poenitentiali. Item glossa loquit in purgatione morae in poena conventionali, nec loquitur in conventione iurata [...]*.

[67] Pontano, Ludovico, *Singularia subtilia*, *Singularia plurimorum doctorum*, Lugduni, 1543, sing. 444, fol. 40va-vb: *Iuramentum excludit facultatem purgandi moram commune dictum est legistarum [...] sed istud est verum in foro iudiciali sed an sit idem in penitentiali [...]*. Pontano, Ludovico, *Consilia*, Lugduni, 1555, cons. 427, num. 7, fol. 127vb: *quod non locus est purgationi morae, ubi poena adiicitur cum praefixione termini. Secundo iuravit hoc ius dicens statuta omnia servare et consequenter hoc volens infra dies XV huius causam terminari et licet certum sit per iuramentum moram purgari posse quo ad evasionem poene spiritualis [...] tamen non quo ad evasionem poenae temporalis [...]*.

[68] Rittershausen points to *singularium* no. 344 and *consilium* no. 127 but there are accordingly no. 444 and no. 427 in this Decio's source text.

concerning secular law (C. 2.4.41) and the other one regarding a gloss to the Decretum (C.32, q.1, c.10).

Summarizing this part of Rittershausen's *Proemium*, we can say that there are some inspiring thoughts contained in the fifth and sixth rules which focus on the delimitation of the two laws. Judges should maintain their legal order, but be aware that *rigor iuris* should be subordinate to *aequitas*. Last but not the least, it is better to agree than create tensions and differences between the two laws.

3.4. Rittershausen's general rules – a summary

On the basis of the abovementioned rules, some general remarks can be made. The first observation concerns the textual sources which Rittereshausen uses. He rarely makes direct references to the texts from *corpora iuris*, relying mainly on the works produced by legal doctrine of his time. These works are primarily from the 15th-16th centuries, and medieval *differentiae* are hard to find. Furthermore, the most frequently quoted works are *consilia*, *responsa* and commentaries. Among dozens of examples, Rittereshausen mentions most willingly passages from Wesenbeck, Mynsinger or Pistoris. They are also present later in *Proemium*, when he lists the lawyers particularly important for his study. Even though almost all of Rittershausen's rules were copied from other writers, it seems they were put together in an original way. He presents *regulae* within a new frame and through the prism of his own experience.

A two-dimensional perspective is noticeable in Rittershausen's rules. In each pair of rules there are practical instructions regarding the choice of law, and some more nuanced directives are provided for dealing with legally ambiguous situations. By combining the rules in three pairs, it is possible to illustrate the patterns in this two-dimensional perspective in each pair of rules. In the first pair there is a practical notion on how to proceed in the event of lack of regulation in one of the two laws. If one law is questionable or controversial, it is necessary to consider whether it would be better to apply the other one. Finally, Rittershausen emphasizes that the two bodies of law are complementary. In the second pair of rules, we learn that the contradictions between the laws mean they remain separate, so each one is appropriate for the dispute in the civil forum or the ecclesiastical forum. However, there is an exception which is related to the avoidance of sin, when canon law should be followed in the first place and the precedence of canon law is visible. In the third pair of rules, it is stated that each judge follows solutions included in each of the two bodies of law, but equity should always be considered in the background. Finally, differences between the two laws should not be fostered or accentuated. In each pair of rules, there are practical instructions complemented with some nuanced theoretical elucidations.

We may add to this an observation that the method which stood behind *regulae generales* has two objectives, as the rules may at the same time serve for comparison of the two laws and for the selection of the appropriate norm when a conflict of norms occurs. In the latter perspective, these rules may be seen as a tool resulting from the challenges of early modern legal pluralism. This is therefore an interesting example of how the phenomenon of legal pluralism was addressed by early modern legal scholars, whose views were encapsulated into six rules by Rittershausen.

4. *Differentiae* – how to apply the two bodies of law?

Rittershausen's *Differentiarum libri septem* is only one example of *differentiae* from the early modern period and our objective now will be to examine if and how any methodological premises were provided by the authors of other works dedicated to the differences between canon law and civil law. We will take into consideration over twenty works dedicated to the relations between the two bodies of law which were published in the 17th-18th centuries and contain the word *differentia* in their title[69]. The scope and length of these works vary a great deal and for this reason we will limit our examination to the introductions.

Several examples of *differentiae* do not address the question of the procedure appropriate for deciding which body of law should be followed when both laws differ. As they vary at all levels (date, length, purpose) it seems pointless to draw any conclusion from the bare fact that there are no methodological remarks of the kind we are looking for. Among these examples we count the works of Fortún García de Ercilla y Arteaga (1494-1534), Joachim Hasseus (lifespan dates unknown, first edition of *differentiae* from 1624), Sigismund Finckelthaus (1611-1674), Johann Strein (1584-1662), Johann Jacob Wissenbach (1607-1665), Werner Johann Uffelmann (1640-1690), and Bernhard Heinrich Reinold (1677-1726)[70].

The rest of the examined examples will be grouped into three categories reflecting the scope and breadth of the authors' methodological premises. As we find the rules to be the most mature methodological tool applied in *differentiae*, we used their presence as a criterion. Within the three groups, the sources will be discussed

[69] For the search of the sources we used the early modern catalogues of legal books: Lipenius, M., *Bibliotheca realis iuridica, omnium materiarum, rerum, et titulorum, in univero universi iuris ambitu occurentium ordine alphabetico sic disposita*, Francofurti ad Moenum: Sumptibus Johannis Friderici, 1679, pp. 140-141; Fontana, A., *Amphitheatrum legale in quo quilibet operum legalium author habet suam sedem ordine alphabetico collocatam seu Bibliotheca legalis amplissima*, pars 3, Parmae: Typis Iosephi ab Oleo et Hippolyti Rosati, 1688, pp. 229-234; Struve, B.G., *Bibliotheca iuris selecta secundum ordinem litterarium disposita et ad singulas iuris partes directa*, Ienae: Christianus Henricus Cuno, 1756, pp. 302-303; the general introductions to the history of canon law: Schulte, J.F. von, *Die Geschichte der Quellen und Literatur des Canonischen Rechts von Gratian bis auf die Gegenwart*, vol. 3: *Von der Mitte des 16. Jahrhunderts bis zur Gegenwart*, part 2-3: *Das evangelische Recht, die evangelischen Schriftsteller, die Geschichte der wissenschaftlichen Behandlung, Uebersicht*, Stuttgart: F. Enke, 1880, p. 349; Scherer, R. von, *Handbuch des Kirchenrechtes*, vol. 1, part 1, Graz: Moser, 1898, p. 124; van Hove, A., *Prolegomena ad Codicem iuris canonici*, Mechliniae-Romae: Dessain, 1945, pp. 569-570. We consulted also digital databases of old prints (Digital Library of Max Planck Institute for Legal History and Legal Theory, Gallica, Google Books, das Münchener DigitalisirungsZentrum).

[70] García de Ercilla y Arteaga, Fortún, *Tractatus de ultimo fine iuris civilis et canonici, de primo principio et subsequentibus praeceptis, de derivatione et differentiis utriusque Iuris, et quid sit tenendum ipsa iustitia*, Coloniae Agrippinae, 1585; Hasseus, Joachim, *Sesquicenturia differentiarum iuris civilis et canonici, secundum ordinem Pandectarum disposita*, Basileae, 1624; Finckelthaus, Sigismund, *Decas controversiarum iuridicarum, exhibens consonantias et differentias quasdam iuris potissimum civilis et canonici, ut et doctorum differentias-non differentias*, Lipsiae, 1638; Strein, Johann, *Antinomia iuris pontificii et caesarei per CCL differentias plurium doctorum auctoritate probatas, singulari studio in certas classes reducta, discussa et explicata*, *idem*, *Summa iuris canonici*, vol. 5, Coloniae, 1658; Wissenbach, Johann Jacob, *Differentiae iuris civilis et canonici ad seriem Institutionum*, Ravens, Joannes Arnoldsz, *Ius Canonicum methodo Institutionum per aphorismos strictim explicatum*, Hallae, 1721, pp. 46-55; Uffelmann, Werner Johann, *Lectiones Rittershusianae seu observationes ad Rittershusii icti celeberiimi tractatum de differentiis iuris civilis et canonici*, Verdensi, 1663; Reinold, Bernhard Heinrich, *Disputatio iuridica inauguralis de suspectis quibusdam iuris civilis et canonici differentiis*, Traiecti ad Rhenum, 1705.

chronologically and with particular reference to their possible inspirations in the work of Rittershausen.

4.1. Short methodological notes

Some authors of *differentiae* begin their works with introductory notes concerning the appropriate method for comparing the two laws. None of these authors proposes a sophisticated methodology, let alone any set of general rules. Nevertheless, their concepts deserve a brief examination.

The *Differentiarum in iure libri duo* of Georg Lauterbeck (ca. 1505-1578), a jurist and clerk, was printed at least four times. It is a very elaborated work collecting plethora of differences in two books without distinguishing between the intrinsic differences within one body of law and the differences between the two laws. The author gives interesting general remarks on the nature of *differentiae* in one passage titled *Inter ius canonicum et civile* (a passage reiterated later as a supplement to two editions of Rittershausen's work). Lauterbeck argues that it seems to be incorrect to dismiss canon law *en bloc*, because even though the canons are founded on statutes, the former are closer to the present day and for this reason they contain valuable insights. He also admits that there are more differences than he listed, and that all of them could have been described in more detail, but his aim is solely to provide these brief examples, as it is enough to expose the way one should handle *differentiae*[71]. Nevertheless, he offers a vast number of differences between the two laws throughout his work apart this short list.

In his introduction, Johann Jakob Nezer, a scarcely known law student from Ingolstadt, claims to apply a method founded on the approach to the organisation of differences into three groups concerning *personae*, *res* and *iudicia*, following the imperial and ecclesiastical lawgivers[72]. Samuel Stryk (1640-1710), the author of *Specimen usus moderni pandectarum* and a renowned scholar, was the supervisor of a minor *disputatio iuridica* on *differentiae* written by the 17th century jurist Gottfried Felov. The author openly admits that he ran out of time and collates only a few differences without any particular method (he also mentions other works of this kind, such as Rittershausen's *Differentiarum libri septem*)[73]. In the *dissertatio* written by the jurist and councillor Anton Christoph Reimers (1684-1750), under the supervision of Christian Thomasius (1655-1728), the famous German representative of natural law tradition, we can find a list of a couple of earlier works of this kind (starting with Rittershausen's) and the author declares briefly that his approach to *differentiae* is twofold. Firstly, the historical context is taken into consideration, and secondly what is

[71] Lauterbeck, Georg, *Differentiarum in iure libri duo*, Basileae, 1548, pp. 127-132.

[72] Nezer, Johann Jakob, *Collatae differentiae inter ius caesareum et pontificium*, Ingolstadii, 1629, Praefatio, p. 1: *In conferendis Pontificii iuris et Caesarei differentiis rectissime nos facturos arbitrati sumus, si eam usurpaverimus methodum qua ipsimet iurium conditores usi sunt [...] id tamen non ita sollicite, ut nullam inter utrumque ius discrepantiam praeteriisse videri velimus, sed receptiores et utiliores solum quaestiones attigisse sufficiet*.

[73] Felov, Gottfried, *Disputatio iuridica continens differentias iuris civilis et canonici quae XII decades divisae una cum subiuncta praxi moderna*, Francofurti ad Viadrum, 1683, Praefamen, p. 3.

more just and good is described[74]. Finally, the famous Dutch jurist Johannes Voet (1647-1714), before listing his concise *differentiae*, gives only a general overview of canon law sources[75].

We can see that the authors of *differentiae* had various methodological objectives, which were reflected in the initial parts of their works. Some of them were inspired by Rittershausen, but it seems that none of them was particularly innovative.

4.2. Alternative examples of general rules

In most *differentiae*, the authors proposed a more developed approach founded on a general rule or rules regulating the application of the two laws. These examples are particularly interesting in the context of the set of rules given by Rittershausen and they will be presented in two paragraphs. Firstly, we will discuss the works where the authors mostly limited themselves to a presentation of the rules, without broad reference to the history and significance of the relations between the two bodies of law or to any other methodologically significant point. Then we will move to the more developed introductions where the general rules were only a part of the broader lectures.

In his *differentiae*, Rudolf Everdes (a barely known 17th century lawyer from Emden in East Frisia) provides some general introductory notes and only within the subsequent sections of his work can we find the rules governing the application of both laws. It seems there is justification for claiming that he copied the *regulae generales* from Rittershausen almost verbatim, but with significant abbreviations. Everdes also puts them in slightly different context and provides fewer secondary sources[76]. Still, there is no rationale for studying his account of the rules in detail.

In the *dissertatio* on *differentiae* presented in Helmstedt by Christoph Wegner (?-1653) there is no proper introduction, but there are several remarks important for our study in his notes to the first *thesis*. He briefly introduces the general rules concerning the application of canon or civil law to cases which are similar to the ones provided by Rittershausen but less sophisticated. He mentions, *inter alia*, Wesenbeck, Mynsinger and Rittershausen as secondary sources for his elaborations[77]. Alas, we do not know much about the author himself.

Antonio Pérez (1583-1672) was a Leuven law professor of Spanish origin. He adds an enumeration of *differentiae* before one of many editions of his commentary on Justinian's Institutes and states one general rule concerning the application of the two

[74] Reimers, Anton Christoph, *Dissertatio inauguralis juridica de differentiis iuris civilis et canonici in doctrina de testamentis*, Hallae Magdeburgicae, 1707, § 2, p. 5: *Ita autem procedendum esse existimavi, ut primo capite differentias hac parte occurrentes historice recenserem, deinde autem altero capite breviter ostenderem, quodnam ex discrepantibus hisce iuribus regulis aequi et boni magis consentaneum sit*.

[75] Voet, Johannes, *Differentiae iuris civilis et canonici, idem, Compendium iuris iuxta seriem Pandectarum*, Coloniae, 1734, pp. 542-543.

[76] Everdes, Rudolf, *Disputatio inauguralis de differentiis iuris civilis et canonici*, Basileae, 1638, thesis 1, num. 12-21, s.f.

[77] Wegner, Christoph, *Disputatio de differentiis utriusque iuris*, Helmestadii, 1635, thesis 1, lit. c, s.f. In the other note (lit. g) he provides some insights on the different aims of *leges* and *canones*.

bodies of law[78]. Pérez indicates the complementarity of the two laws. He declares that it is legitimate to use either body of law if there is no regulation in canon law or civil law. However, the rule is not constant but has limitations. One of them is related to the violation of the rules of law. The rule is also limited when the law involves any possibility of committing a sin. Pérez concludes that if there are some questionable limitations, then either law should be applied in its own forum.

We do not know much about Justus Christoph Willerding, apart from the fact that his works were first published in the early 18th century and the title page of his *Fundamenta iuris canonici*, a work which contains *differentiae*, indicates that he was *iuris utriusque licentiatus et practicus* in Hildesheim. In *Praefatio* he gives several interesting remarks on the relations between the two laws, but they are not necessarily linked directly to *differentiae* since here he only provides a general introduction to his *Fundamenta iuris canonici*. In *Prolegomena* he repeats the same general rules as those elaborated by Rittershausen, but he claims that they were established by the canonists[79]. He also adds some typical observations, e.g. on the sources of canon law.

Johann Peter von Ludewig (1668-1743) was a philosopher, lawyer, historian (in fact he may be called even legal historian), politician, and the chancellor of the University of Halle. He offers his readers some *generalia* in five points before listing differences according to the Institutes of Justinian. According to him, *ius canonicum* has a more enduring authority in Germany than *ius civile*, but the importance of *ius Saxonum* is even more longer lasting. For this reason, it is not accurate to claim that canon law is valid in Germany for as long as it is has been accepted, but rather it is valid as long as it is not rejected, and this is true even for the Protestant churches[80]. This thesis resulted in the following conclusion: that the burden of proof lies with the party that claims the inapplicability of canon law (with the exception of the Protestants, in cases which support papal authority or restrict the truth of the Gospel and ecclesiastical freedom). He also adds the rules for the application of one of the two bodies of law, which sound very familiar. The danger for the soul implies that canon law should be applied, but in other cases, each of the two laws should be applied within the territory of the Church or the Empire. Ludewig adds, however, that there is nothing against conscience in civil

[78] Pérez, Antonio, *Differentia iuris canonici et civilis, idem, Institutiones imperiales erotematibus distinctae*, Coloniae Agrippinae, 1660, s.f.: *Ea est differentia inter ius canonicum, et civile, quod ubi ius canonicum in re aliqua deficit, ibi licite recurratur ad ius civile, et e contra, supplendi, vel interpretandi alter ius causa [...] ita ut hinc recte constitutum sit a iure canonico, ut si iudex ecclesiasticus neglectis iuris canonici, vel civilis constitutionib. aliter sententiam dixerit, ipsa vel iure nulla sit, vel iuste ab ea provocetur [...]. Quae tamen regula non est perpetua, sed suas limitationes habet, quia primo ea tantum intelligitur, ubi ius civile favorabile est, non ubi odiosum. Deinde quia omnis potestas et iurisdictio detracta et laicis disponendi de personis, et rebus ecclesiasticis, nequi, quaeve semel Deo dicata sunt, temere ad humanos usus transferantur contra iuris regulas. Tum etiam limitatur, ubi lex, seu constitutio civilis peccatum fovet, ut est concubinatus, usura, malae fidei praescriptio, quae ius can. non admittit, quia non valent. Postremo ubi extra praemissas limitationes ius can. a iure civil. discrepat, utrumque in suo foro observandum est*.

[79] Willerding, Justus Christoph, *Fundamenta iuris canonici in nuclea exhibita, et iuxta ordinem Decretalium adornata, quibus differentiae iuris utriusque, civilis et canonici titulus congruis sunt adiectae, cum indice materiarum*, Francofurti et Lipsiae, 1707, Prolegomena, § 10, s.f.: *Quod tandem ipsam iuris canonci authoritatem, casu quo inter illud et ius civile pugna esse videtur, attinet, sequentes a canonistis suppeditantur regulae*.

[80] Ludewig, Johann Peter von, *Differentiae juris civilis et canonici, subiuncta praxi moderna, methodo Institutionum strictim propositae*, Hallae Magdeburgicae, 1712, Generalia, § 2, p. 3: *Exinde falsa hypothesis, ius canonicum in Germania valere, quatenus receptum: Rectius ita: Valere quatenus non reiectum, etiam inter ipsos Evangelicos*.

law[81]. Finally, he says that in doubtful cases one should seek concord between the two bodies of law, not foster differences, and keep in mind that the two laws support and supplement each other[82].

It seems that the examples discussed above show that the concept of *regulae generales*, as it was presented by Rittershausen, was a successful approach. After his endeavour to collect such rules, no clear progress was made in this area. The later writers either provided a simpler collection of rules or copied the rules from Rittershausen.

4.3. Elaborate methodological introductions

The last group of *differentiae* consists of the works in which the authors propose the theoretical frame of their scholarly effort in an extensive manner. For this reason, it will not be possible to examine their concepts in the same detail as above. Here, we will focus on two particular questions. What kind of general rules on the application of the two bodies of law do they propose? What are the relations between their concepts and the rules from the *Proemium* of Rittershausen?

Henricus Canisius (1557-1610) was a Belgian jurist and historian, and professor of canon law in Inglostadt. His *Differentiae* were written before the publication of *Differentiarum libri septem*[83]. For this reason they may serve for us as an interesting point for a comparison of works of a similar nature written at a similar time, and possibly without mutual influences. Canisius begins his short treatise on *differentiae* with a number of interesting remarks, and among them there are also some general rules concerning the relations between the two bodies of law. He describes the nature of papal decision expressed in c. *Intelleximus* and lists a handful of other decretals founded on the application of Roman law in the event of *lacunae* in canon law. He shows that it is even accepted in the canon law jurisprudence that the judge is obliged to take into account the authority of civil statutes[84]. This favourable attitude toward *ius civile* is however restricted by several limitations which Canisius discusses towards the end of his introduction. The application of civil law is limited when it is detrimental to the Church when it expressly mentions ecclesiastical entities or things, when it touches on spiritual matters, when it contains sin within itself, and when there is a discrepancy between the two bodies of law[85]. This final limitation is the reason for providing the list of *differentiae* which is a list of situations in which there is no possibility for the

[81] *Ibid.*, Generalia, § 4, p. 4: *Vulgata Dd. Regula est: Quoties agitur de peccato vitando, vel animae periculo avertendo, in foro magis sequimur ius can. quam civile […] Quodsi vero materia sit indifferens, tunc in terris Ecclesiae h.e. Pontifici subiectis, ius canon. in terris Imperii ius civile observatur. Verum ius civ. qua praecipit vel prohibit, nihil continent quod conscientiae adversum. Secus ubi quod permittit*.

[82] *Ibid.*, Generalia, § 5, p. 4: *In dubio iura iuribus concordanda, h.e. differentia iuris can. et civilis non admittenda, nisi manifeste appareat. Quodsi vero controversia quaedam expresse in iure civili, et non iure canonico, decisa sit, tunc sequimur decisionem iuris civilis, etiam in foro ecclesiastico: alterum enim ius quod in re aliqua deficit per alterum debet suppleri.*

[83] See Schnitzer, "Differentienliteratur...", pp. 339-340.

[84] Canisius, Henricus, *Tractatus de differentiis iuris canonici et civilis, idem, Opera quae de iure canonico reliquit*, Lovanii, 1649, p. 831: *Ut hinc nata sit haec regula apud Dd. nostros, quod, ubi ius canonicum in re aliqua deficit, ibi licite recurratur ad ius civile, et econtra, supplendi, vel interpretndi alterius causa*.

[85] *Ibid.*, pp. 831-833.

application of civil law on the ecclesiastical forum. We can therefore enumerate at least three major differences between his attitude and that of Rittershausen, bearing in mind that the latter did not influence the former. Firstly, Canisius proposes one general rule and several exceptions instead of a set of *regulae*. Secondly, and more importantly, the perspective the canonist takes is the perspective of canon law. He does not ask when canon law may be applied in civil court but rather when *ius civile* may enter the ecclesiastical forum. The difference and rationale behind this is clear, but it affects the whole argument. Thirdly and consequently, Canisius builds his method on canon law sources and canonists, mainly on Panormitanus, Felino Sandeo (1444-1503) and Filippo Decio. Altogether we may conclude that the rules of Rittershausen and Canisius were written at a similar time but were based on different paradigms and sources. An interesting point for further research is the impact made by the author's confessional faith on the shape of his *differentiae*, as well as on his way of seeking solutions[86].

Johann Emerich von Rosbach (1541-1605) was a jurist from Meißen, the author of books on criminal and civil processes. His work is another example of *differentiae* written before Rittershausen's *Differentiarum libri septem*. It should be stressed that Rosbach openly focuses on a *comparatio* of the two bodies of law and the description of *differentiae* is only a byproduct of his effort. Before moving to the well-organized, detailed comparison of the two laws, he explains typical issues concerning the definitions of the two bodies of law, the differences between their scope, contents and purposes. He subsequently describes the application of the two laws and provides some statements that are similar to rules, but not arranged in a structure. According to Rosbach, each law should be observed on its forum and the sanction for litigating a case on the wrong forum is a rejection of the suit. However, when a case involves spiritual matters or the danger of sin, it is canon law that has to be followed. In a case concerning civil matters, each law should be applied on its respective fora. Civil law should be also followed in ecclesiastical courts if it is closer to *aequitas*. Finally, when there is a case clearly regulated in one law and lacking regulation in the other, the former should take precedence on both fora[87]. Despite the inverse order of rules, they are very similar to the ones proposed by Rittershausen and only a little bit less sophisticated. This is interesting,

[86] On this question, see e.g. Wolter, *Ius Canonicum in Iure Civili*, pp. 91-98, 131-139; Germann, M., "Das kanonistische Recht in der protestantischen Kirchenrechtslehre an der Universität Halle zu Beginn des 18. Jahrhunderts", *Law and Religion: The Legal Teachings of the Protestant and Catholic Reformations* (W. Decock, *et al*., eds.), Göttingen: Vandenhoeck & Ruprecht, 2014, pp. 79-80; Schmoeckel, *Das Recht der Reformation*, p. 72-74.

[87] Rosbach, Johann Emerich von, *Tractatus de comparatione iuris civilis et canonici in quo utriusque differentia seu diversa constitutio ostenditur*, Francofurti, 1601, num. 14-17, p. 5-6: *Cum enim res quaelibet ad suum forum et iudicium competens pertineat, adeo ut qui ad incompetens tribunal causam trahat, ea mulctetur […] eique iudici, qui ultra iurisdictionem suam ius dicere velit, impune non pareatur [...] non tantum quid de proposita quaestione ius civile vel canonicum statuat, sed etiam, si diversa sit inter utrumque dispositio, utrum sequendum, et ad quod forum causa trahenda, spectandum est. Distinguunt vero pro solutione huius quaestionis, ita fere communiter: Aut quaestio, vel causa constroversa, est de rebus spiritualibus, et eiusmodi causis, quae peccatum ac periculum animae concernunt […] referent, et tum indistincte ius canonicum in utroque foro, tam Ecclesiastico, quam civili observari volunt [...] aut versamur in causis civilibus, et tum aut sumus in terris Imperii, et ius civile observamus: aut in terris Ecclesiae, et ius canonicum sequimur […] Quod si tam ius civile aequitatem statueret; ius vero canonicum rigorem, ius civile potius quam canonicum, etiam in foro ecclesiastico, servandum esset […] Item quando casus est aperte decisus a iure civili: at in iure canonico, vel non definitus vel incertus aut dubius, servatur ius civile in utroque foro, et econtra […] Si res non inveniatur iure civili aperte decisa, et per canones expressim definita sit, quod hoc in casu etiam in foro civili ius canonicum attendendum sit.*

especially when we take into consideration that they were composed at similar time and based on a mostly different set of sources and literature. Nevertheless, it seems that it was Rittershausen who attracted the attention of later authors who sought rules of this kind.

A vast introduction opens the original work entitled *Manuductio ad ius canonicum ac civile* written by the Swiss jurist from Basel, Jacob Brandmüller (1617-1677). Here *differentiae* are incorporated to the alphabetical list of legal terms and institutions comprising a work over seven hundred pages long. Each entry consists of three columns: the definition, sources and literature on canon law on the left, and on civil law respectively on the right, while in the middle there is a column dedicated to discussion on *differentiae*. The extent of the work and the erudition of the author is remarkable. From the long *Introductio* on canon law – divided into seven sections covering its origins, name, definition, components, relation with civil law, authority and referencing – we will just briefly take a look at the general rules for the application of canon law on the civil forum. They resemble the *regulae generales* of Rittershausen in various ways, so it may be more useful to focus on the differences between these two compositions. Brandmüller is interested mostly in the perspective of a civil judge (he does not mention that in the event of a lack of a clear civil statute canon law may be applied on the civil forum), he puts the rules in an alternative order, he includes a remark on the contrary opinions of the civil lawyers and the canonists, and he adds a rule concerning the necessity of following the judicial norms of civil law also on the ecclesiastical forum[88]. He also builds his rules from slightly different sources – a few of them are the same as in Rittershausen, but plenty of doctrinal notes refer to authors omitted by the latter. Beyond any doubt Brandmüller was aware of Rittershausen's work, as he recalls, *inter alia*, his name below the list of rules. It seems justified to claim that he was strongly influenced by Rittershausen's *Differentiarum libri septem* in this regard, while he managed to provide some alternative points to provide a brand-new jurisprudential basis for the rules.

The next example of *differentiae* was authored by Anton Bobers, a jurist from Hameln who prepared his *dissertatio* in Helmstedt in 1672 under the supervision of Hulderich Eyben (1629-1699). In the first half of his work, dedicated to the general observations on the applicability of canon law in the Protestant lands, *differentiae* are of minor importance. The second part of the work is organised around them, covering the study of particular discrepancies between the two bodies of law. For us, the passage on

[88] Brandmüller, Jacob, *Manuductio ad ius canonicum ac civile iuxta seriem aplhabeticam enucleata meditationibus historico-politicis digesta aliorum iurium accessionibus illustrate: eiusdem authoris sumptu procurata. E qua quae fuerint olim sint hodie non tam sint quam esse videantur utriusque iuris differentiae et cui iuri propius sit accedendum legum ac diversarum artim consecraneis perspicuitate facili fit manifestum*, Basileae, 1661, p. 12: *Cum itaque ius canonicum usu fori, servatis conditionibus supra relatis, frequentetur, aliquot conclusiones in gratiam iuniorum notare volui. 1. Quod in rebus spiritualibus et conscientiam concernentibus, vel quando agitur de peccato evitando, attendendum sit ius canonicum potius quam civile […] Indeque quando opiniones canonistarum et legistarum ad invicem pugnant, attenditur opinio canonistarum in materia canonica, opinio autem legistarum in materia civili […] 2. Quando aliquid est dubium de iure civili, et clarum de iure canonico, standum est iuri canonico etiam in foro civili [...] Et hanc conclusionem ex communi omnium doctorum utriusque censurae opinione procedere tradit […] 3. Ius canonicum a iure civili, in causis praesertim et quaestionibus forensibus, discrepare non praesumitur […] ideoque contrarium allegans id probare tenetur. 4. Quod ex levi causa non sit statutenda differentia inter ius canonicum et civile […] 5. Quando ius canonicum, in materia civili, pugnat expresse cum iure civili, tunc in terris Ecclesiae servatur ius canonicum; in terris vero Imperii ius civile.*

the prevalence of canon law over civil law is especially significant. Starting from a different point than Rittershausen, he firstly notes the areas in which canon law should take precedence and mentions the criterion of *periculum animae*. Only after that does he move to the other rules, which he expresses similarly to Rittershausen. He also provides a couple of other sources than those that appear in *Differentiarum libri septem*, but in total his references are much smaller[89]. What is however most surprising is that he does not refer to Rittershausen here. Still, from other parts of Bober's work, we learn that he was acquainted with *Differentiarum libri septem*. This is therefore an interesting example of Rittershausen's probable influence not being acknowledged in a later source.

Mathias Joseph Reichel was a Czech theologian, lawyer and canonist who served as public notary and proposed his *dissertatio inauguralis* in Prague in 1683, under Johann Christoph Schambogen (1636-1696). *Dis- et concordantia canonum et legum* is yet another example of an approach towards *differentiae*. Reichel opens this work with two preliminary disquisitions: one entitled *De Iuris utriusque Concordantia*, the other *De Iuris utriusque Discrepantia seu Antinomia*. Here again there are too many issues raised for them to be discussed at length, but already the title of his work and the titles of these two disquisitions show that his objective is broader than is typical for *differentiae*. Reichel's approach distinguishes him from the others in various ways, starting with the sources he takes into account, up to the formulation of even basic problems in the relations between the two bodies of law[90]. In both of preliminary disquisitions he does not list the general rules for applying the two laws, nor does he refer to the work of Rittershausen. This is particularly interesting, as he enumerates nine examples of *differentiae* right after the introductory essays (reaching from Bartolus and late medieval examples up to Canisius, Pérez and Strein). He was with no doubt well acquainted with the development and contents of *differentiae*, yet he still missed Rittershausen's *Differentiarum libri septem*. This may serve to show that, contrary to the evidence from many other sources examined, Rittershausen's work was not so commonly acknowledged.

Johann Friedrich Böckelmann (1633-1681) was a renowned professor of civil law in Heidelberg and in Leiden, and the author of several noted works on Justinian's compilation. In his posthumously published treatise, there is a detailed introduction to *differentiae*. There are three components of this introduction. Firstly, there is the *Praefatio* written by the editor, Cornelis van Eck (1662-1732). It is entitled *De Usu, et Abusu Iuris Canonici et Hodierni, in institutione Academica*. It is slightly different than a typical introduction and we will not discuss it here. It is followed by an interesting

[89] Bobers, Anton, *De origine, progressu, usu et auctoritate iuris canonici in terris Protestantium in genere, nec non in specie de quibusdam utriusque iuris, civilis et canonici differentiis, maxime de iis, quae usum aliquem in foro habere videntur*, Helmestadii, 1672, num. 18, s.f.: *In universum autem haec affertur regula: quoties in causis periculum animae concernentibus pugnant leges cum canonibus, hi potius in iudiciis tam civilibus, quam ecclesiasticis observandi erunt. In caeteris autem periculum animae non concernentibus, quando discrepantia est inter utrumque ius, standum esse iuris civilis dispositioni in terris Imperii; canonici autem, in terris Ecclesiae, iudexque secularis sequetur suum ius, et ecclesiasticus quoque suum, modo sit manifesta iuris dissonantia, et utrumque ius rationabile […] Quoties enim altero iure clare quid definitum et expressum, quod in altero sit controversum, toties eam definitionem expressam in utroque foro, quia alterum ius per alterum suppletur […] Denique in dubio non facile inter utrumque ius pugnam quandam admittendam, sed, nisi manifestus sit dissensus, amice inter se conspirare censendum esse tradunt.*

[90] Reichel, Mathias Joseph, *Dis- et concordantia canonum et legum seu disputatio inauguralis de differentiis inter iura communia, canonicum et civile universum*, Neo-Pragae, 1683, pp. 1-10.

addition, entitled *Testimonia de Utilitate et Necessitate Iuris Canonici*. This consists of long quotations from several works concerning the usefulness of canon law on the civil forum, taken from François Douaren (1509-1559), Mathias Stephani (1570-1646), Arthur Duck (1580-1648), Eberhard Speckhan (1550-1627) and Gerhard von Mastricht (1639-1721), but it is also of less importance for our study. Finally, there is the first part of Böckelmann's *differentiae*, *Tractatus generalis*, which covers the general problems of the relations between the two bodies of law in classical way, i.e. the etymology of canon law, its origins and components. The last three chapters may be considered as a methodological approach to the application of canon law in the civil court. Böckelmann briefly discusses the question of the reception of canon law and complements this with a set of general rules which should be applied in places where canon law and civil law both keep their authority. These rules are copied from the *Proemium* of Rittershausen but are slightly abbreviated and without any references to the sources and literature (except X 5.32.1 and 5.32.2 at the beginning)[91]. The author openly admits that these rules were inspired by the works of Duck and Rittershausen. The next chapter deals with the distinct purposes of the two bodies of law, while the last one is an insightful list of the defects of canon law. It is a clear *caveat* for a Protestant reader to keep in mind that the academic approach to canon law does not support its claims or solve its internal contradictions.

A very interesting example of jurisprudential development in the area of the systematic approach to *differentiae* is provided by a short work of Johann Ernst von Flörcke (1695-1762)[92]. He was a lawyer and professor in Jena and Halle, who died as a hostage of the imperial army. Flörcke pictures the history of the relations between the two bodies of laws to highlight how the reception of canon law in civil law evolved[93]. This study is founded on a vast selection of literature and, despite its shortness, constitutes an erudite approach to the topic, but his perspective was slightly broader as he was not focusing on *differentiae*. Here we would only like to highlight that Flörcke was aware of the concept of the general rules of application of canon law in the civil forum and provided his remarks on this issue. He refers to the rule concerning situations involving conflict between the two bodies of law (i.e. each of them should be applied on their respective fora) but he sharply criticizes the limitations linked to the threat of sin and underlining the authority of canon law in such cases. He argues that the result of such a broad and vague limitation is the destruction of the rule itself. He acknowledges some rational limitations founded on the list of relevant legal matters to which the limitation should be applied, but prefers to follow the other rule inspired by many authors who wrote on the general issue of the application of canon law in the civil forum: *ius canonicum in dubio iuri civili praevalere, nisi specialis exceptio probari possit*[94]. Flörcke does not address other rules in detail but this one example shows his

[91] Böckelmann, Johann Friedrich, *Tractatus postumus de differentiis iuris civilis, canonici et hodierni*, Traiecti ad Rhenum, 1694, Tractatus generalis, cap. 11, num. 5-10, p. 16-17.

[92] We used the edition from 1722, but it was only in the edition from 1757 (Hallae) that the word *differentia* appeared in the title. Nevertheless, it seems justified to take this work into account.

[93] This is a late example of the literature dedicated to the status of canon law in German Protestant lands in general. On this kind of literature in general, see Wolter, *Ius Canonicum in Iure Civili*, *passim*; Wolter, U., "Die Fortgeltung des kanonischen Rechts und die Haltung der protestantischen Juristen zum kanonischen Recht in Deutschland bis in die Mitte des 18. Jahrhunderts", *Canon Law in Protestant Lands* (R. Helmholz, ed.), Berlin: Duncker & Humblot, 1992, pp. 13-47.

[94] Flörcke, Johann Ernst von, *Schediasma de praerogativa iuris canonici prae iure Iustinianeo quo simul lectiones suas hoc semestri aestivo istituendas decenter intimat*, Ienae, 1722, § 10, p. 18: *Verum*

insight on the topic and autonomy from Rittershausen. Still, his objective was much broader than focusing on *differentiae* and this is clear from the scope of theoretical reflexion provided in his work.

4.4. *Differentiae* – the theoretical approach to legal pluralism

The compilation of sources examined is a heterogeneous one. However, it seems justified to claim that most of the *differentiae* written in the 17th and 18th centuries are founded on theoretical reflection concerning the application of canon law and civil law. In the works which contained long introductions, general rules were nearly always presented in this regard. These rules were mostly similar, but they differ in their order, length and the supporting references. Nevertheless, it is now clear that the *regulae generales* of Rittershausen were successful, as they influenced this kind of literature. There were no more sophisticated rules than Rittershausen's, and they were often copied or adapted. At least in the German sphere, his *Differentiarum libri septem* was a clear benchmark.

Therefore, we can say that if there were any methodological notions in the *differentiae*, they were presented in general in a similar way. There was even a classical approach typical for the works written from the perspective of civil law in Protestant territories. It consisted of a presentation of canon law, its name and sources, and a discussion on the possibilities of applying canon law on the civil forum. This classical approach was possibly also affected by the format of Rittershausen's *Proemium*.

The relatively large number of works which, based on preliminary studies, may be counted as *differentiae*, provides an intriguing insight to the approach of early modern legal scholars to legal pluralism. It seems that the conflict of various norms was a constant challenge for early modern jurisprudence and this legal genre was developed to provide some rules that could support the choice of a proper set of norms. The practical significance of concurrence between civil and canon law in Protestant lands was diminished in comparison with the Middle Ages. For this reason, *differentiae* may be seen as a genre dedicated to addressing the conflict of norms from a rather academic perspective. This is proved by the fact that many examples of *differentiae* were short *dissertationes* which were hardly useful in practice.

5. Conclusions and perspectives

In the early modern era, *differentiae* grew apart from their medieval predecessors. The two most evident dimensions of the change that occurred are the scope of these works and their methodological background. Most of the *differentiae* written after 1600 were built on the application of a set of general rules designed to provide answers to the question of when canon law and civil law may be applied outside

enim vero sicut addita limitatio regulam obscuram reddit, quia non satis constat inter interpretes, quando peccatum vel iniquitas subsit, cum saepius aequitas cerebrina fingatur; ita eadem limitatio totam regulam destruit, quia ubi dissentit ius canonicum a iure civili, semper vel intuitu peccati vel aequitatis utplurimum cerebrinae recedit [...] Hinc potius regula intervertenda est: ius canonicum in dubio iuri civili praevalere, nisi specialis exceptio probari possit.

their respective fora. The rise of such methodological premises may be seen as one small example of a wider tendency in modern jurisprudence and the popularity of *differentiae* may be explained accordingly by the emergence of the new paradigm of academic legal science. The early modern legal pluralism encouraged scholars to develop some theoretical tools suitable for resolving the conflict of norms.

The most distinctive and influential example of new *differentiae* was the *Differentiarum libri septem* of Konrad Rittershausen. Earlier, we asked what made his work so important, and we can explain this now, stressing that it was above all the methodological framework on which he built his *differentiae*. This is particularly interesting, as he was not an original author of a single rule – they had all been expressed earlier in the literature. What he achieved was to arrange all these rules in a coherent structure and to support it with a plethora of references. These references were convincing, as they were very recent and mostly practice-oriented. When we add to this that he wrote his work at a perfect time, when no work of similar scope had received a wide reception, and there were a lot of theoretical insights scattered throughout the jurisprudential literature, we may understand the reason for the success of his endeavour.

In conclusion, what we want to stress is that all these methodological premises and theoretical concepts require proper verification 'in action'. It seems that such verification may be twofold. It may consist of detailed research on the works included in the *differentiae* genre, one by one, with a lot of attention paid to the general premises and specific differences, or it may take the form of a series of case studies that will examine the application of general rules to particular differences throughout the works pertaining to the *differentiae* genre[95]. Particularly interesting seems to be the confessional tension within this literature, e.g. tracing the origins of various institutions which grew from canon law but which German scholars tended to link to the old German laws. This is closely bound up with the question of the normative value of canon law for Protestants, which is a well-known issue, and studies on *differentiae* may contribute to this field[96]. We hope that our preliminary study will be of some assistance in these further developments, which hopefully may also lead to the formulation of a sound definition of the legal genre called *differentiae*.

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