

RESEARCH ARTICLE

The Reasonable Person in Canon Law

Dr. Johnny M Sakr

Sessional Academic at Macquarie University and the University of New England, School of Law; Adjunct Lecturer in Law at The University of Notre Dame Australia, Sydney.

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Corresponding Author: Dr. Johnny M Sakr, Sessional Academic at Macquarie University and the University of New England, School of Law; Adjunct Lecturer in Law at The University of Notre Dame Australia, Sydney.

Abstract

This paper examines whether the canon law legal system used objective standards to judge human behaviour. The focus of this paper is on canon law before the revision of the *Corpus Juris Canonici* in 1582 AD. The author evaluates whether objective standards, such as the reasonable person standard of English common law, are also prevalent in canon law. The paper begins by defining the terms ‘canon law’ and ‘ecclesiastical law’ and briefly discussing the historical influence of ecclesiastical law on the English legal system. The author shows that the *Didascalia Apostolorum*, a handbook for the churches written around c 250 AD, used a fictitious ‘wise man’ as an objective standard to judge human behaviour.

The paper continues by demonstrating that canon law used objective standards to assess whether a person was guilty of voluntary or involuntary homicide. Canon law identified circumstances that reduced a person’s guilt from voluntary to involuntary homicide by inferring their intent. If someone accused of voluntary homicide could demonstrate that their actions were reasonable under the circumstances, their guilt was reduced. Canon law also used an objective standard, the *homo constantissimus*, to address duress.

Overall, the paper shows that canon law shared a similar approach to assessing human behaviour as other legal systems.

Keywords: Reasonable Man, Canon Law, Objective Standards, Jurisprudence.

1. Introduction

In this paper, the author assesses whether canon law used objective standards similar to that of the reasonable person standard of English common law. This paper will focus on canon law issued before 1582 AD when Pope Gregory XIII revised and promulgated the *Corpus Juris Canonici* (the body of canon law).

The purpose of this paper is to evaluate whether objective standards, such as the reasonable person standard, are universal in other jurisdictions.

This paper will begin by defining the terms ‘canon law’ and ‘ecclesiastical law’ along with a brief historical account of ecclesiastical law’s influence on the English legal system. Within this paper, the term

‘canon law’ will refer only to Catholic canon law, unless otherwise stated.

This paper will continue by showing that objective standards were used in the *Didascalia Apostolorum*, a ‘handbook for the churches’ written around c 250 AD.¹ Its authorship is usually attributed to Jesus’

1. Matthew C Baldwin, *Whose Acts of Peter?: Text and Historical Context of the Actus Vercellenses* (Mohr Siebeck, 2005) 83. See also; Roy Zuck, *Vital Church Issues: Examining Principles and Practices in Church Leadership* (Wipf and Stock Publishers, 2006) 226; David Fienst, *Prayed Alleged to Be Jewish: An Examination of the Constitutiones Apostolorum* (California Scholars, 1980) 19-20; Erwin Fahlbusch and Geoffrey William Bromiley, *The Encyclopedia of Christianity* (Wm B Eerdmans Publishing,

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apostles, but this authorship is contested.² The *Didascalia Apostolorum* used a fictitious ‘wise man’ as an objective standard to judge human behaviour.

Objective standards were used in canon law to assess whether a person was guilty of voluntary or involuntary homicide. Canon law identified circumstances that reduced a person’s guilt from voluntary to involuntary homicide by inferring a person’s intent. If someone accused of voluntary homicide could defend himself by demonstrating that his actions were reasonable under the circumstances, his guilt was reduced because he had acted reasonably according to accepted objective standards.

Canon law also used an objective standard which functioned like English common law’s reasonable person, the *homo constantissimus*. This objective standard was used to address duress and was used in the *Decretum Gratian*, *Glossa Ordinaria*, the decretals of Gregory IX and in Pope Alexander III’s second decretal, *Veniens ad nos*. Duress occurred if a *homo constantissimus* in the victim’s situation would have been moved by fear.

2. What Is Catholic Canon Law?

Catholic canon law is a system of laws and legal principles³ that are created and enforced by church hierarchical authorities, such as the Roman Pontiff,⁴

to regulate the church’s external organization and government and to implement order and discipline through its internal structures as rules and procedures.⁵

Like the term ‘ecclesiastical law’, ‘canon law’ also carries an ambiguous meaning. The term ‘canon law’ is not an adequate synonym for ‘religious law’ because canon law does not refer to the law and policy that governs all churches.

Rather, ‘canon law’ is a term that is used only in connection with particular Christian churches, the Catholic and Anglican churches in particular.⁶ Even within this limited Christian understanding, the term is problematic.⁷ For example, some commentators interpret this term to refer to one source of law (the canons of the Church of England),⁸ while others use this term as a synonym for ecclesiastical law.⁹

In a broad sense, ‘canons are intended to lead men and women to act justly in the world so that they may ultimately stand before God unashamed.’¹⁰ However, canon law was not completely established for spiritual guidance. Richard A. Hemholz has written:

[A] large part of [the canon law] has provided detailed rules for the governance of the church – regulations of conduct by the clergy, instructions for the performance of sacraments, and directions for decision-making within the church. By design, the Canons create conditions that promote harmony within

2003) vol 3 220; Eckhard J Schnabel, *Early Christian Mission: Jesus and the Twelve* (InterVarsity Press, 2004) 529.

2. Craig A Evans and James A Sanders, *Early Christian Interpretation of the Scriptures of Israel: Investigations and Proposals* (A&C Black, 1997) 121. See also; Bart D Ehrman, *Forgery and Counter-forgery: The Use of Literary Deceit in Early Christian Polemics* (OUP USA, 2013) 344; Virginia Burrus, *Late Ancient Christianity* (Fortress Press, 2005) vol 2 243; R Hugh Connolly, *Didascalia Apostolorum: The Syriac Version Translated and Accompanied by the Verona Latin Fragments* (Wipf and Stock Publishers, 2010) xc.

3. Nigel G Foster and Satish Sule, *German Legal System and Laws* (Oxford University Press, 2010) 9. See also; Guenther H Haas, *The Concept of Equity in Calvin’s Ethics* (Wilfrid Laurier University Press, 1997) 28; John P Beal, James A Coriden and Thomas Joseph Green, *New Commentary on the Code of Canon Law* (Paulist Press, 2000) 4; Rhidian Jones, *The Canon Law of the Roman Catholic Church and the Church of England* (A&C Black, 2nd ed, 2011) 24.

4. John J Coughlin, *Canon Law: A Comparative Study with Anglo-American Legal Theory* (Oxford University Press, 2010) 177. See also; Libero Gerosa, *Canon Law* (LIT VerlagMünster, 2002) 15; Ladislav Orsy, ‘Theology and Canon Law: An Inquiry into Their Relationship’ (1990) 50 *The Jurist* 163; Stephan Kuttner, ‘Natural Law and Canon Law’ (1949) *University of Notre Dame Natural Law Institute Proceedings* 87; Richard H Helmholz, *The Spirit*

of Classical Canon Law (University of Georgia Press, 2010) 311.

5. Gerosa (n 4) 23. See also; James A Coriden, *An Introduction to Canon Law* (Paulist Press, 2004) xi, 4; Catherine Innes-Parker and Naoe Kukita Yoshikawa, *Anchortism in the Middle Ages: Texts and Traditions* (University of Wales Press, 2013) 25; Russell Sandberg, *Law and Religion* (Cambridge University Press, 2011) 174; John C Bush and Patrick R Cooney, *Interchurch Families: Resources for Ecumenical Hope* (Westminster John Knox Press, 2002) 75.

6. Sandberg (n 5) chapter 9.

7. Norman Doe, *The Legal Framework of the Church of England* (Clarendon Press, 1996) 12-13.

8. Mark Hill, *Ecclesiastical Law* (Oxford University Press, 3rd ed, 2007) 2.

9. Timothy Briden and Brian Hanson, *Moore’s Introduction to English Canon Law* (Mowbrays, 3rd ed, 1992) 4.

10. R H Helmholz, ‘Western Canon Law’ in John Witte, Jr and Frank S Alexander (eds), *Christianity and Law: An Introduction* (Cambridge University Press, 2008) 71. See also; Augusto Zimmermann, ‘Christianity and the Common Law: Rediscovering the Christian Roots of the English Legal System’ (2014) 16 *University of Notre Dame Australia Law Review* 152.

the church and freedom from interference from without.¹¹

3. What Is Ecclesiastical Law?

As Doe explained, the inconsistent use of the term ‘ecclesiastical law’ and the lack of an agreed definition have rendered its use ‘extremely problematic’.¹² ‘Ecclesiastical law’ can refer to Catholic ecclesiastical law or Anglican ecclesiastical law.

The term ‘canon law’ thus carries a Christian connotation, but the term’s usefulness has been undermined by the various uses of this term. The term ‘ecclesiastical law’ has been used to refer to religious law. But the term (‘ecclesiastical law’) has also been used to describe all of the laws created by the Catholic Church and for the ‘Church by God’.¹³

In contrast, in continental literature,¹⁴ this term (ecclesiastical law) is also used to refer to religious law - meaning all the law created by the state for the Church.¹⁵ However, the term ‘ecclesiastical law’ did not seem to include laws created by the State that *affects* the Church.¹⁶

The distinction between ecclesiastical law and canon law depends upon the relationship of the Church and the secular government. As a general rule, ecclesiastical law relates to the Church but is made for the Church by the State, canon law is made for the Church by the Church itself.¹⁷ More accurately perhaps, ecclesiastical law may be taken to include both canon law, laws made by the Church which are not canon laws such as public law,¹⁸ and laws made

by the State for the Church.¹⁹

Furthermore, in England, the term ‘ecclesiastical law’ has been used to refer to the laws ‘of the Church of England to the exclusion of all other law applicable to other churches’.²⁰ The term ‘ecclesiastical law’ has been used by both the judiciary²¹ and legislature,²² in this sense. Hill has stated that ‘the term ecclesiastical law is used to denote the law of the Church of England, howsoever created’.²³

‘English ecclesiastical law’ is ‘the law relating to any matter concerning the Church of England administration and enforced in any court’, ecclesiastical or temporal, and ‘law administered by ecclesiastical courts and persons’.²⁴ Ecclesiastical law forms part of the general law of England, it is not foreign law.²⁵ Formal ecclesiastical laws include liturgical rubrics, decrees, resolutions, Acts of Parliament, ordinances, by-laws, rules and regulations.²⁶ Alongside the formal ecclesiastical laws of both the Anglican and Catholic churches, there are less formal and sometimes unwritten sources of ecclesiastical law which include decisions of Church courts, customs or traditions, and ‘principles of canon law’. ‘Alongside laws properly

Cardinal Ottaviani, *Institutiones Iuris Publici Ecclesiastici* (Typis Polyglottis Vaticanis, 1958) 10-11, citing Pope St Pius X, constitution *Vacante Sede Ap*, 25 Dec 1904. The public law derives from the long history of the interaction between the Catholic Church and various forms of government ranging from the Roman Empire to tribal societies to feudal fiefdoms to the modern nation state.[1] It also arises from the desire of the human person to be both a faithful member of the religious community and a loyal citizen of the state. In light of canon law’s tradition, this article identifies three broad principles that underpin the *ius publicum ecclesiasticum* about the proper relation between church and state. These are: (i) the principle of separation; (2) the principle of cooperation; and (3) the principle of human dignity. (Cf John J Coughlin, ‘Separation, Cooperation, and Human Dignity in Church-State Relations’ (2013) 73 *Jurist* 539.) See Eugino Corecco, *The Theology of Canon Law: A Methodological Question* (Francesco Turvasi trans., Duquense University Press, 1992) 132-133.

19. Noel Cox, ‘Ecclesiastical Jurisdiction in the Church of the Province of Aotearoa, New Zealand and Polynesia’ (2001) 6(2) *Deakin Law Review* 266–267.

20. Doe (n 7) 12–15.

21. See, e.g., the dicta of Sedley LJ in the Court of Appeal decision in *Aston Cantlow v. Wallbank* (2001) *EQCA Civ* 713.

22. See *Welsh Church Act* 1914.

23. Hill (n 8) 1.02.

24. Alfred Denning, ‘The Meaning of Ecclesiastical Law’ (1944) 40 *Law Quarterly Review* 236.

25. *Mackonochie v Lord Penzance* (1881) 6 *App Cas* 424, 446.

26. Doe (n 7) 22.

11. Helmholz (n 10) 71.

12. Doe (n 7) 12-15.

13. Sandberg (n 5) 7-8.

14. For example, see the essays in José Valle and Alexander Hollerbach (eds), *The Teaching of Church-State Relations in European Universities* (Peeters, 2005). See also; Sandberg (n 5) 8.

15. Rhidian Jones, *The Canon Law of the Roman Catholic Church and the Church of England* (A&C Black, 2nd ed, 2011) 60. See also; Norman Doe, *Canon Law in the Anglican Communion: A Worldwide Perspective* (Clarendon Press, 1998) 21.

16. Sandberg (n 5) 7.

17. Thomas Glyn Watkin, ‘Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales’ (1990) 2 *Ecclesiastical Law Journal* 110.

18. David Parrott, *Your Church and the Law: A Simple Explanation and Guide* (Hymns Ancient and Modern Ltd, 2011) 8. ‘Examples of human public law are: norms relative to the institution and rights of patriarchal sees; certain rights contained in concordats; certain norms concerning the government of the Church during the vacancy of the Apostolic See and the election of the Roman Pontiff.’ Cf.

so-called, churches are regulated by quasi-legislation, informal administrative rules designed to supplement the formal law':²⁷ 'directions', 'guidelines', 'codes of practice' or 'policy documents'.²⁸

The ecclesiastical law of England is as much the law of the land as any other part of the law. It is grounded in both common and statute law, and is altered from time to time by statute or by Measure, a form of legislation initiated by the Church of England but requiring Parliamentary approval.²⁹

Both Catholic canon law and Catholic ecclesiastical law governed, and still govern, the constitution and life of the Roman Catholic Church that is united under the Pope as its visible head.³⁰ However, prior to the reformation, 'canon law was the law of the ecclesiastical courts and applied by [church officers]'.³¹ The doctrines that derived from ecclesiastical courts made an impact on the development of English ecclesiastical law.³²

It was prohibited during the reign of Richard II (c. 1377-1399 A.D.) to cite Roman canon law in the English common law courts.³³ This command was given due to the hostility between England and Rome during the latter part of Richard's reign because of the Court of Rome's exactions. However, despite England's split from Rome, canon law still influenced the development of English law.³⁴

27. Norman Doe, *The Law of the Church in Wales* (University of Wales Press, 2002) 23.

28. Norman Doe, 'Non-Legal Rules and the Courts: Enforceability' (1987) 9 *Liverpool Law Review* 173-88. See also; Cox (n 19) 267.

29. *Tyler v UK* (1994) European Commission on Human Rights, Determination 21283/93, text published in Hill (n 8) 77.

30. May (n 130) 395. See also; Jones (n 15) 24; Coriden (n 5) 3-4.

31. Charles P Sherman, 'A Brief History of Medieval Roman Canon Law in England' (1920) 68(3) *University of Pennsylvania Law Review* 237.

32. *Ibid* 240.

33. George Spence, *Equitable Jurisdiction of the Court of Chancery* (V and R Stevens and G S Norton, 1846) vol 1 83.

34. George Spence wrote: Many of the titles of the canon law, such as those of buying and selling, of leasing and letting, of mortgaging and pledging, of giving by deed of gift, of detecting, of collusion, of murder, of theft and receiving [from] thieves, and others (like usury, although they are known notoriously to belong to the cognizance of the common law of this day), yet with the matters whereof they treat, were anciently in practice and allowed in bishops'

Objective standards were used within Roman law and canon law.³⁵ Even though human beings follow precedents; they do not do so blindly. Instead, precedents are assessed whether they are efficient and work within that society. The retention of these precedents in new environments when innovation is possible is significant. That is particularly so after the Reformation. That was surely a time for change and change came, but objective standards and the use of precedents that worked well, remained. They were adopted because they enabled the judicial evaluation of human behaviour. The adoption of these standards was not necessary; it was voluntary, indicating that objective standards were not adopted due to necessity but, rather, because they were an integral part of social justice.

The common use of objective standards to assess the conduct of the wrongdoer in all of these legal systems suggests that they were justified by reason³⁶ and were perceived as efficient in the delivery of social justice. The point of this paper is not to focus on the reception of canon law into English common law, the concern of most of the historians who write in this area. The objective of this paper is to show that canon law was full of objective standards and that these were in place because they contributed to the recognition and delivery of social justice. The following section will reveal the use of objective standards in canon law focusing on laws promulgated between the third century and the sixteenth century.

courts in this land amongst clerks... Whether any traditional remembrance of the Roman law, which was preserved in London and other commercial towns, contributed to this must be left to conjecture. When we come to the reign of Henry II, we find that many of the Roman doctrines above averted to, particularly...letting and hiring, and of pledge, were in operation in the King's Court, and without being noticed as of novel introduction, from thence they became with modifications incorporated in the common law... We can only look to the clerical members of the King's Court or ecclesiastical synods, for their introduction, for the clergy presided as judges in the King's -court under the Norman sovereigns. Cf. George Spence, *Equitable Jurisdiction of the Court of Chancery* (V and R Stevens and G S Norton, 1846) vol 1 82.

35. See Johnny Sakr, *The Conjecture from the Universality of Objectivity in Jurisprudential Thought: The Universal Presence of a 'Reasonable Man'* (Master of Philosophy Thesis, University of Notre Dame Australia, 2019) 77 – 98.

36. Michael H Hoeflich, *Roman and Civil Law and the Development of Anglo-American Jurisprudence in the Nineteenth Century* (University of Georgia Press, 1997) 83-84.

4. Objective Standards In Historical Canon Law

This paper will not provide a comprehensive historical account of canon law. Rather, it will briefly outline canon law's use of objective standards as far back as we can trace it. This historical review will provide evidence that objective standards were used in judicial reasoning by canon lawyers when applying the laws of a secular state and within the church.

Canon law was not static, rather it gradually evolved and solutions were sought and found as new issues arose.³⁷ Canon law derived from a wide arrange of sources, some of which are still used in the modern canon law of 1983. I will now briefly survey those sources.

From the 'Introduction' of the *Codex Iuris Canonici* (Code of Canon Law) of 1983, we have this statement:

Subsequent laws, especially those enacted by the Council of Trent during the time of the Catholic Reformation and those issued later by various dicasteries of the Roman Curia, were never digested into one collection. This was the reason why during the course of time, legislation outside the *Corpus Iuris Canonici* constituted 'an immense pile of laws piled on top of other laws.' The lack of a systematic arrangement of the laws and the lack of legal certainty along with the obsolescence of and lacunae in many laws led to a situation where church discipline was increasingly imperilled and jeopardised.³⁸

The codification of the canon law organised church law and resolved many of the issues that arose. The issues examined were resolved using a faithful person standard or similar objective standard. For the purposes of this paper, I will use the term 'faithful person' because it focuses on the Christian context within which these laws were developed. However, the overriding point is that canonical jurisprudence always used objective standards to justly resolve issues.

37. Wilfried Hartmann and Kenneth Pennington, *The History of Courts and Procedure in Medieval Canon Law* (CUA Press, 2016) 239.

38. Code of Canon Law (11 January 2017) Vatican <http://www.vatican.va/archive/ENG1104/_P1.HTM>.

5. A Sources of Canon Law Up To 1140 Ad (Pre-Gratian Canon)

In the previous section, I provided a brief differentiation between canon law and ecclesiastical law whilst identifying the important aspects of both. In this section, I will examine Catholic canon law between 250 and 1140 AD to identify its use of objective standards in some of the most difficult cases that law is called to guide and resolve. This assessment will focus on identifying the use of objective standards in canon law from c 250 AD up until 1140 AD

Until the mid-twelfth century, canonical texts were collected successively and superimposed in countless canonical compilations known as the pre-Gratian canon.³⁹ The pre-Gratian canon was compiled and circulated in the west for seven centuries before the 1100's.⁴⁰ The following section lists a few sources from which canon law derived its laws from the third century up until the twelfth century. This section will identify objective standards in these sources that functioned in a manner similar to English common law's reasonable person test. I will refer to the canon law's 'reasonable man' as the 'wise man' and the 'faithful man' to distinguish him from his English descendant.

5.1 Didascalia Apostolorum

The *Didascalia Apostolorum* was a 'handbook for the churches' which is thought to have been written in Syria c 250 AD⁴¹ Its authorship is usually attributed to Jesus' apostles, but this authorship is contested.⁴²

The *Didascalia Apostolorum* used a fictitious individual as the objective standard, called a 'wise man'. The *Didascalia Apostolorum* outlined the characteristics of a wise man in s I.7 [20].⁴³ A wise man chose things that were good as found in the Holy Scriptures and the Gospel of God. These sources provided him with a solid theological foundation and equipped him to cast away evil in order that he 'may be found blameless in life everlasting with God.'⁴⁴

39. R N Swanson, *The Routledge History of Medieval Christianity: 1050-1500* (Routledge, 2015) 78.

40. Swanson (n 39) 78.

41. Baldwin (n 1) 83.

42. Evans and Sanders (n 2) 121.

43. [20] And that we prolong not and extend the admonition of our teaching with many (words), (p 7) if we have left anything, do you as wise men choose for yourselves those things that are good from the holy Scriptures and from the Gospel of God, that you may be made firm, and may put away and cast from you all evil, and be found blameless in life everlasting with God.

44. *Didascalia Apostolorum* i.7 [20].

In other words, a wise man would go to these sources to identify the good so that he would be able to cast away evil and be firmly established in right doctrine. The ultimate objective of canon law of course was that he might 'be found blameless in life everlasting with God.'

The *Didascalia Apostolorum* decreed that if a person did not meet the standard established for a wise man, he was not blameless before God. By establishing particular characteristics of a wise man, the *Didascalia* used this fictitious character to establish socially acceptable behaviour. To assess whether a person had acted wisely, a person was measured against the standard established for a wise man. If the person in question did not choose things that were good as found in the Holy Scriptures and the Gospel of God, that person was judged as being unwise, for he failed to act like a wise man.

The use of objective standards in the *Didascalia Apostolorum* shows that canon law viewed objective standards as an important component for judging human behaviour.

The following section will outline other sources of canon law that used objective standards and were authoritative before the compilation and incorporation of the 1917 Code of Canon Law.

5.2 Council of Ancyra

One of the most important councils to be held after the persecutions of Christians had ceased with the death of Emperor Maximinus II Daia in AD 313,⁴⁵ was the Council of Ancyra (314 AD).⁴⁶ Between twelve and eighteen bishops were present at the Council of Ancyra from the various regions of Syria and Asia Minor.⁴⁷

The decrees of this Council used objective standards for the purposes of judicial enquiry.

The purpose of this Council was to address the diversity of disciplinary issues that were raised by those who faltered, either willingly or by force, during the persecutions. The Council was summoned to pass legislation pertaining to the kidnapping of virgins,

45. Krzysztof Stopka, *Armenia Christiana: Armenian Religious Identity and the Churches of Constantinople and Rome: 4th–15th Century* (Wydawnictwo UJ, 2016) 29.

46. Périclès-Pierre Joannou, *Les Canons des Synodes Particuliers* (Rome-Grottaferrata, 1963) vol 2 56-73.

47. H Kaufhold, 'Griechisch-syrische Väterlisten der frühen griechischen Synoden' (1993) 77 *OrChr* 1–96. See also; *Ecclesiae Occidentalis monumenta iuris antiquissima canonum et conciliorum interpretationes latine*, ed C H Turner (Oxford, 1899–1907) 2.32, 50, 51.

bestiality, celibacy, adultery, the sale of church property, and voluntary and involuntary homicide.⁴⁸

Nearly all of these canons were implemented to provide a uniform set of disciplinary measures that were clearly defined and rigorous. These canons were applied broadly to the regions of Syria and Asia Minor.⁴⁹

A Council Of Ancyra And Homicide

If the wrongdoer was convicted of voluntary homicide by a church court, he was admitted to communion only at the end of his life. However, if he was convicted of involuntary homicide, he was admitted to communion after he had served the shorter penance of five years.⁵⁰

Canon 22 of the Council of Ancyra

Concerning wilful murderers let them remain prostrators, but at the end of life let them be indulged with full communion.

Canon 23 of the Council of Ancyra

Concerning involuntary homicides, a former decree directs that they be received to full communion after seven years [of penance], according to the prescribed degrees, but this second one, that they fulfil a term of five years.⁵¹

The canons above do not identify the circumstances that place the guilt of voluntary or involuntary homicide on the accused wrongdoer. Rather, the canons specify the ecclesiastical punishment given upon conviction. However, the writings of authoritative individuals such as St Gregory, Bishop of Nyssa (394 CE),⁵² reveal circumstances that differentiate between voluntary and involuntary homicide. Identifying these distinguishing circumstances highlights the concept of reasonableness and its presence in canonical jurisprudence. The Apostolic Canons, discussed in the next section, provide canons that dealt with the issue of homicide whilst incorporating the writings of St Gregory and St Basil (330 - 379 AD),⁵³ the bishop

48. Wilfried Hartmann and Kenneth Pennington, *The History of Byzantine and Eastern Canon Law to 1500* (CUA Press, 2012) 18.

49. Hartmann and Pennington (n 48) 18.

50. Hartmann and Pennington (n 48) 19.

51. Translated by Henry Percival from Philip Schaff and Henry Wace, *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church: Socrates, Sozomenus* (Christian Literature Publishing Co, 2nd ed, 1900) vol 14.

52. Matthew Levering, *On Prayer and Contemplation: Classic and Contemporary Texts* (Rowman & Littlefield, 2005) 19.

53. Matthew Bunson, *A Dictionary of the Roman Empire* (Oxford University Press, 1991) 51.

of Caesarea Mazaca in Cappadocia, Asia Minor.⁵⁴ The canons in the Apostolic Canons provide context as to the cultural perception of homicide and intent as derived from the circumstances. In other words, they demonstrate how the Apostolic Canons differentiated between voluntary and involuntary homicide, which assists in understanding Canons 22 and 23 of the Council of Ancyra.

The wilful use of deadly force under a specific set of circumstances may be reasonable, but it still constituted involuntary homicide if a life was lost in the process. However, if the act perpetrated by the accused was considered unreasonable under the circumstances, the person accused was convicted of voluntary homicide rather than involuntary homicide.

Though a person was not acquitted of all guilt, objective standards were used to distinguish between voluntary and involuntary homicide and these standards were preserved in the *Canones Ecclesiastici Apostolorum*, otherwise translated as the Ecclesiastical Canons of the Apostles (the 'Apostolic Canons').⁵⁵ In the following section, I use the writings of St Basil to explain why a person was still guilty of involuntary homicide even if the use of deadly force was justified and why he was still required to undergo obligatory penance.

5.3 The Apostolic Canons

The text known as the Apostolic Canons (c. fourth - fifth century AD)⁵⁶ was a collection of 85 ecclesiastical canons relating to the government and discipline of the Church.⁵⁷

The canons in this document were written as conciliar canons that reflected the decisions of the Council of Antioch (241 AD), Laodicea (late fourth century AD), Ancyra (314 AD), Nero-caesera (319 AD), and Nicaea (325 AD).⁵⁸

A The Apostolic Canons And Homicide

Canon 66 of the Apostolic Canon states:

If any Clergyman strikes anyone in a fight, and kills by a single blow, let him

be deposed for his insolence. But if he is a layman, let him be excommunicated.⁵⁹

Canon 66 relied upon Canon XCI of the 6th Ecumenical Synod, Canons XXI, XXII, XXIII of Ancyra, Athanasios in his Epistles, Canons II, VIII, XI, XIII, XXXIII, XLIII, LII, LIV, LVI, LVII of Basil and Canon V Gregory of Nyssa in its assessment of fault.⁶⁰

Canon 66 did not outline whether the use of deadly force constituted voluntary or involuntary homicide. However, Canon VIII of St Basil did, one of the sources from which this canon was derived.

Canon VIII of St Basil the Great identified two circumstances that help identify the presence of malicious intent in the homicide under consideration. The first circumstance occurred when the wrongdoer wilfully and intentionally killed the victim, whilst the second circumstance occurred when a personal wilfully, although unintentionally, killed the victim. Thus, involuntary homicide was an act that was neither intentional nor wilful, such as throwing a stone at a tree but then consequently hitting a man and killing him.

Canon VIII of St Basil reads:

He that kills another with a sword, or hurls an axe at his own wife and kills her, is guilty of wilful homicide, not he who throws a stone at a dog, and undesignedly kills a man, or who corrects one with a rod, or scourge, in order to reform him, or who kills a man in his own defence, when he only designed to hurt him. But the man, or woman, is a [murderer if he or she] gives a *philtrum*,⁶¹ [and] the man that takes it dies ..., so are they who take medicines to procure abortion, and so are they who kill on the highway.

The element of the will, or intent, was an essential element for the wrongdoer to be guilty of voluntary homicide. St Gregory of Nyssa also subscribed to this view. St Gregory's version may be seen in his canonical letter addressed to St Letoious, Bishop of Melitene written in c 390 AD⁶² He wrote '[t]here [is] a lot of depravity, fury and rage. The worst of

54. Palladius and Dom Cuthbert Butler (eds), *The Lausiaca History of Palladius* (Cambridge University Press, 2014) vol 1 118.

55. Lawrence J Johnson, *Worship in the Early Church: An Anthology of Historical Sources* (Liturgical Press, 2009) vol 1 266.

56. Szuromi (n 39) 15.

57. Desiderius Erasmus, *Controversies* (University of Toronto Press, 2012) 132.

58. Cochini (n 47) 310.

59. Apostolic Canon 66.

60. Orthodox Christian Education Society, *The Rudder* (Pedalion, 8th ed, 2005) 205.

61. Philtrum in ancient Latin was a love potion.

62. Saint John of Damascus, *The Fathers of the Church: St John of Damascus - Writings* (Federic H Chase, Jr (trans), CUA Press, 2010) vol 37 136 fn 57.

all is the homicide, which is divided into wilful and unintentional.’⁶³

The defences outlined in Canon VIII relied on objective standards. St Basil said that no intention was imputed if a stone was thrown at a dog but accidentally killed a man, nor if a man was killed during the course of punishment for misconduct when it was only intended for the punishment to hurt the wrongdoer. Under these circumstances, a person was not guilty of voluntary homicide because it was inferred that he did not possess malicious intent.

The objective standard is there because a faithful person who threw a stone at a dog would not expect that someone, let alone a specific person, would die in consequence. The accused was measured against an external standard to decide whether he manifested guilty intent or premeditation. Though the faithful person standard is not mentioned in this reasoning, the reasoning relied on an objective standard all the same.

Objective standards identified by reason were used to identify intent which helped distinguish between voluntary and involuntary homicide. Because it was not reasonable to treat all those who kill, intentionally and unintentionally, in the same way, canon law asked whether the faithful person would have killed in this case. If he would have, then there was either no crime or it attracted less moral turpitude.

Canons 22 and 23 of the Council of Ancyra and Canon 66 of the Apostolic Canon distinguished between voluntary and involuntary homicide based upon the intent of the alleged wrongdoer. The intent of the accused was inferred by the circumstances.

St Basil and St Gregory agreed that intent was the decisive factor in determining the guilt of the accused wrongdoer. Both men acknowledged that circumstances help identify the existence, or non-existence, of malicious intent. Objective standards were used to determine the wrongdoer’s intent. St Basil assumed that if a faithful person threw a stone at a dog and consequently killed a man, a faithful person would not possess malicious intent. That is, a faithful person in those circumstances would not have intended to kill the victim. Therefore, neither did the alleged wrongdoer. If, under the circumstances, it was unlikely that a person possessed malicious intent, he was vindicated from the charge of voluntary homicide.

63. Borislav Grozdić and Ilija Kajtez, ‘Attitude to Murder in the Canons of the Orthodox Church’ (2013) 16(33) *Defendologija* 37.

However, he was still guilty of involuntary homicide.

St Basil used four scenarios to determine whether intent to kill existed. If a person used similar force under these circumstances, he would not be guilty of voluntary homicide since a faithful person would not have possessed ill intent. The four circumstances are as follows. Firstly, if a person threw a stone at a dog and accidentally struck the victim, killing him; secondly, if he killed the victim in the course of chastisement; thirdly, when he killed another man in self-defence; and fourthly when he killed the victim during war.⁶⁴

According to St Basil’s interpretation of the canon law at the end of the fourth century, taking the life of another human being in any of the four circumstances did not constitute voluntary homicide. However, the wrongdoer was guilty of involuntary homicide, even if he was acquitted of voluntary homicide and his actions were reasonable under the circumstances. The punishment for involuntary homicide was obligatory penance. As Belgian canonist⁶⁵ Zeger Bernhard van Espen (1646 - 1728 AD)⁶⁶ wrote:

Of voluntary and involuntary homicides St Basil treats at length in his Canonical Epistle ad Amphiloichium, canons viii, lvi and lvii, and fixes the time of penance at twenty years for voluntary and ten⁶⁷ years for involuntary homicides. It is evident that the penance given for this crime varied in different churches, although it is clear from the great length of the penance, how enormous the crime was considered, no light or short penance being sufficient.⁶⁸

64. Canon VIII of St Basil the Great. See Philip Schaff, *Nicene and Post-Nicene Fathers: Second Series - Volume XIV the Seven Ecumenical Councils* (Cosimo Incorporation, 2007) vol 14 605. See also; Philip Schaff and Henry Wace, *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church: Socrates, Sozomenus* (Christian literature Company, 1900) 605.

65. Owen Chadwick, *The Popes and European Revolution* (Clarendon Press, 1980) 404.

66. Samuel J Miller, *Portugal and Rome C. 1748-1830: An Aspect of the Catholic Enlightenment* (Gregorian Biblical BookShop, 1978) 5.

67. However, in Canon XI of St Basil’s first canonical Epistle to Amphiloichius, Bishop of Iconium (339-394 AD), Basil proclaimed that a man guilty of involuntary murder must perform 11 years for penance: He that is guilty of involuntary murder, shall do eleven years’ penance--that is, if the murdered person, after he had here received the wound, do again go abroad, and yet afterward die of the wound. [Cf Schaff (n 64) 605.]

68. Cf *ibid* 74.

Possessing right intent and a proper disposition of love was not sufficient to remove the guilt of involuntary homicide because there was a spiritual danger of being involved in taking away human life, even if it was involuntary. Canon law not only required repentance for voluntary homicide that occurred during an altercation,⁶⁹ but also for taking a life during a just war.⁷⁰ Every human life had to be acknowledged and paid for. To require no penance was to diminish or extinguish the value of human life.

A footnote commenting on Canon 66 of the Apostolic Canon, referenced above, provided the reason why penance must be performed even though deadly force was used when killing a robber to defend property, in accordance with the command given by a Christian emperor:⁷¹

But whosoever after being many times begged to do so goes forth and searches and finds a thief and puts him to death for the sake of the common interest of the public at large, he is to be deemed to deserve rewards. Nevertheless, for safety's sake, it has been found to be reasonable that he too should be penalised for three years.⁷²

St Gregory's canon also required the act of penance of those guilty of involuntary homicide 'through failure to pay attention to the situation'.⁷³

Canon 66 of the Apostolic Canon outlined the objective standard that enforced objective reasonableness. If a person behaved reasonably under the circumstances, his guilt was reduced, but not extinguished. A life had still been lost, and a human life should never be lost.⁷⁴

69. See Canon 66 of the Apostolic Canons in Sts. Nicodemus and Agapius, *The Rudder of the Orthodox Catholic Church* (D Cummings trans, Luna Printing, 1983) 113-117.

70. See 'The Canons of St Basil the Great' in *The Rudder of the Orthodox Catholic Church* (D Cummings trans, Luna Printing, 1983) Canon 13 801-802.

71. Hugo Tristram Engelhardt, *The Foundations of Christian Bioethics* (Taylor & Francis, 2000) 321.

72. See 'The Canons of St. Basil the Great' in *The Rudder of the Orthodox Catholic Church* (D Cummings trans., Luna Printing, 1983) 116.

73. 'The Canons of St. Gregory of Nyssa' in *The Rudder of the Orthodox Catholic Church* (D Cummings trans., Luna Printing, 1983) Canon 5 874.

74. The taint here analogous to the Mosaic rules that held people ritually unclean for seven days if they had come in contact with the dead. See Numbers 19:11, 14 and Numbers 9:6. See also; Christine E Hayes, *Gentile Impurities and Jewish Identities: Intermarriage and Conversion from the Bible to the Talmud* (Oxford University Press, 2002) 38.

The notion of 'reasonableness' was determined by how a faithful person would act in those circumstances. For instance, if a faithful person would have used deadly force under specific circumstances, then a person's guilt was reduced for acting in a similar manner. However, canon law held a person guilty of voluntary homicide if he deviated from this objective standard influenced by Judeo-Christian doctrines.⁷⁵

As the Canons of St Basil formed part of the foundation of Canon 66 of the Apostolic Canon, and objective standards helped explain the difference between voluntary and involuntary homicide to lay people, that distinction and objective explanation were carried forward into the Apostolic Canons.

Canon law recognised that there was less culpability if the wrongdoer used deadly force for the purposes of warfare, self-defence and in situations where the victim's death was an unforeseen consequence of the wrongdoer's actions. Therefore, canon law reduced guilt. Culpability was reduced under these circumstances when compared to situations when homicide was private and premeditated. Canon law inferred that a person did not possess malicious intent if he used deadly force in warfare, self-defence and where the victim's death was an unforeseen consequence of the wrongdoer's actions, since a faithful person in those circumstances would not act maliciously.

5.4 *Corpus Juris Canonici* (Body Of Canon Law)

The second part of the *Corpus Juris Canonici* was composed of the decisions of Pope Gregory IX on matters that were referred to him from all parts of Europe. This document was called both the *Decretals* of Gregory IX and the *Gratian Decretum* because it was compiled by a Benedictine monk⁷⁶ named Johannes Gratian. It is also collectively called the *Liber Extra*.⁷⁷

Around 1140 – 1150 AD,⁷⁸ Gratian published his *Concordia discordantium Canonum* (known historically as the *Decretum Gratiani*) at the University

75. *Decretales Gregorii IX*, Book V Chapter III.

76. E Michael Gerli, *Medieval Iberia: An Encyclopedia* (Routledge, 2013) 467. See also; Frederik Pedersen, *Marriage Disputes in Medieval England* (A&C Black, 2000) 1.

77. Edward Smedley, Hugh James Rose and Henry John Rose, *Encyclopaedia Metropolitana* (B Fellowes, 1845) 787.

78. Szabolcs Anzelm Szuromi, *From a Reading Book to a Structuralized Canonical Collection: The Textual Development of the Isonian Work* (Frank & Timme GmbH, 2010) 59.

of Bologna.⁷⁹ The *Decretum Gratiani* was a collection of canon law.⁸⁰

This version of the *Corpus Juris Canonici* was used by Canonists of the Roman Catholic Church until Pentecost of the 19th May 1918.⁸¹ The Code of Canon Law (*Codex Iuris Canonici*) promulgated by Pope Benedict XV on 27 May 1917 replaced the former *Corpus Juris Canonici*.⁸²

A Decretum Gratiani

The *Decretum Gratiani* forms the first part of the collection of five legal texts, which together became known as the *Corpus Juris Canonici*.⁸³ This consolidated all previous papal legislation down to the year 1139.⁸⁴ However, Gratian's *Decretum* was a private collection and was never officially enacted. Nonetheless, it quickly became one of the most authoritative legal compilations in the field of canon law.⁸⁵

I The 'Homo Constantissimus'

An objective test, like English common law's reasonable person test, was used⁸⁶ in the *Decretum Gratiani* in the form of the *homo constantissimus* – the 'most constant man' or the *homo diligens* – the diligent (or constant) man.⁸⁷ The *homo constantissimus* was used in cases of duress to assess whether the victim

79. Rebecca Rist, *The Papacy and Crusading in Europe, 1198-1245* (Bloomsbury Publishing, 2009) 122.

80. Gawdiak and Goldberg (n 78) 43. See also; John Doran and Damian J Smith, *Pope Innocent II (1130-43): The World Vs. the City* (Routledge, 2016) 276.

81. John Morris Jones, *The World Book Encyclopaedia* (Quarrie Corporation, 1947) vol 3 1216. See also; Joseph Pope, *One Hundred and Twenty-Five Manuscripts: Bergendal Collection Catalogue* (Brabant Holdings, 1999) 51.

82. Robert Louis Benson, *Bishop-Elect: A Study in Medieval Ecclesiastical Office* (Princeton University Press, 2015) 6.

83. Kulwant Singh Boora, *Baptism in the Name of Jesus (Acts 2: 38) from Jerusalem to Great Britain* (Author House, 2011) 63.

84. John Henry Wigmore, Ernst Freund and William Ephraim Mikell, *Select Essays in Anglo-American Legal History* (Little and Brown, 1908) vol 2 258.

85. Serge Dauchy et al, *The Formation and Transmission of Western Legal Culture: 150 Books that Made the Law in the Age of Printing* (Springer, 2016) 21.

86. Some have argued that Roman law influenced canon law, therefore; the *homo constantissimus* was received into canon law. This thesis will not answer whether or not, or to what extent, Roman law influenced canon law. See James A Brundage, *Law, Sex, and Christian Society in Medieval Europe* (University of Chicago Press, 2009) 345.

87. Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500-1650)* (Martinus Nijhoff Publishers, 2013) 187.

was coerced.⁸⁸ Canon law took into consideration the age, gender, and status of the complainant.⁸⁹ In order for duress to be inferred, the act must be one that would affect even the 'most constant man' (*homo constantissimus*).⁹⁰ This hybrid standard was also used to assess the validity of a marriage.⁹¹ A marriage was invalid if a *homo constantissimus*, in the victim's circumstances, would have consented to marry due to fear or irresistible force.⁹²

Whilst the *homo constantissimus* was not purely objective, it still possessed an objective element which enabled the evaluation of human behaviour. Again, objective standards allowed flexibility because they assessed what the objective man would do in different circumstances. The use of objective standards enabled the assessment of duress in marriage arrangements. If purely subjective standards were applied, citizens might have been bound by this sacrament.⁹³ Because this person went through the act, he was bound despite his intent. Subjective standards were used to take into consideration the personal idiosyncrasies of the victim.

A second decretal of Pope Alexander III (1159-1181 AD),⁹⁴ *Veniens ad nos*, responded to the concern of marriage that occurred through duress.⁹⁵ *Veniens ad nos* legislated the remedy for coerced marriages by declaring that marriages of this nature were invalid. If the court declared that the *homo constantissimus*, under the same circumstances, would have consented to marriage out of fear, the court would declare that this matrimonial arrangement was invalid. These are cases where the lack of consent was hidden because of external factors not observable at the ceremony.

88. Liber Extra X 1.40.4 and 4.1.28. See also; Mia Korpiola, *Nordic Perspectives on Medieval Canon Law* (Matthias Calonius Society, 1999) 140.

89. Brundage (n 86) 167. See also; Charles J Reid, *Power Over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon Law* (Wm B Eerdmans Publishing, 2004) 68.

90. Metum autem (D 4.2.6). See also; Gratian, *Decretum* C.15 q.6 cc.1; Alexander III in X. 4.1.15; Decock (n 87) 187.

91. Reid (n 89) 76.

92. Reid (n 89) 76. See also; Judith M Bennett and Ruth Mazo Karras, *The Oxford Handbook of Women and Gender in Medieval Europe* (OUP Oxford, 2013) 167; John Thomas Noonan Jr, *Bribes* (University of California Press, 1987) 197.

93. In a Christian context.

94. Joseph F O'Callaghan, Donald J Kagay and Theresa M Vann, *On the Social Origins of Medieval Institutions: Essays in Honor of Joseph F O'Callaghan* (BRILL, 1998) 17.

95. Papal Decretal of Alexander II X 9.1.15.

John Noonan⁹⁶ stated that ‘a ‘steady man’ [*homo constantissimus*] was a fictional man of average fortitude who served in fear cases much as a ‘prudent man’. [This man, also referred to as the] reasonable person, is used to measure negligence in modern tort law.’⁹⁷ The hypothetical *homo constantissimus* was taken to be the ideal legal agent, a reasonable person who would not be moved by frolicsome concerns.⁹⁸

The concept of the *homo constantissimus* was also found in the canon law document *Glossa Ordinaria* (twelfth century AD)⁹⁹ to determine the validity of a marriage.¹⁰⁰

The *Glossa Ordinaria* was a collection of biblical commentary which was the foundation of canon law.¹⁰¹ Cino da Pistoia (1270 – 1336 CE),¹⁰² Italian jurist,¹⁰³ described the *Glossa Ordinaria* as ‘the idol of the law.’¹⁰⁴

96. Senior United States federal judge on the United States Court of Appeals for the Ninth Circuit. Ohio. Secretary of State, Official Roster, Federal, State, County Officers and Departmental Information (The Secretary, 1989) 17.

97. John T Noonan Jr, ‘The Steady Man: Process and Policy in the Courts of the Roman Curia’ (1970) 58 California Law Review 654 (emphasis mine). The ‘steady man’ test was extended explicitly to women in Honorius III’s Decretal Consultatitimi Tulle X 4.1.28. See also; Reid (n 89) 76.

98. Salisbury, ¶Donavin and ¶Price (n 91) 62.

99. Albrecht Classen, Handbook of Medieval Studies: Terms, Methods and Trends (Walter de Gruyter, 2011) 138.

100. X 4.1.14–15 and 29. The Latin phrase is ‘metus qui cadere potest in constantem virum’ (the fear that can fall upon a constant man). See also; Richard H Helmholz, ‘Baptism in the Medieval Canon Law’ (2013) 21 Rechtsgeschichte 120; David Sereno, Whether the Norm Expressed in Canon 1103 is of Natural Law or of Positive Church Law (Gregorian Biblical BookShop, 1997) 65; Thomas Sanchez, De Matrimonio 1.4.D.13; Patrick McKinley Brennan, The Vocation of the Child (Wm B Eerdmans Publishing, 2008) 259.

101. Allan Fitzgerald and John C Cavadini, Augustine Through the Ages: An Encyclopaedia (Wm B Eerdmans Publishing, 1999) 383.

102. Christian Emden, Catherine Keen and David R Midgley, Imagining the City (Peter Lang, 2006) vol 2 80. See also; Decock (n 87) 277.

103. Trevor Dean and Chris Wickham, City and Countryside in Late Medieval and Renaissance Italy: Essays Presented to Philip Jones (A&C Black, 1990) 22.

104. Baldus, Consiliorum Sive Responsorum 5.169 vol 5 at 45va. See also; Cino da Pistoia, Commentaria de Codicem 4.10.1; Petrus Lenauderius, De Privilegiis Doctorum 4.42.64 at 13rb, Woldemar Engelmann, Die Wiedergeburt de Rechtskultur in Italien (Leipzig, 1938) 189-204.

6. Conclusion

This paper has identified canon law’s use of objective standards in judicial reason in cases of homicide and marriage, to differentiate intentional human behaviour from that which was unintentional.

The *Didascalia Apostolorum* used objective standards to govern church organisation, finance and church discipline. The wise man standard outlined in the *Didascalia*, established socially acceptable conduct. Canon law assessed whether a person acted wisely if they acted like a wise man in his position.

The decrees of the Council of Ancyra used objective standards for the purposes of judicial enquiry. This Council was summoned to pass legislation condemning the kidnapping of virgins, bestiality, celibacy, sorcery and divinization marriage, adultery, the sale of church property, and voluntary and involuntary homicide. For the purposes of this paper, attention is given to the decrees presented for homicide in Canons 22 and 23 of the Council, alongside Canon 66 of the Apostolic Canon, which also covers laws relating to homicide. These legislative provisions adopted objective standards, following the model of St Basil’s eighth canon.

Although these canons did not identify the circumstances that place the conviction of voluntary homicide or involuntary homicide upon the alleged wrongdoer, the writings of St Gregory, Bishop of Nyssa and St Basil the Great, did.

An assessment of these writings provided the conclusion that, Canons 22 and 23 of the Council of Ancyra distinguished between voluntary and involuntary homicide based upon the will of the wrongdoer. Circumstances were the deciding factor in allowing canon law jurists to assess the element of intent. St Basil provided numerous examples.

The *homo constantissimus* – the ‘most constant man,’ was used in *Decretum Gratiani* and functioned like English common law’s reasonable person. The *homo constantissimus* was used to assess whether the person in question was a victim of duress. This standard was also used to assess the validity of a marriage. This objective standard also used in the twelfth century in Pope Alexander III’s second decretal, *Veniens ad nos*, in the *Glossa Ordinaria* and in the Decretals of Gregory IX. As does English common law, canon law used objective standards to judge human behaviour because objective standards resonated with human reason.

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