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WHY PROHIBIT DONATIONS BETWEEN HUSBAND AND WIFE IN MEDIEVAL EUROPE?

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Between the end of the eleventh century and the beginning of the twelfth century, following the rediscovery of Roman law in the West, the first Bolognese commentators stuck to the Roman principle prohibiting donations between spouses. Authors commented over and over again upon fragments of the writings of Roman jurists Paul and Ulpian that were integrated into the Digest of Emperor Justinian. According to these jurists of the Classical Age, fears of despoliation between spouses, of negligence in the children's education and of marriage becoming venal were the main reasons found. Medieval canon law takes the subject of donations between spouses very seriously. Laurent of Spain († 1248), in the Glossa Palatina, worries about donations of cosmetics, which are seen as luxury enhancing. In Liber Extra (1234), a decretal signed by Gregory IX took up the subject, confirming the opinions expressed by Paul and Ulpian by expressing hostility to such donations on the basis of public morality. Following the Fourth Lateran Council (1215), a new literary form appeared: confession — or casuistic — manuals. In these aspects, the subject of gifts between spouses is closely assimilated to the question of sin, especially of luxury. Continental Europe's common law (ius commune) shows similar spirit in that respect. Italian statutory laws, in conformity with the separatist spirit of Roman law, forbade them without distinction. They were outlawed in English law by unitas carnis which presides over conjugal relations. According to Jean Boutillier (1395), the author of La Somme rural, a famous French interpreter of law, donations between spouses are generally regarded as a result of fear, complacency or luxury, and so should be forbidden. The common theme between Roman or Canon law and different common laws is the upholding of a certain public morality and the control of couples as the mainstay of their respective families.

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INTRODUCTION[1]

Donations between spouses were forbidden for a long time by the principal European legal systems. In France, they only became legal after the adoption of the *Civil Code* in 1804.[2] Worse still, in Italy, they were legalized

[1] Principal abbreviations used in this article: *Bibl. Apost.* = *Biblioteca Apostolica Vaticana*; *Bibl. mun.* = *Bibliothèque municipale*; *C.*, 1, 1, 1, 1 = *Codex Justiniani*, liber I^{us}, titulus I^{us}, capitulum I^{um}, § I^{us} (P. Krüger ed.); *Com.* = *Commentarius, commentarii; De cons.*, D. 1, c. 1 = *De consecratione Gratiani tractatus*, Distinctio I^{a}, canon I^{us} (Æ. Friedberg ed.); *D.*, 1, 1, 1, 1 = *Digesta*, liber I^{us}, titulus I^{us}, capitulum I^{um}, § I^{us} (T. Mommsen ed.); ms. = manuscript; X, 1, 1, 1 = *Decretales Gregorii Papæ IX, sive Liber Extra*, liber I^{us}, titulus I^{us}, capitulum I^{um} (Æ. Friedberg ed.)

[2] *Code Napoléon*, art. 1094, al. 1: "L'époux pourra, soit par contrat de mariage, soit pendant le mariage, pour le cas où il ne laisseroit point d'enfants ni descendants, disposer en faveur de l'autre époux, en propriété, de tout ce dont il pourroit disposer en faveur d'un étranger, et en outre de l'usufruit de la totalité de la portion dont la loi prohibe la disposition au préjudice des héritiers." (The husband shall be allowed, either by marriage-contract, or during the marriage, in the case where he shall leave neither children nor descendants, to dispose in favor of his wife, absolutely, of every thing which he might dispose of in favor of a stranger, and in addition of the usufruct of the entirety of the portion of which the law prohibits the disposition to the prejudice of heirs); *Code Napoléon*, art. 1094, al. 2: "Et pour le cas où l'époux donateur laisseroit des enfants ou descendants, il pourra donner à l'autre époux, ou un quart en propriété, et un autre quart en usufruit, ou la moitié de tous ses biens en usufruit seulement." (In the case where the husband donor shall leave children or descendants, he may give his wife either one fourth absolutely, and another fourth in usufruct, or the moiety of his property in usufruct only.)

only after a decision by the Constitutional Court in 1973.[3]

In this matter, the principal European civil laws were influenced by Romano-canonical law taught in medieval universities. This article focuses on the medieval doctrinal material found by jurists in the *Corpus* of Justinian after his rediscovery and in the main canonical sources: the *Decretum Gratiani* (ca. 1140) and the *Liber Extra* of Pope Gregory IX (1234). Considerable scholarly attention has been given to the renaissance of study of the Justinian's compilations during the Middle Ages. Legal historians commonly agree that there was no continuity between the schools of jurisprudence of ancient Rome and medieval legal science. Despite the fact that many parts of the Theodosian (438) and Justinianic Codes (534) circulated during the earlier Middle Ages, Justinian's *Digest* (533) — the compilation of excerpts taken from the writings of the classical Roman jurists — completely disappeared in the Latin West. During half a millennium, the situation remained unchanged until the rise of the Northern Italian Universities during the eleventh century. The renaissance of the Justinian's compilations was bound up with the revival of organized urban life and trade.[4] The reasoning of the Medieval civilists in making a prohibition of donations between husband and wife is based on the doctrinal material found in Justinan's *Digest* and in the Justinianic *Code* (I). The canonist also aimed at developing a legal prohibition that emerged from the relationships between Roman law and Canon law and from the growth of pontifical legislation (II).

I. ROMAN PROHIBITION

The Roman prohibition came from the Roman customary law (*mores*) and was justified in Justinian's *Digest* by three arguments given by Ulpian († 223) and Paul: (1) the risk of mutual despoliation, (2) the danger of neglecting

[3] In 1973, the Italian constitutional court repealed of article 781 of the civil code; *Codice civile italiano*, art. 781: "I coniugi non possono, durante il matrimonio, farsi l'uno all'altro alcuna liberalità …" (During the marriage, the spouses cannot make any donation one to the other …)

[4] W. Müller, *The Recovery of Justinian's Digest in the Middle Ages*, (20) Bulletin of Medieval Canon Law 1–29.

children's education, and (3) the fear that conjugal harmony would be purchased through gifts.[5]

In 206, a Severan Constitution of Caracalla, without revoking the old prohibition, decided that donations between husband and wife became liable to annulment: If the donor dies without revoking, the donation is confirmed.[6] Despite this Constitution, in fact, at the time of the renaissance of Roman law during the 11th and 12th centuries in Medieval Europe, jurists were focused on the old prohibition and tried to explain how these Roman arguments were appropriate for a medieval prohibition. The Italian glossators, such as Accursius († ca. 1260–63), the author of the ordinary gloss, gave an unexpected explanation.

1. Mutual Despoliation. — Despite the undeniable domination of men over women established by clerks and jurists, men seemed to fear the

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[5] *D.*, 24, 1, 1 [Ulpianus, *Libro 32 ad Sabinum*]: "Moribus apud nos receptum est, ne inter virum et uxorem donationes valerent. Hoc autem receptum est, ne mutuo amore invicem spoliarentur, donationibus non temperantes, sed profusa erga se facilitate." (As a matter of custom, we hold that gifts between husband and wife are not valid. This rule is upheld to prevent people from impoverishing themselves through mutual affection by means of gifts which are not reasonable, but beyond their means); *D.*, 24, 1, 2 [Paulus, *Libro 7 ad Sabinum*]: "Nec cesset eis studium liberos potius educendi. Sextus Caecilius et illam causam adiciebat: quia saepe futurum esset, ut discuterentur matrimonia, si non donaret is qui posset, atque ea ratione eventurum, ut venalia essent matrimonia." (People might not have as great a desire to educate their children. Sextus Caecilius added another reason, that a marriage would often break down where the husband had property but did not donate it, and so the result would be that marriage would become a matter of purchase.); *D.*, 24, 1, 3, *pr.* [Ulpianus, *Libro 32 ad Sabinum*]: "Haec ratio et oratione imperatoris nostri Antonini Augusti electa est: nam ita ait: 'Maiores nostri inter virum et uxorem donationes prohibuerunt, amorem honestium solis animis aestimantes, famae etiam coniunctorum consulentes, ne concordia pretio conciliari viderentur, neve melior in paupertatem incideret, deterior ditior fieret.' " (This explanation is also drawn from an oration of Emperor Antoninus Augustus, for it says "Our ancestors prohibited gifts between husband and wife in the belief that true affection was based on the heart alone. They also took into account the reputation of the parties to the marriage in order to prevent the agreement appearing to have been made for money and to stop the more generous partner becoming poorer and the less generous one richer.")

[6] *D.,* 24, 1, 32, 2 [Ulpianus, *Libro 33 ad Sabinum*]: "Ait oratio: 'Fas esse eum quidem qui donavit paenitere: heredem vero eripere forsitan adversus voluntatem supremam eius qui donaverit durum et avarum esse.' " (The oration says: It is proper for a person who made a gift to change his mind, but it would be hard and miserly for the heir to seize the property when this would perhaps be contrary to the last wishes of the person who made the gift.)

medieval wife, who is described as avaricious and miserly by the Italian glossators Placentinus († 1192) and Accursius: "genus mulierum avarissimum."[7] This is a common-place of medieval literature: André le Chapelain, who was the author of the *De amore* (ca. 1174–98), outlined a pejorative portrait of women and compared women with "drunkards who were never drunk enough."[8]

The fear which was expressed through the legal texts was that the donee would become richer and the donor poorer. The French jurist Master Géraud, who was the author of the *Summa Trecensis* on the Justinianic *Code* (ca. 1135–50), based his commentary on the famous definition of law given by Celsus: prohibiting donations between husband and wife on the grounds of equity.[9] He considered that it would be unfair that the best of them became poorer and the most mischievous richer. A commentator of the *Brachylogus*, written by a jurist and a companion of Thomas Becket in exile in Auxerre between 1166 and 1167, advised the couples to be cautious and to keep an eye on their spouses in order to save themselves from despoliation.[10]

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[7] Placentinus, *Summa super C.*, 5, 3: "Et quidem donatio sponsalici appellatur, quam sponsus confert in sponsam, vel contra. Hoc fiet perraro, quippe genus mulierum avarissimum et tenacissimum" (*Summa Codicis*, 195 [Moguntiae, 1536, Torino, 1962]); Accursius, *Glossa ordinaria ad D.*, 16, 1, 4, V° *Donat*: "Est enim genus mulierum avarissimum in donando." (*Glossa ordinaria in Digestum vetus*, fol. 245r [Venetiis, 1488, Augustae Taurinorum, 1969]); Accursius, *Glossa ordinaria ad C.*, 5, 3, 16, V^is *Raro accedit*: "Quia avara" (*Glossa ordinaria in Codicem*, fol. 129v [Venetiis, 1488, Augustae Taurinorum, 1968]).

[8] A. Le Chapelain, *Comment maintenir l'amour*, F. Lemonde ed., at 115–17 (Paris, Éditions Payot et Rivages, 2004).

[9] *Summa Trecensis*, V, 11, 5: "Nec enim tamquam inter infestos et malivolos hoc jus tractandum est, set ad bonum et equum redigendum est et ne occasione maritalis amoris invicem se spoliarent" (H. Fitting ed., *Summa Codicis des Irnerius*, at 151 [Berlin, 1894]); about the author, see A. Gouron, *L'auteur et la patrie de la Summa Trecensis*, Ius Commune, (12) 1984, at 1–38, reprin. A. Gouron, *Études sur la diffusion des doctrines juridiques médiévales*, III (London, Variorum reprints, 1987); A. Gouron, *L'élaboration de la* "*Summa Trecensis*," in *Sodalitas Scritti in onore di Antonio Guarino*, t. 3, at 3681–96 (Napoli, Jovene, 1985), reprin. A. Gouron, *Études sur la diffusion des doctrines juridiques médiévales*, IV.

[10] *Glossa ad Brachylogum*, 13: "Ideo autem hujusmodi donationes inter virum et uxorem prohibetur ne propter nimium amorem cautiori minus cautam suis facultatibus privetur" (Città del Vaticano, *Bibl. Apost.*, ms. Reg. lat. 441, fol. 29v). About the author of the *Brachylogus*, see A. Gouron, *L'auteur du Brachylogus: un compagnon de Thomas Becket en exil?*, in *A Ennio Cortese*, D. Maffei ed., t. 2, at 163–73 (Roma, Il Cigno, 2001); reprin. A. Gouron, *Pionniers du droit occidental au Moyen Âge*, VII (Aldershot, Ashgate, 2006).

The Italian glossator Odofredus († 1265) feared the exploitation of the simple-minded spouse:

> *Odofredus, Com. ad C., 5, 16, 2: "Si quaeretur, quae est ratio quare prohibite sunt donationes inter virum et uxorem ? Respondeo triplex est ratio […]. Secunda est, si unus esset malitiosus, et alter simplex, malitiosus deciperet simplecem."*
>
> *"Why are donations between husband and wife prohibited? I answer that there are three reasons [...]. The second is, if a spouse was mischievous, and the other spouse was simple, the mischievous would deceive the simple."*[11]

These texts explain why jurists compared the relationship between husband and wife to a kind of medieval tournament, as pointed out by a famous French historian Georges Duby.[12]

2. Purchase of Conjugal Harmony. — According to the classical jurists Paul and Ulpian, unconditional love has no price and donations between husband and wife cannot be used in order to purchase conjugal harmony. Medieval jurists also borrowed the concept of honest love (*honestus amor*) from medieval philosophy and literature. Hugh de Saint-Victor and Abelard thought that honest love was chaste and selfless, comparable to Ciceronian friendship.

This concept was taken up by different Italian commentators. An anonymous pre-Accursian glossator in a manuscript kept at the Vatican explained that love was dissociated from lucre and was exclusively depended on feelings:

> *Glossa ad D., 24, 1, 1: "Nota quod honestus amor est inter virum et uxorem et pendet ex animo non ex lucro. Item nota quod prohibita est donatio inter eos regulariter ut hic et per totum matrimonio constante."*
>
> *"Honest love between husband and wife depends on feelings and not on lucre. And donations between husband and wife are prohibited because of these arguments, and during the entire marriage."*[13]

The honest love is chaste, and in fact, the donation between husband and wife could be analyzed as a sexual contract and this explains why the

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[11] *Lectura super Codice*, fol. 280v (Lugduni, 1552, Bologna, 1969).

[12] G. Duby, *Mâle Moyen Âge*, 76 (2nd ed., Paris, Flammarion, 2010).

[13] Città del Vaticano, *Bibl. Apost.*, ms. Vat. lat. 11155, fol. 306rb.

French author Jean Boutillier feared "burning lucre."[14] By forbidding the purchase of a conjugal relationship, and more specifically the purchase of a wife's sexual services, the glossators and commentators seek to avoid a married woman being described as a prostitute.

3. Neglect of Children's Education. — The neglect of children's education is the last argument given by Paul for the Roman *mores*. He feared that parents by mutual donations neglect children's education and their studies. This is a typical commonplace of medieval literature, such as the *De eruditione filiorum nobilium,* the work of the Dominican friar Vincent of Beauvais († 1264). In the first decades of the twelfth century, the Italian civilist Placentinus, in his *Summa* on the Justinianic *Code*, tried to demonstrate how donations between husband and wife were contrary to the Christian requirement of procreation.[15] Medieval civilists give arguments which are very close to the canonical prohibition.

II. CANONICAL PROHIBITION

In canon law, the prohibition of donations between husband and wife was constructed later, after 1210. This prohibition has been elaborated by decretists on the basis of the sin of luxury (1), and by decretalists on the basis of the Augustinian goods of marriage (2).

1. Women Sinners. — Decretists deal with donations between husband and wife when they comment an Augustinian letter inserted in the Gratian's

[14] J. Boutillier, *Somme rural*, 99: "Si sçachez que la donation que feroit le mary a sa femme durant le mariage, ne vault selon que les sages usent. Et la raison si est que si le mary donnoit a sa femme, il sembleroit que ce fust par ardante luxure" (L. Charondas le Caron ed., at 566 [Paris, 1611]) (You should know that donation made by the husband to his wife during the marriage is invalid, according to the experts. And the reason is that if the husband gave something to his wife, he would do that by burning lucre); Jean Boutillier, *Somme rural*, 45: "Car trop seroient les femmes introduictes a donner a leurs maris, ou pour complaire, ou pour crainte qui souvent pourroit advenir, ou par motif de luxure" (L. Charondas le Caron ed., 328 [Paris 1611]) (Because too many women would give something to their husbands by excessive kindness, or fear, or luxury.)

[15] Placentinus, *Summa super C.*, 5, 16: "Prohibite sunt donationes inter conjuges moribus, ut ff., eodem, lege I [*D.*, 24, 1, 1]. Tribus ex causis et quia venalitia fierent matrimonia et quia melior pauperior fieret et deterior ditior et quia operam potius dari quaestui inter se et deceptioni, quam honesto amori, vel liberorum procreationi." (*Summa Codicis*, 211; Grenoble, *Bibl. mun.*, ms. 626 [391.1], fol. 81vb.)

Decretum. This letter, addressed to Possidius bishop of Calama, punished women's use of cosmetics.[16] The Spanish decretist Laurent of Spain († 1248), who composed the *Glossa Palatina* between 1208 and 1210, wondered if a husband could give money to his wife in order to buy cosmetics. Despite the canonical prohibition of excessive women's cosmetics, the Spanish jurist allowed the donation of perfume, fragrance, pearls and different ornaments to the wife.[17] In fact, the first decretists were not interested in the Roman prohibition and gave other arguments to explain the banning of these donations. They considered women as sinners and described them as idle and lustful.[18]

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[16] *De cons.*, D. 5, c. 38: "Fucare pigmentis, quo vel rubicundior, vel candidior appareat, adulterina fallacia est, qua non dubito etiam ipsos maritos se nolle decipi, quibus solis permittendae sunt feminae ornari secundum veniam, non secundum imperium […]."

[17] Laurentius Hispanus, *Glossa Palatina ad De cons*., D. 5, c. 38, V° *Virorum*: "Id est a viris date. Sed videtur quod nec in talibus teneat donatio quia dicit lex quod si vir dat uxori margaritas extricatas […]. Si ei dat unguenta et pecuniam ad eam emenda et tenet donatio, ff., De donationibus inter virum et uxorem, Quod autem, I [*D*., 24, 1, 7, 1]. Idem est si dat ei ornamenta, ff., De auro argento legatis, Argumento, § Ornamenta [*D*., 34, 2, 25, 10]." (*Glossa Palatina ad Decretum Gratiani*, Città del Vaticano, *Bibl. Apost.,* ms. Pal. lat. 658, fol. 103v; Reims, *Bibl. mun.*, ms. 680, fol. 241v); Johannes Teutonicus, *Glossa ordinaria ad De cons*., D. 5, c. 38: "Id est a viris datae. Sed videtur, quod nec in talibus teneat donatio, quia dicit lex quod si vir dat uxori margaritas extricatas …. Si dat ei unguenta vel pecuniam ad ea emenda, tenet donatio, ff., De donationibus inter virum et uxorem, Quod autem, § I [*D*., 24, 1, 7, 1]. Idem est si dat ei ornamenta, ff., De auro argento mundo ornamentis unguentis veste vel vestimentis et statuis legatis, lege Argumento, § Ornamenta [*D*., 34, 2, 25, 10]" (*Glossa ordinaria ad Decretum Gratiani*, Beaune, *Bibl. mun.*, ms. 5, fol. 318vb; Douai, *Bibl. mun.,* ms. 586, fol. 292vb; Saint-Omer, *Bibl. mun.,* mss. 192, fol. 251rb, 436, fol. 321ra; Paris, *Bibl. nat.,* mss. lat. 3903, fol. 285rb, lat. 3905, fol. 295va; Tours, *Bibl. mun.,* ms. 559, fol. 244rb; Troyes, *Bibl. mun.,* ms. 60, fol. 228va).

[18] Johannes Faventinus, *Summa super De cons*., D. 5, c. 38: "Fucare etc. Duo sunt quae maxime otium pariunt, scilicet curiositas et voluptas. Cum ergo duo sunt genera personarum que potissimum ab exteriori otio vacare solent utique clericorum et mulierum curiositatem spectandi ex clericoum venientem notaverat." (*Summa super Decretum Gratiani*, Arras, *Bibl. mun.,* ms. 271, fol. 148r; Laon, *Bibl. mun.,* ms. 371, fol. 175v; Paris, *Bibl. nat.,* mss. lat. 14606, fol. 166va, lat. 14607, fol. 144v, lat. 14609, fol. 213r); Huguccio, *Summa super De cons*., D. 5, c. 38: "*Fucare* id est tingere, colorare. Duo pariunt, scilicet curiositatem et voluptatem. Et duo sunt ergo personarum que exteriori maxime otio vacare solent, scilicet clericorum et mulierum." (*Summa super Decretum Gratiani*, Cambrai, *Bibl. mun*., ms. 612, fol. 385ra; Lons-le-Saunier, *Arch. dép. du Jura*, ms. 16, fol. 483ra; Paris, *Bibl. nat.*, mss. lat. 3891, fol. 320rb, lat. 3892, fol. 400va, Nouv. acq. lat. 15397, fol. 150vb).

After the 4th Lateran Council in 1215, the first confessors' manuals condemned these donations and used Roman arguments. The manuals are traditionally divided into seven deadly sins: wrath, greed, sloth, pride, lust, envy, and gluttony. In the *Summa confessorum* of the Franciscan John of Erfurt (ca. 1295–1302) and in the *Summa* of Durand de Champagne, written at the end of the thirteenth century, the authors inserted many arguments about donations between husband and wife in the chapter dedicated to the avarice of the wife.[19] We find these arguments also in the commentaries of the civilists, such as Placentinus and Accursius who described women as miserly. This avarice of the wife is a *topos* of medieval law and medieval literature.

2. The Augustinian Goods of Marriage. — In 1234, Pope Gregory IX inserted the decretal *Donatio* in his compilation — the *Liber Extra* — compiled by the Dominican Raymond of Peñafort († ca. 1275).[20] This text took up the civilists' arguments and the Severan Constitution of Caracalla: According to this decretal, donations between husband and wife were confirmed if the donor dies without revoking the donation. The first decretalists used the three goods of marriage, given by Augustine in the *De bono conjugali* (*fides, proles* and *sacramentum*) in order to justify the new canonical prohibition.

The demand of *fides* gives a right to each spouse over the other spouse's body. In his commentary to the first book of the *Liber Extra*, Baldus de Ubaldis explained how a donation between husband and wife conflicted with the conjugal obligation of *fides*. He took up the pre-Accursian concept of honest love, selfless and chaste. The honest love, in keeping with the

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[19] Johannes Erfurdensis, *Summa confessorum*, 1, 6, 2 (N. Brieskorn, *Die Summa Confessorum des Johannes von Erfurt*, t. 2/1, at 346–49 [Frankfurt am Main-Bern-Cirencester, Peter Lang, 1981]); Durandus de Campania, *Summa confessorum,* 1, *De donatione*: "Utrum conjux possit donare conjugi? Respondeo donatio quae constante matrimonio inter conjuges sit ex quae alter locupletior et alter pauperior sit, non habet firmitatem, nisi donatoris obitu confirmatur, vel donator in ea vote usque ad mortem perduret quae tunc penitus evanescit, sed revocetur." (Paris, *Bibl. nat.,* ms. lat. 3264, fol. 69rb).

[20] X, 4, 20, 8: "Donatio, quae constante matrimonio inter coniuges dicitur esse facta, ex qua alter locupletior, et pauperior alter efficitur, firmitatem non habet, nisi donatoris obitu confirmetur; quae tamen penitus evanescit, si revocetur ab eo tacite vel expresse, vel qui donatum accepit prius debitum naturae persolvat."

Christian demand of *fides*, was not sympathetic to conjugal liberalities, which were traditionally analyzed as the consequence of cupidity.[21]

Proles, which means fecundity, was established by the Christian Church in the first century. It is to demonstrate how Placentinus, in his *Summa*, explained why these liberalities were conflicting with Christian fecundity. The Italian canonist Johannes of Imola used the same fragment of Paul and the neglect of children's education to explain how donations between husband and wife are conflicting with the necessity to procreate.[22]

In the first decade of the twelfth century, the Christian marriage became indissoluble. On the basis of an Ulpinian fragment, Johannes of Imola feared that if the donor refused to grant a gift to his spouse, she could decide to leave him. With the argument of *sacramentum*, canonists feared the use of threats of divorce in order to blackmail the donor. *Sacramentum* is also used in another way: It is symbolized by the Bible, in the Genesis 2, 24: "That is why a man leaves his father and mother and is united to his wife, and the two become one flesh."[23] This verse was used by the medieval canonist Hostiensis († 1271): Husband and wife became one flesh and the hand of the donor and the hand of the donee are one. The donation is made impossible by this symbolism:

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[21] Baldus de Ubaldis, *Com. ad C.*, 5, 3, 20, n°15: "Item est institutum ut inter eos sit fides, non solum in eo, quod respicit pudorem matrimonium, sed etiam ut in cunctis sit castitas, amor, honestas, contra quod bonum opponitur extorsio, seu depauperatio." (*In quartam et quintum Codicis librum*, fol. 155r [Venetiis, 1599, Goldbach, 2004]).

[22] Johannes de Imola, *Com. ad* X, 2, 24, 28, n°89: "Item ex eo, quia videtur esse contra bona matrimonii, qui sunt tria, videlicet, proles, fides et sacramentum. Ut legitur et nota per glossam in capitulo fin., infra De conditionibus appositis [X, 4, 5, 7]. Videtur enim per ipsam donationem, si valeret, impediri educatio prolis, seu filiorum ut etiam videtur colligi, ex dictae leges I [*D.*, 24, 1, 1] et II [*D.*, 24, 1, 2], De donationibus inter virum et uxorem, et per hoc videtur impediri bonos prole. Ita etiam videtur impediri ipsum sacramentum, quia per hoc, matrimonia fiebant venalia. Nam si non fiebant donationes, inducebant divortium […] Et eo, quia videretur, quod inducerentur conjuges ad praedicta, que sunt contra bona matrimonii." (*In secundum decretalium commentaria,* fol. 207r [Venetiis, 1575]).

[23] *Gen.,* 2, 24: "Quamobrem relinquet homo patrem suum et matrem, et adhaerebit uxori suae; et erunt duo in carne una." This verse of the Genesis is inserted in the Gratian's *Decretum* (C. 27, q. 2, c. 1) and in the *Liber extra* of Gregory IX (X, 4, 19, 8 [= *Comp. III*^{a}, 4, 14, 2]); L. Mayali, "Duo erunt in carne una" *and the Medieval Canonists*, in *Iuris Historia. Liber Amicorum Gero Dolezalek*, V. Colli & E. Conte ed., at 161–75 (Berkeley, The Robbins Collection, 2008)

Hostiensis, Summa super X, 4, 20, n°9: "Sicut vir et uxor sunt duo in carne una [...]. Et ideo non valet donatio facta a patre in filium, quia videtur de una manu ponere in alteram nam manus filli est manus patris."

"Husband and wife are two in one flesh and for the same reasons, donation made by a father to his son is invalid because one hand [the hand of the donor] has to put in the other hand [the hand of the donee], and the hand of the son [or the hand of the wife] is the hand of the father [or the hand of the husband]."[24]

CONCLUSION

Two conclusions can be given: On the one hand, despite the influence of Roman law on classical canon law, as pointed out by Pierre Legendre,[25] canonists elaborated their own arguments on the basis of the sin of luxury and on the basis of the Augustinian goods of marriage; on the other hand, the old Roman *mores* appeared suitable for Medieval Europe. During the rediscovery of Justinian's *Digest*, the first glossators adopted these arguments. Research proves that the prohibition of donations between husband and wife is found in many customary sources, influenced by Roman law, more specifically in France[26] and in Germany.[27] Italian statutory laws, in conformity with the

[24] *Summa aurea*, fol. 222v (Lugduni, 1537, Aalen, 1962).

[25] P. Legendre, *La pénétration du droit romain dans le droit canonique classique de Gratien à Innocent* IV (Paris, Jouve, 1964).

[26] See, for example, *Le Grand coutumier de France*, written at the end of fourteenth century by Jacques d'Ableiges; Jacques d'Ableiges, *Grand coutumier de France*, 22: "Item nota secundum consuetudinem Parisiensem quod uxori vivae nihil legare possum vel in morte donare." (E. Laboulaye and R. Dareste ed., 21 [Paris, 1868]). (According to the custom of Paris, I cannot give or leave anything to my wife.) See also *Le coutumier bourguignon glosé*, written in Burgundy during the fourteenth century; *Coutumier bourguignon glosé*, 386: "Se aucun donne a sa femme, la donacio ne vault riens." (M.-L. Marchand, J. Metman and M. Petitjean ed., 278 [Paris, CNRS, 1982]). (If a man gives something to his wife, the donation is invalid.)

[27] See *Sachsenspiegel*, written ca. 1231/1235; *Sachsenspiegel*, I, 31, 2: "Swen en man wif nimt, so nimt he in sine were al er gut to rechter vormuntscap; dar umme ne mach nen wif erme manne nene gave geven an erme egene." (*Sachsenspiegel Landrecht*, K. A. Eckardt ed., 96 [Berlin-Frankfurt, 1955]). (When a man marries a woman, he takes her under his power and her property under his administration. That is why a woman cannot make a donation to her husband.)

separatist spirit of Roman law, forbade them without distinction.[28] They were outlawed in English law by *unitas carnis* which presides over conjugal relations.[29] It is not only the product of Renaissance of the twelfth century. The arguments for the prohibition are socially obvious from a social standpoint in Medieval Europe: the transfer of an estate to descendants and the defense of an indissoluble marriage.

[28] The statutory laws of Rome prohibited these donations. See *Statuta urbis Romae*, I, 57: "Donatio inter virum et uxorem et inter sponsum et sponsam non valeant." (Romae ca. 1471) (Donation between husband and wife or between the two engaged persons is invalid.)

[29] *Les tenures de Monsieur Littleton*, II, 168: "Nota coment que home ne poit graunter ne doner ses tenentes a sa feme durant le coverture, pur ceo que sa fems et luy ne sint forsque un person en ley." (fol. 37r [London, 1585]) (We note that a man cannot favor or give something to his wife during the marriage, because they are one flesh.) About English law, see C. Donahue Jr., *Lyndwood's Gloss* "propriarum uxorum": *Marital Property and the ius commune in the Fifteenth Century England*, *in Europäisches Rechtsdenken in Geschichte und Gegenwart. Festschrift für Helmut Coing zum 70. Geburstag*, N. Horn ed., t. 1, at 19–37 (München, Beck, 1982).