

導 論

近年來的中意法學交流構成了中意關係中一道亮麗的風景線，極大地促進了同樣具有悠久歷史的兩個偉大民族之間的相互認知和理解，並且也構成了中西文明互鑒的重要典範。在這個領域裡，我們需要特別提及桑德羅·斯齊巴尼（Sandro Schipani）教授，他以非凡的富有前瞻性的胸懷，極大促進了中意法學界的交流。受益於斯齊巴尼教授和他的同僚的不斷促進，中意法學界的交流從1990年代的涓涓細流發展到今天的規模，從最初的羅馬法和私法學向多專業、多方向發展，雙方很多高校也建立了穩定的交流機制並定期舉行國際會議，每年的留學生和訪問學者的規模現已非常可觀。本叢書作者中的一些中方學者也是因為斯齊巴尼教授的幫助才得以接觸到了宗教法（*diritto ecclesiastico*）和教會法（*diritto canonico*）專業，並結識了意大利相關學者，有的還在他的推薦下跟隨意大利前憲法法院院長、羅馬二大著名的宗教法專家凱撒·米拉貝利（Cesare Mirabelli）教授攻讀宗教法專業的博士（該生因故未完成學業）。斯齊巴尼教授一直在為提高中國師生在宗教法專業方面的學術水準作出了巨大的努力。因此在本叢書出版之際，請容許我們表達對斯齊巴尼教授的感謝！

Introduction

In recent years, legal exchanges between China and Italy have become a beautiful feature of China-Italy relations, significantly promoting mutual recognition and understanding between the two great nations equally with long history. These exchanges have also served as an important model for mutual learning between Chinese and Western civilizations. In this field, we should particularly mention Professor Sandro Schipani, who has been greatly promoting exchanges between the legal communities of China and Italy with his extraordinary foresight and magnanimity. Thanks to his and his colleagues' continuous efforts, the international exchanges between Chinese and Italian legal communities have grown from a small stream in the 1990s to a great river, and from the Roman law and private law in the beginning to the multiple disciplines and spheres; some universities of both sides have now established the stable exchange mechanisms and hold regular international conferences; the number of exchange students and visiting scholars each year is now quite substantial. It is due to Professor Sandro Schipani that some Chinese scholars in this series were able to be exposed to *diritto ecclesiastico* and *diritto canonico* (canon law) and began to make friends with Italian scholars in these fields; and it is for this recommendation that one had been studying for a PhD of *diritto ecclesiastico* with Professor Cesare Mirabelli, who is the former president of the Italian Constitutional Court and

意大利特有的歷史傳統和地緣位置使其在宗教法和教會法研究領域享有世界領先地位。但遺憾的是，自1978年以來，中國的大學和科研院所中尚無學者在意大利的法學院學習宗教法和教會法專業並取得博士學位。部分地由於這個原因，中國學界對宗教法和教會法的關注相對較少，誤解相當普遍。這一狀況不僅影響了中國對於西方文明及其法治發展史的理解，也影響了中國法學的建設，還在一定程度上影響到了中梵關係正常化的推進。有鑑於此，本叢書致力於推進中意法學界在宗教法和教會法領域的研究和交流。

教會法（*diritto canonico*）是指天主教會的內部法律規範體系，意大利語文獻在此領域具有壓倒性優勢。這種現象的主要原因是教廷在羅馬，意大利語為教廷官方語言，世界上的頂級教會法教材、研究、期刊等也因而主要使用意大利語書寫。從這個意義上說，由於意大利的特殊地緣位置，意大利語成為了天主教會的世界語。因此本叢書首先關注和介紹意大利語文獻。未來隨著研究的深入與擴大，我們也會把關注範圍逐漸拓展到西班牙語和德語等其他語種的文獻，以拓寬相關我們的學術視野。

教會法的姊妹學科是宗教法（*diritto ecclesiastico*）。宗教法是大陸法系世俗法中的一個獨立學科，而不是憲法學或國際法學等學科之下的分支方向。需要說明的是，「宗教法」（*diritto ecclesiastico*）術語在普通法系中並沒有嚴格的對應表達（後文會介紹英語 *ecclesiastical law* 的涵義）；普通法系中雖然也有宗教法（*religious law*）研究，但相關研究屬於憲法學之下的一個分支方向，並沒有獨立的學科地位。宗教法誕生於19世紀末的大陸法系國家，其關注的是國家法律體系中宗教的社會因素部分，從而將法律與宗教在社會中的互動所產生的社會、法律和

famous expert in ecclesiastical law at the University of Tor Vergata (This Chinese student failed to complete his study for some reason). Professor Sandro Schipani has always been making enormous efforts to raise the academic level of Chinese students and professors in the field of *diritto ecclesiastico*. Therefore, on the occasion of the publication of this series, please allow us to express our gratitude and respect to Mr. Sandro Schipani!

Italy's unique historical traditions and geographical location have given it a leading position in the study of *diritto ecclesiastico* and *diritto canonico*. However, it is regrettable that since 1978 no scholars from China's university or academic institute had studied *diritto ecclesiastico* and *diritto canonico* in law school and obtained doctoral degrees from Italian university. Partly for this reason, the China's intellectual community paid a relatively weak attention to *diritto ecclesiastico* and *diritto canonico*, so misunderstandings are very popular. This situation has not only influenced China's understanding of Western civilization and the evolution of legal history, but influenced the jurisprudence development in China, and affected the advancement of the normalization of China-Holy See relation to a certain extent. Considering this, the series is committed to promoting study and exchanges between Chinese and Italian legal communities in *diritto ecclesiastico* and *diritto canonico*.

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政治問題置於研究的中心，在幾乎所有時間和地理背景下都是如此。現今除法國以外的歐陸國家以及幾乎所有拉美國家的法學院，都將宗教法是作為一門獨立的法學學科。以意大利為例，目前他們有110名宗教法教授從事這一學科的教學和研究，公立和私立大學都會開設宗教法課程，並且宗教法也是國家司法考試的必備內容。

從內容上說，宗教法規範並不構成一個天然有機整體，而是散見於國際法、憲法、行政法、教育法、慈善法、稅法、勞動法、婚姻法、財產法等部門法之中。從性質上說，宗教法規範不僅涉及公法，也涉及私法，具有鮮明的跨學科特點。正是宗教法的這種特點使得其成為了一個單獨的法學學科，而不是被定位為公法學或憲法學之下的分支。誠然，宗教憲法學（在德語中這一方名為 *Religionsverfassungsrecht*）是一個有價值的研究方向，但這並不是宗教法學的全部。實際上，19世紀最初一批宗教法手冊幾乎就很少處理憲法內容，而主要是處理教產問題。宗教法研究對象的複雜性表明，相關專業的教學和人才培養只有通過複合型課程體系才能得到制度化實現，傳統的法學學科無法實現這一任務。從這個意義上說，教學自主權是宗教法在歐陸法系獲得獨立法學學科地位的原因之一。

然而，單單對象（即質料）本身並不足以支撐起宗教法的獨立學科地位，方法或研究範式（即形式）也同樣十分重要，而後者直接與二法關係有關。事實上，宗教法學科從誕生時期起，就始終面臨如何處理世俗法與教會法的關係這一重大問題。及至1929年《拉特朗政教協定》之後（該協定不僅具有雙邊意義，也具有世界意義），這一問題的重要性變得更加凸顯。簽署政教協定（*concordato*）的目的不僅是要對國家和聖座之間的

ecclesiastico and *diritto canonico*, so misunderstandings are very popular. This situation has not only influenced China's understanding of Western civilization and the evolution of legal history, but influenced the jurisprudence development in China, and affected the advancement of the normalization of China-Holy See relation to a certain extent. Considering this, the series is committed to promoting study and exchanges between Chinese and Italian legal communities in *diritto ecclesiastico* and *diritto canonico*.

Canon law (*diritto canonico*) refers to the internal legal system of the Catholic Church. Italian studies have an overwhelming advantage in this field. The main reason of this phenomenon is that the Holy See is located in Roma, and Italian language is the official language of Roman Curia. Consequently, the world's first class textbooks, researches, journals, etc. on canon law are mainly written in Italian. In this sense, for Italy's unique geographical location, Italian has become the lingua franca of the Catholic Church. Therefore, this series will give priority to Italian studies. In the future, with the deepening and broadening of the study, we will gradually extend the scope of our attention to the studies in other languages, such as Spanish and German, so as to enrich our academic eyesight.

The sister discipline connected closely with canon law is *diritto ecclesiastico*, which is an independent legal discipline in continental law system, not a branch of constitutional law or international law. It should be noted that term of "*diritto ecclesiastico*" does not have a strict equivalent expression in common law system (the meaning of "ecclesiastical law" in English will be explained in the later); and that there are studies on religious law in common law system, but they are branch of constitutional law, without an independent disciplinary status. The *diritto ecclesiastico* had originated in the continental

實體關係進行協調（*concordare*），而且是要對世俗法和教會法之間的二法關係進行協調（僅建立外交關係本身無需簽署政教協定）。而二法關係的一個基本原則就是世俗法和教會法在各自領域內（*ciascuno nel proprio ordine*）是獨立和具有主權的（*indipendenti e sovrani*），彼此無權干涉對方管轄範圍內的事務，即彼此無權（*Mutua Incompetenza*）。因此分離原則對天主教會而言還具有法律層面的對等意蘊，這一現象也構成了宗教法研究的一個重要方法論基礎。

反之，如果像魯道夫·索姆（Rudolph Sohm, 1841-1917）那樣否認教會法的獨立地位，不僅將損害二法關係研究，也將嚴重影響國家宗教立法和司法的品質。完全不顧及教會法和政教協定，而以一種純粹單邊主義的立場去處理宗教法和宗教政策，不僅無法保障宗教法和宗教政策的品質，也會折損國家的政治形象。正因為此，近些年來羅馬一大、博洛尼亞大學、佩魯賈大學等著名公立大學設立了「宗教法和教會法」（*Diritto Ecclesiastico e Diritto Canonico*）院系或研究機構，德國符茨堡大學（Würzburg）、弗萊堡大學等則設有二法博士學位（*Utrumque Ius*），以培養精通二法關係的人才。順便提及的是，中國學界所熟悉的烏爾曼（Walter Ullmann, 1910-1983）在奧地利因斯布魯克大學（Innsbruck）取得的學位即為二法博士（Dr. Jur. Utr.）。正因為此，在意大利、德國和西班牙等國，很多宗教法專家同時也是教會法專家。從根本上說，這是由宗教法的研究對象和方法論所決定的。

當然，我們在談論宗教法的學科特殊性時，也需要注意，宗教法不是自動發展出來的，而是由法律科學的各個領域共同貢獻的，不能因為所謂的特殊性就迴避法律的一般原則，特別是適

law nations in the end of 19th century, which concerns the religious social factor in the State's legal system, and hence places at the centre of the study the social, legal and political issues that arise from the interactions between law and religion in society, in almost every era and geographical context. Today, in law schools of European countries, except France, and of almost all Latin American countries, *diritto ecclesiastico* has been established as an autonomous legal discipline. Take Italy for example, they currently have 110 professors teaching and studying this discipline, with courses in *diritto ecclesiastico* and canon law provided in public and private universities. What's more, *diritto ecclesiastico* is one necessary part of National Judicial Examination.

By material, the norms of *diritto ecclesiastico* do not constitute an organic body, but are scattered throughout all the sectors into which the legal system is articulated: in international law, the Constitution, administrative law, education law, charity law, tax law, labor law, the marriage law, property law, etc. By nature, norms of *diritto ecclesiastico* are not only of public law but also of private law, with strong character of interdisciplinary. It is this character that made *diritto ecclesiastico* an independent legal science, instead of being classified as one branch of public or constitution law. Admittedly, constitutional law of religion (referred to in German as *Religionsverfassungsrecht*) is a valuable area of research, but it does not constitute the entirety of *diritto ecclesiastico*. The first manuals of *diritto ecclesiastico* in the 19th century, in fact, hardly dealt with the constitutional part, but dwelt extensively on patrimonial issues. The complexity of the subjects of *diritto ecclesiastico* shows that professional teaching and training can only be realized through institutionally complex disciplinary curriculum. This task cannot be accomplished within the framework of traditional legal disciplines. In this sense, didactic autonomy is one

用於所有法律學科的解釋原則。法學是一個整體，人們只是爲了方便起見，如教學上的便利，才將其劃分爲不同的部門法，這並不意味著部門法因此就具有脫離法學整體的特殊性，它們只是目標不同罷了。宗教法在本質上是國家法的一部分，因此世俗法學的方法論是首先的、基礎性的，然後才是其特殊性。宗教法研究是在法學軌道內展開的，其與史學或政治學研究等存在著根本性的不同。與此同時，我們絕不能將宗教法學與教會法學或相關學科混爲一談，神學或教牧立場並不構成宗教法學的基礎，這一立場對於內在理解教會法是非常必要的，但這並不是宗教法學的研究方法。

需要特別提請注意的是，儘管在當代社會中，世俗法和教會法的二元並行現象是被普遍承認的，但近代則不然。以英格蘭爲例，16世紀亨利八世掀起宗教改革之後，聖公會被奉爲國教，英格蘭與聖座的關係由此緊張了數百年之久。只是到19世紀之後，英國才逐漸放棄了敵視天主教的政策，並頒佈了《大公教會禁令解除法》（*The Act for the Relief of Catholics*, 1828）等法律，教會法在英國天主教會中的適用也得到某種恢復。紐曼（John Henry Newman, 1801-1890）樞機和阿克頓勳爵（Baron Acton, 1834-1902）就是宗教寬容政策下湧現出來的傑出天主教人物。儘管如此，英梵正式建交卻是在1982年，即宗教改革的450年之後。北歐新教諸國也是這種情況。聖座與瑞典、挪威、丹麥、冰島直至1982年才正式建交（聖座與芬蘭1942年建交，與蘇芬戰爭有關）。而美國則在教皇國覆滅與聖座斷交，直至1984年才建交。由於簽署政教協定原則上以國家和聖座彼此相互承認和建交爲前提，以及一些其他原因，英美和北歐都沒有簽訂總體政教協定的傳統，他們的法學界也因此缺乏研究二法關係和教會法的現實需要。

of the reasons that *diritto ecclesiastico* had gained the status as an independent legal discipline in the continental legal system.

However, the object (i.e., the material) alone is not sufficient to support the independent status of *diritto ecclesiastico* as a discipline. The method or research paradigm (i.e., the form) is equally important, which is directly related with the relation of dual legal systems. In fact, in the early stages of the discipline of *diritto ecclesiastico*, it had consistently been facing a fundamental issue of how to address the relationship between civil law and canon law. By the time the Lateran Concordat was signed in 1929 (which was significant not only bilaterally but also globally), this issue had become more important. The purpose of signing a concordat is not only to coordinate the substantive relationship between the State and the Holy See, but also to coordinate the relationship between civil law and canon law (The diplomacy alone does not require the signing of a concordat). One of the basic principles of the relationship between the two laws is that civil law and canon law are independent and sovereign in their respective orders, each without the right to interfere in the jurisdiction of the other, i.e., the Mutual Incompetence. Therefore, the principle of separation also has a legal significance for the Catholic Church, and this phenomenon constitutes an important methodological basis for the study of *diritto ecclesiastico*.

Contrariwise, if one denies the independent status of canon law just like what Rudolph Sohm (1841–1917) had done, it would not only seriously undermine the study of the relationship between the two legal systems, but also significantly affect the quality of national religious legislation and judicial practice. Completely disregarding canon law and concordats, and dealing with religious law and religious policy with a purely unilateral position, not only fails to ensure the quality of

儘管現在英國已放棄了敵視天主教的國策，但其近代國家學說的影響力卻十分巨大。其中霍布斯的國家理論最具代表性。在他看來，教會只是國家的一個部分或一個功能，傳統的國家法和天主教教會法以及王座（the Crown）和宗座（the Roman Pontiff）的二元並存，都沒有正當性。他思想集中表現在《利維坦》的封面形象上：象徵最高主權者的利維坦一手持象徵世俗治權的寶劍，一手持象徵教會治權的牧杖，集教俗兩界權力於一體。本質地說，這種模式是一元論的，是對古代以色列或羅馬帝國政教關係的某種恢復。儘管1982年英梵建交即已表明一元論並沒有經受得住英國歷史的最終考驗，但一元論的遺跡現今依然可以看到：聖公會的教會法亦然是國家法律的一部分，有的甚至還要由議會批准頒佈或由君主禦准（Royal Assent）。英國特有的政教關係史造成了這一現象，即英語中的“ecclesiastical law”通常是指聖公會教會法和國家法的混合物，其與大陸法系中的「宗教法」（*diritto ecclesiastico*）並無對應關係。

總之，天主教的教會法（*diritto canonico*）、大陸法系中的宗教法（*diritto ecclesiastico*）、英國的宗教法（*ecclesiastical law*）和美國的宗教法（*religious law*）都各有各的目的和功能，也反映了不同法體系和不同制度體系及其歷史背景。在絕大多數大陸法系國家中，宗教法是一門從法律體系中各個領域汲取規則的複合性學科，其教學和學科自主性並不是純學術或純理論問題，而是與教學自主權問題相互交織。及至教皇國覆滅和1929年意梵及1930年代德梵一系列現代政教協定之後，宗教法研究愈發重視二法關係和教會法。時至今日，有些國家甚至還與基督新教、猶太教、伊斯蘭教乃至中國佛教和日本的創價學會等宗教團體簽署了教會協定（德語稱為 *Kirchenvertrag*）。這就要求宗教法學要不可避免地拓展到教規研究，因為宗教規範與世俗規範

religious law and policy, but also undermines the political image of the state. Because of this, in recent years, some famous public universities such as University of Sapienza University of Roma, the University of Bologna, and the University of Perugia have established departments or institutions of “*Diritto Ecclesiastico e Diritto Canonico*”, while the University of Würzburg and the University of Freiburg in Germany offer a PhD of *Utrumque Ius* to train professionals in the relationship between the dual legal systems. By the way, Walter Ullmann (1910-1983), well known in Chinese academic circles, obtained his degree in the University of Innsbruck in Austria as Doctor Juris Utriusque. Because of this, in countries such as Italy, Germany, and Spain etc., many experts in *diritto ecclesiastico* are also experts in canon law, which is fundamentally determined by the subject and methodology of *diritto ecclesiastico*.

Apparently, when discussing the particularity of the discipline of *diritto ecclesiastico*, we should be reminded that *diritto ecclesiastico* has not developed autonomously but with the contribution of various sectors of legal science, not shirking, by reason of an alleged speciality, any of the general principles of law, in particular those of interpretation, valid for all legal disciplines. The legal science is one and that only for the sake of convenience, including didactic aspects, are the various sectors distinguished without any specialty being derived from this, but only a diversity of goals. *Diritto ecclesiastico* is, in essence, a part of state law; therefore, the methodology of civil legal science is primary and fundamental, while its particularity comes only thereafter. The study of *diritto ecclesiastico* is conducted within the field of jurisprudence and differs completely from historical or political studies. At the same time, we shall not confuse the science of *diritto ecclesiastico* with the science of canon law or related disciplines, for *diritto ecclesiastico* is

的關係及其相互影響並不是個別案例，如世俗法吸收教會法的情況（*canonization of civil laws*），而是涉及整個法學領域，這就帶來了相當大的方法論問題。全球化帶來的投資和人員的國際化交流日益加深，對宗教法研究的國際視野和比較法研究也提出了更高的要求。儘管目前中國的宗教法和教會法研究尚較為薄弱，但我們相信其一定能迅速發展起來，這對中國日益走入世界舞臺的中心、對建設人類命運共同體，都是非常必要的，本叢書也希望榮幸地在這個過程中發揮出可被歷史認可的貢獻。

叢書編委

2025年4月20日

not based on the theological or pastoral positions. Such positions are quite necessary for an intrinsic understanding of canon law, but they are not the methodology of the science of *diritto ecclesiastico*.

We should be reminded particularly that the dual coexistence of civil law and canon law is widely recognized in the contemporary society, but this was not the case in the early of modern time. Take England for example, when Henry VIII launched the Reformation in the 16th century, the Anglican Church began to be established as the state religion, leading to strained relations between England and the Holy See for centuries. It was not until the 19th century that UK gradually abandoned its hostile policy towards the Catholic Church and enacted laws such as *The Act for the Relief of Catholics* (1828), which restored the application of canon law in the Catholic Church in UK to a certain extent. Cardinal John Henry Newman (1801–1890) and Baron Acton (1834–1902) were prominent Catholic figures emerging under this policy of religious tolerance. Despite of this, the formal diplomatic relation between UK and the Holy See were not established until 1982, 450 years after the Protestant Reformation. The similar situation had happened in the Protestant countries of Northern Europe. The Holy See did not establish formal diplomatic relations with Sweden, Norway, Denmark, and Iceland until 1982 (the Holy See established diplomatic relations with Finland in 1942, which was related to the Finnish-Soviet War). The United States, on the other hand, stopped its diplomatic relation with the Holy See when the collapse of the Papal States and did not re-establish diplomatic relations until 1984. Since the signing of political-religious agreements is, in principle, conditioned by the mutual recognition and diplomatic relations between a state and the Holy See, and by other reasons, neither the UK nor the Nordic countries don't have a tradition of signing general concordat. As a result, their

legal communities lack the practical need to study the legal dualism and the canon law.

Although the UK has now abandoned their hostile policies towards the Catholic Church, the influence of its state doctrines in the early modern time remains influential, among them Thomas Hobbes' state theory is among representative example. In his view, the Church is only a part or function of the state, and the coexistence of traditional state law and Catholic canon law, and of the Crown and the Roman Pontiff, have no legitimacy. His idea is embodied particularly in the image in cover of *Leviathan*: Leviathan, who represents the supreme power, holds a sword symbolizing the civil power in one hand, and holds a staff symbolizing the ecclesiastical power in the other hand, incarnating both civil and ecclesiastical power. In essence, this model is of monism and a restoration of the church-state relation of ancient Israel or the Roman Empire in some sense. Though the diplomacy between the UK and the Holy See in 1982 suggested that monism did not withstand ultimately the test in British history, the monistic remnants could be seen even now: the canon law of the Anglican Church is still one part of state law, with some approved and promulgated by Parliament or Royal Assent. The unique history of church-state relations in UK has produced such phenomenon that the term of "ecclesiastical law" typically refers to a mixture of Anglican Church's canon law and state law, without correspondence to "*diritto ecclesiastico*" in the continental law system.

In sum, canon law of the Catholic Church, *diritto ecclesiastico* in continental law system, ecclesiastical law in the UK, and religious law in the United States have their own purposes and functions, reflecting different legal systems, institutional systems and historical contexts. In most countries of continental law system, *diritto ecclesiastico* is a complex discipline that draws its rules from all sectors of the legal

system, its didactic and scientific autonomy is neither a merely scholastic nor theoretical matter, but is intertwined with the issue of teaching autonomy. With the fall of the Papal States and modern concordat with Italy of 1929 and a series of concordats with Germany in the 1930s, the study of *diritto ecclesiastico* began to take seriously the legal dualism and canon law more ever than before. Nowadays, some countries have even signed church agreements (*Kirchenvertrag* in German) with religious communities such as Protestant churches, Judaism, Islam, as well as Chinese Buddhism and Japanese Soka Gakkai. This requires that the study of *diritto ecclesiastico* will inevitably extend to the study of religious norms, for the relationships between canonical and civil norms, their reciprocal influence, as in the case of the canonization of civil laws concern not individual cases, but entire sectors of legal science, posing considerable methodological problems. Globalisation has brought about increasing internationalisation of investment and personnel exchanges, placing higher demands on international perspectives and comparative studies on *diritto ecclesiastico*. The study of China's religious law and canon law is still relatively weak now, but we believe deeply that it will develop very quickly. This is necessary for Chinese growing presence on the world stage and for the building of a community with a shared future for mankind. We hope that this series will be able to make a contribution to this process that will be recognized by history.

20 April 2025

Editorial Committee