Summary

Canonistic Justification of Freedom of Contract in the Western Legal Tradition

The monograph poses three research questions. What arguments in favour of freedom of contract did the canon law jurisprudence elaborate between 12th and 15th centuries? What was the influence of canonistics on freedom of contract in private law in the Middle Ages and in the modern era? What is the contemporary significance of canonistics in this manner – may it be useful for the discussion on the limitations of freedom of contract? The research area that arose from these questions is the history of justification of freedom of contract in the Western legal tradition from the late Middle Ages up till nowadays. The book consists of three chapters. The first one was dedicated to setting up the argumentation of late medieval canonists in favour of actionability of all agreements. The second chapter discussed the reception of canonistic idea of the binding force of the given word or lack thereof in modern era and the development of new justifications of freedom of contract. The third chapter proved the significance of medieval canonistic argumentation for contemporary theory of contract.

The accomplished research led to three general conclusions. Firstly, it were the canonists who discovered the new doctrine of the binding force of the given word and the canonistic justification of freedom of contract was the first of this kind in the Western legal tradition. It was founded on the theological and social argumentation and grew from the nature of the sources available for the canonists.

Secondly, in the modern era this argumentation was in retreat as it was either straightaway rejected (in legal humanism and the school of the law of nature) or in the lapse of time its significance was questioned and finally forgotten (in the Dutch jurisprudence and *usus modernus Pandectarum*). In legal humanism there was no need at all for accepting the actionability of all agreements, and in the most influential schools of jurisprudence (the school of the law of nature and *usus modernus*) the canonistic justification was superfluous. The binding force of agreements was possible to derive from natural law or from combined Germanic law and custom respectively. As these two latter schools influenced the shape of the first codifications, canon law and canonistics lost any importance for the justification of freedom of contract and the memory of the canonistic origin of *pacta sunt servanda* maxim began to evanescence. Functionally canonistic argumentation was of high significance but its direct doctrinal influence was relatively low.

Thirdly, the general theory of contract provides no comprehensive answer to the question of *ratio* of binding force of contracts therefore it is justified to search for such an answer elsewhere. The general theory of contract was founded on the transition from casuistics and explanation of contract law by descriptions of particular types of contracts to the creation of a coherent system, where the focal point is a general concept of contract as a source of obligation. In the 19th century it was believed, both in codified continental law and in common law, that such a theory will satisfy all the

challenges of private law, but in the following century this belief was proved wrong. Nowadays it is clear that codified law requires more sources of argumentation for the justification in the discussion of the limits of freedom of contract. Such sources include both medieval canon law jurisprudence and contemporary common law contract theory.

The justification of freedom of contract developed by the canonists has a universal character and for this reason it is still of high value. The theological argumentation is in its nature established on the ethical argument according to which the given word and keeping the promise are appreciated. From the threat of sin and the venture of loss of salvation (social argument) one can move to recognition of keeping promises as a commonly accepted value. Social argumentation means that where the reliance of the other party is violated there are also negative social effects. From the striving for peace among the community of Christians (teleological argument) one can move to recognize the importance of creation of socially valuable relations. An additional argument proving the universal character of canonistic justification of freedom of contract are the analogies with common law contract theory. Particular significance of canonistic justification of *ratio* of binding force of contract comes from the contemporary value pluralism. The application of similar argumentation by both medieval canonists and contemporary common law contract theorists confirms that there is a constant approach toward contracts in the Western legal tradition.

To illustrate the research conclusions one can refer to a common metaphor which claims that the Roman law came close to the doorstep of freedom of contract but did not cross it. It was where the Romans stopped that the canonists began their work. It seems, however, that even though the canonists were able to cross the threshold of freedom of contract, they were not interested in doing so. It is more adequate to say that they opened the door to this freedom wide providing the suitable argumentation, yet they never took the step forward. It was only the modern jurisprudence that overstepped this threshold by creating the general theory of contract which assumed freedom of contract. After crossing the doorstep it is worth reaching for the rationales which opened the door to freedom of contract. Not only are they still valuable for current contract theory but their rejection may be premature with the growing uncertainty concerning the limits of freedom of contract.