The Fourth Lateran Council and the Development of Canon Law and the ius commune

Edited by
Atria A. Larson and
Andrea Massironi

BREPOLS

THE FOURTH LATERAN COUNCIL
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Acknowledgments

From November 23 to November 27, 2015, a large group of international scholars met in Rome, perambulating through the city for various events just as the international participants of the Fourth Lateran Council had done eight hundred years prior. When the two of us attended this conference, entitled "*Concilium Lateranense IV*: Commemorating the Octocentenary of the Fourth Lateran Council of 1215", we had never met or even heard of one another and had no intentions, individually or in partnership, of editing a volume of proceedings afterwards. The organizing committee for the conference, however, led by Peter D. Clarke and including Brenda Bolton, Damian J. Smith, and Danica Summerlin, subsequently approached us to edit one volume among several arising from the conference. We are grateful for the organizing committee's invitation and for the opportunity to work with each other and with a truly diverse cohort of scholars ranging from young, promising doctoral candidates to eminently renowned senior scholars in the fields of medieval ecclesiastical history and the history of Roman and canon law. We thank our contributors for their timely and kind cooperation and their scholarly efforts resulting in fine essays developed well beyond what they had the time or necessity to present when in Rome.

We would also like to extend our gratitude to Pascal Montaubin, editor for Brepols's *Ecclesia Militans* series. Professor Montaubin expressed interest in the volume from the start and has provided valuable support as well as insightful feedback on a complete manuscript. This volume would not be what it is without his involvement. We are also immensely grateful to Alexander Sterkens and other staff at Brepols Publishers for their professional and timely communications and their work to bring this volume to publication.

Finally, both of us have made significant career strides in the two years since this process began. We are grateful to our institutions, mentors, colleagues, and families who have supported and encouraged us to achieve our personal goals and strive ever higher in our scholarly work and ever broader in collegiality with like-minded scholars in both Europe and the Americas.

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List of Abbreviations

Standard Legal Works

Decr. Grat.	*Decretum Gratiani*
De pen.	*De penitentia*
1Comp.	*Compilatio prima*
2Comp.	*Compilatio secunda*
3Comp.	*Compilatio tertia*
4Comp.	*Compilatio quarta*
X	*Liber Extra/Decretales Gregorii noni*
VI	*Liber Sextus*
Clem.	*Constitutiones Clementinae*
Auth.	*Authenticae*
Cod.	*Codex Iustiniani*
Dig.	*Digestum Iustiniani*
Nov.	*Novellae*

Libraries, Journals, Series, Dictionaries

ACA	Archivo de la Corona d'Aragon/Arxiu de la Corona d'Arago
AHC	*Annuarium historiae conciliorum*
AKKR	*Archiv für katholisches Kirchenrecht*
ASV	Archivio Segreto Vaticano
BAV	Biblioteca Apostolica Vaticana
BISM	*Bullettino dell'Istituto Storico Italiano per il Medio Evo*
BL	British Library
BM	Bibliothèque Municipale
BMCL	*Bulletin of Medieval Canon Law, New series*
BN	Bibliothèque nationale / Biblioteca nazionale
BSB	Bayerische Staatsbibliothek
C & S	*Councils & Synods with other documents relating to the English Church* 1.1: 871-1066, ed. by D. Wittenlock and others (Oxford: Clarendon Press, 1981) 1.2: 1066-1204, ed. by D. Wittenlock and others (Oxford: Clarendon Press, 1981)

	II.1: 1205-1265, ed. by F. M. Powicke and C. R. Cheney (Oxford: Clarendon Press, 1964)
	II.2: 1265-1313, ed. by F. M. Powicke and C. R. Cheney (Oxford: Clarendon Press, 1964)
CCCM	*Corpus Christianorum, Continuatio mediaevalis*
CHR	*Catholic Historical Review*
COD	*Conciliorum œcumenicorum decreta*, ed. Centro di Documentazione... (COD³: ed. 3)
COGD	*The General Councils of Latin Christendom: From Constantinople IV to Pavia-Siena (869-1424)*, ed. A. García y García et al., Corpus Christianorum, Conciliorum Oecumenicorum Generaliumque Decreta II.1 (Turnhout: Brepols, 2013)
CSEL	*Corpus scriptorum ecclesiasticorum latinorum*
CSS	*Collected studies series*
DA	*Deutsches Archiv für Erforschung des Mittelalters*
DBI	*Dizionario biografico degli Italiani* (Roma: Istituto della Enciclopedia italiana, 1960-)
DEC I	*Decrees of the Ecumenical Councils. I. Nicaea I to Lateran V*, ed. by N. P. Tanner (London: Sheed & Ward; Washington: Georgetown University Press, 1990)
DDC	*Dictionnaire de droit canonique*
EHR	*English Historical Review*
EIC	*Ephemerides iuris canonici*
ED	*Enciclopedia del diritto*
GC	*Gallia christiana*
IC	*Ius commune*
JEH	*Journal of Ecclesiastical History*
JK, JE, JL	Jaffé, *Regesta pontificum romanorum* ed. secundam curaverunt F. Kaltenbrunner (JK: an. ?-590), P. Ewald (JE: an. 590-882), S. Loewenfeld (JL: an. 882-1198)
Mansi	*Sacrorum conciliorum nova et amplissima collectio*, ed. G. D. Mansi, 31 vols (Florentiae: expensis Antonii Zatta Veneti, 1756-98)
MGH	Monumenta Germaniae historica
Conc.	Concilia
Epp.	Epistolae (in Quart)
SS	Scriptores
MIC	Monumenta iuris canonici
Series A	Series A: Corpus Glossatorum
Series C	Series C: Subsidia
NA	*Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde*
ÖNB	*Österreichische Nationalbibliothek*
PL	Migne, *Patrologia latina*

Po.	Potthast, *Regesta pontificum romanorum*
Proceedings Toronto 1972	*Proceedings of the Fourth International Congress of Medieval Canon Law* (Toronto, 21-25 August 1972), ed. by S. Kuttner (Città del Vaticano: BAV, 1976, MIC Series C 5)
Proceedings San Diego	*Proceedings of the Eighth International Congress of Medieval Canon Law* (San Diego, University of California at La Jolla, 21-27 August 1988), ed. by Stanley Chodorow (Città del Vaticano: BAV, 1992, MIC Series C 9)
Proceedings Washington	*Proceedings of the Twelfth International Congress of Medieval Canon Law* (Washington D.C., 1-7 August 2004), ed. by U.-R. Blumenthal and others (Città del Vaticano: BAV: 2008, MIC Series C 13)
Proceedings Esztergom	*Proceedings of the Thirteenth International Congress of Medieval Canon Law* (Esztergom, 3-8 August 2008), ed. by P. Erdö and A. Szuromi (Città del Vaticano: BAV, 2010, MIC Series C 14)
Proceedings Toronto 2012	*Proceedings of the Fourteenth International Congress of Medieval Canon Law* (Toronto, 5-11 August 2012), ed. by J. Goering and others (Città del Vaticano: BAV, 2016, MIC Series C 15)
Proceedings Paris	*Proceedings of the Fifteenth International Congress of Medieval Canon Law* (Paris, 17-23 July 2016) (Città del Vaticano: BAV, forthcoming, MIC Series C 16)
QF	*Quellen und Forschungen aus italienischen Archiven und Bibliotheken*
REDC	*Revista española de derecho canónico*
Reg. Inn. III	*Die Register Innocenz III.*, ed. O. Hageneder *et al.* (Graz: Böhlau; Wien: Österreichischen Akademie der Wissenschaften, 1964-, Publikationen des Historischen Instituts beim Österreichischen Kulturinstitut in Rom: Abt. 2, Quellen, 1. Reihe)
RHD	*Revue historique de droit français et étranger* (4^{e} série unless otherwise indicated)
RHE	*Revue d'histoire ecclésiastique*
RIDC	*Rivista internazionale di diritto comune*
RS	Rolls Series (*Rerum Britannicarum medii aevi scriptores*)
RSDI	*Rivista di storia del diritto italiano*
SDHI	*Studia et documenta historiae et iuris*
SB	Staatsbibliothek
SG	*Studia Gratiana*
UB	Universitätsbibliothek
TRG	*Tijdschrift voor Rechtsgeschiedenis*
ZKG	*Zeitschrift für Kirchengeschichte*

ZRG, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,*
Kan. Abt. Kanonistische Abteilung

ATRIA A. LARSON & ANDREA MASSIRONI

Introduction

If one were to judge purely on the basis of the eyewitness account of one German attendee of the Fourth Lateran Council in November 1215, the decrees issued at the council took up very little of the conciliar fathers' time. Compared to the time devoted to political questions, theological and ecclesiastical disputes, and liturgical ceremony, the matters of what reforms to enact seem to have taken little energy and caused little or no friction. In his comments on one segment of the final session of the council, this observer tersely stated "Deinde leguntur constitutiones domini pape"[1]. He mentions no discussion or quarrels over fine points in them; by this observer's account, Pope Innocent III (1198-1216) had pre-prepared decrees that he read out to the participants just when events of the council were nearly over, thereby preventing any debate or large-scale modifications. As several constitutions indicate, he probably sought the fathers' approval, likely in the form of verbal acclamation[2], so that it is not incorrect

1 S. Kuttner and A. García y García, 'A New Eyewitness Account of the Fourth Lateran Council', in *Traditio* 20 (1964), pp. 114-78, p. 128, l. 184; repr. in S. Kuttner, *Medieval Councils, Decretals, and Collections of Canon Law* (Ashgate: Variorum, 1992², CSS 126), no. IX, and in A. García y García, *Iglesia, sociedad y derecho*, II (Salamanca: Universidad Pontificia de Salamanca, 1987), pp. 61-121: 'Then the constitutions of the lord pope were read'. The final session was the third and was held on November 30, 1215. The eyewitness account is preserved in Giessen, UB, 1105, fols. 59ra-60va, following upon a copy of the council's constitutions written in the same script.

2 Kuttner and García y García, 'A New Eyewitness Account', cit., p. 164. They cite four instances from the series of constitutions that make reference to a decision that is made with 'the approval (*approbatio*) of the holy council'. For instance, c.44 says, 'sacri approbatione concilii decernimus'. One should not, as several scholars have, merely on this basis and later inscriptions attributing Lateran IV constitutions to Innocent III, assume that Innocent III was himself solely responsible for their composition. It seems likely that Innocent III was active in their framing but that he had significant help from others at his curia who had more legal training than he and more time to do the research combing through early decretals, whose language they frequently borrowed. See the recent treatment of the issue in K. Pennington, 'The Fourth Lateran Council, its Legislation, and the Development of Legal Procedure', in *Texts and Contexts in Legal History: Essays in Honor of Charles Donahue, Jr.*, ed. J. Witte and others (Berkeley: The Robbins Collection, 2016, Studies in comparative legal history), pp. 179-98. For the debate about the genesis and the author of the conciliar decrees see also

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to assume that they did little more than accept the canons passively[3]. The mere five words devoted to the constitutions in the eyewitness account should not, however, mislead scholars as to the value and importance of the conciliar constitutions. They were not an afterthought of the council, not a minor point of Innocent's agenda. Quite the contrary, the Lateran IV constitutions marked a high point in the development of medieval canon law and presented the heart of Innocent's influential reform aims for the Church[4]: they were indeed 'a legal and canonical monument, unique in the history of the ecumenical Councils'[5].

'Reform of the universal Church' had in fact constituted one of the two main stated aims of the council. The pope had been thinking, at least in vague terms, about convening a general council very early in his pontificate to deal with necessary matters within the Church. Other ecclesiastical officials had likewise recommended that a general council be held for matters of ecclesiastical discipline[6]. In consideration of

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M. Maccarrone, 'Il IV Concilio lateranense', in *Divinitas* 5.2 (1961), pp. 270-98, pp. 282-84; A. García y García, 'El gobierno de la Iglesia universal en el Concilio IV lateranense', in AHC 1 (1969), pp. 50-68, repr. in Idem, *Iglesia, sociedad y derecho*, II, cit., pp. 123-41, pp. 132-35; Idem, 'Las constituciones del Concilio IV lateranense de 1215', in *Innocenzo III. Urbs et Orbis* (Atti del Congresso internazionale, Roma, 9-15 settembre 1998), ed. by A. Sommerlechner (Roma: presso la Società alla Biblioteca Vallicelliana, 2003, Nuovi studi storici 55; Miscellanea della Società romana di storia patria 44), pp. 200-24, pp. 206-09; A. García y García and A. Melloni, 'Concilium Lateranense IV, 1215 (Introduction)', in COGD II.1, pp. 149-59, pp. 152-55.

3 J. C. Moore, *Pope Innocent III (1160/61-1216): To Root Up and to Plant* (Leiden & Boston: Brill, 2003, Medieval Mediterranean 47), p. 237.

4 Designating conciliar decrees as 'constitutions', rather than 'canons', with a term deliberately drawn from Roman law to indicate the *lex scripta*, aims to stress their universality and the will to extend them to all Christendom. Beginning with Lateran IV, the term 'canon' seems inadequate for the conciliar decrees; the word 'constitution' indicates the autonomy of every decree (as is evidenced also by their collocation in separate titles as self-standing decrees in the *Compilatio quarta* and in the *Liber Extra*): Maccarrone, 'Il IV Concilio lateranense', cit., p. 283; D. Quaglioni, 'Il Concilio Lateranense IV', in R. Aubert and others, *Storia dei Concili* (Cinisello Balsamo: San Paolo, 1995), pp. 122-30, p. 127. In the MS Firenze, Biblioteca Mediceo-Laurenziana, S. Croce III sin. 6, the decrees are named as *novellae*, using a label reminiscent of Justinian: García y García, 'Las constituciones del Concilio IV lateranense de 1215', cit., p. 203 ("denominación de sabor justiniáneo").

5 A. García y García, 'El Concilio IV de Letrán (1215) y sus comentarios', in *Traditio* 14 (1958), pp. 484-502, p. 486: "un monumento jurídico-canónico, único en la historia de los Concilios Ecumenicos". See also Kuttner and García y García, 'A New Eyewitness Account', cit., p. 163: ("the most important single body of disciplinary and reform legislation of the medieval Church"); C. Duggan and N. H. Minnich, 'Lateran Councils', in NCE 8 (San Francisco: McGraw-Hill, 1967), pp. 350-55, p. 352 ("the high point of medieval papal legislation"); J. W. Baldwin, 'Paris et Rome en 1215 : les réformes du IV[e] Concile du Latran', in *Journal des savants*, 1997, pp. 99-124, p. 123 ("En fin de compte, ce sont les soixante-dix canons destinés à réformer l'Église qui constituent le monument le plus durable de son [Innocent's] pontificat").

6 A. Melloni, '*Vineam Domini* – 10 [*recte* 19] April 1213: New Efforts and Traditional *Topoi*; Summoning Lateran IV', in *Pope Innocent III and His World*, ed. J. C. Moore (Aldershot: Ashgate, 1999), pp. 63-73, p. 64. Werner Maleczek has recently argued that, although the idea of a general council had been raised previously, by and to Innocent, the formulations were vague. In his opinion, the announcement of a general council that Innocent issued in spring 1213 would have come as a surprise. See W. Maleczek, '*Vineam Domini*: Das päpstliche Rundschreiben vom 13. April 1213 zur Einberufung

the loss of Jerusalem in the Holy Land in 1187 and the subsequent disastrous Fourth Crusade resulting in the sack of Constantinople in 1204, relations with Christians in the East and the matter of crusade required attention. For several years, however, other matters across Christendom, including many contentious ones involving high-ranking members of society and the church, had occupied his time. By early 1213, most of these matters had calmed down, allowing Innocent to turn his attention to crusade and reform[7]. Recovering the Holy Land (*recuperatio*) and reforming the whole Church (*reformatio*) thus formed the two main aims for a new general council modeled after the ancient custom of the Church, as stated in Innocent's summons to the council, *Vineam Domini*, dated April 19, 1213, a full two-and-a-half years before the council was to convene on November 1, 1215[8]. The opening imagery of the summons, that of beasts seeking to demolish the vineyard of the Lord, comes from Isaiah 5:1-7, where the prophet reproved God's people for being like a vineyard producing bad fruit despite all of Yahweh's diligent tilling; it thus deserved to be destroyed. For Alberto Melloni, this is not the imagery of heresy needing to be driven out but rather of internal corruption requiring reform, but Werner Maleczek has noted that the vineyard imagery appears in other Innocentine material in light of the struggle against heresy[9]. One can confidently say that Innocent viewed the two, namely reforming the church internally and purging Christendom of heresy, as intimately related. The remainder of the document reveals the prominence of reform in his mind, for he also instructed his recipients (archbishops, bishops, abbots, and priors throughout the Church) how to prepare for the council: "Interim vero et per vos ipsos et per alios viros prudentes universa subtiliter inquiratis que correctionis aut reformationis studio indigere videntur, et ea fideliter conscribentes, ad sacri concilii perferatis examen"[10]. In other words, every region of Latin Christendom was to examine what matters required reform and correction so that the council could address the problems of the whole Church.

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des Konzils', in *Il Lateranense IV. Le ragioni di un concilio.* Atti del LIII Convegno storico internazionale (Todi, 9-12 ottobre 2016) (Spoleto: Centro italiano di studi sull'alto medioevo, 2017, Atti dei Convegni del Centro italiano di studi sul basso medioevo n.s. 30), pp. 45-74.

7 Maleczek, '*Vineam Domini*', cit., pp. 48-55.

8 *Vineam Domini*: "ut ad recuperationem videlicet terre sancte ac reformationem universalis Ecclesie valeamus intendere cum effectu ... ut quia hec universorum fidelium communem statum respiciunt, generale concilium juxta priscam sanctorum Patrum consuetudinem convocemus". Melloni, '*Vineam Domini*', cit., provides a new edition of the text on pp. 72-73; Maleczek, '*Vineam Domini*', cit., on pp. 72-74. It is also available in PL 116:823-27; *Selected Letters of Pope Innocent III Concerning England (1198-1216)*, ed. C. R. Cheney and W. H. Semple (Edinburgh: T. Nelson, 1953), pp. 144-47. According to Maleczek, '*Vineam Domini*', cit., p. 63, by the terminology 'generale concilium juxta priscam sanctorum Patrum consuetudinem', Innocent meant a council like those in late antiquity and where the preeminence of the papal see was undisputed.

9 Melloni, '*Vineam Domini*', cit., p. 67; Maleczek, '*Vineam Domini*', cit., pp. 60-61. On the connections to heresy, see also R. Rist, '« Le petits renards qui détruisent la Vigne du Seigneur Sabaoth » : Innocent III et le Cantique des cantiques', in *Innocent III et le Midi*, éd. par M. Fournié et al. (Toulouse: Éditions Privat, 2015, Cahiers de Fanjeaux 50), pp. 255-77.

10 *Vineam Domini*, ed. Melloni, p. 73: 'In the meantime, you should, both of your own initiative and through other prudent and learned men, make detailed inquiry into all the things that seem to require the zealous application of correction and reform, and you should write these things down faithfully

While none of these diocesan documents have survived, it is reasonable to assume that, since so many ecclesiastics heeded the call to Lateran IV (some 70 patriarchs and metropolitans, more than 400 bishops, and more than 800 abbots and priors and monastic representatives attended[11]), they similarly heeded Innocent's instructions here. No doubt much material was gathered from the dioceses in advance in preparation of the conciliar decrees[12]; moreover, there was ample opportunity, between the three plenary sessions on November 11, 20, and 30, for local ecclesiastics to bring further issues of concern to the attention of curial officials[13]. Reform thus stood at the heart of the council[14]; the major expression of such reform consisted in the constitutions; and the reform would gain traction when the constitutions were implemented throughout the Church after the ecclesiastical officials in attendance returned home[15].

The constitutions did not solve all canonical problems or even address all issues in need of reform. It is even hard to find a thread linking them[16], except for the will

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and convey them for the consideration of the holy council'. On this clause of the letter, similar instances for councils later in the thirteenth century, and secular counterparts in the period, see Maleczek, '*Vineam Domini*', cit., pp. 65-68.

11 For a list of the conciliar fathers, though limited to cardinals, metropolitans, and bishops, see R. Foreville, *Latran I, II, III et Latran IV* (Paris: Editions de l'Orante, 1965, Histoire des Conciles Oecumeniques 6), pp. 391-95.

12 Because there was little discussion during the sessions of the council, the reports from the inquires in the dioceses were in practice the contribution of the conciliar fathers to the preparation of the decrees, which indeed were aimed at solving local problems that had emerged from the inquires: C. R. Cheney, *Pope Innocent III and England* (Stuttgart: Hiersemann, 1976, Päpste und Papsttum 9), pp. 46 and 48. Even though none of this material has survived, P. Silanos, 'Prodromi di riforma: La legislazione dei concili provinciali e sinodi diocesani (1179-1215) e il IV Concilio del Laterano', in *Il Lateranense IV. Le ragioni di un concilio*, cit., pp. 261-93, argues that scholars can still gain a sense of what the reports would have contained from the legislation of diocesan synods prior to Lateran IV, which are useful for understanding the concerns and areas of needed reform that the bishops likely would have related to the curia in response to Innocent's call.

13 B. Bolton, 'A Show with a Meaning: Innocent III's Approach to the Fourth Lateran Council, 1215', in *Medieval History* 1 (1991), pp. 53-67; repr. in Eadem, *Innocent III: Studies on Papal Authority and Pastoral Care* (Aldershot: Ashgate, 1995, CSS 490), no. XI, p. 58.

14 In Innocent's mind, the council was a sort of Estates General of the Church, since he deemed it as the proper place to reform the Church and to give fresh impetus to her mission in the world as a religious organization: Maccarrone, 'Il IV Concilio lateranense', cit., pp. 275-77.

15 In theory, such implementation would occur predominantly through diocesan synods where bishops informed ecclesiastics in their diocese about the reforms. As scholarship has shown, these synods did occur, and their own decrees took up much from the Lateran IV constitutions. As A. J. Duggan, 'Conciliar Law, 1123-1215: The Legislation of the Four Lateran Councils', in *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Gregory IX*, ed. W. Hartmann and K. Pennington (Washington DC: Catholic University of America Press, 2008, History of Medieval Canon Law), pp. 318-66, p. 354, has said, 'The contemporary records of the Latin Church bear testimony to their application to a greater or lesser extent throughout the thirteenth century, and beyond, in the different regions of the Latin Church'. See pp. 353-66 for an overview of the reception of the constitutions in various regions. More work can certainly be done in this area.

16 M. Sensi, 'Concilio lateranense IV (1215)', in *Storia dei concili ecumenici: attori, canoni, eredità*, ed. O. Bucci and P. Piatti (Roma: Città nuova, 2014), pp. 227-57, p. 255.

to reform, and they are not ordered systematically[17]. They also did not necessarily become the standard of canon law after which there was nothing left to be said. Nevertheless, they addressed dozens of issues of reform and contributed significantly to the advancement of canon law and, concomitantly, the *ius commune*. It did so largely by building upon the canonistic jurisprudence and individual decretal decisions of the previous decades and put them into a form that automatically became universally applicable in Latin Christendom and, in theory (though not in fact), universally enforceable. That they exceeded earlier conciliar legislation and addressed far more matters of reform is clear from the numbers alone. The modern edition lists seventy-one decrees; the Third Lateran Council, celebrated under Pope Alexander III (1159-81) in 1179, issued twenty-seven[18]. The last of the seventy-one constitutions dealt at length with a plan for another crusade (c.71 *Ad liberandam*), while the first two dealt with dogmatic matters, providing a statement of faith (c.1 *Firmiter*) and a condemnation of the work of Joachim of Fiore against Peter Lombard's view of the Trinity (c.2 *Dampnamus*)[19]. This leaves sixty-eight constitutions treating matters of ecclesiastical organization, procedures, property, discipline, pastoral care, and relations with other groups. Anne Duggan has provided a good introduction to the basic content of the body of decrees and their relationship to the three Lateran councils of the twelfth century[20]. These earlier councils had an impact on the developing canon law and canonistic jurisprudence (especially Lateran III), yet Innocent III's council exceeded them all. All sixty-eight decrees immediately became subject to commentary by leading canonists of the age (some even commented on the other three)[21], who understood

17 A. García y García, 'The Fourth Lateran Council and the Canonists', in *The History of Medieval Canon Law*, cit., pp. 367-78, p. 368; Idem, 'Las constituciones del Concilio IV lateranense de 1215', cit., p. 203. Nevertheless, the classic division adopted by Bernard of Pavia and followed by canonists for canonical collections (and summed up by the verse *iudex, iudicium, clerus, connubia, crimen*) is discernible.

18 The latest edition of the 1179 decrees appears in COGD, II.1, pp. 127-47; the 1215 constitutions appear ibid., pp. 163-204. The latter edition reproduces the critical edition of Antonio García y García in his *Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum* (Città del Vaticano: BAV, 1981, MIC Series A 2).

19 The two dogmatic decrees also seem to have been drafted earlier and presented to the assembly for approval by acclamation. See Kuttner and García y García, 'A New Eyewitness Account', cit., p. 154, and lines 152-58 of the edition of the account. On c.1, see M. Rainini, '«Firmiter credimus». Premesse teologiche e obiettivi polemici della costituzione I del Concilio Lateranense IV', in *Il Lateranense IV. Le ragioni di un concilio*, cit., pp. 111-56.

20 Duggan, 'Conciliar Law, 1123-1215', cit., esp. pp. 341-52.

21 *Constitutiones Concilii quarti Lateranensis*, ed. García y García, cit., includes an edition of the three earliest commentaries on the Lateran IV constitutions by Johannes Teutonicus, Vincentius Hispanus, and Damasus as well as two shorter, anonymous glosses (*Casus Parisienses* and *Casus Fuldenses*). See also García y García, 'The Fourth Lateran Council and the Canonists', cit., pp. 367-78. Paradoxically, c.71 about the Crusade, i.e. the topic that had took great part of the discussions during the sessions of the council together with political issues (B. Studt, 'Concilio Lateranense IV', in *Diccionario general de derecho canónico*, ed. J. Otaduy and others [Cizur Menor: Aranzadi, 2012], II, pp. 383-87, p. 385), was less glossed and commented on than the other constitutions (Pennington, 'The Fourth Lateran Council, its Legislation, and the Development of Legal Procedure', cit., pp. 180-81).

the actual value and importance of the conciliar legislation[22]. Johannes Teutonicus then incorporated all but two (c.42 and c.71) of the seventy-one into his *Compilatio quarta* (c.1216)[23]. Raymundus de Pennaforte included all of these (minus c.49) in the *Liber Extra* (1234), which Gregory IX commissioned him to compile as an official collection of canon law that would supersede earlier collections[24]. As part of the *Liber Extra*, they became part of the *Corpus iuris canonici*, received fixed form in the 1582 *Editio Romana* of the *Corpus*, and remained in effect until the new *Codex iuris canonici* of 1917. Even in that *Codex*, all but eleven constitutions appeared as sources for the revised regulations of the Catholic Church[25]. In short, the legislation of Lateran IV was massive, long-lasting, and influential; Lateran IV was the greatest ecumenical council of the Middle Ages[26], one of the most important ecclesiastical gatherings in the history of the Church[27], since it can be seen as the first pillar (the second being the Council of Trent) upon which the life of the Church from the Middle Ages to the modern era developed[28].

Exactly how influential, and in what ways, deserves far closer attention. Certain decrees have tended to attract much attention, others less so. This volume in no way intends to rectify the lack of a comprehensive treatment of all the constitutions and their place in the development of canon law and the *ius commune*. It does, nevertheless, represent a contribution and deals in far more detail with several constitutions and select issues than has hitherto appeared in the scholarship. The essays here ask questions such as how Lateran IV's decrees are related to canonistic developments of the twelfth century; what the particular aims of individual decrees were; how canonists received the conciliar legislation and further developed canonistic jurisprudence as a result; what impact a particular decree had on a certain issue in a local region; how concepts utilized in the Lateran IV constitutions related to intellectual debates about other issues in society; or in what way the Lateran IV decrees drew from Roman law and its twelfth-century jurisprudence, thus furthering a welding of the norms and terminology of Roman and canon law in the formation of the *ius commune*. These

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22 García y García, 'Las constituciones del Concilio IV lateranense de 1215', cit., pp. 201-02. The constitutions deeply influenced medieval Church and society; as solutions for political problems, they were less successful: see also Baldwin, 'Paris et Rome', cit., p. 123.

23 K. Pennington, 'Decretal Collections, 1190-1234', in *History of Medieval Canon Law in the Classical Period*, cit., pp. 293-317, p. 314.

24 See García y García, 'El Concilio IV de Letrán (1215)', cit., p. 485; Idem, 'Introducción', in *Constitutiones Concilii quarti Lateranensis*, cit., pp. 3-38, with the title 'Tradicion manuscrita y editorial del Concilio 4 Lateranense', in Idem, *Iglesia, sociedad y derecho*, II, cit., pp. 15-59, p. 16; Idem, 'The Fourth Lateran Council and the Canonists', cit., p. 367. For the correspondence of the conciliar decrees with *Compilatio quarta* and the *Liber Extra*, see García y García, 'El Concilio IV de Letrán', cit., pp. 485-86, and S. A. Szuromi, 'The Constitutions of the Fourth Lateran Council (1215) according to its Theological, Canonical and Historical Aspects', in RIDC 15 (2004), pp. 185-99, p. 197 n. 86 (for the *Liber Extra* only).

25 García y García and Melloni, 'Concilium Lateranense IV, 1215 (Introduction)', cit., p. 153.

26 Kuttner and García y García, 'A New Eyewitness Account', cit., p. 116.

27 Duggan and Minnich, 'Lateran Councils', cit. p. 352; W. Ullmann, *A Short History of the Papacy in the Middle Ages* (London-New York: Routledge, 2003[2]), p. 156.

28 Maccarrone, 'Il IV Concilio lateranense', cit., p. 298.

essays are grouped together into four parts: (1) The Canon Law Background to the Fourth Lateran Council, (2) Canon Law and Canonistic Jurisprudence for Regulating Clerics and the Liturgy, (3) Canon Law and Canonistic Jurisprudence for Governing the Faithful, and (4) The *ius commune* of Contracts, Rights, and Procedure.

Scholars can easily enough provide references to earlier conciliar decrees that deal with the same matters as one of the constitutions of Lateran IV. The DEC lists some comparable Lateran III decrees in its notes. ANNE J. DUGGAN's chapter in the *History of Medieval Canon Law in the Classical Period* shows basic equivalences with earlier, twelfth-century Lateran decrees. The background to the constitutions is, of course, far more complex than merely drawing lines from one conciliar decree to a succeeding one, and Duggan has for this volume written a masterful study ('The Ghost of Alexander III: "Following Closely in the Footsteps of Pope Alexander, our Predecessor of Good Memory, so Great is our Veneration for Him..."') documenting the influences of Pope Alexander III, whom Innocent III held in high regard, on the Lateran IV decrees and in Innocent III's decretals. Such influence comes from Alexandrine conciliar decrees but also his own decretals, that is, his letters expressing rulings and giving advice on particular cases throughout Christendom[29]. Innocent III viewed Alexander as establishing important precedents but sometimes diverged from his predecessor's decisions. In either case, Duggan demonstrates the considerable impact of the longest-reigning pope of the twelfth century on the reform agenda of Innocent III, which coalesced in the Lateran IV constitutions. LAWRENCE G. DUGGAN too has much to say about the twelfth century and Alexander III in his examination of one particular canonical issue, that of armsbearing by the clergy ('Armsbearing by the Clergy and the Fourth Lateran Council'). His tale stretches back into the second half of the eleventh century and includes the critical context of the crusades and the emergence of military orders, several of which received papal recognition under Alexander III. Alexander III was also the pope who established explicitly the right of clergy to self-defense and to repel force with force, thus making a prohibition of clergy bearing arms more relaxed. Against this backdrop, the constitutions of Lateran IV with relevance for the issue – and why there is no direct prohibition of clerical armsbearing in them – are better understood.

From the earliest days of Church councils, the administration of the Church as an earthly institution stood at the center of the decrees issued from them. A large portion of the content of canon law collections deals with how the Church is organized, how the various offices of the Church function, who is qualified to fill those offices, and what pertains to various orders within the Church. Much of canon law also pertains to liturgical usage, that is, how those within the ecclesiastical hierarchy carry out ceremonial and sacramental duties for the sake of the cultic life of the Church. Both the organizational structure of the Church and its liturgical practices required clarification in 1215, only eleven years after the sack of Constantinople by crusaders

29 On the genre of papal decretals, see A. A. Larson and K. Sisson, 'Papal Decretals', in *A Companion to the Medieval Papacy: Growth of an Ideology and Institution*, ed. K. Sisson and A. A. Larson, (Leiden: Brill, 2016, Brill's Companions to the Christian Tradition 70), pp. 158-73.

which resulted in the establishment of a Latin patriarchate in the capital of Byzantium. Latin patriarchates had already been established in Antioch and Jerusalem as a result of the First Crusade. These ecclesio-political developments brought into focus issues of sacramental and liturgical variations between East and West, much of which the pope did not counter, except when the Greeks appeared to be engaging in practices out of contempt for the Latins, such as washing altars on which Latin priests had celebrated Mass using unleavened bread rather than leavened bread, which was the custom among Greeks. THOMAS M. IZBICKI ('The Lateran Council and the Greeks: c.4 *Licet Graecos*') examines the sacramental issues at issue in Lateran IV c.4 *Licet Graecos* as well as the canonistic reflection on that constitution, in which decretalists clarified their thinking about the sacraments of baptism and the Eucharist and about liturgical customs deviating from Roman usage within a hierarchical understanding of the Roman Church as the *mater et magistra* of other churches, as Hostiensis put it. STEVEN A. SCHOENIG, S.J. ('The Pope and the Patriarchs: The Fifth Constitution of Lateran IV') then looks more closely at Lateran IV's constitution establishing this preeminence of the Roman see over the other ancient patriarchates. As expressed in c.5 *Antiqua patriarchalium*, such preeminence had both liturgical and jurisdictional significance. The liturgical significance pertained to the bestowal of the pallium and the carrying of the standard of the Lord's cross; the jurisdictional significance pertained to appeals. In all these matters, the council awarded the five patriarchates supremacy within their provinces but gave Rome supremacy over the others: a patriarch could not bestow the pallium unless the patriarch had first received his own pallium from Rome; no patriarch could bear the standard of the cross in Rome or when the pope was present; and any appeal directly to Rome halted judicial processes of appeal to a patriarchate.

Below patriarchs remained archbishops and, below them, bishops; Lateran IV kept these ranks in mind as well and produced important constitutions on the election of bishops. FABRICE DELIVRÉ ('Une constitution électorale: Théories et pratiques au miroir de *Quia propter*') provides a detailed accounting of the canonistic jurisprudence on episcopal elections, and its effects in practice, arising from these constitutions, especially c.24 *Quia propter*. In particular, his essay looks at the important and influential terminology of the *formae electionis/electionum* – what are the proper forms of elections? What does not pertain to the *forma concilii generali* (the form mandated at the Fourth Lateran Council) and would invalidate an episcopal election? How did participants in an election argue for its validity or invalidity utilizing the jurisprudence of the *forma electionis*? With extensive and careful manuscript research, not just of canonistic commentary but also of accounts of actual elections, Delivré examines the development and usage of this concept through the thirteenth century and beyond.

The structure of the Church had also, for centuries, included religious orders, and, as anyone familiar with medieval religious currents knows, the twelfth through thirteenth centuries are of immense importance for the rise of new religious orders. An expert on these developments, GILES CONSTABLE here names and comments on all the full constitutions and the smaller portions of other decrees from Lateran IV that pertained to the regulation of the religious ('The Fourth Lateran Council's Constitutions on Monasticism'). His essay shows that much literature about the

prohibition of new religious orders in c.13 *Ne nimia* has perhaps misstated the council's intention, and it also emphasizes that Innocent III did not make radical departures from policies developed by his recent predecessors and earlier in his pontificate. He was not re-defining the heart of religious life but was confirming and extending earlier practices and policies about regular regional meetings, tithes, monastic privileges, and the rise and rules of new orders within a more centralized and universal ecclesiastical structure.

The law of the Church encapsulates far more than clerics and the hierarchy's various functions, including liturgical ones; as the Church includes all the faithful, the *fideles*, lay and cleric, so too does the law of the Church govern all baptized Christians and establish what norms are appropriate for them and when and how violations of those norms require ecclesiastical discipline to ensure the purity of the Church and its other members. The constitutions of Lateran IV, with their reform aims, also played a part in the developing canon law and canonistic jurisprudence in these areas, ranging from considerations of how to handle heretics who had left the fold of orthodox *fideles* to contemplation of how to define and justify marriage regulations, and from instructions about how Christians should handle relics to regulations about who should be allowed burial in Christian cemeteries. VITO PIERGIOVANNI ('Eresia e lesa maestà nella normativa di Innocenzo III e nel Concilio Lateranense del 1215') presents an overview of the background, from Gratian through the decretists, of the usage within canonistic jurisprudence of the Roman law concept of *lèse-majesté* (or *crimen maiestatis*), which Innocent III famously applied to heresy in his decretal *Vergentis in senium* of March 25, 1199, prescribing the same punishment for heretics as civic traitors[30]. Although the term *crimen maiestatis* does not appear in Lateran IV c.3 *Excommunicamus*, the punishments remain, making clear that the jurisprudence of *lèse-majesté* continued to have an effect on how the Church dealt with the question of suppressing heresy. ALEJANDRO MORIN ('The Fourth Lateran Council's *Non debet* (c.50) and the Abandonment of the System of Derived Affinity') assumes the difficult task of explaining changes to the canon law of affinity as an impediment to marriage. It is well-known that Lateran IV c.50 *Non debet* reduced the prohibited degrees of sanguinity and affinity from seven to four[31]. As Morin explains, academics reflected upon the new principle set out in *Non debet* with a maxim, *affinitas non parit affinitatem* ('affinity does not beget affinity'), which actually arose out of theological reflection. The idea was that there was a limit to the multiplication of bonds of affinity – or, affinity had no generative power – so that, for instance, a cousin (Hugo) of a man (Victor) would not be prohibited from marrying a female cousin of Victor's wife (Bernadette). Hugo did not acquire a bond of affinity to Bernadette's relatives, even though Victor did. Morin demonstrates how such maxims dealing with the canon

30 Po. 643; 3Comp. 5.4.1; X 5.7.10; *Reg. Inn. III*, 11.1, pp. 3-5.

31 J. A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1987), pp. 88, 140-41, 193-95, 355-56. According to K. Pennington, *Pope and Bishops. The Papal Monarchy in Twelfth and Thirteenth Centuries* (Philadelphia: University of Pennsylvania Press, 1984, Middle Ages series), p. 21, this is an example of the pope's power in making lawful what had been unlawful.

law of marriage and impediments could be applied or considered parallel to other situations. He looks at the analogous formulae *pecunia non parit pecuniam* (dealing with usury) and *fictio non parit fictionem* (dealing with legal fictions). His analysis points to the importance of theologians to these discussions and to the main difference among these three maxims, namely that it was eventually considered valid for money to beget money, thereby justifying usury. Perhaps in surprising ways, the decisions of Lateran IV had connections to a much wider segment of western intellectual history than might be first anticipated.

Reshaping Christian society in light of reform implied that every aspect in the faithful's existence needed to be disciplined, even after death. Therefore, the regulation of the venerated Christian dead was one of the issues that received specific treatment in Lateran IV. Christine Oakland ('The Legacy of Canon 62 in the Diocese of Sens in Northern France (1215-1469)') asks what sort of impact c.62 *Cum ex eo* had in the diocese of Sens in the long-standing dispute over the relics of St. Loup, focusing on one of the major questions about the legislation of Lateran IV, i.e. what effect it had in various locales. Scholars can pursue this general line of inquiry by considering how local, diocesan synods took up and reiterated the Lateran IV constitutions after 1215; they can also look at actual disputes and cases to see if the participants involved seemed to be demonstrating care to follow the prescriptions of Lateran IV[32]. Oakland takes both approaches in her case study, simultaneously elucidating how some monks sought to benefit from relics and why the public display of relics might have been so important to them. The heated debate over the relics of St. Loup in the diocese of Sens and the potential for abuse, no doubt similar in many other regions of Latin Christendom, also help elucidate why Innocent III felt that the usage of relics required more centralized regulation and included provisions for it in 1215. Anthony Perron ('Grave Concerns: Law, Miracles, and the Cemetery, 1100-1300') reminds us that the constitutions of Lateran IV did not decree on every possible matter but was part of a larger context of vigorous conciliar activity at local levels. To properly understand how the Fourth Lateran Council relates to the developing canon law, then, one also has to examine issues that seem peripheral in the Lateran IV constitutions but correlate to larger trends, expressed elsewhere in diocesan synods or Innocentine decretals and traceable in other constitutions at Lateran IV concerned with the governance of the *fideles*. As Perron argues, that governance increasingly included an element of coercion and repression, whereby those whom the Church judged had not followed its norms were threatened with, and indeed received, severe punishments. This included excommunication, the effects of which extended beyond death in stipulations barring the excommunicate from Christian burial. As Perron notes, c.21 *Omnis utriusque* is part of this story, for it barred those who refused to confess their sins to their own priest annually from Christian burial. Perron examines canonical regulation of the space of cemeteries, both in the ghastly practice of ordering exhumations and in the

32 On the first approach, see the overview in Duggan, 'Conciliar Legislation: 1123-1215', cit., and the numerous studies cited there.

prohibition of revelry at graveyards, from 1140 to 1280. The Fourth Lateran Council sits squarely in the middle of these developments.

Another development in which the Fourth Lateran Council was involved consisted of the emergence from the second half of the twelfth century onward of the *ius commune*. Inklings of the mingling and borrowings between civil or Roman law and canon law appear in the Lateran III decrees and in papal decretals in the sixty or so years leading up to Lateran IV, but the 1215 constitutions begin to demonstrate more clearly than others the impact of the exchange. As Kenneth Pennington has recently reiterated, the *ius commune* did not consist of a set of statutes; rather, it consisted of "a set of principles, norms, doctrines, rules, and concepts that could be applied to many different legal problems and areas of law"[33]. As a result, when one is looking at the place of Lateran IV in the *ius commune*, one is not trying to find Roman laws that Innocent directly transferred to the Church in the Lateran IV constitutions; nor is one trying to find constitutions that secular princes would have directly taken up afterward. Rather, one is looking with a much more subtle and multi-layered analysis at the ways in which the Church found concepts and norms from civilian jurisprudence helpful for establishing regulations for the reform of the Church, its laws, and its procedures. One is also looking for how the stipulations of the Lateran IV constitutions spurred further canonistic and civilian jurisprudence in a variety of areas that affected legal practice and judgments in both secular and ecclesiastical courts after 1215. The Church found it especially useful to look to Roman law and civilian jurisprudence in areas into which ecclesiastical law had not ventured but which required attention in the early thirteenth century. Contract law comprised one of these areas. Piotr Alexandrowicz ('Canon *Plerique* (c.56) of the Fourth Lateran Council Within the Development of the Principle *Pacta Sunt Servanda*') examines the jurisprudence on contracts (*contractus*) deriving from Roman law and taken up by canonists in the twelfth century; he gives special attention to which kinds of contracts were actionable, which is to say, which contracts could form the basis of legal action or suit when one party felt that the contract had not been maintained. The principle *pacta sunt servanda*, establishing the binding force of all agreements, emerged in the late twelfth century, and canonistic jurisprudence continue to develop on the issue right up to 1215. In 1215, c.56 *Plerique* established that clerics could not form agreements with tenants that caused harm to parish churches, thus decreeing that some contracts were *not* binding if they contradicted a higher principle of protecting the common good by prejudicing (or causing harm to) some other entity. Alexandrowicz closes by recounting the early canonistic commentary on *Plerique*, seeing how ecclesiastical concerns for the common good and theological concerns about avarice helped shaped the *ius commune* of contracts.

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33 K. Pennington, 'Protestant Ecclesiastical Law and the *Ius commune*', in RIDC 26 (2015), pp. 9-35, p. 12. For an introduction to the *ius commune*, see M. Bellomo, *L'Europa del diritto comune* (first edition Lausanne: Editrice Galileo Galilei, 1988; last and new edition Leonforte: Euno, 2016, Saggi 4); in English: *The Common Legal Past of Europe, 1000-1800* (Washington DC: Catholic University of America Press, 1995, Studies in medieval and early modern canon law 4).

Roman law is most explicitly present in c.39 *Saepe contingit*, c.40 *Contingit interdum*, and c.41 *Quoniam omne*. Two essays examine these decrees and the jurisprudence surrounding them in more detail. ŁUKASZ JAN KORPOROWICZ ('Roman Law Behind the Decrees 39-41 of the Fourth Lateran Council (1215)') asks which specific Roman laws might have been in the mind of the composers of these constitutions, highlighting the fact that a simple answer cannot always be given but that the canonists were clearly drawing on terms and norms from the civilian tradition as a whole, even if they sometimes conscientiously altered precise rules (for instance, on prescription) for application in the ecclesiastical context. Korporowicz's essay also delves into concepts such as *contumacia*, the possession of disputed objects while a suit was active, *bona fides*, usucaption, and *aequitas canonica* (as a means to justify modifying Roman law). His essay returns to many late antique texts and reiterates, as do so many of the essays of the volume, the importance of Alexander III and the canonists of his time in the twelfth century. ANDREA MASSIRONI ('Prescrizione e buona fede acquisitiva: la costituzione Quoniam omne (c.41) nell'interpretazione della canonistica medievale') investigates in more detail the notions of good faith and prescription in c.41 *Quoniam omne*. His essay reminds scholars that canon law operated under a higher set of principles and values and that theological considerations and biblical exegesis often guided how the Church applied those principles to modify norms deriving from Roman law and its jurisprudence. In this case, even if Roman law stated that bad faith eventually caused no harm, *Quoniam omne* countered that bad faith always caused harm. This meant that an individual could never acquire property through prescription if he had ever suspected that it in fact belonged to someone else. Indeed, the Church always had in mind how particular actions might endanger an individual's soul, not just how they might adversely affect social harmony. Thus, preventing the faithful from committing a sin justified the intervention of Lateran IV in this field – at least from the Church's perspective. In interpreting c.41, canonists agreed with this ethical approach to the topic, but at the same time they asserted their role as jurists and their difference from moralists and theologians.

Scholars have rightly focused on the emergence of romano-canonical procedure and the proliferation of procedural tracts known as *ordines iudiciarii* as a foundational element within the *ius commune*[34]. Numerous scholars have drawn attention to the Fourth Lateran Council and its role in the emergence of inquisitorial procedure[35].

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34 See, recently, *The History of Courts and Procedure in Medieval Canon Law*, ed. by W. Hartmann and K. Pennington (Washington DC: Catholic University of America Press, 2016, History of Medieval Canon Law), and B. C. Brasington, *Order in the Court: Medieval Procedural Treatises in Translation* (Leiden: Brill, 2016, Medieval Law and Its Practice 21); the classic studies of the *ordines iudiciarii* are L. Fowler-Magerl, *Ordo iudiciorum vel ordo iudiciarius: Begriff und Literaturgattung* (Frankfurt a.M.: Klostermann, 1984, Ius commune, Sonderhefte 19) and Eadem, *'Ordines iudiciarii' and 'Libelli de ordine iudiciorum': From the Middle of the Twelfth to the End of the Fifteenth Century* (Turnhout: Brepols, 1994, Typologie des sources du Moyen Âge occidental 63).

35 Pennington, 'The Fourth Lateran Council, Its Legislation, and the Development of Legal Procedure', cit.; note the point reiterated on p. 180 that the ordeal was already dead in Church courts, contra the common narrative that a major contribution of Lateran IV was to ban the ordeal (p. 190 n. 34); see a basic overview in M. H. Eichbauer, 'Medieval Inquisitorial Procedure: Procedural Rights and the

Giovanni Chiodi ('La costituzione *Qualiter et quando* [c.8] e l'*ordo inquisitionis* nella canonistica medievale') returns to this theme. With extensive attention to the works of canonists from Johannes Teutonicus in the early thirteenth century to Panormitanus in the early fifteenth, he traces how canonistic jurisprudence about inquisitorial procedure developed in relationship to the specific points raised in Lateran IV c.8 *Qualiter et quando*. Chiodi observes that different species of *inquisitio* did exist and consequently different rules were applicable to the procedures. A fundamental distinction was about an *inquisitio ex officio* (with the judge instigating the investigation) and an *inquisitio cum promovente* (with another individual, the 'promoter', pushing a case). While the latter introduced accusatorial aspects in the inquisitorial procedure, the former strengthened the powers of the judge, who in some cases could also subvert the *ordo*, since the inquisitorial *ordo* was flexible. The rights of the accused were thus reconsidered. Chiodi also devotes much space to the important notion of *fama publica* and how and where it was to function in the legal process. The end result was that in the fourteenth century it would be inconceivable not to have the inquisitorial *ordo* within the *ius commune*.

Collectively, these essays offer new and expanded approaches to the constitutions of the Fourth Lateran Council and the council's reform agenda. The council comprised the greatest ecumenical gathering for centuries, both before and after its occurrence. It occurred in a period when universities received formal charters and canon and Roman law were forming the basis of both teaching and professional careers. It is no wonder that it sought to produce a jurisprudentially rich set of decrees, or that the decrees received much commentary afterward. Repeatedly, the essays in this volume return to the canonists, both before and in the wake of Lateran IV, and their importance in shaping the constitutions and then making them influential in the continued development of canon law and the *ius commune*. Some of the essays also draw attention to the potential limits and/or abuses of the law and its jurisprudence. Lastly, they remind scholars of the variety of ways in which legal sources can be studied in order to gain a more comprehensive understanding of both the legal and the greater historical developments of which they are a part.

Question of Due Process in the 13th Century', *History Compass* 12:1 (2014), pp. 72-83.

PART I

The Canon Law Background to the Fourth Lateran Council

ANNE J. DUGGAN

The Ghost of Alexander III

"Following Closely in the Footsteps of Pope Alexander, Our Predecessor of Good Memory, so Great is Our Veneration for Him..."

The subtitle, "following closely in the footsteps of Pope Alexander, our predecessor of good memory, so great is our reverence for him...", is one of the few examples in which Innocent III's own voice comes through the formal rhetoric of the papal chancery. Used in *Pastoralis officii*, the famous *responsum* sent to Bishop Eustace of Ely in 1204, to which I shall return[1], it is an expression of genuine respect for the man and for his legal decisions. The extent to which this respect manifested itself in the formal acts of Innocent's pontificate will be examined below under four headings: the influence of Alexander's Lateran Council of 1179 on Innocent's Lateran Council of 1215; traces of Lateran III in Innocent's letters; echoes of Alexander's letters in Innocent's; and the influence of Alexander's letters on the decrees of Lateran IV. Altogether, this amounts to a very significant Alexandrine contribution to the refinement of canonical procedure and substantive law under Innocent III.

1 *Reg. Inn. III*, VII.169, pp. 298-304, p. 302; *Selected Letters of Pope Innocent III concerning England (1198-1216)*, ed. C. R. Cheney and W. H. Semple (London: Thomas Nelson and Sons Ltd, 1953), pp. 69-78 no. 22, p. 74. See below, n. 85.
This essay uses the following additional abbreviations: App. = *Appendix concilii Lateranensis: concilia omnia tam generalia quam particularia ...*, ed. P. Crabbe (Cologne, 1551[2]), II, pp. 820-944; repr. in Mansi, XXII, pp. 248-453; *PUE* = *Papsturkunden in England*, ed. W. Holtzmann, 3 vols (I, Berlin: Weidmann, 1930, Abhandlungen der Gesellschaft der Wissenschaften zu Göttingen, philologisch-historische Klasse, New Ser. 25; II, Berlin: Weidmann, 1935-1936, 3rd Ser. 14-15; III, Göttingen: Vandenhoeck and Ruprecht, 1952, 3rd Ser. 33).
N.B.: Innocent's letters are cited from *Reg. Inn. III*, I-II, V-XIII. Where the number of the letter in Migne (PL CCXIV- CCXVI) differs, it is given in brackets: e.g. II.110(119). *Registers* III-IV and XIV-XVI are cited from PL.

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The Fourth Lateran Council and the Development of Canon Law and the ius commune, ed. Atria Larson and Andrea Massironi, Turnhout: Brepols, 2018 (EMI 7), pp. 29–61

10.1484/M.EMI-EB.5.116647

Influence of Lateran III on the Decrees of Lateran IV

There is much to be said for seeing Lateran IV as in large part a completion and clarification of decrees in Lateran III. Indeed, one paragraph of Lat. III c.4 § a, which restricted the size of ecclesiastical entourages, was cited in the very letter (*Vineam Domini*) which summoned the Fourth Lateran[2], and it and a further five were cited by name in the decrees of the council[3]. None, however, was a mere recapitulation. On the provision of a suitable benefice in every cathedral church to support a master to provide free instruction to clerics and poor students, Lateran IV, c.11, *Quia nonnulla*, confirmed Lateran III's canon 18, *Quoniam ecclesia Dei*, even to the extent of quoting its words directly:

> in Lateranensi concilio pia fuit constitutione provisum *ut per unamquamque cathedralem ecclesiam magistro, qui clericos eiusdem ecclesie aliosque scolares pauperes gratis instrueret, aliquod competens beneficium preberetur, quo et docentis releveretur necessitas et via pateret discentibus ad doctrinam*[4].

But Innocent added significant reinforcements and clarifications. Where Alexander had required the foundation of cathedral schools and the restoration of monastic and other schools which had existed in the past, Innocent added (*addicimus*), that other churches with sufficient income were to appoint suitable masters to teach "grammar":

> non solum in qualibet cathedrali ecclesia sed etiam in aliis, quarum sufficere potuerint facultates, constituatur magister idoneus a prelato, cum capitulo seu maiori ac saniori parte capituli eligendus, qui clericos ecclesiarum ipsarum et aliarum gratis in grammatica facultate ac aliis instruat iuxta posse[5].

Metropolitan churches, however, were additionally to appoint a theologian to instruct priests and others in sacred scriptures and things necessary for the *cura animarum*. In such cases, the theologian was to be maintained by the metropolitan and the grammarian by the chapter. Where this was not possible, the cathedral was to provide for the theologian and another church in the city or diocese should bear

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2 PL CCXVI, col. 823-825 (XVI.30), col. 825: "personarum, et evectionum mediocritate servata quam Lateranense concilium definivit".

3 Lat. III cc.4 § a, 8 § b, 9, 13, 18, and 19 are cited in Lat. IV, cc.33, 29 § b, 61, 29 § a, 11, and 46.

4 Lat. IV c.11, COGD, p. 173: 'By salutary decree it was provided in the Lateran Council *that in every cathedral church a suitable benefice should be provided for a master who should instruct the clerics of that church and other poor scholars without charge, so that the master's need may be relieved and a way to knowledge opened to learners*'. Italics indicate *verbatim* quotation from Lat. III, c.18 (COGD, p. 140).

5 Lat. IV c.11, COGD, p. 173: 'not only in every cathedral church but also in other churches where means are sufficient, a competent master should be appointed by the prelate, with his chapter, or chosen by the greater and more discerning part of the chapter, who shall instruct without charge and to the best of his ability the clerics of those and other churches in the art of grammar and other branches of knowledge'.

the expenses of the grammarian[6]. This example is fairly typical: without changing Lateran III's essential directives, Innocent clarified and extended its provisions, and added concrete instructions for its application.

In c.33 on procuration, similarly, it was sufficient to refer to the restrictions of Lateran III, canon 4 § a, *Cum apostolus*, without repeating them: "et tunc evectionum et personarum mediocritatem observent in Lateranensi concilio diffinitam"[7]. It was assumed that all interested parties would be fully aware of its precise formulation of the size of trains allowed to the different ranks of ecclesiastics. On this assumption, Lateran IV c.33 merely added two codicils: that where papal legates and nuncios required hospitality in any particular place, the cost was to be shared between the churches of the district; that any prelate who imposed excessive burdens was to restore the procuration and pay an indemnity equal to the charge[8]. The same was true of c.61, on abuse of privilege by religious orders. Here the precedent was Lateran III c.9, *Cum et plantare*[9]. This had castigated Templars and Hospitallers by name, together with *alii quoque religiose professionis*, for various abuses: admission of excommunicates and persons subject to interdict to the sacraments and Christian burial, their own disregard of interdict, acceptance of tithes and churches from laypersons and appointing and moving clerics without episcopal authority, and so on. Lateran IV c.61 summarized the essential core but removed the references to the Military Orders, thus emphasizing that all religious orders must present suitable priests to the diocesan bishop for institution in their churches and could not remove them without episcopal approval[10].

Similarly, on plurality, § a of Lateran IV c.29 cited Lateran III c.13 (*Quia nonnulli*), which forbade the accumulation of dignities and parish churches[11]. Since the decree had not been observed, however, Innocent added further reinforcements. Where a cleric in possession of a *beneficium curatum* accepts another, he should *ipso facto* be deprived

6 Ibid., pp. 173-74: "Sane metropolitana ecclesia theologum nichilominus habeat, qui sacerdotes et alios in sacra pagina doceat et in hiis presertim informet, que ad curam animarum spectare noscuntur. Assignetur autem cuilibet magistrorum a capitulo unius prebende proventus, et pro theologo a metropolitano tantumdem, non quod per hoc efficiatur canonicus, set tamdiu redditus ipsos percipiat, quamdiu perstiterit in docendo. Quod si forte de duobus metropolitana ecclesia gravetur, theologo iuxta modum predictum ipsa provideat, grammatico vero in alia ecclesia sue civitatis sive dioecesis, que sufficere valeat, faciat provideri".

7 Lat. IV c.33, COGD, p. 183: 'And then they shall observe the moderation defined in the Lateran Council in respect of conveyances and attendants'.

8 Ibid.: "Hoc adhibito moderamine circa legatos et nuncios apostolicae sedis, ut cum oportuerit eos apud aliquem locum moram facere necessariam, ne locus ille propter illos nimium aggravetur, procurationes recipiant moderatas ab aliis ecclesiis vel personis, que nondum fuerant de suis procurationibus aggravate [...] Qui autem contra hoc venire temptaverit, et quod accepit reddat, et ecclesie quam taliter aggragaverit, tantundem impendat".

9 Lat. III c.9 (COGD, pp. 132-34).

10 Lat. IV c.61 (COGD, p. 195).

11 Compare Lat. IV c.29 § a (COGD, p. 181), and Lat. III, c.13 (COGD, p. 136).

of the first, and if he tries to hold on to it, he should lose both[12]. Furthermore, § b (of c.29) declared that if a collator failed to appoint a suitable cleric within six months[13], the right of appointment was to devolve on another, in accordance with the decree of the Lateran Council, here citing the important Alexandrine canon (8 § b, *Cum vero praebendas*) that had established the principle of devolution: if the responsible authority (chapter, bishop, religious house) failed to appoint within six months[14], the right devolved upon the next higher authority. Having in fact benefited from the right throughout his pontificate[15], Innocent reiterated the decree in Lateran IV, but added a further penalty. Negligent collators were also to indemnify the church in question for any revenues taken from it during the vacancy. Furthermore, the same regulations were extended to dignities – titled offices in cathedrals. Even if no *beneficium curatum* was attached to them, no one should hold more than one dignity in the same church, although the Apostolic See could allow dispensations for 'eminent and learned persons'[16]. Alexander's canon had not mentioned bishoprics, perhaps because the second Lateran council (c.28) had re-stated the tradition that episcopal elections should take place within three months, but nothing was said about devolution[17]. Here, Innocent supplied the necessary precision in Lateran IV c.23. This decreed that cathedral and regular churches should not be vacant for more than three months, following which the power to elect (*eligendi potestas*) devolved on the next presiding authority[18].

And finally, on lay exactions, targeted principally on the Italian cities, Innocent's c.46 summarized Alexander's c.19, *Non minus pro peccato*, which, under anathema, prohibited *rectores et consules civitatum* from imposing imposts and taxes on churches, but allowed that bishops and clergy could proffer voluntary aid if they judged that

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12 Lat. IV c.29 § a (COGD): "presenti decreto statuimus ut quicumque receperit aliquod beneficium habens curam animarum annexam, si prius tale beneficium optinebat, eo sit ipso iure privatus, et si forte illud retinere contenderit, etiam alio spolietur".

13 This is the reading of the recently published (2013) *editio critica*, COGD, p. 181; the third edition (COD, pp. 248-49), however, read *tres menses*. See following note.

14 Both modern editions agree on *sex menses* (*editio tertia* [COD, 1972], p. 215; *editio critica* [2013], COGD, p. 181), and X 3.5.28 also reads *sex menses*, but, relying on a false tradition, Friedberg noted (8) that the Council text read *tres*. The reading *sex menses* is confirmed by Innocent III's letter to AB Philip of Milan, issued at the end of April 1198, where Innocent claimed the right to appoint a papal subdeacon to the office of chancellor, "licet jurisdictio conferendi eam ad nos, iuxta Lateranen. statuta concilii, pleno iure sit devoluta, cum nec per te *infra sex menses* nec per Mediolanen. capitulum *infra sex alios fuerit* ordinate ... ": *Reg. Inn. III*, 1.120, pp. 183-84, p. 184. Here, the Milanese chapter had the primary right, the archbishop the secondary right, and after him the right devolved to the pope.

15 See below, n. 64.

16 Lat. IV, c.29 § b (COGD, pp. 181-82): "verum etiam tantum de suis cogatur proventibus in utilitatem illius ecclesie, cuius illud est beneficium assignare, quantum a tempore vacationis ipsius constiterit esse perceptum. Hoc idem in personatibus decernimus observandum, addentes ut in eadem ecclesia nullus plures dignitates aut personatus habere presumat, etiamsi curam non habeant animarum. Circa sublimes tamen et litteratas personas, que maioribus sunt beneficiis honorande, cum ratio postulaverit, per sedem apostolicam poterit dispensari".

17 COD, p. 203, citing 'patrum sanctiones'; cf. *Decr. Grat.* D.63 c.35.

18 Below, n. 21.

the resources of the lay people were inadequate to meet the perceived need[19]. Here, too, Innocent added a significant restriction: such subventions were allowable, but bishops must first consult the Roman pontiff. Any laws to the contrary issued by excommunicated persons are void; and any ruler or official who contravenes the decree remains liable even after he has left office, and his successor also[20].

These examples are hard to miss, since Alexander's Lateran Council is cited by name – *in Lateranensi concilio prohibitum* (c.29 § a), *in Lateranensi concilio definitam* (c.33), *In Lateranensi concilio noscitur fuisse prohibitum* (c.61), etc., but there are at least a further eighteen unremarked echoes distributed through seventeen canons[21]. Of these, three extended or refined prescriptions already referred to Lateran III in other canons. Lateran IV c.23 added episcopal and monastic churches to the benefices subject to devolution in Alexander's c.8 § b (cited in Lateran IV c.29 § b); c.34 supplemented the preceding c.33 (based on Alexander's 4 § a), imposing penalties on prelates who took more than the lawful procuration; and c.57 added considerably to Alexander's prescriptions in Lateran III c.9 (cited in Innocent's c.61), on abuse of monastic privilege.

The remaining fifteen examples record silent endorsement of what became fundamental definitions of law or principle. Lateran III's reiteration of the requirements for clerical order and office (c.3)[22] clearly underpins Lateran IV's directives in constitutions 26, 27, and 30: that prelates must scrupulously investigate the suitability of all recommended for ecclesiastical promotion involving the cure of souls, in terms of age, education, and moral conduct. But there is no allusion to the source. The precise details were assumed to be so well known that there was no need to reiterate them. Innocent, however, extended the scrutiny to episcopal office (c.26) and episcopal responsibility for instructing the clergy in liturgical practice (c.27), added clear directives and penalties for non-compliance, and conferred overall scrutiny on provincial councils (c.30)[23]. Equally, Alexander's directives on appeals and excommunication (Lat. III, c.6) were reflected in Innocent's constitutions 35 and 47, which again gave greater clarification[24]; Alexander's condemnation of the taking

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19 Compare Lat. IV, c.46 (COGD, pp. 187-88) and Lat. III, c.19 (COGD, pp. 140-41).

20 Lat. IV, c.46 (COGD, pp. 187-88): "Propter imprudentiam tamen quorundam, romanus prius pontificem consulatur, cuius interest communibus utilitatibus providere [...] Ceterum, quia fraus et dolus alicui patrocinari non debent, nullus vano decipiatur errore, ut infra tempus regiminis sustineat anathema, quasi post illud non sit ad satisfactionis debitam compellendus; nam et ipsum, qui satisfacere recusavit et successorem ipsius, nisi satisfecerit infra mensem, manere decernimus ecclesiastica censura conclusum donec satisfecerit competenter, cum succedat in honere qui substituitur in honore". For the probable Alexandrine derivation of "quia fraus et dolus alicui patrocinari non debent", (cf. Dig. 4.3, 42.8 and Cod. 2.20, 7.75) see below, nn. 95 and 97.

21 Lat. III c.1 § b and 16 (*maior et sanior pars*) = Lat. IV c.11 and c.24; Lat. III c.3 § a = Lat. IV cc.26, 27, 30; Lat. III c.4 § a = Lat. IV c.34; Lat. III c.6 = Lat. IV c.35 and c.47; Lat. III c.7 § a = Lat. IV cc.63, 65, 66; Lat. III c.8 § b = Lat. IV c.23 (n. 18, above); Lat. III c.9 = Lat. IV c.57; Lat. III c.10 = Lat. IV c.64; Lat. III c.11 = Lat. IV c.14; Lat. III c.20 = Lat. IV c.71 § *Licet enim*; Lat. III c.24 § a = Lat. IV c.71 § *Excommunicamus*; Lat. III c.27 § a = Lat. IV c.3.

22 Cf. Lat. II, c.10, § 'Innovamus autem' (COD, p. 199).

23 Compare Lat. IV, cc.26, 27, and 30 (COGD, pp. 180-81 and 182) and Lat. III, c.3 (COGD, pp. 126-27).

24 Compare Lat. IV, cc.35 and 47 (COGD, pp. 184 and 188-89) and Lat. III, c.6 § § ab (COGD, p. 131).

of fees for blessings, installations, burials, and any kind of sacramental in Lateran III c.7 § a, *Cum in ecclesie*, was re-stated in Lateran IV c.63, even to the extent of citing the allusion to Giezi, the biblical archetype of simony[25], and *Cum in ecclesie* was further echoed in Lateran IV c.65, forbidding episcopal extortion, and c.66, forbidding various forms of clerical extortion, including fees for burials, nuptial blessings, and so on, although Innocent moderated its impact by allowing the continuation of "pious customs (*pias consuetudines*)"[26]. The parallel strictures on payment of fees for entry to monasteries in Lateran III c.10 were applied specifically to women's houses in Lateran IV c.64, perhaps to fill a loophole, with only a one-sentence reference to "monks and other regulars"[27]; and the penalties laid out in Alexander's decree on incontinent clergy (c.11) were reinforced in Innocent's c.14[28].

Although it is possible that Alexander's decree against named heretics (Cathars, Patarenes and Publicani) in Lateran III c.27 § a influenced Lateran IV's c.3, the latter owes much more to Lucius III's *Ad abolendam* of 1184[29]. There is no doubt, however, that two of Alexander's decrees find an echo – in one case, more than an echo – in Innocent's regulations for the crusade (c.71). Lateran III c.20, itself following the earlier precedents of Innocent II's Lateran II (1139) c.14 and Eugenius III's Reims council (1148) c.12, provided the precedent for Innocent's three-year ban on tournaments (c.71 § h, *Licet autem torneamenta*)[30], and his decree against the supply of military materials to Saracens (weapons and iron and wood for galleys) or service as pilots on their ships, and so on (c.71 § f/11: *Excommunicamus*), reproduced the core directives of Lateran III's c.24 almost *verbatim*[31].

Most important of all, however, was Innocent's borrowing of the ruling that the vote of the *maior et sanior pars* of an electoral body was required for valid elections. The broad concept had a long history, traceable to the Benedictine directive for the election of an abbot in c.64 of the *Sancta regula*: "ut hic constituatur quem sive omnis concors congregatio secundum timorem Dei, sive etiam pars quamvis parva congregationis saniore consilio elegerit"[32]. Abbreviated to *communi consensu, vel fratrum pars consilii sanioris*, it adorned the privileges granted to religious houses from

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25 Compare Lat. IV, c.63 (COGD, p. 197) and Lat. III, c.7 § a (COGD, p. 132).

26 Compare Lat. IV, cc.65 and 66 (COGD, pp. 197-98) and Lat. III, c.7 § a (COGD, p. 132).

27 Compare Lat. IV, c.64 (COGD, p. 197) and Lat. III, c.10 (COGD, pp. 135-36).

28 Compare Lat. IV, c.14 (pp. 175-76) and Lat. III, c.11 (COGD, p. 136; COD, pp. 217-18).

29 Compare *Ad abolendam* (X 5.7.9) and Lat. IV, c.3 (X 5.7.13).

30 Compare Lat. IV, c.71 § h (COGD, p. 203) and Lat. III, c.20 (COGD, p. 142).

31 Compare Lat. IV, c.71 § f/11 (COGD, p. 203) and Lat. III, c.24 (COGD, p. 144). Lat. IV, c.71 § f/11: "... illos falsos et impios christianis, qui contra ipsum Christum et populum christianum *saracenis arma, ferrum et lignamina deferunt galearum*; eos etiam qui galeas eis vendunt vel naves, quique *in piraticis saracenorum navibus curam gubernationis exercent* vel in machinis aut quibuslibet aliis aliquod eis impendunt consilium et auxilium ... ipsosque *rerum suarum privatione mulctari, et cepientium[cod cap-] servos fore censemus*. Precipientes *ut per omnes urbes maritimas diebus dominicis et festivis huiusmodi* sententia publice innovetur... ". Italics indicate *verbatim* citation.

32 *The Rule of Saint Benedict in Latin and English*, ed. and trans. J. McCann (London: Burns, Oates, 1952), pp. 144-47: 'that he be made abbot who is chosen in the fear of God by the whole assembled community, or even by a part of the community, however small, *if its counsel be more wholesome*.'

at least Urban II (1088-99) onwards, including many of Innocent III's[33]. Meanwhile, Innocent II (1130-43) applied variants of the clause to episcopal elections in privileges for two English dioceses in 1139 (Salisbury and Lincoln)[34], and he instructed judges delegate to enquire whether the election of William FitzHerbert as archbishop of York in 1141 had been made *a meliori et saniori parte capituli*[35]. None of these letters entered the legal tradition, however[36]. It was Alexander who constructed the succinct form, *maior et sanior pars*, applied to episcopal elections in c.1 and c.16 of Lateran III, whence Innocent, having already used it in a letter of confirmation to the abbot and convent of St Vaast in Arras[37], adopted it in Lateran IV c.24, as the definition of majority where bishops were elected by ballot; and he also applied it to the choice of grammarians in c.11[38]. Thereafter, *maior et sanior pars* became the key phrase governing the validity of elections and collective decisions in ecclesiastical corporations of all kinds.

Altogether, the influence of Lateran III can be seen in twenty-two of Innocent's Lateran constitutions, that is 30%. In this way, it made a significant contribution to the formulation of decrees on clerical life and behaviour, clerical appointment, cathedral and other schools, restrictions on procurations, plurality, simony, devolution, the consent of the *maior et sanior pars* for elections or corporate decisions, and the export of military supplies to Saracens, etc.

Citations of Lateran III in Innocent's Letters and Decretals

Innocent's regard for Alexander's judgments was manifested early in his pontificate, in a response (late February 1200) to a query from Archbishop Hubert Walter of Canterbury[39]. Hubert had reported the scruples of a certain Master Mauger who had been elected (or rather, appointed by Richard I) bishop of Worcester in the previous

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33 E.g. *Reg. Inn. III*, I.150, pp. 217-21, p. 218, to Abbot Gerard and the brethren of Vézelay, *Religiosis votis*, 5 May 1198, "communi consensu vel fratrum pars consilii sanioris".

34 *PUE*, II, 160-161 no. 20, *Que ad perpetuam*, p. 161 (for Bishop Roger of Salisbury); PL CLXXIX, col. 466-468 no. 404, *Cum omnibus ecclesiis*, pp. 467-68 (for Bishop Alexander of Lincoln): both issued in April 1139. For the background, see A. J. Duggan, '*Sicut ex scriptis vestris accepimus*: Innocent II and the *insulae Britanniae et Hiberniae*', in *Pope Innocent II (1130-1143). The World vs the City*, ed. J. Doran and D. J. Smith (London & New York: Routledge, 2016), pp. 69-104, nn. 170-192.

35 *PUE*, II, 176-177 no. 32, *Fraternitati tue*, Lateran? March 1143, to Henry, bishop of Winchester and legate of the Apostolic See: 'the better and wiser part of the chapter'.

36 Although the mandate on the York election (above, n. 35) was inserted into a copy of Ivo of Chartres' sermons in Oxford, Corpus Christi College, 137, fol. 84. Note that the electors of the anti-pope Anacletus II (1130-1138) described themselves as the *maior et sanior pars* of the clergy and people of Rome in their manifesto in 1130: *Pont. Rom. Vitae*, II, pp. 187-90, p. 188.

37 *Cum a nobis petitur* (6 May 1198), *Reg. Inn. III*, I.136, p. 202: "et per M. quondam abbatem sancti Vedasti de consilio majoris et sanioris partis capituli redactas in scriptis".

38 Lat. IV, cc.24 and 11 (COGD, pp. 179-80 and 173-74) and Lat. III, cc.1 and 16 (COGD, pp. 128 and 139).

39 *Innotuit nobis, Letters of Pope Innocent*, pp. 16-22 no. 6. The date has been deduced from the letter's position as the first item in the index to the mutilated third register of Innocent III. The long passage *Nos ergo [...] penam infligit* (ibid., pp. 17-18) was later repeated in a letter to the archbishop of Mainz and others: *Reg. Inn. III*, V.98, pp. 197-99, p. 198, reading *... inflixit*.

August, 1199[40]. He was illegitimate and technically barred from episcopal promotion by the terms of Lateran III c.3 § a, which had forbidden the election of candidates not "born of lawful matrimony" (*de legitimo sit matrimonio natus*)[41]. In his reply, which no longer survives in the Registers, Innocent described the scholarly debate in the Curia[42], culminating with two more or less *verbatim* quotations from the canon[43]:

> ne videlicet quod de quibusdam ex necessitatibus temporis factum est in exemplum trahatur a posteris, nullus in episcopum eligatur nisi qui de legitimo matrimonio sit natus.
>
> And:
>
> Clerici sane si contra formam istam quemquam elegerint, et eligendi tunc potestate privatos et ab ecclesiasticis beneficiis triennio se noverint esse suspensos[44].
>
> And he acknowledged its authority in elaborate terms[45]:
>
> sane predictus canon, qui non per eum qui canones non nosset antiquos sed per illum qui plene noverat canonicas sanctiones in concilio multorum iurisperitorum est editus et ipsius approbatione concilii roboratus.

Innocent duly quashed the election in conformity with Lateran III, but, having been persuaded by letters from both Archbishop Hubert and the monks of Worcester and impressed by Mauger's comportment in the Curia, and finding that he met the other criteria (education, moral character, virtuous life), which were vouched for by some of the cardinals who had known him in the schools, he allowed the monks, if they wished, to substitute a postulation for the invalid election, since Alexander's decree did not deprive him of the power to dispense in such cases[46].

> Etsi canon iste illegitime genitos fortius persequatur quod electionem talem innuit nullam esse, nobis tamen per eum adempta non fuit dispensandi facultas, cum ea non fuerit prohibentis intentio, qui successoribus suis nullum potuit in

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40 *Chronica magistri Rogeri de Houedene* [Howden], ed. W. Stubbs, 4 vols (London: Longman and Co., etc., 1868-1871, RS 51), IV, p. 78. He was the son of a knight who had seduced his mother: ODNB online, accessed 19.11.2015. Elected 1199, Innocent consecrated him bishop on 4 June 1200.

41 COGD, pp. 128-29.

42 *Letters of Pope Innocent*, pp. 17-19.

43 Ibid., p. 18: 'Lest what is done in individual cases to meet the necessities of the time be taken as precedent by posterity, no one is to be elected bishop who is not born of lawful wedlock'.

44 Ibid., pp. 18-19: 'Indeed, clerics who elect someone contrary to this procedure should know that they are immediately deprived of the power of election and suspended from ecclesiastical benefices for three years'.

45 Ibid., p. 19: 'This canon, which was issued in a council of many jurists (*iurisperitorum*), not by a man without knowledge of the ancient canons, but by one fully acquainted with canonical sanctions, was affirmed by the council's approval ...'.

46 Ibid.: 'Although this canon penalizes the illegitimate by implying that such an election is null, nevertheless it did not take from us the power of dispensation: that was not Alexander's purpose in the prohibition; he could not, in the matter of dispensation, establish a decision prejudicial to his successors who after him were to exercise power equal to, or rather, identical with his own; "for equal has no authority over equal"'.

hac parte preiudicium generare, pari post eum immo eadem potestate functuris, cum *non habeat imperium par in parem*...

citing an ancient maxim, traceable to Dig. 36.1.13 § 4 (cf. Dig. 4.8.4), that 'equal has no authority over equal'. That Innocent should have taken such pains to lay out the grounds for papal dispensation in such a way that the full force of the Alexandrine decree remained intact, demonstrates his high regard for the person and for the authority of the canons issued at the Third Lateran Council. In the particular case of Mauger, Innocent wrote, the electors should not have conducted an election; rather, they should have proceeded by direct postulation; and the archbishop was ordered to forbid any such elections in the future[47].

Not only did abbreviations of this letter enter the legal tradition very early[48], but its key part, from *Nos ergo cum fratribus* to *penam inflixit*, with its laudatory citation of Alexander's c.3 § a[49], was quoted almost three years later in a letter on a similar dispute to Archbishop Siegfried/Seffrid of Mainz and others on 7 November 1202[50]. In this case, the chapter of Augsburg had elected one Hartwig as their bishop, although they recognized that the proper course for the promotion of an illegitimate was to present him to the pope by way of postulation. Following the authority of Alexander's decree, Innocent declared the election *irritam et inanem*, but allowed the canons four months to compile and present written evidence of Hartwig's qualities before the papal audience, which members of the chapter should attend to hear Innocent's *iudicium equitatis*. A copy was sent to the chapter[51].

Altogether, there are at least 136 references to decrees of the council distributed through 126 letters, citing eighteen canons, in whole or in part[52], some *verbatim*, among which may be cited Register VI.45[53], VII.72(71)[54], I.536(539)[55], and 3Comp. 3.7.2[56].

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47 Ibid., p. 21. For the practice of postulation, where there was a canonical defect in the person (as here) or the man was already a bishop or abbot elsewhere, see *Decr. Grat.* D.61 d.p.c.10 and c.11, citing Gregory I (590-604).

48 Rainer of Pomposa, 4.2; 3Comp. 1.6.5; X 1.6.20.

49 *Letters of Pope Innocent*, pp. 17-19.

50 *Reg. Inn. III*, V.98(99), pp. 197-99, p. 198, where the Register copy of the Mainz letter refers to the Ely letter (above, n. 39), "ut in prima littera secundi (!) regesti", for the passage *Nos ergo [...] penam inflixit*.

51 Hartwig (II) 1202-1208 was successful.

52 Lat. III, cc. 3 § § abc, 4 § § ab, 6 § § a-c, 7 § § ab, 8 § § ab, 10 § 'non singuli', 13, 14 § § b-d, 15, 16, 19, 20, 21, 22, 24 § a, 25, 26, 27ab.

53 "Olim siquidem, Pharao, rex Aegypti, caeteris servituti subactis, sacerdotes suos et possessiones eorum non solum servavit in pristina libertate, sed etiam alimoniam eis de publico ministravit": cf. Lat. III, c.19.

54 "cum in Lateranensi concilio sit statutum, ut nullus in episcopum eligatur, nisi qui jam aetatis annum tricesimum egerit, et de legitimo sit matrimonio natus, et qui etiam vita et scientia commendabilis demonstretur": cf. c.3 § a.

55 "quod eos qui Sarracenis arma, ferrum, lignamina galearum ministrare praesumpserint et in galeis et piraticis eorum navibus curam gubernatoris et regimen exercere": cf. c.24 § a.

56 "Cum igitur vel ecclesia vel ecclesiaticum ministerium committi debuerit, talis ad hoc persona queratur, quae residere in loco et curam eius per seipsam valeat exercere. Quod si aliter actum fuerit, et qui receperit quod contra sacros canones acceperit, et qui deserit largiendi potestate privetur"; cf. Lat. III, c.13.

On the other hand, there is the perplexing failure to quote or acknowledge a Lateran decree which must have been known to Innocent and the Curia. In a letter issued on 8 March 1202 to Archbishop Hubert Walter of Canterbury, whose original survives in the Canterbury archives, Innocent ordered the archbishop to ensure that proper provision was made for a certain Adam, whom Hubert had ordained as deacon without the assignment of a suitable benefice. The mandate itself is not surprising, but Innocent described it as an act of special generosity[57]:

> Licet autem predecessores nostri ordinationes eorum qui *sine certo titulo* promoventur in iniuriam ordinantium irritas esse voluerint et inanes...

Then, without naming the predecessors or citing the obvious precedent of Lateran III c.5, "desiring to act more generously" (*benignius agere cupientes*), Innocent declared that such clerics should be maintained by their ordainers until they received an ecclesiastical benefice[58]. He had sent a very similar mandate to Zamora in 1198 (3 April), in which the requirement was extended to the subdiaconate, and another to Rouen later in the same year (21 August), neither of which acknowledged the existence of the decree[59]. But Alexander III had in fact anticipated Innocent's benevolence in Lateran III c.5[60]:

> Episcopus, si aliquem sine certo titulo, de quo necessaria vite percipiat, in diaconum vel presbyterum ordinaverit, tamdiu necessaria ei subministret, donec eidem in aliqua ecclesia convenientia stipendia militiae clericalis assignet; nisi forte talis sit qui ordinatus extiterit, qui de sua vel paterna hereditate subsidium vite possit habere.

This Lateran formulation reached *Compilatio prima* (3.5.5) and was in due course included in the *Liber Extra* (3.5.4), where it was joined by excerpts from Innocent's Zamora letter (X 3.5.16). As for the precise formula, *sine* certo *titulo* (which appears nowhere in Gratian), Innocent II had employed it in a response to Archbishop Hugh of Rouen as early as 1131[61] and Alexander III had used it (1165/66) in a mandate instructing Archbishop Henry of Reims to provide for the cleric R., whom Henry

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57 *Cum secundum apostolum*, Canterbury, Christ Church, Dean and Chapter Muniments, Chartae antiquae, A. 191: *Letters of Pope Innocent*, pp. 35-36 no. 12, p. 35, 'Although our predecessors ruled that the ordinations of those who are promoted without a definite title (*sine certo titulo*) should (to the detriment of the ordainers' rights) be null and void...'.

58 Ibid., p. 35: "nos tamen benignius agere cupientes, tam diu per ordinatores vel successores ipsorum provideri volumus ordinatis, donec per eos ecclesiastica beneficia consequantur...".

59 *Reg. Inn. III*, 1.76, pp. 113-15, X 3.5.16: *Cum secundum apostolum*, to Martin of Zamora, 3 April 1198; to William of Rouen, Po. 824.

60 Lat. III, c.5: 'If a bishop ordains anyone as deacon or priest without a specific title from which he may receive the necessaries of life, he should provide him proper support until he can assign him an appropriate stipend for clerical service in some church, unless he who is ordained is of such a status that he can support his life from his own or his father's inheritance.'

61 *Qui in ecclesia* (Auxerre, 26 July 1131): PL CLXXIX, col. 99-101, no. 51, col. 100.

had ordained to the diaconate[62]. Innocent III may have had both Innocent II and Alexander in mind when he referred to his "predecessors"[63], and he may silently have appropriated the Lateran decree. If these three examples were added to the earlier total, the statistics would read 139 echoes from nineteen canons distributed through 129 letters.

Exclusive of these ghosts, the relative order of magnitude of such citations is as follows. Lateran III c.8 § b, on devolution, received the highest number of citations, with 43, of which eighteen involved devolution to the pope himself as the next relevant superior[64]; second, with seventeen citations, was c.8 § a, which forbade expectatives – appointment to a non-vacant benefice before the death of its current holder[65]; joint third, with ten citations each, were c.3 § a, on the requirements for ecclesiastical office, including bishops[66] and c.4 § a on procurations[67]; fourth, with eight citations was c.16, which established the majority principle of *maior et sanior pars*[68]; fifth, with seven citations, was c.25 on usury and sixth, with six citations, was c.13, which forbade plurality of *beneficia curata*[69]; seventh, with five citations, was c.7 § b, *Prohibemus insuper*, forbidding imposition of a new census[70]; eighth, with four citations, was c.4 § b, on tallages and exactions[71]; joint ninth, with three citations each, were c.3 § b, on receiving the order appropriate to the office and c.10, § *non singuli per villas*, forbidding monks to live singly outside their monasteries[72]; joint tenth, with two citations each, were c.3 § c, on penalties for improper elections, c.6 § c, *Si autem*, on penalties for false appeal, c.14 § b against lay exactions, c.19 on unjust taxes, c.20 on tournaments, and c.24 § a forbidding military supplies to the Saracens[73]; and joint eleventh, with only one citation each, were c.6 § a *Reprehensibilis*, on appeals

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62 Alexander III, PL CC, col. 517-518 no. 522, col. 517: "nec tuam discretionem credimus ignorare, quod ordinatio sine certo titulo facta inanis existat".

63 Although neither seems to have entered the legal tradition, copies would have been available in the papal registers.

64 *Reg. Inn. III*, I.120, I.337, I.368, I.459, II.5, II.20, II.26, II.57(60), II.273(289), III.4, V.31(32), V.53 (54-55), V.122(123), V.143(144), VII.71(70), VII.90, VII.98, VII.161, VII.165, VIII.13, VIII.52, VIII.61, VIII.78, VIII.190(189), IX.73, IX.171, IX.260, X.58, X.80, X.91, XIII.155(157), XIV.140, XV.17, XV.38, XV.200, XV.201, XV.228; X: 1.10.3, 1.10.5, 3.7.7, 3.8.6, 3.8.12, **3.12.un. Bold font** indicates devolution to Innocent (*ad nos*).

65 *Reg. Inn. III*, I.175, I.205, II.165, V.53(54-55), VI.225(226), VIII.10, VIII.161(160), IX.57, XI.183(188), XIII.72, XIII.203(205), XIV.161, and PL CCXVII, nos 87 and 240; X: 3.5.19, 3.5.20, 5.1.23.

66 *Reg. Inn. III*, I.444, II.265(277), V.14(14-15), V.98(99), VI.36, VII.72(71), X.39, XV.228, PL CCXVII, no. 89, and Cheney 6.

67 *Reg. Inn. III*, I.140, I.286, I.331, II.110(119), X.88, XIII.58, XIV.54, XV.4, XVI.30, and PL CCXVII, no. 121-122.

68 *Reg. Inn. III*, I.178, I.267, I.305, I.445, II.265(277), XI.102(107), XIV.1, and X 2.28.46 (misprinted 56).

69 Lat. III, c.13: *Reg. Inn. III*, I.191, III.24, III.41, V.71(73), XV.228, 3Comp. 3.7.2; Lat. III, c.25: *Reg. Inn. III*, VI.15, VI.110, X.61, X.92, XI.58(62), and Cheney 11.

70 Lat. III, 7 § b: *Reg. Inn. III*, I.207, I.368, V.90(91), VII.169, and X 3.7.6.

71 Lat. III, 4 § b: *Reg. Inn. III*, I.331, II.102(110), X.222, XI.170(175).

72 Lat. III, c.3 § b: *Reg. Inn. III*, VIII.10, 145(144), Cheney 25; Lat. III, c.10 § 'non singuli', *Reg. Inn. III*, I.446, X.153, and Rainer of Pomposa, 37.1.

73 Lat. III, c.3 § c: *Reg. Inn. III*, VIII.105(104) and PL CCXVII, no. 89; *Reg. Inn. III*, Lat. III, c.6c: *Reg. Inn. III*, VIII.28 and Rainer of Pomposa, 25.1; Lat. III, c.14 § b: *Reg. Inn. III*, X.46, XII.171; Lat. III, c.19: *Reg. Inn. III*, VI.45, VI.4; Lat. III, c.20: *Reg. Inn. III*, IX.195(197), X.74; and Lat. III, c.24 § a: I.534, and XVI.28.

and excommunication, c.7 § a, on improper charges and exactions, c.14 § § c-d on reception of churches and tithes from laymen without episcopal permission, c.15 § a against clerics bequeathing ecclesiastical property to their relatives, c.21 on truces, c.22 forbidding the imposition of new road tolls, c.26 forbidding Jews to have Christian servants, and c.27 § b against mercenaries[74]. If the three ghosts were included, then c.5, on the bishop's responsibility to provide proper maintenance for clerics ordained *sine certo titulo*, would join the table in ninth place.

It is important to notice, in the light of Danica Summerlin's latest article[75], that these cited canons were considered authoritative: *contra statuta Lateranen. concilii* (I.191, 205), *juxta constitutionem Lateranen. concilii* (I.305), *Nam et in Lateranensi concilio est inhibitum* (I.313), *contra statuta Lateranen. Concilii* (I.331), *auctoritate Lateranensis concilii* (V.53), *per poenam in Lateranensi concilio contra usurarios promulgatam* (VI.15), *Lateranensis concilii decrevit auctoritas* (VIII.13), *In Lateranensi quoque concilio noscitur esse statutum* (IX.170), etc., and some were cited in privileges, no doubt at the request of the impetrators. Canons 4 § a-b and 7, on improper exactions and burdens were cited in a privilege for Waltham Holy Cross on 10 July 1199[76], for example, and canon 4 § a

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74 Lat. III, c.6 § a: *Reg. Inn. III*, I.331; Lat. III, c.7 § a: *Reg. Inn. III*, II.102(110); Lat. III, c.4 § a: *Reg. Inn. III*, II.110(119); Lat. III, c.14 § § c-d: *Reg. Inn. III*, I.313; Lat. III, c.15 § a: *Reg. Inn. III*, IX.33; Lat. III, c.21: *Reg. Inn. III*, XII.Processus; Lat. III, c.22: *Reg. Inn. III*, XII.154; Lat. III, c.26: *Reg. Inn. III*, VII.186; and Lat. III, c.27 § b: *Reg. Inn. III*, VII.76(75).

75 In 'Using the Canons of the 1179 Lateran Council', in *Rechtshandschriften des deutschen Mittelalters: Produktionsorte und Importwege [1]*, ed. P. Carmassi and G. Drossbach (Wiesbaden: Harrassowitz Verlag, in Kommission 2015, Wolfenbütteler Mittelalter-Studien 29), pp. 245-60, Dr Summerlin argued that no special authority was attached to the canons of Lateran III. This thesis is hard to sustain in the light of the evidence presented here and the fact that Lateran canons were quoted by commentators on the *Decr. Grat.* from the early 1180s and all 27 canons were distributed in 37 *capitula* through 1Comp. (*c.* 1190). None of the seven examples cited without discussion in 'Using the canons', p. 249 nn. 17 and 18, supports the view that "the curia believed that the canons needed some form of central restatement" or that "Alexander used his letters to ensure their acceptance". WH 207c (1Comp. 1.8.7) informed Hugh of Durham that the decree on the age for holding a benefice (3 § b) did not apply retrospectively; WH 820 (X 5.6.12), to Genoa, extended the existing ban on trade with Saracens (c.24); WH 872 (X 3.26.12) replied (*breviter respondemus*) to a question from the bishop-elect and canons of Cassano all'Jonio (Calabria) about the interpretation of c.15 on the testamentary rights of clergy; and JL 13427 defined *moderno tempore* in c.9 (on the receipt of churches from laymen) for Roger des Moulins, Master of the Hospitallers. The initiative in all cases except Genoa came from petitioners seeking further clarifications, and the Genoa case was a reaction to the fall of Jerusalem in 1187. Some petitioners even had canons inserted in privileges, as in Lucius III's *In eminenti* (10 March 1183: PL CCI, coL 1242-1244 no. 132) for Prémontré (not cited by Summerlin), which quotes Lat. III cc.4 §§ ab, 6 § d, and possibly 23. The remaining three letters listed in n. 18 (JL 14372, 14764, 14699) contain no references to Lat. III. Summerlin's principal example (2Comp. 5.3.1), and the only case examined, was similarly issued in response to an appeal (*Pervenit ad nos*). The *magistri scholarum* of Laon and Tournai sought restoration, in accordance with c.18, of prebends formerly assigned to them, and Alexander III duly instructed the archbishop of Reims to see that it was done. This is a perfect example of beneficiaries invoking a Lateran decree in their favour in the face of local resistance and summoning papal and archiepiscopal authority to ensure its application. Evidence of evasion of a particular canon should not be equated with rejection of its authority.

76 *Reg. Inn. III*, II.102(110), pp. 221-22, *Licet ex iniuncte nobis*, p. 222: "indebitas exactiones vel gravamina contra statuta Romanorum pontificum et precipue Lateranensis concilii ...".

on excessive procurations appears in another privilege for Waltham (5 July 1199)[77]. In the light of this evidence, the influence of twelve of these same canons in Lateran IV (1, 3 § a, 4 § a, 6 § a, 7 § a, 8 § b, 10, 13, 16, 19, 20 and 24 § a) is hardly surprising.

Furthermore, there are direct citations of c.1 of the Council of Tours (1163), which had forbidden the fragmentation of benefices (*sectio prebendarum*), in no fewer than thirteen letters issued by Innocent between 26 May 1198 and 8 January 1214[78], where it was accorded the same authority as the decrees of Lateran III, in phrases such as: *contra Turonensis statuta concilii; quam reprobat concilium Turonense*, etc. Both councils, indeed, were cited in one adjudication in 1210, which forbade the division of prebends (Tours c.1) and the grant of expectatives (Lat. III c.8 § b[79]); and it cross-referred and quoted an earlier Innocentian decretal, cited anonymously (*cuiusdam epistole decretalis*), which had also cited Lat. III, c.8 § b[80]. Although all three citations (of the two councils and Innocent's decretal) were made by the litigants, Innocent cited the conciliar councils as grounds for his judgment: *cum hoc non solummodo Turonensi sed etiam Lateranensi consilio* [sic] *obviaret*[81].

Influence of Alexander III's Letters in Innocent's Letters

The third manifestation, mostly unremarked hitherto[82], is the influence of Alexandrine decretals in Innocent's own letters. Citations or silent echoes of at least 18 Alexandrine 'sentences' can be found in Innocent's letters[83]. *Pastoralis officii*, mentioned above[84], the famous *responsum* answering nineteen questions posed by Bishop Eustace of Ely,

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77 *Reg. Inn. III*, II.110(119), p. 235.

78 *Reg. Inn. III*, I.205; II.99; II.263; VII.172; VIII.109; VIII.189; IX.84; X.197; XIII.72; XV.115; XV.235; XVI.166; X 3.7.6.

79 *Dilecto filio nostro*, to Hervé (1207-1223), bishop of Troyes, 30 April 1210: *Reg. Inn. III*, XIII.72, pp. 122-23; 4Comp. 3.2.1; X 3.5.25.

80 *Dilectus filius T.*, to the archbishop and archdeacon of Sens, 19 April 1206: *Reg. Inn. III*, IX.57, p. 122; 3Comp. 3.5.6; X 3.5.19. For another example, see X 3.7.6, which cites Tours, c.1 and Lat. III, c.7 § b.

81 *Reg. Inn. III*, XIII.72, p. 124; cf. PL CCXVI, col. 267 (reads *concilio*). The case related to a dispute between the new bishop of Troyes and the cellarer of Sens (R. de Avalon), who had resigned his prebend in Troyes in favour of the nephew of a cardinal legate (Guido de Paredo, CB Palestrina 1200-, archbishop of Reims 1204-1206). Despite R.'s resignation, the cardinal had divided the prebendal between R. and his own nephew G. and installed both as canons in the choir and chapter of Troyes, where R. continued to exercise all the liturgical and capitular rights of a canon, including the use of a house. Having heard the arguments pro and contra, Innocent condemned R. to repay whatever he had received under that arrangement and imposed silence on him in repect of the prebend: "dictum cellararium ... *de consilio fratrum nostrorum* sententialiter duximus condemnandum, ei super prebenda ipsa vel eius parte silentium imponentes", but without prejudice to the rights of G. (Cardinal Guido's nephew).

82 P. Landau, 'Innocenz III. und die Dekretalen seiner Vorgänger', in *Innocenzo III: Urbs et Orbis*. Atti del Congresso internazionale (Roma 9-15 settembre 1998), ed. A. Sommerlechner, 2 vols (Roma: Società romana di storia patria: Istituto storico italiano per il Medio Evo, 2003), 1, pp. 175-99, pp. 185-87 and 193-95, discusses two, *Reg. Inn. III*, VIII.18 and V.156: below, n. 117.

83 WH 41 § b, 48 § a, 191 § a, 197 § a, 315 § b, 476, 620 § b, 620 § d, 649 § d, 649 § h, 649 § l, 761 § a, 836, 880 § b, 929 § c, 944 § a, 1013 § b, 1031.

84 Above, n. 1.

issued on 19 December, 1204, quotes Alexander three times[85]. Its opening paragraph, indeed, contains a silent homage to Innocent's happily remembered predecessor in the use of the clause, *Quamvis simus multiplicibus negotiorum occupationibus praepediti.* This had opened one of Alexander's most widely circulated letters, issued from the Rialto in Venice on 21 July 1177[86]. Two further Alexandrine borrowings can be identified in the same Ely letter. The assertion of the principle that a general mandate is derogated by a special one[87] relied, without acknowledgement, on a paragraph from *Sicut Romana*, another important Alexandrine letter, sent to Archbishop William of Sens in June 1173/4: *quia speciale mandatum derogat generali*[88]. His final borrowing from Alexander in this letter was introduced by the fulsome acknowledgement cited above: "bone memorie *Alexandri pape* predecessoris nostri *vestigiis* pro sui reverentia *inherentes*"[89]. This respect led Innocent to echo § b of *Relatum est nobis*, to Archbishop Roger of York. Here, Alexander had stated that where a layman presented two clerics successively to the same benefice, the position of the second, who had been instituted by the diocesan bishop, was stronger, since *melior sit conditio possidentis*[90], – a principle which has many applications, not only in canon law. English readers will be familiar with the analogous maxim, 'Possession is nine tenths of the law'. Innocent's judgment entered *the Liber Extra* at 3.38.29, but Alexander's is also there, in the same title, inserted in its prior chronological position at X 3.38.5[91].

Another nice example of reliance on Alexander's judgment is found in a letter to Bishop Garnier of Troyes (and six associates), whose petition to be relieved of

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85 *Letters of Pope Innocent*, pp. 69-78 no. 22; *Reg. Inn. III*, VII.169, pp. 298-304.

86 *Letters of Pope Innocent*, p. 69. For *Quamvis simus*, § a, see 1Comp. 1.21.7 [WH 761 § a]. Note that the passage *multiplicibus ... commissa* was omitted from X 1.29.6, being supplied by Friedberg from earlier sources.

87 *Letters of Pope Innocent*, p. 71: "quod, cum generali per speciale procul dubio derogetur, iurisdictio per generales litteras attributa, per speciales, quantum ad ea, que specialiter exprimuntur, penitus enervatur, licet de prioribus non faciant mentionem". *Pastoralis*, § f, *Preterea quesivisti*, reached X 1.3.14, where the Ordinary Gloss cites Dig. 50.17.80 (from Papinian: "In toto iure generi per speciem derogatur et illud potissimum habetur, quod ad speciem derectum est"), which no doubt inspired Alexander's earlier statement. Bernard of Pavia had set Alexander's definition as the first authority on the subject in 1Comp. 1.2.1 (repeated at 2.20.12), and Raymond of Peñafort followed suit in X 1.3.1, placing Innocent's segment at X 1.3.14.

88 WH 944 § a, Anagni, 2 June 1173/4: 1Comp. 1.2.1 (rep. 2.20.12) = X 1.3.1; *Letters of Pope Innocent*, p. 71.

89 *Letters of Pope Innocent*, p. 71: 'following closely in the footsteps of Pope Alexander, our predecessor of good memory, *so great is our reverence for him*'.

90 X 3.38.5 to Archbishop Roger of York: App. 15.1 and 2; 1Comp. 3.33.7 (b-c), X 3.38.5; WH 880 § b, from *Relatum est nobis*, 1179-1181; *Letters of Pope Innocent*, p. 74.

91 For the immediate recognition of the legal importance of *Pastoralis officii*, see K. Pennington, 'The Decretalists 1190 to 1234', in *The History of Medieval Canon Law in the Classical Period, 1140-1234. From Gratian to the Decretals of Pope Gregory IX*, ed. by W. Hartmann and K. Pennington (Washington, D.C.: Catholic University of America Press, 2008, History of Medieval Canon Law), pp. 211-45, pp. 225-26. It was appended to existing collections before being enucleated and its key decisions, much redacted, were distributed through the *Liber Extra*: X 1.29.28, X 1.31.11pr., X 1.3.14, X 2.28.53, X 3.38.29, X 5.33.19, X 3.10.9, X 3.24.7, X 3.30.28, X 2.22.8, X 2.25.4, X 2.1.14, X 1.16.1, although "Nos igitur bone memorie Alexandri papae predecessoris nostri pro sua reverentia vestigiis" was reduced to the banal "Nos igitur Alexandri pape vestigiis". Meanwhile the jurists commented on it, and the only

his vow to make a pilgrimage to Jerusalem was granted largely on the authority of an Alexandrine *responsum*: 'especially', wrote Innocent, 'since Pope Alexander, our predecessor of happy memory, replied that even a pilgrimage vow could be redeemed or commuted'[92]. Here Innocent relied on *Super eo quod*, a *responsum* obtained from Alexander by Bartholomew of Exeter in person more than forty years earlier in 1164[93]. Another borrowing, but not from Alexander, is the threefold consideration to be given to a request for commutation (*quid liceat, quid deceat, quid expediat*), which Innocent seems to have taken from Baldwin of Forde's *Liber de sacramento altaris* and expanded to: "quid liceat secundum aequitatem, quid deceat secundum honestatem, quid expediat secundum utilitatem"[94].

There is a strong probability that the maxim that no one should benefit from fraud and deception (*fraus et dolus ei patrocinari non debeant*), which occurs with slight variants at least twenty times in Innocent's letters[95], and also in Lateran IV, c.46[96], was borrowed from § d, 'Si vero vir vel mulier', of Alexander's famous *Licet preter solitum*, probably obtained in person by Archbishop Romuald of Salerno in 1177[97]. And an Alexandrine source can certainly be argued for the test for authenticity applied to a dubious privilege presented by Abbot Gerard of San Donato di Scozòla in Sesto Calende in defence of his claim for restitution of estates and rights against Archbishop Philip of Milan in April 1199. After exhaustively examining the alleged privilege of a certain Henry, Innocent concluded that it was insufficient, "quia nec erat publica manu confectum nec sigillum habebat authenticum"[98], here using the formula that Alexander had employed in *Meminimus nos* to Roger of Worcester in the 1160s[99]. Like *maior et sanior pars* and *fraus et dolus* this definition also became part of the legal vocabulary of the *ius commune*.

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known work of the Spanish canonist Silvestre Godinho (later archbishop of Braga), is a set of glosses on *Pastoralis*: S. Kuttner, 'Glosses of Silvester on the decretal "Pastoralis"', in *Traditio* 22 (1966), pp. 474-76.

92 *Reg. Inn. III*, 1.69, pp. 100-03, *Magne devotionis*: the ides of March 1198?

93 *Super eo quod*, WH 1013 § b, *De peregrinationis quoque votis*: 1Comp. 3.29.1; X 3.34.1: JL 13916.

94 PL CCXIV, col. 59; cf. Baldwin of Forde, PL CCIV, col. 648, "sciens sit inter dextram et sinistram, quid liceat, quid deceat, quid expediat". Baldwin had dedicated the treatise to Bartholomew of Exeter.

95 *Reg. Inn. III*: 1.60, 1.84, VI.15, VI.45, VI.120, VI.121, VI.188(190), VII.161, XVI.116, Rainer of Pomposa, 17.1, 17.2, 25.1; X: 2.6.4, "cum fraus adversariorum suorum eis patrocinari non debeat"; 2.22.3, "Unde quoniam propria fraus nulli debet prodesse aut patrocinium ministrare"; 2.28.50, "fraus et dolus alicui patrocinari non debent"; 3.4.12, "fraus et dolus nemini debeat patrocinium impertiri"; 3.16.5, "Quia igitur fraus et dolus cuiquam patrocinari non debent"; 3.26.14, "quia fraus et dolus alicui patrocinari non debent"; 3.26.15, "cum fraus minime procuratur, quae, si detecta fuerit, patrocinari non debet"; 3.49.7, "quia fraus et dolus alicui patrocinari non debent".

96 Above, n. 20.

97 WH 620 § d, 'Si vero vir vel mulier': 1Comp. 4.11.2; X 4.11.2: "sua fraus non debet patrocinari vel dolus". A similar clause was used in *Suggestum est auribus*, to Hugh of Durham: WH 999; 1Comp. 2.20.20; X 2.28.15.

98 *Inter dilectos filios*: *Reg. Inn. III*, 11.37, pp. 60-66, p. 63.

99 *Meminimus nos*, § l, 'Scripta vero autentica', WH 649 (§ l); JL 13162; 1Comp. 2.15.2; X 2.22.2: "Scripta *vero* authentica, si testes inscripti decesserint, nisi forte *per manum publicam* facta fuerint, ita, quod appareant publica, *aut authenticum sigillum habuerint*, per quod possint probari, non videntur nobis

Significant also is the *verbatim* quotation of two Alexandrine decretals in *Veniens ad apostolicam sedem*, a letter responding on 27 November 1208 to yet another attempt by Philip II of France to free himself from his marriage to Ingeborg of Denmark (married 1193; † 1223)[100]. This is not the place to discuss this extraordinary case, which began with Philip's repudiation of his bride on the day after a magnificently celebrated marriage in 1193 and developed into an extraordinary *cause célèbre*, as the king tried every possible legal ploy to have the marriage annulled[101]. On this occasion, the king argued that since the marriage had not been consummated, he was free to marry someone else if Ingeborg entered a convent. His argument was supported by two of Alexander's decretals, one to a bishop of Brescia (*Ex publico*)[102], the other the much-cited *responsum* issued to Romuald II of Salerno (*Licet preter*), almost certainly at Venice in 1177[103], which had allowed either partner to an unconsummated marriage to withdraw from the contract in order to enter a religious house, leaving the other free to re-marry. Carefully repeating the citations, "felicis memoriae Alexander papa praedecessor noster respondit ... ad religionem transire", from *Ex publico* and "Verum quod post... saeculo remanere", from *Licet preter*, Innocent admitted the force of Alexander's judgments, but rebutted their application to Philip's case with the citation of the limiting clause from 'Pope Alexander's mandate to a certain bishop', meaning *Ex publico*, the first letter cited in Philip's favour. Innocent pointed out that Alexander had instructed the bishop to arrange that the woman in question should either enter religion or return to her husband within two months ("vel ad religionem transiret, vel ad virum suum infra duorum mensium spatium accedere procuraret")[104]. Apart from the fact that Ingeborg had consistently claimed that

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alicuius firmitatis robur habere". Cf. H. Bresslau, *Handbuch der Urkundenlehre für Deutschland und Italien*, 2 vols (Berlin & Leipzig: Veit, 1931²), I, 657-58.

100 *Veniens ad apostolicam*, *Reg. Inn. III*, XI.182, pp. 269-70.

101 For recent discussions of this case, see T. K. Nielsen, 'Celestine III and the North', in *Pope Celestine III (1191-1198). Diplomat and Pastor*, ed. J. Doran and D. J. Smith (Farnham: Ashgate, 2008), pp. 159-78, pp. 164-69; P. Montaubin, 'Celestine III and France', ibid., 113-128, pp. 123-24. He had already tried consanguinity and non-consummation *per maleficium*. Cf. G. Conklin, 'Ingeborg of Denmark, Queen of France, 1193-1223', in *Queens and Queenship in Medieval Europe*, ed. A. J. Duggan (Woodbridge: Boydell, 1997; repr. 2002; e-edition 2007), pp. 39-52, pp. 43-49.

102 Probably Giovanni Fiumicelli (1174-1195). *Ex publico instrumento*: WH 476, JL 13787, 1Comp. 3.28.7; X 3.32.7: "Sane, quod Dominus in evangelio dicit, non licere viro, nisi ob causam fornicationis uxorem suam dimittere, intelligendum est secundum interpretationem sacri eloquii de his, quorum matrimonium carnali copula est consummatum, sine qua matrimonium consummari non potest, et ideo, si praedicta mulier non fuit a viro suo cognita, licitum est [sibi] ad religionem transire".

103 *Licet preter solitum*, § 'Verum post consensum': WH 620 § b; 1Comp. 3.28.2; X 3.32.2: "sicut idem alibi dicitur, quod post legitimum de praesenti consensum licitum est alteri conjugum eligere monasterium, etiam altero repugnante, quemadmodum quidam sancti de nuptiis vocati fuerunt, dummodo carnalis commistio non fuerit subsecuta, et alteri remanenti, si commonitus continentiam servare noluerit, licitum esse videtur ut ad secunda possit vota transire". For further discussion of this important *responsum*, see A. J. Duggan, 'The Nature of Alexander III's Contribution to Marriage Law, with Special Reference to *Licet preter solitum*', in *Law and Marriage in Medieval and Early Modern Times*, ed. P. Andersen and others, Proceedings of the Eighth Carlsberg Conference on Medieval Legal History (Copenhagen: DJØF Publishing, 2012), pp. 45-65.

104 *Reg. Inn. III*, XI.182, pp. 269-70.

the marriage had been consummated and that she had expressed no desire to enter a monastery, Alexander's requirement that the woman should make up her mind within two months had clearly not been observed, since the king had kept Ingeborg in close custody since 1193.

Alexandrine authority was also cited in three letters relating to the appeal of Archbishop Carus of Monreale against the sentence passed on him by the archbishops of Palermo and Capua (two of the three judges delegate commissioned to hear his complaint against Archbishop Paschasius of Rossano), which Carus claimed was issued after the departure of messengers carrying his appeal to Rome, in contravention of "a decretal of Pope Alexander which clearly supported" his action. The question posed to Innocent by Archbishop William of Reggio di Calabria, the third judge, whose opinion was not consulted[105], and Carus and the convent of Monreale, who quoted Alexander's definition in full[106], was whether the two judges had acted lawfully in setting aside Carus's exceptions and declaring the decretal worthless (*frivolam*). Innocent, referring to the *decretalem felicis memorie Alexandri pape III predecessoris nostri*, appointed another judge (John of Cefalù) to sit with William of Monreale to examine the actions of the archbishops of Palermo and Capua and decide accordingly. The Alexandrine 'decretal' which declared that an appeal launched before citation suspended the case, was 'Ceterum cum', § d of *Meminimus nos*, the famous set of responses sent from Benevento to Roger of Worcester on 1 September 1167 × 1169[107].

Of particular interest is Innocent's treatment of *Cum te consulente*, an Alexandrine *responsum* sent to Archbishop Richard of Canterbury between 1174 and 1181[108], which Richard's successor, Archbishop Hubert Walter (1193-1205), thought had been contradicted by Innocent a generation later in 1204. Replying in *Super questionum* Innocent laid out his answer very carefully. He quoted directly from § b of Alexander's *Cum te consulente* and explained that his own constitution did not undermine it, but rather supplied details which were overlooked in Pope Alexander's consultation: "per constitutionem nostrum[109] consultationi bone memorie Al(exandri) pape, predecessoris nostri, nullatenus derogatur, sed illa per istam exponitur, immo in ista,

105 *Reg. Inn. III*, 1.390, pp. 588-89, *Placuit beatitudini vestrae.*

106 *Reg. Inn. III*, 1.391, pp. 589-90, p. 590: "Ceterum cum aliquam causam contigerit tibi appellatione remota commissam fuisse, et adversa pars post factam citationem iter arripuerit ad sedem apostolicam veniendi, non minus poteris in negocii cognitione secundum iuris formam procedere. Quod utique, si ante citationem iter incoeperit, non est utique observandum".

107 *Meminimus nos*, § d, *Ceterum cum* (Benevento, 4 September [1167 × 1169]): WH 649 § d; App. 10.8; 1Comp. 2.20.9; X 2.28.9. For the complex transmission of the letter, see M. Cheney, 'JL 13162, "Meminimus nos ex": One Letter or Two?', in BMCL 4 (1974), pp. 66-70; Eadem, *Roger, Bishop of Worcester, 1164-1179* (Oxford: Clarendon Press, 1980), pp. 172-79, 349-50 no. 63 + 364 no. 91. The combined text, derived from *Belverensis* (c.10), is printed in *Gilberti ex abbate Glocestriae episcopi primum Herefordensis deinde Londoniensis epistolae*, ed. J. A. Giles, 2 vols (Oxford: J. H. Parker, 1845, Patres Ecclesiae Anglicanae 23-24), II.99-102 no. 369.

108 *Cum te consulente*, WH 315 § b, App. 46.1 § a, 2 § b; X 1.29.18; JL 13796.

109 Rainer of Pomposa, 24.4.

verius, que in illa fuerant pretermissa, supplentur"[110]. And he supported his assertion with a verbatim quotation from his own decree:

> Licet is, cui causa committitur appellatione remota, non possit eam aliis sine provocationis obstaculo delegare, si tamen delegatus a nobis aut iudex quicumque non tam cognitorem quam exsecutorem ad aliquem certum articulum quempiam deputarit, ab eo, nisi modum excedat, non liceat appellari, dummodo de partium deputetur vel recipiatur assensu. Quod si delegatus a nobis vel litis exordium vel cause finem nedum totum ei duxerit committendum, ab ipso tanquam a iudice licite provocetur, cum et lis ante iudicem debeat contestari, et causa per judicium diffiniri[111].

He followed this with a clear explanation of the process[112].

Another striking instance is Innocent's response in 1208 to William Malvoisin, bishop of St. Andrews, on the admissibility of witnesses in consanguinity cases (*Per tuas nobis litteras*). After summarizing the complicated case, Innocent expressed his opinion in the words of 'our predecessor Pope Alexander of happy memory [...] who responded thus...', quoting directly from Alexander's response to a consultation from Lanfranco, bishop-elect of Pavia, on how to treat witnesses who came forward after the period assigned by the banns of marriage: if the witnesses were above suspicion they were to be heard; but if they had kept silent when the priests made the proclamation they should be considered suspect, and denied[113].

And similarly, in *Cum illorum absolutio*, a general constitution on the application of *Si quis suadente*, which survives only in canonical collections[114], Innocent began by referring to the exceptions allowed by his predecessor, probably Alexander III, then quoted *verbatim* from two Alexandrine letters, *Sicut dignum est*, sent to Bartholomew of Exeter on 31 January 1172[115], and *Consuluit* nos, to the abbot of Newhouse in Lincolnshire[116]. In the first, Alexander had allowed religious superiors, without

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110 *Reg. Inn. III*, VII.29, pp. 51-53, p. 51 (misnumbered VII.39 in PL CCXV, col. 310).

111 Ibid., p. 51; cf. Rainer of Pomposa, 24.4 (PL CCXVI, col. 1236).

112 *Reg. Inn. III*, VII, pp. 51-52, 'Intentionis igitur nostre assignatam'.

113 *Reg. Inn. III*, XII.34, pp. 66-67, p. 67: "*Felicis recordationis Alexander papa predecessor noster* consultus utrum si de propinquitate illorum qui sunt matrimonio copulandi aliqua fiat mentio, et presbyteri per ecclesias publice dicant ut qui novit aliquid infra terminum qui praefigitur exeat et proponat [dicat], an illi qui posterius veniunt, ad accusationem debeant vel testificationem admitti, taliter legitur respondisse, quod si suspicione carent posterius venientes, ab accusatione vel testificatione repelli non debent; ceterum si commoniti a presbiteris tacent, et postmodum accusare vel testificari voluerint, tanquam suspecti merito repellentur". Cf. 1Comp. 2.13.8, *Ad audientiam*, § b, *Ad hec*: WH 41 § b.

114 Rainer of Pomposa, 32.2; Gilbert* 5.14.13; 3Comp. 5.21.5; X 5.39.32: Po. 1326, where dated 1201.

115 X 5.39.32: "licet *a bonae memoriae Alexandro papa praedecessore nostro* fuerit constitutum quod monachi et canonici regulares, quocunque modo se in claustro percusserint, non sint ad apostolicam sedem mittendi, sed secundum providentiam et discretionem abbatis disciplinae subdantur, et si abbatis discretio ad eorum correptionem non sufficit, providentia est dioecesani episcopi adhibenda"; cf. Alexander III to Exeter: App. 14.8; 1Comp. 5.34.3; WH 929 § c.

116 X 5.39.32: "*et alibi dicatur, quod* de saeculo fugientes, qui religionis habitum in monasterio receperunt, et inter cetera postmodum confitentur, se tale commisisse delictum, per quod ipso actu excommunicationis sententiam incurrerunt, sine licentia Romani Pontificis *abbas non potest nec*

reference to the Apostolic See, to deal with monks and canons regular who laid violent hands on protected persons; in the second, he had allowed that where someone *de saeculo fugiens* later confessed that he had incurred automatic excommunication, the superior could not absolve without recourse to the Holy See, although he could impose appropriate punishment. Here, *in religionis favorem, ut evagandi materia subtrahatur,* Innocent introduced important clarifications. Where such violence occurred within the monastic cloister, unless the attack was "adeo difficilis et enormis, utpote si ad mutilationem membri vel effusionem sanguinis est processum, aut in episcopum aut abbatem violenta sit manus iniecta, cum excessus tales et similes sine scandalo nequeant praeteriri", the superior could impose penance and grant absolution. But if a member of one *religio* laid violent hands on a member of another *religio,* he could be absolved by his own abbot and the abbot of the one who suffered the injury, but if a cleric struck a layman, he could be absolved only by the Apostolic See, in order to avoid scandal. If any had received clerical orders, knowing that they were excommunicate, they should remain suspended from the execution of office or order. For the rest who had no memory of the fact or were ignorant of the law, they could be absolved by the abbot after due penance, *nisi grave fuerit et notabile factum,* or committed when they were *adultus et discretus,* which argues strongly against forgetfulness or ignorance.

In his discussion of Innocent III's treatment of the decretals of his predecessors, Peter Landau singled out two of Alexander's, not only to demonstrate Innocent's respect for the judgments and opinions of his revered predecessor, but also to show that they were closely examined[117]. The first in chronological order was a response, *Per tuas nobis litteras,* sent to Archbishop Peter of Sens on 17 February 1203[118]. Peter had asked for clarification of his rights in respect of the archpriest of Auxerre, who had sought absolution from the sentence of excommunication pronounced by his own bishop. 'Wishing to defer to the said bishop (of Auxerre)', Peter had sent the archpriest back to him, urging the bishop to lift the excommunication (so that the archpriest's complaint could be examined). When he refused, Peter absolved the archpriest; the bishop refused to recognize it, on the ground that Peter of Sens had exceeded his jurisdiction; and Peter sought papal adjudication. As in the Worcester election case[119], the relevant legal authorities were discussed in the curia. Some held that when a complaint is not brought by (judicial) appeal, an excommunicate has no right to speak, since he is separated from the Church: whether he appeals or not, the metropolitan should not grant him absolution[120]. In his decretal, Innocent wrote,

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debet eos absolvere, *quamvis* praesumptionem delinquentium debita possit animadversione punire": WH 197 § a; App. 14.2 (*abbati de Nexibus*); 1Comp. 5.34.8 (addressed to the archbishop of York).

117 Landau, 'Innocenz III. und die Dekretalen seiner Vorgänger', cit., pp. 185-87 and 193-95.

118 *Reg. Inn. III,* v.156, pp. 304-05; 3Comp. 5.21.14; X 5.39.40.

119 Above, n. 39.

120 See R. Helmholz, 'Excommunication as a Legal Sanction: The Attitudes of the Medieval Canonists', in ZRG, Kan. Abt. 68 (1982), pp. 202-18.

> Verum ex verbis cujusdam epistolae, quam dicunt scholastici decretalem et a bonae memoriae Alexandri papa, praedecessore nostro emanasse proponunt, habetur quod, si ante appellationem in aliquem excommunicationis fuerit sententia promulgata, metropolitanus ante litis ingressum ab eo juramento recepto, secundum Ecclesiae consuetudinem, debet ipsum absolvere, nisi voluerit episcopo dioecesano deferre, ipsumque ad illum remittere absolvendum[121].

"From which it is inferred", Innocent continued, citing Alexander's consultation word for word, "quia nec excommunicati audiendi sunt priusquam fuerint absoluti, nec sunt ad illos a quibus appellaverant, remittendi"[122]. To this was opposed the authority of the council of Sardica (probably taken from Gratian)[123], to the effect that a person *abiectus* by his bishop could approach neighbouring bishops and have his case diligently examined. Innocent's judgment carefully distinguished whether the complainant was excommunicated before or after he made his appeal. If after, or if the excommunication involved "an intolerable error"[124], he should be allowed to prove his assertions despite his excommunicate status, although the Apostolic See is accustomed to absolve such persons under caution. If excommunication preceded appeal, however, he should not be heard, unless he asks for absolution; if he does, the metropolitan should absolve him, unless he wishes to defer to his suffragan; if the suffragan demurs, the metropolitan can absolve him, having received a guarantee (*cautio*) that he will obey his mandate, and then he can hear and decide the case[125]. The main point of difference is that where Alexander invalidated an excommunication

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121 *Reg. Inn. III*, v, p. 304: 'But, according to a certain letter, which scholars call a decretal, said to have been issued by Pope Alexander, our predecessor of good memory, it is stated that there is no need for absolution if the excommunication was issued after appeal, since a sentence issued after appeal cannot bind; but if it was issued before appeal, the metropolitan should absolve the appellants before opening the case, having received an oath in accordance with ecclesiastical custom (that they will accept his judgment), unless he wishes to defer to the diocesan bishop and send the complainants back to him for absolution'. This is an accurate summary of Alexander's directive in *Quonian quesitum*, to Rotrou of Rouen, Tusculum, 11 October 1171/72, or possibly 1178. WH 836, App. 31.4; 1Comp. 1.23.2: "Si vero ante appellationem excommunicati sunt, ante ingressum cause, recepto ab eis sacramento secundum ecclesie consuetudinem debes ipsos absoluere, nisi episcopo a quo excommunicati sunt, in hac parte, deferre uolueris et eos ad ipsum absoluendos remittere"; cf. PL CC, col. 1263 no. 1451.

122 *Reg. Inn. III*, v, p. 304.

123 A.D. 342/43, c.17; *Decr. Grat.* C.11 q.3 c.4.

124 E. Vodola, *Excommunication in the Middle Ages* (Berkeley & London: University of California Press, 1986), p. 134.

125 *Reg. Inn. III*, v.156(157), pp. 305-06, p. 305: "Quodsi beneficium absolutionis humiliter postulaverit, metropolitanus eum debet absolvere, nisi suo duxerit suffraganeo deferendum; cui tamen si suffraganeus absolutionis beneficium secundum formam ecclesie noluerit exhibere, ipse nichilominus illum absolvat, cautione recepta, quod suo debeat parere mandato, ac deinde causam audiat et quod canonicum fuerit, iustitia mediante decernat". Cf. *Quoniam quesitum est*: PL CC, col. 1263 no. 1451: "Si autem ante appellationem fuerint excommunicati, ante ingressum causae, recepto ab eis juramento, secundum ecclesiae consuetudinem debes eos absolvere, nisi episcopo a quo fuerunt excommunicati, in hac parte volueris deferre, et eos ad ipsum absolvendos remittere. Cum autem ab episcopo vel a te fuerint absoluti, causam audire debes et eam fine debito terminare: quia nec excommunicati ante absolutionem sunt audiendi, nec causa ad eos a quibus est appellatum, debet aliquatenus remitti".

issued after an appeal had been lodged, Innocent allowed it to stand, but provided a mechanism for the appellant to present his case[126]. Although Alexander's *Quoniam quesitum* did not survive into the *Liber Extra*, much of its terminology, with Innocent's refinements, passed to the *Extra* imbedded in Innocent's *Per tuas litteras*[127]. In a roundabout way, Innocent confirmed much of Alexander's original consultation, but avoided making a formal judgment on the authenticity of the letter.

There is, in fact, no doubt about the authenticity of Alexander's reply to Rotrou of Rouen[128], but the forgery and falsification of papal (and other) letters had become a matter for concern from the middle years of the twelfth century[129]. Celestine III had warned the province of Rouen about letters forged in Rome (*in Urbe*) in December 1191[130]; and in 1198 Innocent informed the archbishop of Reims and his suffragans about the discovery of more forgers in Rome, who had counterfeited Celestine's and his own seal and were found with a cache of falsified papal letters with false bulls attached[131]. In the same year, a letter to Milan described various methods of falsification[132] and another, in 1200, to the archbishop of Bar (Dalmatia), set out what became the key points of reference for determining authenticity, in a manner similar to that given in Huguccio's *Summa* on the *Decretum*. Papal letters should be examined *tam in bulla, quam filo, tam etiam in charta quam stylo* [*dictaminis*][133].

Equally problematic for prelates was the reliability of copies of letters found in decretal collections, which were often cited in judicial cases. No less a person

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126 For the complex principles relating to the judicial rights of excommunicates, Vodola, *Excommunication in the Middle Ages*, cit., pp. 78-85.

127 X 5.39.40. Landau, 'Innocenz III. und die Dekretalen seiner Vorgänger', cit., p. 193, called it a wise compromise – "eine Art Mittelweg".

128 Three separate copies of the decretal, with full protocol and date, had been entered by three different scribes in Oxford, Bodleian Library, E mus 249, once in *Belverensis* (23) and twice in the collection of materials relating to Gilbert Foliot of London assembled in Foliot's household in *c.* 1185: A. J. Duggan, 'Making Law or Not? Papal Decretals in the Twelfth Century', in *Proceedings Esztergom*, pp. 41-70, p. 51.

129 C. Duggan, '*Improba pestis falsitatis*: Forgeries and the Problem of Forgery in Twelfth-Century Decretal Letters (with special reference to English cases)', in *Fälschungen im Mittelalter. 2. Gefälschte Rechtstexte. Der bestrafte Fälscher*, ed. H. Fuhrmann, 2 vols (Hannover: Hahnsche Buchhandlung, 1988, MGH Schriften 33), II, pp. 319-61, p. 320.

130 Ibid., pp. 356-57 no. 19.

131 *Reg. Inn. III*, 1.235. pp. 333-35, *Dura sepe*, 19 May 1198, to William of the White Hands, archbishop of Reims and suffragans, p. 334: "bullas tam sub nomine nostro quam bone memorie Cel(estini) pape, predecessoris nostri, quas falso confinxerant, et quamplures litteras bullis signatas eisdem invenimus apud eos ipsosque captos adhuc in carcere detinemus". Recognition of these serious difficulties led Innocent to undertake a reform of chancery practice from 1204, in which documents were marked with the initials of the scribe and notary who oversaw their issue, as well as notations identifying those to be copied into the papal register: P. Zutshi, 'Innocent III and the Reform of the Papal Chancery', in *Innocenzo III. Urbs et Orbis*, cit., I, pp. 84-101, pp. 92-94.

132 *Reg. Inn. III*, 1.349, pp. 520-22, p. 521, *Licet ad regimen*, 4 Sept. 1198.

133 PL CCXIV, col. 918-921 (III.37), *Quam gravi poenae*, 4 Dec. 1200, at col. 20: 'both the bull and the cord as well as the parchment and the style [of composition]'. Cf. *Huguccio Pisanus: Summa decretorum*, 1: *Distinctiones I-XX*, ed. O. Přerovský (Città del Vaticano: BAV, 2006, MIC Series A 6), p. 306. See also PL CCXIV, col. 929; PL CCXV, col. 316, 942, 1052, 1105, and PL CCXVI, col. 112, 499, 673.

than Bishop Stephen of Tournai[134] had complained to a pope, either Celestine or, more probably, Innocent himself, about "the impenetrable forest of decretal letters" (*inextricabilis silva decretalium epistolarum*), masquerading as letters of Pope Alexander of holy memory, being hawked about and lectured on in the schools[135]. Similar doubts prompted Eustace of Ely in 1204 to ask how he should treat decretals found *in compilatione scolarium*, whose authenticity could not be checked in the normal way. Innocent advised that where a cited decretal was in conformity with the general law (*ius commune*) it should be followed, but where it was not, Eustace should consult his superior[136].

Landau's second example discusses another decretal with the incipit, *Per tuas nobis litteras*, sent to Bishop Matthew of Orvieto on 21 March 1205[137]. Innocent was commenting on the case of Giacomo of Città della Pieve (dioc. Chiusi) and his wife M., which had been referred to the bishop. Giacomo had impugned the validity of the marriage on grounds of consanguinity in the fourth and fifth grade. In response, the wife M. had proved by sufficient witnesses that the couple had been married for eighteen years, with at least three sons, and she cited a decretal of Alexander III to challenge the legal validity of her husband's claim. Despite being pressed by both parties to give a judgment, Matthew demurred and returned the case to the Curia, "because that decretal contradicts the ancient canons" (*cum decretalis illa contradicere antiquis canonibus*)[138]. Again, an Alexandrine decretal is being tested in court and confronted

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134 Born in Orléans 1128, successively canon (1155) and abbot (1167/68-76) of St-Euverte in Orléans, abbot of Ste-Geneviève in Paris 1176-1192, and finally bishop of Tournai, 1192-1203, Stephen was an early product of the law schools in Bologna (where he heard Bulgarus, for example), and achieved wide renown for his commentary on Gratian's *Decretum* (J. F. von Schulte, *Stephan von Doornick. Die Summa über das Decretum Gratiani* [Giessen, 1891]; cf. S. Kuttner, 'The Third Part of Stephen of Tournai's *Summa*', in *Traditio* 14 [1958], pp. 502-05); H. Kalb, *Studien zur Summa Stephans von Tournai. Ein Beitrag zur kanonistischen Wissenschaftsgeschichte des späten 12. Jahrhunderts* (Innsbruck: Universitätsverlag Wagner, 1983).

135 *Lettres d'Étienne de Tournai*, ed. J. Desilve (Valenciennes: Lemaitre, 1893), pp. 344-46 no. 274, p. 345; cf. PL CCXI, col. 516-518 no. 251, at col. 517: "profertur a venditoribus inextricabilis silva decretalium epistolarum quasi sub nomine sancte recordationis Alexandri papae, et antiquiores sacri canones abiciuntur, respuuntur, expuuntur... Novum volumen ex eis compactum, et in scolis sollempniter legitur et in foro venaliter exponitur, aplaudente cetu notariorum, qui in conscribendis suspectis opusculis et laborem suum gaudent imminui, et mercedem augeri".

136 *Pastoralis officii: Selected Letters*, no. 22 at p. 77; *Reg. Inn. III*, VII.169, pp. 298-304, pp. 303-04: "Quesivisti etiam, quibus indiciis fides habenda sit decretalibus, de quarum auctoritate iudex potest non immerito dubitare, cum *plures inveniantur in compilatione scolarium* et allegentur in causis, de quibus per bullam non constitit nec ipse per metropoles insinuatae fuerunt? Quia igitur sepe contigit, quod etiam coram nobis decretales huiusmodi proponuntur, quas esse authenticas dubitamus, fraternitati tue benignius respondentes auctoritate presentium duximus statuendum, ut, cum aliqua decretalis, de qua iudex merito dubitet, allegatur, si eadem iuri communi sit consona, secundum eam non metuat iudicare, cum non tantum ipsius quam communis iuris auctoritate procedere videatur. Verum si iuri communi dissona videatur, secundum ipsam non iudicet, sed superiorem consulat super ipsa". The text in PL CCXV, col. 477-484 (VII.169), at col. 483, has some omissions. One wonders if Eustace's *compilatio scolarium* was a particular English collection or Bernard of Pavia's *Breviarium* (*Compilatio prima*).

137 *Reg. Inn. III*, VIII.18, pp. 30-31, 3Comp. 4.13.2.

138 *Reg. Inn. III*, VIII.18, at p. 30, probably referring to *Decr. Grat.* C.35 qq.2-3 cc.1, 16, 21.

by an appeal to "ancient canons". The decretal in question was § a of *Consuluit nos*, sent to the archbishop of Bordeaux[139], in which Alexander had determined in a very similar case, that a man could not on his own assertion challenge his marriage after twenty or eighteen years, without the support of appropriate witnesses who were above suspicion. In this case, having caused the decretal to be read out in his presence and discussed the meaning of the judgment[140], Innocent had no doubt. Quoting the essence of the decretal word for word[141], he declared that it was relevant to the Orvieto case, since no claim against the marriage had yet been admitted ("tunc habet locum hujusmodi decretalis, cum nondum contra matrimonium accusatio est admissa")[142]. Judgment went to M. on the authority of Alexander's decretal. Innocent confirmed its validity, but added an important gloss: "Tunc enim Ecclesia propter temporis diuturnitatem quodammodo dispensando dissimulat, et dissimulando dispensat"[143], and he limited the future use of the decretal. Where applicable, it had to be invoked before the case was brought to court, and it was the responsibility of the party whom it favoured to use it in his/her defence. Alexander's original judgment did not reach the *Liber Extra*, but its gist was transmitted in this Innocentian confirmation. On another occasion, Innocent accepted the authority of an Alexandrine decision while denying its applicability to the case in which it was alleged[144].

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139 1Comp. 4.19.2; WH 191 § a.

140 1Comp. 4.19.2, "Nos igitur, eam [Alexander's decretal] coram nobis perlegi facientes, ex eius tenore coniecimus quod in eo casu intelligitur decretalis, in quo nondum lis est coram judice contestata, cum dicatur ibidem: Quod si aliquis duxit in ecclesie facie mulierem, et longo tempore cohabitavit eidem, non debet ad accusationem admitti, nisi alie idonee persone suspicione carentes appareant, quae velint et valeant legitime matrimonium accusare, sed nec eaedem debent admitti, si vir et mulier per viginti, vel decem et octo annos, insimul sine questione manserunt. Ecce hic dicitur, quod ad accusationem non sunt persone huiusmodi simpliciter admittendae. Unde sicut proemisimus, tunc habet locum huiusmodi decretalis, cum nondum contra matrimonium accusatio est admissa".

141 *Reg. Inn. III*, VIII.18, p. 31.

142 Ibid.

143 'In that case, because of the length of time, the Church in a form of dispensation dissimulates and by dissimulation dispenses'. This is a neat formulation of the connection between dissimulation and dispensation, which sums up the practice of Alexander in relation to the problem of consanguinity in the twelfth century (A. J. Duggan, '"Our rescripts have not usually made law (*legem facere*) on such matters" (Alexander III, 1169): a new look at the formation of the canon law of marriage in the twelfth century', in *Proceedings Toronto 2012*, pp. 627-50). On the formula, cf. E. Saurwein, *Der Ursprung des Rechtsinstitutes der päpstlichen Dispens von der nicht vollzogenen Ehe* (Rome: Università Gregoriana, 1980, Analecta Gregoriana 215), p. 135. Bernard of Pavia challenged the basis of this Alexandrine judgment in his *summa* on *Compilatio prima*, 4.19.2, *Consuluit*: "quod mirum videtur, quia diuturnitas temporis non minuit peccata sed auget": Bernardus Papiensis, *Summa decretalium*, ed. E. A. T. Laspeyres (Ratisbonae: G. I. Manz, 1860), p. 185. Here, Bernard may have been swayed by Innocent II's judgment in *Super eo quod* (WH 1016; JL 8274; App. 6.31; 1Comp. 4.1.10), which had said that the longer an invalid marriage persisted the greater the guilt: "quanto amplius in secundo committitur, tanto magis culpa augetur".

144 *Per tuas litteras*, to Archbishop Tancred of Otranto, 3 August 1198: *Reg. Inn. III*, 1.322; Rainer of Pomposa, 43.1, citing *Transmisse nobis*, to the archbishop of Rouen: WH 1031; 1Comp. 4.18.3; X 4.17.3. The cases were in fact different.

Sometimes Innocent disagreed with an Alexandrine decision, however, as in a letter to the English prior, Clement of Oseney, in a case of incest[145]. On the question of whether the man who had committed adultery and incest with his wife's sister for three years, until the birth of twins (*geminam prolem*) brought his offence to public attention, could return to his lawful wife, Innocent said that he could, "despite the opinion of a certain predecessor", who distinguished between whether the incest was public or secret. Innocent argued against that predecessor since it was wrong to deny the wife her marital rights because of the husband's misconduct, or, more precisely, "cum affinitas post matrimonium inique contracta illi nocere non debeat quae iniquitatis particeps non existit"[146]. That predecessor was Alexander, also in *Meminimus nos*, who expressed the principle of differentiation very clearly. Although secret incest could be expiated by penance, public incest could not be condoned. In the latter case, the guilty party and his *mecha* (*moecha*: adulteress) must remain *sine spe connubii* for life, although the wife could marry after her husband's death[147]. In fact, Innocent had already rejected Alexander's judgment on similar grounds in a letter to the provost of Magdeburg in 1200: "quae huiusmodi iniquitatis particeps non exsistit ... suo iure non debeat sine sua culpa privari"[148]; and, in the same letter, also set aside Alexander's distinction between first and second-degree affinity and the more remote grades[149]. It was

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145 *Reg. Inn. III*, VI.2, pp. 5-6 to Prior (Clement) Oseney 1205-1221, 24 February 1203, *Per tuas nobis litteras*. The discussion by K. Pennington in his 'Introduction to the Courts' in *The History of Courts and Civil Procedure in Medieval Canon Law*, ed. W. Hartmann and K. Pennington (Washington, DC: Catholic University of America Press, 2016, History of Medieval Canon Law), pp. 3-29, pp. 19-23, seems to me to impose interpretations which are not supported by the text of Innocent's response. It was certainly issued during a vacancy in the diocese of Lincoln between the death of St Hugh (16 Nov. 1200) and the election of William of Blois shortly before 6 July 1203, and there is nothing to suggest that the case originated in the bishop's court, or that Clement of Oseney carried out an inquest. The question of the possible complicity of W.'s wife was not raised in the Curia, nor was there any discussion of women's anatomy or their supposed sexual needs. The citation of a fourteenth-century *novella* from Boccaccio's *Decameron* in the context of early thirteenth-century Rome is somewhat far fetched. On the facts as presented, the wife was innocent, and, if she wished to exercise them, Innocent judged that her marital rights should not be denied, disagreeing with Alexander III, who had based his judgment on whether the incest was public or secret. W's incest was public since the case was founded on *fama*. Innocent changed the law on supervenient affinity in Lat. IV, c.50.

146 '... since affinity sinfully contracted after matrimony should not injure [the woman] who is not party to the sin'.

147 *Meminimus nos*, § h, *Si aliquis parochianorum*, to Roger of Worcester (Benevento, 4 September 1167 x 1169): WH 649 § h. App. 12.1; 1Comp. 4.20.6. Omitted from X. Similar differentiation was made in *Ex relatione J.* (Benevento, 1167-1168), to Fromondo, bishop of Veroli: App. 50.5; 1Comp. 4.13.5; WH 483, JL 10641; *Italia Pontificia*, II, 159 no. 21 and *De adolescente*, § b of *Ex tuarum tenore* (Benevento, 1167-1168) to the papal vicar, Walter, CB of Albano: App. 50.4, 1Comp. 4.13.4; WH 331; JL 11527. Cf. *Veniens ad nos*, to John *aux bellesmains*, bishop of Poitiers: WH 1066; JL 14088; App. 12.4; 1Comp. 4.13.3; X 4.13.2.

148 *Discretionem tuam*, § g: X 4.13.6: 'she who is not party to this iniquity should not without her own fault be deprived of her right'.

149 *Ad aures nostras* (before 1167), WH 48 § a; 1Comp. 4.13.2.

these Alexandrine judgments that Innocent silently set aside in Lateran IV c.50[150]. Neither was received into the *Liber Extra*.

Echoes of Alexandrine Letters in the Decrees of Lateran IV

Even more important, however, are the echoes of Alexander's letters in five of Lateran IV's constitutions (32, 37, 46, 50 and 52), and a sixth, c.51, may have been drafted in the knowledge that an important Alexandrine decision had already entered the legal tradition. For the formulation of the first example, c.32, on the appointment of permanent vicars and provision of reliable incomes, there are clear precedents in two of Alexander's important responses: *Meminimus*, to Bishop Roger of Worcester in 1167-69[151] and *Quamvis simus* to Bishop Richard of Winchester in 1177[152], in both of which Alexander stressed the need for sufficient portions and security of tenure. Innocent's c.32 added little, except nice biblical citations[153].

The second is perhaps a more indirect echo. In c.37, *Nonnulli gratia sedis apostolicae abutentes*, Innocent prohibited litigants from requesting judicial letters from the Apostolic See which required defendants to travel for more than two days (*ultra duas diaetas*) to answer the summons, a limitation which Alexander had indirectly endorsed in a judicial mandate to Archbishop Henry of Reims issued from Sens on 4 June 1164. In response to a complaint from the abbot (Walter/Gualter) of Montier-en-Der[154], that he had been summoned to appear before the Archbishop (Henry) in Reims, two days' journey from his monastery (*per duas diaetas distare*), while his adversary, the abbot (Peter) of St-Rémi[155] was on the spot. Alexander ordered the archbishop to arrange a location convenient for both parties ("congruum locum et utrique parti communem eis assignes")[156]. Alexander regarded a two-day journey as too burdensome in the particular case; Innocent set it as the limit. Any one of a number of Alexandrine letters can be cited as the source for "fraus et dolus alicui patrocinari non debent" in canon 46, which had cited Lat. III, c.19, on improper taxes[157], but an obvious source is *Licet preter solitum*, already cited above[158].

Interesting as these derivations are, the most substantial influence is on c.50 (*Non debet reprehensibile*), where Innocent reduced the prohibited degrees of consanguinity

150 Below, at n. 170.

151 *Meminimus*, to Roger of Worcester, 1 September 1167 x 1169, 'De monachis autem': WH 649 § b; 1Comp. 3.5.14; X 3.5.12.

152 *Quamvis simus* § h, 'Ad hec si persona': WH 761 § h, JL 14156: 1Comp. 1.20.4; X 1.28.3.

153 Lat. IV c.32 (COGD, 182-183).

154 GC, IX, 919: occurs as abbot 1161-1169.

155 This is the famous Peter of Celle, whose letter collection was once mistaken for Walter's: A. J. Duggan, *Thomas Becket: A Textual History of his Letters* (Oxford: Clarendon Press, 1980), p. 96 n. 1; cf. *The Letters of Peter of Celle*, ed. and trans. J. Haseldine (Oxford: Clarendon Press, 2001, Oxford Medieval Texts), pp. XL-XLIII.

156 PL CC, col. 294-95 no. 252, at col. 295.

157 Above, n. 20.

158 4.11.2: above, n. 97.

from seven to four, thus barring kin-marriages to the fourth generation from the common ancestor, rather than to the seventh generation, and liberating marriage law from the stranglehold of customs masquerading as law which had emerged only in the ninth century and were widely circulated in Burchard of Worms' *Decretum* (1008-12)[159]. In defence of this startling change, Innocent wrote:

> It should not be considered reprehensible if *human statutes* are changed according to changing times, especially when *urgent need or evident utility* requires it, since in the New Testament God himself changed some things which He had decreed in the Old.

In one sentence, the pope changed the vocabulary of the debate about the definition of incest. For more than a century popes had wrestled with the problem of maintaining the seven-generation exclusion even as they were driven to find ways of reducing the harmful effects of the rule by dispensation for particular regions or individual cases.

There was certainly growing disquiet through the twelfth century about the way in which marriage could be attacked on grounds of real or imagined consanguinity or affinity. Alexander III, indeed, was moved to acknowledge, in a *responsum* to Archbishop Øystein of Nidaros (Trondheim) in 1169[160], that marriage questions were among the more difficult ecclesiastical cases[161]. Although he did not work out a general solution, his various judgments laid the foundations on which Innocent was to build. Another Trondheim letter (*Ex diligenti*), for example, allowed the inhabitants of an island (Greenland), more than twelve days' sailing from Norway, to marry within the fifth, sixth and seventh degrees of consanguinity, 'until such time as the Almighty removed the pressing need' ("donec omnipotens dominus tantam ab eis aufert necessitate")[162]. At the same time, he permitted marriage in the third or fourth degree of consanguinity in individual cases[163], and in four rescripts relating to specific cases, he used the distinction between the *statuta hominum* and the *statuta domini* to suggest that the elaborate ecclesiastical rules on forbidden relationships belonged to the former and were therefore capable of modification, first stated in a letter to Bartholomew of Exeter between 1161 and 1169/70, relating to a high-profile case

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159 For a general overview, see A. J. Duggan, 'The Paradox of Marriage Law: from St Paul to Lateran IV (1215)', in *Folia Theologica et Canonica III* (25/17) (2014), pp. 189-212, pp. 197-200.

160 For this date, see A. J. Duggan, 'The Decretals of Archbishop Øystein of Trondheim (Nidaros)', in *Proceedings Washington*, pp. 491-530, pp. 497-99.

161 W. Holtzmann, 'Krone und Kirche in Norwegen im 12. Jahrhundert (Englische Analekten III)', in DA 2 (1938), pp. 341-400, pp. 384-86 no. 2, *Uestre discretionis*, p. 385: "difficiliores questiones, que in causis ecclesiasticis contingere solent, circa matrimonium emergere consueuerunt".

162 *Decretales ineditae*, pp. 149-51 no. 86, p. 149; Duggan, 'Decretals of Archbishop Øystein', cit., Appendix, no. 1; Holtzmann, 'Krone und Kirche', cit., pp. 383-95, no. 1.

163 As in the case of Geoffrey of England and Constance of Brittany in 1166, for example (*Materials for the History of Thomas Becket, Archbishop of Canterbury*, ed. J. C. Robertson and J. B. Sheppard, 7 vols [London: Longman and Co., etc., 1875-1885, RS 67], VI.170-74 no. 292, 170-71). They were second cousins, great-grandchildren of Henry I of England, and thus in the third or fourth degree, depending on whether or not the common ancestor was included in the count.

about the marriage of Hugh de Raleigh, sheriff of Devon, and his wife Muriel, which had been challenged on grounds of consanguinity. Alexander advised great caution. 'If the witnesses had kept silent at the time of the marriage', he wrote, 'it would be a grave matter to hear them now. For it is more tolerable to leave some persons joined contrary to men's statutes than, contrary to God's, to separate those lawfully joined'[164]:

> Tolerabilius est enim aliquos *contra statuta hominum* copulatos relinquere, quam coniunctos quoslibet legitime *contra statuta domini* separare.

Lying behind this principle, of course, was Christ's response to the Pharisees in Matt. 19:6, *Quod ergo Deus conjunxit, homo non separet*, but there was also the French theological tradition traceable to Anselm of Laon († 1117), who had distinguished between the 'law of nature' (*lex nature*), meaning the Biblical law in Leviticus, and the 'precepts established by the Church' ("precepta institutionis ecclesie")[165]. To this tradition belonged Peter the Chanter (one of Innocent's teachers in Paris), whose *Verbum abbreviatum* (1191-92) compared the clarity of the divine law revealed to Moses with the complexities of the canon law on consanguinity, affinity, and spiritual relationship, which in his opinion opened the door to chicanery and fraud[166].

Similar formulations were used in a further three Alexandrine decretals (to Abbot Odo of Ourscamp and Dean Fulk of Reims; Archbishop Henry of Reims and the abbot of St. Lucien; and Archbishop Henry of Reims)[167], but only the Raleigh letter passed through the canonical tradition to *Compilatio prima*[168]. Innocent found it

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164 *Pervenit ad audientiam*, to Bartholomew of Exeter, 1161-1169/70; WH 701; App. 8.23; 1Comp. 4.19.3; discussed in C. Duggan, 'Decretals of Alexander III to England', in *Miscellanea Rolando Bandinelli, Papa Alessandro III*, ed. F. Liotta (Siena: Accademia Senesi degli Intronati, 1986), pp. 85-151, pp. 105-06; repr. with the same pagination in C. Duggan, *Decretals and the Creation of New Law in the Twelfth Century. Judges, Judgements, Equity and Law* (Aldershot: Ashgate, 1998), no. III.

165 F. P. Bliemetzrieder, *Anselms von Laon systematische Sentenzen* (Münster: Aschendorff, 1919, Beiträge zur Gechichte der Philosophie des Mittelalters 18), p. 151: "coniugium inter cognatos non est contra legem nature, sed contra precepta institutionis ecclesie". For further discussion, see Duggan, '"Our rescripts have not usually made law (*legem facere*) on such matters"', cit., pp. 642-43.

166 Especially in *Verbum abbreviatum*, c.53: PL CCV, col. 163-165; cf. J. W. Baldwin, *Masters, Princes, and Merchants. The Social Views of Peter the Chanter and his Circle*, 2 vols (Princeton: Princeton University Press, 1970), I, pp. 332-37.

167 PL CC, col. 544-45 no. 573, Benevento, 30 May 1168-1169 (Odo and Fulk): "quoniam tolerabilius est esse conjunctos *contra hominum statuta*, quam quod Deus conjunxit separare" ('because it is more tolerable to be joined *contrary to men's statutes* than to separate what God has joined'); PL CC, col. 695 no. 760 (Henry and St-Lucien): "quod tutius est aliquos *contra hominum statuta* conjunctos insimul permanere, quam quos Deus conjunxit, occasione qualibet separare" ('because it is safer for some joined *contrary to men's statutes* to remain together than for any reason to separate those whom God has joined'); PL CC, col. 891-92 no. 1011 (Henry: *c.* 1171-1173): "quia tutius est minus licite conjunctos simul dimittere quam legitime conjunctos separare" ('because it is safer to leave together those less licitly joined [in matrimony] than to separate the lawfully joined').

168 *Pervenit ad audientiam*: App. 8.23; 1Comp. 4.19.3. The other three (nos 573, 760, 1011) survive only in Arras, BM, ms 964, the large letter collection assembled in Reims under Archbishop Henry of France (1162-1175), whence they were published by E. Martène and U. Durand, *Veterum scriptorum et monumentorum historicorum, dogmaticorum, moralium amplissima collectio*, II (Paris: Apud Franciscum Montalant, 1724), pp. 622-1011; repr. in PL. Ludwig Falkenstein points out the weaknesses of the

and employed it in his own long *rescriptum* to the prior of St. Honoratus in Arles in 1209: "cum tolerabilius sit aliquos *contra statuta hominum* copulatos dimittere quam conjunctos legitime *contra statuta Domini* separare"[169].

From here it was but a short step to using the concept of the mutability of *statuta humana* in Lateran IV's canon 50 to support the removal of the three outer rings of consanguinity, the second and third categories of affinity, and the abolition of supervenient affinity as grounds for marital separation, a decision which silently discounted the complexities of two different Alexandrine judgments[170]. More than that, Innocent employed the full Alexandrine clause, *cum tolerabilius [...] separare* in c.52, in his rejection of hearsay evidence in consanguinity and affinity cases, except from persons of substance[171].

Closely connected with constitutions 50 and 52, of course, was Innocent's condemnation of clandestine marriage in c.51 *Cum inhibitio*[172]. He instructed that the custom should be universally applied that was followed in some regions, namely of announcing prospective marriages in church (banns) so that legal impediments could be discovered in advance[173]. Here he claimed to be following the footsteps of his predecessors, and there is an Alexandrine precedent. Replying to Archbishop Roger of York in *Solet frequenter*, Alexander had ordered Roger to issue a general prohibition in church, forbidding secret weddings under pain of anathema and insisting "that espousals should be contracted publicly before suitable witnesses, so that what is lawful may be validated by proper authority in this way and [marriages] cannot be challenged on account of uncertainty"[174]. I have already argued (2010) that this letter may have been one of the precedents behind Innocent's decree[175],

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Martène edition in 'Alexandre III et Henri de France. Conformités et conflits', in *L'Église de France et la papauté (x^e-xiii^e siècle): Die französische Kirche und das Papsttum (10.-13. Jahrhundert)*, ed. R. Grosse (Bonn: Bouvier Verlag, 1993), pp. 103-76, p. 104, n. 5.

169 *Ex tenore tuarum litterarum*: PL CCXVI, col. 66-68 no. 61, at col. 68; 4Comp. 4.3.1 (not in X).

170 *Meminimus* (1167 x 1169), § h, 'Si aliquis parochianorum': WH 649 § h; 1Comp. 4.20.6; *Ad aures nostras* (before 1167), WH 48 § a; 1Comp. 4.13.2: above, n. 147 and 149.

171 Alberigo, p. 259; X 2.20.47.

172 X 4.3.3: "Unde predecessorum nostrorum inherendo uestigiis, clandestina coniugia penitus inhibemus".

173 The three-fold reading of banns was cited as normal practice in Scotland ("iuxta consuetudinem Ecclesiae Scoticanae"); see Innocent's response to William Malvoisin, bishop of St Andrews in 1208: *Per tuas nobis litteras, Reg. Inn. III*, XII.34; and the practice of proclaiming intended marriages where there was suspicion of consanguinity was reported to Alexander III *c.* 1180 by Bishop Lanfranco of Pavia: *Ad audientiam*, § b, *Ad hec*: 1Comp. 2.13.8; WH 41 § b (only in *Sang.* 10.19 and 1Comp.).

174 *Solet frequenter*, JL 14162, WH 990, 1Comp. 4.4.(4): "Ne igitur pro defectione testium euacuetur, quod si fieret in publico, auctoritate ecclesie debent corroborari, monemus fraternitatem tuam atque mandamus, quatinus generaliter in ecclesia sub anathematis interminatione prohibeas, ne de cetero inter aliquos in absconso, sed publice coram idoneis testibus sponsalia contrahantur, ut sic saltem, quod iuste sit, digno robore conualescat, nec hec causa ambigua possint questione pulsari".

175 A. J. Duggan, 'The Effect of Alexander III's "Rules on the Formation of Marriage" in Angevin England (The R. Allen Brown Memorial Lecture 2010)', in *Anglo-Norman Studies*, ed. C. P. Lewis, 33 (2011), pp. 1-22, p. 11 n. 56.

although it was not widely known outside Anglo-Norman and northern French lands[176].

Paradoxically, while *Solet frequenter* may have provided a precedent for c.51, another Alexandrine letter undoubtedly provided an escape route which Innocent did not close. In response to a query from Bishop Bartholomew of Beauvais in 1170 or 1171, Alexander declared, in *Quod nobis ex parte*, that there was no need to issue a special dispensation for clandestine marriages, since, if the parties wished to publish them, such marriages should be accepted and approved by the Church[177]:

> Si enim matrimonia ita occulte contrahuntur, quod exinde legitima probatio non appareat, ii, qui ea contrahunt, ab ecclesia non sunt aliquatenus compellendi. Verum si personae contrahentium hoc (*recte* haec) voluerint publicare, nisi rationabilis et legitima causa praepediat, ab ecclesia recipienda sunt et comprobanda, tanquam a principio in ecclesiae conspectu contracta.

Their children should then be regarded as legitimate[178]:

> Si qui autem de clandestino matrimonio, postmodum ab ecclesia comprobato et rato habito, geniti fuerint, eos legitimos iudices filios et heredes.

Like nearly all the Alexandrine citations or echoes above, this would have been known to the Curial lawyers, and therefore to Innocent, since it, like them, was in *Compilatio prima*. He could have overridden it, had he so desired, as he had ignored Alexander's instruction on supervenient affinity[179]. That he did not, suggests not inadvertence but deliberate intention. Although he forbade clandestine marriages and penalized priests who colluded in them in c.51, he did not declare them invalid, knowing that his predecessor *felicis memorie* had already provided a procedure for the validation of informal marriages as long as there was no other impediment. Innocent's deliberate silence allowed Raymond of Peñafort to place a slightly abbreviated version of the Beauvais letter (*Quod nobis ex parte*) immediately before Innocent III's c.51 in the *Liber Extra*[180]. The Beauvais letter thus survived as a counter-balance to the Lateran IV decree, enabling regional prelates to deal sensitively with the problem of

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176 It was transmitted in Anglo-Norman and French collections: *Cheltenhamensis*, 9.75; *Tanner*, 7.10.6; *Sangermanensis*, 9.6; *1 Abrinc.*, 8.9.3; *Brugensis*, 52.1; *Francofurtana*, 4.9, but seems not to have circulated more widely. Antonio Agustín (1516-1586) found it, and eight further items (1Comp. 1.4.5-8, 1.9.9, 1.12.2, 1.16.4, 4.4.5) in a copy of *Compilatio Prima* in Barcelona: *Quinque Compilationes*, ed. E. Friedberg, p. VI, "quaequae ad genuinum Bernardi librum non pertinent"; ibid., 46, n. to 4.4.(4).

177 *Quod nobis ex parte*, JL 13774, WH 819: Tusculum, 18 Oct. 1170-1119 Sept. 1171; App. 50.17; 1Comp. 4.3.3 § a; X 4.3.2: 'Indeed, if marriages are contracted so secretly that no lawful proof is apparent, those who contract them should in no way be constrained by the Church. But if the contracting persons wish to publish them, unless some reasonable and lawful cause prevents it, they should be accepted and approved as if they had from the first been contracted in the sight of the Church.'

178 1Comp. 4.3.3 § b; X 4.17.9: 'After it has been approved and ratified by the Church, you should judge any offspring of a clandestine marriage to be legitimate children and heirs.'

179 Above, n. 170.

180 X 4.3.2 (extract from *Quod nobis*); X 4.3.3 (Lat. IV, c.51).

privy marriages, without undermining the essential principle that marriage should be conducted before witnesses[181].

Conclusion

It has been argued above that Alexander's Lateran III influenced 30% of Lateran IV's constitutions[182]. Setting aside the employment of *fraus et dolus*, since Lateran IV c.46 is already counted among the canons influenced by Lateran III, if the influence of the remaining four letters is added to the calculation[183], the percentage rises to slightly more than a third (35.2%), and a more acute analysis might well find more!

For Innocent III, born in 1160 or 1161, only one or two years after Alexander's election in September 1159, Alexander was the pope of his youth. It is not impossible that he witnessed Alexander's canonization of Thomas Becket at Segni in February 1173 – and with St. Thomas, the cause of *libertas ecclesie* with which he was associated – when he would have been twelve or thirteen; he was sixteen or seventeen when peace was made with Frederick I at Venice in 1177, and eighteen or nineteen when Alexander held the Third Lateran Council in March (5-19) 1179, which celebrated the restoration of ecclesial unity after 19 years of schism; and around twenty-four in the mid-1180s, when he made his pilgrimage to the shrine of St. Thomas in Canterbury. That visit must have made an impression, for Innocent recalled it more than twenty years later in 1209, when he reminded William, a monk from Andres (Pas-de-Calais), that he had lodged at Andres *en route* to Canterbury, and formed a high opinion of the good order of the monastery[184]. Pope Alexander was therefore more than the name of a predecessor to whom his chancery paid the customary respect, and his acknowledgement of Alexander's reputation was more than the standard formula. For Innocent, Alexander's successful papacy – as he would have seen it as a young man through the 1170s – presented three aspects: the practice of diplomacy, which enabled Alexander to withstand the opposition of the formidable Frederick I through nineteen years of war and schism; the impact of the Third Lateran Council, whose first canon, *Licet de vitanda*, defined the form of papal elections until the end of

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181 Duggan, 'The Effect of Alexander III's "Rules on the Formation of Marriage"', cit., pp. 9-13. For the difference between the English and Franco-Belgian treatment of clandestinity, see C. Donahue Jr., *Law, Marriage, and Society in the Late Middle Ages: Arguments about Marriage in Five Courts* (Cambridge: Cambridge University Press, 2007), pp. 31-33; cf. R. H. Helmholz, *Marriage Litigation in Medieval England* (Cambridge: Cambridge University Press, 1974), pp. 25-26. Another Alexandrine directive, addressed to Romuald of Salerno in *Licet preter solitum*, § a (WH 620 § a; JL 14091; App. 6.8 § a; X 4.4.3), which had confirmed that marriages contracted 'by mutual consent in plain words (*expressis verbis*) [...] before witnesses [...] in the presence of a priest or even of a notary' were binding, reflected Italian practice: D. L. d'Avray, 'Marriage Ceremonies and the Church in Italy after 1215', in *Marriage in Italy 1300-1650*, ed. T. Dean and K. J. P. Lowe (Cambridge: Cambridge University Press, 1998), pp. 107-115.

182 Lat. IV, cc.3, 11, 14, 23, 24, 26, 27, 29, 30, 33, 34, 35, 46, 47, 57, 61, 63, 64, 65, 66, 71.

183 Lat. IV, cc.32, 37, 50, 52.

184 William of Andres, *Chronica Andrensis*, ed. L. Heller, MGH SS XXIV, p. 738.

the Middle Ages, and beyond, with minor adjustments. This was an example of an Alexandrine decree which needed no confirmation or reference in Lateran IV, because it was immediately accepted as electoral law and applied to successive papal elections, including Innocent's own.

And finally, there was the pervasive impact of Alexander's decretals, which the author (Jean de Breteuil?) of *Tractaturus magister* (a *summa* on Gratian's *Decretum*)[185] designated *ius canonicum nouum* as early as 1182[186]. Altogether, Jean cited 37 Alexandrine decretals by *incipit* to modify or update Gratian. Commenting on Gratian, D.32 c.14, at *post mortem* (fol. 10vb), for example, he wrote: "Sed omnis ambiguitas sublata est ab Alexandro III. in decretali[bus] *Ad petitionem*[187], *Cum sis preditus*"[188]: and *Cum sis preditus* was cited twice more: with reference to Gratian, D.12 pr. (fol. 11ra): "In decretali Alexandri *Cum sis preditus*", and to Gratian, C.27 q.2 c.21, at *promiserit* (fol. 76va): "Sed hodie determinatum est in decretali Alexandri *Cum sis preditus*"[189]. More extensive still was the citation of *Licet preter solitum*, mentioned above, issued to Romuald II of Salerno in 1177[190]. Glossing *Decretum* C.2 q.7 pr. (fol. 39rb), Jean wrote: "Hodie autem totum istud eliminatum est per Alexandrum in illa decretali *Licet preter solitum*"[191]; on C.4 q.2 and 3 pr. (fol. 44r): "nec enim potest testis in tali causa [...] et de laico contra clericum, in decretali Alexandri *Licet*"[192]; on C.18 q.2 c.19, at *Cognovimus* (fol. 65ra): "Alexander III. in decretali *Licet preter solitum* contra, sed hoc non est restituendum ad proximum positionem a sede expulsum"[193]; on

185 Conjecturally identified as the Reims canonist, Jean de Breteuil: P. Landau, 'Die Dekretsumme "Tractaturus magister" und die Kanonistik in Reims in der zweiten Hälfte des 12. Jahrhunderts', in ZRG, Kan. Abt. 131 (2014), pp. 132-152, pp. 132, 150-152. The MS (BN, lat. 15994) can be viewed on the Gallica website.

186 Landau, 'Die Dekretsumme "Tractaturus magister"', cit., p. 140 no. 17 ad C.2 q.6 pr (fol. 37va): "Hodie secundum ius canonicum nouum in decretali Alexandri *Ex publico* personas earum. In arbitrio iudicis est diem prefigure". The first part of this citation is mistaken: *Ex publico* is a marriage decretal (WH 476, JL 13787, 1Comp. 3.28.7; X 3.32.7, Alexander III to a bishop of Brescia); the second, *Personas earum* (recte *ecclesiarum*) refers to WH 488 § b; 1Comp. 2.20.4; X 2.28.4: to Bishop William of Norwich, 1160-1174.

187 Landau, 'Die Dekretsumme "Tractaturus magister"', p. 138 no. 3: WH 84, *Ad petitionem vestram* to Prior Gerard and the brethren of the Crociferi italiani (Ordo cruciferorum) of Bologna, § c, 'Uxoratus sine licentia': App. 5.9; 1Comp. 3.28.8 (wrongly addressed to Prior G. and brethren of St John); X 3.32.8 (as 1Comp.). Cf. W. Holtzmann, 'Kanonistische Ergänzungen zur Italia Pontificia' [2], in QF 38 (1958), pp. 67-175, pp. 78-79 no. 70. The full text is found in the Innsbruck Appendix to the *Decretum*. The 'decretal' derives from *Quod calcatis Deo* (*Italia Pontificia*, II, 285 no. 1: 20 Dec. 1169), in which Alexander confirmed the rule of the Crociferi. For bibliographical information on this Order, I am very grateful to Dr Herwig Weigl of Vienna.

188 WH 308, *Cum sis preditus*, to Arnulf of Lisieux, Siponto, 28 January (1177): wrongly addressed to Exeter in App. 5.3, 1Comp. 3.28.4, and X 3.32.4. The copy in the margin of Omnebene's abbreviation of the *Decretum* in BAV, Reg. lat. 1039, fol. 130v, provides the correct address and date: Dat. Sipont. v. kal. Febr.

189 Landau, 'Die Dekretsumme "Tractaturus magister"', cit., p. 139 no. 8.

190 Above, n. 103. Landau, 'Die Dekretsumme "Tractaturus magister"', cit., p. 141 no. 21.

191 *Licet preter*, § e, 'De cetero laicos': X 2.20.14.

192 *Licet preter*, § e, 'De cetero laicos': X 2.20.14.

193 Unidentified: perhaps a mistake.

C.23 q.8 c.5, at *Cleri factione* (fol. 71rb): "nec in mononachia, in decretali Alexandri *Licet*"[194]; on C.28. q.1 *dictum post* c.17 (fol. 77vb), at *provincie moribus*, "in decretali Alexandri *Licet preter*"[195].

The author of *Tractaturus magister* was not alone[196]. Before him, Simon of Bisignano had included about 190 similar decretal citations (from 80/90 decretals) in his *Summa* on the *Decretum*, completed 1177 × 1179[197], and in the late 1180s, the author(s) of the *Summa, Reverentia sacrorum canonum*, compiled in Cologne, referred to fifty-three decretals, of which forty-four were issued by Alexander[198]. Huguccio himself cited about 227, of which more than 150 were Alexandrine, in his great *Summa decretorum*, composed in Bologna from 1180 and left unfinished when he was elected bishop of Ferrara (1 May 1190)[199].

Significant as these numbers are, they represent only a small proportion of the c.713 Alexandrine decretals which had been assembled in locally compiled collections before 1198[200]. By the time Innocent became pope, not only were professional canonists across Europe using Alexander's pronouncements to gloss the *Decretum*, but extracts from some 400 Alexandrine decretals, divided into about 469 separate *capitula*, appeared on nearly every folio of Bernard of Pavia's *Compilatio Prima*, which was being studied beside Gratian's *Decretum* in Bologna and elsewhere[201]; these in addition to all 27 Lateran canons, distributed through 37 *capitula*[202], and seven of the nine canons of the council of Tours[203]. In this context, despite concerns about

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194 *Licet preter*, § g, 'Porro si clericus': X 5.14.1.

195 *Licet preter*, § a, 'Licet preter': X 4.4.3.

196 For this development, see A. J. Duggan, 'Master of the Decretals: A Reassessment of Alexander III's Contribution to the Development of Canon Law', in *Pope Alexander III* (1159-1181). *The Art of Survival*, ed. P. Clarke and A. J. Duggan (Farnham: Ashgate, 2012), pp. 365-417, esp. 372-87; A. Lefebvre-Teillard, 'Du Décret aux décrétales: l'enseignement du droit canonique au sein de l'école parisienne (fin XII^{e}-début XIII^{e} s.)', in *Les débuts de l'enseignement universitaire à Paris (1200-1245 environ)*, ed. J. Verger and O. Weijers (Turnhout: Brepols, 2013, Studia Artistarum 38), pp. 319-28.

197 *Summa in Decretum Simonis Bisimanensis*, ed. P. V. Aimone-Braida (Città del Vaticano: BAV, 2014, MIC Series A 8), pp. v, xxxi; T. P. McLaughlin, 'The Extravagantes in the Summa of Simon of Bisignano', in *Mediaeval Studies* 20 (1958), pp. 167-75; W. Holtzmann, 'Zu den Dekretalen bei Simon von Bisignano', in *Traditio* 18 (1962), pp. 450-59; P. Landau, 'Simon von Bisignano, Sikard von Cremona und die Mainzer Kanonistik der Barbarossazeit: Zur Biographie des Simon von Bisignano und zur Forschungsgeschichte', in BMCL 28 (2008), pp. 119-44.

198 P. Landau, 'Gérard Pucelle und die Dekretsumme *Reverentia sacrorum canonum*: zur Kölner Kanonistik im 12. Jahrhundert', in *Mélanges en l'honneur d'Anne Lefebvre-Teillard*, ed. B. d'Alteroch *et al.* (Paris: Éditions Panthéon-Assas, 2009), pp. 624-38, pp. 631-36.

199 W. P. Müller, *Huguccio. The Life, Works, and Thought of a Twelfth-Century Jurist* (Washington, DC: Catholic University of America Press, 1994); K. Pennington and W. P. Müller, 'The Decretists. The Italian School', in *The History of Medieval Canon Law*, cit., pp. 121-73, pp. 142-60.

200 W. Holtzmann, 'Über eine Ausgabe der päpstlichen Dekretalen des 12. Jahrhunderts', in *Nachrichten der Akademie der Wissenschaften in Göttingen, phil.-hist. Klasse* (1945), pp. 15-36, p. 34; Duggan, 'Making Law or Not?', cit., (above, n. 128); Eadem, 'Master of the Decretals', cit. (above, n. 196).

201 1Comp., passim.

202 Friedberg, *Quinque compilationes*, p. VIII (note the mistaken repetition of 5.5.6).

203 Ibid., cc.1, 2, 4–8; c.9 (1Comp. 5.32.5, *Calumpniam*) is wrongly attributed to Tours; it is c.14 of the Council of Westminster (1175).

forged or falsified decretals and doubts about the authenticity of decretals found in the scholars' collection (*in compilatione scolarium*)[204], "following in Alexander's footsteps" would have come naturally, although Innocent went forward along his own path. Instead of a caesura with the past, Innocent's pontificate should be seen as one of continuity with and development from the achievements of Alexander III.[205]

204 Above, n. 136.

205 Since this paper was submitted for publication, Ken Pennington has published an important discussion of Lateran IV's dependence on earlier precedents for cc. 8 (*Qualiter et quando*), 18 (*Sententiam sanguinis*), 38 (*Quoniam contra falsam*), and 42 (*Sicut volumus*): 'The Fourth Lateran Council. Its Legislation, and the Development of Legal Procedure', in *Texts and Contexts in Legal History. Essays in Honor of Charles Donahue*, ed. J. Witte, Jr, *et al.* (Berkeley: The Robbins Collection, 2016, Studies in comparative legal history), pp. 179-98.

LAWRENCE G. DUGGAN

Armsbearing by the Clergy and the Fourth Lateran Council*

When Pope Gregory IX issued the *Decretales* in 1234, it included this lapidary formulation: "Clerici arma portantes et usuarii excommunicentur"[1]. Unfortunately, this crisp statement of high principle has not served the reputation of the Holy Roman Church at all well in modern history. Again and again, it has been cited to club the Church over the head for the flagrant behavior of warrior prelates like Bishop Henry Despenser of Norwich, Robert Cardinal of Geneva, and Pope Julius II, and, as far as the development of capitalism is concerned, for both obstructing its development by enforcing the ban on usury and for rank hypocrisy when it did not. However clear and noble this statement of abstract principle may have been, it was not in fact the actual law of the Church even at the time of its promulgation. In the case of usury, not only were the people of Christian Europe developing a variety of financial practices and instruments over the course of the twelfth and thirteenth centuries by which Christians could legally lend money to other Christians with moderate rates of return, but theologians and canon lawyers were also coming slowly but surely to provide the necessary theological and legal framework for these credit instruments (discretionary deposits, gages *mort et vif*, pawns, bills of exchange, the commenda and other partnerships, sales with the right of resale, the *census* or rent, and so on). It was most fortunate for the emergence of western capitalism that in the Parable of the Talents, recounted in both Matthew 25:14-30 and Luke 19:12-28, Jesus had implicitly approved the taking of interest. Western churchmen slowly came to accept interest as legitimate compensation under several different titles, particularly for the loss of the use of the money loaned. (This emphasis on compensation also dovetailed nicely with the earlier medieval practice of *wergeld* or monetary recompense for crimes and injuries). It then became a question of what a *just* rate of compensation or interest should be. Gregory IX's successor, Innocent IV, when asked precisely this question about the *census* or rent, decided that since he had

* I would like to thank John Hosler, Radoslaw Kotecki, and Atria Larson for helpful suggestions on this essay.

1 X 3.1.2 ('Clergy bearing arms and usurers are to be excommunicated').

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The Fourth Lateran Council and the Development of Canon Law and the ius commune, ed. Atria Larson and Andrea Massironi, Turnhout: Brepols, 2018 (EMI 7), pp. 63–75

10.1484/M.EMI-EB.5.116648

learned that a reasonable rate of return on agricultural investment was around 5%, that should be the rate of just return on the buying of rents, a judgment confirmed twice by fifteenth-century popes and included in later additions to canon law[2]. But modern historians, with their varying sources and degrees of animus against the medieval or Catholic Church (or the Christian Church more generally), do not wish to hear of such complexities and prefer to reprove the Church simultaneously for its benightedness and hypocrisy – and in support of their prejudice they can always point to that blunt statement in the first code of law promulgated officially by the papacy – "Clergy bearing arms and usurers are to be excommunicated"[3].

If a simple prohibition was no longer the case with respect to moneylending by 1234, still less was it so with regard to the clergy and armsbearing. It is revealing that, in recovering this canon from earlier legislation, Gregory IX and Raymond of Peñafort went all the way back to the council of Poitiers in 1078, convened during the pontificate of Gregory VII and presided over by a papal legate. It has often been noted that the reformers of the eleventh century condemned armsbearing by the clergy, but the great frequency with which they did so has not always been appreciated. Indeed, in the whole history of Christianity there exists no parallel to the intensity and frequency with which councils and synods repeatedly did so in the second half of the eleventh century – and very often with the explicit support of the papacy. Leo IX launched this campaign at the council of Reims in 1049. Although this was evidently the only one of his nine councils which acted on this issue, it was an important precedent soon widely imitated. During the next thirty years, no fewer than eleven councils and synods followed the example set at Reims in 1049 in forbidding clerical armsbearing. Of these eleven, a pope presided over one (in Rome in 1059), and papal legates over another six (Narbonne in 1054, Tours in 1060, Normandy around 1067, Gerona in 1068 and 1078, as well as Poitiers in 1078). In short, in thirty years, twelve major councils, eight of them under direct papal supervision, condemned arms for the clergy. Furthermore, Pope Urban II at Clermont in 1095 renewed the prohibition. In sum, then, between 1049 and 1095, no fewer than thirteen councils and synods had damned clerical armsbearing. At nine of these thirteen assemblies, three different popes and six papal legates presided. The reforming papacy seemingly could not have been clearer on this issue[4].

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2 L. G. Duggan, *Ecclesiastical Moneylending in Later Medieval Germany* (forthcoming), ch. 2, 'Legitimate Forms of Moneylending'; J. T. Noonan Jr., *The Scholastic Analysis of Usury* (Cambridge, MA: Harvard University Press, 1957), pp. 100-70, especially pp. 116-17. Jesus' words on interest are curiously not mentioned at all by Noonan (who seems to believe or imply that the argument for interest was drawn entirely from Roman law), but their significance is fully recognized by E. Kerridge, *Usury, Interest and the Reformation* (Aldershot, Hants-Burlington, VT: Ashgate, 2002), pp. 5-21.

3 On the contradictory ways in which the medieval Church is doubly damned for both impeding and enabling the rise of capitalism in Europe, see L. G. Duggan, 'Melchior von Meckau: a Missing Link in the Eck *Zins*-Disputes of 1514-1516?', in *Archiv für Reformationsgeschichte* 74 (1983), pp. 25-37, especially pp. 25-26.

4 U.-R. Blumenthal, 'Ein neuer Text für das Reimser Konzil Leos IX. (1049)?', in DA 32 (1976), pp. 23-48, p. 29; Mansi 19:787 (Coyanza, c.3), 830 (Narbonne, c.15), 856 (Compostella, c.2), 915 (Rome, c.10), 927 (Tours, c.7), 1071 (Gerona, c.5); H. E. J. Cowdrey, 'Bishop Ermenfrid of Sion and the Penitential Ordinance following the Battle of Hastings', in JEH 20 (1969), pp. 225-42;

But this item did not have staying power on the papal agenda after the intense burst of prohibitions between 1049 and 1078 and the 1095 renewal at Clermont. Orderic Vitalis says that Calixtus II renewed the latter prohibition at his council at Reims (1119), but the evidence does not sustain his assertion[5]. Nor does it appear among the decrees of Innocent II's councils at Clermont (1130), Reims (1131), or Pisa (1135); Eugenius III's at Reims (1148); or Alexander III's at Tours (1163)[6]. Finally, there is almost nothing in the decrees of the seven so-called ecumenical or general councils held between 1123 and 1312 – the first four conspicuously in Rome at the pope's own Lateran cathedral, then the next two at Lyon and the last at Vienne[7]. (The legatine councils of the twelfth and thirteenth centuries are a much more complex but no less important related matter which would require separate investigation[8]). Of the seven general councils, only Vienne in 1311-12 has anything explicit. Its eighth constitution denounced at great length "clericos carnificum seu macellariorum aut tabernariorum officium publice et personaliter exercentes", and then adds: "Adversus vero alios

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C & S 1.1:581; Mansi 20:399 (Rouen, c.12), 518-19 (Gerona, c.6), 499 (Poitiers, c.10); R. Somerville, *The Councils of Urban II. 1. Decreta Claromontensia* (Amsterdam: Adolf M. Hakkert, 1972, AHC Supplementum 1), pp. 74, 81, 115, 143. It may be worth noting, however, that only four of the fourteen manuscripts recording the decrees of Clermont include this condemnation.

5 *The Ecclesiastical History of Orderic Vitalis*, ed. and trans. by M. Chibnall (Oxford: The Clarendon Press, 1969-80), 6:262-63, 274-77; Mansi 21:233-56.

6 Mansi 21:437-40, 453-62, 487-92, 711-36; *Boso's Life of Alexander III*, trans. by G. M. Ellis (Totowa, NJ: Rowman and Littlefield, 1973), pp. 59-62; R. Somerville, *Pope Alexander III and the Council of Tours (1163): A Study of Ecclesiastical Politics and Institutions in the Twelfth Century* (Berkeley & Los Angeles & London: University of California Press, 1977).

7 Duggan, *Armsbearing and the Clergy*, cit., p. 134. On the evolution of the traditional Roman Lenten synod into the Lateran 'general councils' (and their later numbering as such), see A. J. Duggan, 'Conciliar Law, 1123-1215: The Legislation of the Four Lateran Councils', in *The History of Medieval Canon Law in the Classical Period, 1140-1234. From Gratian to the Decretals of Pope Gregory IX*, ed. by W. Hartmann and K. Pennington (Washington, DC: The Catholic University of America Press, 2008, History of Medieval Canon Law), pp. 318-66, pp. 318-24; and on the emerging clarification of ideas regarding a 'general' council under the presidency of a pope or a legate between c.1088 and c.1175, see R. Somerville, in collaboration with S. Kuttner, *Pope Urban II, the 'Collectio Britannica', and the Council of Melfi (1089)* (Oxford: Clarendon, 1996), pp. 181-85.

8 As for legatine councils, although the one held at Westminster in 1138 condemned clerical armsbearing (probably in response to the rebellion of Robert of Gloucester), an earlier one at Troyes in 1129 approved the Templars, which as we shall see created a potentially large loophole in the ancient prohibition (Duggan, *Armsbearing and the Clergy*, cit., pp. 105, 182). On the significance for English ecclesiastical law and history of the legatine council of 1268 in England, over which a future pope presided, see Duggan, *Armsbearing and the Clergy*, cit., pp. 182-91, especially p. 187 ff. More generally, legatine councils are a very complex issue, since legates were sometimes local prelates deputed to act on behalf of Rome (*legati nati*), while those sent from Rome (*legati missi* or *a latere*) would sometimes act on their own. Whether they reflected papal policy should therefore not always be simply taken for granted. The complexity of the task of studying legatine councils is illustrated further by the sheer numbers involved. Hugh of Die, for instance, convened thirteen legatine councils under Gregory VII, who in turn deployed no fewer than thirty 'legates' of one sort or another during his pontificate; see K. Rennie, *Law and Practice in the Age of Reform: The Legatine Work of Hugh of Die (1073-1106)* (Turnhout: Brepols, 2010), pp. 209, 219-22. More generally on early medieval papal legates, see Idem, *The Foundations of Medieval Papal Legation* (Basingstoke: Palgrave Macmillan, 2013).

clericos, negotiationibus vel commerciis saecularibus vel officiis non convenientibus proposito clericali publice insistentes, vel arma portantes, sic canonica servare student instituta, quod et illi ab excessibus compescantur huiusmodi et ipsi de dampnabili circa haec negligentia nequeant reprehendi"[9]. This curious statement is rendered even more odd by c.14, a very long decree promulgated by the council for the reform of the Benedictine monks, five printed pages in length. One paragraph ends with this sentence: "Praefatae quoque sententiae [excommunicationis] monachos infra septa monasteriorum sine licentia abbatum suorum arma tenentes decernimus subiacere"[10]. The clear implication is that monks may have arms as long as they have permission from their abbots. This is no flat prohibition at all. In fact, never again in the subsequent history of the Roman Catholic Church was a simple ban on clerical arsmbearing ever repeated or enacted at such a high level. The new Codex of Canon Law, issued in 1917 and taking effect in 1918, in c.138 forbade all manner of clerical misconduct, including armsbearing, "nisi quando iusta timendi causa subsit"; and the new Code of 1983, now in force throughout the world, quite deliberately says nothing at all[11]. What on earth is going on here? What had happened between Clermont in 1095 and Vienne in 1311?

Actually, it was between Clermont in 1095 and Lateran IV in 1215 that the prohibition on armsbearing by the clergy had come to be effectively demolished by decisions made by prelates and popes, as will be explained shortly. It is necessary to note, however, that the prohibition had in the first place never been quite as complete as is usually thought[12]. When the ban was enacted (and it had never been so repeatedly reiterated before 1049), it usually took two prohibitory forms, on military service and on *bearing* arms. Sometimes, most noticeably under some of the Carolingians (as Friedrich Prinz pointed out), bishops appear to have been exempted from the ban by simple preterition[13]. But even before then, bishops in the disintegrating late Roman Empire often took up the defense of their cities, if only reluctantly and by default. Gregory the Great is famous not only for having directed troops in the defense of Rome and the lands of St Peter, but also for exhorting other bishops to defend their

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9 COGD, p. 412: 'clerics who publicly and personally engage in the butcher's trade or conduct taverns', and 'As for other clerics who apply themselves publicly to secular commerce and trade or any occupation inconsistent with the clerical state, or who carry arms, the ordinaries are to be diligent in observing the canons, so that these clerics may be restrained from such misconduct and they themselves may not be guilty of reprehensible negligence'; COD, pp. 364-65; Duggan, *Armsbearing and the Clergy*, cit., pp. 134-35.

10 COGD, pp. 422-26, p. 425: 'We decree that monks who keep arms inside their monastery, without leave of their abbot, incur the same sentence'; COD, p. 372.

11 'Except when there exists just cause for fear'. The full text of c.138 of the Codex of 1918 is as follows: "Clerici ab iis omnibus quae statum suum dedecent, prorsus abstineant: indecoras artes ne exerceant; aleatoriis ludis, pecunia exposita, ne vacent; arma ne gestent, nisi quando iusta timendi causa subsit; venationi ne indulgeant, clamorosam autem nunquam exerceant; tabernas aliaque similia loca sine necessitate aut alia iusta causa ab Ordinario loci probate ne ingediantur" (*Codex iuris canonici Pii X Pontificis Maximi iussu digestus...* [Città del Vaticano: Typis polyglottis Vaticanis, 1974], p. 38). For a full discussion of this Codex and the complexities behind that of 1983, see Duggan, *Armsbearing and the Clergy*, cit., pp. 173-80.

12 This is a point that I have come to understand much better since my book appeared several years ago.

13 Duggan, *Armsbearing and the Clergy*, pp. 96-97.

cities as well; and he had no evident compunction about it as long as he did not "involve myself in the death of any human at all"[14], echoing a point made earlier by Leo the Great. That seems to explain why the great eleventh-century Pope Leo IX could both censure armsbearing clerics at Reims in 1049 *and* direct troops against the Normans at Civitate in 1053, or why Gregory VII could announce in a letter of 1074 his preparedness to lead a relief expedition of 50,000 soldiers to the East *and*, only five years later, have his legate preside at the council of 1078 condemning clerical armsbearers and usurers[15]. (Nearly four-hundred years later, Pius II went yet a step farther and died at the papal naval base of Ancona in August 1464, proudly prepared to lead a military expedition for the relief of the East[16]). As much scholarship since Carl Erdmann has revealed, Gregory VII of course changed much if not everything, specifically how much he promoted the militarization of the Church and the sacralization of *milites Christi*, thereby shifting the Roman Church permanently on the theme of warfare to the left or to the right (depending upon one's viewpoint)[17].

What changed between 1095 and 1215 began in the Holy Land and ended in Rome. If one cuts through the endless thickets of discussion initiated above all by Gratian and continued by canonists and theologians all over Europe (the fellow scholars whom modern historians naturally prefer to read and ponder) and instead looks to what the bishops were doing, above all the bishop of Rome, one achieves a greater degree of clarity about what was an admittedly increasingly complex area of lawmaking. On the issue of clerical armsbearing, we can pinpoint the turning point. Two intertwined breakthroughs occurred in the crusader Kingdom of Jerusalem in 1120, and behind them both was the Patriarch of Jerusalem, Warmund or Gormund of Picquigny (1118-28). On January 16 of that year, King Baldwin II and the patriarch convened at Nablus a council of the great men of the realm, ecclesiastical and secular, to enact legislation touching a variety of issues in twenty-five chapters. Number 20 decreed that "Si clericus causa defenssionis [*sic*] arma detulerit, culpa non teneatur". In addition, a cleric who abandoned tonsure to become a soldier, but then repented and confessed before the first day of Lent, would be allowed to resume his clerical status according to the judgment of the patriarch (and also of the king after that

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14 Letter to Sabinian, deacon in Constantinople, September 594, in *The Letters of Gregory the Great*, trans. by J. R. C. Martyn (Toronto: Pontifical Institute of Mediaeval Studies, 2004), 5.6, pp. 326-27; Duggan, *Armsbearing and the Clergy*, cit., p. 20; R. A. Markus, *Gregory the Great and His World* (Cambridge: Cambridge University Press, 1997), pp. 100 ff.

15 Duggan, *Armsbearing and the Clergy*, cit., pp. 22, 24. The traditional belief that Leo actually led troops at Civitate has recently been challenged by Charles D. Stanton, whose marshaling of the evidence indicates that he watched the battle from the city walls: 'The Battle of Civitate: A Plausible Account', in *Journal of Medieval Military History* 11 (2013), pp. 25-55, pp. 46-47.

16 N. Housley, 'Pope Pius II and Crusading', *Crusades* 11 (2012), pp. 209-47; L. Duggan, 'Were Nicholas V and Pius II Really *Renaissance* Popes?', in *Where Heaven and Earth Meet: Essays on Medieval Europe in Honor of Daniel F. Callahan*, ed. by M. Frassetto and others (Leiden & Boston: Brill, 2014), pp. 63-78, especially pp. 77-78.

17 I. S. Robinson would include Leo IX in effecting this momentous shift: *The Papal Reform of the Eleventh Century: Lives of Pope Leo IX and Pope Gregory VII*, ed. and trans. by I. S. Robinson (Manchester & New York: Manchester University Press, 2004, Medieval Sources).

date)[18]. What lay behind this unprecedented legislation? Very likely the vulnerability of the crusader states in the Holy Land exposed in 1119, the year before. Around Easter (6 April) a large group of about 700 pilgrims was attacked in the barren region between Jerusalem and the River Jordan; 300 were killed and 60 captured. And on 27 June, Prince Roger of Antioch and his army perished on the "Field of Blood" (*ager sanguinis*) in his vain effort to attack Aleppo. Antioch now stood defenseless. Its patriarch, Bernard, driven by necessity, ordered that clergy, monks, and laymen guard the walls of the city, and it was he, "nocte et die cum armato suo clero et militibus", who protected the city until the arrival of King Baldwin of Jerusalem[19]. Was the legislation at Nablus six months later meant to justify *ex post facto* the earlier behavior of the patriarch of Antioch and his clergy? Perhaps, although the patriarch of Jerusalem had no jurisdiction over Antioch. It seems more likely that Warmund and the entire episcopate of the Kingdom (who were all present at Nablus) meant this provision to apply to their own clergy should similar dangers arise – and both the prologue to the canons of Nablus and a nearly contemporaneous letter Warmund sent to Archbishop Diego of Compostella reveal how frightened Warmund was of a Saracen world closing in on all sides[20].

Warmund was evidently also the principal ecclesiastical sponsor of the other, possibly related development that may also have occurred at Nablus, but (according to Rudolf Hiestand) certainly did take place sometime between 14 January and 13 September 1120[21]. At the hands of Patriarch Warmund, Hugh of Payns, Godfrey of Saint-Omer, and certain other French knights pledged to live "more canonicorum regularium" (as regular canons, not monks, as is so commonly thought) and accordingly took vows of poverty, chastity, and obedience; and, in return, Warmund and his fellow bishops enjoined upon these consecrated knights, for the remission of their sins, the principal task of keeping roads and highways safe for pilgrims against thieves and highwaymen. Now if this solemn dedication did take place at the council of Nablus in January, is it possible that one reason for the passage of canon 20 was to cover this unprecedented situation? For although the so-called Hospitallers had been developing in the Holy Land since the later eleventh century to care for the sick and needy, these new armed,

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18 B. Kedar, 'On the Origins of the Earliest Laws of Frankish Jerusalem: The Canons of the Council of Nablus, 1120', in *Speculum* 74 (1999), pp. 310-36, especially p. 334, c.20 ('If a cleric bears arms for the sake of defense, he is not to be held at fault'); Duggan, *Armsbearing and the Clergy*, cit., pp. 102-07. For a recent thorough discussion of this council, see M. Barber, *The Crusader States* (New Haven, CT & London: Yale University Press, 2012), pp. 129-32, who however does not remark on the connection of Warmund with these two new, interrelated developments (pp. 133-35).

19 *Galterii Cancellarii bella Antiochena*, ed. by H. Hagenmeyer (Innsbruck: Wagner'sche Universitäts-Buchhandlung, 1896), 2.8.6-8, pp. 95-96: 'night and day with his armed clergy and soldiers'.

20 Duggan, *Armsbearing and the Clergy*, cit., pp. 102-03; Barber, *Crusader States*, cit., pp. 132-34. Warmund's letter is in *Letters from the East: Crusaders, Pilgrims and Settlers in the 12th-13th Centuries*, trans. by M. Barber and K. Bate (Farnham, Surrey-Burlington, VT: Ashgate, 2010, Crusade Texts in Translation 18), pp. 42-44.

21 R. Hiestand, 'Kardinalbischof Matthäus von Albano, das Konzil von Troyes und die Entstehung des Templarordens', in ZKG 99 (1988), pp. 295-325, pp. 317-19. For the disappointingly little that we know about Warmund, see Duggan, *Armsbearing and the Clergy*, cit., pp. 106-07, especially nn. 22 and 26.

consecrated knights, soon to be known as 'Templars', were revolutionary indeed and required nearly another twenty years before they were approved completely by Rome[22]. This company received formal recognition and initial statutes in January 1129 at the council of Troyes, presided over by a papal legate, Matthew Cardinal of Albano; was vigorously defended in a treatise *De laude novae militiae* (*On the New Knighthood*) by Bernard of Clairvaux, arguably the most influential figure in all Europe in the second quarter of the twelfth century[23]; and finally fully accepted as an 'order' (*religio et ueneranda institutio*) in the privilege *Omne datum optimum* in 1139, promulgated by Pope Innocent II, who cited John 15:13 in underscoring the task of these *milites Templi* to protect their fellows Christians against pagan incursions, defend the Church, and attack the enemies of Christ. Two additional bulls, *Milites Templi* (1144) and *Militia Dei* (1145), completed the establishment of this new way of religious life[24]. Between the approbation of Troyes, the juggernaut of Bernard of Clairvaux's rhetoric in his *De laude novae militiae*, and the blessing of Pope Innocent II, the opposition to this very great novelty was largely bowled over (but not entirely, as we have been recently reminded[25]), and the way was now paved for Pope Alexander III (1159-81).

For it was he, more than any other supreme pontiff, who appears to have connected the two separate but possibly related developments going back to Patriarch Warmund and the Holy Land in 1120. It was during his long pontificate that not just the three major Spanish military orders (which is usually what is emphasized), but in fact the *five* Iberian military orders came into being with full papal recognition (Calatrava in 1164, Mountjoy or Montegaudio in 1173, Santiago in 1175, and Evora and Alcantara by 1176)[26], including the additional significant innovation of allowing the consecrated knights of the Order of Santiago de Compostella to be married as long as they practiced 'conjugal chastity', thereby further eroding the already porous traditional boundaries

22 On the original *and* continuing differences between the Hospitallers and the Templars, see the salutary reminder of J. Riley-Smith, *Templars and Hospitallers as Professed Religious in the Holy Land* (Notre Dame, IN: University of Notre Dame Press, 2010), especially pp. 61-65. On the other hand, for similarities between the military and monastic orders, see T. Licence, 'The Military Orders as Monastic Orders', in *Crusades* 5 (2006), pp. 39-53.

23 On the dating of this significant treatise, S. Z. Conedera, S.J., *Ecclesiastical Knights: The Military Orders in Castile, 1150-1330* (New York: Fordham University Press, 2015), p. 24, says that Bernard composed it sometime between 1130 and 1136, but also reports Dominic Selwood's argument that Bernard wrote it before the council of Troyes of 1129 (p. 159, n. 39).

24 See *The Templars: Selected Sources*, ed. and trans. by M. Barber and K. Bate (Manchester & New York: Manchester University Press, 2002), pp. 1-66.

25 See Conedera, *Ecclesiastical Knights*, cit., pp. 28-29 and 163-64 nn. 83-86, especially on John of Salisbury, Walter Map, and Isaac of Stella; and, more generally, M. Aurell, *Des Chrétiens contre les croisades. XII^e-XIII^e siècle* (Paris: Fayard, 2013).

26 A. Forey, *The Military Orders from the Twelfth to the Early Fourteenth Centuries* (Toronto: University of Toronto Press, 1992), pp. 23-32, especially pp. 23-24; D. Smith, 'Alexander III and Spain', in *Pope Alexander III (1159-81): The Art of Survival*, ed. by P. Clarke and A. Duggan (Farnham, Surrey-Burlington, VT: Ashgate, 2012, Faith and Culture in the Medieval West), pp. 212-19; A. Duggan, 'Alexander ille meus: The Papacy of Alexander III', in *Pope Alexander III*, cit., pp. 13-49, p. 42; Conedera, *Ecclesiastical Knights*, cit., passim. Only two additional military orders came into being thereafter in Iberia (c. 1200 and in the 1270s).

between clergy and laity[27]. It was also Alexander, responding to questions that flowed into the curia and working with what Anne Duggan has accurately called his 'legal eagles'[28], who ruled in a series of letters that, like everyone else, the clergy enjoyed the right in natural and in Roman law of self-defense, specifically of the right to repel force with force (*vim vi repellere*). These decisions came to be incorporated into the various compilations of canon law, and in turn fully justified the military-religious orders by extending the right of self-defense to all clergy. The pope, the supreme legislator and judge in the (western) Church, had ruled definitively on the matter, and Alexander had therefore implicitly rejected St Ambrose's position on the clergy and self-defense ('The arms of the clergy are tears and prayers') – but then the bishop of Rome always trumps the archbishop of Milan (as the latter had already been firmly reminded in the eleventh century over the use of the term *papa*).

The full significance of this monumental decision of Alexander on the clergy and self-defense was first recognized by Stephan Kuttner, who in his masterful *Kanonistische Schuldlehre* of 1935 traced these decisions of Alexander III[29]. A major impediment to acknowledging clearly the role of this pope here has evidently been the traditional but erroneous identification of Pope Alexander with the canonist Master Roland of Bologna, who in his commentary on Gratian had taken the unusual position of flatly denying legitimate armsbearing to clergy in major orders, but allowing it to those in minor orders[30]. One sees this assumption that it was Master Roland of Bologna who became Pope Alexander III as recently as 1980 in Ernst-Dieter Hehl's book on the Church and war in the twelfth century[31]. It was, in fact, only in 1977 and 1980 that John T. Noonan Jr., and Rudolf Weigand, respectively, showed independently that the future pope was not Master Roland of Bologna, but rather Roland of Siena, cardinal priest of S. Marco and Chancellor of the Roman Church[32]. It is telling, nevertheless,

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27 *The Rule of the Spanish Military Order of St James 1170-1493*, ed. and trans. by E. Gallego Blanco (Leiden: Brill, 1971), cc.12-15, 25, pp. 99-103, 109; Forey, *Military Orders*, cit., p. 189; Conedera, *Ecclesiastical Knights*, cit., pp. 43-44, 67-68.

28 A. Duggan, 'Master of the Decretals: A Reassessment of Alexander III's Contribution to Canon Law', in *Pope Alexander III*, cit., pp. 365-417, especially pp. 384, 386-87.

29 Duggan, *Armsbearing and the Clergy*, cit., pp. 128-40, especially p. 137 ff., who acknowledges his debt on this point (p. 129 n. 103, and p. 137 n. 140) to the great S. Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX. Systematisch auf Grund der handschriftlichen Quellen dargestellt* (Città del Vaticano: BAV, 1935; repr., 1961, Studi e testi 64), pp. 334-79, especially pp. 344-46, 349-54, who consistently identifies Alexander as *the* pope initiating these new developments, and who confirmed this finding in a conversation with the author in Princeton in 1987.

30 *Die Summa Magistri Rolandi, nachmals Papstes Alexander III., nebst einem Anhange: Incerti auctoris quaestiones*, ed. by F. Thaner (Innsbruck: Wagner, 1874; repr., Aalen: Scientia Verlag, 1962), on C.23 q.8, p. 98.

31 E-D. Hehl, *Kirche und Krieg im 12. Jahrhundert. Studien zum kanonischen Recht und politischer Wirklichkeit* (Stuttgart: A. Hiersemann, 1980, Monographien zur Geschichte des Mittelalters 19), pp. 188 ff., a misidentification which helps explain what appears to be a rather confusing discussion of the positions of later canonists on pp. 236-38.

32 See A. Duggan, 'Alexander ille meus', cit., pp. 14-16, especially p. 14 n. 4 for the historiography, who also notes that it was only in the fourteenth century that the Bandinelli of Siena began to claim Alexander as a relative (p. 15, n. 9).

that Kuttner's findings about the clergy and the right of self-defense have still not yet been fully incorporated into the literature, including a contribution by Charles Reid in the 2011 Festschrift for James Brundage on the rights of self-defense and justified warfare in the writings of the canonists of the twelfth and thirteenth century, an essay which says nothing about the clergy and self-defense[33]. In a very recent article on the right of self-defense in the same period, Peter Clarke does observe that the clergy did come to be included under the right *vim vi repellere* in the discussions of the canonists, but he does not underscore the point that it was Alexander III who decided the matter definitively[34]. These changes were, in any event, understood by churchmen by the thirteenth century. If one looks to the legislation of councils and synods all over Europe from then onward, flat prohibitions of clerical armsbearing occasionally appear, but increasingly one finds allowable exceptions (especially for travel and self-defense, and sometimes for the defense of the faith or of the Church) and only qualified condemnations (usually only of *arma aggressionis*, but not *defensionis*)[35].

Alexander III's own general council, Lateran III of 1179, interestingly neither records nor alludes to any of these developments regarding the 'clergy' and armsbearing, but in its very last canon (c.27) *seems* to declare what can only be called a 'crusade' against the Cathars and other heretics infesting Europe, *and* also against mercenaries ravaging it, granting an indulgence of two years or more to those who participated in it[36]. This crusade was hardly an isolated phenomenon. On the contrary, Jonathan Riley-Smith has noted a number of crusades declared by popes between 1157 and 1184, but they all produced few if any results, which probably largely explains why they are largely forgotten, even in histories of the crusades[37]. Most of these abortive crusades fell during Alexander's long reign. Here again Alexander has arguably been effectively denied credit that is usually accorded later popes, especially Innocent III. That Alexander was an extraordinary lawgiver who arguably did more than any other pope to shape the canon law on canonization, the conferral of benefices, the system of vicars, marriage, papal electoral procedure, majority decision-making (including *maior et sanior pars*),

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33 Reid's essay is otherwise excellent: C. Reid Jr., 'The Rights of Self-Defence and Justified Warfare in the Writings of the Twelfth- and Thirteenth-Century Canonists', in *Law as Profession and Practice in Medieval Europe. Essays in Honor of James A. Brundage*, ed. by K. Pennington and M. Harris Eichbauer (Farnham-Burlington: Ashgate, 2011), pp. 73-91; also, A. Duggan, 'Master of the Decretals', cit., discusses the eleven-point inquiry from Archbishop Romuald of Salerno in which the subject of clerical violence does come up (pp. 381-82), but otherwise does not take up this topic in her splendid coverage of Alexander's achievement.

34 P. Clarke, 'Legitimate Self-Defence in Medieval Theory and Practice: the European Ius commune and English Common Law Compared', in RIDC 25 (2014), pp. 123-54, especially p. 125.

35 Duggan, *Armsbearing and the Clergy*, cit., pp. 145-61, 182-200.

36 COGD, pp. 145-47; COD, pp. 224-25. On this possible crusade of 1179 and its larger context, see the excellent essay by N. Housley, 'Crusades against Christians: their Origins and Early Development, c. 1000-1216', in *Crusade and Settlement. Papers Read at the First Conference of the Society for the Study of the Crusades and the Latin East and Presented to R. C. Smail*, ed. by P. Edbury (Cardiff: University College Cardiff Press, 1985), pp. 17-36, especially pp. 25-26, who also remarks that Alexander interestingly did not follow earlier papal precedents and declare a crusade against his arch-foe, Frederick Barbarossa (p. 24).

37 J. Riley-Smith, *The Crusades. A History* (New Haven: Yale University Press, 2005[2]), pp. 131 ff.

judges delegate, and papal appellate jurisdiction has come to be recognized[38]. Now his contributions to the militarization of the clergy and of the Church deserve to be added to this long list of distinctive and influential features of his papacy.

This brings us to Innocent III and his Lateran council of 1215, which, like Alexander III's, was convened toward the end of his pontificate and efficiently conducted within the space of a month. Given all the legal and institutional developments of the previous hundred years, it comes as no surprise that there appears no interdiction on clerical armsbearing as such. The sixteenth constitution is devoted principally to the dress of clerics, but of the things that might be deemed warlike it forbids only "pectoralibus et calcaribus deauratis". It also goes on to say that "tabernas prorsus evitent, nisi forte causa necessitatis in itinere constituti"[39]. On this point of allowing exceptions for necessity, Lateran IV went well beyond its three predecessors. Thanks to the research of Kenneth Pennington and Franck Roumy we now know that the principle "necessity knows no law" was not of classical Roman origin, but rather a creation of the Christian Church. Although it goes back to Popes Leo I (440-61) and Gelasius (492-96), it began to be cited frequently only from Bede onward. By the twelfth and thirteenth centuries it appears in the writings of Bernard of Clairvaux, St Albert (founder of the Carmelites), and Francis of Assisi, as well as in Gratian and in the "Rules of Law" (*Regulae iuris*) of Boniface VIII's *Liber Sextus* (1298)[40]. In the decrees of the four Lateran councils, however, it only bursts forth in Lateran IV, and there no fewer than seven times. From now on, necessity and travel would both routinely provide clergy with valid reasons to bear defensive arms[41].

Two other canons of Lateran IV seem more directly relevant to clerical armsbearing. Constitution 18 concerns "de iudicio sanguinis et duelli clericis interdicto"[42]. Its strictures need to be read closely. Canon 27 of Lateran III had opened with these words: "Sicut ait beatus Leo, licet ecclesiastica disciplina, sacerdotali contenta iudicio, cruentas effugiat ultiones..."[43]. The principle of clerical abstention from the shedding of blood would therefore seem to go back to at least Pope Leo the Great in his letter to

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38 Besides A. Duggan, 'Master of the Decretals', cit., passim, see also K. Pennington, 'Pope Alexander III', in *The Great Popes through History: An Encyclopedia*, ed. by F. Coppa (Westport, CT: Greenwood Press, 2002), I, pp. 113-22.

39 COGD, p. 176; COD, p. 243: 'breast-plates and spurs that are gilded', and 'let [clerics] avoid taverns altogether, unless by chance they are obliged by necessity on a journey'.

40 K. Pennington, 'Innocent III and the Ius commune', in *Grundlagen des Rechts: Festschrift für Peter Landau zum 65. Geburtstag*, ed. by R. Helmholz and others (Paderborn: F. Schöningh, 2000), pp. 349-66; F. Roumy, 'L'origine et la diffusion de l'adage canonique *Necessitas non habet legem* (VIII^e-XIII^e s.)', in *Medieval Church Law and the Origins of the Western Legal Tradition. A Tribute to Kenneth Pennington*, ed. by W. Müller and M. Sommar (Washington, DC: Catholic University of America Press, 2006), pp. 301-19. On the possible significance of Bede in formulating and spreading this principle, see G. H. Brown, *A Companion to Bede* (Woodbridge, Suffolk-Rochester, NY: The Boydell Press, 2009, Anglo-Saxon Studies 12), pp. 117-34.

41 Duggan, *Armsbearing and the Clergy*, cit., pp. 124-26.

42 COGD, p. 177 ('On sentences involving either the shedding of blood or a duel being forbidden to clerics'); COD, p. 244.

43 'As St Leo says, though the discipline of the Church should be satisfied with the judgment of the priest and should not cause the shedding of blood...': COGD, p. 145; COD, p. 224.

Bishop Turribus of Astorga[44], but there does not seem to be much if any literature on this significant subject. The best treatment I have discovered is by Darryl Amundsen, who finds no pertinent legislation before the twelfth century and very confusing and contradictory legislation in the twelfth and thirteenth[45]. Here, in c.18 of Lateran IV, clerics are forbidden to pronounce judgments or execute actions involving the shedding of blood in a number of ways, including secular justice, surgery, and ordeals. A little different is the curious stipulation that "Nullus quoque clericus ruptariis vel balistariis aut huiusmodi viris sanguinum praeponatur"[46], which can be read as a prohibition on compelling clerics to do such things (rather than forbidding them to take command on their own initiative), or as a condemnation of vile mercenaries and lowborn crossbowmen (already condemned earlier in Lateran II, c.29[47]), but not necessarily of true knights acting rightly. However one construes this canon cobbled together out of related yet still disparate elements, it is not a prohibition on clerical armsbearing in any form. In fact, in view of the changes that had been enacted in the twelfth century, one would venture to speculate that the specifications here concerning the clergy and the shedding of blood now limited what previously might have been a sweeping prohibition and thus, *ex silentio*, allowed clergy to shed blood in defense of the faith and themselves.

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44 PL 54:680A. A slightly different translation appears in B. Neil, *Leo the Great* (Oxford & New York: Routledge, 2009, The Early Church Fathers), p. 84: 'Although [the Church] is content with the judgments of priests and avoids bloody vengeance, it is helped nevertheless by the strict regulations of Christian emperors, since those who fear corporal punishment sometimes have recourse to spiritual cures'. In any event, Leo is here evidently not alluding to a law, but only a principle or an ideal; and it is revealing that c.27 of Lateran III cites no other text earlier or later than this one.

45 D. Amundsen, 'Medieval Canon Law on Medical and Surgical Practice by the Clergy', in *Bulletin of the History of Medicine* 52 (1978), pp. 22-44, repr. in his *Medicine, Society, and Faith in the Ancient and Medieval Worlds* (Baltimore & London: The Johns Hopkins University Press, 1996), pp. 222-47. As for the supposed principle 'ecclesia abhorret a sanguine', Amundsen concurs with the earlier judgment of Charles H. Talbot that this is "a literary ghost" created in 1774 by François Quesnay, the famous physician and Physiocrat. On p. 41 (p. 237 of reprint), he cites with clear approbation the conclusion of C. H. Talbot, *Medicine in Medieval England* (London: Oldbourne, 1967), p. 55: "The famous phrase *Ecclesia abhorret a sanguine*, which has been quoted by every writer on medicine for the past two hundred years as the reason for the separation of surgery from medicine, is not to be found either in the text of the Council of Tours, 1163 A.D. (to which they all attribute it) or in any other Church Council. It cannot be found in the Decretals of the Popes nor in any of the medieval commentaries on canon law. It is a literary ghost. It owes its existence to [François] Quesnay, the uncritical historian of the Faculty of Surgeons at Paris, who in 1774, citing a passage from Pasquier's *Recherches de la France* ('et comme l'église n'abhorre rien tant que le sang') translated it into Latin and put it into italics. No earlier source for this sentence can be found. Quesnay himself quoted a register from the archives of the Surgeons of Paris, in which it was stated that 'at the time of Boniface VIII (1294-1303) and Clement V (1305-14) a decree was put forth at Avignon and confirmed by the council of Philip le Bel that surgery was separated from medicine'. No such decree can be found in the register of Boniface VIII, whilst among the ten thousand documents contained in the register of Clement V only one refers to medicine, and that concerns itself with studies at Montpellier".

46 COGD, p. 175 ('Moreover no cleric may be put in command of mercenaries or crossbowmen or suchlike men of blood'); COD, p. 244.

47 COGD, p. 113; COD, p. 203.

The other potentially germane legislation is the famous c.13 forbidding the creation of new religious orders. Was this meant to extend to the so-called military-religious orders? Thus far I have found no evidence to corroborate that hypothesis. Helen Nicholson observed that Innocent III evinced no objection to the militarization of the Teutonic Knights around 1199[48], and Damien Carraz in an important recent article on precursors and imitators of the military orders from the eleventh to the thirteenth centuries uncovered no obstacles to the founding and approval of religious societies for defending the faith in the decades after Lateran IV (e.g., the Order of the Militia of the Faith of Jesus Christ in Toulouse in 1221, the Order of the Military Brothers of St James in Auch around 1225, or the Militia of Jesus Christ in Parma in 1233)[49]. When Thomas Aquinas, in one of the less familiar sections of his *Summa Theologica*, asked "whether a religious institute can be founded for military service?" he answered affirmatively and made no mention of c.13 of Fourth Lateran whatsoever:

> Religio institui potest non solum ad opera contemplativae vitae, sed etiam ad opera vitae activae, in quantum pertinent ad subventionem proximorum et obsequium Dei, non autem inquantum pertinent ad aliquid mundanum tenendum. Potest autem officium militare ordinari ad subventionem proximorum, non solum quantum ad privatas personas, sed etiam quantum ad totius reipublicae defensionem... Unde convenienter institui potest aliqua religio ad militandum, non quidem propter aliquid mundanum, sed propter defensionem divini cultus et publicae salutis; vel etiam pauperum et oppressorum, secundum illud Psalmi, eripite pauperem, et egenum de manu peccatoris liberate[50].

In 1274, at the second council of Lyon, the bishops set out in c.23 the reform of the religious orders, and specifically of the many mendicant groups. In essentially forcing them into the four major orders of friars, the fathers of the council noted that the rules of Carmelites and the Augustinians predated Lateran IV and thus escaped c.13[51]. No question seems to have been raised at Lyon II at all about the military orders, so it would seem *ex post facto* that they were not intended to be covered by c.13 of Lateran IV. Besides, any new military orders after 1216, like the evolving mendicants, had a number of choices among already existing rules to adopt and adapt to define

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48 H. Nicholson, *Templars, Hospitallers and Teutonic Knights. Images of the Military Orders, 1128-1291* (Leicester: Leicester University Press, 1993), p. 25.

49 D. Carraz, 'Precursors and Imitators of the Military Orders: Religious Societies for Defending the Faith in the Medieval West (11th-13th c.)', in *Viator* 41 (2010), pp. 91-111.

50 *Summa Theologica* 2a. 2ae.q. 188, art. 3 ad (trans. by the English Dominican Fathers [New York & London: McGraw-Hill and Eyre and Spottiswoode, 1964-73]), 47:191: 'A religious institute can be founded not only for the works of the contemplative life but also for those of the active life, if they have to do with help to one's neighbor and the service of God, and not for obtaining some worldly good. But military service can be directed to the assistance of one's neighbors, not only as private persons, but also for the defense of the entire nation... Consequently, a religious institute can be fittingly founded for soldiering, not for worldly goods, but for the defense of divine worship and the public good, or of the poor and oppressed, as stated in Psalms [82:4]: "Rescue the poor, and deliver the needy out of the hand of the sinner"'.

51 COGD, pp. 343-46; COD, pp. 326-27.

their life and work – Cistercian, Augustinian, Templar, Santiago de Compostella, and others. None of the new 'orders' would have had to devise anything new or novel to define their existence. The essential novelties had already become law before 1216.

When one reviews all this evidence regarding armsbearing and the clergy, it is striking that the thirteen condemnations issued by the reformers between 1049 and 1095 came forth from councils, most of them presided over by popes or papal legates, but that what one might call the two-fold militarization of the clergy from 1120 onward (in the form of the acceptance of the military-religious orders and of the correlative right of clergy to repel violence with violence) largely bypassed high-level councils save for what happened at Nablus in 1120 and Troyes in 1129. The making of canon law had clearly passed to the popes, as Peter the Chanter intimated in his observations about Alexander III and the objections of 'John of Chartres' (presumably John of Salisbury, bishop of Chartres [1176-80]) to some of the decrees of Lateran III:

> Item, patet decreta esse mobilia ex eo quod in corde domini pape sint, ut scilicet ea interpretetur ad libitum suum. Quod si secundum ea iudicaverit, iuste iudicauit; si contra ea similiter iuste iudicasse dicetur. In eius enim potestate est condendi, interpretandi, abrogandi canones[52].

In short, on the matter of armsbearing and the clergy (however understood and defined), the ecumenical councils, including Lateran IV, had almost nothing to say about these fateful developments save for the curious pronouncements in passing of Vienne – which itself also had the monumental task of dealing with the matter of the Templars, the only major suppression of a religious order before the Reformations from the 1520s onwards, and over which the pope and his bishops and their council had very little control.

52 'It is clear that the decrees can be changed, since they are in the heart of the lord pope and he may interpret them as he pleases. If he judges according to [the decrees], he judges justly; if he judges contrary to them, he is likewise said to have judged justly. For the making, interpreting [and] abrogating of the canons is in his power'. *Petri Cantoris Parisiensis Verbum adbreviatum. Textus prior*, ed. by M. Boutry, CCCM 196A (Turnhout: Brepols, 2012), c.46, p. 304. Quoted by I. S. Robinson, *The Papacy 1073-1198: Continuity and Innovation* (Cambridge: Cambridge University Press, 1990), p. 143, who cites the older text in PL 205:164BC, c.53. The last sentence alludes to C.25 q.1 d.p. c.16 § 2.

PART II

Canon Law and Canonistic Jurisprudence for Regulating Clerics and the Liturgy

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The Lateran Council and the Greeks: c.4 *Licet Graecos*

From the viewpoint of the Eastern churches, the Fourth Lateran Council met under the shadow of the Fourth Crusade and the traumatic sack of Constantinople (April 1204). This trauma exacerbated existing tensions, calling forth responses from Innocent III and his council. The Lateran council issued canons to be applied in the East. One, *Licet Graecos* (c.4: X 3.42.6), to be examined here, was concerned with liturgical uses[1]. Another reasserted the traditional order of precedence among the five patriarchal sees: Rome, Constantinople, Alexandria, Antioch and Jerusalem (c.5, *Antiqua*: X 5.33.23)[2]. A third canon required Latin bishops to preside locally but to provide for the religious needs of other populations with diverse languages (c.9, *Quoniam in plerisque*: X 1.31.14)[3]. In addition, the Lateran council issued legislation promoting future crusades, leading to the failed Fifth Crusade or Crusade of Damietta (1218-21)[4]. The Lateran decrees had their impact in canon law, both its teaching and its practice. This included the importing of canonistic norms into the Latin enclaves in the East.

The crusades had created these enclaves in the East, deploying populations practicing a liturgy they believed to be more correct amid populations of Greek and other eastern Christians whom they regarded as being in error. The crusader states extended an uneasy tolerance to the rites of these populations. By the late twelfth century, however, relations with the Greeks had begun to sour. Eventually the Greek canonist Theodore Balsamon (d. 1195), when he became absentee patriarch of Antioch, warned the faithful not to participate in the erroneous practices of the Latins[5]. The sack itself included thefts of relics and sacred vessels, even the defiling of

1 COGD 2.1, pp. 168-69. English translations of *Licet Graecos* are taken from DEC 1, pp. 235-36.

2 COGD 2.1, p. 169; DEC 1, p. 236. See essay by Steven Schoenig, S.J. in this volume.

3 COGD 2.1, p. 172; DEC 1, p. 239.

4 One of these crusade decrees became c. *Ad liberandam* (X 5.6.17); see COGD 2.1, pp. 200-04; DEC 1, pp. 267-71. J. A. Brundage, *Medieval Canon Law and the Crusader* (Madison: University of Wisconsin Press, 1969), pp. 181-83.

5 B. Hamilton, *The Latin Church and the Crusader States. The Secular Church* (London: Variorum, 1980), pp. 159-87.

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The Fourth Lateran Council and the Development of Canon Law and the ius commune, ed. Atria Larson and Andrea Massironi, Turnhout: Brepols, 2018 (EMI 7), pp. 79–88

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the main altar of Hagia Sophia. This and the creation of a Latin empire with its seat in Constantinople embittered these tense relationships further[6]. Although Innocent III advised the new Latin patriarch of Constantinople to permit the Greeks to follow their customary rites, pending any further decision of the Roman see[7], this intrusion of Latins into the eastern empire made already tense relations even worse.

The reactions of the Greeks, as perceived in the West, inspired the Lateran canon *Licet Graecos*, censuring the Greeks for rejecting Latin liturgical practices. Among the Greek practices criticized was the rebaptism of persons who had received the sacrament from Latin clergy, "Baptizatos etiam a latinis et ipsi greci rebaptizare ausu nefario praesumebant et adhuc, sicut accepimus, quidam hec agere non verentur"[8]. In addition, Greek priests were accused of scrubbing altars after Latin priests had celebrated mass on them:

> Postquam enim grecorum ecclesia cum quibusdam complicibus et fautoribus suis ab obedientia sedis apostolicae se subtraxit, in tantum greci ceperunt abhominari latinos quod inter alia que in derogationem eorum impie committebant, si quando sacerdotes latini super eorum celebrassent altaria, non prius ipsi sacrificare volebant in illis quam ea tanquam per hoc inquinata lavissent[9].

Note that the canon tied these divergences in sacramental acts to the disobedience of the Greeks, who had withdrawn from submission to the apostolic see.

The primary liturgical issue between Greeks and Latins in this case was the type of bread used in the Eucharist. The Latins used unleavened bread, which Jesus had employed at the Last Supper. The Greeks regarded this usage as Judaizing. They used leavened bread, arguing that the yeast represented the action of the Holy Spirit in the Church. The Greeks dismissed the Latin practice entirely, while many Latins grudgingly accepted the Greek practice as valid but inferior for its departure from biblical practice[10].

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6 C. M. Brand, *Byzantium Confronts the West, 1180-1204* (Cambridge, MA: Harvard University Press, 1968), pp. 232-69. For Nicetas's account of the desecration of Hagia Sophia, see *Recueil des historiens des croisades. Historiens grecs*, 1 (Paris: Imprimerie nationale, 1875), pp. 397-99; *Crusade and Christendom: Annotated Documents in Translation from Innocent III to the Fall of Acre, 1187-1291*, ed. by J. Bird and others (Philadelphia: University of Pennsylvania Press, 2013), pp. 58-60. For an account of the theft of relics written by Gunther of Paris, see pp. 60-63.

7 D. Gress-Wright, *The Gesta Innocentii III: Text, Introduction and Commentary* (Dissertation, Bryn Mawr College, 1980), pp. 233-36; *The Deeds of Innocent III by an Anonymous Author*, trans. by J. M. Powell (Washington, DC: The Catholic University of America Press, 2004), p. 191.

8 COGD, 2.1, p. 169; DEC 1, pp. 235-36: 'The Greeks even had the temerity to rebaptize those baptized by the Latins; and some, as we are told, still do not fear to do this'.

9 COGD 2.1, p. 169; DEC 1, p. 235: 'For, after the Greek Church together with certain associates and supporters withdrew from the obedience of the apostolic see, the Greeks began to detest the Latins so much that, among other wicked things which these committed out of contempt for them, when Latin priests celebrated on their altars they would not offer sacrifice on them until they had washed them, as if the altars had been defiled thereby'.

10 C. Schabel, 'The Quarrel over Unleavened Bread in Western Theology, 1234-1439', in *Greeks, Latins, and Intellectual History 1204-1500*, ed. by M. Hinterberger and C. Schabel (Leuven: Peeters, 2011), pp. 85-127.

Evidence for the practice of washing altars, at least as the Latins perceived it, is provided in the writings of Jacques de Vitry, who arrived in the Levant in 1216 as the newly named bishop of Acre. Writing to masters in Paris, Jacques said that the Syrians (*Suriani*), because they followed the rite of the Greeks, using leavened bread, held 'our sacrament' in contempt because unleavened bread was used. They did not bow their heads when Viaticum was borne to the sick, and they washed altars after Latin priests had used them[11]. In his *Historia orientalis*, Jacques said the Syrians obeyed the Greeks but gave lip service to the Latins. The Syrians, like the Greeks, regarded the Latins as excommunicated. This was the reason that they washed the altars the Latins used for their rites:

> Cum igitur tam Graeci quam Suriani, vt praedictum est, omnes Latinos excommunicatos reputent, altaria supra quae Latini celebrauerunt diuina, priusquam in ipsis celebrant, abluere consueuerunt[12].

The practice of rebaptism by the Greeks has a more secure history. The validity of the Latin formula was questioned as early as 1054 by Michael Keroularios, when he was at odds with Pope Leo IX and his legate, Humbert of Silva Candida. The differences between Latin and Greek formulas, the one emphasizing the priest's action and the other emphasizing the rite itself, was a subject of discord in southern Italy at least as late as the pontificate of Gregory IX (1227-41). Moreover, Greek writers both defended their practice and criticized those of the Latins. Latin clergy, including Pope Gregory, were known to denounce Greek baptisms and even argue for rebaptism. Nevertheless, rebaptism is more often found documented in Greek practice[13].

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11 *Lettres de Jacques de Vitry (1160/1170-1240) évêque de Saint-Jean-d'Acre*, ed. by R. B. C. Huygens (Leiden: Brill, 1960), p. 84: "et quia de pane fermentato more Grecorum conficiunt sacramenta, adeo nostra contempnebant sacramenta, que de pane azimo conficimus, quod ea nolebant adorare vel capita ad illa inclinare cum a sacerdotibus nostris Corpus domini ferebatur infirmis, immo super altaria nostra celebrare nolebant nisi prius ea abluissent". English translation by Iris Rau, accessed via Leeds Medieval Texts in Translation [http://www.leeds.ac.uk/arts/downloads/file/1147/a_letter_of_jacques_de_vitry_121617] on April 7, 2015: 'Because they administered the sacraments with leavened bread according to the Greek manner, they scorned our sacraments which we administered with unleavened bread, to such extent that they refused to respect them or [even] to bow their heads towards them when the Holy Body of the Lord was brought by our priests for the sick. Furthermore they were unwilling to celebrate [the mass] on our altars unless they had first washed them down'.

12 *Iacobi de Vitriaco ... libri dvo, quorum prior Orientalis, siue Hierosolymitanae, alter, Occidentalis historiae nomine inscribitur* (Douai: Balthazar Beller, 1597), p. 142. See also Jacques de Vitry, *Histoire orientale. Historia orientalis*, ed. and trans. by J. Donnadieu (Turnhout: Brepols, 2008, Sous la Règle de saint Augustin 12), p. 302. Jacques de Vitry, *The History of Jerusalem A.D. 1180* (London: Palestine Pilgrims' Text Society, 1896), p. 71, accessed via the Hathi Trust Digital Library [https://babel.hathitrust.org/cgi/pt?id=ucm.5327373307;view=1up;seq=5], July 7, 2016: 'Now, since both the Greeks and the Syrians, as aforesaid, hold all Latins to be excommunicate, they are wont to wash altars whereon Latins have celebrated Mass, before they celebrate thereon'.

13 Y. P. Avvakumov, 'The Controversy over the Baptismal Formula under Pope Gregory IX', in *Greeks, Latins, and Intellectual History*, cit., pp. 69-84. This controversy makes no reference to chrismation of reconciled heretics, a Greek practice approved by Gregory the Great; see *Enchiridion symbolorum definitionum et declarationum de rebus fidei et morum*, ed. by H. Denzinger and A. Schönmetzer (Bologna: Edizioni Dehoniane, 1996), p. 164.

While still a cardinal, Pope Innocent III had also noted the sacramental issues between Latins and Greeks in his tract *De sacro altaris mysterio*. On the question of the Eucharistic bread, he said the Greeks fell into pertinacious error by using leavened bread at the altar[14]. Innocent contrasted Constantinople as a seedbed of heresies and heresiarchs with the Roman Church as founded on the firm rock of apostolic faith. The papacy was tasked not just with upholding the faith but with *ecclesiastici ritus regulam docuere*[15]. The Greeks had strayed at the time of Pope Leo IX, creating division – among other things – by rejecting the rite of sacrifice handed down from Peter and Paul[16].

Innocent's concept of papal primacy and his role as Vicar of Christ was expressed in a letter to the patriarch of Constantinople early in his pontificate. His defense of the Roman Church conceded the temporal priority of Jerusalem, but claimed superior dignity for Rome. The ultimate issue was not Innocent's own status but his pontifical role in nourishing the faithful. The pope was the one shepherd of the one fold under Christ, the prince of shepherds, tasked with seeing to the welfare of the flock. This left no competing role for the patriarchs in matters of ecclesiastical power[17]. This text appeared in the collection of Rainer of Pomposa under the title *De primatu sedis apostolicae*, but it did not enter into the wider stream of canon law[18]. Another early letter to the patriarch said it was not permitted to dissent from the unity of the apostolic see, the mother of all other churches[19].

This issue came down to practicalities in the East. The pope upbraided his legate for the diversion of the Fourth Crusade, including the ill effects of sacrilege on the cause of ecclesiastical union[20]. Innocent, nonetheless, tried to bring about union, obedience and some degree of liturgical conformity. Thus he wrote to the clergy of the city of Constantinople emphasizing the return of the Greeks to obedience[21]. Overall, Pope Innocent showed a willingness to push some issues but not others as long as unity was maintained. In a letter to the vicar in Constantinople, the pontiff said that simple priests in the city were not to administer the sacrament of confirmation, a rite reserved to bishops according to western practice[22]. Innocent was willing, however, to contemplate tolerating Greek Eucharistic practices if conformity to Latin rites

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14 *Innocentii III Romani Pontificis mysteriorum evangelicae legis et sacramenti eucharistiae libri sex*, PL 217:855A. The author has not been able to consult Innocent III, *Il sacrosanto mistero dell'altare*, ed. by S. Fioramonti and M. Sodi (Città del Vaticano: Libreria editrice vaticana, 2002).

15 *Mysteriorum evangelicae legis et sacramenti eucharistiae libri sex*, PL 217:857D-58A. My translation: 'to offer instruction about the rule for the ecclesiastical rite'.

16 *Mysteriorum evangelicae legis et sacramenti eucharistiae libri sex*, PL 217:858A-B.

17 *Apostolicae sedis primatus*: Po. 862 (Nov. 12, 1199); *Reg. Inn. III*, 11.200(209), pp. 382-89; PL 214:758D-765B.

18 Canon *Apostolicae sedis*, PL 216:1186C-1191C. See also *Die Dekretalensammlung des Bernardus Compostellanus Antiquus*, ed. by H. Singer (Wien: Alfred Holder, 1914), pp. 37-38.

19 *Reprobata quondam*: Po. 350; *Reg. Inn III*, 1.354, pp. 528-30; PL 214:327B-329A.

20 See *Crusade and Christendom*, cit., pp. 63-65.

21 J. C. Moore, *Pope Innocent III (1160/61-1216): To Root Up and to Plant* (Notre Dame: University of Notre Dame Press, 2009), pp. 138-39.

22 *Quanto de benignitate*: Po. 868 (Nov. 16, 1199); *Reg. Inn. III*, 11.203(212), pp. 398-99; PL 214:772A-D, 216:1201C-1202A. The second reference in PL is to Rainer's collection of canons.

could not be attained in the East. Innocent even revised his sacramental tract to acknowledge the validity of a mass using leavened bread[23].

Despite this practicality, Innocent still felt obligated to address the resentments the subjugated Greeks showed the Latins. He and his advisors may have been thinking about the reconsecration of an altar defiled by sacrilege when composing *Licet Graecos*. According to a letter of Innocent to the archbishop of Compostella (X 3.40.4), an altar polluted by blood through homicide or wounding was to be reconciled by employing blessed water together with wine and ashes (*ipsa reconciliari poterit per aquam cum vino et cinere benedictam*). Innocent may have equated the cleansing done by the Greeks with this rite of reconciliation of an altar which he might have employed himself when one had been defiled.

The canon *Licet Graecos*, once it entered canon law, influenced study and teaching through its inclusion in the *Decretals of Gregory IX*, when that collection was transmitted to the universities in 1234. Learned opinion on liturgical issues in the East was formed by commentary on the Lateran texts. The earliest transmission of *Licet Graecos* was in the collected decrees of Lateran IV. The understanding of this canon was influenced by the rubrics assigned to it in these manuscripts. The most extensive summary, in one manuscript, reads: *De grecis qui rebaptizant et lauant altaria super quibus latini celebrant* (Concerning the Greeks who rebaptize and wash altars on which the Latins celebrate). The most common rubrics emphasize the pride of the Greeks or their pride against the Latins: *De superbia grecorum contra latinos*. These rubrics would orient the reader to the Latin opinion of the Greeks, treating their resentment of the intruding clergy as sinful pride[24]. The canon entered *Compilatio quarta* (1216) as the first chapter in the title *De baptismo et eius effectu* (4Comp. 3.16.1). This placement highlighted the issue of rebaptism rather than the washing of altars[25]. In 1234, *Licet Graecos* entered the *Liber Extra* or *Decretals of Gregory IX* (1234) under the same title (X 3.42.6), providing the same emphasis. The *Margarita Baldi* on the commentary of Innocent IV also emphasized the issue of rebaptism by the Greeks[26].

The *casus* or summaries accompanying the Lateran canons offered brief explanations of the topics of the texts. The *Casus Parisienses* on c. *Licet Graecos* said the Greeks introduced the rejected practices of rebaptizing and washing altars *in odium latinorum* (out of hatred for the Latins)[27]. The *Casus Fuldenses* said these issues were among the many in which the Greeks sinned. The author underlined the penalties of excommunication and deposition from office to be inflicted on priests who did these

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23 H. Tillmann, *Pope Innocent III*, trans. by W. Sax (Amsterdam: North-Holland, 1980), pp. 264-65.

24 *Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum*, ed. by A. García y García (Città del Vaticano: BAV, 1981, MIC Series A 2), p. 141.

25 *Quinque compilationes antiquae nec non Collectio canonum Lipsiensis*, ed. by E. Friedberg (Leipzig: Tauchnitz, 1882; repr. Graz: Akademische Druck- und Verlagsanstalte, 1956), p. 144.

26 *Margarita decretalium Baldi, loco repertorii Innocentii IV* (Francofurti ad Moenum: Sigismundus Feierabendt, 1570), "Baptizatus a Latino non rebaptizetur a Graeco, nec converso, De baptis., Licet, 3.42.6", accessed via the Medieval Canon Law Virtual Library [http://works.bepress.com/david_freidenreich/46], on April 12, 2015.

27 *Constitutiones Concilii quarti Lateranensis*, cit., p. 467.

condemned things[28]. A few canonists commented on the Lateran decrees early on. Johannes Teutonicus simply stated that the Greeks were subject to the Roman see[29]. Damasus reproved those whose practices were not congruent with the liturgy of the Roman Church. No one was to abominate sacraments administered according to the form of the universal Church, even rites properly conducted by heretics (*etiam ab hereticis collatum*)[30].

As the decretalists hit their stride commenting on the *Extra*, Bernard of Parma tackled *Licet Graecos* in his Ordinary Gloss. His *casus* on the text summarized the developments which followed the break of the Greeks from obedience to the Roman Church. He blamed hatred of the Latins by the Greeks for both the washing of altars, regarded as polluted, and the rebaptism of those christened by Latins, an act of rashness[31]. Bernard added that the Greeks were supposed to conform in liturgy *tamquam filii* (like children) obeying their mother, the Roman Church, once they returned to the fold. Otherwise they risked excommunication and deposition from their benefices[32]. Bernard reiterated in his glosses on the text the claim that the Church of the Greeks was subject to that of Rome[33].

Thereafter, commentary on *Licet Graecos* often went in a less polemical direction. Pope Innocent IV, writing on that text as a private doctor, discussed the form of baptism, saying faulty use of the words did not annul the rite if the names of the persons of the Trinity were expressed correctly. When in doubt, Innocent was willing to presume that even an illiterate priest had baptized legitimately unless there was strong evidence to the contrary. This exposition of the canon included his defense of baptism by Greeks, despite differences in the formula employed, when the priest administered the sacrament in his own language[34]. In that context, the pope said that denying the validity of baptism in Greek would be the equivalent of denying that a mother could baptize her child in a case of life-threatening emergency if she used the vernacular[35]. However, Innocent said that baptism was not valid if it was used

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28 *Constitutiones Concilii quarti Lateranensis*, cit., p. 484.

29 *Constitutiones Concilii quarti Lateranensis*, cit., p. 191.

30 *Constitutiones Concilii quarti Lateranensis*, cit., pp. 420-21.

31 Ordinary Gloss at X 3.42.6 *casus*: "Postquam Graeci se subtraxerunt ab obedientia ecclesiae Romanae in tantum coeperint abominari Latinos, quod inter alia quae contra eos committebant, si quando sacerdotes Latini in eorum sacrificassent altaribus, non prius sacrificabant in ipsis, quam ea, tamquam per hoc polluta, lauissent: et baptizatos a Latinis presumebant ausu temerario rebaptizare".

32 Ordinary Gloss at X 3.42.6 *casus*.

33 Ordinary Gloss at X 3.42.6 s.v. *Reuertentes*: "De iure enim ecclesia Graecorum subiecta est Romanae ecclesiae".

34 Innocent IV, *Commentaria: Apparatus in V libros decretalium* (Francofurti ad Moenum: Sigismundus Feierabendt, 1570; repr. Frankfurt am Main: Minerva, 1968), fol. 456va-b [*ad* X 3.42.6].

35 Innocent IV, *Commentaria*, cit., fol. 456vb [*ad* X 3.42.6]: "Et si aliter diceres oportet te dicere, quod mater quae baptizat filium in necessitate non baptizat, si per verba vulgaria dicat. Et etiam quod Graecus non possit in sua lingua: neque vulgari neque Latina. scilicet. vt sacramentum baptismi accipiant: sed vt satis sint'. Similarly, Antoninus of Florence accepted baptism in any tongue, Latin, Greek, Hebrew or the vernacular: see *Summa theologiae*, 4 vols. (Verona: P. Ballerinus, 1740; repr. Graz, Akademische Druck u. Verlagsanstalt, 1959), III, pp. 709, 715.

in an effort to save a sick person without any intention of conferring the sacrament (*non intenderet conferre baptismum*)[36].

Geoffrey of Trani discussed baptism briefly in his *Summa super titulis decretalium*. He said that a Latin could baptize in Greek or another tongue in a case of necessity because the apostles spoke various tongues and the 'real form' of the sacrament was what mattered[37]. Hostiensis, in his *Summa super titulis decretalium* said the same thing, accepting use even of the Hebrew language for baptisms by Latins under certain circumstances. The cardinal underlined the need for using the *verba apta* (appropriate words) in any tongue[38].

Hostiensis discussed *Licet Graecos* in his commentary on the *Extra*, returning to the issues originally addressed at Fourth Lateran. The cardinal emphasized the subjection of the Greek Church to the Roman Church. He quoted the Lateran decree *Firmiter credimus* (c.1) to prove that the Roman Church was the *mater et magistra* (mother and teacher) of the other churches[39]. The cardinal argued for tolerance of the Greek rite unless their practices offended God[40]. Addressing the practice of rebaptism denounced in the canon, Hostiensis accepted the Greek rite of baptism, saying it should be tolerated. However, the practice of rebaptism was described as an intolerable error[41]. Moreover, the cardinal regarded rebaptizing as an act done presumptuously (*presumptuose*)[42]. Hostiensis reminded his readers that even baptism by a heretic was valid if he followed the form used by the Church[43]. He went on to discuss whether a simple priest had botched the form when using a language like Greek or German. Hostiensis repeated what others had said about accepting a rite done with the proper intention and using the divine names in an intelligible way. He repeated the argument that ruling out a baptism on account of words said badly would be like rejecting baptism by a mother of her dying child even if she used Greek, German or some other tongue[44].

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36 Innocent IV, *Commentaria*, cit., fol. 456vb [*ad* X 3.42.6].

37 Geoffrey of Trani, *Summa perutilis et valde necessaria do. Goffredi de Trano super titulis decretalium...* (Lugduni: Johannes Moysin, 1519; repr. Aalen: Scientia Verlag, 1968), fol. 164vb [*ad* X 3.42]: "Nam et apostoli loquebantur variis linguis et forma realis attentenda est non verbalis", accessed via the Medieval Canon Law Virtual Library [http://works.bepress.com/david_freidenreich/46], on April 12, 2015.

38 *Summa domini Henrici cardinalis Hostiensis* (Lugduni: Johannes de Lambray, 1537; repr. Aalen: Scientia, 1962), fol. 186vb [*ad* X 3.42].

39 Henricus de Segusio (Hostiensis), *Decretalium commentaria*, 5 vols. (Venetiis: apud Iuntas, 1581; repr. Frankfurt: Vico Verlag, 2009), III, fol. 170vb [*ad* X 3.42.6].

40 Hostiensis, *Decretalium commentaria*, cit., III, fol. 170vb [*ad* X 3.42.6]: "*Ac ritus eorum*. Adhuc tolerantur ritus grecorum... [Inquantum cum domino] id est. salua offensione fidei. in illis. Enim. Nemini est parcendum: quia nec est deferendum alicui homini contra Deum...".

41 Hostiensis, *Decretalium commentaria*, cit., III, fol. 170vb [*ad* X 3.42.6]: "etiam quantum ad formam baptismi, quam seruant, ab ecclesia tolerari... quamuis igitur forma baptismi, quam seruant, possit ab ecclesia tolerari, ut no. supra. c. 1. error tamen eorum intolerabilis. Si ipsum uellent inducere, non esset aliquatenus tolerandus".

42 Hostiensis, *Decretalium commentaria*, cit., III, fol. 171ra [*ad* X 3.42.6].

43 Hostiensis, *Decretalium commentaria*, cit., III, fol. 171ra [*ad* X 3.42.6]: "quia sacramentum baptismi a quocunque etiam haerético, dummodo in forma ecclesiae conferatur, effectum habet".

44 Hostiensis, *Decretalium commentaria*, cit., III, fol. 171ra [*ad* X 3.42.6]. Hostiensis also reiterated the uselessness for salvation of a baptism performed only to effect a cure.

Hostiensis rejected any practices that corrupted the faith; they were not to be tolerated. He especially applied this to Greek attitudes toward the rites of the Latins[45]. Writing about the washing of altars by the Greeks, the cardinal said they did this impudently (*impudenter*). Even if the Latins were excommunicated, this would not affect an altar[46]. Hostiensis concluded his gloss on *Licet Graecos* by affirming that the universal Church was one sheepfold (*ovile*) with one shepherd on earth, the Roman pontiff[47].

These decretalist writings culminated in the *Novella commentaria* of Johannes Andreae, written in the early fourteenth century. His commentary was heavily based on those by Innocent IV and Hostiensis. Johannes also occasionally treated the opinions stated in the Ordinary Gloss. The *Novella* said the canon rejected *duplicem Grecorum excessum* (the double excess of the Greeks). It focused, however, on the prohibition of rebaptism by Greeks of those christened by Latins[48]. The *Novella* repeated Hostiensis' comments on tolerating Greek rites except where the intolerable error of rebaptism was inflicted on those baptized by Latins[49]. (The canonist also said rebaptism offended the sacrament[50]). Johannes Andreae reiterated what his predecessors had said about linguistic problems with the form of baptism and the ability of anyone, even a heretic, to baptize legitimately[51]. The *Novella*'s comment on *Licet Graecos* concluded with an evocation of the unity of the Church as one sheepfold[52].

The canonists consistently said the rites of the Greeks could be tolerated. They had greater problems with those practices, rebaptism and the washing of altars, which treated the sacraments of the Latins as invalid. The canonists regarded such acts as disobedient, rash, and not to be tolerated. The issues of liturgical practice, however, were not treated as crucial when the Second Council of Lyon met in 1274. The doctrine of the Trinity, by that date, was regarded as the fundamental issue dividing East from West[53].

The sacraments received renewed attention at the Council of Ferrara-Florence (1438-45), which reaffirmed the western list of seven sacraments and many of the

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45 Hostiensis, *Decretalium commentaria*, cit., III, fol. 171ra [*ad* X 3.42.6]: "*Abhominari latinos.* quod non est tolerandum, cum ex hoc posset sequi fidei corruptela, et in his immineant animarum pericula, et talia ecclesiae derogent honestati ...".

46 Hostiensis, *Decretalium commentaria*, cit., III, fol. 171ra [*ad* X 3.42.6]: "*Lauissent.* satis impudenter, quia et si latini essent excommunicati, non tamen propter hoc afficerentur altaria. supra. de sacra. Non iteran. c. ij. Quae enim sunt sancta".

47 Hostiensis, *Decretalium commentaria*, cit., III, fol. 171ra [*ad* X 3.42.6].

48 *Johannis Andreae... In tertium Decretalium librum Nouella Commentaria ...* (Venetiis: apud haeredem Hieronymi Scoti, 1581; repr. Torino: Bottega d'Erasmo, 1968), fol. 228va [*ad* X 3.42.6]: "Baptizatos a Latinis Graeci rebaptizari non debent".

49 Johannes Andreae, *Nouella Commentaria*, cit., fol. 228va [*ad* X 3.42.6], s.v. *Periculum.*

50 Johannes Andreae, *Nouella Commentaria*, cit., fol. 228vb [*ad* X 3.42.6], s.v. *Ausu.*

51 Johannes Andreae, *Nouella Commentaria*, cit., fol. 228vb [*ad* X 3.42.6]: "*Rebaptizare.* satis imprudenter, quia sacramentum baptismi collatum a quodam etiam haeretico valet".

52 Johannes Andreae, *Nouella Commentaria*, cit., fol. 228vb [*ad* X 3.42.6], s.v. *Ovile.*

53 The canon *Fideli ac devote* [VI 1.1.1] of the Second Council of Lyon focuses on the doctrine of the Trinity and the inclusion by the Latins of the *filioque* in the Nicene Creed, not on the sacraments. That text is omitted from COGD 2.1. *Fideli* and the profession of faith offered by Michael VIII

Latin sacramental practices in the decrees declaring the reunion of eastern and western churches. Although the council's norms were largely western, the decrees were somewhat irenic in tone, accepting the validity of eastern Eucharists. The Greeks were offered acceptance of their use of leavened bread[54]. The Armenians were taught the Latin idea of seven sacraments. This included affirming the basic materials of the Eucharist, wheat bread and watered wine, without mentioning yeast[55]. The decree for the Syrians said it was irrelevant whether the Eucharistic bread had been baked on the day of the celebration or on a day before. It also affirmed the words of Eucharistic institution used in the Latin liturgy[56]. The leading delegate of the Maronites and Chaldeans, including their community on Cyprus, had to promise giving up the addition of oil to the sacramental bread[57].

In pastoral terms, the differences expressed over liturgical practice in the Lateran decrees were most important to bishops and priests holding positions in the East. Any impact of the Lateran decree *Licet Graecos* and its commentaries can be tracked most easily on Cyprus, where the Latins coexisted with the Greeks and other eastern Christians for centuries. The 1220 agreement of western rulers and clergy made little reference to the Greeks except to say their clergy should obey Latin bishops. The Greek patriarch of Constantinople, living in exile in Nicaea, wrote to the Greeks of Cyprus urging resistance to their subjection to Latin prelates[58]. The resentment felt by some Greeks boiled over in the case of thirteen monks from Our Lady of Kantara, who were burned as heretics in 1231 as the result of a confrontation over the issues dividing East from West. Among the accusations against the monks was that they denied the validity of any Eucharist celebrated with unleavened bread, saying God was absent from the Latins' altars. These monks thought the Latins had Judaized and were guilty of paganism too, while their Eucharist was 'mere mud'[59]. Pope Gregory IX later unsuccessfully sought reconciliation, but the monks came to be regarded as martyrs, a sign of continuing division[60].

The synods of Nicosia, beginning in 1252, decreed respect for Latin practices, including the Elevation of the Host and the carrying of Viaticum to the sick[61]. The Greek clergy were enjoined not to insult the Latins, especially at the Elevation or

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Palaiologos appear in Denzinger, *Enchiridion symbolorum*, pp. 275-77. *Fideli* appears in DEC 1, p. 314. The crusade decree *Zelus fidei* did mention bringing the Greeks back to unity: see COGD 2.1, pp. 289-307, pp. 290-91; DEC 1, pp. 309-14, pp. 310-11.

54 COGD 2.2, p. 1216; DEC 1, p. 527.

55 COGD 2.2, pp. 1241-43; DEC 1, pp. 545-46.

56 COGD 2.2, p. 1291; DEC 1, p. 581.

57 COGD 2.2, p. 1315; DEC 1, p. 590.

58 C. Schabel, 'Martyrs and Heretics, Intolerance of Intolerance: The Execution of Thirteen Monks in Cyprus in 1231', in C. Schabel, *Greeks, Latins, and the Church in Early Frankish Cyprus* (Farnham: Ashgate, 2010, CSS 949), pp. 1-31, pp. 28-31. See also the letter of Gregory IX in *The Synodicum Nicosiense and Other Documents of the Latin Church of Cyprus, 1196-1373*, ed. by C. Schabel (Nicosia: Cyprus Research Center, 2001), p. 297.

59 Schabel, 'Martyrs and Heretics', cit., pp. 10-14.

60 Schabel, 'Martyrs and Heretics', cit., pp. 16, 29-32.

61 *Synodicum Nicosiense*, pp. 98-101, 254-55.

the carrying of Viaticum. Different customs were supposed to be permitted within the unity of the Church. This included acceptance of the use of unleavened bread by the Latins[62]. By 1313, the celebration of the feast of Corpus Christi was authorized by a papal legate in a synod of Nicosia. Because an unleavened host would be carried through the streets, this offered another occasion of potential confrontation between Latins and Greeks[63]. A 1353 statute from Nicosia forbade Greek and Latin clergy to administer to each other's flocks except when necessity required it[64].

Behind these efforts to prevent confrontation lay the conviction by both the Greeks and Latins that the other was wrong. The Latin side of this was expressed in a letter of Pope Innocent IV saying Greek usages could be tolerated if obedience was offered to Rome, but practices like the anointing the Greeks did in baptism were to be tolerated only if they could not be rooted out[65]. Nonetheless, issues between Latins and Greeks remained contentious on the island. By 1263, Urban IV wrote to the archbishop of Nicosia authorizing him to act against Greeks and Syrians who refused to observe what they were obliged to and abused the Latin Church instead[66]. In addition, he wrote to the king's bailiff urging support for the measures the archbishop felt compelled to take[67]. Such measures were threatened without avail. In the fifteenth century, John-Jerome of Prague said the Greeks of Cyprus and Rhodes turned their backs when a Latin priest elevated an unleavened host which he had consecrated[68]. However, there is evidence on Naxos and Cyprus that some churches had separate altars for Greek and Latin liturgies, allowing for coexistence within the same building of different Eucharistic usages long after Lateran IV had adjourned. Although this was not peace more than three hundred years after the sack of Constantinople and the Fourth Lateran Council, it was a form of ecclesiastical truce[69].

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62 *Synodicum Nicosiense*, pp. 118-19, 124-27.

63 *Synodicum Nicosiense*, pp. 222-23, citing the original authorization of the feast by Pope Urban IV.

64 *Synodicum Nicosiense*, pp. 268-71.

65 *Synodicum Nicosiense*, pp. 307-08.

66 *Synodicum Nicosiense*, pp. 320-23.

67 *Synodicum Nicosiense*, pp. 324-25.

68 Schabel, 'Martyrs and Heretics', cit., p. 32.

69 N. Coureas, 'The Latin and Greek Churches in Former Byzantine Lands under Latin Rule', in *A Companion to Latin Greece*, ed. by N. I. Tsougarakis and P. Lock (Leiden-Boston: Brill, 2015, Brill's Companions to European History 6), pp. 145-84, pp. 159-60.

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The Pope and the Patriarchs: the Fifth Constitution of Lateran IV

Pope Innocent III intended to convoke a "generale concilium juxta priscam sanctorum Patrum consuetudinem", and his great synod at the Lateran in 1215 was quickly regarded as an authentically ecumenical council, alongside those of the ancient Church[1]. Since the term "ecumenical" or "general" meant "universal", one of the commonly accepted prerequisites for such a council was the participation of all five of the patriarchates that had arisen in the early Christian world and become embedded in the ecclesiastical constitution[2]. Despite centuries of drifting apart, marked by sporadic doctrinal and disciplinary disputes and schisms of varying significance, the western and eastern churches ideally had to join together to celebrate a truly ecumenical council. Rome, the sole patriarchate in the West, had to reach out to the churches of Constantinople, Alexandria, Antioch, and Jerusalem, long separated by political and religious disagreements. In western eyes, it was an auspicious historical moment: not since late antiquity had the churches been better poised to cooperate. Crusading zeal had at least superficially restored three patriarchates to union with Rome. The success of the First Crusade had established Latin patriarchs in Antioch and Jerusalem at the end of the eleventh century, and now, at the beginning of the thirteenth century, the diverted Fourth Crusade's sack of Constantinople had resulted in a Latin patriarchate there. In addition, though still

1 Po. 4076, PL CCXVI, col. 824: 'general council according to the original custom of the holy fathers'; G. Tangl, *Die Teilnehmer an den allgemeinen Konzilien des Mittelalters* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1969²), p. 219; A. J. Duggan, 'Conciliar Law, 1123-1215: The Legislation of the Four Lateran Councils', in *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, ed. by W. Hartmann and K. Pennington (Washington, D.C.: The Catholic University of America Press, 2008, History of Medieval Canon Law), pp. 318-66, pp. 319, 342.

2 V. Peri, 'L'ecumenicità di un concilio come processo storico nella vita della Chiesa', in AHC 20 (1988), pp. 216-44, pp. 220-22.

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The Fourth Lateran Council and the Development of Canon Law and the ius commune, ed. Atria Larson and Andrea Massironi, Turnhout: Brepols, 2018 (EMI 7), pp. 89–109

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an Orthodox see, Alexandria had enjoyed relatively positive relations with Rome during the past century[3].

The Fourth Lateran Council thus became not only the largest gathering the medieval Church had ever seen, but also the most representative: western bishops and abbots, joined by delegates from the new religious orders and envoys from the secular powers, welcomed their brethren from the East. Fathers from the more than eighty ecclesiastical provinces participating in the council included seventeen prelates from the patriarchate of Constantinople, four from Jerusalem, and one from Antioch[4]. Patriarch Peter of Antioch was too ill to attend, but sent the bishop of Tortosa in his stead[5]. The newly elected patriarch of Jerusalem, Ralph of Merencourt, was confirmed by Innocent at the Lateran Council[6]. The contested see of Constantinople was the subject of discussion early in the council, and the victor Gervase then assumed the patriarchate[7]. Finally, Patriarch Nicholas of Alexandria sent a legate[8]. Apart from this Alexandrian envoy, the primate of the Maronites, and two Cypriot bishops, the easterners were actually all Latins[9]. Thus, while formally speaking all five patriarchates were represented at the Lateran, the reunion between East and West that the assembly may have perceived was tenuous, even illusory. Nevertheless, it was enough to prompt Innocent to issue a law that addressed the eastern patriarchs by including them in his ideal, comprehensive view of Christendom[10].

The set of constitutions probably composed by the pope and his collaborators, then presented to and ratified by the council in its final session, opened with four declarations concerning the catholic faith and deviations from it[11]. Then, beginning a series of decrees on ecclesiastical order and pastoral oversight, the fifth constitution (c.5) turned to the top of the hierarchy: the pope and the patriarchs, and their relations to one another.

> Antiqua patriarchalium sedium privilegia renovantes, sacra universali synodo approbante sancimus ut post romanam ecclesiam, que disponente domino super

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3 B. Hamilton, *The Latin Church in the Crusader States: The Secular Church* (London: Variorum Publications, 1980), p. 327.

4 J. Werner, 'Nachlese aus Zürcher Handschriften I', in NA 31 (1906), pp. 575-93, pp. 585-86; Duggan, 'Conciliar Law', cit., p. 343.

5 Hamilton, *The Latin Church in the Crusader States*, cit., p. 223.

6 Hamilton, *The Latin Church in the Crusader States*, cit., p. 253.

7 Tangl, *Die Teilnehmer an den allgemeinen Konzilien*, cit., p. 222; K. M. Setton, *The Papacy and the Levant (1204-1571). 1. The Thirteenth and Fourteenth Centuries* (Philadelphia: The American Philosophical Society, 1976, Memoirs of the American Philosophical Society 114), p. 46 n. 9; J. C. Moore, *Pope Innocent III (1160/61-1216): To Root Up and to Plant* (Leiden & Boston: Brill, 2003, Medieval Mediterranean 47), p. 233.

8 M. Maccarrone, 'Il IV Concilio lateranense', in *Divinitas* 5.2 (1961), pp. 270-98, p. 279; J. M. Powell, 'Innocent III and the Crusade', in *Innocent III: Vicar of Christ or Lord of the World?*, ed. by J. M. Powell (Washington, D.C.: The Catholic University of America Press, 1994[2]), pp. 121-34, p. 128.

9 Tangl, *Die Teilnehmer an den allgemeinen Konzilien*, cit., p. 222; Moore, *Pope Innocent III*, cit., p. 230.

10 W. O. Duba, 'The Status of the Patriarch of Constantinople after the Fourth Crusade', in *Diplomatics in the Eastern Mediterranean, 1000-1500: Aspects of Cross-Cultural Communication*, ed. by A. D. Beihammer and others (Leiden: Brill, 2008), pp. 63-91, p. 63.

11 Fourth Lateran Council (1215), cc.1-4, COGD II.1, pp. 163-69.

omnes alias ordinarie potestatis optinet principatum utpote mater universorum christifidelium et magistra, constantinopolitana primum, alexandrina secundum, antiochena tertium et ierosolymitana quartum locum optineant, servata cuilibet propria dignitate, ita quod postquam earum antistites a romano pontifice receperint pallium, quod est plenitudinis officii pontificalis insigne, prestito sibi fidelitatis et obedientie iuramento licenter et ipsi suis suffraganeis pallium largiantur recipientes pro se professionem canonicam et pro romana ecclesia sponsionem obedientie ab eisdem. Dominice vero crucis vexillum ante se faciant ubique deferri, nisi in urbe romana et ubicumque summus pontifex presens extiterit aut eius legatus utens insigniis apostolice dignitatis. In omnibus autem provinciis eorum iurisdictioni subiectis ad eos cum necesse fuerit provocetur, salvis appellationibus ad sedem apostolicam interpositis quibus est ab omnibus humiliter deferendum[12].

This important text did four things: first, it ruled on the order of precedence among the five patriarchates; second, it regulated the patriarchs' reception and bestowal of the vestment known in the West as the pallium; third, it explained the proper use of the processional cross by the patriarchs; and fourth, it established the patriarchates as courts of canonical appeal, within certain limits. In announcing these directives, the law claimed to be acting in an essentially conservative manner: it was renewing the "ancient privileges" of the patriarchs, and preserving the "dignity proper to each". Nevertheless, something creative was definitely afoot: through these measures Innocent was incorporating the patriarchs into the papally centered medieval Church, as it had developed over the previous five hundred years.

Scholars tend to focus only on c.5's first part, which attempted to settle age-old constitutional and political questions affecting the so-called ecclesiastical pentarchy[13]. This scholarly interest is nothing new; the rubrics provided for c.5 in several manuscripts that transmitted the council's decrees were likewise preoccupied with

12 Fourth Lateran Council (1215), c.5, COGD II.1, p. 169: 'Renewing the ancient privileges of the patriarchal sees, with the approval of the sacred universal synod, we decree that – after the Roman Church, which by the Lord's arrangement holds the chief place of ordinary power over all others, inasmuch as [she is] the mother and mistress of all Christ's faithful – the Constantinopolitan [Church] shall hold first place, the Alexandrine second, the Antiochene third, and the Jerusalemite fourth, each preserving its own dignity, such that, after their bishop receives from the Roman pontiff the pallium, which is the insigne of the fullness of the pontifical office, having taken an oath of fidelity and obedience to him, they themselves also may licitly bestow the pallium on their own suffragans, and receive from the same men a canonical profession for themselves and a pledge of obedience for the Roman Church. And they may have the standard of the Lord's cross carried before them everywhere, except in the Roman city and wherever the supreme pontiff, or his legate using the insignia of apostolic dignity, is present. Moreover, in all the provinces subject to their jurisdiction, one may make an appeal to them when it is necessary, save for appeals introduced to the apostolic see, to which [appeals] all must humbly defer.'

13 For example, Maccarrone, 'Il IV Concilio lateranense', cit., pp. 279, 289; Moore, *Pope Innocent III*, cit., p. 241; Duba, 'The Status of the Patriarch of Constantinople', cit., pp. 83-84; Duggan, 'Conciliar Law', cit., p. 345. A. García y García concentrates on this first part, along with a very brief foray into the rest of the constitution, in *Historia del concilio IV lateranense de 1215* (Salamanca: Centro de estudios orientales y ecuménicos 'Juan XXIII', 2005, Bibliotheca oecumenica salmanticensis 31), pp. 273-74.

ranking the patriarchs[14]. When the pope proclaimed the "places" of the patriarchates as first Rome, second Constantinople, third Alexandria, fourth Antioch, and fifth Jerusalem, he professed to be hearkening back to the longstanding rights of these sees[15]. Indeed, the Council of Nicaea in 325 privileged Rome, Alexandria, and Antioch, and added Jerusalem in a sort of honorary position[16]. Afterwards, the First Council of Constantinople in 381 ranked Constantinople directly after Rome because it was the "New Rome", and the Council of Chalcedon in 451 confirmed that decision, after providing a lengthy justification[17]. Rome, however, long resisted this promotion of Constantinople because it violated the prerogatives of the other patriarchs and seemed contrary to the original Nicene decrees – and probably also because it was based on civil criteria, rather than the evangelical principles from which the papacy derived its power[18]. Nevertheless, the Council *in Trullo* in 691/92, regarded by the eastern Church as a legitimate supplement to the fifth and sixth ecumenical councils, reasserted the newer series, with Constantinople in second place, and the Council of Constantinople of 869-70, eventually regarded as ecumenical by the western Church, accepted it too[19]. In Distinction 22 of his *Decretum*, Gratian summarized and briefly analyzed this complex evolution[20]. Now Lateran IV set the papal stamp of approval on the new order of precedence; as the patriarch of Constantinople was now a Latin,

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14 For example, 'Post Romanam sedem iiii. alie tantum obtinent principatum', 'Hic distinguuntur sedes patriarcharum', 'De sedibus et ordine patriarcharum', 'De maioritate et obedientia' ('After the Roman see only four others hold the chief place', 'Here the sees of the patriarchs are distinguished', 'On the sees and the order of the patriarchs', 'On precedence and obedience'): see A. García y García, *Constitutiones concilii quarti Lateranensis una cum commentariis glossatorum* (Città del Vaticano: BAV, 1981, MIC Series A 2), p. 141.

15 Vincentius Hispanus, however, noted that these "antiqua privilegia" were "non antiquissima" ('not the most ancient'), as Pope Gelasius I's dismissal of Constantinople's claims in *Decr. Grat.* D.22 c.5 demonstrated (*Apparatus in Concilium quartum Lateranense*, in *Constitutiones concilii quarti Lateranensis*, cit., *ad* c.5 s.v. *antiqua privilegia*, p. 292).

16 First Council of Nicaea (325), cc.6-7, COGD 1, p. 23. Again Vincentius Hispanus objected, citing c.6 of Nicaea in *Decr. Grat.* D.65 c.6, that Lateran IV's ranking did not reflect the original tradition, unless the equality mentioned in the Nicene text had only referred to certain respects, and unless 'Rome' was to be understood there as Constantinople (*Apparatus in Concilium quartum Lateranense*, ed. cit., *ad* c.5 s.v. *Alexandrina*, p. 292) – a rather torturous attempt to harmonize Nicaea with Lateran IV.

17 First Council of Constantinople (381), c.3, COGD 1, p. 66; Council of Chalcedon (451), c.28, COGD 1, pp. 150-51.

18 T. J. Shahan, 'Constantinople, Councils of', in *The Catholic Encyclopedia: An International Work of Reference on the Constitution, Doctrine, Discipline, and History of the Catholic Church*, ed. by C. G. Herbermann and others, IV (New York: The Encyclopedia Press, 1913), pp. 308-12, p. 308; Duba, 'The Status of the Patriarch of Constantinople', cit., p. 66.

19 Council *in Trullo* (691/92), c.36, COGD 1, p. 255; Fourth Council of Constantinople (869-70), c.21, COGD II.1, pp. 43-44.

20 *Decr. Grat.* D.22. Here c.6, the decree of the Council *in Trullo*, was inscribed "ex VI. Sinodo" ('from the sixth synod'), as if attributed to the Third Council of Constantinople (680-81). Gratian observed that the rise of Constantinople had reduced the ancient ranks of Alexandria and Antioch by one. Similarly, the *Glossa ordinaria*, *ad* X 5.33.23 s.v. *Alexandrina secundum*, in *Corpus iuris canonici* (Rome: Aedes Populi Romani, 1582), vol. II, col. 1826, noted that Alexandria "priuata fuit iure suo sine culpa, quod esse non debet regulariter" ('was deprived of its right without fault, which as a rule ought not to be [done]'); nevertheless, it went on to justify the demotion by reason of "favor".

perhaps the danger of rivalry between that see and Rome was no longer so great a concern[21]. In addition, Innocent made sure to insert a clause that justified Roman primacy in no uncertain terms: Rome possessed the "chief place of ordinary power" by the institution of Christ himself, and thus acted as "mother and mistress of all Christ's faithful". Here the pope drew on language and imagery already found in his letters, which encapsulated his conception of papal supremacy[22].

These abstract points of primacy and precedence within the highest echelons of Christendom had ramifications for several areas of ecclesiastical life. It was the other parts of c.5 – regarding the pallium, the processional cross, and canonical appeals – that juridically and ritually manifested the consequences of the first part. The practices regulated here gave concrete form to the idea of an episcopal rank just below the pope in prestige, of more or less equivalent antiquity, and set in authority over the bishops and metropolitans of a broad region. Such a rank had been missing from the western Church's experience since late antiquity. Admittedly, there were pale imitations in the West – patriarchs of an honorary sort, and primates of more recent creation – but in his *Summa de iure canonico* Raymond of Penyafort suggested that the title of patriarch should be reserved to the four ancient eastern ones, while the rest were really just primates[23]. Now that the eastern patriarchs appeared to be restored to communion with Rome, it was up to Innocent to clarify their standing and its implications in contemporary western terms. This essay will examine the other three parts of c.5 – and how they were interpreted as they entered the mainstream of the canonical tradition – as nuanced expressions of patriarchal status and authority, appropriate to the assumptions of the thirteenth-century Latin Church. Because of its importance and long historical development, particular attention will be given to the pallium.

Pallium Customs in West and East

The pallium was a band of white wool embroidered with crosses that encircled the shoulders and fell in two strips to the front and back[24]. Its origins are obscure; it

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21 However, Hostiensis, *Lectura, ad* X 5.33.23 s.v. *Constantinopolitana* et *primum* et *locum*, in *Lectura sive apparatus domini Hostiensis super quinque libris decretalium* (Argentini: Ioannes Schottus, 1512), vol. II, fol. 325v, complicated the law's interpretation by observing that the bishop of Ostia, the most eminent of the cardinal bishops, had been given certain rights of precedence second only to the pope.

22 For example, in a letter to the patriarch of Constantinople in 1199, Po. 862, PL CCXIV, cols 758-65. See R. W. Shaffern, '*Mater et magistra:* Gendered Images and Church Authority in the Thought of Pope Innocent III', in *Logos: A Journal of Catholic Thought and Culture* 4 (2001), pp. 65-88. Also, in 'The Status of the Patriarch of Constantinople', cit., Duba describes how Innocent conceptualized the unique status of the eastern patriarchs while safeguarding papal monarchy.

23 Raymond of Penyafort, *Summa de iure canonico*, ed. by X. Ochoa and A. Diez (Roma: Commentarium pro Religiosis, 1975, Universa Bibliotheca Iuris 1/A), col. 48 (2.1.5). Raymond listed Aquileia, Grado, and Bourges as examples of titular western patriarchates.

24 On the pallium's history, see S. Schoenig, *Bonds of Wool: The Pallium and Papal Power in the Middle Ages* (Washington, D.C.: The Catholic University of America Press, 2016, Studies in Medieval and Early Modern Canon Law 15).

was probably related to the sashes granted to imperial officials in late antiquity, but became an insigne and liturgical vestment for Christian bishops. In the East, where it became known as the *omophorion*, every bishop wore it, while in the West it was at first reserved to the bishop of Rome. By the early sixth century the popes began to share its use with other bishops as a mark of honor and a sign of closeness to the Roman Church. When Pope Gregory the Great set up the new Anglo-Saxon Church, he attached the power to consecrate bishops to possession of the vestment, and the English missionary Boniface continued this pattern when he evangelized German lands and reformed the Frankish Church. In accord with this model, the papally granted pallium became a badge of metropolitan rank, confirming the prelate in office and bestowing on him the full powers of his position. By the ninth century the vestment had been woven into the constitution of the western Church, an evolution that was not paralleled in the East, where it retained its earlier, more purely ceremonial significance.

In the Carolingian period, divergence between eastern and western practices can explain western misinterpretations of eastern affairs. Around 835, for example, Abbot Hilduin of St.-Denis claimed that Patriarch Tarasius of Constantinople had restored the bishop of Athens to his rightful place by sending him the "pallium archiepiscopale" and granting his see the "metropolis auctoritas"[25]. This language reflected the recent restoration of the metropolitan structure of the Frankish Church, and while Tarasius may well have bestowed an *omophorion* and raised the status of Athens, it is doubtful that the two matters were connected. Further, the Council of Constantinople of 869-70 was occasioned by eastern problems, occupied with eastern business, and attended by eastern bishops. Nevertheless, its canons should be scrutinized for western notions, because it was convoked, presided over, shaped, and confirmed by western authority[26]. Thus it is unsurprising to discover western pallium practice enshrined in its decrees: c.17 reaffirmed the power of patriarchs over their metropolitans, including the right to confirm metropolitans' elections either by consecrating them personally or by conferring the pallium on them[27]. In addition, c.27 portrayed the pallium as a badge of office and discussed its proper use, according to traditional restrictions of time and place, under pain of correction or even deposition by the patriarch[28]. Although both canons were ambiguous enough to embrace both western and eastern customs, they addressed currents of concern that had emerged over the previous decades in the West. Indeed, five years later Pope John VIII would pronounce two laws on the same topics – the obligation of metropolitans to seek the pallium as part of their promotion, and the strict prohibition against misusing it – that made their way into western canon law[29].

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25 Letter of Hilduin of St.-Denis to Louis the Pious, c. 835, MGH Epp. V, p. 332: 'archiepiscopal pallium', 'authority of a metropolis'.

26 F. Dvornik, *The Photian Schism: History and Legend* (Cambridge: Cambridge University Press, 1948), pp. 202-10.

27 Fourth Council of Constantinople (869-70), c.17, COGD II.1, pp. 40-41.

28 Fourth Council of Constantinople (869-70), c.27, COGD II.1, p. 48.

29 Council of Rome (875), cc.2-3, MGH Conc. V, pp. 9-10, repeated with some variations at the Council of Ravenna (877), cc.1, 3, MGH Conc. V, p. 68.

The case of the newly founded Bulgarian Church illustrates tensions between East and West exacerbated by differing pallium customs. In his famous reply to Bulgarian ecclesiastical questions in 866, Pope Nicholas I outlined a typically western procedure: the Roman pontiff would grant the pallium to the Bulgarian archbishop (Nicholas preferred this term to the original question's use of "patriarch"), which would then allow the archbishop to consecrate other bishops. In other words, after ordination, but before obtaining the "archiepiscopatus privilegia" from the pope, he would hold office "sane interim in throno non sedens et praeter corpus Christi non consecrans, priusquam pallium a sede Romana percipiat, sicuti Galliarum omnes et Germaniae et aliarum regionum archiepiscopi agere comprobantur"[30]. This overture to the Bulgarians did not prevent Constantinople from making its own, however. In 879 Pope John VIII wrote to the Byzantine emperor and to Patriarch Photius, and instructed his own legates as well, that the Greeks should cease ordaining bishops in Bulgaria, and the patriarch should cease sending them pallia[31]. For the pope, the vestment represented not simply the episcopal dignity, as in the East, but a bond of loyalty and subjection to the one who gave it. Another patriarch's bestowal of pallia in a church claimed by Rome amounted to a usurpation of papal rights and jurisdiction.

The most direct clash over the pallium between East and West in the early Middle Ages arose between the pope and the patriarch of Constantinople in regard to themselves. Around 853 Patriarch Ignatius of Constantinople sent a pallium to Pope Leo IV. According to western thinking, it might have been a bid to exert control over the papacy, but Leo did not doubt Ignatius' good intentions: the gift may have simply been a gesture of friendship or a sign of communion, in accord with eastern thinking. Nevertheless, the pope refused the vestment and sent it back with the words: "Non est mos istius ecclesie, cum magistra et caput omnium videatur aecclesiarum existere, aliunde pallium erogatum accipere, sed per totam Europam, ad quos delaegatum est tradere"[32]. Although Leo claimed primacy over all the churches, his reference to "Europe" may have indicated a more limited area that left room to eastern patriarchs to bestow *omophoria* on their own bishops[33]. In any case, for the pope to wear a pallium granted by the patriarch would be tantamount to admitting the subjection of Rome to Constantinople, for the very act of giving reflected the recipient's dependence on the donor and incurred the debt of grateful reciprocation. In fact, a later pope, John VIII, did not hesitate to send a pallium to

30 JE 2812, MGH Epp. VI, p. 593: 'privileges of the archiepiscopate', 'in the meantime, of course, not sitting on the throne and not consecrating (except for the body of Christ) before he receives the pallium from the Roman see, as all the archbishops of Gaul and Germany and other areas are proven to do'.

31 JE 3271, MGH Epp. VII, pp. 173-74; JE 3273, MGH Epp. VII, pp. 185-86; JE 3276, MGH Epp. VII, p. 189 n.

32 JE 2647, MGH Epp. V, p. 607: 'It is not the custom of this church, since she is seen to be the mistress and head of all the churches, to accept a pallium bequeathed from elsewhere, but to hand it out through the whole of Europe to those to whom it is assigned'.

33 K. J. Leyser, 'Concepts of Europe in the Early and High Middle Ages', in *Past and Present* 137 (1992), pp. 25-47, p. 40.

Ignatius' successor, Patriarch Photius. The Greek acts of the so-called Photian Synod of 879-80 portrayed the gift as a tangible symbol of communion, but the eastern mentality may not have grasped the inequality that western eyes saw in the bond. John may well have intended to convey papal confirmation of Photius' contested position as patriarch, but the acts treated the event simply as a sign of unity between the pope and his "adelphos kai sulleitourgos"[34].

In the course of the tenth century, western writers seemed to presume this ninth-century papal stance when they described the pallium customs of the eastern Church, even though there is no evidence that popes regularly conferred pallia on patriarchs. Around 914 the anonymous author of a polemical treatise defending the controversial Pope Formosus argued that annulling that pontiff's legitimacy would call into question all those he had palliated. "Constantinopolis namque, Sicilia, tota Italia, Gallia, Germania, in quarum spaciis metropolitani [...] degere uidentur", he declared to the anti-Formosan party, "aduersus te causantur et querelantur, quia nullus metropolitanus consecracionem facere potest, nisi a sede apostolica pallium sumat"[35]. The point, of course, was to conjure dire consequences for the universal Church, but the inclusion of Constantinople, as if its patriarch looked to Rome for the pallium, was surely an exaggeration, a product of wishful thinking or ideology rather than reality. Similarly disconnected from reality was Liutprand of Cremona, who in 969 asserted that the patriarch had once used the pallium only by leave of the pope. But then, he claimed, the Byzantine emperor bribed the ruler of Rome to extort a papal privilege granting all future patriarchs the use of the pallium without special permission. "Ex quo turpi commercio", he went on, "vituperandus mos inolevit, ut non solum patriarchae, sed etiam episcopi totius Greciae palliis utantur. Quod quam absurdum sit, censore opus non est"[36]. It was one westerner's erroneous attempt to explain foreign eastern customs, from which western practice had by that time significantly deviated.

The revolutionary winds blowing through the eleventh century brought three significant additions to western pallium practice that were not replicated in the eastern Church. First, shortly after the turn of the century, the popes began attaching another papal prerogative to some pallium grants: the processional cross, which will be discussed further below[37]. Second, with the advent of the reform papacy, the idea that the pallium represented or conveyed the fullness of a metropolitan's office began to be expressed in a descriptive epithet appearing in papal privileges. As a prerequisite for

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34 *Acta pseudo-synodi Photianae* (879-80), Mansi XVII, col. 389: 'brother and fellow minister'.

35 *Invectiva in Romam*, in *Gesta Berengarii imperatoris: Beiträge zur Geschichte Italiens im Anfänge des zehnten Jahrhunderts*, ed. by E. Dümmler (Halle: Waisenhaus, 1871), p. 149: 'Constantinople, Sicily, all Italy, Gaul, Germany, in whose expanses metropolitans [...] are seen to live, protest and complain against you, for no metropolitan can do a consecration unless he receives the pallium from the apostolic see'.

36 Liutprand of Cremona, *Relatio de legatione Constantinopolitana*, CCCM CLVI, p. 215: 'From this disgraceful deal a blameworthy custom developed, that not only the patriarchs but also the bishops of all Greece use pallia. How absurd this is does not need a critic [to see]'.

37 Starting in 1012 with JL 3989, in *Papsturkunden 896-1046*, ed. by H. Zimmermann, vol. II (Vienna: Österreichische Akademie der Wissenschaften, 1985, Denkschriften: philosophisch-historische Klasse 177, Veröffentlichungen der historischen Kommission 4), pp. 896-98.

this rank, the vestment's reception indicated that the process of installation had been consummated by papal confirmation: the recipient was now in complete possession of his authority. By 1092, probably thanks to the papal chancellor, John of Gaeta, the phrase settled into a stable formulation and became a routine part of pallium grants as "plenitudo pontificalis officii" (the fullness of the pontifical office)[38]. While it was not explicitly interpreted, it seemed to refer to acts of consecration (such as ordaining bishops) and jurisdiction (such as convoking synods) traditionally linked to possessing the pallium. Proper to the highest prelates, the garb was a sign of complete priestly power, the mark of one who was fully a bishop, without which he was deficient in his office. Third, from at least the time of Gregory VII, the papacy began to exact a stricter adherence to the person of the Roman pontiff. This loyalty was manifested in an oath of fidelity, through which the petitioner was required to swear fealty to the pope and his successors before he could acquire the vestment. Although it first arose in Italy, where the popes had long demanded a tighter subordination, they tried to impose this obligation on archbishops across the Latin Church. The content of the oath reinforced the reform agenda and encouraged a more personal bond with the pope. Paschal II defended the practice because often, he contended, he did not personally know the recipients of the pallium, and so the oath was useful for the sake of obedience and ecclesiastical unity[39]. Indeed, it reflected the reformers' vision of a centralized Church, with an episcopate firmly subsidiary and accountable to its head.

After the rise of crusading, with the inauguration of Latin patriarchs in Antioch and Jerusalem, twelfth-century writers paid greater heed to how patriarchs fit within the western tradition. In the first half of the century, Honorius Augustodunensis noted that both the patriarchs and the pope wore the pallium because they were known to be "eodem officio praediti"[40]. This statement stressed the pope's status as one of the patriarchs – in fact, "officium" may simply have indicated their shared duties, one of which was to distribute pallia. But others, for instance Eadmer of Canterbury around 1120, added that patriarchs received their own pallia from the pope[41]. Indeed, a decade or two later, Gratian included Pope John VIII's requirement for metropolitans to seek the pallium in the first recension of his *Decretum*, but in a *dictum* he broadened the obligation to all archbishops, primates, and patriarchs – in effect, all bishops with jurisdiction over other bishops. Further, he concluded that the stricture against consecrating bishops before receiving the pallium extended to all those prelates as well[42]. Of the earliest commentators on Gratian, Paucapalea followed the Master, but Rufinus dropped the mention of patriarchs – perhaps because they had been shown to be equivalent to primates – and Rolandus' summary dropped both primates and

38 Starting in 1092 with JL 5464, PL CLI, pp. 344-46.

39 JL 6570, PL CLXIII, cols 428-30; see also M. Brett, 'Some New Letters of Popes Urban II and Paschal II', in JEH 58 (2007), pp. 75-96, pp. 89-94.

40 Honorius Augustodunensis, *Gemma animae*, PL CLXXII, col. 611: 'endowed with the same office'.

41 Letter of Eadmer of Canterbury to the monks of Glastonbury, *c.* 1120, RS LXIII, p. 416.

42 *Decr. Grat.* D.100 d.a.c.1.

patriarchs – perhaps because, in his brevity, he wished to focus on the most common recipients, namely archbishops[43].

In the second half of the century, Canon Peter Mallius of St. Peter's Basilica remarked that "romanus pontifex mittit [pallia] patriarchis, archiepiscopis, per universum orbem constitutis", an observation corroborated by Cardinal Albinus of Albano around 1189[44]. Sicard of Cremona a few years later equated patriarchs with primates and described their office as not only summoning synods but also consecrating archbishops, who in turn consecrated suffragan bishops. On patriarchs, primates, and archbishops were conferred both the processional cross, "ut se Crucifixum imitari debere cognoscant", and the pallium, "ut torque victoriae coronentur". It was the pope's duty to bestow these pallia[45]. Finally, around 1195 Lothar of Segni himself, the future Innocent III, associated the pallium with metropolitans, primates, and patriarchs, for through it "a caeteris episcopis discernantur, et privilegiatam obtineant dignitatem"[46].

While these thinkers formulated pallium theory, the popes were putting it into practice, with the cooperation, and occasionally the resistance, of the Latin patriarchs of the East. In the cases for which there is evidence, it was controverted elections that most often prompted the patriarchs to turn to the pope for the vestment. When Patriarch Ebremar of Jerusalem's position was contested, he personally came to Rome in 1107 to seek the pallium from Paschal II as a sign of papal confirmation, although he was unable to gain it[47]. In another dispute over Jerusalem, Arnulf had better luck in 1116, when Paschal approved him as patriarch: "Quod eius adhuc dignitati deerat, pallei uidelicet indumentum ex apostolice sedis benignitate concessimus". Now, the pope said, he possessed "patriarchice dignitatis integritas et gratie nostre plenitudo"[48]. It happened a third time in 1158, according to William of Tyre, when Pope Hadrian IV sent the pallium to bolster Amalric of Jerusalem, who had been

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43 Paucapalea, *Summa*, in *Summa über das Decretum Gratiani*, ed. by J. F. von Schulte (Giessen: E. Roth, 1890), p. 50; Rufinus, *Summa decretorum*, ed. by H. Singer (Paderborn, 1902), p. 194; Rolandus, *Stroma ex decretorum corpore carptum*, in *Summa magistri Rolandi*, ed. by F. Thaner (Innsbruck, 1874), p. 12.

44 Peter Mallius, *Descriptio basilicae Vaticanae*, in *Codice topografico della città di Roma*, ed. by R. Valentini and G. Zucchetti, vol. III (Roma: Tipografia del Senato, 1946, Fonti per la storia d'Italia 90), p. 385: 'the Roman pontiff sends [pallia] to patriarchs and archbishops appointed throughout the whole world'; Albinus of Albano, *Digesta pauperis scholaris*, in *Le Liber censuum de l'Église romaine*, ed. by P. Fabre and L. Duchesne, vol. II, fasc. VI (Paris: Fontemoing, 1910, Bibliothèque des écoles françaises d'Athènes et de Rome, 2. sér., 6), p. 109.

45 Sicard of Cremona, *Mitrale*, PL CCXIII, cols 70-71: 'so that they may learn that they ought to imitate the Crucified', 'so that they may be crowned with the wreath of victory'.

46 Lothar of Segni, *De sacro altaris mysterio*, PL CCXVII, col. 781: 'they may be distinguished from the rest of bishops and acquire a privileged dignity'.

47 JL 6175, in *Papsturkunden für Kirchen im Heiligen Lande: Vorarbeiten zum Oriens Pontificius III*, ed. by R. Hiestand (Göttingen: Vandenhoeck and Ruprecht, 1985, Abhandlungen der Akademie der Wissenschaften in Göttingen: philologisch-historische Klasse, 3. Folge, 136), pp. 104-07.

48 JL 6528, in *Papsturkunden für Kirchen im Heiligen Lande*, cit., pp. 124-26: 'Because he was yet lacking in his dignity, namely the apparel of the pallium, we have granted it from the kindness of the apostolic see', 'the wholeness of the patriarchal dignity and the fullness of our grace'. Cf. Robert of Torigny, *Chronica*, MGH SS VI, p. 484.

chosen through the machinations of three noble ladies, over the protests of several bishops[49].

Nevertheless, the Latin patriarchs must have been tempted to autonomy, given the ancient pedigrees and independent traditions of their eastern churches[50]. In 1121 Pope Calixtus II sent the pallium to Patriarch Warmund of Jerusalem, and thereby "pontificalis seu patriarchalis officii plenitudo [...] ut deinceps illi facultas sit concilia et episcopales consecrationes [...] celebrandi"[51]. But the pope included an admonition to unity with and obedience to Rome, possibly spurred by the fact that Warmund had waited over two years to request the vestment[52]. Later in the decade, the papal legate Giles of Paris sharply reminded Patriarch Bernard of Antioch that he had promised obedience to the pope before he put on "pallii fides", which had been brought to him by another legate[53]. Also, William of Tyre told a colorful tale of patriarchal pretension involving Ralph of Antioch. Upon his election by popular acclaim in 1135, but lacking the assent of his suffragans, Ralph donned a pallium taken up from his cathedral's altar. Undoubtedly he wished to solidify his claim swiftly in the face of opposition, but his strategy, in William's words, showed "nulla ad ecclesiam Romanam [...] reverentia", since Ralph had neither requested nor received the vestment from the pope[54]. His attitude surprised few, since Ralph was said to be a proud prelate, who "sedem cui preerat, Antiochenam videlicet, Romane subiacere dedignabatur, sed ei eandem in omnibus parificare contendebat, dicens utramque Petri esse cathedram"[55]. Three years later, however, various charges lodged against Ralph endangered his position, and he had little choice but to go to Rome and defend himself[56]. There he had a convenient change of heart, and the pallium, previously a sign of his arrogance, became the means of his submission and reconciliation: "Resignato pallio, quod idem patriarcha de altari Antiochene ecclesie sua sibi sumpserat auctoritate in iniuriam, ut dicebatur, sedis apostolice, et cardinalibus tradito, aliud ei, sumptum de corpore beati Petri [...], traditur"[57]. The vestment bore such a weight of meaning that Ralph

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49 William of Tyre, *Historia rerum in partibus transmarinis gestarum*, CCCM LXIIIA, p. 841.

50 For a post-Lateran IV example, see the strained relations between Pope Honorius III and Patriarch Gervase of Constantinople, rebuked for overreaching himself and attempting to exercise quasi-papal authority (Setton, *The Papacy and the Levant*, cit., vol. I, pp. 46-47).

51 JL 6922, in *Papsturkunden für Kirchen im Heiligen Lande*, cit., pp. 128-30: 'the fullness of the pontifical and patriarchal office [...] so that henceforth he may have the faculty of celebrating [...] councils and episcopal consecrations'.

52 See the editorial introduction to JL 6922, as in n. 51 above.

53 Letter of Giles of Paris to Bernard of Antioch, 1127x30, PL CLXXIII, col. 1391: 'the faith of the pallium'.

54 William of Tyre, *Historia*, cit., pp. 641-42: 'no reverence for the Roman Church'.

55 William of Tyre, *Historia*, cit., pp. 692-93: 'scoffed that the see of which he was in charge, namely Antioch, was subject to the Roman [see], but asserted that it was equal to [Rome] in all things, saying that both were chairs of Peter'.

56 Hamilton, *The Latin Church in the Crusader States*, cit., pp. 33-35; B. Hamilton, 'Ralph of Domfront, Patriarch of Antioch (1135-40)', in *Nottingham Medieval Studies* 28 (1984), pp. 1-21, pp. 10-14.

57 William of Tyre, *Historia*, cit., p. 693: 'Having resigned the pallium that [he] had taken for himself from the altar of the church of Antioch by his own authority – to the injury, it was said, of the apostolic see – and having handed it to the cardinals, another one, taken from the body of blessed Peter, was handed over to him'.

had to surrender his old pallium and receive a new one, invisibly but no less potently linked to Rome by having been laid on St. Peter's tomb. As he accepted a Roman pallium, this patriarch acknowledged the limits of his own authority.

Although the two patriarchs in the Holy Land were supposed to receive their pallia from Rome, Latin archbishops under them apparently did not. William of Tyre's chronicle hinted that the patriarchs themselves ordinarily bestowed the vestment on their archbishops, in accord with the eastern custom: thus Patriarch Bernard of Antioch palliated Archbishop Peter of Albara-Apamea around 1110[58]. The same chronicle, however, showed how the archbishops of Tyre employed pallium petitions directly to the pope in order to increase their independence from the patriarchs. The first archbishop, William (the chronicler's homonymous predecessor), was consecrated by the patriarch of Jerusalem, but went to Rome for the pallium in 1128; the patriarch was "invitus et renitens", but Pope Honorius II had no hesitations about this direct Roman intervention[59]. The next archbishop, Fulcher, followed William's example a decade later, but the patriarch's men waylaid him and almost kept him from completing the journey. In Rome Pope Innocent II readily conferred the pallium on Fulcher and sharply reprimanded the patriarch for his interference[60]. Why had Fulcher been harassed? Jerusalem may well have interpreted his recourse to Rome as treason. The patriarch probably preferred to palliate Fulcher himself, rather than suffer Rome to intrude upon Jerusalem's internal affairs. Furthermore, although the province of Tyre belonged to the patriarchate of Antioch in the past, under the crusaders it was divided between Antioch and Jerusalem. The popes had recently upheld Jerusalem's control, since the city of Tyre lay within that kingdom, but the archbishops of Tyre were not beyond playing Jerusalem's claims off Antioch's. It seems likely that the patriarch was afraid that, by travelling to Rome and dealing directly with the pope, Fulcher was trying to structure his province according to his own wishes, against Jerusalem's rights[61].

In sum, the patriarchs chafed under the subordination implicit in submitting to the pope for the pallium, but sometimes desired it for papal support when they were challenged; and archbishops under them ordinarily received the vestment from their patriarchs, but sometimes sought it directly from Rome in order to achieve a measure of freedom. The early years of Innocent III's pontificate saw many of the same trends, which undoubtedly helped him to clarify the ideas he would enunciate at Lateran IV. In 1203 and 1205, during a problematic succession in the patriarchate of Jerusalem, the pope sent pallia, first to entice one candidate, Soffred, to accept the see and then, when he refused, to arrange the installation of the next candidate

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58 William of Tyre, *Historia*, cit., p. 353.

59 William of Tyre, *Historia*, cit., pp. 616-17: 'unwilling and resistant'; JL 7315-16, in *Papsturkunden für Kirchen im Heiligen Lande*, cit., pp. 132-33.

60 William of Tyre, *Historia*, cit., pp. 643-44; JL 7943, in *Papsturkunden für Kirchen im Heiligen Lande*, cit., pp. 152-53.

61 See the editorial introduction to JL 7315-16, as in n. 59 above; J. G. Rowe, 'The Papacy and the Ecclesiastical Province of Tyre (1100-1187)', in *Bulletin of the John Rylands Library* 43 (1960-61), pp. 160-89, pp. 162-83; and Hamilton, *The Latin Church in the Crusader States*, cit., pp. 70-71.

of his choice, Albert[62]. At the same time, crusaders were erecting a Latin Empire at Constantinople and had chosen a Latin patriarch, Thomas Morosini[63]. Although Innocent deemed his lay-engineered appointment uncanonical, he was persuaded to consecrate and palliate him, but only after Thomas had taken "fidelitatis et obedientiae juramentum, sub ea forma jurandi antiqua et approbata, secundum quam primates et metropolitani solent in susceptione pallii Romano pontifici et Ecclesiae Romanae jurare". Furthermore, "ad indicium etiam gratiae plenioris", the pope gave the patriarch authority to grant the pallium to his "archiepiscopi suffraganei" after receiving from them a canonical "sponsio obedientiae", both to himself as patriarch and to the pope and the Roman Church[64]. Finally, Innocent enjoined that future patriarchs, after election and consecration, should seek the pallium and, upon receiving it, take the customary oath[65]. In short, the pallium regulations of 1215 had already taken shape by 1205.

Innocent enforced these regulations, too, as may be seen in the case of Antelm, elected as archbishop of Patras in Achaea in the same year. When he approached the pope for consecration and the pallium, the pope – while noting that, from the plenitude of his power, he was able to do what was asked – deferred to the patriarch of Constantinople, to whom that archbishopric was subject. The patriarch had the right to ordain and palliate Antelm as one of his suffragans, and Innocent did not wish to interfere in this hierarchy except when necessary. Even so, he left no doubt that he wanted Antelm confirmed, and so the patriarch was not exactly a free agent[66]. The case of the Bulgarian Church between 1202 and 1204 exposed more delicate negotiations. Kalojan (or Johannitsa), the lord of the Vlachs and Bulgars, was willing to submit to Rome if the pope granted him the title of emperor and

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62 *Gesta Innocentii III*, in *The Deeds of Pope Innocent III by an Anonymous Author*, trans. by J. M. Powell (Washington, D.C.: The Catholic University of America Press, 2004), pp. 146, 150, 174; Po. 1987, PL CCXV, cols 141-45; Hamilton, *The Latin Church in the Crusader States*, cit., pp. 248-49.

63 On Thomas Morosini's controversial election, see Setton, *The Papacy and the Levant*, cit., vol. I, p. 14.

64 The Latin reconstruction of the patriarchate directly subjected certain sees to Constantinople as suffragans, in contrast to Greek tradition, and thus made the patriarch now also a metropolitan. Nevertheless, the mention of archiepiscopal suffragans in Innocent's letter drew on the older conception of Constantinople's jurisdiction, which gave the patriarch authority over all metropolitans and autocephalous archbishops in his patriarchate. See R. L. Wolff, 'The Organization of the Latin Patriarchate of Constantinople, 1204-1261: Social and Administrative Consequences of the Latin Conquest', in *Traditio* 6 (1948), pp. 33-60, pp. 51, 56. For example, as discussed below, the archbishop of Patras, himself a metropolitan and not a direct suffragan of Constantinople, was supposed to receive his pallium from the patriarch, and so lay under the patriarch's jurisdiction as an archiepiscopal suffragan.

65 *Gesta Innocentii III*, ed. cit., pp. 178-81; PL CCXIV, col. 143: 'the oath of fidelity and obedience, in that ancient and approved form of swearing according to which primates and metropolitans are accustomed to swear to the Roman pontiff and the Roman Church upon the reception of the pallium'; Po. 2458, PL CCXV, col. 575: 'as evidence of even fuller grace', 'suffragan archbishops', 'promise of obedience'. See also Duba, 'The Status of the Patriarch of Constantinople', cit., p. 75.

66 *Gesta Innocentii III*, ed. cit., pp. 192-94. On this case, see C. Schabel, 'Antelm the Nasty, First Latin Archbishop of Patras (1205-c. 1241)', in *Diplomatics in the Eastern Mediterranean*, cit., pp. 93-137, especially pp. 97-99.

Archbishop Basil of Trnovo the title of patriarch. Innocent compromised by offering the titles of king for the former and primate for the latter, to whom he also sent the pallium, to be put on after an oath of fidelity. According to the plan outlined by the pope, future primates would have to apply to the apostolic see for the vestment, which they would receive after swearing fidelity to the Roman Church. And future suffragan metropolitans would likewise have to request it from Rome, whereupon it would be sent to the primate for distribution to them, in collaboration with a papal legate if present. This semi-patriarchal position – the Bulgarian primate could only bestow the pallium on his suffragans after they had asked Rome for it and Rome had sent it to the primate – was Innocent's best attempt to avoid erecting a new eastern patriarchate while not alienating the Bulgarians. The pope seemed to be deliberately stoking confusion when he wrote to Basil that primate and patriarch "pene penitus idem sonant"[67]. Kalojan eventually submitted to Rome, while still claiming an empire for himself and the power "faciendi et consecrandi archiepiscopos, metropolitas, et episcopos" for Basil, who, unsurprisingly, kept calling himself patriarch. Basil also asked the pope to send him two pallia that he could give to the two metropolitans of the realm, but Innocent chose rather to confer them through his legate[68].

The Pallium according to Lateran IV

Building on this long tradition, Lateran IV's fifth constitution expanded upon Innocent's treatment of the first Latin patriarch of Constantinople. Later canonists drew further implications from this law, especially while commenting on the *Liber extra*, into which Raymond of Penyafort incorporated the Lateran text by way of Johannes Teutonicus' *Compilatio quarta*[69]. First of all, c.5 assumed that the patriarchs, just as metropolitans and primates, had to receive the pallium from the pope[70]. Perhaps to explain this need, it described the vestment as "the insigne of the fullness of the pontifical office", an extended form of the standard epithet, "the fullness of the pontifical office". Why the addition of "insigne"? Maybe it was a less literal-minded, legally more precise expression, since the pallium itself was not the fullness, but only a badge thereof. As the *Liber extra* bore witness, Innocent had used the same phrase in a letter of 1204 to the Bulgarian archbishops, and, four years before that,

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67 Cf. Raymond of Penyafort, *Summa de iure canonico*, ed. cit., col. 48 (2.1.5): "Nota quod haec nomina Patriarcha et Primas pro eodem supponunt, nam inter Patriarcham et Primatem non est realis differentia, sed vocalis" ('Note that these names, patriarch and primate, substitute for the same thing, for between a patriarch and a primate there is no real difference, but [only] a vocal one').

68 *Gesta Innocentii III*, ed. cit., pp. 95-119, 127-29; Po. 2137, PL CCXV, col. 281: 'mean almost completely the same thing'; PL CCXV, col. 287: 'the making and consecrating of archbishops, metropolitans, and bishops'.

69 4Comp. 5.12.6 = X 5.33.23.

70 Raymond of Penyafort, *Summa de iure canonico*, ed. cit., col. 193 (2.34.4), labelled this practice "de iure communi" ('by common law'), probably referring to *Decr. Grat.* D.100 c.1.

he had explained to a legate that the fullness was conferred "in" the pallium[71]. The *Glossa ordinaria* to the *Liber extra* later clarified this epithet as "signum plenitudinis potestatis pastoralis officii", which shifted the emphasis from a bishop's office or duty to his power, his ability to perform certain functions[72]. In his *Summa aurea* Hostiensis agreed, but drew distinctions, depending on who was wearing the pallium: for a simple bishop, it was "plena officii potestas", for an archbishop, "plenior officii potestas", for a patriarch, "plenissima officii potestas", and for the pope, "plenitudo potestatis plenissima". He admitted, however, that such gradations were academic and not terribly meaningful[73].

Next, c.5 mentioned that the patriarchs had to swear an "oath of fidelity and obedience" to the pope upon receiving the pallium. This was nothing new in western pallium practice, but it tried to ensure that these high-ranking prelates would remain loyally submissive to the papal donor. The *Glossa ordinaria* reasoned that the patriarchs "nullo medio subsunt domino Papae", and so owed him this oath, just as suffragan bishops swore obedience and reverence to their metropolitans[74]. Since the glosses used these terms consistently, perhaps there was a shade of difference between "fidelity" to the pope and "reverence" to a lesser hierarch. However, Hostiensis in his *Lectura* called the latter "fidelitas [...] eadem"[75].

So far the patriarchs sounded quite similar to their lesser confreres, but what followed in c.5 made them decidedly unusual: they themselves could grant the pallium to their own suffragans. As Raymond of Penyafort wrote, the pope alone could bestow the vestment – with the sole exception of these four churchmen[76]. Hostiensis in his *Summa aurea* called these pallium donors the "quatuor Patriarchae principales", but stressed that the pallium was given "*uniuersaliter* [...] a domino Papa tantum"[77]. In his *Lectura* he added that there was no need for a patriarch to seek permission for this

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71 Po. 2145, Po. 1112 = X 1.8.4 (*pars decisa*), X 1.8.3. Cf. Paschal II's language in JL 6570, PL CLXIII, col. 428: "In pallio, frater, plenitudo conceditur pontificalis officii" ('In the pallium, brother, the fullness of the pontifical office is granted'). Innocent seemed to prefer 'insigne plenitudinis pontificalis officii' ('the insigne of the fullness of the pontifical office') to describe the pallium in his letters: see Po. 1775, PL CCXIV, col. 1115; Po. 1776, PL CCXIV, col. 1117; Po. 1983, PL CCXV, col. 148; Po. 1987, PL CCXV, col. 145; Po. 1994, PL CCXV, col. 157; Po. 2137, PL CCXV, col. 281; Po. 2139, PL CCXV, col. 292; Po. 2140, PL CCXV, col. 293; Po. 2458, PL CCXV, col. 575; Po. 2462, PL CCXV, col. 578; Po. 3167, PL CCXV, col. 1209; Po. 3190, PL CCXV, col. 1229; Po. 3429, PL CCXV, col. 1422; Po. 3529, PL CCXV, col. 1479; Po. 3728, PL CCXVI, col. 47; Po. 3730, PL CCXVI, col. 49; Po. 3934, PL CCXVI, col. 215.

72 *Glossa ordinaria ad* X 5.33.23 pr., in *Corpus iuris canonici*, ed. cit., vol. II, col. 1826: 'the sign of the fullness of the power of the pastoral office'.

73 Hostiensis, *Summa aurea, ad* X 1.8, in *Henrici de Segusio cardinalis Hostiensis summa aurea* (Basileae: apud Thomam Guarinum, 1573), col. 123: 'full power of office', 'fuller power of office', 'fullest power of office', 'the fullest fullness of power'.

74 *Glossa ordinaria ad* X 5.33.23 s.v. *fidelitatis et oboedientiae*, in *Corpus iuris canonici*, ed. cit., vol. II, col. 1826: 'are immediately under the lord pope'.

75 Hostiensis, *Lectura, ad* X 5.33.23 s.v. *fidelitatis et oboedientiae*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 326r: 'the same fidelity'.

76 Raymond of Penyafort, *Summa de iure canonico*, ed. cit., col. 193 (2.34.4).

77 Hostiensis, *Summa aurea, ad* X 1.8, in *Henrici summa aurea*, ed. cit., col. 124: 'the four chief patriarchs', '*universally* by the lord pope alone'. Emphasis added.

"speciale privilegium", since the law, namely c.5, sufficed[78]. He noted, however, that the law did not allow this privilege to be exercised before, but only after, a patriarch was himself palliated[79]. Still, there were several details the law left unclear. Who were these palliable suffragans? According to eastern tradition, even simple bishops wore the *omophorion*. The canonists, however, stuck to western ways: both the *Casus Parisienses* and the *Casus Fuldenses* assumed that the recipients were archbishops, as did Hostiensis in his *Lectura*[80]. Presumably the Latin patriarchs did not follow the eastern custom in this respect. What about the pallia themselves: from where did the patriarchs acquire them? By long habit in the West, they lay upon the tomb of St. Peter before conferral, thus becoming contact relics, said to have been "de beati Petri corpore sumptum"[81]. Lacking access to the Petrine remains, the patriarchs either received pallia from Rome for distribution or created their own local pallia. Raymond of Penyafort seemed to dodge this question[82].

Even if the pallia to be bestowed within the patriarchates were not Roman, the Roman character of the practice was preserved by requiring a double oath from the recipients, to their patriarch and to the pope. The law spoke of the first oath as a "professio canonica" and the second as a "sponsio oboedientiae" to the Roman Church. First, what was the canonical profession? Eadmer of Canterbury had used the phrase in 1122 to describe Archbishop Thomas of York's act of subjection to Anselm of Canterbury as primate of England before Anselm consecrated him[83]. Indeed, a letter of Anselm to Paschal II in 1108 had insisted that Thomas not receive the pallium until he professed "mihi debita oboedientia"[84]. This understanding meshed with the *Glossa ordinaria*'s later interpretation of the canonical profession as "obedientia canonica" and "iuramentum obedientiae et reuerentiae"[85]. In his *Lectura* Hostiensis agreed that it was something sworn, and articulated it as "fidelitas et obedientia professa

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78 Hostiensis, *Lectura*, *ad* X 5.33.23 s.v. *licenter etiam ipsi*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 326r: 'special privilege'.

79 Hostiensis, *Lectura*, *ad* X 5.33.23 s.v. *ita quod postquam*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 325v.

80 *Casus Parisienses in Concilium quartum Lateranense ad* c.5, in *Constitutiones concilii quarti Lateranensis*, cit., p. 467; *Casus Fuldenses in Concilium quartum Lateranense ad* c.5, in *Constitutiones concilii quarti Lateranensis*, cit., p. 484; Hostiensis, *Lectura*, *ad* X 5.33.23 s.v. *licenter etiam ipsi*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 326r. See also nn. 58, 66 above.

81 Cf. the earliest papal reference to this practice in *c.* 1105, JL 6570, PL CLXIII, col. 429, and the earliest occurrence of this formulaic phrase in 1161, JL 10669, PL CC, col. 123: 'taken from the body of blessed Peter'.

82 Raymond of Penyafort, *Summa de iure canonico*, ed. cit., col. 49 (2.1.5), and cf. col. 193 (2.34.4). Raymond appears to have omitted a relevant pronoun: the patriarchs granted the pallium to their suffragans, he said, 'postquam ipsi receperunt a Sede Apostolica' ('after they received from the apostolic see'). Was the implied object their own pallium, or further pallia for them to distribute in turn?

83 Eadmer of Canterbury, *Historia novorum in Anglia*, RS LXXXI, pp. 10-11.

84 Letter of Anselm of Canterbury to Paschal II, 1108, in *S. Anselmi Cantuariensis archiepiscopi opera omnia*, ed. by F. S. Schmitt, vol. II (V) (Stuttgart: Frommann, 1984²), p. 399: 'the obedience due to me'.

85 *Glossa ordinaria ad* X 5.33.23 pr., in *Corpus iuris canonici*, ed. cit., vol. II, cols 1825-26: 'canonical obedience', 'an oath of obedience and reverence'.

secundum dominum et canones". He explained that it was called a "profession" because it was a serious obligation, not unlike the commitment of a religious to his rule, and it was called "canonical" because canon law required its keeping, and because it could never mandate actions against the canons[86]. As for the second promise, the pledge of obedience to the Roman Church, Hostiensis asserted that it was an actual oath – for it would be "nuda" without one – and that it might be received in writing. Strangely, he seemed to acknowledge that it was not always taken; nevertheless, it did not matter, for "semper ecclesie romane et pape prae ceteris obediendum est", oath or no oath[87]. Already shortly after Lateran IV, the *Casus Fuldenses* equated the oath to the patriarch and the oath to the Roman Church simply as "fidelitas" (fealty), that is, an oath of fidelity[88]. Raymond of Penyafort likewise spoke of both in the same terms[89]. For all the variant language, then, both promises were likely nothing other than the usual oath of fidelity demanded of western archbishops, but in this case doubly directed, to the immediate superior who conferred the vestment and to Rome, by whose authority it was conferred[90].

The Processional Cross

Having treated the pallium, c.5 proceeded to another papally conferred prerogative of western archbishops, the use of the processional cross or *crux gestatoria*, a crucifix fastened to a staff and carried during processions before the pope and those to whom he granted the privilege. Identified as the "vexillum crucis" (the standard of the cross), this honor exalted prelates in a Roman manner: while heightening their prestige with papal trappings, it also tied them more closely to Roman custom and gave them another reason to rely on a papal benefactor. Beginning in 1057, recurring occasionally thereafter, and fairly consistently from the 1120s onward, the popes had specified that this right could only be exercised within the recipient's province (or diocese, if he was a simple bishop)[91]. Now, however, the patriarchs were allowed to use it "everywhere". But important restrictions were added: if they were in Rome, in the presence of the pope, or in the presence of a papal legate using apostolic insignia, they had to forgo the cross. Precedents for the universal use of the processional cross and the accompanying restrictions

86 Hostiensis, *Lectura*, *ad* X 5.33.23 s.v. *professionem* et *canonicam*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 326r: 'fidelity and obedience professed according to the lord [pope] and the canons'.

87 Hostiensis, *Lectura*, *ad* X 5.33.23 s.v. *sponsionem*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 326r: 'naked', 'one must always obey the Roman Church and the pope before others'.

88 *Casus Fuldenses in concilium quartum Lateranense ad* c.5, ed. cit., p. 484.

89 Raymond of Penyafort, *Summa de iure canonico*, ed. cit., col. 193 (2.34.4).

90 Cf. *Glossa ordinaria ad* X 5.33.23 s.v. *fidelitatis et oboedientiae*, in *Corpus iuris canonici*, ed. cit., vol. II, col. 1826; Hostiensis, *Lectura*, *ad* X 5.33.23 s.v. *fidelitatis et oboedientiae*, in *Lectura sive apparatus*, ed. cit., vol. II, fols 325v-26r.

91 Starting in 1057 with JL 4369, PL CXLIII, col. 837, and becoming more frequent by 1126 with JL 7266, PL CLXVI, col. 1264.

could be found in privileges for two so-called patriarchates in the West, Aquileia and Grado; presumably those precedents were now being applied to the eastern patriarchs[92]. Innocent had already done so for the sake of Thomas Morosini, the first Latin patriarch of Constantinople[93].

Early on, canonists felt the need to explain the anomalies in this legislation. Regarding the scope of use, the *Casus Fuldenses* wished to limit the patriarchs' universal right to "omnes prouincie sue", that is, the provinces within a particular patriarchate, but such a remark rendered the explicit exception of Rome nonsensical[94]. Regarding the accompanying restrictions, Johannes Teutonicus pointed out that, based on Justinian's *Digest* and Gratian's *Decretum*, "minor iudex non potest exercere suam iurisdictionem presente suo maiori iudice"[95]. This comment was echoed by the *Glossa ordinaria* and Hostiensis' *Lectura*[96]. Indeed, the cardinal, always eager to protect Roman prerogatives, also held that the prohibition applied to the city of Rome even when the pope was absent[97]. Some years before, in his *Summa aurea*, he had applied the same reasoning and restrictions to the use of the pallium, although the present law did not address that matter[98]. As for papal legates, the *Casus Fuldenses* implied that the mere presence of such an envoy was enough to prohibit the use of the cross, whether or not he was using apostolic insignia[99]. It is unclear whether this position

92 JL 7576, PL CLXXIX, col. 144; JL 7783, PL CLXXIX, col. 286; JL 8560, PL CLXXIX, col. 845.

93 Po. 2458, PL CCXV, col. 575.

94 *Casus Fuldenses in concilium quartum Lateranense ad* c.5, ed. cit., p. 484: 'all their provinces'.

95 Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense, ad* c.5 s.v. *nisi in urbe Romana*, in *Constitutiones concilii quarti Lateranensis*, cit., p. 191: 'a lesser judge cannot exercise his jurisdiction in the presence of his greater judge'. Cf. Dig. 1.16.16; *Decr. Grat.* D.21 c.6. Vincentius Hispanus (*Apparatus in Concilium quartum Lateranense, ad* c.5 s.v. *nisi in urbe Romana*, ed. cit., p. 292) also cited Dig. 1.16.1, which dictated that a proconsul could use the proconsular insignia everywhere – but only after he left Rome.

96 *Glossa ordinaria ad* X 5.33.23 pr. et s.v. *nisi in urbe*, in *Corpus iuris canonici*, ed. cit., vol. II, col. 1826; Hostiensis, *Lectura, ad* X 5.33.23 s.v. *praesens extiterit*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 326r. Elsewhere (*ad* X 1.30.8 s.v. *pro sedis apostolicae reverentia*, in *Lectura sive apparatus*, ed. cit., vol. I, fol. 164v) the cardinal explained that the lesser authority must yield for two reasons: because the greater had the "prerogatiua reuerentie" ('prerogative of reverence'), and lest "in uno corpore uideantur duo capita quasi monstrum" ('two heads may be seen on one body, like a monster').

97 Hostiensis, *Lectura, ad* X 5.33.23 s.v. *nisi in urbe*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 326r.

98 Hostiensis, *Summa aurea, ad* X 1.8, in *Henrici summa aurea*, ed. cit., col. 123. The cardinal admitted that the archbishop of Canterbury had worn his pallium in Lyon while the pope was in the city, perhaps merely because of inattentiveness, but he emphasized that "quid fieri debeat" ('what ought to be done') always trumped "quid fit" ('what is done'). Cf. Urban II at the Council of Bari (1098), apparently the only prelate in attendance who wore the pallium, which even the archbishop of Bari was not wearing, though in his own province: Eadmer of Canterbury, *Historia novorum in Anglia*, RS LXXXI, p. 107; William of Malmesbury, *Gesta pontificum Anglorum*, RS LII, p. 99.

99 *Casus Fuldenses in concilium quartum Lateranense ad* c.5, ed. cit., p. 484. The point of c.5's restriction, it may be supposed, was to prevent competing papal symbols, and so a legate not using his insignia would not create a visual conflict with the patriarch and his cross. Hostiensis, in *Lectura, ad* X 5.33.23 s.v. *ubicumque summus pontifex aut eius legatus utens insigniis*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 326r, listed as examples of a legate's apostolic insignia red vestments, a palfrey, a white bridle, and gilded spurs, which suggests that a legate did not typically use the processional cross itself.

resulted from a sloppy abbreviation of the text, or whether the *Fuldenses* were again trying to limit patriarchal prerogatives. In any event, the gist of this part of c.5 was that the patriarchs could display this sign of dignity throughout the world, a right which went far beyond the privilege of an archbishop, but they could not thereby compete with the pope himself.

Canonical Appeals

In its final part, c.5 turned from the ceremonial to the judicial, as it discussed the role of the patriarchs in canonical appeals. Their right to receive appeals within the provinces of their respective patriarchates was recognized. Once again this concession to the patriarchs traced its roots to Innocent's initial privileges to Thomas Morosini[100]. The stipulation "when it is necessary" did not elicit comment from most scholars of the time, except when Hostiensis in his *Lectura* explained that such appeals ought to be made "si quis gravetur, non aliter"[101]. But thirteenth-century canonists were nearly unanimous in interpreting this appellate jurisdiction as "omissis mediis", that is, able to be directly invoked, without first having to appeal to intermediate authorities[102]. Such a characteristic pertained also to the pope, and so seemed to place the patriarchs on the same level[103]. Yet c.5 hastened to except appeals to the pope from this patriarchal privilege, and emphasized that the pope's appellate jurisdiction, unlike the patriarchs', applied universally[104]. Hostiensis confirmed that "appellatio ad Romanam ecclesiam facta facte ad patriarcham preiudicat", and further claimed that "est ergo privilegium specialissimum apostolice sedis, ut omissis quibuslibet mediis

100 Po. 2462, PL CCXV, col. 578.

101 Hostiensis, *Lectura*, *ad* X 5.33.23 s.v. *fuerit provocetur*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 326r: 'if someone is oppressed, [but] not otherwise'.

102 Starting with Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, *ad* c.5 s.v. *ad eos cum necesse fuerit provocetur*, ed cit., p. 191: 'skipping over the middlemen'. Innocent IV stated the principle succinctly in his sole comment on c.5, in *Apparatus in quinque libros decretalium*, *ad* X 5.33.23, in *Commentaria Innocentii quarti pont. maximi super libros quinque decretalium* (Francofurti ad Moenum: per Martinum Lechler, impensis Hieronymi Feyerabend, 1570), fol. 536r: "Antistite patriarchae provocetur etiam aliis omissis" ('One may appeal from a bishop to a patriarch, even skipping over the middlemen'). Many canonists cited *Decr. Grat.* C.11 q.1 c.46 in support. Hostiensis noted, on the contrary, that there were precedents for not skipping over intermediate judges, as in Dig. 49.1.21 and X 2.28.66 (*Lectura*, *ad* X 5.33.23 s.v. *ad sedem apostolicam*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 326r).

103 Vincentius Hispanus, *Apparatus in Concilium quartum Lateranense*, *ad* c.5 s.v. *Constantinopolitana* et *salvis appellationibus ad sedem apostolicam interpositis*, ed. cit., p. 292; Raymond of Penyafort, *Summa de iure canonico*, ed. cit., col. 49 (2.1.5); *Glossa ordinaria ad* X 5.33.23 pr. et s.v. *ab omnibus*, in *Corpus iuris canonici*, ed. cit., vol. II, col. 1826; Hostiensis, *Lectura*, *ad* X 5.33.23 s.v. *ad sedem apostolicam*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 326r.

104 On the canonical development of this idea, see R. L. Benson, 'Plenitudo Potestatis: Evolution of a Formula from Gregory IV to Gratian', in SG 14 (1967), pp. 193-217.

possit appellari ad ipsam"[105]. Several writers paralleled this papal right to that of the ancient Roman emperor[106]. As a canonical foundation for the pope's unique faculty, the *Glossa ordinaria* posited that "dominus Papa est iudex ordinarius singulorum", and Hostiensis followed that line of thought in both his major works[107]. In his *Summa aurea* he asserted: "Ad Papam potest, omisso medio, a quolibet ordinario et a quolibet appellari [...], quia et mediate et immediate ordinarius est cunctorum", while in his *Lectura* he phrased it slightly differently: "Immediate preest omnibus [...], unde ad eum potest omisso alio medio quilibet appellare [...]. Et est una ratio: quia et ei est quilibet immediatate [*sic*] subiectus"[108].

Canonists sometimes entertained ancillary considerations prompted by this section of c.5. The *Casus Fuldenses* admitted the patriarchs' right to receive appeals, but added "nisi in arduis causis"[109]. Once more this commentary seemed eager to limit patriarchal rights, though its proposed exception was not founded on the Lateran decree. Perhaps it was assuming that particularly controversial cases would be appealed over the head of a patriarch, directly to the pope. Around the same time, Damasus cited a question of Vincentius Hispanus – oddly, one not found in Vincentius' extant work – that speculated, "Quid si simpliciter dicat, 'Appello', et non exprimat ad quem?"[110]. This question addressed the form of an appeal, and was pertinent only because the appellant had a choice between appealing to his patriarch or appealing directly to the pope. Finally, Raymond of Penyafort listed the case of a bishop appealing over his archbishop to his patriarch as one of the few situations in which a patriarch possessed jurisdiction over a subordinate metropolitan's suffragan bishop[111]. In other words, the patriarchs certainly did not enjoy the immediate universal

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105 Hostiensis, *Lectura*, *ad* X 5.33.23 s.v. *ad sedem apostolicam*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 326r: 'an appeal made to the Roman Church prejudices one made to a patriarch', 'it is therefore the most special privilege of the apostolic see, that, skipping over any middlemen, one can appeal to her'.

106 Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, *ad* c.5 s.v. *ad eos cum necesse fuerit provocetur*, ed. cit., p. 191; *Glossa ordinaria ad* X 5.33.23 s.v. *ab omnibus*, in *Corpus iuris canonici*, ed. cit., vol. II, col. 1826; Hostiensis, *Lectura*, *ad* X 5.33.23 s.v. *ad sedem apostolicam*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 326r.

107 *Glossa ordinaria ad* X 5.33.23 pr., in *Corpus iuris canonici*, ed. cit., vol. II, col. 1826: 'the lord pope is the ordinary judge of everyone'.

108 Hostiensis, *Summa aurea*, *ad* X 2.28, in *Henrici summa aurea*, ed. cit., col. 633: 'Any ordinary and anyone can appeal to the pope, skipping over the middleman [...], for, both mediately and immediately, he is the ordinary of all'; Hostiensis, *Lectura*, *ad* X 5.33.23 s.v. *sponsionem* et *ad sedem apostolicam*, in *Lectura sive apparatus*, ed. cit., vol. II, fol. 326r: 'He is immediately in charge of all [...]; thus anyone can appeal to him, skipping over another middleman [...]. And there is one reason: that everyone is also immediately subject to him'.

109 *Casus Fuldenses in concilium quartum Lateranense ad* c.5, ed. cit., p. 484: 'except in difficult cases'.

110 Damasus, *Apparatus in Concilium quartum Lateranense*, *ad* c.5 s.v. *salvis appellationibus ad sedem apostolicam*, in *Constitutiones concilii quarti Lateranensis*, cit., p. 421: 'What if he should simply say, "I appeal", and not express to whom?'. The proposed solution made reference to 3Comp. 2.19.13 = X 2.28.55, which does not seem entirely relevant to the question.

111 Raymond of Penyafort, *Summa de iure canonico*, ed. cit., col. 48 (2.1.5). Cf. Pope Honorius III's complaint in 1217 against Patriarch Gervase of Constantinople, who was claiming the right to hear all cases from the archdiocese of Thebes, whether appealed or not (Setton, *The Papacy and the Levant*, cit., vol. I, p. 46).

jurisdiction attributed to the papacy. Just as the regulation of the processional cross exalted the patriarchs with papal-like privileges beyond the reach of archbishops, but also prevented them from endangering the pope's uniqueness, so in the juridical realm the regulation of canonical appeals did the same.

Conclusion

The impact of the fifth constitution must be assessed by taking the entire constitution into account. However politically momentous the ranking of the patriarchates at the beginning seems, the provisions following it were not mere window dressing. In subtler ways, which must be understood within their broad historical context and analyzed according to their contemporary canonical interpretations, these juridical and ritual protocols defined what exactly the patriarchs were. In a culture that increasingly ordered its relationships according to law, determining who could decide cases was not at all a technical detail, but an essential demarcation of power. And in a sacramental culture in which symbols not only signified realities but brought them about, marks of rank and status were crucial to exercising authority. These things served to express in a legal, ceremonial, and even material manner the peculiar standing of the eastern patriarchs, by long tradition almost on a par with the papacy, yet without threatening the western *sine qua non* of papal primacy. Through these regulations Pope Innocent III incorporated the patriarchs into the high medieval conception of the perfect ecclesiastical hierarchy, as prelates prestigious but firmly subordinate to Rome, enjoying faculties similar to but transcending those of metropolitans. As Raymond of Penyafort put it, "Patriarchae [...] sunt minores Papa, maiores Metropolitanis"[112]. As a result, c.5 affirmed, their "proper dignity" would be preserved. The need to receive the pallium but also the ability to confer it, the leave to use the cross almost anywhere but also the curbs on that use, the right to hear appeals from many provinces but the possibility that appellants could turn directly to Rome – these stipulations made tangible the unique position of the most important bishops in Christendom, and so made manifest Innocent's vision of the ideal Christian community.

112 Raymond of Penyafort, *Summa de iure canonico*, ed. cit., col. 48 (2.1.5): 'Patriarchs [...] are less than the pope, [but] greater than metropolitans'. Duba calls a patriarch, in Innocent's view, 'a supra-metropolitan answerable to the pope' ('The Status of the Patriarch of Constantinople', cit., p. 85).

FABRICE DELIVRÉ

Une constitution électorale : Théories et pratiques au miroir de *Quia propter*

Promulguée à l'issue du concile de Latran IV (14 décembre 1215)[1], *Quia propter* marque, à bien des égards, un tournant dans l'histoire de l'élection des évêques[2]. Inscrite dans une séquence homogène (cc.23-26), reproduite dans la *Compilatio quarta* (1216) puis le *Liber Extra* (1234)[3], qui fixe à trois mois la durée maximale de la vacance des Églises cathédrales et régulières, pose le principe de la dévolution du droit d'élire (c.23, *Ne pro defectu*)[4], définit les formes d'élection (c.24, *Quia propter*),

1 U.-R. Blumenthal, '*Liber Extra* 5.6.17 (*Ad liberandam*) : A Surprising Commentary by Hostiensis', in *Honos alit artes. Studi per il settantesimo compleanno di Mario Ascheri*, éd. P. Maffei et G. M. Varanini, 1 (Firenze : Firenze University Press, 2014), pp. 309-18, pp. 310-11, 317-18.

2 G. Barraclough, 'The Making of a Bishop in the Middle Ages : The Part of the Pope in Law and Fact', in CHR 19 (1933), pp. 275-19, p. 285 ; B. Schimmelpfennig, 'Papst- und Bischofswahlen seit dem 12. Jahrhundert', in *Wahlen und Wahlen im Mittelalter*, éd. R. Schneider et H. Zimmermann (Sigmaringen : Thorbecke, 1990, Vorträge und Forschungen 37), pp. 173-95, repris in Idem, *Papsttum und Heilige. Kirchenrecht und Zeremoniell. Ausgewählte Aufsätze*, éd. G. Kreuzer et S. Weiß (Neuried : Ars et unitas, 2005), pp. 231-56, n. 9, pp. 241, 249-50, 252-53 ; O. Condorelli, *Principio elettivo, consenso, rappresentanza. Itinerari canonistici su elezioni episcopali, provvisioni papali e dottrine sulla potestà sacra da Graziano al tempo della crisi conciliare (secoli XII-XV)* (Roma : Il Cigno Edizioni, 2003, I libri di Erice 32), pp. 35-36 ; J. Peltzer, *Canon Law, Careers and Conquest. Episcopal Elections in Normandy and Greater Anjou, c. 1140-c. 1230* (Cambridge : Cambridge University Press, 2008, Cambridge Studies in Medieval Life and Thought, Fourth Series 71), pp. 39-40 ; M. Bégou-Davia, 'Les élections discordantes dans la pratique et la législation pontificales au XIII[e] siècle', in *Etudes offertes à Jean-Louis Harouel. Liber amicorum*, éd. D. Salles *et al.* (Paris : Éditions Panthéon-Assas, 2015), pp. 509-24, pp. 510-11.

3 'Concilium Lateranense IV, 1215', éd. A. García y García et A. Melloni, in COGD, 11.1, pp. 149-204, pp. 161-204, pp. 179-181 (cc.23-26) ; *Constitutiones concilii quarti Lateranensis una cum commentariis glossatorum*, éd. A. García y García (Città del Vaticano : BAV, 1981, MIC Series A 2), pp. 41-118, pp. 69-72 (cc.23-26) ; *Quinque compilationes antiquae*, éd. E. Friedberg (Leipzig : Tauchnitz, 1882 = Graz : Scientia Verlag, 1956), p. 137 (4Comp. 1.3.8-11) ; *Corpus iuris canonici. Pars secunda : Collectiones decretalium*, éd. E. Friedberg (Leipzig : Tauchnitz, 1881 = Graz : Scientia Verlag, 1959), cols 88-90 (X 1.6.41-44).

4 A. A. Larson, 'Archiepiscopal and Papal Involvement in Episcopal Elections : The Origins and Reception of Lateran IV cc.23-24 from the Third Lateran Council to the *Liber Sextus*', in ZRG, Kan. Abt. 102 (2016), pp. 73-98.

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The Fourth Lateran Council and the Development of Canon Law and the ius commune, ed. Atria Larson and Andrea Massironi, Turnhout: Brepols, 2018 (EMI 7), pp. 111–47

10.1484/M.EMI-EB.5.116651

en écarte toute intromission séculière (c.25, *Quisquis electioni*) et conforte la règle de l'examen par le supérieur de la personne de l'élu et du procès d'élection (c.26, *Nichil est*), *Quia propter* a retenu les glossateurs dès le premier quart du XIII^e siècle. Au début des années 1260, la *Lecture* de Bernard de Montmirat (m. 1296) la qualifie de constitution bonne et utile[5]. Francesco Zabarella (m. 1417) évoque, de son côté, une très fameuse décrétale[6]. Quant à Girolamo Chiari, dans la seconde moitié du XV^e siècle, il a muni la glose ordinaire de Bernard de Parme (m. 1266) d'un *summarium* qui la hausse au rang de principale décrétale du titre *De electione et potestate electi* (X 1.6), pourtant riche de soixante chapitres[7]. L'étude de *Quia propter*, au prisme du texte et de sa fortune, éclaire les multiples dimensions de l'élection canonique forgée par le *ius commune*.

> Quia propter diversas electionum formas, quas quidam invenire conantur, et multa impedimenta proveniunt et magna pericula imminent ecclesiis viduatis, statuimus ut cum electio fuerit celebranda, presentibus omnibus qui debent et volunt et possunt commode interesse, assumantur tres de collegio fide digni, qui secreto et singillatim vota cunctorum diligenter exquirant, et in scriptis redacta, mox publicent in communi, nullo prorsus appellationis obstaculo interiecto, ut is collatione habita eligatur, in quem omnes vel maior et sanior pars consentit; vel saltem eligendi potestas aliquibus viris idoneis committatur, qui vice omnium ecclesie viduate provideant de pastore. Aliter electio facta non valeat, nisi forte communiter esset ab omnibus, quasi per inspirationem, absque vitio celebrata. Qui vero contra prescriptas formas eligere attemptaverint, eligendi ea vice potestate priventur. Illud autem penitus interdicimus, ne quis in electionis negotio procuratorem constituat, nisi sit absens in eo loco de quo debeat advocari iustoque impedimento detentus venire non possit; super quo si opus fuerit, fidem faciat iuramento, et tunc si voluerit uni committat de ipso collegio vicem suam. Electiones quoque clandestinas reprobamus, statuentes ut quam cito electio fuerit celebrata, sollempniter publicetur[8].

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5 Città del Vaticano, BAV, Borgh. 231, fols 17vb-19ra (*ad* X 1.6.42), fol. 17vb ; M. Bertram, 'Pierre de Sampson et Bernard de Montmirat. Deux canonistes français du XIII^e siècle', in *L'Eglise et le droit dans le Midi (XIII^e-XIV^e s.)*, *Cahiers de Fanjeaux* 29 (1994), pp. 37-74, repris in Idem, *Kanonisten und ihre Texte (1234 bis Mitte 14. Jh.). 18 Aufsätze und 14 Exkurse* (Leiden-Boston : Brill, 2013, Education and Society in the Middle Ages and Renaissance 43), pp. 343-74 (n. XIII), 501-503 (Nachträge XIII), p. 357.

6 München, BSB, Clm 6570, fols 139vb-43vb (*ad* X 1.6.42), fol. 139vb.

7 *Decretales cum summariis suis et textuum divisionibus ac etiam rubricarum continuationibus* (Venetiis : Baptista de Tortis, 1491), fols 30vb-31rb (*ad* X 1.6.42), fol. 30vb.

8 'Concilium Lateranense IV', cit., pp. 179-80 (c.24) ; *Constitutiones concilii quarti Lateranensis*, cit., pp. 70-71 (c.24) ('En raison des diverses formes d'élection que certains s'efforcent de trouver, les Églises en veuvage font face à de multiples encombres et courent de grands périls. Aussi décidons-nous que, lorsqu'il faudra célébrer une élection, en présence de tous ceux qui doivent, veulent et peuvent commodément y prendre part, seront choisis au sein du collège trois membres dignes de foi qui examineront les votes de chacun avec diligence, en secret et un par un et qui, après les avoir rédigés par écrit, les publieront immédiatement devant tous, aucun appel interjeté ne pouvant être opposé. Au terme de la collation des votes, celui qui a recueilli l'accord de tous ou de la plus grande et plus saine partie sera élu. Ou bien le pouvoir d'élire sera confié à quelques personnes idoines qui, à

Détaillant le *modus procedendi* avec l'examen des votes de chacun par trois membres du collège dignes de foi ou, autre possibilité, le recours à quelques personnes idoines chargées d'élire en lieu et place de tous, la constitution *Quia propter* évitait les termes techniques de scrutin (*scrutinium*) et de compromis (*compromissum*) attestés dans la rubrique[9] – l'élection unanime par inspiration divine étant hors normes. L'histoire du compromis est plus heurtée que celle du scrutin. Si Bernard de Pavie (m. 1213) indique, dans sa *Summula* (1177-79), qu'une élection peut être faite au moyen d'électeurs (*per electores*)[10], la stabilisation de la *compromissio* n'intervient que dans le premier tiers du XIII^e^ siècle. Au milieu des années 1230, les lettres pontificales – héritières des procès-verbaux rédigés *in partibus* – voient l'avènement des compromissaires (*compromissarii*), pendants des scrutateurs (*scrutatores*)[11]. La terminologie des formes d'élection s'impose, de son côté, avec les glossateurs de *Quia propter*. Alors que les *Casus decretalium* (1234-38) de João de Deus (m. 1267) emploient des périphrases pour qualifier le compromis et la quasi-inspiration[12], Vincentius Hispanus (m. 1248) est le premier, dans son apparat de gloses au *Liber Extra*, à décrire les formes de l'inspiration, du scrutin et du compromis (*forma inspirationis, forma scrutinii, forma compromissi*)[13]. À l'heure de la *reformatio ecclesie generalis*, la formalisation emprunte des voies parallèles. Dans cette perspective, trois aspects seront envisagés, qui apparaissent comme les facettes d'un seul et même processus : le discours sur les formes d'élection (*formae electionum/electionis*) (I), l'émergence et les usages de la "forme du concile général" (*forma concilii generalis*) (II) ainsi que l'élaboration et la diffusion de modèles (*formae*) qui régissent les pratiques d'oralité et d'écriture (III).

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la place de tous, pourvoiront l'Église veuve d'un pasteur. Toute élection faite autrement n'aura pas de valeur, à moins qu'elle n'ait été célébrée en commun, par tous, comme par inspiration, sans vice. Ceux qui oseraient procéder à une élection contre les formes prescrites seraient privés pour cette fois de leur pouvoir d'élire. En outre, nous interdisons absolument à quiconque de constituer un procureur dans une cause d'élection, sauf s'il est absent du lieu où il doit être convoqué et que, retenu par un juste empêchement, il ne peut venir. En cas de nécessité, il en fera serment et, s'il le veut, il chargera un membre dudit collège de tenir sa place. Nous réprouvons aussi les élections clandestines, décidant que l'élection, dès qu'elle a été célébrée, soit solennellement publiée').

9 Ci-dessous, n. 17.

10 'Bernardi summa de electione', éd. E. A. T. Laspeyres, in *Bernardi Papiensis Faventini episcopi summa decretalium ad librorum manuscriptorum fidem cum aliis eiusdem scriptoris anecdotis* (Regensburg : Josef Manz, 1860 = Graz : Akademische Druck- und Verlagsanstalt, 1956), pp. 307-23, Appendix, n. II, pp. 317-18.

11 *Les registres de Grégoire IX (1227-1241)*, éd. L. Auvray *et al.*, II (Paris : A. Fontemoing/E. de Boccard, 1907), cols 174-79, n. 2796 (Assise, 01/10/1235).

12 Città del Vaticano, BAV, Borgh. 145, fol. 10va (*ad* X 1.6.42).

13 Paris, BN, lat. 3967, fols 22rb-23ra (*ad* X 1.6.42), fol. 22rb-22vb ([*s.v. formas*]) ; Madrid, BN, 30, fols 29ra-30ra, fol. 29ra-29va.

Les formes d'élection

Dans ses *Additiones* et sa *Novella*, Giovanni d'Andrea (m. 1348) est le premier à avoir rapproché, sur le thème de la diversité des formes d'élection, les prélats d'avant la constitution *Quia propter* et les magistrats séculiers de son temps, podestats, consuls et recteurs de cités[14] – une démarche, enracinée dans le paysage de l'Italie centro-septentrionale, reprise par la *Lecture* de Giovanni da Legnano (m. 1383)[15]. Au siècle précédent, Jean le Teutonique (m. 1245), suivi par Bernard de Parme, se contentait d'affirmer que le système des scrutateurs avait apporté un remède salutaire aux discordes et aux subterfuges et, en particulier, à l'abus qui consistait, pour une fraction du chapitre, à faire appel aussitôt après l'élection, afin d'empêcher toute promotion concurrente[16]. Plusieurs indices dénotent les nouvelles attentions qui entourent la forme/les formes d'élection au XIII^e siècle. S'il y a peu à tirer des rubriques de *Quia propter* dans les recueils de constitutions conciliaires, où les rares occurrences de la forme d'élection (*de forma electionis* ; *de electionum forma*) ne le disputent guère au titre générique *de electione facienda per scrutinium vel compromissum*[17], l'incursion de *Quia propter* dans les *Compilationes antiquae* est autrement plus significative. Jean le Teutonique (1215-16) l'évoque à quatre reprises dans sa glose à la *Compilatio tertia* (1210), trois fois au sujet de la citation et de la représentation des absents et une fois à propos du passage de la nomination à l'élection[18]. Mais il revient aux gloses de Tancrède (v. 1220) – un auteur dont on sait

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14 München, BSB, Clm 6351, fol. [12rb-12vb] (*ad* X 1.6.42), fol. [12rb] (s.v. *electionum formas*) ; München, BSB, Clm 14026, fols 21rb-21vb, 23ra-23rb (*ad* X 1.6.42), fol. 21rb (s.v. *electionum formas*) ; Paris, BN, lat. 4016, fols 71vb-75ra (*ad* X 1.6.42), fol. 72ra (s.v. *formas*) ; Iohannes Andreae, *In quinque decretalium libros novella commentaria*, I (Venetiis : apud F. Franciscium, 1581 = Torino : Bottega d'Erasmo, 1963), fols 115ra-118vb, fol. 115ra. Sur les *Additiones*, matériaux préparatoires de la *Novella* ou *Lecturae reportatae per viam additionum* : K. Pennington, 'Johannes Andreae's *Additiones* to the Decretals of Gregory IX', in ZRG, Kan. Abt. 74 (1988), pp. 328-47, repris in Idem, *Popes, Canonists and Texts, 1150-1550* (Aldershot : Variorum, 1993, CSS 412), XIX ; V. Colli et G. Murano, 'Un codice d'autore con autografi di Giovanni d'Andrea (ms. Cesena, Biblioteca Malatestiana, S. II. 3)', in IC 24 (1997), pp. 1-23 et fig. 1-10, repris in V. Colli, *Giuristi medievali e produzione libraria. Manoscritti-Autografi-Edizioni* (Stockstadt am Main : Keip, 2005, Bibliotheca eruditorum 35), pp. 407*-34*, n. 13, pp. 20-21/426*-27*, n. 47 ; G. Murano, 'Giovanni d'Andrea (1271-1348)', in *Autographa. 1.1. Giuristi, giudici e notai (sec. XII-XVI med.)*, éd. G. Murano (Bologna : CLUEB, 2012, Centro interuniversitario per la storia delle università italiane 16), pp. 44-50, pp. 48-49. Dans les lignes qui suivent, le parti a été pris de renvoyer aux *Additiones I* (München, BSB, Clm 6351) et aux *Additiones II* (München, BSB, Clm 14026). Sur les pratiques d'élection communales, H. Keller, 'Wahlformen und Gemeinschaftsverständnis in den italienischen Stadtkommunen (12./14. Jahrhundert)', in *Wahlen und Wählen im Mittelalter*, cit., pp. 345-74.

15 Città del Vaticano, BAV, Borgh. 230, fols 239ra-241rb (*ad* X 1.6.42), fol. 239ra (s.v. *diversitas* [sic]).

16 *Constitutiones concilii quarti Lateranensis*, cit., pp. 211-14 (*ad* Lat. IV c.24), pp. 211-12 (s.v. *assumantur tres de collegio fide digni*) ; Saint-Omer, BM, 435, fol. 21rb-21va (*ad* X 1.6.42), fol. 21rb (s.v. *tres de collegio*) ; Bologna, Collegio di Spagna, 280, fol. 26ra-26va, fol. 26rb (s.v. *de collegio*) ; *Decretales d. Gregorii papae IX suae integritati una cum glossis restitutae* (Roma : In aedibus populi Romani, 1582), cols 179-82, col. 180.

17 *Constitutiones concilii quarti Lateranensis*, cit., p. 150.

18 Johannes Teutonicus, *Apparatus glossarum in Compilationem tertiam*, éd. K. Pennington (Città del Vaticano : BAV, 1981, MIC Series A 3), pp. 46-48 (*ad* 3Comp. 1.6.3, *Cum inter universas*), p. 47, pp. 54-57 (*ad* 3Comp. 1.6.6, *Cum inter canonicos*), pp. 56-57, pp. 70-74 (*ad* 3Comp. 1.6.13, *Quod sicut*), p. 71,

le penchant pour la procédure – d'avoir pleinement associé *Quia propter* et les formes d'élection[19]. Une même tendance se fait jour dans la *Summa iuris canonici* (1218-21) de Raymond de Peñafort, qui s'appuie sur la *Compilatio quarta*[20]. Une fois intégrée au *Liber Extra*, la constitution inspire les *summae* des décrétalistes confrontés au titre *de electione*, depuis le pionnier Juan de Petesella (v. 1235-36), au plus près du texte[21], jusqu'à Henri de Suse/Hostiensis (m. 1271) qui, avant 1253, glose très longuement la constitution dans sa section *Qualiter facienda sit electio*[22], en passant par Goffredo da Trani (m. 1245) qui, dans sa *Summa* (1241-43), décrit les formes d'élection selon *Quia propter*[23]. Divisant la matière en trois parties, entre ce qui a trait aux formes d'élection, aux procureurs et à la publication, les *Casus decretalium* de João de Deus annoncent les sommaires des glossateurs du *Liber Extra*[24]. Dans sa présentation du scrutin, Vincentius Hispanus distingue trois catégories au sein de *Quia propter*. La convocation des électeurs, la détermination de la date et du lieu de l'élection, l'attente des absents ou de leurs procureurs ainsi que le choix de la voie d'élire sont situés en amont de la forme (*ante formam*) tandis que les modalités de recrutement des scrutateurs excèdent la forme (*preter formam*). Seules les conditions d'examen, la mise par écrit et la publication des votes, ainsi que la collation et l'élection (commune) ressortissent à la forme (*de forma*)[25], autant d'éléments repris dans la

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pp. 76-78 (*ad* 3Comp. 1.6.15, *In causis*), p. 77.

19 Città del Vaticano, BAV, Vat. lat. 1377, fol. 4ra-4rb (*ad* 1Comp. 1.4.15, *Licet de vitanda*), fol. 4rb : "*maioris*. Valet in electionibus quod fit a maiori parte capituli dummodo una de formis nuper statutis in concilio servata sit, alias non valent electiones in discordiam facte ut in concilio Innocentii III *Quia per diversas*, quod hoc locum [habet] in electionibus prelatorum magnarum [mangnatarum *ms.*] ecclesiarum. In electione vero domini pape non credo constitutionem illam optinere sed standum esse constitutioni presenti. T." (*'de la plus grande (partie)*. Les élections faites par la plus grande partie du chapitre sont valables, à condition que soit observée une des formes autrefois définies en concile, tandis que les élections faites dans la discorde n'ont pas de valeur, ainsi que cela a été décidé par *Quia per diversas* du concile d'Innocent III, qui regarde les élections des prélats des grandes Églises. Je ne crois pas en revanche que cette constitution régisse l'élection du seigneur pape, dans laquelle il faut se tenir à la présente constitution. T.'), fols 158vb-59rb (*ad* 3Comp. 1.6.1, *Cum inter dilectos*), fol. 159rb : "*volumus*. Hodie nulla electio in discordia facta valet si non fuerit servata aliqua de formis quas habes in constitutione concilii domini Innocentii pape III *Quia per diversas*. [...] T.".

20 Città del Vaticano, BAV, Borgh. 261, fols 100va-101va (*ad* X 1.6), fol. 100vb : "Item cum fuerint in locco (*sic*) debito eligant secundum unam de formis quas habes extra iiii. e. const. *Quia propter*".

21 Città del Vaticano, BAV, Borgh. 163, fols 1ra-3ra (*ad* X 1.6), fol. 1rb-1va. Sur l'auteur et son œuvre, M. Bertram, '*Gallecia unde duxi originem*. Johannes Hispanus Compostellanus (de Petesella) und seine Dekretalensumme (c. 1235/36)', in *Life, Law and Letters : Historical Studies in Honour of Antonio García y García*, éd. P. Linehan, SG 28 (1998), pp. 89-119, repris in Idem, *Kanonisten und ihre Texte*, cit., pp. 183-211 (n. VIII), 491(Nachträge VIII).

22 München, BSB, Clm 14006, fols 11rb-16vb (*ad* X 1.6), fols 12va-14ra ; Paris, BN, lat. 15410, fols 17ra-24va, fols 19ra-21ra ; Reims, BM, 713, fols 18ra-26vb, fols 20rb-22vb ; Henricus [de Segusio], *Summa super titulis decretalium*, 1 (Augsburg : Ludwig Hohenwang, 1477) (GW 12232), fols d16v-f18, fols e6v-e18v.

23 Troyes, BM, 456, fols 3va-5ra (*ad* X 1.6), fols 3vb-4rb.

24 Città del Vaticano, BAV, Borgh. 145, fol. 10va (*ad* X 1.6.42).

25 Paris, BN, lat. 3967, fol. 22rb-22va (*ad* X 1.6.42, [s.v. *formas*]) ; Madrid, BN, 30, fol. 29rb-29va.

glose de Bernard de Parme[26]. Goffredo da Trani, dans son apparat puis sa somme, déclare que la présence de tous ne fait pas partie de la forme[27]. De même, face aux décrétales *Cumana* (X 1.6.50) et *Cum in veteri* (X 1.6.52) qui laisseraient penser le contraire, Bernard de Compostelle (m. 1267) invoque la pratique curiale pour soutenir que la fixation du jour de l'élection ne relève pas de la forme[28]. Quant à l'apparat de Sinibaldo Fieschi/Innocent IV (m. 1254), il fait le départ entre l'élection commune en chapitre et la publication de l'élection devant le peuple, seule la première étant *de forma* ou *de substantia electionis*[29]. L'idée de substance de l'élection, rencontrée chez Vincentius Hispanus ("quia substantia electionis lesa est")[30], a eu ses détracteurs – tel Guglielmo Nasone, qui ramène le débat à la forme plutôt qu'à la substance[31]. Dans le discours sur la forme du scrutin, le second XIII^e^ siècle voit triompher les *substantialia electionis*. Quatorze sont décrits dans la *Lecture* d'Henri de Suse/Hostiensis[32]. Paolo Liazari (m. 1356) en dénombre dix-sept dans son *Commentum* de *Quia propter*[33]. Giovanni da Legnano, après avoir signalé les quatre *principalia* que sont l'examen, la publication, la collation et l'élection (commune), recense dix-huit *substantialia*[34], un chiffre reçu jusque dans la *Lecture* de Francesco Zabarella, lequel est tenté d'ajouter deux *substantialia* à la liste, en vertu des *iura nova* du Sexte (1298) qui stipulent que l'élection commune doit être prononcée par une seule personne, agissant au nom de tous, et au singulier plutôt qu'au pluriel ("quod electio pronuntietur per unicum et per verba singularis numeri")[35]. La littérature procédurale vulgarise la

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26 Saint-Omer, BM, 435, fol. 21ra (*ad* X 1.6.42, s.v. *maior et sanior*) ; Bologna, Collegio di Spagna, 280, fol. 26rb (s.v. *et sanior*) ; *Decretales d. Gregorii papae IX*, cit., col. 180 (s.v. *sanior*).

27 Montecassino, Archivio e Biblioteca dell'Abbazia, 266, p. 27a-27b (*ad* X 1.6.42), p. 27ra (s.v. *aliter*) ; Troyes, BM, 456, fol. 3vb (*ad* X 1.6).

28 Reims, BM, 708, fols 77va-81va (*ad* X 1.6.42), fol. 77va : "ut vidi papam determinare iura predicta" ('comme j'ai vu le pape déterminer les droits susdits') ; Saint-Omer, BM, 160, fols 46ra-48va, fol. 46ra.

29 Bologna, Collegio di Spagna, 220, fols 38ra-39vb (*ad* X 1.6.42), fols 38ra (s.v. *presentibus omnibus*), 39vb (s.v. *publice[tur]*) et, mieux encore, München, BSB, Clm 3892, fols 26ra-27rb, fols 26ra, 27rb ; Innocentius IV, *Commentaria ... super libros quinque decretalium* (Francofurti ad Moenum : per Martinum Lechler, impensis Hieronymi Feyerabend, 1570), fols 71ra-74rb, fols 71rb, 74rb.

30 Paris, BN, lat. 3967, fol. 22va (*ad* X 1.6.42, [s.v. *formas*]) ; Madrid, BN, 30, fol. 29va.

31 Wien, ÖNB, Cod. 2083, fols 49va-50ra (*ad* X 1.6.42), fol. 49vb : "*formas*. Non dicit substantias et tamen glosule dicunt. Et ego non video quod sit substantia in ipsa electione et idem dicunt in excommunicatione quantum ad absolutionem". Sur Guglielmo Nasone, S. Kuttner et B. Smalley, 'The '*Glossa ordinaria*' to the Gregorian Decretals', in EHR 60 (1945), pp. 97-105, repris in S. Kuttner, *Studies in the History of Medieval Canon Law* (Aldershot : Variorum, 1990, CSS 325), XIII, pp. 103-05 (Appendix II : William Naso), *Retractationes XIII*, p. 19.

32 München, BSB, Clm 13015, fols 93rb-99ra (*ad* X 1.6.42), fols 95vb-96rb (s.v. *consentit*) ; Hostiensis, *Lectura sive apparatus ... super quinque libris decretalium*, I (Argentini : Johannes Schott, 1512), fols 67ra-71ra, fols 68va-69ra.

33 Le texte (Inc. *Casus. Ponit electionum formas secundum quas provideri debet ecclesiis viduatis per collegia*) est conservé dans des recueils de répétitions (Paolo Liazari, Giovanni et Gaspare Calderini) : Barcelona, ACA, Ripoll 66, fols 49v-58 (*ad* X 1.6.42) ; Salamanca, Biblioteca Histórica General (Biblioteca Universitaria), 2384, fols 21ra-27ra ; Sigüenza, Biblioteca de la Catedral, 4, fols 48ra-49vb, 1ra-2ra; Basel, UB, C I 19, fols 157vb-61vb.

34 Città del Vaticano, BAV, Borgh. 230, fol. 240rb-40va (*ad* X 1.6.42).

35 München, BSB, Clm 6570, fols 140vb-41va (*ad* X 1.6.42).

pensée des glossateurs[36]. La *Summula* de Lawrence Somercote (1254) énumère six "necessaria [...] de substantia et forma electionis"[37], alors que Guillaume de Mandagout, dans son *Libellus super electionibus* (1286/87), repère six *substantialia*[38]. Dans la deuxième moitié du XIV^e^ siècle, un *Tractatus de electione* bolonais dégage les onze *necessaria* du scrutin, le dernier rappelant que les *substantialia* (qui précèdent) doivent être observés dans l'ordre de *Quia propter*[39]. Quant aux *Libelli de iure canonico* de Roffredo da Benevento (m. 1243), ils contiennent une liste de trente-trois causes de nullité de l'élection *ipso iure* qui s'ouvre par le non-respect de la forme transmise dans *Quia propter*[40].

Évoquant tour à tour, et dans des proportions décroissantes, le scrutin, le compromis et la quasi-inspiration, la constitution de Latran IV avait établi un cadre que les glossateurs ne manquèrent pas d'interroger. Tous s'entendaient sur l'importance du scrutin et du compromis, dans la lignée des rubriques que les recueils de constitutions conciliaires avaient affectées à *Quia propter*[41]. La marginalité de la quasi-inspiration est patente chez Goffredo da Trani. Dans sa *Summa* (son appareil de gloses le reconnaît de manière plus implicite[42]), il considère qu'il n'existe que deux formes d'élection, l'inspiration devant être regardée comme une exception aux

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36 Pour une synthèse, F. Delivré, 'Les lois du genre. *Summae*, *practicae* et élection des évêques en Occident (XII^e^-XV^e^ siècle)', in RHD 94 (2016), pp. 62-78.

37 *Der Traktat des Laurentius de Somercote, Kanonikus von Chichester, über der Vornahme von Bischofswahlen entstanden im Jahre 1254*, éd. A. von Wretschko (Weimar : Hermann Böhlaus Nachfolger, 1907), p. 41. Sur le traité, K. Harvey, *Episcopal Appointments in England, c. 1214-1344* (Farnham : Ashgate, 2014, Church, Faith and Culture in the Medieval West), pp. 31-41, 46, 73.

38 Paris, BN, lat. 15415, fols 209va-29ra, fol. 214va-14vb (*Pars* 1, *cap.* 22) ; Guillermus Mandagotus. *Practica electionum et postulationum ... XXV. formas instrumentorum in ea re necessariorum continens* (Parisijs : per Henricum Stephanum, sumptibus et impensis ... fratrum Engelberti et Godefridi de Marnef, 1506), fols 18v-19v. Plus largement, F. Delivré, 'Le *Libellus super electionibus* de Guillaume de Mandagout (1286/1287). Histoire d'un succès dans l'Occident médiéval', in *Proceedings Toronto 2012*, pp. 233-42.

39 Paris, BN, nouv. acq. lat. 904, fols 127-153 (Inc. *Pro materia electionis est notandum quod tres sunt vie per quas providetur ecclesie vacanti*), fols 138-146, fol. 138-38v, fol. 138v : "11^mo^. Quod omnia substantialia capituli *Quia propter* quoad hanc formam serventur ordinate et per ordinem ut in dicto c. traditur". L'opinion rejoint celle de Giovanni da Legnano, le plus récent des glossateurs invoqués dans l'œuvre (Città del Vaticano, BAV, Borgh. 230, fol. 240va : "XVIII [substantiale electionis]. Quod omnium predictorum ordo servetur").

40 Città del Vaticano, BAV, Borgh. 250, fols 1ra-47va, fol. 3va : "Prima causa est si omit[t]atur forma tradita in [con]stitutione consilii (*sic*) extra de electione *Quia propter*. Nam ibi dicitur *aliter electio facta non valeat*" ; Roffredus Beneventanus, *Libelli iuris canonici*, in *Libelli iuris civilis, libelli iuris canonici, quaestiones sabbatinae* (Avenione : Pierre Rohault, 1500 = Torino : Bottega d'Erasmo, 1965, Corpus glossatorum iuris civilis 6), pp. 333a-431b, pp. 333a-41b, pp. 338a-39b (*De causis propter quas vitiatur electio*), p. 338a. Il existe des versions parallèles. Les *Distinctiones* de Pierre de Sampson intègrent une liste de trente *casus* (Angers, BM, 381, fols 4va-5ra (*ad* X 1.6.29, *Auditis*), fols 4vb-5ra, fol. 4vb : "Nota [Primus vero *ms.*] casus in quibus electio [vel] infirmatur vel ipso iure nulla est. Et sunt in universo XXX. Primus est si dimittatur forma tradita in concilio generali i.e. *Quia propter*". Une autre liste de vingt-neuf *casus* est associée à la *Summa de electione* de Giovanni d'Andrea (voir ci-dessous, n. 153).

41 *Constitutiones concilii quarti Lateranensis*, cit., p. 150.

42 Montecassino, Archivio e Biblioteca dell'Abbazia, 266, p. 27a (*ad* X 1.6.42, s.v. *aliter*).

formes (*exceptio a formis*)[43]. Bernard de Compostelle défend la position contraire. Il n'est pas grave, selon lui, d'assimiler la quasi-inspiration à une forme, bien qu'elle soit davantage la privation de forme (*forme privatio*)[44]. Si Pierre de Sampson répète l'opinion en vogue depuis Goffredo[45], son disciple Bernard de Montmirat, pressé d'en venir au fait, se montre plus réservé[46]. L'agencement de *Quia propter* (scrutin, compromis, quasi-inspiration) menait à l'ordre des formes et à la possible transition de l'une à l'autre. Avant de s'engager dans la glose littérale conventionnelle, qui remanie celle de Jean le Teutonique sur la *Compilatio quarta*, Vincentius Hispanus s'est attardé sur les trois formes de l'inspiration, du scrutin et du compromis[47]. Son exposé liminaire, auquel il renvoie au moment de gloser *formas*[48], a été apprécié de Pierre de Sampson, qui l'a copié dans ses *Distinctiones*[49]. La préséance de l'inspiration y est légitimée par la supériorité de la force de la bénédiction sur celle de la nature, l'accord des scrutateurs est requis pour passer du scrutin, forme ordinaire (*forma ordinaria*), au compromis, tandis que le scrutin doit être préféré au compromis si le chapitre se divise entre les deux formes[50]. Dans sa *Summula*, Lawrence Somercote aborde l'inspiration à la lumière de Goffredo da Trani et de Vincentius Hispanus, et il désigne le scrutin comme la forme ordinaire, qui n'en est pas moins semée d'embûches[51]. Henri de Suse/Hostiensis imagine une gradation des recours et, de fait, une hiérarchie des formes, qui l'amène à inverser l'ordre de *Quia propter* (inspiration, compromis, scrutin)[52]. En outre, comme l'affirme Guillaume de Mandagout au chapitre 21 de son *Libellus* (*Quot sunt eligendi forme et in quibus ecclesiis et dignitatibus vendicant sibi locum*), qui présente les formes d'élection selon *Quia propter* (scrutin, compromis, inspiration divine) et accueille la réflexion des glossateurs (s.v. *ecclesiis*

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43 Troyes, BM, 456, fol. 3vb (*ad* X 1.6).

44 Reims, BM, 708, fol. 79va (*ad* X 1.6.42, s.v. *nisi forte*) ; Saint-Omer, BM, 160, fol. 47rb.

45 Paris, BN, lat. 4009, fols 11vb-12rb (*ad* X 1.6.42), fol. 12ra (s.v. *per inspirationem*).

46 Città del Vaticano, BAV, Borgh. 231, fol. 18vb (*ad* X 1.6.42, s.v. *nisi forte communiter esset ab omnibus quasi per inspirationem*) : "sed sive sit forma sive non, ad eius evidentiam aliqua sunt dicenda" ('mais, qu'elle soit une forme ou non, certaines choses doivent être dites à son sujet, afin de la rendre claire').

47 Paris, BN, lat. 3967, fol. 22rb-22vb (*ad* X 1.6.42, [s.v. *formas*]) ("De forma inspirationis primo tractemus – et ita scolares supervenientes non debent audiri quantum enim ad eos res iam non est integra") ['Nous traiterons en premier de la forme de l'inspiration – et ainsi les écoliers qui arrivent ne doivent pas être entendus dans la mesure, en effet, où la question qui les concerne n'est plus indécise'] ; Madrid, BN, 30, fol. 29ra-29va.

48 Paris, BN, lat. 3967, fol. 22vb (*ad* X 1.6.42, s.v. [*prescriptas*] *formas*) ; Madrid, BN, 30, fol. 29vb.

49 Angers, BM, 381, fol. 5ra-5vb (*ad* X 1.6.42), fol. 5ra-5va.

50 Paris, BN, lat. 3967, fol. 22rb, 22va (*ad* X 1.6.42, [s.v. *formas*]) ; Madrid, BN, 30, fol. 29ra, 29rb, 29va.

51 *Der Traktat des Laurentius de Somercote*, cit., pp. 31, 40.

52 München, BSB, Clm 14006, fols 13vb-14ra (*ad* X 1.6) ; München, BSB, Clm 13015, fol. 96vb (*ad* X 1.6.42) : "*communiter*. [...] Et hec prima [forma] potest dici tertia et ultima, prima quia primo ad tertiam, secundo ad mediam et ad primam tertio recurretur. Sic in parte caude frenum in hoc c. poni debet" ('*en commun*. Et cette première [forme] peut être dite troisième et la dernière, première, car on recourt premièrement à la troisième, deuxièmement à celle du milieu et troisièmement à la première. Ainsi un frein doit-il être mis à la partie finale de ce chapitre'). Le triptyque peut laisser place à un schéma quadripartite qui voit se succéder l'inspiration, la quasi-inspiration, le compromis et le scrutin (fol. 96vb, s.v. *quasi per inspirationem*) ; Henricus [de Segusio], *Summa super titulis decretalium*, cit., I, fol. e16v ; Hostiensis, *Lectura sive apparatus*, cit., fol. 69rb, 69va.

viduatis), le compromis et l'inspiration mettent en jeu la volonté des électeurs alors que le scrutin obéit à la nécessité ("prima forma [scrutinii] necessitatis dicitur [...] due vero alie voluntatis")[53]. La leçon est retenue dans le *Tractatus de electione* bolonais du second XIV^e^ siècle qui distingue la voie de droit commun du scrutin, la voie ordinaire du compromis et l'inspiration, au statut incertain[54]. Le triptyque des formes de *Quia propter* organise l'ensemble[55] – une structure classique dans les *summae de electione*[56].

S'il ne souffle mot de la quasi-inspiration, Damase croit aux vertus du consentement unanime, une solution qui permet d'échapper au piège de la *maior et sanior pars* traitée, non sans contradiction, au fil des décrétales[57]. Chez Bernard de Compostelle, l'unanimité qui se manifeste dans l'inspiration – ceux guidés par l'esprit de Dieu n'étant pas *sub lege* – offre l'avantage, en s'affranchissant des formes et des solennités du droit, d'éviter la vacance prolongée des Églises, source de dommages[58]. Bien qu'elle occupe moins les glossateurs, eu égard au scrutin et au compromis, l'élection par (quasi-)inspiration suscite des remarques à la confluence de la doctrine et de la pratique. En quête de glorieux précédents d'*electio divinitus inspirata*, la *Summula super modis et questionibus electionum* de João de Deus (1254) convoque Nicolas de Myre et Ambroise de Milan, deux laïcs élevés à la chaire cathédrale, ainsi que les évêques désignés par la grâce d'une colombe descendue du ciel, tels Euverte d'Orléans et Sévère de Ravenne[59]. Les trois *casus* d'Ambroise, Nicolas et Sévère proviennent d'un *dictum* de Gratien (*Decr. Grat.* D.61 d.p. c.8, *Hiis omnibus*) dans lequel le Maître de Bologne discutait de la non-élection des laïcs (*Laici prohibentur*

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53 Paris, BN, lat. 15415, fol. 214rb-14va ; Guillermus Mandagotus, *Practica electionum*, cit., fol. 18-18v.

54 Paris, BN, nouv. acq. lat. 904, fols 127, 138 : "Prima via est iuris communis que vocatur scrutinium, 2^a^ ordinaria scilicet compromissi, 3^a^ inspirationis quam quidam dicunt non esse viam im[m]o exceptionem a via, argumento c. *Quia propter* isto ti. dum dicit *nisi*. [...] Unde propter hoc dicitur forma [scrutinii] neccessitatis et alie vie voluntarie. De isto no. Mand. in c. XX^e^ primo".

55 Paris, BN, nouv. acq. lat. 904, fols 138-46 (scrutin), 146-48 (compromis), 148-48v (inspiration).

56 *Der Traktat des Laurentius de Somercote*, cit., pp. 31-36 (inspiration), 36-40 (compromis), 40-46 (scrutin) ; Paris, BN, lat. 15415, fols 214va-18rb, 218rb-20rb, 219vb-20rb, *Pars* I, cap. 22-38 (scrutin), 39-51 (compromis), 52 (inspiration) ; Guillermus Mandagotus, *Practica electionum*, cit., fols 18v-33v, 33v-40v, 41-42. Le traité anglais anonyme (Canterbury, fin des années 1220 ?) inséré dans la continuation de la chronique de Gervais de Canterbury démontre une prédilection pour le compromis ("Hanc formam magis approbo inter omnes"), après avoir présenté l'inspiration et le scrutin : *The Historical Works of Gervase of Canterbury*, éd. W. Stubbs, II (London : Longman, 1880, RS 73.2), pp. 124-27 (s. l., s. d.), pp. 125-26. Sur l'opuscule, Harvey, *Episcopal Appointments in England*, cit., pp. 30-31, 43.

57 *Constitutiones concilii quarti Lateranensis*, cit., pp. 430-31 (*ad* Lat. IV c.24), p. 431 (s.v. *nisi... esset ab omnibus*).

58 Reims, BM, 708, fol. 79vb (*ad* X 1.6.42, s.v. *nisi forte*) ; Saint-Omer, BM, 160, fol. 47rb.

59 Viterbo, Biblioteca Capitolare, 54, fols 272-76v, fol. 276-76v ; Olomouc, Státní Archív, C.O. 199, fols 173va-75va, fol. 175rb-75va ; Porto, Biblioteca Pública Municipal, 48, fol. 13ra-13vb, fol. 13va-13vb ; Montecassino, Archivio e Biblioteca dell'Abbazia, 184, pp. 269a-71b, p. 271a (*Bibliotheca Casinensis seu codicum manuscriptorum qui in tabulario Casinensi asservantur series, cura et studio monachorum ordinis S. Benedicti abbatiae Montis Casini*, IV [Montecassino : Ex Typographia Casinensi, 1880], Florilegium Casinense, pp. 183b-91b, pp. 190b-91a). Sur l'œuvre, F. Delivré, 'La *Summula super modis et questionibus electionum* de João de Deus (m. 1267)', in *Proceedings Paris* (à paraître).

in episcopatum eligi)[60]. Ambroise et Nicolas ont droit de cité dans l'apparat d'Henri de Suse/Hostiensis[61]. À sa suite, ils reprennent du service, aux côtés de Sévère, dans la *Novella* de Giovanni d'Andrea, un auteur qui rappelle la légende de l'élection miraculeuse des archevêques de Ravenne par une colombe, laquelle, depuis les temps anciens, a été victime d'un corbeau[62]. Le rapport complexe de l'inspiration avec les formes juridiques est déjà tangible dans la glose au Décret, à propos de l'élection d'Ambroise, Nicolas et Sévère. S'efforçant, comme le faisait Gratien, de justifier les exceptions à la règle, Jean le Teutonique (v. 1216) invoque la science et la bonté de certains laïcs, à même de surpasser les clercs en perfection. Mais il concède que les trois protagonistes, en raison de leur état laïque, auraient dû être postulés plutôt qu'élus – une réserve technique qui s'efface, toutefois, devant la puissance de l'action divine[63]. Prise dans son ensemble, l'élection par inspiration est tiraillée entre la part de Dieu et celle des hommes. La *Summula* de João de Deus sépare ceux

60 Sur Ambroise, Nicolas et Sévère, T. D. Barnes, 'The Election of Ambrose of Milan', in *Episcopal Elections in Late Antiquity*, éd. J. Leemans *et al.* (Berlin-Boston : De Gruyter, 2011, Arbeiten zur Kirchengeschichte 119), pp. 39-59, pp. 53-59 ; P. Corsi, 'La "Vita" di san Nicola e un codice della versione di Giovanni diacono', in *Nicolaus. Rivista di teologia ecumenico-patristica* 7 (1979), pp. 359-80, pp. 361-80, 368-69, n. 7 ; Agnellus Ravennatis, *Liber pontificalis ecclesiae Ravennatis*, éd. D. Mauskopf Deliyannis (Turnhout : Brepols, 2006, CCCM 199), pp. 154-64, pp. 155, 161-62. Invoquée par João de Deus, l'élection d'Euverte d'Orléans par la colombe se rattache à la tradition hagiographique carolingienne, que remanie Adhémar de Chabannes en marge du concile de Limoges (1031) : T. Head, *Hagiography and the Cult of Saints. The Diocese of Orléans, 800-1200* (Cambridge : Cambridge University Press, 1990, Cambridge Studies in Medieval Life and Thought, Fourth Series 14), pp. 35-36, 105-06 ; J. Dubois et G. Renaud, 'Influence des Vies de saints sur le développement des institutions', in *Hagiographie, cultures et sociétés* (Paris : Études augustiniennes, 1981), pp. 491-511, pp. 497-501, 509-10, pp. 499-500, n. 9 (d'après Paris, BN, lat. 2400, fol. 153, *Item exemplum de electione episcopi*).

61 München, BSB, Clm 13015, fol. 96vb (*ad* X 1.6.42, s.v. *quasi per inspirationem*) ; Hostiensis, *Lectura sive apparatus*, cit., fol. 69va.

62 Paris, BN, lat. 4016, fol. 73rb (*ad* X 1.6.42, s.v. *quasi*) ; Iohannes Andreae, *In quinque decretalium libros novella commentaria*, cit., fol. 116va. Aux XI^e^-XII^e^ siècles, le motif de l'élection par la colombe s'étend au fondateur Apollinaire afin de comprendre, sur le modèle apostolique, les douze premiers évêques de Ravenne : H. P. Laqua, *Traditionen und Leitbilder bei dem Ravennater Reformer Petrus Damiani, 1042-1052* (München : Wilhelm Fink, 1976), pp. 324-35. Les *Additiones I* de Giovanni d'Andrea (München, BSB, Clm 6351, fol. [12va], *ad* X 1.6.42) ne donnent aucun exemple canonico-historique. Ambroise de Milan et les élections par la colombe (sans détail) figurent en revanche dans les *Additiones II* (München, BSB, Clm 14026, fol. 21vb, *ad* X 1.6.42, s.v. *quasi*).

63 Troyes, BM, 60, fol. 39ra (*ad* D.61 d.p. c.8) : "*His omnibus.* Hec solutio non valet quia laicus quandocumque sit perfectus non est eligendus sed tantum postulandus ut i.e. *Obitum* et s. e. *In sacerdotibus.* De hiis tribus divinitus fuit factum vel dic quod isti postulati fuerunt" ('*Selon toutes ces (autorités).* Cette solution n'a pas de valeur parce qu'un laïc, quand bien même il serait parfait, ne doit pas être élu mais seulement postulé, dans la même dictinction [61], ci-dessous au chapitre *Obitum* et ci-dessus au chapitre *In sacerdotibus.* Ce qui concerne les trois [élus] a eu lieu par la grâce divine. Ou bien dis qu'ils ont été postulés'). Sur ce dernier manuscrit, replacé dans l'analyse des plus anciens témoins du Décret de Gratien, G. Murano, 'Graziano e il *Decretum* nel secolo XII', in RIDC 26 (2015), pp. 61-139, p. 125. La révision de la glose par Bartolomeo da Brescia (v. 1234-1241 ?) parle d'inspiration divine (Paris, BN, lat. 3095, fol. 68ra : "*Hiis omnibus.* [...] Quod autem dicitur de hiis tribus non obstat quia divina inspiratione factum fuit vel dic quod isti postulati fuerunt"). La *Summa* d'Huguccio confrontait déjà postulation et élection : München, BSB, Clm 10247, fols 66va-67ra (*ad* D.61 d.p. c.8), fol. 66vb.

directement appelés par le Seigneur (l'archétype est Aaron), ceux dont la tête a été gratifiée de la visite de la colombe du Saint-Esprit, les laïcs promus par la volonté divine et, enfin, ceux élus "quasi per inspirationem" selon *Quia propter*[64]. Dans la dernière situation, l'enjeu est de circonscrire la quasi-inspiration puisque, comme l'admet Bernard de Compostelle, elle est dotée d'une "certaine forme" (*aliquam habet formam*)[65]. Un nœud du débat concerne la relation entre l'inspiration et les tractations des électeurs. Pour Vincentius Hispanus, qui propose une mise au point doctrinale dont hérite Bernard de Compostelle, seul est autorisé le *tractatus generalis*, qui consiste à prier Dieu de donner au chapitre un bon prélat, et il faut proscrire le *tractatus specialis*, domaine des calculs et des intrigues[66]. Les apparats de gloses de Bernard de Compostelle et d'Henri de Suse/Hostiensis indiquent que l'inspiration divine est à l'œuvre lorsque deux ou trois personnes désignent celui qu'elles veulent élire, mais que l'instigation humaine (*hominis instigatio*) prend le dessus si la *maior pars* a procédé à la nomination dans le cadre d'un examen particulier des votes (*sigillatim*)[67]. Pierre de Sampson estime que *tractatus* et *inspiratio* sont inconciliables. Mais il lui paraît difficile que tous les électeurs s'accordent d'emblée, sans sermon ni discours préalable, une aporie qu'il résout en déclarant que l'inspiration est une des formes de *Quia propter* soumises aux électeurs et en insistant sur l'unanimité qui doit dicter le choix de l'inspiration et présider, ensuite, à la désignation – le ralliement à une proposition singulière initiale (*bene placet*) – et à l'élection commune[68]. Cette ultime phase, qui assurait la conversion des volontés de chacun en la décision de tous, pouvait-elle être sacrifiée sur l'autel de la concorde ambiante ? D'après Bernard de Compostelle, l'élection par inspiration est réputée "une et commune" ("una debet censeri et communis") en raison de l'existence de volontés et de voix unanimes et il n'est pas nécessaire, dès lors, de conférer à quelqu'un le pouvoir d'élire au nom de tous[69]. À l'opposé, Bernard de Montmirat considère qu'il vaut mieux ne pas délaisser l'*electio communis*[70], quand bien même son absence n'a pas été préjudiciable à l'élection de l'évêque de Béziers Pons de

64 Viterbo, Biblioteca Capitolare, 54, fol. 276-76v, fol. 276v : "Item alio modo dicitur electio divinitus i[n]spirata secundum decretalem Innocentii III editam in concilio generali ut extra de electione *Quia propter*, que sic intelligenda est littera ubi dicitur *quasi per i[n]spirationem factam*" ; Olomouc, Státní Archív, C.O. 199, fol. 175rb-75va, fol. 175va ; Porto, Biblioteca Pública Municipal, 48, fol. 13va-13vb, fol. 13vb ; Montecassino, Archivio e Biblioteca dell'Abbazia, 184, p. 271a-71b, p. 271b (*Bibliotheca Casinensis*, cit., IV, pp. 190b-91a, p. 191a).

65 Reims, BM, 708, fol. 79va (*ad* X 1.6.42, s.v. *nisi forte*) ; Saint-Omer, BM, 160, fol. 47rb.

66 Paris, BN, lat. 3967, fol. 22rb (*ad* X 1.6.42, [s.v. *formas*]) ; Madrid, BN, 30, fol. 29ra ; Reims, BM, 708, fol. 79va (*ad* X 1.6.42, s.v. *nisi forte*) ; Saint-Omer, BM, 160, fol. 47rb.

67 Reims, BM, 708, fol. 79va (*ad* X 1.6.42, s.v. *nisi forte*) ; Saint-Omer, BM, 160, fol. 47rb ; München, BSB, Clm 13015, fol. 96vb (*ad* X 1.6.42, s.v. *quasi per inspirationem*) ; Hostiensis, *Lectura sive apparatus*, cit., fol. 69rb.

68 Paris, BN, lat. 4009, fol. 12ra-12rb (*ad* X 1.6.42, s.v. *vitio*).

69 Reims, BM, 708, fol. 79va (*ad* X 1.6.42, s.v. *nisi forte*) ; Saint-Omer, BM, 160, fol. 47rb.

70 A. von Wretschko, 'Die *electio communis* bei den kirchlichen Wahlen im Mittelalter', in *Deutsche Zeitschrift für Kirchenrecht* II (1902), pp. 321-92.

Saint-Just (1261)[71]. Pour ce qui est de la désignation, le même auteur soutient que l'inspiration suppose une adhésion commune immédiate ou quasi-immédiate, plutôt que des consultations particulières, et il se fonde, cette fois, sur une sentence rendue par Innocent IV, à Lyon, dans la cause de l'élection au siège du Puy (1248 ?)[72]. Discipliner l'inspiration, en la revêtant d'une forme spécifique, permettait aussi de répondre au mouvement qui la maintenait éloignée de toute formalisation. À la Curie romaine, les parties qui s'inquiétaient du caractère défectueux d'une élection pouvaient trouver en l'inspiration une planche de salut, à condition, toutefois, d'en maîtriser les subtilités. D'après les lettres de Grégoire IX et la *Summula* de João de Deus[73], qui en fait état dans des développements consacrés à l'inspiration, les

71 Città del Vaticano, BAV, Borgh. 231, fol. 18vb (*ad* X 1.6.42, s.v. *nisi forte communiter esset ab omnibus quasi per inspirationem*) ; Bertram, 'Pierre de Sampson et Bernard de Montmirat', cit., pp. 345 (n. 10), 354 (Appendice III, n. 1).

72 Città del Vaticano, BAV, Borgh. 231, fol. 19ra (*ad* X 1.6.42, s.v. *nisi forte communiter esset ab omnibus quasi per inspirationem*).

73 Città del Vaticano, ASV, Reg. Vat. 14, fols 125v-26, n. 32 (Pérouse, 04/07/1229), fol. 126 : "Sane ecclesia vestra pastore vacante vos in magistrum S. decanum vestrum qui preesse poterat et prodesse vota vestra unanimiter direxistis. Sed quia processum qui a vobis super ipsius electione habitus fuerat inordinatum invenimus, cum scrutinium non fuerit redactum in scriptis et ante electionem consensus eiusdem extiterit requisitus, quod super hoc factum extitit tamquam contra generalis formam concilii attemptatum, iustitia cassavimus exigente, provisione nobis ipsius ecclesie reservata" ('Un pasteur faisant réellement défaut à votre Église vacante, vous avez dirigé vos votes à l'unanimité sur votre doyen maître S., qui pouvait commander et être utile. Mais comme il nous est apparu que le procès sur ladite élection dressé par vous n'était pas en bon ordre, dans la mesure où le scrutin n'avait pas été rédigé par écrit et où le consentement de celui-ci [maître S.] avait été demandé avant l'élection, ce qui porte atteinte à la forme du concile général, nous avons cassé l'élection ainsi que l'exigeait la justice, en nous réservant la provision de ladite Église') ; *Les registres de Grégoire IX*, cit., I, cols 196-97, n. 318 (Pérouse, 05/07/1229 [*sic*]) (reg.) ; *La documentación pontificia de Gregorio IX (1227-1241)*, éd. E. Sáinz Ripa, I (Roma : Instituto español de historia eclesiástica, 2001, Monumenta Hispaniae Vaticana, Sección : Registros II), pp. 224-25, n. 151 (Pérouse, 05/07/1229 [*sic*]) ; Viterbo, Biblioteca Capitolare, 54, fols 273, 276v : "Item est tertius modus eligendi scilicet quasi per inspirationem divinam [...]. Et quia collatio non precessit, papa Gregorius cassavit electionem Silvestri archiepiscopi Bracarensis. Et est ratio quia non per inspirationem sed per clamorem processit si collatio non precessit et talis electio reprobatur extra de electione c. ii. [...] Item alio modo dicitur electio divinitus i[n]spirata secundum decretalem Innocentii III editam in concilio generali [...]. Debent enim canonici a capitulo premittere tractatum de electione habendo collationem inter se de personis sive canonicis ecclesie dicendo sic *Multi boni viri sunt in capitulo nostro scilicet tales et tales*. Et si [sic *ms.*] omnes dicunt nullo contradicente *Talis sit episcopus noster*, tunc ille posset fieri episcopus quia per i[n]spirationem vocatus est. Cavendum tamen est ne hoc fiat vocibus tumultuosis sine deliberatione eligendi et tractatu et collatione quia tunc electio non valeret, sicut contingit in electione Silvestri archiepiscopi Bracarensis cui tamen per Dei gratiam post cassationem papa contulit archiepiscopatum ecclesie memorate [menocate *ms.*]" ('Item, il existe un troisième mode d'élection, à savoir par quasi-inspiration divine. [...] Et parce que la collation n'avait pas eu lieu auparavant, le pape Grégoire cassa l'élection de l'archevêque de Braga Silvestre. Et cela est raisonnable car si la collation n'a pas précédé l'élection, on a procédé par clameur plutôt que par inspiration et une telle élection est réprouvée, deuxième chapitre du titre *De l'élection*. [...] Item, un autre type d'élection peut être dit par inspiration divine, à savoir selon la décrétale d'Innocent III éditée en concile général. [...] En effet, les chanoines du chapitre doivent traiter au préalable de l'élection et évaluer les personnes ou les chanoines de l'Église en disant *Il y a beaucoup d'hommes bons dans notre*

chanoines de Braga qui prétendaient avoir élu *unanimiter* l'archevêque Silvestre Godinho (1229) et qui, à ce titre, durent se placer sous le patronage de l'inspiration se virent reprocher l'omission de plusieurs étapes de la procédure, *deliberatio eligendi, tractatus,* mise par écrit et collation des votes recueillis lors du scrutin (!) ainsi que demande de consentement postérieure, et non antérieure, à l'élection (commune). Avant d'adresser ses lettres de provision à Silvestre Godinho, le pape avait cassé l'élection au motif que de tels manquements portaient atteinte à la *forma concilii generalis.*

La forme du concile (général)

Attestée dans les lettres de chancellerie pontificales depuis les années 1220, la "forme du concile (général)" était susceptible de recouvrir tous les décrets de Latran IV. Dans l'écrasante majorité des cas, l'expression se rapporte toutefois aux affaires électorales et, plus étroitement, à la constitution *Quia propter.* Celle-ci fait office de ligne de partage puisque sont définis, vis-à-vis d'elle, et sur le modèle du discours relatif au droit (*forma iuris*), la conformité (*secundum/iuxta*) ou, au contraire, les écarts (*contra*) à la règle. Au milieu du XIII^e^ siècle, Lawrence Somercote recommande, à propos du scrutin, l'observation de la forme du concile général avant de dévoiler les prescriptions de *Quia propter*[74]. La diplomatique capitulaire s'en fait l'écho. En 1222, les chanoines de Rouen écrivent au roi de France Louis VIII pour demander la mainlevée de la régale de l'archevêché, notifiant que l'élection de Thibaud d'Amiens (1222-29) – par compromis – a eu lieu selon la forme du concile (*secundum formam concilii*)[75]. Il s'agit là d'une réminiscence du décret d'élection destiné, en vue de la confirmation, au pape Honorius III. Avant l'élection, afin de présenter les formes admises par le droit, *Quia propter* faisait l'objet d'une lecture inaugurale en chapitre, après celle des lettres d'excuse des absents, une pratique documentée dans la *Summa* de Lawrence Somercote[76] – dont certains exemplaires fournissent l'intégralité de la constitution, au-delà du seul *incipit,* à l'heure d'aborder l'inspiration, première des formes d'élection traitées par l'auteur[77]. *Quia propter* se découvre également, mais entre les lignes, dans les *summae* bolonaises des XIII^e^-XIV^e^ siècles selon lesquelles celui

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chapitre, à savoir ceux-ci et ceux-là. Et si tous disent, sans qu'aucun ne s'y oppose, *Que celui-ci soit notre évêque,* alors ce dernier pourra devenir évêque car il a été appelé par inspiration. On prendra garde, cependant, à ce que tout cela n'ait pas lieu dans le tumulte et les vociférations, sans délibération sur la voie d'élire, sans traité et sans collation, car une telle élection n'aurait pas de valeur, comme il est advenu dans l'élection de l'archevêque de Braga Silvestre auquel le pape, par la grâce de Dieu, a toutefois conféré l'archevêché de l'Église susdite') ; Olomouc, Státní Archiv, C.O. 199, fols 174ra, 175va ; Porto, Biblioteca Pública Municipal, 48, fol. 13ra, 13vb ; Montecassino, Archivio e Biblioteca dell'Abbazia, 184, pp. 269b, 271b (*Bibliotheca Casinensis,* cit., IV, pp. 185b, 191a-91b).

74 *Der Traktat des Laurentius de Somercote,* cit., pp. 40-41.

75 *Layettes du Trésor des chartes,* éd. A. Teulet *et al.,* I (Paris : Plont-Nourrit et Cie, 1863), pp. 539-40, n. 1513 (Rouen, 05/03/1222 n. s.).

76 *Der Traktat des Laurentius de Somercote,* cit., pp. 31, 35, 37, 39, 45, 49.

77 Oxford, Bodleian Library, Bodley 490, fols 6v-15v, fol. 8-8v.

qui a la première voix au chapitre est tenu d'exposer aux autres les formes d'élection en vigueur (*nominare formas superius positas/expressas*), afin que le choix se porte sur l'une d'entre elles[78]. La connaissance partagée de *Quia propter* ne présageait en rien de l'interprétation univoque du texte. Une belle illustration en est donnée dans la cause de l'élection à l'évêché de Châlons (1226-27), où le chapitre s'est divisé entre Robert de Thourotte, alors chanoine de Reims, le futur évêque de Langres (1232-40) puis de Liège (1240-46), et le "Lombard" Bartolomeo, qui tient une prébende à Châlons, créé ensuite cardinal-prêtre de Santa Pudenziana (1227)[79]. D'après des lettres de Grégoire IX (1228), la partie du second aurait produit l'argument selon lequel la formule de *Quia propter* "aliter electio celebrata non valeat" (en réalité, "aliter electio facta non valeat") ne comprenait que les entorses à la *forma concilii*, sans englober tout ce qui était dit dans la constitution et ne relevait pas de la forme (*de forma*) et, en l'espèce, la clause relative aux présents ("presentibus omnibus qui debent, volunt et possunt commode interesse") sur laquelle s'appuyaient les adversaires pour réclamer l'annulation de l'élection, au motif qu'un des membres du collège électoral n'avait pas été invité à se prononcer (*contemptus*). Par ailleurs, en renfort de la lecture minimaliste, un détournement de la loi *Si quando* du Code de Justinien (Cod. 3.28.35) élevait le pontife romain à la stature de défenseur des droits[80]. Reçues dans le *Liber Extra* (X 1.6.57, *Ecclesia vestra*), les lettres de Grégoire IX au chapitre de Châlons devinrent un des hauts lieux de la réflexion sur le vote et le consentement des absents, la *maior et sanior pars* et la forme des élections. La décrétale est alléguée par Goffredo da Trani, qui y recourt dans sa glose sur *Quia propter*, indiquant que la clause "aliter, etc." renvoie aux deux formes du scrutin et du compromis, alors que les éléments qui précèdent, comme la présence de tous, n'appartiennent pas aux formes[81]. Dans la *Summa*, à la suite des partisans du chanoine Bartolomeo, Goffredo se fonde sur la décrétale *Ecclesia vestra* ainsi que sur la loi *Si quando* pour comparer le pape et le prince, auxquels on ne saurait prêter l'intention d'avoir voulu ruiner, par un seul mot (à l'image de la clause "aliter facta electio, etc."), les nombreux droits édifiés *magnis laboribus*[82]. En dernière analyse, *Quia propter* est une ressource procédurale mobilisée par les parties en litige à la Curie romaine. Son usage est le signe de la juridicisation de l'élection et, plus largement, de l'invasion du langage du droit.

Par l'emploi des déclinaisons du verbe *statuere*, à travers le dispositif (*statuimus*) – les glossateurs y sont sensibles dans leurs sommaires – et, dans la décision finale (*statuentes*), au sujet de la publication immédiate de l'élection, *Quia propter* était pourvue d'une valeur constitutionnelle qui dépendait de son ascendance conciliaire (*constitutio*

78 Città del Vaticano, BAV, Borgh. 45, fols 22va-23ra (*ad* X 1.6.42) (Egidio), fol. 22va ; Paris, BN, lat. 4030, fol. 190-190v (Giovanni d'Andrea), fol. 190.

79 A. Paravicini Bagliani, *Cardinali di curia e 'familiae' cardinalizie dal 1227 al 1254*, I (Padova : Antenore, 1972, Italia sacra 18), pp. 72-75, n. 5 ; S. Guilbert, *Diocèse de Châlons-en-Champagne* (Turnhout : Brepols, 2015, Fasti ecclesiae gallicanae 14), pp. 70-73, n. 782, pp. 70-71.

80 Larson, 'Archiepiscopal and Papal Involvement', cit., pp. 83-89, pp. 86-88 ; *Les registres de Grégoire IX*, cit., I, cols 111-14, n. 192 (Latran, 22/03/1228), cols 113-14.

81 Montecassino, Archivio e Biblioteca dell'Abbazia, 266, p. 27a-27b (*ad* X 1.6.42, s.v. *aliter*).

82 Troyes, BM, 456, fol. 3vb (*ad* X 1.6).

concilii generalis). Jean le Teutonique parle à son endroit de *statutum* (*causa statuti*)[83], tandis que les lettres de Grégoire IX, dans la cause de l'évêché de Châlons, la qualifient de *statutum generalis concilii*. Le rayon d'action de la norme ne laisse pas indifférent. Tancrède précise que *Quia propter* ne s'applique pas à l'élection du pape, régie par la constitution *Licet de vitanda* du concile de Latran III (1179)[84]. Une vingtaine d'années plus tard, Goffredo da Trani rappelle le principe de la majorité des deux tiers des cardinaux, ajoutant que ces derniers peuvent y renoncer au profit de la majorité simple ("ut prevaleat electio que a pluribus fuerit celebrata")[85]. Théoriquement dégagée des formes de *Quia propter*, l'élection du souverain pontife n'en subit pas moins l'attraction du nouvel ordre, à travers l'adoption – *mutatis mutandis* – du scrutin, du compromis et de la quasi-inspiration[86] et, par ailleurs, la confection d'une novelle d'Innocent IV (*Quia frequenter*) qui, bien que n'étant jamais entrée en vigueur, conçoit le cas d'espèce à l'aune du modèle commun[87]. À une autre échelle, Jean le Teutonique affirme, dans sa glose aux constitutions de Latran IV, que *Quia propter* implique les évêques et les autres prélats, à l'exclusion des chanoines[88]. Il approfondit la réflexion dans sa glose à la *Compilatio quarta* (1215-17), discutant l'élargissement à d'autres dignités ecclésiastiques, décanats et prévôtés, sans faire place, cependant, aux dignités cathédrales. La prudence l'amène à réduire le spectre de la constitution aux évêchés et aux prélatures régulières[89]. Le débat est conditionné par deux éléments : la

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83 *Constitutiones concilii quarti Lateranensis*, cit., p. 211 (*ad* Lat. IV c.24, s.v. *assumantur tres de collegio fide digni*).

84 Città del Vaticano, BAV, Vat. lat. 1377, fol. 4rb (*ad* 1Comp. 1.4.15, *Licet de vitanda*, s.v. *maioris*).

85 Troyes, BM, 456, fol. 4rb (*ad* X 1.6) ; H. Dondorp, 'Die zweidrittelmehrheit als Konstitutivum der Papstwahl in der Lehre der Kanonisten des dreizehnten Jahrhunderts', in AKKR 161 (1992), pp. 396-425, pp. 397-405, p. 400.

86 P. Herde, 'Die Entwicklung der Papstwahl in dreizehnten Jahrhundert. Praxis und kanonistische Grundlagen', in *Osterreichisches Archiv für Kirchenrecht* 32 (1981), pp. 11-41, repris in Idem, *Studien zur Papst- und Reichsgeschichte, zur Geschichte des Mittelmeerraumes und zum kanonischen Recht im Mittelalter*, 1 (Stuttgart : A. Hiersemann, 2002, Gesammelte Abhandlungen und Aufsätze 2.1), pp. 153-80, n. 6 ; Dondorp, 'Die zweidrittelmehrheit als Konstitutivum der Papstwahl', cit., pp. 401-05.

87 H. Singer, 'Das c. *Quia frequenter*, ein nie in Geltung gewesenes "Papstwahldekret" Innocenz' IV. : Zugleich ein Beitrag zur Frage der Selbstwahl im Konklave', in ZRG, Kan. Abt. 6 (1916), pp. 1-140, pp. 13-14. Sur le texte, M. Bertram, 'Die Extravaganten Gregors IX. und Innozenz' IV. (1234-1254)', in ZRG, Kan. Abt. 92 (2006), pp. 1-44, p. 37, n. 58.

88 *Constitutiones concilii quarti Lateranensis*, cit., p. 211 (*ad* Lat. IV c.24, s.v. *ecclesiis viduatis*).

89 Città del Vaticano, BAV, Vat. lat. 1377, fol. 285vb, fol. 285va-85vb (*ad* 4Comp. 1.3.9), fol. 285vb : "*viduatis*. Per hoc patet quod loquitur tantum de electione prelatorum, non canonicorum. Sed numquid extenditur istud ad omnes dignitates et ad decanatus, ad preposituras sic ad omnes que non sunt cathedrales ? Sed in cathedralibus [chathedralibus *ms.*] non, quia illa non dicitur viduata cum habeat episcopum. Videtur tamen quod tantum ad episcopatus et ad regulares prelaturas debent artari ut s. e. *Ne pro defectu*" ('*veuves*. Par ce terme, il est évident que l'on parle seulement de l'élection des prélats, et non de celle des chanoines. Mais cela ne peut-il pas s'étendre à toutes les dignités, aux décanats, aux prévôtés ainsi qu'à toutes celles [les dignités] qui ne sont pas cathédrales ? En aucun cas aux dignités de la cathédrale, parce qu'elles ne sont pas dites *veuves* lorsque celle-ci dispose d'un évêque. Il semble toutefois qu'il faille uniquement s'en tenir aux évêchés et aux prélatures régulières, comme ci-dessus au chapitre *Ne pro defectu* du même titre'). Sur l'évolution d'un commentaire à l'autre, S. Kuttner, 'Johannes Teutonicus, das vierte Laterankonzil und die

mention, dans *Quia propter*, des Églises en veuvage (*ecclesiis viduatis*), une métaphore matrimoniale adaptée à la représentation de l'évêque en époux (*sponsus*), et, dans *Ne pro defectu*, les allusions au pasteur (*pastor*) et à la *cathedralis vel regularis ecclesia*. Très concis dans son apparat de gloses, où il signale que l'Église est veuve suite à la mort du prélat, et non des chanoines[90], Goffredo, dans sa *summa*, étend la forme du scrutin, au-delà des Églises épiscopales et majeures, aux Églises mineures, parmi lesquelles les archiprêtrés, les prévôtés et les paroisses (*ecclesie plebanate*). Mais il isole l'archidiacre, le prévôt et l'archiprêtre de la cathédrale (*maior ecclesia*)[91]. S'en tenant d'abord aux évêchés et aux prélatures régulières, Bernard de Parme ménage ensuite un espace aux prélats qui détiennent une juridiction générale dans les Églises dotées de collèges ("de illis prelatis qui habent iurisdictionem generalem in ecclesiis collegiatis"), délaissant, lui aussi, les dignités et les personats des cathédrales[92]. Sinibaldo Fieschi/Innocent IV colporte l'avis de ceux qui s'aventurent jusqu'aux paroisses (*plebes*) et aux chapelles, pourvu qu'elles aient à leur tête des prélats investis d'une *generalem prelationem in spiritualibus* sur les clercs et les laïcs – les chanoines et les dignitaires (*prelati*) des cathédrales étant exclus. Mais c'est pour mieux revenir à l'opinion de ceux qui cantonnent les effets de la constitution aux Églises cathédrales et régulières ("in cathedralibus et in regularibus ecclesiis")[93]. Henri de Suse/Hostiensis parcourt le chemin en sens inverse, ouvrant l'éventail à toutes les dignités dont la collation appartient à un collège (*collegium*)[94], un maître-mot qui était celui de *Quia propter*, au sujet des scrutateurs (*tres de collegio*) et des procureurs ("uni committat de ipso collegio vicem suam"), et que Goffredo da Trani avait mis en évidence dans sa *Summa* ("Electio spectat ad collegium clericorum")[95]. Paolo Liazari retient la dimension collégiale dans le sommaire de son *Commentum* de *Quia propter*[96]. La doctrine reflète parfois des préoccupations plus intimes, qui ne sont pas étrangères

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Compilatio quarta', in *Miscellanea Giovanni Mercati*. v. *Storia ecclesiastica-Diritto* (Città del Vaticano : BAV, 1946, Studi e testi 125), pp. 608-34, repris in Idem, *Medieval Councils, Decretals, and Collections of Canon Law. Selected Essays* (Aldershot : Variorum, 1992², CSS 126), n. x, *Retractationes* x, pp. 9-11, *New Retractationes* x, p. 7, pp. 613-14.

90 Montecassino, Archivio e Biblioteca dell'Abbazia, 266, p. 27a (*ad* X 1.6.42, s.v. *viduatis*).

91 Troyes, BM, 456, fol. 4ra (*ad* X 1.6).

92 Bologna, Collegio di Spagna, 280, fol. 26ra-26rb (*ad* X 1.6.42, s.v. *viduatis*) ; *Decretales d. Gregorii papae IX*, cit., col. 179 (s.v. *ecclesiis viduatis*). Le passage est absent dans le premier état de la glose ordinaire : Saint-Omer, BM, 435, fol. 21rb (s.v. *viduatis*).

93 Bologna, Collegio di Spagna, 220, fol. 38ra (*ad* X 1.6.42, s.v. *viduatis*) ; München, BSB, Clm 3892, fol. 26ra ; Innocentius IV, *Commentaria ... super libros quinque decretalium*, cit., fol. 71ra-71rb.

94 München, BSB, Clm 13015, fol. 93rb-93va (*ad* X 1.6.42, s.v. *viduatis*) ; Hostiensis, *Lectura sive apparatus*, cit., fol. 67ra-67rb.

95 Troyes, BM, 456, fol. 3va (*ad* X 1.6).

96 Barcelona, ACA, Ripoll 66, fol. 49v (*ad* X 1.6.42) : "Casus. Ponit electionum formas secundum quas provideri debet ecclesiis viduatis per collegia [...]". La mention des collèges est une addition de Paolo Liazari à ce que son maître Giovanni d'Andrea (*dominus meus*) soutenait dans la *Novella* (Paris, BN, lat. 4016, fol. 71vb, *ad* X 1.6.42 ; Iohannes Andreae, *In quinque decretalium libros novella commentaria*, cit., fol. 115ra) : "Casus. Statuit concilium formas electionum secundum quas provideri debet ecclesiis viduatis [...]". En bonne logique, le dernier texte figure également dans les *Summarii casus* de Giovanni d'Andrea (Leipzig, UB, 903, fol. 37rb, *ad* X 1.6.42 ; Luxembourg, BN, 133, fol. 56-56v).

au *cursus* clérical. Traitant des dignités concernées par *Quia propter*, Bernard de Montmirat, après avoir rendu hommage à l'*episcopalis honor*, réserve une attention spécifique au monde conventuel, masculin tout au moins (les moniales sont écartées), dirigé par des abbés et des prieurs qui détiennent la *curam totius ecclesie* – à l'image du prieur de Cassan, dans le diocèse de Béziers[97]. La validité de *Quia propter* se déduit également des sanctions qui frappent ceux qui contreviennent à la règle, à savoir la privation du droit d'élire en cas d'atteinte aux formes prescrites ("Qui vero contra prescriptas formas eligere attemptaverint, eligendi ea vice potestate priventur"). Dans ces conditions, les électeurs perdaient la faculté de pourvoir à l'Église vacante – Vincentius Hispanus, dans son apparat de gloses sur les constitutions du concile de Latran IV, rapprochait *eligendi potestas* et *ordinatio*[98]. Pour les glossateurs de *Quia propter*, une question essentielle résidait dans l'articulation avec la constitution *Cum in cunctis* du concile de Latran III (c.3) (1Comp. 1.4.16 ; X 1.6.7), qui privait du pouvoir d'élire et suspendait de tout bénéfice ecclésiastique, pour une durée de trois ans, les clercs qui s'étaient rendus coupables de l'élection d'un indigne[99]. La solution était de dissocier ce qui relevait des électeurs et de l'élu, d'une part, et de la forme d'élection, d'autre part. Au milieu des années 1230, Juan de Petesella affirme que la suspense de bénéfice pendant trois ans, qui touche celui ayant agi contre la forme de *Cum in cunctis*, ne s'applique pas à celui qui n'observe pas l'une des formes (d'élection) du concile général énoncées dans *Quia propter* – dans la mesure où la constitution ne dit rien de cette peine[100]. Un champ connexe regarde les modalités de la privation du droit d'élire, *ipso iure* ou en vertu d'une sentence. Comme souvent, Goffredo da Trani apporte une pierre à l'édifice. Dans sa glose, il explique par le non-respect des formes ("cum peccatur circa formas") le fait que la privation soit à venir, alors que l'élection d'un indigne entraîne la privation *late sententie*[101]. La matière est amplifiée dans la *Summa*, au sujet de la *pena male eligentium* – une expression qu'un recueil tardif des constitutions de Latran IV introduit dans la rubrique de *Quia propter*[102]. Ceux qui élisent sciemment un indigne sont privés *ipso iure* du droit d'élire et suspendus de leurs bénéfices pendant trois ans, une période durant laquelle ils ne peuvent en acquérir aucun autre, tandis que ceux qui élisent contre les formes de *Quia propter* sont privés de leur droit d'élire *per sententiam*[103]. Bernard de Parme est plus bref, mais le dénouement est identique[104]. La peine des électeurs conduisait à

97 Città del Vaticano, BAV, Borgh. 231, fol. 17vb (*ad* X 1.6.42).

98 *Constitutiones concilii quarti Lateranensis*, cit., p. 319 (*ad* Lat. IV c.24, s.v. *eligendi ea vice potestate priventur*).

99 '*Concilium Lateranense III*, 1179', éd. A. Larson et K. Pennington, in COGD, II.1, pp. 115-147, pp. 125-47, 128-29 (c.3). Sur la privation d'élire, M. Bégou-Davia, 'Innocent III et les élections épiscopales : quelques aspects juridiques', in RHD 94 (2016), pp. 42-61, pp. 53-61.

100 Città del Vaticano, BAV, Vat. lat. 2343, fol. 143rb (*ad* X 1.6).

101 Montecassino, Archivio e Biblioteca dell'Abbazia, 266, p. 27b (*ad* X 1.6.42, s.v. *priventur*).

102 Laon, BM, 156, fols 384-420, fols 398v-99, fol. 398v (*De electionum forma et pena male eligentium*) ; *Constitutiones concilii quarti Lateranensis*, cit., p. 150.

103 Troyes, BM, 456, fols 3vb, 4vb-5ra (*ad* X 1.6).

104 Saint-Omer, BM, 435, fol. 21va (*ad* X 1.6.42, s.v. *priventur*) ; Bologna, Collegio di Spagna, 280, fol. 26rb ; *Decretales d. Gregorii papae IX*, cit., col. 181.

la valeur de l'élection. Dans une distinction sur *Quia propter*, Pierre de Sampson déclare que l'élection n'est pas valable *ipso iure* lorsque les électeurs ne disposent pas du pouvoir d'élire, soit qu'ils en aient été privés (*privati*) en raison de l'élection d'un indigne, soit qu'ils doivent l'être (*privandi*) pour ne pas avoir respecté la forme. Il ajoute, un peu plus loin, que le défaut dans la *forma electionis* engendre la nullité *ipso iure* ou l'annulation de l'élection[105]. Quelques décennies avant lui, Juan de Petesella avait distingué, à propos de *Cum in cunctis*, la peine de l'élu et celle des électeurs, la seconde en vertu d'une sentence (*ferende sententie*), tandis que la première (*late sententie*) n'était autre que la nullité de l'élection *ipso iure*. Concernant *Quia propter*, l'omission de toute forme ou l'existence d'un défaut majeur, telle une élection par une nette minorité d'électeurs, comme cinq ou six des vingt membres d'un chapitre, provoquaient également la nullité de l'élection (*electionem nullam*), la procédure d'annulation (*eam adnullandam*) regardant toute autre erreur dans la forme[106]. Quant à la durée de la privation du pouvoir d'élire, comme le soulignait l'apparat de Goffredo da Trani, elle n'allait pas au-delà de la vacance si tous les électeurs avaient commis la faute[107] – la division du chapitre laissant la voie ouverte à une élection dont ne seraient exclus que les *male eligentes*. La sanction soulevait l'épineux problème de la dévolution[108]. En 1255, le chapitre cathédral de Trieste qui a élu Arlongo di Voitsberg,

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105 Wien, ÖNB, Cod. 2083, fol. 73rb-73va (*ad* X 1.6.42) : "Item quando propter personas elligentium quoniam non habent potestatem elligendi aut quia lapsum est spatium iii. mensium, s. e. *Ne pro defectu*, unde amplius non possunt elligere et si elligerint ellectio non valebit, i. de conces. pre. *Nulla* et c. *Dilectus*, vel quia iam ellegerunt sive valeat ellectio sive non. Nam si valet prima non cassata non debet attentari secunda, s. e. *Consideravimus* et c. *Auditis*. Si autem non valet ipso iure non possunt ellectores tunc elligere cum sint privati potestate elligendi si indignam personam ellegerint, s. e. *Cum in cunctis*, vel privandi si alias peccaverint in formam, s. e. *Quod sicut*. [...] Item propter formam ellectionis quia aut est nulla ipso iure aut an[n]ullanda, s. e. *Quod sicut*. P." ('Item en raison des personnes de ceux qui élisent. Parce qu'elles n'ont pas le pouvoir d'élire ou parce que le délai de trois mois [pour élire] est écoulé, ci-dessus, au chapitre *Ne pro defectu* du même titre. De telle sorte qu'elles ne peuvent dorénavant plus élire ou que, si elles élisent, l'élection sera sans valeur, ci-dessous, aux chapitres *Nulla* et *Dilectus* du titre *De la concession de la prébende*. Ou bien parce qu'elles ont déjà élu, quelle que soit la valeur de l'élection. De fait, si la première élection a une valeur, on ne peut procéder à une deuxième élection tant qu'elle [la première] n'a pas été cassée, ci-dessus, aux chapitres *Consideravimus* et *Auditis* du même titre. Si l'élection est sans valeur *ipso iure*, les électeurs ne peuvent alors élire car ils ont été privés du pouvoir d'élire pour avoir élu une personne indigne. Ou bien ils devront en être privés [du pouvoir d'élire] s'ils ont autrement commis une faute dans la forme [d'élection], ci-dessus, au chapitre *Quod sicut* du même titre. Item en raison de la forme de l'élection, qu'elle soit nulle *ipso iure* ou qu'elle doive être annulée, ci-dessus, au chapitre *Quod sicut* du même titre. P.'). Pour l'attribution, Bertram, 'Pierre de Sampson et Bernard de Montmirat', cit., p. 368. Un texte proche, mais sans référence à la forme d'élection, se trouve dans une version singulière des *Distinctiones* : Saint-Omer, BM, 546, fols 14vb-17va (*ad* X 1.6.42), fol. 17rb-17va ; M. Bertram, 'Aus kanonistischen Handschriften der Periode 1234-1298', in *Proceedings Toronto 1972*, pp. 27-44, repris in Idem, *Kanonisten und ihre Texte*, cit., pp. 1-18 (n. 1), 469-470 (Nachträge 1), pp. 8, 16 (Anhang VI).

106 Città del Vaticano, BAV, Vat. lat. 2343, fol. 143rb (*ad* X 1.6).

107 Montecassino, Archivio e Biblioteca dell'Abbazia, 266, p. 27b (*ad* X 1.6.42) : "*ea vice*. Idest ea vacatione si omnes communiter peccaverint, ceterum si indiviso. Tunc dic ut no. s. e. t. *Cum Wintonien.* in glo. *Videtur*. Gof.".

108 Larson, 'Archiepiscopal and Papal Involvement', cit., *passim*.

alors excommunié, et attenté à la *forma generalis concilii*, est privé *sententialiter* du pouvoir d'élire, lequel échoit par dévolution à deux chanoines qui n'ont pas été impliqués dans l'élection – l'un *contradicens* et l'autre *contemptus*. Ces derniers transfèrent la *potestas providendi ecclesie* au prévôt de Sant'Odorico, lequel postule Guarniero di Cuccagna, chanoine d'Aquilée, une postulation admise (à tort) par le métropolitain élu d'Aquilée plutôt que par le Siège apostolique[109]. Lorsque le chapitre était reconnu fautif dans son ensemble et que la *potestas eligendi* ne subsistait dans aucun membre préservé du collège électoral, la dévolution se faisait au supérieur, l'archevêque ou le pape. En pratique, comme à Bourges en 1235, le régime de la grâce pontificale pouvait, en sauvegardant les droits coutumiers et les équilibres institutionnels, concéder au chapitre cathédral la faculté d'élire (*eligendi facultas*), sans imposer la privation du pouvoir d'élire dont étaient passibles ceux qui avaient mis à mal la forme du concile général[110].

Dans l'affaire de Bourges, l'examen du procès d'élection adressé au pape révéla qu'aucune forme prescrite par le concile de Latran IV n'avait été observée. À Rouen, en 1235, du fait des divisions du chapitre, les chanoines organisèrent concurremment, semble-t-il, un scrutin et un compromis, une confusion des formes ("duas formas insimul assumendo") qui, pour certains, aurait dû entraîner la dévolution au supérieur. La partie adverse rétorquait qu'une élection canonique était survenue après deux tentatives (inabouties) de scrutin et de compromis et que la privation du pouvoir d'élire, selon *Quia propter*, n'était infligée qu'à ceux qui ne respectaient pas la forme (d'élection)[111]. Les débats pouvaient atteindre un plus haut degré de raffinement. Pierre de Sampson, dans sa *Lecture*, fait de l'oubli du vote des scrutateurs un motif fréquent de cassation des élections à la Curie romaine[112]. Les actes de la pratique lui donnent raison. Dans la cause de l'évêché de Beauvais (1238-39), une des parties affirme que l'examen des votes des scrutateurs, qui devaient être exprimés avant le scrutin et scellés de cire, n'a pas eu lieu, ce à quoi les adversaires répliquent que la procédure a été suivie, ajoutant néanmoins, par précaution, que l'examen du

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109 *Les registres d'Alexandre IV (1254-1261)*, éd. C. Bourel de la Roncière *et al.*, I (Paris : A. Fontemoing-E. de Boccard, 1895), p. 100a-101a, n. 335 (Naples, 12/03/1255).

110 Città del Vaticano, ASV, Reg. Vat. 18, fol. 16, n. 30 (Pérouse, 21/04/1235) : "[...] electionem [...] examinantes sicut decuit diligenter, quia ex processu vestro nullam formam generalis concilii repperimus esse servatam, ipsam iustitia cassavimus exigente. Licet autem qui contra formam eiusdem concilii attemptant eligere sint ea vice eligendi potestate privandi, propter specialem tamen dilectionis affectum quem ad ecclesiam vestram habemus, eligendi secundum Deum personam idoneam in pastorem ipsius ecclesie liberam vobis concedimus facultatem" ('Examinant l'élection avec diligence, comme il convenait, nous l'avons cassée, selon ce que la justice exigeait, car il nous est apparu, d'après votre procès [d'élection], qu'aucune forme du concile général n'avait été observée. Cependant, bien que ceux qui cherchent à élire contre la forme dudit concile doivent être privés pour cette fois du pouvoir d'élire, nous vous concédons, en raison de l'affection spéciale et de la dilection que nous avons à l'égard de votre Église, la libre faculté d'élire, selon Dieu, une personne idoine comme pasteur de cette Église') ; *Les registres de Grégoire IX*, cit., II, col. 37, n. 2523 (reg.).

111 *Les registres de Grégoire IX*, cit., II, cols 174-79, n. 2796 (Assise, 01/10/1235), cols 176, 178 ; Peltzer, *Canon Law, Careers and Conquest*, cit., pp. 92-99, pp. 92-95.

112 Paris, BN, lat. 4009, fol. 12ra (*ad* X 1.6.42, s.v. *cunctorum*).

vote des scrutateurs ne ressortit pas à la forme de l'élection puisque le concile de Latran IV s'attachait aux votes des autres électeurs (!)[113]. L'antériorité du vote des scrutateurs, afin d'empêcher qu'ils n'agissent sous influence et décident du sort de l'élection, est martelée par les glossateurs, tels Vincentius Hispanus, Bernard de Compostelle, Pierre de Sampson ou Bernard de Montmirat[114]. La collation qui, après la publication des votes du scrutin, confrontait le nombre et le zèle des électeurs ainsi que le mérite des élus constituait également un passage obligé des décrétalistes. Certains agrémentaient les considérations doctrinales de situations concrètes. Ainsi, selon Bernard de Montmirat, à propos de la *collatio meriti ad meritum*, le maître en théologie (ou en décret) l'emporte sur l'écolâtre[115]. L'absence de collation des votes est un exemple-type de forme d'élection défaillante, comme dans les successions aux évêchés de Côme (1228) ou de Châlons (1238)[116]. La publicité est une autre pierre d'achoppement. Le problème se limitait parfois à la publication du scrutin ("mox [vota cunctorum] publicent in communi"), lorsque Bernard de Compostelle, qui s'appuie sur une affaire jugée en cour de Rome (*et sic obtinuit*), déclare que l'absence d'un des trois scrutateurs n'a causé aucun tort[117]. Bien plus souvent, il s'agissait, selon la lettre de *Quia propter*, de la publication de l'élection ("statuentes ut quam cito electio fuerit celebrata, sollempniter publicetur"). Dans sa glose au Décret de Gratien, Jean le Teutonique oppose l'élection commune, consonante et canonique à l'élection clandestine réprouvée par *Quia propter* ("Electiones quoque clandestinas reprobamus")[118]. La réflexion du concile de Latran IV en matière matrimoniale favorisait les points d'intersection. Encore Goffredo da Trani remarque-t-il, dans son apparat de gloses, l'existence d'une différence fondamentale entre élections et

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113 *Les registres de Grégoire IX*, cit., II, cols 882-86, n. 4078 (Latran, 09/02/1238), col. 884, III, cols 85-90, n. 4911 (Latran, 17/08/1239), cols 86, 88.

114 Paris, BN, lat. 3967, fol. 22va (*ad* X 1.6.42, [s.v. *formas*]) ; Madrid, BN, 30, fol. 29va ; Reims, BM, 708, fol. 78ra (*ad* X 1.6.42, s.v. *de collegio*) ; Saint-Omer, BM, 160, fol. 46rb ; Paris, BN, lat. 4009, fol. 12ra (*ad* X 1.6.42, s.v. *cunctorum*) ; Città del Vaticano, BAV, Borgh. 231, fol. 18rb (*ad* X 1.6.42, s.v. *vota cunctorum*).

115 Città del Vaticano, BAV, Borgh. 231, fol. 18va (*ad* X 1.6.42, s.v. *collatione*).

116 Città del Vaticano, ASV, Reg. Vat. 14, fols 63v-64, n. 102 (Latran, 21/03/1228), fol. 63v : "Unde nos electiones ipsas presumptas etiam contra formam concilii generalis, cum collatio in communi obmissa fuerit que post publicationem scrutinii fieri debuisset, de fratrum nostrorum consilio sententialiter duximus irritandas et electores hac vice eligendi potestate privavimus, providentie nostre ordinationem ipsius ecclesie reservantes" ; *Les registres de Grégoire IX*, cit., I, col. 107, n. 184 (reg.), II, cols 907-08, n. 4119 (Latran, 27/02/1238), col. 908.

117 Reims, BM, 708, fol. 78rb (*ad* X 1.6.42, s.v. *mox publicent*) ; Saint-Omer, BM, 160, fol. 46va.

118 München, BSB, Clm 14024, fol. 40rb (*ad* D.63 c.1) : "*communem ac consonantem atque canonicam electionem.* [...] Et privata conventicula in electionibus prohibentur ut LXXIX. di. c. i[i]. et c. *Nullus.* Ar. contra LXIII. di. *Quanto*, extra iii. de elec. *Quod sicut* et extra iii. de postul. *Bone* in fi. et servitus separatim ceditur ff. de servit. *Per fundum.* Dico nullam esse [talem] electionem cum sit clandestina ut extra iii[i]. de elec. *Quia propter.* Io." La glose de Jean le Teutonique peut comporter une allégation fautive à *Ne pro defectu* au lieu de *Quia propter* (Troyes, BM, 192, fol. 30ra ; Paris, BN, lat. 14317, fol. 49va). Ce caractère se retrouve jusque dans la révision de Bartolomeo da Brescia, laquelle ajoute une référence à la décrétale *In Genesi* (X 1.6.55) (Paris, BN, lat. 3895, fol. 69va ; Praha, Knihovna Národního muzea, XII A 12, fol. 54rb ; Bologna, Collegio di Spagna, 261, fol. 49rb). La confusion entre *Ne pro defectu* et *Quia propter* a parfois été corrigée (Troyes, BM, 60, fol. 39vb).

mariages clandestins, à savoir la validité des seconds en dépit de leur prohibition[119]. De fait, les élections ne s'accommodaient d'aucune façon de la clandestinité, au risque d'être identifiées à des *secreta conventicula*, un horizon néfaste fixé dans la glose de Jean le Teutonique sur la *Compilatio quarta*[120]. À cet égard, Bernard de Compostelle affirme qu'une élection à la métropole de Galice (1237-38 ?) a été cassée parce que les chanoines n'en ont rien laissé paraître hors du chapitre par crainte du roi de Castille et de León (*propter metum regis*), dont le congé d'élire n'avait pas été requis au préalable[121]. Il reste, pour le même auteur, que l'absence de publication solennelle n'entraînait pas la cassation d'une élection tant que celle-ci n'était pas clandestine[122].

Modèles formels

À plusieurs titres, *Quia propter* contenait des éléments qui renvoyaient, de manière succincte, à l'*agenda* de la procédure électorale. Ainsi de la mise par écrit et de la

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119 Montecassino, Archivio e Biblioteca dell'Abbazia, 266, p. 27b (*ad* X 1.6.42, s.v. *electiones clandestinas*).

120 Città del Vaticano, BAV, Vat. lat. 1377, fol. 285vb (*ad* 4Comp. 1.3.9) : "*clandestinas*. Que fit per secreta conventicula ut LXXIX. di. c. ii.".

121 Reims, BM, 708, fol. 81rb (*ad* X 1.6.42) : "*clandestinas*. Queritur : Que sint clandestine ? Respondeo : Que fiunt per secreta conventicula vel privatas subscriptiones, i. Ut ec. bene. *Ut nostrum*, LXXIX. di. c. ii., vel si canonici concordant inter se firmantes quod nichil extra capitulum de electione dicatur, ut fecerunt Compostellani propter metum regis cuius consensus primo non fuerat requisitus. Unde fuit cassata electio eorum propter propter (*sic*) hoc verbum *reprobamus*" ('*clandestines*. Il est demandé : Quelles sont les élections clandestines ? Je réponds : Celles qui sont faites par des conventicules secrets ou des souscriptions privées, ci-dessous au chapitre *Ut nostrum* du titre *Afin que les bénéfices ecclésiastiques* et au deuxième chapitre de la distinction 79. Ou bien celles dans lesquelles les chanoines s'accordent pour affirmer que rien ne sera dit de l'élection hors du chapitre, comme l'ont fait ceux de Compostelle par crainte du roi, auquel le consentement n'avait pas été d'abord requis. Aussi leur élection a-t-elle été cassée sur la base de ces mots *nous réprouvons*'). La leçon *propter regis timorem* se trouve dans Saint-Omer, BM, 160, fol. 48rb. Bernard de Compostelle, glossateur du *Liber Extra* et des *Novelles* d'Innocent IV, se confond avec le *magister Bernardus Yspanus*, archidiacre dans l'Église de Compostelle et chapelain du pape, élu à la métropole de Santiago après la disparition de Juan Arias (1238-1266) : G. Barraclough, 'Bernard of Compostella', in EHR 49 (1934), pp. 487-94, pp. 490-91 ; A. García y García, 'Canonistas gallegos medievales', in *Compostellanum* 16 (1971), pp. 101-24, pp. 116-18, n. 4, p. 116. Faisant face à un rival, en la personne de Juan Alfonso, il meurt alors que les *due electiones in discordia* ont été portées en cour de Rome : *Documentos de Clemente IV (1265-1268) referentes a España*, éd. S. Domínguez Sánchez (León : Universidad de León, 1996), pp. 275-78, n. 153 (Viterbe, 05/11/1267), pp. 282-86, n. 158-60 (Viterbe, 18/12/1267), pp. 286-89, n. 161-63 (Viterbe, 19/12/1267) ; X. M. Sánchez Sánchez, *La Iglesia de Santiago y el pontificado en la Edad Media (1140-1417)* (Santiago de Compostela : Universidade de Santiago de Compostela, 2012), pp. 111-12. L'élection clandestine dénoncée par Bernard de Compostelle a pu intervenir lors de la vacance ouverte par la résignation de l'archevêque Bernard II (1224-1237), un prélat connu pour sa bibliothèque (A. Garcia y García et I. Vázquez Janeiro, 'La biblioteca del arzobispo de Santiago de Compostela, Bernardo II († 1240)', in *Antonianum* 61 (1986), pp. 540-68). Au sujet de la succession de 1237-1238, mais sans référence aux débats sur la publicité/clandestinité de l'élection, *La documentación pontificia de Gregorio IX (1227-1241)*, cit., II, pp. 312-13, 361-64, n. 905 (Latran, 23/03/1238), 965-969 (Latran, 15/11/1238), 970 (Latran, 20/11/1238).

122 Reims, BM, 708, fol. 81rb-81va (*ad* X 1.6.42, s.v. *publicetur*) ; Saint-Omer, BM, 160, fol. 48rb.

publication du scrutin, de la commission accordée aux compromissaires, des serments des absents, de la désignation des procureurs ou, en dernier lieu, de la publication de l'élection. Les glossateurs étayèrent le propos. Pour Pierre de Sampson, toutes les opérations devaient être consignées dans un instrument public[123]. En bonne logique, le vote exprimé lors du scrutin occupe les esprits. La plupart des canonistes mettent en exergue la nomination et le consentement plutôt que l'élection – cette dernière étant réservée à la phase de l'*electio communis*. Vincentius Hispanus critique la formule de consentement d'un électeur qui envisagerait le report de son vote sur sa personne[124]. Selon Jean le Teutonique, l'examen secret des votants impliquait qu'ils soient soumis à la prestation d'un serment[125], une position abandonnée par Giovanni d'Andrea, qui substitue la simple adjuration des scrutateurs à l'exigence d'un serment solennel[126]. En revanche, les absents sont tenus de justifier, par ce biais ("fidem faciat [absens] iuramento"), l'empêchement canonique qui fait obstacle à leur venue. Le système des procurations apporte son lot de questions. Jean le Teutonique se demande si le procureur peut exprimer plusieurs consentements, le sien et celui de son mandant, et les diriger sur des personnes distinctes[127]. Par delà le scrutin, qui concentre l'attention, le compromis a droit à quelques égards. Bernard de Compostelle, qui évoque le cas de León ("vacante ecclesia Legionensi [...] nos

123 Paris, BN, lat. 4009, fol. 12rb (*ad* X 1.6.42, s.v. *vitio*).

124 Paris, BN, lat. 3967, fol. 22va (*ad* X 1.6.42, [s.v. *formas*]) : "Unde reprobo consensum illius qui interrogatus in quem consentiret respondit *Si aliqui in me consentiunt consentio cum eis* vel sic *Complector vota illorum qui in me consentiunt*" ('Par conséquent, je réprouve l'accord de celui qui, interrogé au sujet de celui sur lequel il s'accorde, répond : *Si certains s'accordent sur moi, je consens avec eux* ou *J'accueille les votes de ceux qui s'accordent sur moi*') ; Madrid, BN, 30, fol. 29va.

125 Città del Vaticano, BAV, Vat. lat. 1377, fol. 285vb (*ad* 4Comp. 1.3.9) : "*secreto*. Forte per iuramentum ut s. e. *Ad nostram*".

126 München, BSB, Clm 6351, fol. [12rb] (*ad* X 1.6.42) : "*diligenter*. Forte per iuramentum dicebat Io. Hoc (*sic*) non servatur. Immo exigitur quedam simplex adiuratio secundum ea que vidisti in dec. *Constitutis* de ap. infra. Et satis enim est quod scrutatores dicant *Adiuramus te in virtute Spiritus sancti et in periculo anime tue ut consentias in illum quem ecclesie tue magis utilem esse credis*. Et satis approbat consuetudo quod talis simplex adiuratio habeatur loco cuiusdam sollempnis iuramenti" ('*avec diligence*. Peut-être par serment, disait Jean [le Teutonique]. Cela n'est plus observé. De fait, une simple adjuration est exigée, selon ce que tu as vu, ci-dessous, dans la décrétale *Constitutis* du titre *De l'appel*. Et il suffit que les scrutateurs disent *Nous t'adjurons, en vertu du saint Esprit et au péril de ton âme, de t'accorder sur celui que tu croies être le plus utile à ton Église*. Et la coutume approuvée dit assez que cette adjuration simple remplace le serment solennel'). Le propos est repris dans les *Additiones II* (München, BSB, Clm 14026, fol. 21va, *ad* X 1.6.42, s.v. *diligenter exquirant*) et abrégé dans la *Novella* (Paris, BN, lat. 4016, fol. 72rb, *ad* X 1.6.42 ; Iohannes Andreae, *In quinque decretalium libros novella commentaria*, cit., fol. 115va) : "*diligenter*. Et forte per iuramentum. Ioan. Non est moris quod iurent sed adiurantur per scrutatores ut illum nominent et in illum consentiant quem credunt meliorem et utiliorem. Facit de ap. *Constitutis* ii. in prin." ('*avec diligence*. Et peut-être par serment. Jean [le Teutonique]. Il n'est pas de coutume qu'ils jurent mais les scrutateurs les adjurent de désigner et de s'accorder sur celui qu'ils croient être le meilleur et le plus utile. Cela est prouvé au début du deuxième chapitre *Constitutis* du titre *De l'appel*').

127 *Constitutiones concilii quarti Lateranensis*, cit., p. 214 (*ad* Lat. IV c.24, s.v. *iustoque impedimento detentus venire non possit*), repris par la glose de *Quia propter* dans la *Compilatio quarta* (Città del Vaticano, BAV, Vat. lat. 1377, fol. 285va, *ad* 4Comp. 1.3.9, s.v. *venire non possit*).

omnes convenimus in dominum M.")[128], s'interroge sur les mots (*verba*) que doivent employer les compromissaires[129]. La mise par écrit du scrutin ("vota [...] in scriptis redacta") était considérée par Vincentius Hispanus comme partie intégrante de la forme d'élection ("dico scripturam esse de forma"), ce que ne renie pas Henri de Suse/Hostiensis, dans sa somme ("si non scribantur vota non observatur forma") puis son apparat ("aliter non servatur forma")[130]. Selon Bernard de Parme, le secret qui entourait l'examen des votes supposait la mise à l'écart du chapitre, non de ceux dont les services étaient indispensables au déroulement de la procédure ("capitulum tantum excluditur et non persone necessarie")[131]. Giovanni d'Andrea affirme que l'absence de précision quant au caractère public desdits écrits laissait place à une main privée[132]. La question cruciale demeurait, au cas où les scrutateurs n'officiaient pas, le statut des personnes sollicitées. D'après la *Summa* puis le *Commentum* d'Henri de Suse/Hostiensis, qui invoque l'opinion de Iacopo d'Albenga, la seule présence d'un tabellion laïque avait suffi à entraîner la réprobation/cassation de l'élection de Plaisance (1243 ?)[133]. À la fin du XIII[e] siècle, l'exemple est reçu dans le *Libellus* de

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128 Il n'est pas exclu que le glossateur ait songé à l'élection (non confirmée) de l'archidiacre de León M. (1244), un personnage qui doit être identifié à Martín Fernández, lequel s'impose lors de la succession suivante en 1254 : Città del Vaticano, ASV, Reg. Vat. 21, fol. 69, n. 410 (Latran, 27/01/1244) ; Città del Vaticano, ASV, Reg. Vat. 23, fol. 160, n. 102 (Anagni, 06/08/1254) ; *Les registres d'Innocent IV (1243-1254)*, éd. É. Berger, I (Paris : E. Thorin/A. Fontemoing/E. de Boccard, 1884), p. 74, n. 412 (reg.), III, p. 492a, n. 7919 (reg.) ; *La documentación pontificia de Inocencio IV (1243-1254)*, éd. A. Quintana Prieto (Roma : Instituto español de historia eclesiástica, 1987, Monumenta Hispaniae Vaticana, Sección : Registros 7), I, pp. 55-56, n. 35, II, pp. 882-84, n. 1005.

129 Reims, BM, 708, fol. 79ra-79rb (*ad* X 1.6.42, s.v. *provideant*) ; Saint-Omer, BM, 160, fol. 47ra.

130 Paris, BN, lat. 3967, fol. 22va (*ad* X 1.6.42, [s.v. *formas*]) ; Madrid, BN, 30, fol. 29rb ; München, BSB, Clm 14006, fol. 13ra (*ad* X 1.6.42, s.v. *et in scriptis redacta*) ; Paris, BN, lat. 15410, fol. 19va ; Reims, BM, 713, fol. 21ra ; Henricus [de Segusio], *Summa super titulis decretalium*, cit., I, fol. e1ov ; München, BSB, Clm 13015, fol. 94vb (*ad* X 1.6.42, s.v. *et in scriptis redacta*) ; Hostiensis, *Lectura sive apparatus*, cit., fol. 68ra.

131 Bologna, Collegio di Spagna, 280, fol. 26rb (*ad* X 1.6.42, s.v. *redacta*) ; *Decretales d. Gregorii papae IX*, cit., col. 180. Le terme n'est pas commenté dans la première recension de la glose ordinaire : Saint-Omer, BM, 435, fol. 21rb.

132 Paris, BN, lat. 4016, fol. 72rb (*ad* X 1.6.42, s.v. *scriptis*) ; Iohannes Andreae, *In quinque decretalium libros novella commentaria*, cit., fol. 115va.

133 München, BSB, Clm 14006, fol. 13ra (*ad* X 1.6.42) : "*et in scriptis redacta*. Ergo si non scribantur vota non observatur forma. Sed per quem scribentur ? Dico per tabellionem clericum ad ecclesiastica negotia per episcopum deputatum [...]. Laicus enim tabellio scribere non debet quia ob hoc solum fuit reprobata electio Placentini secundum Iac." ('*et rédigés par écrit*. En conséquence, la forme n'est pas observée si les votes ne sont pas mis par écrit. Mais qui doit les mettre par écrit ? Je dis : un clerc tabellion député par l'évêque aux affaires ecclésiastiques. [...] En effet, le tabellion laïque ne doit pas écrire car, selon Jacques [d'Albenga], l'élection de [l'évêque de] Plaisance a été réprouvée pour ce seul motif') ; Paris, BN, lat. 15410, fol. 19va ; Reims, BM, 713, fol. 21ra ; Henricus [de Segusio], *Summa super titulis decretalium*, cit., I, fol. e1ov ; München, BSB, Clm 13015, fol. 94vb (*ad* X 1.6.42) : "*et in scriptis redacta*. [...] Sed per quem scribentur ? Numquid per tabellionem laycum ? [...] Puto contra quia ob hoc solum cassata fuit electio Placentini secundum Ia." ; Hostiensis, *Lectura sive apparatus*, cit., fol. 68ra. Pendant la vacance du Siège apostolique (1241-1243), l'archiprêtre de Padoue, vicaire du légat Gregorio da Montelongo, cassa l'élection comme évêque de Plaisance, mais par compromis plutôt que par scrutin, de l'archidiacre Aimerico Caccia (1242), une décision qui profita au prieur

Guillaume de Mandagout[134]. Il est repris ensuite chez Giovanni d'Andrea. Dans la *Novella*, Iacopo d'Albenga et Hostiensis sont en compagnie de Guglielmo Nasone et d'Egidio[135]. Guglielmo indique dans sa *Lecture* sur le *Liber Extra* – celle d'Egidio n'est pas conservée – que l'élection de Plaisance a été cassée en raison de la présence d'un notaire (laïque) aux côtés des trois scrutateurs[136].

Afin de compléter la glose littérale de *Quia propter*, Guglielmo Nasone s'en remet à un opuscule *ad hoc* qui décrit la procédure pour chacune des formes d'élection (scrutin, compromis, inspiration), tout en répondant à des questions d'ordre pratique[137]. D'une version à l'autre des *Additiones*, et dans une même visée didactique, Giovanni d'Andrea a renforcé la glose de *Quia propter* au moyen d'un

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du couvent des Prêcheurs Giacomo di Castell'Arquato : P. M. Campi, *Dell'historia ecclesiastica di Piacenza*, II (Piacenza : Giovanni Bazachi, 1651), pp. 397-98, n. LXXXVI (Plaisance, 08/05/1242), LXXXVII (s. l., s. d.), LXXXVIII (Tivoli, 08/06/1242), LXXXIX (Plaisance, 10/07/1243) ; Città del Vaticano, ASV, Reg. Vat. 21, fol. 59-59v, n. 354 (Latran, 22/12/1243) ; *Les registres d'Innocent IV*, cit., I, p. 63b, n. 356 (reg.) ; F. Ughelli et N. Coleti, *Italia sacra sive de episcopis Italiae*, II (Venezia : Nicolò Coleti, 1717), cols 224-25 (éd.) ; M. P. Alberzoni, 'Le armi del legato : Gregorio da Montelongo nello scontro tra Papato e Impero', in *La propaganda politica nel basso medioevo*. Atti del XXXVIII Convegno storico internazionale (Todi, 14-17 ottobre 2001) (Spoleto : Centro italiano di studi sul basso medioevo, 2002, Accademia Tudertina, Nuova serie 15), pp. 177-239, pp. 213 (n. 98), 217, 221, 231.

134 Paris, BN, lat. 15415, fols 213vb-141rb (*Pars* I, *cap.* 19), fol. 214ra : "*contrariam*. Que est Osti. et Iac. secundum quem fuit cassata electio Placentini ob hoc solum quod laycus scripsit vota ut notatur per ipsum Ostien. in predicto c. *Quia propter*" ; Guillermus Mandagotus, *Practica electionum*, cit., fols 16-17, fol. 17.

135 Paris, BN, lat. 4016, fol. 74va (*ad* X 1.6.42) : "In glo. *per ipsos* ibi *tabellionem*. [...] Et dicunt quod propter hoc fuit cassata electio episcopi Placentini" ; Iohannes Andreae, *In quinque decretalium libros novella commentaria*, cit., fol. 118rb. Les *Additiones I* (München, BSB, Clm 6351, fol. [12va], *ad* Glo. *per ipsos scrutatores* [*scripta* ms.] ibi *per tabellionem*) se réfèrent à Iacopo d'Albenga et à Hostiensis, tandis que les *Additiones II* (München, BSB, Clm 14026, fol. 23ra, *ad* In glo. *per ipsos* ibi *per tabel[l]ionem*) leur ajoutent Guglielmo Nasone.

136 Wien, ÖNB, Cod. 2083, fol. 49vb (*ad* X 1.6.42) : "*tres*. [...] Numquid poterunt esse plures vel pauciores ? [...] Et propter hoc cassata fuit electio Placentini quia interfuit cum eis tribus notarius quia sic esset contra formam concilii". La lecture conteste (fol. 49vb), sur un aspect, la glose de Bernard de Parme : "*Si venire*. B. dicit quod potest exprimere voluntatem suam per litteras. Ego dico quod non potest exprimere voluntatem per litteras quia illud non dicitur hic [...]" ('*S'il [ne peut] venir*. B. dit qu'il peut exprimer sa volonté par lettres. Je dis qu'il ne peut pas exprimer sa volonté par lettres puisque cela n'est pas dit ici').

137 Wien, ÖNB, Cod. 2083, fols 49va-50ra (*ad* X 1.6.42), fol. 49va-49vb ("*Quia propter*. Tres sunt forme que fiunt in electione – s. e. *Causamque*. N."), fols 49vb-50ra ("*formas*. Non dicit substantias – *Si venire*. [...] nec ille potest committere vices alicui qui non sit de collegio quia esset contra formam. N." [*S'il [ne peut] venir* [...] et il ne peut charger quelqu'un qui ne soit pas du collège de tenir sa place, parce que cela serait contre la forme']). Le seul traité, détaché de la glose littérale, se lit également dans Montecassino, Archivio e Biblioteca dell'Abbazia, 136, pp. 209b-10a (*ad* X 1.6.42) : "*Quia propter diversas*. Tres sunt forme que fiunt in electionibus – s. [e.] *Causamque inter moniales*. G. Nas." Édité d'après cette source (R. Trifone, 'Gli scritti di Guglielmo Nasone conservati nella biblioteca di Montecassino', in RSDI 2 (1929), pp. 242-60, pp. 258-60), il a été signalé par Kuttner et Smalley ('The '*Glossa ordinaria*' to the Gregorian Decretals', cit., p. 104 et n. 3) puis exploité par R. Benson (*The Bishop-Elect. A Study in Medieval Ecclesiastical Office* [Princeton (NJ) : Princeton University Press, 1968], pp. 114-15 et n. 18).

traité de procédure[138]. Le document se retrouve, avec une paternité assumée dès les premières lignes ("Ego autem Io. An. secundum alios dico quod tantum due sunt forme electionum"), comme pièce additionnelle d'un manuscrit du *Liber Extra* doté de la glose ordinaire. Il y jouxte la constitution *Quia propter* encadrée, cette fois, d'une glose dérivée des *Additiones II*[139]. Comme l'apprend un autre témoin, le texte est une répétition de Giovanni d'Andrea sur *Quia propter*[140] – ce que confirme sa présence, mais sans attribution, dans une collection de *repetitiones* de Giovanni d'Andrea, Paolo Liazari et Giovanni Calderini (m. 1365)[141]. En revanche, les *Additiones II* orientent vers un dénommé Egidio ("Ego autem Egidius secundum alios dico quod tantum due sunt forme electionis")[142], lequel surgit parfois au détour d'exemplaires placés sous l'autorité de Giovanni d'Andrea[143]. À connotation procédurale, la répétition d'Egidio circule également hors de ce territoire d'influence. On la rencontre au titre d'addition marginale à la glose ordinaire du *Liber Extra* (Bologne, v. 1260)[144] et, surtout, comme une œuvre à part entière[145] – qui a pu être mise au crédit de Bernard de Parme (*Ber.*)[146]. Ce dernier est l'unique glossateur cité dans un texte qui démontre, au chapitre de l'inspiration, une familiarité avec les thèses de Goffredo da Trani et de Bernard de

138 München, BSB, Clm 6351, fol. [12rb]-[12vb] (glose) (*ad* X 1.6.42) ; München, BSB, Clm 14026, fols 21rb-21vb, 23ra-23rb (glose), 23rb-23va (traité) (*ad* X 1.6.42).

139 Bologna, Collegio di Spagna, 280, fols 1va-1vb (*ad* X 1.6.42) (Inc. *Ad evidentiam huius decretalis Quia propter*), 2ra-2rb (*Quia propter* et glose des *Additiones II*), 1vb (glose des *Additiones II*, suite et fin). Les additions de Giovanni d'Andrea sur la glose ordinaire de *Quia propter* sont absentes. Au fol. 1ra, le *codex* renferme une glose sur *Quia propter* proche de celle de Giovanni d'Andrea et une liste de *Casus in quibus electio non valet*.

140 Bologna, Collegio di Spagna, 70, fols 28ra-29rb (*ad* X 1.6.42), fols 28ra, 29rb : "In nomine Domini amen. Repetitio c. *Quia propter* secundum Iohannem Andree. [...] Io. An. repetit hanc decretalem"). La répétition doit être ajoutée à celles connues sur le *Liber Extra* : Pennington, 'Johannes Andreae's *Additiones*', cit., pp. 344-45.

141 München, BSB, Clm 6349, fols 36va-37va (*ad* X 1.6.42).

142 München, BSB, Clm 14026, fol. 23rb (*ad* X 1.6.42).

143 Amiens, BM, 376, fols 137vb-39ra ("Modus procedendi in electionibus prelatorum secundum Iohannem Andree. Ad evidentiam decretalis *Quia propter* [...] quia raro sunt in concordia. Egidius. [...] Et sic est finis. Iste est modus procedendi in electionibus quem tradidit Iohannes Andree") ; Seu d'Urgell (La), Biblioteca Capitular, Fragmentos mayores, II, fols 45-48 ("Pra[c]tica que servari debet in electionibus faciendis notata per Iohannem Andree. Ad evidemptiam (*sic*) decretalis *Quia propter* [...] quia raro sunt in concordia. Egidius. [...]").

144 Klosterneuburg, Augustiner-Chorherrenstift, 88, fols 28ra-29ra (*ad* X 1.6.42).

145 Città del Vaticano, BAV, Borgh. 45, fols 22va-23ra (*ad* X 1.6.42) ; Luxembourg, BN, 132, fols 100vb-01vb (dans ce recueil, le sigle "Egit." (*sic*) est indiqué à la fin de la section sur le scrutin, fol. 101va) ; Bamberg, SB, Msc. Can. 47 (P. II. 22), fol. 127va-27vb ; Bamberg, SB, Msc. Can. 59 (P. II. 9), fol. 139ra-39rb ; Bamberg, SB, Msc. Jur. 33 (D. II. 18), fols 11vb-12rb ; Hannover, Kestner-Museum, Nr. 3943, fols 133-38 ; Bologna, Collegio di Spagna, 87, fols 303-04 ; Valenciennes, BM, 261, fols 208v-09v. Le premier manuscrit de Bamberg contient ensuite des extraits de l'apparat d'Henri de Suse/Hostiensis (fols 127vb-28ra, *ad* X 1.6.42) et des *questiones* qui allèguent l'apparat d'Innocent IV, le Digeste et les *Libelli de iure canonico* de Roffredo da Benevento (fol. 128ra-28rb, *ad* X 1.6.42).

146 Città del Vaticano, BAV, Borgh. 292, fol. 76ra-76vb (*ad* X 1.6.42), fol. 76vb.

Compostelle[147]. Produite dans la seconde moitié du XIII^e siècle, la répétition sur *Quia propter* est sans doute sortie de la plume d'Egidio Foscarari (m. 1289)[148]. Au bout du compte, Giovanni d'Andrea dépendrait d'un travail antérieur, qu'il se serait approprié jusqu'à occulter sa provenance, avant que Paolo Liazari ne fasse fructifier l'héritage[149]. Dans ce schéma, la répétition traduirait l'intensité des liens savants et affectifs qui unissaient Giovanni d'Andrea à son premier maître et à l'un de ses principaux disciples. Quoi qu'il en soit, l'ancrage bolonais est incontestable. Au-delà de la critique d'attribution, l'exemple de la cathédrale Saint-Pierre de Bologne et de son archidiacre, premier dignitaire du chapitre, suffit à s'en convaincre[150]. Reprenant la trilogie de *Quia propter*, la répétition a une vocation pratique. Elle se focalise sur

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147 Città del Vaticano, BAV, Borgh. 45, fols 22va, 23ra (*ad* X 1.6.42) : "Quod autem dicitur forma inspirationis non est forma sed est exceptio a predictis formis. Et hoc probat littera que dicit *nisi forte communiter, etc.* Item alia ratione ubi loquitur de inspiratione divina. Sed ei quod a Deo procedit non potest imponi ab homine forma aliqua quia qui spiritu Dei ducuntur non sunt sub lege, extra de regularibus *Licet*, XIX. q. ii. *Due sunt.* [...] Item quero utrum isti scrutatores possint esse plures [quam tres]. Et dicit magister Ber. quod possunt esse plures [...]" ('Ce qui est qualifié de forme d'inspiration n'est pas une forme mais une exception aux formes susdites. Et cela est prouvé par la formule qui dit *à moins que en commun, etc.* Item, pour une autre raison où l'on parle d'inspiration divine. Mais aucune forme ne peut être imposée par l'homme à ce qui procède de Dieu puisque ceux qui sont conduits par l'esprit de Dieu ne sont pas soumis à la loi, au chapitre *Licet* du titre *Des réguliers* du *Liber Extra* et au chapitre *Due sunt* de la deuxième question de la Cause 19. Item, je demande si lesdits scrutateurs peuvent être plus [que trois]. Et maître Ber. dit qu'ils peuvent être plus [...]'). La notion d'*exceptio a formis* est tirée de la *Summa* de Goffredo da Trani : Troyes, BM, 456, fol. 3vb (*ad* X 1.6). L'allégation du Décret est empruntée à la glose de Bernard de Compostelle : Reims, BM, 708, fol. 79va (*ad* X 1.6.42, s.v. *nisi forte*). Elle se découvre, avec celle au *Liber Extra*, dans le commentaire d'Innocent IV : Bologna, Collegio di Spagna, 220, fol. 38va (*ad* X 1.6.42, s.v. *per inspirationem*).

148 A. Rota, 'Il decretista Egidius e la sua concezione del diritto naturale', in SG 2 (1954), pp. 211-49, pp. 217-19 ; M. Boháček, 'Le opere delle scuole medievali di diritto nei manoscritti della Biblioteca del Capitolo di Olomouc', in SG 8 (1962), pp. 305-421, pp. 378-79, avec renvoi à Olomouc, Státní Archív, C.O. 36, fol. 3 et C.O. 209, fol. 104-104v, respectivement siglés "Egi. de Bon." et "Egi.") ; C. Bukowska Gorgoni, 'Foscarari (Foscherari), Egidio', in DBI XLIX (Roma : Istituto dell'Enciclopedia italiana, 1997), pp. 277-80, p. 279 ; G. Morelli, 'Egidio Foscherari († 1289)', in *Autographa. I.2. Giuristi, giudici e notai (sec. XII-XV)*, éd. G. Murano (Imola : Editrice La Mandragora, 2016), pp. 45-48, p. 47.

149 Eichstätt, UB, Cod. st 618, fols 340v-42 (*ad* X 1.6.42) ; München, BSB, Clm 14837, fols 130v-33v ; Paris, BN, lat. 4030, fol. 191-91v ; Bamberg, SB, Can. 18 (P. III. 1), fols 23va-24ra ; J. F. von Schulte, *Die Geschichte der Quellen und Literatur des canonischen Rechts*, II (Stuttgart : F. Enke, 1877 = Graz : Akademische Druck- und Verlagsanstalt, 1956), pp. 246-47, § 60, n. 87, p. 247, n. 7, n. 10, qui signale Wrocław, Biblioteka Uniwersytecka, II. F. 53, fols 188-204 (*Decretalis commentata*). L'autre manuscrit cité par Schulte (Göttweig, Stiftsbibliothek, 181a, [fols 115-130]) porte en revanche sur la décrétale *Scriptum est* (X 1.6.40). Il faut en outre distinguer la répétition sur *Quia propter* de celle sur *Nullus* (X 1.6.1) (Inc. *Congregatio eligit sibi prelatum*), deux textes confondus dans G. Fantuzzi, *Notizie degli scrittori bolognesi*, V (Bologna : Stamperia di San Tommaso d'Aquino, 1786), pp. 64-67, p. 66. Seule la répétition sur *Nullus* a été imprimée dans Paulus de Liazariis, [*Repetitiones super libro decretalium*] (Venetiis : Iohannes et Gregorius de Gregoriis, 1496), [fols 1rb-3ra]. Sur *Quia propter*, Paolo Liazari exploite les répétitions de Giovanni d'Andrea et d'Egidio.

150 Dans Bologna, Collegio di Spagna, 70, fols 28ra-29rb (*ad* X 1.6.42) (voir ci-dessus, n. 140), la cathédrale de Padoue a remplacé celle de Bologne. Il est plausible que le changement ait à voir avec la position institutionnelle de Giovanni d'Andrea, qui a enseigné à Padoue (1307-1309), ou avec la réception locale de sa doctrine.

le scrutin, réserve des observations ponctuelles au compromis et ne fait que signaler l'inspiration. L'ensemble est conclu par quatre *questiones*, résolues par le maître (*dico quod*), qui touchent les scrutateurs, pour trois d'entre elles, et les compromissaires pour la dernière, l'inspiration ne devant guère retenir l'attention ("non est multum curandum") puisque, d'après Egidio, elle n'advient que rarement, faute de concorde parmi les électeurs ("raro sunt in concordia")[151], un constat que Giovanni d'Andrea prolonge en arguant de la malice et de l'envie des clercs ("raro sunt in concordia propter malitiam et invidiam clericorum")[152]. Fidèle à la doctrine des glossateurs, le propos démontre la faveur pour les paroles prononcées (l'exposition des formes d'élection, l'adjuration, l'expression du vote, l'annonce de la collation, l'élection commune) ainsi que pour les modèles d'actes (lettres de citation des absents, procès-verbaux relatifs à la forme d'élection choisie, à la désignation des scrutateurs et au transfert de la *potestas eligendi* aux compromissaires). La dimension concrète des répétitions est encore accentuée lorsqu'elles quittent les cercles académiques pour les communautés ecclésiastiques. Ainsi s'opère la transition vers la *Summa/Summula de electione* (*Forma electionis* ; *Practica de electione*) de Giovanni d'Andrea, la répétition étant élaguée des quatre questions finales, souvent restreinte au scrutin et précédée d'une liste de causes de nullité *ipso iure* de l'élection (Inc. *Ut habeas in summa tractatum (tituli) de electione nota XXIX casus in quibus electio infringitur et ipso iure cassatur*)[153]. Dans le même sens, les

151 Città del Vaticano, BAV, Borgh. 45, fol. 23ra (*ad* X 1.6.42).

152 München, BSB, Clm 6349, fol. 37va (*ad* X 1.6.42) ; München, BSB, Clm 14026, fol. 23rb ; Bologna, Collegio di Spagna, 280, fol. 1vb. Dans ce dernier manuscrit, les quatre *questiones* figurent en addition sur dix-sept lignes, d'une écriture de plus petit module (fol. 1va-1vb). Une version proche, mais avec des traits typiques (la désignation d'un vicaire général par le chapitre durant la vacance, l'allusion au décret d'élection présenté au pape), s'achève sur les mots suivants : "De forma vero inspirationis non est curandum quia illa raro accidit propter malitiam hominum modernorum" (Paris, BN, lat. 9634, fols 156ra-57va [*ad* X 1.6.42], fol. 157va). Si elle circule de façon anonyme (G. Fransen, 'Un manuscrit universitaire padouan à l'abbaye de Parc', in *L'Année canonique* 17 (1973) [*Mélanges offerts à Pierre Andrieu-Guitrancourt*], pp. 481-506, repris in Idem, *Canones et Quaestiones. Évolution des doctrines et système du droit canonique*, éd. A. García y García, I.1 (Goldbach : Keip, 2002, Bibliotheca eruditorum 25), pp. 367*-92*, pp. 375*-81*, 379* n. 19, 392*), la répétition pourrait être de Giovanni Calderini, un des principaux auteurs (avec Paolo Liazari) représentés dans le volume.

153 von Schulte, *Die Geschichte der Quellen und Literatur*, cit., II, pp. 205-29, § 54, n. 68, pp. 223-24, p. 223, n. 88. L'œuvre est connue par les témoins suivants : Halle, Universitäts- und Landesbibliothek Sachsen-Anhalt, Ye 2° 79, fol. 1ra-1vb ; Klagenfurt, Archiv der Diözese Gurk, Bischöfliche Bibliothek, XXX b 8, fols 271-72v ; Klosterneuburg, Augustiner-Chorherrenstift, 337, fols 223va-24va ; Lüneburg, Ratsbücherei, Jurid. E 2° 29, fols 189v-90 ; München, UB, 2° Cod. ms. 263, fols 115-116 ; Paris, BN, lat. 4030, fol. 190-90v ; Reims, BM, 770, fols 184v-85v ; Stuttgart, Württembergische Landesbibliothek, HB VI 45, fols 181rb-82ra ; Uppsala, UB, C 576, fols 158-60 ; Wien, ÖNB, Cod. 5124, fols 95v-97vb. Schulte a distingué la *Summa de electione* (p. 223, n. 88) du *De electione* (pp. 223-24, n. 12h), qui met à jour le *Libellus super electionibus* de Guillaume de Mandagout ("eine Ueberarbeitung des Werkes des *Wilhelm von Mandagoto*"), une entreprise connue par les *Additiones* au *Speculum iudiciale*. Giovanni d'Andrea est également l'auteur d'un commentaire de la rubrique du titre *de electione et potestate electi* (X 1.6) (Inc. *In tertia compilatione sequens rubrica precedebat istam*). Dans les *Additiones* II (München, BSB, Clm 14026, fol. 13vb, *ad* X 1.6), on lit à l'emplacement du texte manquant : "Super hac rubrica vide plene quod dixi in commento decretalis e. ti. *Publicato*". De fait, la répétition de Giovanni d'Andrea sur *Publicato* (X 1.6.58) (Inc. *Breve est capitulum*) fait suite à des considérations sur le titre *de*

répétitions bolonaises ont pu être étoffées par d'autres *formae*, comme la protestation relative aux chanoines excommuniés, suspens et interdits ou le modèle de collation des votes lors d'un scrutin[154]. Aux côtés des répétitions sur *Quia propter* et de leurs avatars, les plus amples *summae/summulae de electione* délimitent un autre domaine d'investigation. Si Lawrence Somercote fournit des modèles d'actes au fil du texte, Guillaume de Mandagout fait plus encore, jalonnant la procédure d'élection et d'appel au Siège apostolique, en vue de la confirmation ou en cas d'élection discordante, de quelque vingt-cinq *formae* rassemblées dans les deux dernières parties de son traité (cap. 59-60), authentique recueil de formules. Le *Libellus* de Mandagout rejaillit ensuite sur les glossateurs de *Quia propter* – et ce de façon croissante, chez Giovanni d'Andrea (*Additiones* au *Liber Extra*, *Novella*) et, après lui, Paolo Liazari (*Commentum* sur *Quia propter*)[155]. Beaucoup plus modestement, mais dans un esprit semblable, le formulaire d'un moine du Bec-Hellouin commence par une section sur l'élection, qui veille à dissiper les doutes ayant assombri celle de l'abbé Ymer (1281-1304), dans laquelle la constitution *Quia propter* a été garnie de modèles de *verba* et de *scripta*[156].

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electione (X 1.6). Sur l'ensemble textuel, dissocié (par principe) dans la *Novella*, Pennington, 'Johannes Andreae's *Additiones*', cit., pp. 344-45, p. 345, n. 16 ; Colli et Murano, 'Un codice d'autore', cit., pp. 17-20, pp. 17, 20 (n. 6). La même configuration (rubrique *de electione* + *Publicato*) est attestée dans Wien, ÖNB, Cod. 2132, fols 341ra, 341ra-351va. Il faut revenir sur la position de Schulte (p. 223, n. 88), qui pensait que le manuscrit viennois contenait la *Summa de electione* (Inc. *Ut habeas in summa tractatum (tituli) de electione*). Dans cette dernière, Giovanni d'Andrea a retravaillé sa répétition sur *Quia propter*. Sont introduits la protestation de l'archidiacre/du doyen du chapitre relative aux excommuniés et aux irréguliers ("*Ego nomine meo et omnium de capitulo protestor quod si aliquis sit excommunicatus vel irregularis exeat capitulum et permittat nos libere eligere, protestans quod cum eo non intendo eligere*"), la précision sur la formule d'expression du vote ("[...] *consentio in pastorem eligendum*. Et non dicat *Eligo*. Fateor tamen quod si dixerit *Eligo* non vitiaretur electio") ainsi que la mention touchant l'élection d'un indigne ("Si vident isti quod una pars elegit scienter indignum immo debent dicere et monere ut a tali nomine recedant, quod possunt ante electionem e. ti. c. *Perpetuo* li. VI.").

154 Paris, BN, lat. 4030, fols 190v-91 (*Protestatio facienda ante electionem*), 191 (*Collatio in forma scrutinii*). Les deux pièces sont intercalées entre les opuscules attribués à Giovanni d'Andrea et à Paolo Liazari.

155 München, BSB, Clm 14026, fols 211rb-211vb, 231ra-231rb (*ad* X 1.6.42) ; Paris, BN, lat. 4016, fols 71vb-75ra (*ad* X 1.6.42) ; Iohannes Andreae, *In quinque decretalium libros novella commentaria*, cit., fols 115ra-118vb ; Barcelona, ACA, Ripoll 66, fols 49v-58 (*ad* X 1.6.42) ; Salamanca, Biblioteca Histórica General (Biblioteca Universitaria), 2384, fols 211ra-271ra. Le plus grand nombre de renvois au *Libellus super electionibus* se trouve cependant dans les *Additiones* de Giovanni d'Andrea au *Speculum iudiciale* de Guillaume Durand (*Lib.* IV, *partic.* I, *De electione*) : Paris, BN, lat. 4260, fols 177va-79rb ; Iohannes Andreae, *Additiones ad Durantis Speculum iudiciale* (Strasbourg : Georg Husner, avant 25/03/1475), lib. IIII, fols 7ra-8va. Pour la mise à profit du *Libellus de Mandagoto* dans une lecture de Montpellier (1338-1339), Paris, BN, lat. 4036, fols 79rb-82rb (*ad* X 1.6.42), fols 79rb-80ra. Sur le texte, N. Laurent-Bonne, 'Un canoniste montpelliérain oublié : Étienne de Clapiers, abbé de Saint-Victor de Marseille', in *Proceedings Toronto 2012*, pp. 407-20.

156 London, BL, Cotton MSS, Domitian A XI, fol. 109-09v (*De tripplici forma electionis videlicet per gratiam Spiritus sancti, per scrutinium et per compromissum*). La pièce ("Quia propter diversas electionum formas quas quidam invenire conantur et multa impedimenta perveniunt (*sic*) et magna pericula imminent ecclesiis viduatis. Ideoque statutum fuit in concilio generali ut cum electio in aliquo monasterio fuerit celebranda – His enim modis celebrata electio non valeret nisi forte communiter esset ab omnibus quasi per inspirationem divinam absque vitio celebrata" ['En raison des diverses formes d'élection que certains s'efforcent de trouver, les Églises en veuvage font face à de

Adressé au supérieur, le décret d'élection a partie liée avec la promotion des évêques. Les pontificaux de la tradition romano-germanique l'évoquent dans l'*ordo* de consécration, préconisant sa lecture, dessinant ses contours, tandis que les folios de garde des manuscrits accueillent, parfois, des modèles d'actes[157]. L'intensité de la pensée canonique du XII^e^ siècle sur l'élection et la confirmation provoqua l'extraction du *decretum* de sa gangue liturgique. Dans sa glose au Décret de Gratien, Jean le Teutonique livre quelques réflexions[158]. Raymond de Peñafort lui emboîte le pas dans la *Summa iuris canonici*[159]. Tancrède franchit un cap, passant en revue les figures imposées de l'acte même s'il admet, *in fine*, que le décret appartient à la solennité plus qu'à la forme de l'élection[160]. La matière est reprise dans la *Summa*

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multiples encombres et courent de grands périls. Par conséquent, il a été décidé en concile général que, lorsqu'il faudra célébrer une élection dans un monastère – En effet, une élection célébrée selon de telles modalités sera sans valeur, à moins qu'elle n'ait été célébrée en commun, par tous, comme par inspiration divine, sans vice']) ouvre la première section (fols 109-112) du formulaire (fols 109-155). Mes remerciements vont à Fabien Paquet (Université Caen-Normandie), qui m'a fait connaître le document.

157 *Le pontifical romano-germanique du X^e^ siècle*, éd. C. Vogel et R. Elze, I (Città del Vaticano : BAV, 1963, Studi e testi 226), pp. 194-95, n. LVI (*Decretum quod clerus et populus firmare debet de electo episcopo*). Pour un exemple à Avranches (milieu XII^e^ siècle), Paris, BN, lat. 14832, fols 54-64, fols 54-55v ; V. Leroquais, *Les pontificaux manuscrits des bibliothèques publiques de France*, II (Mâcon : Protat frères, 1937), pp. 185-93, n. 154, pp. 187-88. D'autres pontificaux, tel celui de l'Église du Mans au XIII^e^ siècle, se limitent à indiquer la lecture du décret (d'élection) avec celle des lettres des évêques absents (*legitur decretum et littere absentium episcoporum*) : Le Mans, BM, 141, fols 116v-29, fol. 117. Un pontifical sénonais de la fin du XII^e^ siècle transcrit un décret-type que le clergé et le peuple d'une Église suffragante sont tenus d'adresser au métropolitain, en vue de la consécration : Sens, BM, 9, fol. B.

158 Troyes, BM, 60, fol. 39rb (*ad* D.61 c.11, *Episcopus*, s.v. *subscriptionibus*).

159 Città del Vaticano, BAV, Borgh. 261, fol. 101rb (*ad* X 1.6) : "Solet queri utrum decretum sit de substantia electionis ita quod non valeat electio sine ipso. [...] Sed dic cum Io. quod licet in electione requiratur decretum cum subscriptionibus canonicorum tamen electio sine ipso facta tenet" ('Il est d'usage de demander si le décret appartient à la substance de l'élection, au point que l'élection n'aurait pas de valeur sans lui. Mais dis avec Jean [le Teutonique] que bien que l'on exige, dans l'élection, un décret avec les souscriptions des chanoines, l'élection faite sans décret tient cependant').

160 Città del Vaticano, BAV, Vat. lat. 1377, fols 160rb-61va (*ad* 3Comp. 1.6.5, *Innotuit nobis olim*), fol. 160va : "*decreto*. Decretum continere debet totam seriem et formam electionis, nomina eligentium et consentientium et eorum consensum et subscriptiones cuiuslibet sic : *Ego talis canonicus predicte ecclesie huic electioni interfui, consensi et manu mea subscripsi*. Et continere debet electi nomen et ad quam dignitatem electus est, et illa scriptura per manum publicam debet esse scripta vel cum sigillis capituli et personarum que consentiunt vel interfuerunt auctenticata, ar. hic s. de postulatione prela. *Bone memorie* et LXI. d. *Episcopus dum*. Et est tale decretum de solle[m]pnitate electionis et non de substantia, ar. XXX. q. v. *Nostrates* et C. de probationibus *Cum res*. T." ('*le décret (d'élection nous ayant été présenté)*. Le décret doit contenir toutes les étapes et la forme de l'élection, les noms de ceux qui élisent et ont donné leur accord, l'accord de ces derniers et les souscriptions de chacun comme suit : *Moi, untel, chanoine de la susdite Église, j'étais présent à cette élection, j'ai donné mon accord et j'ai souscrit de ma main*. Et il [le décret] doit contenir le nom de l'élu et la dignité à laquelle il a été élu, et cette écriture doit être écrite par une main publique ou authentifiée au moyen des sceaux du chapitre et des personnes qui ont donné leur accord ou participé, d'après le chapitre *Bone memorie*, ci-dessus, du titre *De la postulation des prélats* et le chapitre *Episcopus dum*, à la distinction 61. Et ledit décret appartient à la solennité de l'élection et non à la substance, d'après le chapitre *Nostrates*, à la question 5 de la Cause 30, et la loi *Cum res*, au titre *Des preuves* du Code. T.').

de Goffredo da Trani[161]. Si elle ne disait rien de la teneur du *decretum electionis*, la constitution *Quia propter* portait les germes de la mise en forme de l'acte. À travers leurs commentaires, les glossateurs relèvent les funestes conséquences qui découlent de l'emploi d'expressions inappropriées. Bernard de Compostelle juge trop rigoureuse la cassation d'une élection par Alexandre IV (1254-61) suite à l'usage du pluriel au lieu du singulier dans la formule prononcée par celui des compromissaires qui s'exprime pour lui-même et ses associés[162]. D'après Pierre de Sampson, l'élection de l'évêque de Parme, célébrée par quasi-inspiration, fut cassée en cour de Rome au motif qu'un *tractatus* l'avait indûment précédée[163], un témoignage corroboré par Bovetino de Mantoue (m. 1301)[164]. L'affaire, qui recoupe l'éviction (1258) par Opizzo Sanvitale, neveu d'Innocent IV, de l'élu du chapitre Giovanni di Donna Rifiuta (1257), archiprêtre et *magiscola* de la cathédrale, doit sa notoriété au fait que le responsable de la composition du décret d'élection, entaché par l'impossible cohabitation du *tractatus* et de l'*inspiratio*, n'était autre – selon Pierre de Sampson – que l'éminent Bernard de Parme[165]. Les notaires se trouvaient également aux prises avec les affaires

161 Troyes, BM, 456, fol. 4va (*ad* X 1.6).

162 Reims, BM, 708, fol. 79rb (*ad* X 1.6.42, s.v. *provideant*) ; Saint-Omer, BM, 160, fol. 47ra.

163 Paris, BN, lat. 4009, fol. 12ra (*ad* X 1.6.42) : "*vitio*. Scilicet precedentis tractatus. Et nota quod dicit *precedentis tractatus* quia quedam electio facta de quodam archipresbitero Parmensi cassata fuit ex eo quod fuit habitus tractatus antequam eligeretur per inspirationem et magister B. et quidam alius iurisperitus dictaverunt sententiam illam et inter alia dicebatur sic : *habito diligenti tractatu talis electus fuit per inspirationem*. Eo ipso quod habitus fuit tractatus, cassata fuit electio. Nam tractatus [et] inspiratio sunt contraria. Unde qui debet eligi per inspirationem sine aliquo tractatu eligatur subito ab omnibus. Unde nota istam expositionem *scilicet precedentis tractatus* quia nullo modo precedere debet" ('(*sans*) *vice*. C'est-à-dire : *d'un traité qui précède*. Et note qu'il dit *d'un traité qui précède* car l'élection [comme évêque] d'un archiprêtre de Parme a été cassée parce qu'un traité avait eu lieu avant qu'il ne soit élu par inspiration. Et maître B. ainsi qu'un autre expert en droit composèrent ce procès-verbal dans lequel il était dit, entre autres : *au terme d'un traité diligent, untel a été élu par inspiration*. L'élection a été cassée pour le simple fait qu'un traité avait eu lieu auparavant. En effet, le traité et l'inspiration sont contraires. De là il découle que celui qui doit être élu par inspiration doit être aussitôt élu par tous, sans aucun traité. Prends bonne note de cette interprétation, c'est-à-dire *d'un traité qui précède*, car un traité ne peut précéder [l'élection par inspiration] d'aucune façon').

164 Wien, ÖNB, Cod. 2129, fol. 121ra-21rb (*ad* X 1.6.42), fol. 121ra : "*quasi per inspirationem*. Intellige quam non precesserit aliquis tractatus sicut precessit in electione Parmensis episcopi. Nam in electione Parmensis episcopi [que] fuerat de archipresbitero Parmensi per XV. dies tractatus electionis precesserat et tandem elegerunt archipresbiterum in episcopum omnes quasi per inspirationem, cuius electio fuit in curia reprobata quia curia non ap[p]robat talem electionem licet videatur ab omnibus celebrata per inspirationem si aliquis tractatus precessit quia potuisset iterum intervenisse aliqua turpitudo" ('*comme par inspiration*. Comprends ici qu'aucun traité n'a précédé [l'élection] comme cela fut le cas dans l'élection de l'évêque de Parme. De fait, dans l'élection de l'évêque de Parme qui avait été archiprêtre de Parme, un traité sur l'élection a précédé quinze jours durant. Et tous ont cependant élu l'archiprêtre évêque, comme par inspiration. L'élection a été réprouvée à la Curie parce que, bien que tous l'aient célébrée [l'élection], semble-t-il, par inspiration, la Curie n'approuve pas une telle élection si un tel traité l'a précédée, dans la mesure où une chose honteuse pourrait de nouveau en résulter').

165 L'élection par inspiration que revendique le chapitre conforte la relation du chroniqueur franciscain Salimbene de Adam : *Cronica*, éd. G. Scalia, I (Turnhout : Brepols, 1998, CCCM 125), pp. 100-01 (*De episcopis Parmensis ecclesie qui diebus meis fuerunt*), p. 101. Le cas d'école est repris par Giovanni

électorales. Un *ars notaria* florentin de la première moitié du XIII^e siècle contient deux modèles d'*electiones* par compromis et scrutin, mais il s'agit du *processus* plutôt que du *decretum*[166]. En revanche, la *Summa totius artis notariae* (1255-73) de Rolandino dei Passeggeri comporte le décret d'élection d'un abbé de S. Prospero (Reggio), un acte auquel Giovanni d'Andrea reproche, dans sa *Novella*, d'avoir situé l'examen des votes des scrutateurs après ceux des autres électeurs[167]. Confiés aux soins des chapitres, les décrets d'élection n'échappèrent pas au tropisme de *Quia propter*. Transmis dans la continuation de la chronique de Gervais de Canterbury, l'acte dressé pour Walter d'Eynsham, archevêque élu par compromis après la mort d'Étienne Langton (1228), signale la lecture de la constitution du concile de Latran IV, à laquelle il prélève quelques passages[168]. Librement adapté et destiné au chapitre cathédral de Rouen, du fait de la vacance du siège métropolitain, le décret d'élection de Raoul II de Cierrey à l'évêché d'Évreux (1236) trahit une dépendance certaine[169], tandis que *Quia propter* façonne les décrets d'élection d'Henri de Grez à Chartres (1243) autant que de Roger de Meyland à Coventry-Lichfield (1257)[170]. Dès 1222, après la mort de l'archevêque Pierre de Corbeil (1200-22), les chanoines de Sens qui demandent à Honorius III d'approuver la postulation de l'évêque de Langres Hugues de Montréal évoquent le scrutin (infructueux) qui l'a précédée dans les termes de *Quia propter*[171]. Le matériau

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d'Andrea dans les *Additiones II* – les *Additiones I* font état de Modène plutôt que de Parme (München, BSB, Clm 6351, fol. [12va], *ad* X 1.6.42, s.v. *ab omnibus*) – et, en substance, dans la *Novella* : München, BSB, Clm 14026, fol. 21vb (*ad* X 1.6.42, s.v. *absque vitio*) ; Paris, BN, lat. 4016, fol. 73rb (*ad* X 1.6.42, s.v. *absque vitio*) ; Iohannes Andreae, *In quinque decretalium libros novella commentaria*, cit., fol. 116va.

166 *Formularium Florentinum artis notariae (1220-1242)*, éd. G. Masi (Milano : Vita e pensiero, 1943, Orbis Romanus 17), pp. 46-48. Sur le texte, S. P. P. Scalfati, 'Les formulaires toscans d'*ars notaria*', in *Les formulaires : compilation et circulation des modèles d'actes dans l'Europe médiévale et moderne*, éd. O. Guyotjeannin *et al.* (Paris : École nationale des chartes, 2016), publié en ligne (http://elec.enc.sorbonne.fr/cid2012/).

167 München, BSB, Clm 14037, fol. 16rb-16va (*Instrumentum electionis facte per formam scrutinii*) ; Paris, BN, lat. 4016, fol. 72rb (*ad* X 1.6.42, s.v. *exquirant*) ; Iohannes Andreae, *In quinque decretalium libros novella commentaria*, cit., fol. 115va.

168 *The Historical Works of Gervase of Canterbury*, cit., II, pp. 123-24 (Canterbury, 03/08/1228).

169 Rouen, AD Seine-Maritime, G 4494 (s. l. [Évreux], lundi après l'octave de la Trinité [02/06]/1236). La pièce est éditée dans F. Pommeraye, *Sanctae Rotomagensis ecclesiae concilia ac synodalia decreta* (Rouen : Bonaventure Le Brun, 1677), pp. 222-23. Sur l'élection, Peltzer, *Canon Law, Careers and Conquest*, cit., p. 107.

170 *Layettes du Trésor des chartes*, cit., II, p. 524, n. 3146 (Chartres, 09/12/1243, copie de 1281) ; *Annales monasterii Burtonensis*, in *Annales monastici*, éd. H. R. Luard, I (London : Her Majesty's Stationary Office, 1864, RS 36.1), pp. 183-500, 379-80 (Coventry, mardi après la fête de la Conversion de saint Paul [30]/01/1257 n. s.). L'acte est connu de von Wretschko, 'Die *electio communis*', cit., p. 326, n. 1. Sur l'affaire, Harvey, *Episcopal Appointments in England*, cit., pp. 115, 245.

171 Oxford, Bodleian Library, Laud. misc. 646, fol. 55v (s. l. [Sens], 24/07/1222) ; Sion/Sitten, Archives du chapitre/Kapitelsarchiv, 83, fol. 213 (s. l. [Sens], 24/07/1222) : "Qua die, cum neque per unanimem consensum neque per compromissionem possemus ecclesie nostre consulere nec restaret nisi scrutinium, electi fuerunt tres de collegio nostro fide digni qui, auditis voluntatibus singulorum et in scriptis fideliter redactis, ea mox prout iuris est in communi publicarunt. Quibus publicatis inventum fuit quod [...]" ('Le dit jour, comme il nous était impossible de pourvoir à notre Église par un accord unanime ou un compromis et qu'il ne restait rien d'autre que le scrutin, trois membres de notre collège dignes de foi furent choisis qui, après l'audition et la fidèle mise par écrit des volontés de chacun, les publièrent aussitôt

qui touche l'élection de Pietro da Collemezzo à la métropole de Rouen (1236) est revisité, pour sa part, dans les *Libelli de iure canonico* de Roffredo da Benevento[172]. Les modèles de décrets d'élection par scrutin et compromis y reprennent les mots de *Quia propter* – soit que leurs rédacteurs, qui les expédiaient en cour de Rome, aient voulu s'entourer de toutes les garanties procédurales, soit que Roffredo ait contribué à la qualité de leur caractère formel[173]. Dans tous les cas, le décret des *Libelli de iure canonico* circule au rythme de la diffusion de l'œuvre, comme l'atteste son remploi dans des modèles pour l'élection d'un évêque de Freising (1263) ou d'un archevêque de Tours (s. d.)[174]. Les glossateurs avaient ouvert la voie. Dans sa somme aux titres du *Liber Extra*, Juan de Petesella transmet le décret d'élection par scrutin d'un évêque de Padoue (1229-34/35)[175]. Henri de Suse, après 1253, et peut-être après sa promotion cardinalice (1262), écrit son *Decretum electionis* qui offre des modèles de décrets

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devant tous, comme il est de droit. Celles-ci ayant été publiées, on découvrit que [...]'). Parce qu'elles révèlent la hiérarchie des formes d'élection (quasi-inspiration, compromis, scrutin) et décrivent le scrutin et – *a fortiori* – la postulation, les lettres du chapitre cathédral de Sens ont accédé à la condition de formule. C'est à ce titre qu'elles sont copiées dans les deux recueils juridiques susdits. Je remercie Andrea Massironi de m'avoir indiqué le manuscrit suisse. Sur la succession à l'archevêché de Sens, F. Delivré, 'Science canonique et gouvernement pastoral : l'exemple de Gautier Cornut (v. 1200-v. 1240)', in *La France religieuse du jeune (saint) Louis*, éd. P. Montaubin et C. Vincent (à paraître).

172 P. Montaubin, 'Les chapitres cathédraux séculiers de Normandie et la centralisation pontificale au XIII[e] siècle', in *Chapitres et cathédrales en Normandie*, éd. S. Lemagnen et P. Manneville (Caen : Musée de Normandie, 1997, Annales de Normandie, Congrès des Sociétés historiques et archéologiques de Normandie 2), pp. 253-72, pp. 263, 270 ; Peltzer, *Canon Law, Careers and Conquest*, cit., pp. 95, 96-97, 98-99.

173 Città del Vaticano, BAV, Borgh. 250, fol. 41rb-41vb. Roffredo fait suivre le décret d'élection de modèles de lettres (fols 41vb-51ra) qui demandent la confirmation de l'élection (le chapitre de Rouen au pape Grégoire IX ; un chapitre à l'archevêque de Bénevent), la concession du congé d'élire par l'empereur ou le roi (le chapitre de Telese à Frédéric II) et l'assentiment du souverain, l'ensemble étant placé sous les auspices de *Quia propter* et de ses antécédents en droit civil, à charge pour les canonistes d'apporter toute correction (fol. 51ra) ; Roffredus Beneventanus, *Libelli iuris canonici*, cit., pp. 339b-40b.

174 Deux décrets par scrutin et compromis (Wien, ÖNB, Cod. 130, fol. 159ra-59rb, 159rb-59va) ont été annexés au *Liber pastoralis* de João de Deus (fols 135ra-59ra). L'intrusion de l'archevêque de Rouen (fol. 159rb), vestige de l'élection revisitée par Roffredo, conforte la dépendance textuelle. La première souscription présente une mixité insolite ("Quo scripto statim subiunguntur subscriptiones per hunc modum : *Ego S. archidiaconus Rothomagensis in dominum P. consentio et ipsum eligo in pastorem ecclesie Frisingensis*" ['Celui-ci [le décret] ayant été écrit, on fait aussitôt suivre les souscriptions de cette façon : *Moi, S. archidiacre de Rouen, je m'accorde sur le seigneur P. et je le choisis comme pasteur de l'Église de Freising*'], fol. 159rb). Venant après une liste de 34 *casus* de nullité de l'élection (Saint-Omer, BM, 446, fol. 79rb-79vb) et un traité à l'usage d'une communauté monastique (l'abbaye de Saint-Bertin ?) sur les formes du scrutin, du compromis et de la quasi-inspiration (fols 79vb-80vb, Inc. *Quoniam propter processum electionis minus canonice factum*), le décret "tourangeau" (fols 80vb-81ra) est copié avant des lettres de demande de la confirmation (un chapitre à l'archevêque de Sens) et du congé d'élire (à Frédéric II), trois pièces qui doivent tout à Roffredo. L'ensemble (*casus*, traité, décret et lettres) est rangé sous la rubrique *Breviarium magistri Bernardi Compostellani super diversis casibus* (fol. 79rb). Dans le recueil, la suite est occupée par le *Breviarius* (*sic*) *ad omnes materias in iure canonico inveniendas* (fols 81ra-91ra), une œuvre de Pedro de Lérida (*Petrus Ilerdensis*) que la tradition attribuait à Bernard de Compostelle.

175 Bertram, '*Gallecia unde duxi originem*', cit., pp. 188-89, 205, n. 3.

d'élection, par compromis et scrutin, adressés au souverain pontife[176]. Alors que les *summae de electione* de Lawrence Somercote et de Guillaume de Mandagout, conçues à l'usage des cathédrales de Chichester et de Nîmes, proposent des décrets-types pour chaque forme de *Quia propter*[177], le traité d'Henri de Suse/Hostiensis connut également son heure de gloire. L'originalité de l'*incipit* ("Sacris canonibus novimus esse cautum ut ultra tres menses pontifice proprio cathedralis non vacet ecclesia") facilite la découverte des filiations. Pour son *Speculum iudiciale*, Guillaume Durand puise à son devancier, source du droit (*fons iuris*), le *decretum electionis* par scrutin et compromis, auquel il ajoute des modèles complémentaires (l'un d'entre eux regarde l'abbé de Saint-Paul de Narbonne) ainsi qu'un décret d'élection par inspiration[178]. En outre, une version abrégée du décret d'élection par compromis est annexée à des exemplaires de la *Summa de electione* de Giovanni d'Andrea[179]. L'empreinte la plus saisissante du *Decretum electionis* d'Henri de Suse/Hostiensis et, en dernier ressort, de *Quia propter* est à chercher auprès des communautés locales. En 1286, lorsqu'ils demandent au pape Honorius IV de confirmer l'élection par compromis de leur abbé Raymond II, les moines de Saint-Gilles produisent un décret qui témoigne d'une acculturation réussie[180]. Dans la décennie antérieure, les moines du prieuré cathédral de Durham, électeurs de Robert de Insula (1274), s'étaient déjà illustrés en

176 A. von Wretschko, 'Ein Traktat des Kardinals Hostiensis mit Glossen betreffend die Abfassung von Wahldekreten bei der Bischofswahl', in *Deutsche Zeitschrift für Kirchenrecht* 17 (1907), pp. 73-88. Plus récemment, G. Brugnotto, 'L'apporto dell'Ostiense al processo di elezione del vescovo in epoca medievale', in EIC 53 (2013), pp. 375-89 ; G. Voltolina, 'Breve guida all'edizione critica di un testo giuridico-canonico di epoca medievale' et 'Enrico da Susa, *Decretum per formam compromissi*. Edizione critica a cura di Giulietta Voltolina', in EIC 53 (2013), pp. 317-35, 337-73. Il faut ajouter d'autres témoins aux cinq recensés pour l'édition. Citons parmi eux : Saint-Omer, BM, 446, fols 3ra-6vb ; Bourges, BM, 367, fols 35-37v.

177 *Der Traktat des Laurentius de Somercote*, cit., pp. 34-35, 39-40, 44-45 ; Paris, BN, lat. 15415, fols 225vb-26vb (*Pars* II, *cap.* 59, *formae* 14-16) ; Guillermus Mandagotus, *Practica electionum*, cit., fols 65v-69v.

178 Paris, BN, lat. 4255, fols 258rb-61vb, fols 259va-60rb, 261rb-61va, 261vb ; Zwettl, Stiftsbibliothek, 38, fols 126rb-31rb, fols 127vb-29ra, 130va-31ra, 131ra-31rb ; *Speculum iudiciale* (Strasbourg : Georg Husner et Johannes Beckenhaub, 1473), fols 9vb-15rb (*Lib.* IV, *partic.* I, *De electione*), fols 11vb-12vb, 14rb-14vb, 15ra. Pour l'usage du traité par Guillaume Durand, von Wretschko, 'Ein Traktat des Kardinals Hostiensis', cit., pp. 73, 76-77, 84-87.

179 Cambrai, BM, 174, fols 157ra-58va, fol. 158rb-58va ; Amiens, BM, 376, fol. 139ra-39rb ; Seu d'Urgell (La), Biblioteca Capitular, Fragmentos mayores, II, fol. 47v. Les trois manuscrits ont aussi en commun une pièce relative au consentement de l'élu par scrutin ("Nota quod ubi electus ante publicationem scrutinii consentit electioni – et sic nichil habebunt contra ipsum"). Contrairement à la version de Cambrai (fol. 158rb), celle d'Amiens (fol. 139rb) et d'Urgell (fol. 48) se réfère à la position de l'archidiacre de Bologne Guido da Baysio (m. 1313), ancien maître de Giovanni d'Andrea. Le recueil d'Urgell place la note sous la double autorité de Giovanni d'Andrea et de Giovanni da Legnano ("Io. An. et Io. de Lig. qui hoc scripsit in c. *Quia propter* de elec."). Il lui adjoint ensuite un second *nota* sur les quatre *principalia* et dix-huit *substantialia* de l'élection, lui-même dérivé du commentaire de Giovanni da Legnano à *Quia propter*.

180 L. Ménard, *Histoire civile, ecclésiastique et littéraire de la ville de Nismes*, I (Paris : H. D. Chaubert, 1750), *Preuves de l'histoire de la ville de Nismes*, pp. 111-13, n. LXXXIII ([Saint-Gilles], 15/07/1286). L'élection – dans laquelle Bernard de Montmirat, abbé de Montmajour, a rempli le rôle de

adaptant le modèle aux exigences de la confirmation de l'archevêque d'York[181] – une alternative (pape/métropolitain) prévue par Henri de Suse/Hostiensis et, après lui, le *Speculator* et Guillaume de Mandagout[182].

Pièce maîtresse de l'exégèse des docteurs et du gouvernement ecclésial, *Quia propter* est une référence incontournable. Lorsque Boniface VIII, par la décrétale *Quamquam in casu* (VI 1.6.18), introduit la règle, pour les Églises cathédrales, de la dévolution de la *potestas eligendi* au pontife romain plutôt qu'au supérieur immédiat, il prend soin de rappeler la distinction entre les deux types de privation du droit d'élire, celle encourue *ipso iure* en raison de l'élection d'un indigne et celle survenue *per sententiam* pour non-observation de la forme du concile général ("formam traditam in generali concilio"), une expression qui désigne la constitution *Quia propter*[183].

Dès le second XIII^e siècle, le recours au Siège apostolique infléchit le cadre normatif. Dans son *Libellus super electionibus*, Guillaume de Mandagout, après avoir décliné les formes d'élection de *Quia propter*, scrutin, compromis et quasi-inspiration (cap. 22-52), réserve trois chapitres à la postulation (cap. 53-55)[184], de même qu'il dédie la fin de son œuvre aux formules à employer pour l'appel en cour de Rome (cap. 60)[185].

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compromissaire avec quatre moines de Saint-Gilles – est confirmée par le Siège apostolique : *Les registres d'Honorius IV (1285-1287)*, éd. M. Prou (Paris : E. Thorin, 1888), col. 449, n. 629 (Sainte-Sabine, 11/10/1286).

181 *The Historians of the Church of York and its Archbishops*, éd. J. Raine, III (London : Longman, 1894, RS 71.3), pp. 190-99, n. CXXXII, pp. 196-98 (Durham, 24/09/1274).

182 Saint-Omer, BM, 446, fol. 3ra : "*pedum oscula.* [...] Quod si decretum metropolitano mittatur, sufficit quod dicatur : *Reverendo in Christo patri ac domino Dei gratia tali archiepiscopo vel primati tales eius devoti filii reverentiam tam debitam quam devotam*" ; Bourges, BM, 367, fol. 35ra ; Paris, BN, lat. 4255, fol. 259va ; Zwettl, Stiftsbibliothek, 38, fols 127vb-28ra ; *Speculum iudiciale*, cit., fol. 11vb : "Almo ac beatissimo patri *vel sic* Sanctissimo patri et domino suo Clementi divina providentia sacrosancte Romane ac universalis ecclesie summo pontifici. [...] Si vero scribatur metropolitano sufficit dicere : *Reverendo in Christo patri ac domino Dei gratia tali archiepiscopo vel primati tales eius devoti filii reverentiam tam debitam quam devotam.* Sacris canonibus novimus esse cautum [...]" ('Au très bon et bienheureux père *ou* À son très saint père et seigneur Clément [IV] par la providence divine souverain pontife de la sacrosainte Église romaine et universelle. [...] Si l'on écrit en revanche au métropolitain, qu'il suffise de dire : *Au révérend père en Christ et seigneur, untel archevêque ou primat par la grâce de Dieu, tel et tel, ses fils dévoués, révérence due autant que dévouée.* Les sacrés canons nous ont enseigné qu'il est prudent [...]') ; Paris, BN, lat. 15415, fols 225vb-26va (*Pars* II, *cap.* 59, *forma* 14), fol. 225vb : "*sanctissimo.* Cum scribitur domino pape erit sic salutatio inchoanda. Si vero scribatur metropolitano tunc dicetur : *Reverendo in Christo patri domino tali archiepiscopo, etc.*" ; Guillermus Mandagotus, *Practica electionum*, cit., fols 65v-68v, fol. 66.

183 *Corpus iuris canonici. Pars secunda*, cit., cols 959-60 ; Larson, 'Archiepiscopal and Papal Involvement', cit., pp. 95-96. La décrétale de Boniface VIII retouche des éléments d'une extravagante d'Alexandre IV (*Dilecti filii procuratores*) : M. Bégou-Davia, 'Le *Liber Sextus* de Boniface VIII et les extravagantes des papes précédents', in ZRG, Kan. Abt. 90 (2004), pp. 77-191, pp. 91, 95-99 (n. 71, 76, 78-79, 81), 116-117, 119 (n. 121), 132 (n. 140), 180.

184 Paris, BN, lat. 15415, fols 220rb-21ra ; Guillermus Mandagotus, *Practica electionum*, cit., fols 42-46v. En amont, *Der Traktat des Laurentius de Somercote*, cit., pp. 46-50. Sur la postulation, Bégou-Davia, 'Innocent III et les élections', cit., pp. 45-53.

185 Paris, BN, lat. 15415, fols 227rb-28vb (*Pars* III, *cap.* 60, *formae* 1-7) ; Guillermus Mandagotus, *Practica electionum*, cit., fols 72-80.

Alors qu'il s'attache, dans l'intervalle, aux démarches auprès du Siège apostolique (cap. 56-58), il évoque le *novissimum ius* de la décrétale *Cupientes* (1279) relative aux modalités de l'examen pontifical, prélude à la confirmation ou à l'infirmation du choix des chapitres, des élections aux Églises cathédrales et régulières parvenues à la Curie romaine en vertu d'une soumission immédiate ou par la voie de l'appel[186]. La décrétale de Nicolas III, glosée par Garsias Hispanus (Bologne, v. 1280)[187], exerce son emprise jusque sur les *summae de electione*. Citée au terme d'un opuscule de Giovanni da Legnano[188], elle peut escorter le traité de Guillaume de Mandagout[189] tandis que le prologue de Garsias est copié à la suite du *Libellus super electionibus*, déjà enrichi de la *Practica* de Paolo Liazari[190]. Centrée sur la procédure électorale, *Quia propter* perd de son actualité face à la provision apostolique[191]. Si la routine universitaire est tenace, puisque l'interprétation des textes suppose une filiation de maîtres et de doctrines, la mutation du droit électoral se profile au gré des commentaires. Négligeant la réflexion classique sur les prélatures et les dignités auxquelles s'applique la constitution *Quia propter*, Paolo Liazari consacre sa glose d'*ecclesie viduate* à la distinction entre personnes et Églises, à l'appui des usages contrastés de la chancellerie pontificale et, plus exactement, de l'opposition entre les fils de soie des lettres de grâce et les fils de chanvre des lettres de provision[192].

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186 M. Bertram, 'Die Dekretalensammlung Papst Nikolaus' III. (1280)', in ZRG, Kan. Abt. 90 (2004), pp. 60-76, pp. 61-62, 64-65, 67-68 ; *Corpus iuris canonici. Pars secunda*, cit., cols 954-56 (VI 1.6.16).

187 García y García, 'Canonistas gallegos medievales', cit., pp. 118-21, n. 5 ; P. Linehan, '*Gar*. A Case of Mistaken Identity', in REDC 55 (1998), pp. 749-754 ; Bertram, 'Die Dekretalensammlung Papst Nikolaus' III.', cit., pp. 64-65 (et n. 22).

188 Seu d'Urgell (La), Biblioteca Capitular, Fragmentos mayores, 11, fols 43v-44v, fol. 44v : "Et prestito consensu habet [electus] tempus ad confirmationem petendam ut ibi in cathedralibus autem et regularibus immediate subiectis pape vel per appellationem devolutas (*sic*) servetur decretalis *Cupientes* infra e. li. VI." ('Et le consentement ayant été prêté, il [l'élu] dispose d'un certain temps pour demander la confirmation, afin que l'on observe ici la décrétale *Cupientes*, ci-dessous, au même titre du Sexte, dans les églises cathédrales et régulières immédiatement soumises au pape ou dévolues par appel [au Siège apostolique]'). Le traité n'est connu qu'à travers ce témoin : P. Maffei, 'La cultura giuridica fra Linguadoca e Catalogna nelle testimonianze dei manoscritti urgellensi', in RIDC 20 (2009), pp. 147-77, p. 161, n. 60 ; P. Maffei, 'I codici urgellensi e la giurisprudenza italiana fra Tre e Quattrocento. Appunti su alcune particolarità', in TRG 78 (2010), pp. 381-93, p. 392 et n. 40.

189 Paris, BN, lat. 15003, fols 1ra-55vb, 56ra-71vb ; Bertram, 'Die Dekretalensammlung Papst Nikolaus' III.', cit., pp. 70-76, pp. 71-73, p. 72.

190 Bamberg, SB, Can. 18 (P. III. 1), fols 1ra-23vb, 23va-24ra, 24va-24vb.

191 Sur la provision des évêchés au XIII^e^ siècle, K. Ganzer, *Papsttum und Bistumsbesetzungen in der Zeit von Gregor IX. bis Bonifaz VIII. : Ein Beitrag zur Geschichte der päpstlichen Reservationen* (Köln-Graz : Böhlau, 1968, Forschungen zur Kirchlichen Rechtsgeschichte und zum Kirchenrecht 9). Sur la transition et ses effets, J. Gaudemet, 'De l'élection à la nomination des évêques. Changement de procédure et conséquences pastorales. L'exemple français (XIII^e^-XIV^e^ siècles)', in *Il processo di designazione dei vescovi. Storia, legislazione, prassi*, éd. D. J. Andrés Gutierrez (Roma : Pontificia Università Lateranense, 1996, Utrumque ius 27), pp. 137-56 ; G. Silano, 'The Apostolic See and the Elections of the Bishops of Perugia in the Duecento and Trecento', in *Mediaeval Studies* 50 (1988), pp. 488-511, pp. 498-511 ; Harvey, *Episcopal Appointments in England*, cit., *passim*.

192 Barcelona, ACA, Ripoll 66, fol. 57-57v (*ad* X 1.6.42) : "*ecclesie viduate*. Providetur ergo ecclesie non persone, respectu cuius est onus non gratia. Et immo tales littere habent filum de canapo non de sirico quam (*sic*) habent littere gratiose quando papa providet in curia".

Au XV^e siècle, le regain des élections explique la fortune dont jouissent les anciennes *summae* – la tradition manuscrite le prouve – et l'apparition de nouveaux jalons de cette littérature. Ainsi la *Practica electionum prelatorum* (1490) du chanoine de Passau Michael Lochmair[193]. Prenant beaucoup au *Libellus super electionibus*, prisé en terre d'Empire[194], la *Practica* aborde, en quatre parties, les phases préliminaires (1), les formes d'élection (2), les personnes des électeurs et de l'élu (3) et la postulation (4). Si *Quia propter* et ses commentaires nourrissent l'exposition des diverses formes d'élection, la pratique électorale repose sur le décret *Sicut in construenda* du concile de Bâle (session 12, 13 juillet 1433), reproduit à la jonction des première et deuxième parties[195]. Abolissant la réserve pontificale générale des métropoles, cathédrales, collégiales et monastères, le décret bâlois vante les bienfaits de l'élection et de la confirmation par le supérieur. S'il s'apparente à *Quia propter* par sa structure logique, le texte se caractérise par l'absence de description technique et par l'insistance mise sur la dignité/l'indignité de l'élu et la responsabilité des électeurs, lesquels doivent agir sous serment après avoir confessé leurs fautes et reçu l'eucharistie. La dimension pastorale ressort également des passages sur les effets nocifs du crime de simonie ainsi que sur la prohibition de toute influence corruptrice des rois, des princes et des communautés.

En matière électorale, le concile de Bâle plongeait ses racines canoniques dans la disposition du droit commun (*iuris communis dispositio*) et affichait l'intention de renouer avec les "sacrés canons promulgués selon l'Esprit divin" ("sacri canones Spiritus Dei promulgati") qui imposaient l'élection des prélats par les Églises, les collèges et les couvents. Quelques mois auparavant, le comité de réforme des vingt-quatre avait exigé que les élections dans les Églises cathédrales aient lieu selon l'ancien droit commun ("secundum ius commune antiquum")[196]. De telles formules conviennent au Décret de Gratien, dépositaire de l'antique discipline des élections (D.61-66). Aussi brillante fût-elle, l'exaltation de l'Église primitive n'éclipsa pourtant pas *Quia propter* qui, bien qu'associée au *ius novum* des décrétales, avait pour elle de procéder d'un concile de l'Église universelle et de garantir le pouvoir d'élire. À la fin du XV^e siècle, lorsqu'ils défendent les élus des chapitres cathédraux face aux bénéficiaires de la provision apostolique, les avocats du Parlement de Paris n'ont pas de peine à se placer, dans leurs plaidoiries, sous la double protection des conciles de Nicée (325) et de Latran IV (1215)[197].

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193 M. Lochmair, *Practica electionum prelatorum* (s. l. [Passau] : Johann Petri, s. d. [1490 ; pas après 1491]) (32 fols) (GW M18670).

194 Stuttgart, Württembergische Landesbibliothek, HB VI 138, soit une copie (35 fols) du traité de Guillaume de Mandagout réalisée en 1472 par Johannes Wassermann, au service de l'official de Constance Andreas Wall.

195 Lochmair, *Practica electionum prelatorum*, cit., fols 8v-10. Pour le décret, '*Concilium Basiliense*, 1431-1449', éd. J. Stieber, in COGD, II.2, pp. 667-1157, pp. 721-1157, pp. 891-95.

196 *Quellen zur Kirchenreform im Zeitalter der grossen Konzilien des 15. Jahrhunderts*, éd. et trad. J. Miethke et L. Weinrich, II (Darmstadt : Wissenschaftliche Buchgesellschaft, 2002), pp. 286-301, n. XIVa ([Bâle], 28/02/1433), p. 286.

197 V. Julerot, 'L'histoire de l'élection épiscopale à travers les plaidoiries des avocats du Parlement de Paris à la fin du XV^e siècle', in RHD 82 (2004), pp. 335-70, pp. 350-51.

GILES CONSTABLE

The Fourth Lateran Council's Constitutions on Monasticism

Innocent III devoted considerable attention to monasteries and monastic reform throughout his pontificate. This interest carried over into the legislation of the Fourth Lateran Council, of which he was the principal architect and, probably, drafted the decrees[1]. It was not concerned with the affairs of individual religious houses but passed two decrees, constitutions 12 and 13, of general importance for monasticism and several others dealing with particular issues concerning monks, nuns, and regular canons, who were collectively referred to as *religiosi*. The two more general decrees dealt respectively with the organization of general chapters and the prohibition of new forms of religious life, or "religions", as they were called[2].

Lateran IV's c.12 *In singulis* decreed the regional meetings of general chapters of abbots and priors. Specifically, it established that in each kingdom and province a general chapter of superiors of religious houses "qui non consueverunt tale capitulum celebrare" ('who were not accustomed to hold such a chapter') should meet every three years, "salvo iure diocesanorum pontificum" ('saving the rights of the diocesan bishops'). All superiors who were without canonical impediment were to come to a suitable monastery with no more than six horses and eight attendants. Two Cistercian abbots should be invited to assist in the beginnings of this novelty, as it was called, "cum sint in huiusmodi capitulis celebrandis ex longa consuetudine plenius informati" ('since they are by long custom more fully informed about celebrating chapters

1 On Innocent's role in drafting the canons of Lateran IV, see the introduction, by Antonio García y García and Alberto Melloni, to the edition of the canons in COGD II.1, pp. 154-55, citing Michele Maccarrone and Christopher R. Cheney. On this edition, see the critical review by W. Brandmüller, 'A New Edition of the Medieval Councils', in CHR 101 (2015), pp. 573-77. Cf. the introduction to this volume, which slightly modifies this assessment.

2 The canons of the Council are cited here by number only and by page reference in COGD. For purposes of translation, the edition in *Conciliorum oecumenicorum decreta*, ed. J. Alberigo a.o. (Bologna: Istituto per le Scienze Religiose, 1973[3]), pp. 227-71 has also been consulted, which has been compared with the translations in R. Foreville, *Latran I, II, III et IV* (Paris: Éditions de l'Orante, 1965, Histoire des Conciles Œcuméniques 6).

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The Fourth Lateran Council and the Development of Canon Law and the ius commune, ed. Atria Larson and Andrea Massironi, Turnhout: Brepols, 2018 (EMI 7), pp. 147–57

10.1484/M.EMI-EB.5.116652

of this sort'), and they were to preside together with two of the participants. The chapter was to consider the reformation of the order and observance of the rule, and everyone should obey its decrees. "Religiosi ac circumspecte persone" ('Religious and cautious persons') were to be appointed to visit the monasteries in the kingdom or province, "corrigentes et reformantes que correctionis et reformationis officio viderint indigere" ('correcting and reforming that which needs correction and reform'). Any difficulty *in hac novitate* which the visitors cannot settle should be appealed to the Holy See. Bishops were to reform the monasteries subject to them so that the visitors would find more to praise than to correct. In conclusion, the bishops and chairmen of the chapters were instructed

> compescant advocatos, patronos, vicedominos, rectores et consules, magnates et milites seu quoslibet alios ne monasteria presumant offendere in personis aut rebus; et si forsan offenderint, eos ad satisfaciendum compellere non omittant, ut liberius et quietius omnipotenti Deo valeant famulari[3].

This constitution was the only one issued by the council explicitly concerned with the reform of religious communities. The term reform is in fact used four times, once each as *reformatio* and *reformare* and twice in conjunction with words for correction (*corrigentes et reformantes, correctio et reformatio*). Though the general chapter is twice referred to as a novelty (*novitas*), this refers only to the houses that were not accustomed to meeting in general chapters, since it is also called an established custom (*longa consuetudo*) in the Cistercian order. Two abbots from local Cistercian houses were to join two other, presumably non-Cistercian, abbots in presiding over the meetings, which were to last 'continually for several days according to the custom of the Cistercians'. The institution of the general chapter was well established by the beginning of the thirteenth century and has been studied by several scholars, most recently by Florent Cygler, whose book examines the general chapters of the Cistercians, Premonstratensians, Carthusians, and Cluniacs in the twelfth century[4]. The prelates at the Council, including Innocent III, were certainly aware of this, and the phrase in c.12 excluding from the new meetings those who were accustomed to hold such a chapter applied to these orders. The decree in effect therefore, like many other constitutions of the council, did not mark an absolute innovation but rather extended an existing practice.

Two further points may be noted with regard to c.12. The first is that it provided for the grouping of religious houses 'in each kingdom and province', of which the precise

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3 Lat. IV c.12, COGD II.1, p. 175: 'that they restrain advocates, patrons, vidames, rectors and consuls, magnates and knights, and various other men from presuming to oppress the monasteries in people or in things; and, if by chance they should so oppress, [the bishops and chairmen] should not fail to compel them to make satisfaction so that they may be able to serve almighty God more freely and peacefully'.

4 F. Cygler, *Das Generalkapitel im hohen Mittelalter. Cisterzienser, Prämonstratenser, Kartäuser und Cluniazenser* (Münster: Lit-Verlag, 2002, Vita regularis. Abhandlungen 12); cf. the review by Giles Constable, in ZRG, Kan. Abt. 90 (2004), pp. 576-79, repr. in Idem, *The Abbey of Cluny* (Münster: Lit-Verlag, 2010, Vita regularis. Abhandlungen 43), pp. 357-60.

character was not specified but which presumably corresponded to archbishoprics or, in some areas, perhaps to bishoprics. The new meetings included all houses except those belonging to orders that already held general chapters, and they therefore tended to organize monasticism on the basis of nation and region rather than observance[5]. The second point, which is linked to the first, is the assertion, or reassertion, of the traditional rights of bishops over the religious houses in their dioceses. This is hardly surprising in view of the prominent role played by bishops in the make-up of the council, which included some four hundred patriarchs, archbishops, and bishops in addition to eight hundred lower clerics[6]. The rights of the diocesan bishops were explicitly protected in the opening words of the canon, and again towards the end, where bishops were instructed to reform the monasteries subject to them so that the visitors appointed by the general chapter should find more to commend than to condemn in the houses they visited. The day-to-day supervision of the religious communities in their dioceses was thus firmly in the hands of the bishops.

The following decree, c.13 *Ne nimia*, was concerned with prohibiting new forms of religious life:

> Ne nimia religionum diversitas gravem in ecclesia Dei confusionem inducat, firmiter prohibemus ne quis de cetero novam religionem inveniat, set quicumque voluerit ad religionem converti, unam de approbatis assumat. Similiter qui voluerit religiosam domum de novo fundare, regulam et institutionem accipiat de religionibus approbatis. Illud etiam prohibemus ne quis in diversis monasteriis locum monachi habere presumat, nec unus abbas pluribus monasteriis presidere[7].

This constitution includes a number of disputed points and has given rise to considerable scholarly discussion and dispute. The term approved (*approbatus*), which is used twice in relation to forms of religious life, is not clearly defined. According to Maccarrone, it comes from canon law and applied to the right of a diocesan bishop to approve the religious houses in his diocese, subject to confirmation by the papacy.

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5 See P. Schmitz, *Histoire de l'Ordre de Saint-Benoît. III. Histoire externe. 1. Du Concordat de Worms au Concile de Trente* (Maredsous: les éditions de Maredsous, 1948), pp. 48-50; J.-B. Mahn, *L'ordre cistercien et son gouvernement des origines au milieu du XIII^e siècle (1098-1265)* (Paris: É. de Boccard, 1951[2], Bibliothèque des Écoles françaises d'Athènes et de Rome 161), pp. 248-49; M. Maccarrone, *Nuovi studi su Innocenzo III.* (Roma: Istituto storico italiano per il Medioevo, 1995, Nuovi studi storici 25), pp. 19-38, esp. pp. 26, 29.

6 R. Foreville, 'Représentation et taxation du clergé au IV^e concile du Latran (1215)', in *Académie des Inscriptions et Belles-Lettres, Comptes rendus des séances de l'année* (1966), pp. 16-28, repr. in Idem, *Gouvernement et vie de l'Église au Moyen-Âge: Recueil d'études* (London: Variorum Reprints, 1979, CSS 95), III, p. 64, citing J. Werner; García y García, in COGD II.1, p. 151.

7 Lat. IV c.13, COGD II.1, p. 175: 'Lest the excessive diversity of forms of religious life (*religiones*) should introduce serious confusion into the Church of God, no one in the future should establish (*inveniat*) a new form of religious life (*religionem*), but anyone who wants to convert to religious life should adopt one of those [forms] that has been approved. Similarly, anyone who wants newly to found a religious house should adopt a rule and institution from the approved forms of religious life. We also prohibit that anyone should presume to have the place of a monk in several monasteries or that one abbot should preside in many monasteries'.

"C.13 implicitly confirms the right of the bishop to approve," he wrote, "which establishes the dependence of monks and their houses on diocesan authority"[8]. It may be, however, that it applied to papal approval, in which case it reinforced the control of the papacy over new forms of monasticism.

The phrase *regula et institutio* or "clause of regularity" marked an important stage in the classification of religious houses by the Roman curia[9]. The rule, according to Vicaire, was "the fundamental and stable part of regulating legislation, a particular rule or general rule like the rule of saint Benedict", and the institution was "its canonical statute established by the prescriptions of councils and the confirmations of the pope"[10]. Dubois in particular studied the term *institutio*. It was used in papal bulls to cover several realities, including the basic legislative code of a group of monasteries, the identity of a customary shared by several houses, and the relation between a mother house and its dependencies[11]. While restrictive in some respects, its use in c.13 left room, as Maccarrone put it, "for liberty and independence of expression" in the development of new forms of religious life[12]. Vicaire argued on the contrary that, although monks and canons still had plenty of choice, as did the eremitical, hospitaller, and military orders, the apostolic and penitential movements were more restricted. "It was manifest that canon 13 of the council was directed", he wrote, "above all against the collective foundations and even against the individual vocations of apostolic preachers", who were left with no clear way of access into the church[13]. The final section prohibiting anyone to be a monk in more than one monastery or a single abbot to preside over several houses was potentially of importance for orders, like that of Cluny, in which the abbot was the superior in many houses, of which the monks all made their professions to him. Maccarrone called it "an independent addition, extraneous to the context of the first part"[14], but it may have been designed to restrict the movement of monks and superiors between houses and thus to promote the constitution's purpose of preventing confusion in the Church[15].

The most serious scholarly dispute over c.13 relates to the policy of Innocent III. In his influential book on religious movements of the Middle Ages, first published in 1935, Herbert Grundmann described this constitution as "a defensive veto of new creations in the process of birth" and said that it "clashed directly with Innocent's

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8 Maccarrone, *Nuovi studi*, cit., p. 38.

9 J. Dubois, 'Les ordres religieux au XII[e] siècle selon la curie romaine', in *Revue bénédictine* 78 (1968), pp. 283-309, p. 308; M.-H. Vicaire, *Histoire de saint Dominique*, 2 vols. (Paris: Les éditions du cerf, 1957), II, pp. 24-25; Maccarrone, *Nuovi studi*, cit., pp. 41-42.

10 Vicaire, *Saint Dominique*, cit., II, pp. 24-25.

11 Dubois, 'Les ordres religieux', cit., p. 298.

12 Maccarrone, *Nuovi studi*, cit., pp. 41-42.

13 Vicaire, *Saint Dominique*, cit., II, pp. 27-28.

14 Maccarrone, *Nuovi studi*, cit., p. 7.

15 See R. Foreville, 'Lyon II, 1274. Dans le sillage de Latran III et Latran IV', in *1274. Année charnière: mutations et continuités* (Lyon-Paris, 30 septembre-5 octobre 1974) (Paris: Centre national de la recherche scientifique, 1977, Colloques internationaux du Centre national de la recherche scientifique 558), pp. 355-74, repr. in Idem, *Gouvernement et vie de l'Église*, cit., V, pp. 362-63, and Idem, *Latran*, cit., pp. 296-97.

earlier measures" and "completely contradicted" his policy. "So it must be assumed that it did not correspond with the pope's desires, but was adopted against his will", probably at the initiative of the prelates and bishops whose pastoral rights were threatened by the new apostolic orders and of the representatives of the old orders which regarded them as rivals. "The opposition between the will of the council and the will of Innocent is obvious", Grundmann continued. "The council's decree not only contradicts the earlier measures of the pope, but Innocent also consciously acted against the effects of this decree in establishing Francis and the religious house of St. Damian"[16]. Two years later Pierre Mandonnet echoed this view in his book on St. Dominic, where he wrote that "the thirteenth canon was doubtless not inspired by Innocent III. It is even very probable that the pope opposed it before finally giving in to the pressure of the episcopate". After citing the example of some of the new orders approved by Innocent earlier in his pontificate, Mandonnet went on to say, "The occasion of the council allowed the interested bishops to take their revenge and to arm themselves against what they regarded as a real danger"[17]. Vicaire likewise said that "the canon went directly against the initiatives of the pope in this matter since the beginning of his pontificate, especially against the approbation he had given to the way of life of Durand of Huesca, of Bernard Prim, of saint Francis, and of their companions". He later described the pope's approval of the mendicant statutes as "in spite of c.13 of the Lateran"[18]. Tillmann, citing Grundmann, Mandonnet, and Vicaire, said that the decree "certainly did not arise from the initiative of the pope"[19], and Sayers wrote that "there can be no doubt that there was disagreement in the council on this matter of recognition and that the older orders, the Benedictines, Augustinians and Cistercians, put pressure on the pope ... [who] may have overruled the council on this, using his plenitude of power"[20].

It is time to reconsider this question, especially in light of the current view that either Innocent himself drafted the decrees of the council before it met or Innocent was active in overseeing the drafting performed by members of his curia working extensively from his earlier decretal letters[21]. It would be surprising if he and/or his curia had included a decree with which he fundamentally disagreed. Indeed, Innocent very likely shared the view that an excessive variety of types of religious life would introduce confusion into the Church. If the term *approbatus* is taken as applying to papal rather than episcopal approval, as suggested above, the canon appears

16 H. Grundmann, *Religiöse Bewegungen im Mittelalter* (Berlin: E. Ebering, 1935, Historische Studien 267; repr. Hildesheim: Olms, 1961) cited here from *Religious Movements in the Middle Ages*, trans. S. Rowan (Notre Dame: University of Notre Dame Press, 1995), pp. 61, 65-66.

17 P. Mandonnet, *Saint Dominique. L'idée, l'homme et l'œuvre.* I. *Étapes* (Paris: Desclée de Brouwer et C., 1937), p. 50, citing Grundmann.

18 Vicaire, *Saint Dominique*, cit., II, p. 28 (citing Grundmann), p. 170.

19 H. Tillmann, *Papst Innocenz III.* (Bonn: Ludwig Röhrscheid, 1954, Bonner historische Forschungen 3), p. 184.

20 J. Sayers, *Innocent III: Leader of Europe, 1198-1216* (London and New York: Longman, 1994, The medieval world), p. 99.

21 See above n. 1.

to be fully consistent with the views of Innocent, who frequently demonstrated, according to Maccarrone, a wish "to frame the new forms of religious life within the boundary of previously approved types and rules ... while leaving them their independence and liberty of internal arrangement and development", which would be covered by the *regula et institutio*. "With a single act of authority", Maccarrone said, "c.13 recognized and sanctioned all the 'religions' which could claim to have been approved at that time". Only the small local communities which had arisen more or less spontaneously outside the canonical framework were sacrificed, and the popes were left free to approve new forms of religious life[22]. To this extent the two new orders of Franciscans and Dominicans benefitted during their early history by the elimination of potential rivals.

Other constitutions decreed at Lateran IV contained provisions pertaining to religious orders. Constitutions 55 and 56 dealt with the application of existing rules concerning tithes. C.55 *Nuper abbates* begins with a recent decision of the Cistercian abbots "ut ... non emant possessiones de quibus decime debeantur ecclesiis, nisi forte pro monasteriis de novo fundandis"[23]. This decision was made *ad commonitionem nostram*, which is an unusual term and under the circumstances presumably means 'at our [that is, the pope's] recommendation'. If such possessions were given them by the faithful or bought for new foundations, they should be cultivated by other men who pay tithes to churches, "ne occasione privilegiorum suorum ecclesie ulterius pregraventur" ('lest by the occasion of their [that is, the monks'] privileges the churches should be further oppressed'). The council further decreed:

> De alienis terris et amodo acquirendis, si eas propriis manibus aut sumptibus excoluerint, decimas persolvant ecclesiis quibus ratione prediorum antea solvebantur, nisi cum ipsis ecclesiis aliter duxerint componendum. Nos ergo statutum huiusmodi gratum et ratum habentes, et hoc ipsum ad alios regulares, qui gaudent similibus privilegiis, extendi volumus et mandamus ut ecclesiarum prelati proniores et efficaciores existant ad exhibendum eis de suis malefactoribus iustitie complementum, eorumque privilegia diligentius et perfectius studeant observare[24].

This decree attempted to solve a long established situation, which has been studied by several scholars (including myself) and arose when monks who were freed from paying tithes acquired (by either gift or purchase) lands from which the

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22 Maccarrone, *Nuovi studi*, cit., pp. 39, 40, 43.

23 Lat. IV c.55, COGD II.1, p. 193 (cf. the alternate versions, which do not alter the meaning of the canon): 'that they not buy lands from which the tithes are owed to churches, except by chance (*nisi forte*) for recently founded monasteries'.

24 Ibid.: 'Tithes should be paid from lands held by others (*alienis terris*) and acquired in the future, even if they are cultivated thereafter by their own hands or at their own expense, to the churches to which they were previously paid on account of the fields (*ratione praediorum*) unless a composition has been otherwise made with these churches. We, therefore, considering this statute acceptable and reasonable, wish that the same should be extended to other monks (*ad alios regulares*) who enjoy similar privileges and order that the superiors of churches should be more willing and efficient in executing justice to them [that is, the monks] for those who had done them harm and should strive more diligently and perfectly to observe their privileges'.

tithes had traditionally been paid to churches, which were thus deprived, without compensation, of a traditional source of revenue[25]. The decision of the council was not in principle "profoundly innovative", as Maccarrone said[26], but it extended to all religious orders the compromise that had been worked out many years before for the Cistercians and other monks who had been granted the privilege of freedom from the obligation to pay tithes. In the following decree, c.56 *Plerique sicut*, the council specifically forbade monks or secular clerics who rented or granted fiefs from their lands to make agreements or *pacta*, as they were called, "in preiudicium parochialium ecclesiarum" ('in prejudice of the parish churches'), that the renters or fief-holders would pay tithes to themselves or be buried in their churches[27]. The parish churches should recover anything they had lost in this way.

Constitutions 63-66 are concerned with simony. Simony is defined in c.63 *Sicut pro certo* as "exactiones et extorsiones turpes et prave pro consecrationibus episcoporum, benedictionibus abbatum et ordinibus clericorum"[28]. The council strictly prohibited it, "firmiter statuentes, ut pro hiis sive conferendis sive collatis, nemo aliquid quocumque pretextu exigere ac extorquere presumat"[29]. C.64 *Quoniam simoniaca* applied this rule to members of religious orders and especially to nuns, saying,

> Quoniam simoniaca labes adeo plerasque moniales infecit ut vix aliquas sine pretio recipiant in sorores paupertatis pretextu, volentes huiusmodi vitium palliare, ne id de cetero fiat, penitus prohibemus, statuentes ut quecumque de cetero talem commiserit pravitatem, tam recipiens quam recepta, sive sit subdita sive prelata, sine spe restitutionis de suo monasterio expellatur, in locum arctioris regule, ad agendum perpetuo penitentiam, retrudenda[30].

Someone who had been received simoniacally before the passage of this decree should be sent to another house of the same order or, if there is no space there, remain *dispensative* ('under dispensation') in the same house after their previous positions had been changed and they had been assigned to lower ones ("mutatis prioribus

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25 C. R. Cheney, 'A Letter of Pope Innocent III and the Lateran Decree on Cistercian Tithe-paying', in *Citeaux* 2 (1962), pp. 146-51, repr. in Idem, *Medieval Texts and Studies* (Oxford: at the Clarendon Press, 1973), pp. 277-84; G. Constable, *Monastic Tithes from Their Origins to the Twelfth Century* (Cambridge, University Press, 1964, Cambridge Studies in Medieval Life and Thought, N.S. 10), pp. 304-06, with further references in 306, n. 3.

26 Maccarrone, *Nuovi studi*, cit., p. 14, see generally pp. 12-14.

27 Lat. IV c.56, COGD II.1, p. 193. Cf. the essay below by Piotr Alexandrowicz.

28 Lat. IV c.63, COGD II.1, p. 197: 'the shameful and wicked exactions and extortions for the consecrations of bishops, the blessings of abbots, and the ordinations of clerics'.

29 Ibid.: 'firmly decreeing that no one should presume on any pretext to exact or extort anything either for the granting of these [orders] that are to be granted or for those that have been granted'.

30 Lat. IV c.64, COGD II.1, p. 197: 'Since the stain of simony infects so many nuns that they receive scarcely any as sisters without payment, wishing to palliate this sort of vice under the pretext of poverty, we totally forbid that henceforth this should be done, decreeing that whoever (*quaecumque* in the feminine) commits such a depravity, both she who receives and she who is received [into the monastery], whether she is placed in an inferior or superior position, shall be expelled from her monastery without hope of restitution, to do perpetual penance enclosed in a place of stricter rule'.

locis et inferioribus assignatis")[31]. The constitution then specified that the decree applied also to monks and other regulars. Joseph Lynch commented, "No element of the canon was entirely new, since Innocent had experimented with the problem for fifteen years. But c.64 was a complete formulation that reflected the results of those years of trial and error in the face of a serious practical problem"[32].

In this decree a monastery of stricter rule (*locum arctioris regulae*) was in effect treated as a place of punishment, though it may refer to a house where the rule is more strictly observed and where there is no suspicion of simony. The idea of a monastery as a prison, however, is also found in c.21 *Omnis utriusque* concerning annual confession, which decreed at the end that a confessor who in any way revealed a sin made known to him in confession should "non solum a sacerdotali officio deponendum ... verum etiam ad agendam perpetuam penitentiam in arctum monasterium detrudendum", and the practice of using monasteries as a place of punishment was widespread earlier in the Middle Ages[33].

One of the other Lateran IV constitutions clarified the nature of monastic privileges. C.57 *Ut privilegia* said,

> Ut privilegia, que quibusdam religiosis personis romana concessit ecclesia, permaneant inconvulsa, quedam in eis duximus declaranda, ne minus sane intellecta pertrahant ad abusum, propter quem possent merito revocari, quia privilegium meretur amittere qui permissa sibi abutitur potestate[34].

This states clearly that monastic privileges could be revoked or changed, presumably by the authority that had granted them. Maccarrone considered this "profoundly innovative for the right of monks" and referred to "the new principle of the revocability of the privileges themselves and their adaptation and change"[35]; but there was nothing especially new about this. Monastic privileges had in fact often been modified and even effectively abolished, as in the matter of tithes[36]. C.57 then went on to clarify two such privileges. The first concerned the right granted by the papacy to certain monks (*quibusdam regularibus*) to bury (and presumably to receive burial fees from) those to whom they had granted confraternity (*confratres*), even

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31 Foreville, *Latran*, cit., p. 379, translated this passage 'après mutation des prieures et officières inférieures', i.e. after the officials of the house in question were changed. But it is applied to the individuals, as here, in J. H. Lynch, *Simoniacal Entry into Religious Life from 1000 to 1260* (Columbus: Ohio State University Press, 1976), pp. 195, 217, and Maccarrone, *Nuovi studi*, cit., p. 17. The phrase *tam recipiens quam recepta* presumably applies to the people rather than the gift.

32 Lynch, *Simoniacal Entry*, cit., p. 195.

33 Lat. IV c.21, COGD II.1, p. 178: 'not only be deposed from the priestly office ... but also be put into a strict monastery to do perpetual penance'. On the practice of *detrusio*, see G. Geltner, '*Detrusio*: Penal Cloistering in the Middle Ages', in *Revue bénédictine* 118 (2008), pp. 89-108.

34 Lat. IV c.57, COGD II.1, p. 194: 'In order that the privileges which the Roman Church has granted to certain religious people may remain undisturbed (*inconvulsa*), certain points in them should be made clear in order that those that are less clearly understood should not lead to abuse on account of which they can justly be revoked, since those who abuse a power permitted to them deserve to lose it'.

35 Maccarrone, *Nuovi studi*, cit., p. 16.

36 Constable, *Monastic Tithes*, cit., p. 279.

when they belonged to churches which were under interdict, provided the *confratres* themselves were not interdicted or excommunicated. It also defined in detail the status of the *confratres* and the conditions under which they were and were not entitled to burial. The second privilege concerned the right of monks to celebrate the holy offices in towns, castles, and villages that were under interdict. Here the council specified that the privilege applied to only one church and once a year, not to all the churches whenever they came, which would in effect nullify the interdict. This was a significant clarification and modification (since the original privilege had apparently referred to churches in the plural) of a privilege that the pope and bishops clearly thought had been abused.

Two other constitutions pertained to monks. C.59 *Quod quibusdam* extended to all monks the papal prohibition, which had previously applied only to certain monks, of guaranteeing or serving as surety for anyone or to receive money from anyone without permission from the abbot and a majority of the chapter. This put monasteries in a position to control and approve the legal and financial operations of their members[37]. Finally, c.60 *Accedentibus ad nos* formally forbade abbots from usurping episcopal powers, such as jurisdiction over marriage cases, public penances, and granting letters of indulgence "nisi forte quisquam eorum speciali concessione vel alia legitima causa super huiusmodi valeat se tueri"[38].

Taken together these canons touched on many aspects of monastic life, but they did not fundamentally alter the position of the religious orders within the Church. For the most part they clarified points that had already been settled in principle. In his volume on the Lateran Council, which formed part of his multivolume work on Innocent III, Achille Luchaire wrote, "The members of the regular clergy, the monks, had their turn, but the canons which concerned them were very few in number"[39]. He explained this by the fact that, from the beginning of his pontificate, Innocent had taken an interest in monastic affairs and many monasteries had been the subject of special reform decrees[40]. "His decisions", according to Philibert Schmitz, "established a monastic jurisprudence which was epoch-making in the history of the order". He promoted orders concerned with social utility, such as the Trinitarians, and organized councils of abbots, resembling general chapters. He tried especially to reform the Cistercian order[41]. In 1202, he referred in a letter to the *rumores sinistri* concerning the Cistercians[42], and in 1214 he wrote that the internal discords and complaints of the Cistercians posed a danger to both the order and the papacy and urged them to

37 Maccarrone, *Nuovi studi*, cit., p. 8, and n. 22, citing previous individual examples.

38 Lat. IV c.60, COGD II.1, p. 195: 'unless by chance *(nisi forte)* one of them has the power to exert himself in this way by special concession or some other legitimate cause.'

39 A. Luchaire, *Innocent III: le Concile de Latran et la réforme de l'Église* (Paris: L. Hachette et C., 1908), p. 79.

40 Ibid., pp. 157-68; G. Cariboni, *Il nostro ordine è la Carità. Cistercensi nei secoli XII e XIII* (Milano: Vita e Pensiero, 2011), p. 102.

41 Schmitz, *Histoire*, cit., p. 51.

42 Cariboni, *Il nostro ordine*, cit., pp. 92-126 ('Il papato di fronte alla crisi istituzionale dell'ordine cistercense nei primi decenni del XIII secolo').

find a solution[43]. By the time of the Lateran Council these issues were to some extent behind him and were not therefore a cause of particular concern to the council.

Recent scholarship has elucidated the extent to which the council built on the past in regard to religious orders. The *usus* or procedures for establishing normative texts to regulate life in religious communities and for verifying, approving, and confirming monastic rules and *propositum vitae* during the years before the Lateran Council have recently been studied by Pietro Silanos. Silanos concentrated on the papal approval of the Trinitarians, Humiliati hermits of the Val du Choux, canons of San Marco in Mantua, Poor Catholics of Durand of Huesca, and Reconciled Poor Men of Bernard Prim[44]. This work provides more support for the earlier statements of scholars such as Christopher Cheney, who observed that, "as a whole the decrees mark the culmination of a period of speculation and experiment in matters of doctrine and Church government which can be traced uninterrupted from at least the pontificate of Alexander III"[45]. This backward-looking aspect of the council's work helps to explain why the decrees on monasticism, important as they were, dealt for the most part with matters of administration and clarification rather than with the essence of religious life.

They were incorporated into canon law, however, and their influence can be traced throughout the later Middle Ages[46]. According to Stefanie Unger in her book on the reception of the canons of the councils of Lateran IV and Lyons II (1274) in the statutes of the archbishops of Cologne and Mainz up to 1310, c.12 was cited in the canons of the councils of Cologne in 1261 and 1281, c.13 in the decrees of the council of Cologne in 1307, and c.64 in the decrees of the councils of Cologne in 1308 and 1310[47]. The application of c.12 concerning general chapters ran into resistance and was admitted by most of the Benedictines, according to Mahn, "only with regret and not without difficulties"[48], but owing to its stress on regional structure it contributed in the long run to the emergence of a *ius proprium* in each order and the distinctive organization and institutionalization of the monastic way of life[49]. Already in the early thirteenth century chapters of monks met in England, Germany, Spain, and France

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43 Cheney, 'A Letter of Pope Innocent III', cit., p. 283.

44 P. Silanos, '*In sede apostolica specula constituti*: Procedure curiali per l'approvazione di regole e testi normativi all'alba del IV Concilio lateranense', in QF 94 (2014), pp. 33-93. Cf. Luchaire, *Innocent III*, cit., pp. 157-67.

45 Cheney, 'A Letter of Pope Innocent III', cit., p. 277.

46 See A. Murray, *Conscience and Authority in the Medieval Church* (Oxford: Oxford University Press, 2015), p. 30.

47 S. Unger, *Generali concilio inhaerentes statuimus: Die Rezeption des Vierten Lateranum (1215) und des Zweiten Lugdunense (1274) in den Statuten der Erzbischöfe von Köln und Mainz bis zum Jahr 1310* (Mainz: Selbstverl. der Ges. für Mittelrhein. Kirchengeschichte, 2004, Quellen und Abhandlungen zur mittelrheinischen Kirchengeschichte 114), pp. 288-290.

48 Mahn, *L'ordre cistercien*, cit., p. 250, who attributed the resistance at least in part to the role played by the Cistercians.

49 Cariboni, *Il nostro ordine*, cit., p. 117, citing the works of Joachim Wollasch and Gert Melville; cf. Cygler, *Das Generalkapitel*, cit., pp. 479 and 485.

and later met all over Europe[50]. C.13 prohibiting the foundation of new orders was cited in the canons of Lyons II in 1274/5, and Bourges in 1276 and by councils in the archdiocese of Rouen as well as Cologne in 1307[51]. It is impossible to say whether these citations and reissues had a practical effect, but they show that the ideas behind them were still alive. Certainly, the new orders established in the thirteenth century, such as the John-Bonites, who followed the rule of Augustine, made an effort to adopt an approved rule. On the negative side, c.13 prevented Birgitta of Sweden from obtaining approval for her "Rule of the Savior"[52]. Boniface VIII in 1298 accepted the legitimacy of the Carmelites and Augustinian Hermits because they had been founded before Lateran IV[53], but Gregory IX interdicted the mendicant orders founded after Lateran IV[54]. Meanwhile c.64 on monastic simony was cited in England and France as well as Germany in the thirteenth century[55]. Much work remains to be done on the history of these decrees, but this evidence shows that they dealt with continuing problems and retained their force for many years after the council.

50 Schmitz, *Histoire*, cit., pp. 50-51, 67, 98, 117-18, 137, 141-42.

51 R. Foreville, 'La réception des conciles généraux dans l'Église et la Province de Rouen au XIII[e] siècle', in *Droit privé et institutions régionales. Études historiques offertes à Jean Yver* (Paris: PUF, 1976), pp. 243-53, repr. in Idem, *Gouvernement et vie de l'Église*, cit., IX, p. 251.

52 G. Melville, *Die Welt der mittelalterlichen Klöster: Geschichte und Lebensformen* (München: Beck, 2012), pp. 244-45.

53 Ibid., p. 251.

54 Foreville, 'Lyon II', cit., p. 363.

55 Lynch, *Simoniacal Entry*, cit., pp. 212-3.

PART III

Canon Law and Canonistic Jurisprudence for Governing the Faithful

VITO PIERGIOVANNI

Eresia e lesa maestà nella normativa di Innocenzo III e nel Concilio Lateranense del 1215

Per la parte canonistica il maggiore studioso ed editore di testi relativi al IV Concilio Lateranense del 1215 è stato Antonio García y García, studioso insigne, Maestro e Collega sempre disponibile e da poco mancato – ed ho sempre pensato che fosse francescano non solo nell'abito ma soprattutto nel cuore – ed è a Lui che vorrei dedicare questo mio intervento sui suoi temi, certo di ottenere la sua comprensione.

In uno scritto Antonio ha sostenuto che "The Fourth Lateran Council, the most important of the five Lateran councils, is also more interesting to the historian of canon law than any of the other general councils of the Middle Ages. All of its constitutions passed into the *Compilatio quarta* [...] and into the *Liber Extra* [...] These constitutions were still being cited in the notes of 228 canons in the *Codex Iuris Canonici* of 1917"[1].

Ennio Cortese, a sua volta, pone in rilievo un altro importante esito di questa vicenda. Egli ricorda che la compilazione di Innocenzo III "fu la prima collezione ufficiale nella storia della Chiesa; venne trasmessa alla scuola bolognese che si affrettò a glossarla. Quest'invio alla scuola [...] non solo rivela quanta importanza avesse ormai assunto la scienza come tramite della recezione delle norme nella prassi, ma soprattutto inaugura una forma di 'pubblicazione' [...] dei complessi normativi pontifici che sarà regolarmente adottato dai successori d'Innocenzo"[2].

Non più collezioni private, quindi, ma una svolta sostanziale nella storia dell'ordinamento della Chiesa. Le norme conciliari del IV Concilio Lateranense sono legate alle concezioni proprie del tempo nel quale nascono e riflettono i rapporti tra poteri ecclesiastici e secolari.

1 A. García y García, 'The Fourth Lateran Council and the Canonists', in *The History of Medieval Canon Law in the Classical Period, 1140-1234. From Gratian to the Decretals of Pope Gregory IX*, ed. by W. Hartmann and K. Pennington (Washington D.C.: The Catholic University of America Press, 2008, History of Medieval Canon Law), pp. 367-78, p. 367.

2 E. Cortese, *Il diritto nella storia medievale. II. Il Basso Medioevo* (Roma: Il Cigno Galileo Galilei, 1995), p. 214.

Vito Piergiovanni, Università degli Studi di Genova

The Fourth Lateran Council and the Development of Canon Law and the ius commune, ed. Atria Larson and Andrea Massironi, Turnhout: Brepols, 2018 (EMI 7), pp. 161–68

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A mio parere la lotta intrapresa contro gli eretici da Innocenzo III tra la fine del secolo XII e l'inizio del XIII, per la sua durata e per le sue conseguenze, ha segnato un momento decisivo per la Chiesa medievale, in riferimento sia alla sua futura collocazione europea, sia alla propria interna organizzazione. Avvalendosi della sua autorità spirituale, la Chiesa in questo momento ha la possibilità politica di stroncare una delle più gravi minacce che siano state portate contro la propria unità, e adopera a questo scopo tutti gli strumenti spirituali e materiali che le possano essere di utilità. Anche la normativa ecclesiastica si dispone in tal senso e la legislazione pontificia è tipica nella sua progressiva ricerca di sempre più dure sanzioni contro gli eretici[3].

Il testo giuridico che diventa l'emblema ed il modello di questa nuova situazione politica è certamente la decretale di Innocenzo III *Vergentis*, emanata nel 1199 contro gli eretici di Viterbo, e con la quale, come è stato affermato, il *crimen lesae maiestatis* fa il suo ingresso ufficiale nel diritto della Chiesa: con questa decretale, cioè, si è avuto un effettivo e completo uso dell'idea politica e giuridica di maestà nell'ambito ecclesiastico. *Vergentis in senium* è una lettera inviata alla città di Viterbo nel marzo del 1199 e riflette la crescente apprensione per l'eresia nei territori pontifici e stabilisce nuove e più stringenti pene per chi rigetta o sovverte la fede cristiana[4].

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3 V. Piergiovanni, 'La lesa maestà nella canonistica fino ad Uguccione', in *Materiali per una storia della cultura giuridica* 2 (1972), pp. 55-88, ora anche in Idem, *Norme, scienza e pratica giuridica tra Genova e l'Occidente medievale e moderno*, 1 (Genova: nella sede della Società Ligure di Storia Patria, 2012, Atti della Società Ligure di Storia Patria n.s. 52.1), pp. 547-74.

4 H. Maisonneuve, 'Le droit romain et la doctrine inquisitoriale', in *Études d'histoire du droit canonique dédiées à Gabriel Le Bras*, II (Paris: Sirey, 1965), pp. 931-42, p. 932. Sulla decretale *Vergentis* si veda ancora, per i riferimenti alla lesa maestà, W. Ullmann, 'The significance of Innocent III's Decretal «Vergentis»', in *Études d'histoire du droit canonique dédiées à Gabriel Le Bras*, II, cit., pp. 729-41; J. Chiffoleau, 'Note sur la bulle *Vergentis in senium*, la lutte contre les hérétiques du Midi et la construction des majestés temporelles', in *Innocent III et le Midi*, éd. M. Fournié *et al.* (Toulouse: Privat, 2015, Cahiers de Fanjeaux 50), pp. 89-144. Sull'importanza del testo nella politica antiereticale della Chiesa vd. O. Hageneder, 'Studien zur Dekretale «Vergentis» (X, V, 7, 10)', in ZRG, Kan. Abt. 80 (1963), pp. 138-73; H. Maisonneuve, *Études sur les origines de l'Inquisition* (Paris: Librairie philosophique J. Vrin, 1960²); J. Chiffoleau, 'Dire l'indicibile. Osservazioni sulla categoria del *nefandum* dal XII al XV secolo', in *La parola all'accusato*, a cura di J.-C. Maire Vigueur e A. Paravicini Bagliani (Palermo: Sellerio, 1991), pp. 42-73, in particolare pp. 57-60; P. Clarke, 'Innocent III, Canon Law and the Punishment of the Guiltless', in *Pope Innocent III and His World*, ed. J. C. Moore (Aldershot: Ashgate, 1999), pp. 271-85; M. Meschini, 'Validità, novità e carattere della decretale *Vergentis in senium* di Innocenzo III (25 marzo 1199)', in BMCL 25 (2002-2003), pp. 94-113; Idem, 'L'evoluzione della normativa antiereticale di Innocenzo III dalla *Vergentis in senium* (1199) al IV concilio lateranense (1215)', in BISM 106.2 (2004), pp. 207-31; H. Walther, 'Innocenz III. und die Bekämpfung der Ketzer im Kirchenstaat: ein Beitrag zur Wirkungsgeschichte von *Vergentis in senium*', in *Religiöse Bewegungen im Mittelalter. Festschrift für Matthias Werner zum 65. Geburtstag*, hg. E. Bünz *et al.* (Köln-Weimar-Wien: Böhlau, 2007, Veröffentlichungen der Historischen Kommission für Thüringen. Grosse Reihe 24), pp. 723-35; R. Parmeggiani, 'La costituzione «Excommunicamus» (c.3) alla confluenza di riflessione ecclesiologica e prassi antiereticale', in *Il Lateranense IV. Le ragioni di un concilio*. Atti del LIII Convegno storico internazionale (Todi, 9-12 ottobre 2016) (Spoleto: Centro italiano di studi sull'alto medioevo, 2017, Atti dei Convegni del Centro italiano di studi sul basso medioevo n.s. 30), pp. 295-321. Sulle eresie medievali si veda anche *Hérésies et sociétés dans l'Europe pré-industrielle (XI^e^-XVIII^e^ siècles). Communications et débats du Colloque de Royaumont présentés par J. Le Goff* (Paris-La Haye: Mouton, 1968, Civilisations et sociétés 10), con ampi

Kenneth Pennington ritiene che in questa operazione che è, insieme, politica e culturale, il Pontefice abbia avuto riferimenti dalla scuola di diritto civile, equiparando l'eresia con la lesa maestà ed applicando le sanzioni per il tradimento del diritto romano agli eretici che prevedono la confisca dei beni e l'infamia anche a scapito dei parenti innocenti[5]. È ancora importante ricordare che Federico II incorpora *Vergentis* nella sua legislazione nel 1220: in sostanza, come giustamente sostiene Othmar Hageneder, i canonisti trasferiscono l'idea di *crimen publicum* alla Cristianità[6].

Per la Chiesa il problema più urgente da affrontare è certo quello dell'espandersi dell'eresia. È stata anche giustamente affermata l'esemplarità, in tale contesto, della decretale innocenziana *Vergentis in senium* e dell'accostamento culturale ed ideologico dell'eresia come *crimen lesae maiestatis*: essa è, in sostanza, "un atto di più precisa concezione teorico-giuridica del potere monarchico del Papa, che in quanto monarca, di fronte al carattere ormai generalizzato dell'eresia e in relazione al compenetrarsi di diritto canonico e diritto romano, definiva le prerogative del

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riferimenti bibliografici. Per i rapporti tra eresia e lesa maestà alcuni riferimenti è possibile reperire in A. Esmein, *Histoire de la procédure criminelle en France et spécialement de la procédure inquisitoire depuis le XIII^e siècle jusqu'à nos jours*, I (Paris: L. Larose et Forcel, 1882), p. 78; P. Hinschius, *System des katholischen Kirchenrechts mit besonderer Rücksicht auf Deutschland*, V (Berlin: J. Guttentag, 1895), pp. 302-03 e 680; R. His, *Das Strafrecht des deutschen Mittelalters. II. Die einzelnen Verbrechen* (Weimar: Bohlaus, 1935), pp. 18 ss. e 36 ss.; S. Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX.* (Città del Vaticano: BAV, 1935, Studi e testi 64), p. 55; S. Mochi Onory, *Fonti canonistiche dell'idea moderna dello Stato. Imperium spirituale. Iurisdictio divisa. Sovranità* (Milano: Vita e pensiero, 1951, Pubblicazioni dell'Università Cattolica del Sacro Cuore 38), p. 112; G. De Vergottini, *Studi sulla legislazione imperiale di Federico II in Italia. Le leggi del 1220* (Milano: Giuffrè, 1952, Pubblicazioni straordinarie dell'Accademia delle Scienze di Bologna 11), pp. 6 ss., 19 ss., 24 ss. e 26 nota 1; C. Ghisalberti, 'Sulla teoria dei delitti di lesa maestà nel diritto comune', in *Archivio giuridico Filippo Serafini* 149 (1955), pp. 100-77, p. 160 ss.; W. Ullmann, *Principles of Government and Politics in the Middle Ages* (London: Methuen & Co., 1961), p. 79 ss.; Idem, *The Growth of papal Government in the Middle Ages* (London: Methuen, 1962[2]), pp. 21, 305 ss., 339. Per l'età medievale sono fondamentali J. Chiffoleau, 'Le crime de majesté médiéval', in *Genèse de l'État moderne en Méditerranée. Approches historique et anthropologique des pratiques et des représentations.* Actes des tables rondes internationales tenues à Paris (24-26 septembre 1987 et 18-19 mars 1988) (Rome: École française de Rome, 1993, Publications de l'École française de Rome 168), pp. 183-213, e Idem, 'Le crime de majesté, la politique et l'extraordinaire. Note sur les collections érudites de procès de lèse majesté du XVII^e siècle et leurs exemples médiévaux', in *Les procès politiques (XIV^e-XVII^e siècles)*. Actes du colloque de Rome (20-22 janvier 2003), éd Y.-M. Bercé (Rome: Ecole française de Rome, 2007, Collection de l'Ecole française de Rome 375), pp. 577-662; per l'età moderna vd. M. Sbriccoli, *Crimen laesae maiestatis. Il problema del reato politico alle soglie della scienza penalistica moderna* (Milano: Giuffrè, 1974, Per la storia del pensiero giuridico moderno 2).

5 K. Pennington, 'Pro Peccatis Patrum Puniri: A Moral and Legal Problem of the Inquisition', in *Church History* 47 (1978), pp. 137-54, anche in Idem, *Popes, Canonists and Texts, 1150-1550* (Aldershot: Variorum, 1993, CSS 412), XI. Su questi temi si veda V. Piergiovanni, *La punibilità degli innocenti nel diritto canonico dell'Età classica. II. Le "poenae" e le "causae" nella dottrina del secolo XIII* (Milano: Giuffrè, 1974, Collana degli Annali della Facoltà di Giurisprudenza dell'Università di Genova 38), pp. 180-91.

6 O. Hageneder, 'La decretale «Vergentis» (X.5, 7, 10). Un contributo sulla legislazione antiereticale di Innocenzo III', in *Il sole e la luna. Papato, impero e regni nella teoria e nella prassi dei secoli XII e XIII*, a cura di M. P. Alberzoni (Milano: Vita e Pensiero, 2000, Cultura e storia 20), IV, pp. 131-64.

potere *tout court*: Innocenzo III, riservando al Papa nei territori del 'patrimonio' e ai principi nelle loro terre le pene conseguenti all'equiparazione del delitto di eresia al delitto di lesa maestà, agiva come 'sovrano modello' per ogni maestà temporale. Il conformarsi al 'modello' legittimava l'esercizio dell'autorità sovrana: la repressione dell'eresia diventava uno degli elementi costitutivi del potere. L'eresia appariva così ad un tempo delitto religioso-dottrinale e crimine di natura pubblicistica"[7].

Si assiste, in sostanza, ad un salto di qualità concettuale e politica alla cui affermazione i giuristi danno un contributo veramente significativo, offrendo giustificazioni teoriche e pratiche all'accostamento testuale ed ideologico dell'uso della lesa maestà in ambito canonico.

Si può iniziare dalle opere dottrinali dei canonisti del periodo immediatamente precedente all'opera innocenziana, poiché, a mio parere, a partire dal Decreto di Graziano, la presenza della lesa maestà ha indotto e contribuito soprattutto alla chiarificazione di due ordini di problemi, uno di politica ecclesiastica ed uno di carattere tecnico-giuridico, i quali appaiono strettamente connessi e vicendevolmente reagenti: la lesa maestà, messa a punto concettualmente dai giuristi romani e largamente utilizzata nel periodo dell'Impero Romano e bizantino, è giunta al mondo medievale con caratteristiche secolari, e soprattutto imperiali; essa viene ufficialmente introdotta nel diritto canonico da Innocenzo III per disporre di un duttile strumento repressivo nel quadro del rafforzamento politico e organizzativo della Chiesa. Prima del pontificato innocenziano si ha, in sostanza, una limitata utilizzazione concettuale e pratica del *crimen maiestatis*. Con l'eccezione di Sicardo da Cremona che brevemente si cimenta nella definizione del *crimen maiestatis*, rifacendosi pressoché pedissequamente al Piacentino, Graziano ed i decretisti danno per risaputo il contenuto di questo reato. I pochi riferimenti sono direttamente tratti da norme romane, di solito riferite alla congiura per attentare alla vita del principe, e sono, pertanto, restrittive rispetto al concetto che si era venuto formando nel mondo romano e soprattutto imperiale. Fino alla caduta della Repubblica, infatti, i contorni concettuali e la casistica dei reati di lesa maestà si erano distaccati ben poco dalla primitiva concezione che considerava offese alla *maiestas* taluni atti di guerra o di tradimento contro lo stato romano (e l'arcaico termine *perduellio* è mantenuto, anche in epoca successiva, per identificare questi casi). Già con Silla e poi con la *lex Iulia de maiestate* vengono aggiunte nuove fattispecie delittuose, ma con l'avvento dell'Impero si entra in una fase diversa e tendente a riportare nell'ambito della lesa maestà ogni azione contro la persona e le prerogative dell'Imperatore. È stato affermato che di colpo il concetto di maestà si trasforma: non è più, se non in maniera astratta, un attributo riferito collettivamente al popolo romano, ma è innanzi tutto diventato *maiestas principis*, si è cioè personalizzato[8].

Marongiu sostiene che già nel Medio Evo si ha una specie di religione ed esaltazione del regnante. Tra gli aspetti giuridici di questa restaurazione monarchica è da considerare

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7 G. Tabacco e G. G. Merlo, *Medioevo. v-xv secolo* (Bologna: il Mulino, 1981, La civiltà europea nella storia mondiale 1), p. 468.

8 Piergiovanni, *La punibilità degli innocenti*. II, cit., p. 548.

anche una specie di gara all'esaltazione della 'maestà' del sovrano: in età moderna, infatti, si ha l'assunzione da parte dei sovrani dell'appellativo 'Maestà', il quale fino allora sarebbe stato riservato all'imperatore, primo in dignità fra i principi cristiani. Diventa "comune [...] per l'imperatore e per i vari re [...] fenomeno dell'acuirsi, intensificarsi e concretizzarsi, del carattere maiestatico della sovranità in generale [...] Simile accentuazione è conosciuta e appare quasi tangibile nei suoi riflessi giuridici. Il delitto di lesa maestà (*crimen maiestatis*) rinverdito dalla costituzione *Qui sint rebelles* di Arrigo VII e dal commentato di questo fatto da Bartolo da Sassoferrato è di nuovo in auge [...] È considerata lesa maestà ogni azione o cospirazione contro i pubblici poteri [...] È lesa maestà anche la eresia, qualificata come lesa maestà divina: del resto chi cospira contro la... sacra persona del sovrano pecca anche contro la religione; i tribunali dell'Inquisizione [...] diventano di fatto anch'essi dei tribunali per la difesa dello Stato"[9].

Nel diritto canonico del periodo qui considerato non si afferma ancora l'equiparazione nell'offesa e nella repressione della Chiesa e del Papa all'Impero ed al suo detentore, e, per tale ragione, del reato di maestà ci si limita ad utilizzare solo alcuni aspetti. Ci si appropria concretamente soltanto di alcune caratteristiche processuali e si riesce ad ottenere, per la repressione dei più importanti reati ecclesiastici, come la simonia e l'eresia, strumenti giudiziari e procedurali rapidi ed efficaci: correlativamente e come giustificazione di tale uso da un punto di vista teorico, la lesa maestà diviene un riferimento quasi emblematico, ma generico, per identificare crimini enormemente gravi e pericolosi. La stessa terminologia con cui si è soliti richiamarla si avvale normalmente di espressioni come "exemplo" o "ad instar criminis lesae maiestatis", cioè prendendo ad esempio, o a somiglianza del delitto di lesa maestà, per evocare un modello a cui ci si accosta, soprattutto processualmente, ma con il quale non ci si identifica sostanzialmente. Il contenuto politico e giuridico del concetto di maestà è ancora estraneo alla Chiesa ed al diritto canonico[10].

Una seconda tendenza si affianca a quella appena detta e contribuisce a rafforzare l'impressione di una estrema prudenza e oculatezza nella utilizzazione pratica del concetto di maestà: si accetta infatti il riferimento ad una gravissima mancanza passibile di severe pene e lo si adatta ad alcuni reati ecclesiastici, ma nel contempo si adottano concrete restrizioni a favore dei ministri della Chiesa, soprattutto per evitare il pericolo che siano giudicati da tribunali civili[11]. Si può arrivare a richiedere l'intervento del braccio secolare, ma di questo non si accettano interferenze: soprattutto per le testimonianze, le pene, le torture e le accuse la differenza tra chierici e laici è enorme. Nella tradizione della lesa maestà si inserisce in maniera significativa la lesa maestà divina: come sostiene Mario Sbriccoli, "ribellione e tradimento assorbono nella quasi totalità le fattispecie desumibili dalla struttura romanistica della 'lesa maestà' fondata sui titoli specifici del Digesto e del Codice dedicati alla protezione

9 A. Marongiu, *Storia del diritto italiano. Ordinamento e istituto di governo* (Milano: Cisalpino-Goliardica, 1977), pp. 230-32.

10 Piergiovanni, 'La lesa maestà nella canonistica fino ad Uguccione', cit., p. 550.

11 Ibidem.

del sovrano e dei primari cardini politici dello Stato. Tuttavia l'allargamento della casistica e la scelta del potere da un lato e degli interessi del paese dall'altro, quali parametri per valutare il livello di un atto criminoso e [...] la sua ascrivibilità o meno al novero dei reati politici, determinano l'ingresso dichiarato nel sistema del *crimen laesae maiestatis* di una lunga serie ulteriore di beni giuridici protetti e, quindi, di reati particolari che vengono a quel titolo perseguiti". Tra questi la *maiestas divina* con quanto essa rappresenta per i suoi contenuti[12].

I testi che, nel Decreto e nelle opere dei decretisti fino ad Uguccione, trattano del *crimen maiestatis* fanno sostanzialmente riferimento a tre problemi: il primo riguarda la possibilità dell'ammissione di infami, servi e criminosi all'accusa della simonia di un prelato; il secondo riguarda la possibilità o meno per una donna d'accusare un sacerdote; il terzo si occupa della disciplina di alcuni casi di sacrilegio. L'ipotesi che più delle altre si è prestata alla discussione dei canonisti è quella per la quale ci si chiede, nei riguardi di un vescovo coscienzioso ("religiosus episcopus") accusato di simonia, se possa essere accusato da soggetti coinvolti in crimini o già connotati dall'infamia ("an crimine irretiti vel infamia notati ad huiusmodi accusationem sint admittendi"): la gravità del reato non consente atteggiamenti di mediazione e Graziano lo paragona per giustificarne teoricamente la durezza repressiva, al *crimen lesae maiestatis*: l'infamia fa parte dell'ultima articolazione nella partizione delle pene spirituali canoniche e, oltre alla conseguenza di mutare il modo di essere delle singole persone ("qua status hominum deformatur"), può essere inflitta anche per colpe non personali come avviene nel crimine di lesa maestà ("quandoque propter peccatum alterius infligitur, sicut pro crimine lesae maiestatis")[13].

Il procedimento inquisitorio in campo processuale e l'equiparazione sostanziale di eresie e lesa maestà sono i cardini di una politica tesa a reprimere qualsiasi fermento di rinnovamento politico e dottrinale nell'ambito della Chiesa, e a questo fine vengono recepite anche le conseguenze dannose che il diritto romano prevedeva per i terzi innocenti[14]. Soprattutto la diseredazione assume più precisi contorni e mostra tutta la sua gravità. Mentre ancora Lucio III prevedeva, parlando di persecuzione degli eretici, che la circostanza di essere ortodossi, per i loro congiunti fosse titolo per entrare in possesso del patrimonio sottratto al colpevole, la decretale *Vergentis* si esprime in modo contrario. Si sostiene, infatti, che l'uso della misericordia può evitare la pena di morte ("filiis suis vita solummodo ex misericordia conservata"), poiché

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12 Sbriccoli, *Crimen laesae maiestatis*, cit., p. 342.

13 Piergiovanni, 'La lesa maestà nella canonistica fino ad Uguccione', cit., p. 551. Sul problema dell'esclusione degli infami dall'accusa e dalla testimonianza vd. P. Landau, *Die Entstehung des kanonischen Infamiebegriffs von Gratian bis zur Glossa Ordinaria* (Köln-Graz: Böhlau, 1966, Forschungen zur kirchlichen Rechtsgeschichte und zum Kirchenrecht 5), p. 102 ss. Si veda C.6 q.1 d.p. c.19, dove si sostiene che gli infami sono esclusi dalla testimonianza contro i vescovi, ma non cosl gli eretici, che possono essere accusati dagli infami come è permesso ai minori nei confronti degli adulti ("Sed licet infames ab accusatione episcoporum prohibeantur, non tamen isti ab huius accusatione prohibendi sunt. Hereticos namque accusare infamibus non prohibetur, ut supra patuit in ea causa, ubi de accusatione minorum adversus maiores disputatum est").

14 Piergiovanni, *La punibilità degli innocenti*. II, cit., p. 555.

coloro che tralignano dalla fede offendono Gesù Cristo e devono essere puniti dalla giustizia ecclesiastica e privati dei patrimoni personali e la motivazione risiede nella maggiore gravità dell'offesa alla maestà della religione ("qui aberrantes in fide Domini Dei filium Iesus Christum offendunt [...] ecclesiastica debent districtione praecidi, et bonis temporalibus spoliari, cum longe sit gravius aeternam quam temporalem laedere maiestatem")[15].

La severità della punizione non può essere evitata "quasi cuiusdam miserationis praetextu" e non risparmia neppure i figli ortodossi ai quali già capita di essere, per altre ragioni, colpiti sia dal giudizio divino che dalle sanzioni canoniche. La novità di questo testo è rilevante, quando si pensi che i canonisti precedenti hanno dichiarato che la gravità delle pene per la lesa maestà civile non trovava un parallelo nel diritto canonico. In precedenza l'equiparazione del reato romano con l'eresia e la simonia era, infatti, ristretta agli elementi processuali, ma la gravità della situazione creata dall'eresia consiglia Innocenzo III a fare un ulteriore passo in avanti. Non è esplicitamente prevista la pena di morte per i rei principali, anche se è un risultato che si raggiunge con la traduzione dinanzi ai tribunali secolari, ma è accettato senza limitazioni il principio di diseredare i familiari: da questo momento anche i discendenti o i collaterali rimasti ortodossi devono sottostare a tale grave punizione. Il delitto di eresia è lesa maestà divina, quindi più grave di quella umana, e deve almeno prevedere le stesse sanzioni stabilite per quest'ultima.

Le opinioni dei canonisti successivi sono divise tra i favorevoli alla applicabilità totale della decretale e coloro che vogliono restringerne la portata: l'Ostiense, peraltro, nel riportare questa posizione chiarisce che una posizione di minor rigore verso i discendenti si può giustificare solo se verso di loro si voglia usare misericordia ("intelligitur loqui de misericordia non de rigore")[16].

Ragionando su questo tema scrivevo tempo fa che proprio riguardo alle differenti opinioni sull'eresia Henri Maisonneuve ricava una impressione complessiva di serenità: la ricerca di soluzioni equitative gli pare in stridente contrasto con le rigide prassi repressive seguite dagli inquisitori[17]. È certo comprensibile che i testi dottrinali risultino meno immediati e drammatici di altre fonti, che si riferiscono a fattispecie reali e non al ripensamento delle stesse, ma pare che più che un'impressione di serenità emerga da questi passi la testimonianza di dibattiti non esauriti nelle implicazioni di tecnica giuridica, ma preoccupati di pervenire a soluzioni le più utili possibile all'istituzione ecclesiale. Ci sono da salvare gli aspetti esteriori dell'istituzione, che non può presentarsi come perennemente tesa a perseguire vendette nei confronti dei trasgressori delle sue norme, ma può avere necessità ed interesse a mostrarsi condiscendente sia con coloro che intendano tornare nel suo seno, sia soprattutto, ed è il caso dei figli ortodossi degli eretici, con coloro che, pur avendone l'opportunità, non hanno tralignato. I giuristi favorevoli a soluzioni di maggiore equità appaiono

15 3Comp. 5.4.1 (X 5.7.10). Piergiovanni, *La punibilità degli innocenti*. II, cit., p. 184.

16 Piergiovanni, *La punibilità degli innocenti*. II, cit., p. 187.

17 Maisonneuve, *Études sur les origines de l'Inquisition*, cit., p. 351.

l'espressione della parte della Chiesa più attenta alla previsione delle conseguenze negative di una politica di eccessiva severità nella repressione delle eresie.

Come emerge dalle decisioni del quarto Concilio Lateranense anche Innocenzo III, che pure non ha risparmiato dure condanne e spietate utilizzazioni di forza, tende ad affiancare all'azione penale e militare, quella della riorganizzazione interna e del rilancio di una spiritualità di carattere ortodosso. In questo quadro si inserisce la decretale *Vergentis* ed il supporto teorico offerto dalla utilizzazione estensiva del concetto, tratto dal diritto romano, di lesa maestà, che si ritiene possa essere, oltre che umana, anche divina: la legislazione pontificia, in questo caso, sopravanza la dottrina e, impadronendosi del concetto, lo usa per i propri scopi politici, rendendo, in larga misura, vano lo sforzo di sistemazione teorica operato dai canonisti anteriori.

ALEJANDRO MORIN

The Fourth Lateran Council's *Non Debet* (c.50) and the Abandonment of the System of Derived Affinity

At the beginning of the thirteenth century important changes were introduced to kinship rules in Latin Christianity. One of them was a new principle operating in canon law after the Fourth Lateran Council had amended the regime of impediments to marriage. In addition to reducing impediments to the fourth degree in the case of consanguineous unions (i.e. unions involving persons related by blood, or biologically, to the fourth degree) and unions of affinity (i.e. unions involving persons related through sexual intercourse between a man and a woman), the constitution *Non debet* (c.50) abandoned the system of derived affinity:

> Non debet reprehensibile iudicari, si secundum varietatem temporum statuta quandoque varientur humana, presertim cum urgens necessitas vel evidens utilitas id exposcit, quoniam ipse Deus ex hiis, que in Veteri Testamento statuerat, nonnulla mutavit in Novo. Cum ergo prohibitiones de coniugio in secundo et tertio affinitatis genere minime contrahendo, et de sobole suscepta ex secundis nuptiis cognationi viri non copulanda prioris, et difficultatem frequenter inducant et aliquando periculum pariant animarum, ut cessante prohibitione cesset effectus, constitutiones super hoc editas sacri approbatione concilii revocantes, presenti constitutione decernimus ut sic contrahentes de cetero libere copulentur. Prohibitio quoque copule coniugalis quartum consanguinitatis et affinitatis gradum de cetero non excedat, quoniam in ulterioribus gradibus iam non potest absque gravi dispendio huiusmodi prohibitio generaliter observari. Quaternarius enim numerus bene congruit prohibitioni coniugii corporalis, de quo dicit Apostolus quod 'vir non habet potestatem sui corporis, set mulier; neque mulier habet potestatem sui corporis, set vir', quia quatuor sunt humores in corpore, quod constat ex quatuor elementis. Cum ergo iam usque ad quartum gradum prohibitio coniugalis copule sit restricta, eam ita volumus esse perpetuam, non obstantibus constitutionibus super hoc dudum editis, vel ab aliis vel a nobis, ut si qui contra prohibitionem huiusmodi presumpserit copulari, nulla longinquitate defendatur

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annorum, cum diuturnitas temporis non minuat peccatum set augeat, tantoque graviora sint crimina quanto diutius infelicem detinent animam alligatam[1].

The system in force until 1215 defined affinity bonds of a second and third genus. *Non debet* implied the enforcement of a new principle, later summarized in the adage *affinitas non parit affinitatem* ('affinity does not beget affinity'), meaning that, if a man had intercourse with a woman, the man became related to the woman's relatives but the man's relatives did not derivatively become relatives of the woman's relatives. This paper aims to analyse these changes in connection with two homologous formulae of the medieval learned world: *pecunia pecuniam non parit* ('money does not beget money') and *fictio non parit fictionem* ('a fiction does not beget fiction'). In the following pages we will develop them further. Both dealt with the relations between nature and the artifice of institutional constructions. The correlation of the three adages may enable us to take a glimpse at a common paradigm concerning the limits of fictional construction in the Middle Ages.

Affinitas non parit affinitatem

Affinitas non parit affinitatem set aside a body of regulations that, for example, we find in the *Decretum Gratiani* and the decretists. It involved a three-genus pattern with a degree calculation dependent on that of consanguinity. This system suited the general tendency of canon law to conceive of the impediments to marriage broadly[2]. The affinity impediment was founded on the theory of the *unitas carnis*. According to it, one's spouse's blood-relatives were assimilated as one's own kin in the same way as one's blood-relatives' spouses. The incest prohibition between affines was

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1 COGD II.1, p. 190. Also in *Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum*, ed. A. García y García (Città del Vaticano: BAV, 1981, MIC Series A 2), pp. 90-91. 'It should not be judged reprehensible if human statutes sometimes change with the times, especially when urgent needs or evident utility demands this. For God himself changed in the New Testament several things he had legislated in the Old. Prohibitions against contracting marriage in the second and third degree of affinity and against uniting the offspring of a second marriage to the first spouse's blood relatives frequently produce difficulties and sometimes cause peril to souls. Therefore, as when the prohibition ceases its effects cease, we, with the approval of the Sacred Council, revoke the enactments promulgated on this and decree by the present enactment that those thus contracting may be freely joined. In the future let the prohibition of conjugal union not exceed the fourth degree of consanguinity and affinity, since a prohibition for the further degrees cannot be generally observed without serious inconvenience. The four-fold number is in harmony with the prohibition concerning a spouse's body, concerning which the Apostle says that the husband does not have power over his body, but the wife, nor does the wife have power over her body, but the husband. For the body has four humors according to the four elements. Since the prohibition of conjugal union is now restricted to fourth degree, we will that it be perpetual, notwithstanding enactments on this hitherto published by others or by us. If someone presumes to marry against this prohibition, let him not have a defence in the number of years, for long passage of time does not diminish his sin but increases it for crimes are more serious the longer they ensnare the unhappy soul').

2 See J. Gaudemet, *Le mariage en Occident: les mœurs et le droit* (Paris: Éd. du Cerf, 1987).

then measured according to the consanguinity degree with the spouse in question (for instance, a woman's husband's cousin [second degree of consanguinity] would also be considered her cousin [second degree of affinity]). Affinity "was born" from consanguinity as a second genus but did not modify the degree in question[3].

It is important to remember that the *unitas carnis* was understood as blood contact and so could come into existence through any sexual intercourse. The etymology of *affinitas* led to the idea of a meeting *ad fines* between kindreds, which was accomplished through intercourse[4]. It was precisely by coitus (and not by marital bond) that the affinity was generated: "Affinitas est regularitas personarum ex nuptiis proveniens omni parentela carens. Per nuptias autem intellige quemlibet coitum ordinatum"[5]. This distinction between affinity and marriage had two important consequences for the development of the regime of impediments in the decretist literature. First, sexual relationships out of wedlock had the same effect as those occurring within it, since the marital bond was not required to produce a *commixtio sanguinum* ('mixing of bloods')[6]. Second, and counterwise, affinity was not generated by an unconsummated marriage or by an unnatural sexual act (that is, an act that did not involve blood contact because it was not performed according to nature, such as oral sex)[7].

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3 'Et quia ex consanguinitate affinitas nascitur [...]', cf. *Summa 'Elegantius in iure diuino' seu Coloniensis*, ed. G. Fransen and S. Kuttner, vol. IV (Città del Vaticano: BAV, 1978, MIC Series A 1), XV, c.57, p. 119. In *Die Summa Decretorum des Magister Rufinus*, ed. H. Singer (Paderborn: Ferdinand Schöningh, 1902), *ad* C.35 qq.2-3, p. 515, Rufin of Bologna observes that a person attached to another through carnal copulation changes genus but not degree and, inversely, the person attached to another through the propagation of the flesh changes degree but not genus: 'persona addita persone per carnis copulam mutat genus et non gradum. Cui alia regula contraria est, que ait: persona addita persone per carnis propagationem mutat gradum, et non genus.'

4 Bernardus de Montemirato, *In lib. Decretalium aurei commentarii* (Venetiis: apud Iuntas, 1588), *ad* X 4.14.8, p. 129: "Affinis quasi ad alterius fines, id est, qui per carnalem copulam ad finem alterius propinquitatis accessit" ('Affine as if it were till the other's limits, i.e., who reaches the limit of someone else's kindred through carnal copulation').

5 Stephen of Tournai, *Die Summa über das Decretum Gratiani*, ed. J. F. von Schulte (Aalen: Scientia Verlag, 1965), *ad* C.35 qq.2-3, p. 249: 'Affinity is the regularity of persons lacking all kin and stemming from marriage. By marriage, however, you understand any ordinary coitus.' In *Partidas* IV.6.5 Alphonse the Wise offers his translation in thirteenth-century Castillian: 'Affinidad, segund derecho canonico, es proximidad de personas, proueniente de ayuntamiento carnal, careciente de toda parentela. E es assi dicha affinidad, casi unidad de dos a un fin, porque dos diuersas cognaciones se copulan en ella, o por desposorio, segund leyes, o por coyto, segund canones', *Las Siete Partidas*, ed. G. López (Salamanca: Andrea de Portonaris, 1555 = Madrid: Boletín Oficial del Estado, 1974), p. 18. Finally see A. Esmein, *Le mariage en droit canonique* (Paris: L. Larose et Forcel, 1891), pp. 377-79.

6 This led to diriment impediments for *affinitas ex copula illicita* ('affinity from illicit copulation'). See Gl. ord. *ad v. concubitus*, C.35 qq.2-3 c.8 in Gratian, *Decretum* (Romae: in aedibus populi romani, 1582): "affinitas contrahitur per coitum fornicarium sicut per legitimum" ('affinity is contracted through fornication just as through legitimate intercourse').

7 On the *pollutio ordinaria* and the *extraordinaria*, cf. Rolandus, *Die Summa Magistri Rolandi nachmals Papstes Alexander III.*, ed. F. Thaner (Innsbruck: Wagnerischen Universitaets-Buchhandlung, 1874), *ad* C.35 qq.2-3, p. 211. In the same way, in his *Summa Decretalium*, ed. E. A. T. Laspeyres (Graz: Akademische Druck – u. Verlagsanstalt, 1956), lib. 4 tit. 14 § 16, p. 172, Bernardus Papiensis reminds that a kiss does not engender a bond since there is not the mixing of blood ('osculum non parit propinquitatem, quia nullam facit sanguinis commixtionem'). On impotence and marriage

This logic of blood contact and the general tendency to extreme exogamy in the canonical regime of impediments resulted in a multiplicative scheme by which affinity seemed to self-reproduce[8]. Thus an *affinitas secundi generis* was generated, which meant that the spouse (person A) of a first-genus affine (a spouse's blood relative; person B) became in turn an affine with his or her (person B's) respective blood relatives. In this second-affinity genus, marriage was forbidden up to the fourth degree; in fact, up to the third degree it was a diriment impediment, and in a fourth-degree case, those unions which had already been consummated were not dissolved in spite of the prohibition still in force. Finally, a second-genus affine could transfer affinity to a new spouse and the respective consanguineous relatives: this was the *tertium genus affinitatis* in which the ban on marriage reached the second degree. Needless to say, second- and third-genus affinities were still affected by the logic of blood contact; both were generated through spouses as much as through any other sexual partner. Regarding this point, there was no difference with a first-genus affinity except for the number of relatives through which affinity was acquired[9].

Therefore, according to this pattern, affinity did generate affinity. In the words of Stephen of Tournai's *Summa*: "quidam dicunt, quod primum genus est affinitas, secundus affinitatis affinitas, tertium de affinitate affinitatis affinitas"[10]. This system multiplied the number of persons an individual was forbidden to marry to an extent that was considered excessive in the late twelfth century. In fact, a strong wish to modify marriage rules spread in the society of that time as part of a set of reforms and rearrangements promoted by some groups, such as, for example, the Parisian circle of Peter Chanter[11]. Regarding affinity and consanguinity rules, the practical

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consummation, see M. Madero, 'De la *unitas carnis* a la *commixtio seminum* y la dificultad de la prueba de la *impotentia coeundi*', in *Procesos, inquisiciones, pruebas. Homenaje a Mario Sbriccoli (1941-2005)*, ed. by M. Madero and E. Conte (Buenos Aires: Manantial, 2009), pp. 141-67.

8 This tendency to extreme exogamy was conceived in the Middle Ages as a policy of propagation of *caritas*. Nowadays, historians can see it as part of a strategy to seize estate inheritances or as part of a general process of deparentalization of society. On the one hand, see J. Goody, *The Development of the Family and Marriage in Europe* (Cambridge: Cambridge University Press, 1983), chapter 6, and J. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago & London: The University of Chicago Press, 1987), pp. 299-301. On the other, see A. Guerreau-Jalabert, 'El sistema de parentesco medieval. Sus formas (real/espiritual) y su dependencia con respecto a la organización del espacio', in *Relaciones de poder, de producción y parentesco en la Edad Media y Moderna. Aproximación a su estudio*, ed. by R. Pastor, (Madrid: CSIC, 1990), pp. 85-106, and J. Morsel, *L'Histoire (du Moyen Âge) est un sport de combat... Réflexions sur les finalités de l'histoire du Moyen Âge destinées à une société dans laquelle même les étudiants d'histoire s'interrogent* (Paris: LAMOP-Paris 1, 2007, online edition: https://halshs.archives-ouvertes.fr/halshs-00290183/document), chapter 5.

9 Stephen of Tournai, *Die Summa*, cit., *ad* C.35 q.3, p. 253: "primum genus affinitatis una tantam mediante persona contrahitur, secundum duabus, tertium tribus" ('the first genus of affinity is contracted through one person, the second through two, the third through three').

10 Stephen of Tournai, *Die Summa*, cit., *ad* C.35 q.3, p. 253: 'Some people say that the first genus is affinity, the second one affinity of affinity, the third one affinity of affinity of affinity'.

11 See J. Baldwin, *Masters, Princes and Merchants. The Social Views of Peter Chanter and his Circle* (Princeton, NJ: Princeton University Press, 1970), pp. 332-37.

effects of the current legislation were evidently unsatisfactory; its implementation could be counter-productive and not practical in operation.

Three points can be mentioned on this subject. First, the wide range of the canonical impediments for consanguinity or affinity could be used by secular aristocrats to exercise control over marital alliances. The recurrent annulments due to incest made it clear to the clergy that laymen could make use of canon law to their favor, for both political and material gain. The practical impossibility of observing the far-reaching prohibitions allowed lineages to manipulate the kinship rules and to have virtually any marriage annulled so that marriage indissolubility was ultimately called into question[12]. Second, the harshness of the established system led to a proliferation of exceptions. As Peter Chanter observed, the very stability of the positive law was compromised by a high-level arbitrariness, which engendered two main consequences. First, the almost unavoidable request of exemptions threatened the legitimacy of the system. Second, those who conceded such exemptions were placed in an awkward position of complicity[13]. These kinds of issues influenced Lotario da Segni, the future Pope Innocent III, who took part in Peter's circle[14]. Finally, the logic and range of the regime of impediments also involved questions linked to legal proofs[15]. Some situations, such as sexual relationships associated with *affinitas ex copula illicita*, posed serious evidentiary difficulties, for it was not always easy to prove that illicit intercourse had occurred. Moroever, it was impossible to determine whether a *commixtio seminum* ('mixing of semen') actually happened in a specific act of sexual intercourse[16]. This general situation of dissatisfaction with the current system explains the Fourth Lateran Council's c.50, *Non debet*, later integrated into the *Decretals of Gregory IX* as X 4.14.8.

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12 See G. Duby, *Le chevalier, la femme et le prêtre* (Paris: Hachette, 1981), pp. 218-21.

13 Peter Chanter remarked on the inconvenience of keeping the incest prohibition beyond the fourth degree as well as the second- and third-genus affinities. Cf. his *Verbum abbreviatum* (c.53), PL 205, col. 164.

14 See Baldwin, *Masters, Princes and Merchants*, cit., pp. 332-37, and Idem, 'Paris et Rome en 1215 : les réformes du IV[e] concile de Latran', in *Journal des savants* 1 (1997), pp. 99-124, pp. 114-15, on the bonds between Lotario da Segni and Peter Chanter to whom he turned on issues related to marriage. Also see Brundage, *Law, Sex, and Christian Society*, cit., pp. 337-41.

15 See Ph. Toxé, 'La *copula carnalis* chez les canonistes médiévaux', in *Mariage et sexualité au Moyen Âge. Accord ou crise ?*, ed. by M. Rouche (Paris: Presses de l'Université de Paris-Sorbonne, 2000), pp. 123-33, p. 131.

16 See Madero, 'De la *unitas carnis* a la *commixtio seminum*', cit. In his sixteenth-century commentary on the *Lectura arboris affinitatis* of Giovanni d'Andrea, Johann von Breitenbach holds that if a man penetrated a woman but he did not ejaculate, affinity is not acquired, as there must be mixing of blood or seed ('si vir fregit claustra pudoris sed non emisit semen adhuc non contrahitur affinitas. qm. ad contrahendam affinitatem requiritur necessario utriusque sanguinis vel seminis commixtio'). And he quotes Domenico de San Gimignano who explains that affinity is not acquired if the woman emits her seed during coitus and the man does not emit his ('Unde dic. do. gemi. in loco praedic. quod si mulier emiserit semen in concubitu et vir non affinitas per hoc non contrahitur'), in Giovanni d'Andrea, Johann von Breitenbach and Stephan Gerdt, *Lectura super arboribus consanguinitatis* (Lipsia, 1508), s. f.

The Scholastic Rationalization

Even if *Non debet* implied the enforcement of a new principle, decretalists did not invoke an underlying *ratio* to explain the legal innovations[17]. From this perspective, they reflected on how the new rules would affect marriages consummated before the council, on the impact of the removal of second- and third-genus affinities on the *publicae honestatis iustitiae* impediment still in force, or on how the *arbor affinitatis* would be reconfigured[18]. If we want to find a more developed explanation for these legal changes, we must turn to other kinds of sources. In fact, it is among theologians where it is possible to find a rational deployment that sustains the new regime. It was among them that the principle of 'affinity does not beget affinity' was formulated and inserted into an interesting reflection on the modes by which entities come into being. Here the *sedes materiae* was a text by Peter Lombard, d. 41 from Book 4 of his *Sentences*, which in fact deals with affinity.

Two considerable developments can be found in the commentaries of Bonaventure and Thomas Aquinas regarding the question of affinity begetting affinity[19]. In his commentary on *Sent.* 4.41.2, Bonaventure makes use of the division between what exists *per se* and what exists *per accidens*. In this scheme, what is not an *ens per se* (a being existing through itself) lacks the ability to multiply and spread. That is why

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17 Thus we find in Giovanni d'Andrea's *Lectura arboris affinitatis* that "inter consanguineos viri et mulieris nulla est affinitas. Unde duo fratres contrahunt cum duabus sororibus: pater et filius cum matre et filia. Sed est affinitas inter consanguineos mulieris et ipsum virum, et consanguineos viri et ipsam mulierem" ('between the husband's consanguineous relatives and the wife's ones there is no affinity. Hence, two brothers get married with two sisters, father and son with mother and daughter. But there is affinity between the wife's consanguineous relatives and the husband, and between the husband's consanguineous relatives and the wife'), in *Lectura super arboribus consanguinitatis*, cit., s/f. His text deals with several situations resolved by expressions like 'Olim non poterat [...] Hodie vero potest'. Similarly, in *Summa Aurea* (Venetiis: apud Jacobum Vitalem, 1574), lib. 4, col. 1359, Henry of Segusio states that there are three genus of affinity but only one forbidden 'nowadays' ('quot sunt genera affinitatis. Tria, sed unum tamen hodie habet prohibitionem').

18 On the *publicae honestatis iustitiae* impediment, see the definition offered by Albert the Great in his commentary on the *Sentences* (IV, d.41, a.7), *Opera omnia* (Lugduni, 1651), t. 16, p. 782: "publicae honestatis iustitia est propinquitas ex sponsalibus proveniens, robur trahens ab Ecclesiae institutione propter eius honestatem" ('the justice of public honesty is a relationship arising out of betrothal, and derives its force from ecclesiastical institution by reason of its honesty'). Also see Johannes Teutonicus, *Apparatus in Concilium Quartum Lateranense*, in *Constitutiones Concilii quarti Lateranensis*, cit., p. 257. On the relations between betrothal and the *publicae honestatis* impediment, see Ch. Donahue Jr., *Law, Marriage, and Society in the Later Middle Ages* (Cambridge: Cambridge University Press, 2007), p. 31. On the modifications of the *arbor affinitatis*, for example see Vincentius Hispanus, *Apparatus in Concilium Quartum Lateranense*, in *Constitutiones Concilii quarti Lateranensis*, cit., p. 360.

19 Other commentators dwell upon the same question. For instance, Richard of Middleton, *Commentum super quarto libro Sententiarum* (Venetiis: Christophorus Arnoldus, c. 1476-78), *ad* d. 41, p. 498, formulates a simplistic argument when he rejects the idea of affinity begetting affinity because *Non debet* removed second- and third-genus affinities: if affinity caused affinity, then they would still be in force. Hence, affinity did not generate affinity ('si affinitas causaretur ex affinitate. adhuc remanerent duo affinitatis genera. Ergo affinitas ex affinitate non causatur').

affinity does not generate affinity, as it is considered a "vinculum per accidens" (that is, a relation or bond existing by way of something accidental), unlike consanguinity (which produce a bond or relation that exists through their very nature)[20]. Additionally, since it lacks generative power and it acts *per accidens*, affinity is excluded from the rule of similarity between what generates and what is generated; this principle applies only to what is true *per se* ("quod verum est per se"), and Bonaventure illustrates his argument with a comparison between the generation of lepers and that of one-armed men[21].

In his response to the first *questiuncula* of his commentary to *Sent.* 4.41.1, Thomas Aquinas takes the notion of two ways of natural communication from Aritotle's *Ethics* (VIII, 12). The first is the one provoked by the propagation of the flesh; the second comes from the conjunction ordered to the propagation of the flesh. Both differed in a crucial point. The person related to another by carnal propagation (like a son to his father) shares the same "root" (though in a different degree) and the same kind of bond (consanguinity). On the contrary, the person joined by the carnal act does not share the same root but is rather *quasi extrinsecus adjuncta* ('joined as if from the outside') through a bond of another kind (affinity)[22].

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20 "Vinculum affinitatis est vinculum per accidens. Vinculum consanguinitatis est vinculum per se: et quoniam omne per accidens necessario habet reduci ad per se: hinc est, quod affinitas necessario praesupponit consanguinitatem, et superaddit commixtionem. et ex has duobus surgit: quia ergo illud quod est per accidens, non habet virtutem multiplicandi, et diffundendi se, nisi per illud, quod est ens per se: hinc est, quod diffusio et descensus affinitatis secundum veritatem attenditur a parte consanguinitatis solum: non a parte commixtionis, quantum est de natura vinculi [...] Et ita dicendum, quod secundum veritatem, et secundum tempus praesens affinitas non generet affinitatem" ("The affinity bond is a bond *per accidens*. The consanguinity bond is a bond *per se*: and as long as all that is *per accidens* must be reduced to what is *per se*, it is then evident that affinity necessarily presupposes consanguinity and it overlays intercourse, and it arises from them both. Thus because what is *per accidens* lacks the ability to multiply and spread if it is not through what is a being *per se*, therefore diffusion and descent of affinity concern in truth only consanguinity and not intercourse, inasmuch it is in the nature of the bond [...] And so it must be stated that, in truth and in the present, affinity does not engender affinity"), q. II, *conclusio*, in *In librum III et IV Sententiarum* (Moguntiae: sumptibus Antonii Hierati, 1609), p. 456.

21 "Leprosus generat leprosum, et calculosus, calculosum, quia ibi est corruptio vis generatiuae: sed tamen mancus non necessario generat mancum, quia defectus ille non respicit generantem, secundum quod est generans. Et quia affinitas per accidens respicit aliquem, ideo non diffundit eam in alterum, nec in eum, qui propagatur, nec in eum qui carnaliter commiscetur" ("A leper generates a leper and an afflicted with calculus [generates] an afflicted with calculus, because in these cases there is corruption of the generative power. But, on the other hand, the one-armed man does not generate necessarily a one-armed man because that defect does not concern who generates according to what generates. And because affinity concerns a person *per accidens*, therefore it does not spread to another: nor in the one that spreads, nor in the one that entwines carnally"), ibidem. Also see J. Dauvillier, *Le mariage dans le droit classique de l'Église* (Paris: Recueil Sirey, 1933), p. 152.

22 "Naturalis autem communicatio est duobus modis, secundum philosophum 8 Ethic. Uno modo per carnis propagationem; alio modo per conjunctionem ad carnis propagationem ordinatam; [...] persona conjuncta alicui per carnis propagationem, sicut filius patri, fit particeps ejusdem radicis et sanguinis; unde eodem genere vinculi colligatur filius consanguineis patris quo pater conjungebatur, scilicet consanguinitate, quamvis secundum alium gradum, propter majorem distantiam a radice. Sed persona conjuncta per carnalem copulam non fit particeps ejusdem radicis,

The argument is complemented by the response to the *questiuncula* 5 where Thomas introduces the idea of a double kind of coming into being. The first one, by similitude of species, is derived from the exercise of a generative power that implies the same reproduction pattern every time the operation is repeated. Thus, a human will always generate humans[23]. On the other hand, the second one is by dissimilitude of species, an inferior modality of emanation that accordingly will generate a different thing every time it takes place. Thomas illustrates this point with a geometrical image far distant from the biological stage: generation by means of movement from points to bodies through lines and planes. Affinity operates by dissimilitude as it is incapable of an act of the generative power. As an equivocal agent, it generates something that will never be affinity[24].

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sed quasi extrinsecus adjuncta; et ideo ex hoc efficitur aliud genus vinculi, quod affinitas dicitur", in *Scriptum super Sententiis*, in *Divi Thomae Aquinatis Doctoris Angelici Ordinis Praedicatorum Opera*, t. 13 (Venetiis: Joseph Bettinelli, 1750), lib. 4 d. 41 q. 1 a. 1 qc. 1, p. 249: 'the natural communication exists in two ways, according to the Philosopher, in *Ethics* VIII. The first one is through the propagation of the flesh; the other, through an union ordered to the propagation of the flesh; [...] the person attached to another through the propagation of the flesh, as a son to his father, participates in the same root and in the same blood; whence the son is linked to his father's consanguineous relatives by the same kind of bond as the father was linked to them, that is, by consanguinity, though to a different degree, given the greater distance to the root. But the person attached through the carnal act does not participate in the same root, but is attached as from outside. Thus another kind of bond is created, that is called affinity'.

23 "Duplex est modus quo aliquid ex alio procedit. Unus secundum quem procedit in similitudinem speciei, sicut ex homine generatur homo; alius secundum quem procedit dissimile in specie; et hic processus semper est in inferiorem speciem, ut patet in omnibus agentibus aequivoce. Primus autem modus processionis quotiescumque iteretur, semper remanet eadem species; sicut si ex homine generetur homo per actum generativae virtutis, ex hoc quoque generabitur homo, et sic deinceps" ('there is a double way for something to come from other thing: the first one depends on whether it comes by similitude of species, as a man is engendered from a man; the other one, depends on whether it comes by dissimilitude of species and this emanation always exist in a inferior species, as it happens with all equivocal agents. And in the first mode of emanation the same species always remains, every time it takes place, as if a man is engendered from a man by an act of the generative power, and so on'), in *Scriptum super Sententiis*, cit., p. 251.

24 "Secundus autem modus, sicut in primo facit aliam speciem, ita quotiescumque iteratur, aliam speciem facit; ut si ex puncto per motum procedit linea, non punctus, quia punctus motus lineam facit; ex linea linealiter mota non procedit linea, sed superficies; et ex superficie corpus; et ulterius per talem modum processus aliquis esse non potest. Invenimus autem in processu attinentiae duos modos, quibus vinculum hujusmodi causatur. Unus per carnis propagationem; et hic facit semper eamdem speciem attinentiae: alius per matrimonialem conjunctionem; et hic facit aliam speciem in principio; sicut patet quod conjuncta matrimonialiter consanguineo non fit consanguinea, sed affinis. Unde, etsi iste modus procedendi iteretur, non erit affinitas, sed aliud attinentiae genus" ("But the second way, while it makes another species in the first place, it also makes another species every time it takes place, as when a line emanates from a point by movement, but not a point, because the movement of the point makes a line; of a line moved in a linear way, a line does not emanate but a surface; and of a surface [emanates] a body, and there cannot exist beyond that another mode of emanation. And we find in the emanation two modes of relation, by which a bond of this nature is caused. The first one through propagation of the flesh: this one always produces the same kind of relation; the other one through the conjugal union: this one gives another species in its principle, as it is clear that the one who is joined by marriage to a consanguineous relative does not

Thus, Bonaventure and Thomas present arguments that are different though homologous in a certain sense. Besides, and as a logical consequence of their formulations, both agree on considering that second- and third-genus affinities were not strictly affinity; rather, their previous prohibition was founded on the *publicae honestatis iustitiae* impediment[25]. This reflection on the different kinds of coming into being places affinity in the context of an imagery that excludes natural or biological reproduction. From a formal perspective, it is possible to visualize two different scenarios on the basis of these texts. The first one is linked to nature and to the propagation of the flesh. The second one is conceived as artificial and is depicted as an intervention that is applied to the first scenario as if "from the outside".

Peter Paludanus follows Thomas Aquinas's scheme in his own commentary on the *Sentences*. But in some way Peter gives it a twist when he emphasizes the bond between *unitas carnis* and the fact that the relation produced by it is of another kind, precisely because it is *extrinsecus adiuncta* ('joined from the outside'). Man and woman form one body in the sexual act, but this does not happen "simply" but rather as a result of an extrinsic operation[26].

Homologous Formulae

The opposition between the propagation of the flesh or natural reproduction (*carnis propagatio*) and affinity *quasi extrinsecus adjuncta*, as well as Bonaventure's distinction between what exists *per se* and what *per accidens*, should be analysed in relation to those other homologous *formulae* in the medieval learned milieu mentioned at the beginning of this paper.

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become consanguineous but affine. Even if this mode of emanation is repeated, there will not be affinity, but another type of relation'), ibidem. In the sixteenth century, Domingo de Soto resumes the Aristotelian argument of Thomas on the two kinds of coming into being, by similitude and dissimilitude, and the equivocal and inequivocal agents. Thus he compares humans that generate humans (unequivocal cause, generative power) to the Sun. Cf. *Commentariorum in IV Sententiarum* (Salamanca: Andrea de Portonaris, 1560), vol. II, *ad* d. 41, p. 350.

25 Thus, Bonaventure, in *In librum III et IV Sententiarum*, cit., p. 456: "et secundum hunc modum fuerunt antiquitus secundum genus affinitatis, et tertium, quae magis pertinebant ad publicae iustitiam honestatis, quam ad affinitatem" ('and according to this way there were formerly a second affinity genus and a third one which pertained more to the justice of public honesty than to affinity'). Also Thomas in *Scriptum super sententiis*, cit., p. 251.

26 Peter Paludanus, *Scriptum in librum quartum sententiarum* (Venetiis: Bonetus Locatellus, 1493), *ad* d. 41, p. 188: 'eo modo quo uxor est aliquo modo unum corpus cum viro: sed quia non simpliciter unum cum eo sed quasi ab extrinseco adiuncta: imo quicumque attinet viro attinet uxori in eodem gradu. Sed quia ab extrinseco adiuncta: ideo attinet ei alio genere attinentie: quia consanguinei viri sunt affines uxoris' ('Likewise the wife is in a way one body with the husband but because she [is] not simply one with him but as if attached from the outside, certainly whoever is linked to the husband is linked to the wife in the same degree. But because [she is] attached from the outside, therefore he is linked to her in another kind of relation because the consanguineous relatives of the husband are affines of the wife').

One of them, *fictio non parit fictionem* ('a fiction does not beget a fiction'), originated in a restrictive theory of fiction combinations in medieval law. In fact, ancient Roman law had widely allowed the possibilities of combining fictions and presumptions as well as of deriving one fiction from another. But in the twelfth century with the recovery of Roman texts, these fictional operations collided with the concept of nature as God's "intangible" creation[27]. At this point it is necessary to remember the particular operational modalities of the fiction of law, which differentiate it from other types of legal artifice like presumption. Presumption works on the uncertainty of truth. Founded on a reference to a possible reality, it eliminates any doubt that blocks a decision (Albertus Gandinus: "presumptio est super incertis, et sic coniecturis opus est"[28]). On the contrary, fiction of law turns the certainty of falsehood into truth and hence bears no relation with a substratum of reality (Gandinus: "fictio vero est super certis, ut quando ius scit unum esse et fingitur aliud")[29]. Fiction operates precisely by working against nature (for example, pretending that what exists does not, making one thing out of two, considering what never took place as a fact and vice versa, etc.)[30].

Medieval jurists applied an idea of nature different from that of Roman law. This can be seen in the expression *Natura id est Deus* ('Nature, that is to say, God') that appears in the Ordinary Gloss to *Decretum Gratiani*[31]. Ancient Romans called "nature" a first stage of juridical construction in comparison with a second one (for

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27 See Y. Thomas, 'Les artifices de la vérité en droit commun médiéval', in *L'Homme*, 3-4, n° 175-76 (2005), pp. 113-30, p. 113.

28 'Presumption is about uncertain things and therefore there is need of conjecture', *Tractatus de Maleficiis*, in *Albertus Gandinus und das Strafrecht der Scholastik*, ed. H. Kantorowicz (Berlin & Leipzig: J. Guttentag, 1926), p. 81. As an example, Bartolus de Saxoferrato recommends the use of the presumption of similarity between parents and sons in the context of the factional struggle of Italian political life of the time. In his *Tractatus de Guelphis & Gebellinis* poses that such presumption (authorized by Cod. 9.8.5) may be used as a way of proof in case of doubt about political fidelities. Cf. *Consilia, quaestiones et tractatus* (Venetiis, 1590), p. 151. On the medieval regime of presumptions, see A. Fiori, 'Praesumptio violenta o iuris et de iure? Qualche annotazione sul contributo canonistico alla teoria delle presunzioni', *Der Einfluss der Kanonistik auf die europäische Rechtskultur. 1. Zivil- und Zivilprozessrecht*, ed. by O. Condorelli and others (Köln-Weimar-Wien: Böhlau, 2009), pp. 75-106.

29 'In truth fiction is about true things, like when the Law knows what one thing is and pretends it is another', in *Tractatus de Maleficiis*, cit., p. 81. An example of this artifice is the fiction of civil death, established by law in certain cases like the entry into monastic life or deportation. By this device, living people were considered dead for some purposes like inheritance, parental authority, the right to sue or testify, etc. See for instance *Partidas* IV.18.2, cit., p. 49: "Civil muerte es dicha, una manera que y ha de una pena, que fue establescida en las leyes, contra aquellos que fazen tal yerro, porque merescen ser judgados, o dañados, para aver la [...] E como quier que el que es deportado, non sea muerto naturalmente: tienen las leyes, que lo es quanto a la honrra, e a la nobleza e a los fechos deste mundo".

30 Its hallmark is the formulation of a reality operating in a completely artificial way. In the words of Yan Thomas, fiction "transgresse, pour le fonder autrement, l'ordre même de la nature des choses", in 'Les artifices de la vérité en droit commun médiéval', cit., p. 129. On the medieval regime of fictionality, also see Y. Thomas, 'Fictio legis. L'empire de la fiction romaine et ses limites médiévales', in *Droits. Revue française de théorie juridique* 21 (1995), pp. 17-63, and M. Bettetini, *Figure di verità: la finzione nel Medioevo occidentale* (Torino: Einaudi, 2004).

31 See B. Tierney, '*Natura id est Deus*: A Case of Juristic Pantheism?', in *Journal of the History of Ideas* 24 (1963), pp. 307-22.

example, kinship in comparison with adoption). Medieval jurists, however, saw in nature a limit to juridical operations according to the due respect for God's creation, in which artificial things could not reproduce by themselves. That is why they restricted the use of artifice, banning the laying of one level on top of another. Only one step of fictional intervention was admitted. This inhibited the possibility of deriving a fiction from another or of laying one over another. This medieval elaboration clearly gained widespread support at the time, and has even reached modern law with the principle "no fiction on fiction"[32]. This is a recurring matter among glossators and commentators of Roman law, especially at the beginning of the fourteenth century when a theory of fictions of law was developed[33].

The relations are also clear regarding the second expression of our corpus, *pecunia pecuniam non parit* ('money does not beget money'). Based on Aristotelian writings, this adage represented one of the many arguments that medieval theologians used to support the scholastic condemnation of usury. The thesis of the sterility of money seemed to match this framework that admitted only one level of artificial intervention forcing nature. Churchmen like Basil and Ambrose took from Aristotle a biological metaphor that envisioned the charging of interest as an unnatural generation. Canon law also took up this idea, as is seen in the *Decretum Gratiani*. Unlike the first civilian jurists, most canonists condemned usury using the idea of the *fructificatio contra naturam*, a bearing of fruit against nature (but not all of them; some canonists even emphatically disagreed with this idea, as Carlo Gamba has proved[34]).

The artificiality of money is a *topos* among the scholastics that dealt with this question, mainly in its contrast with natural riches. For example, Nicholas Oresme defined *pecunie* as *artificiales diuicie* ('artifical riches'): money was conceived as "instrumentum permutandi ad inuicem naturales diuicias, quibus de per se subuenitur humane necessitati"[35]. It is worth noting that the comparison between artificial and natural riches could include expressions that we have already pointed out elsewhere in the artifice/nature relation as in Bonaventure and his distinction *per se/per accidens*.

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32 See Thomas, 'Les artifices de la vérité en droit commun médiéval', cit., pp. 118-19, and I. Maclean, 'Legal Fictions and Fictional Entities in Renaissance Jurisprudence', in *The Journal of Legal History* 20.3 (1999), pp. 1-24, p. 12.

33 We know about the formulation of the principle "fictio fictionis esse non potest, sicut servitus servitutis" ('there can be no fiction of a fiction, just as there can be no slavery of slavery') by the jurist William of Cuneo through Bartolus de Saxoferrato, *Commentaria in primam Digesti noui partem* (Venetiis: apud Iuntas, 1602), *ad* Dig. 41.3.15.69, fol. 96. In the same way, Cino da Pistoia (*ad* Cod. 8.50.1) noted that "fictio non generat fictionem"; Baldus de Ubaldis (*ad* Dig. 23.3.70) that "duae fictiones non possunt concurrere"; Oldradus de Ponte (cons. 79) that "duo specialia in eodem subiecto non possunt", and so on. See Baldus de Ubaldis, *In secundam Digesti Veteris partem commentaria* (Venetiis, 1586), p. 192; Oldradus de Ponte, *Consilia et quaestiones* (Basilea: Eberhard Frommolt, 1481), p. 147; the passage by Cino da Pistoia is quoted in Thomas, 'Les artifices de la vérité en droit commun médiéval', cit., p. 119. These elaborations were studied by Yan Thomas in his several works on medieval fiction.

34 See C. Gamba, *Licita usura* (Roma: Viella, 2003).

35 'The instrument for exchanging the natural riches which of themselves minister to human need', in N. Oresme, *The De Moneta of Nicholas Oresme and English Mint Documents*, ed. Ch. Johnson (London: Thomas Nelson and Sons Ltd, 1956), pp. 4-5.

John Buridan, for instance, differentiated between riches *per accidens* and natural riches that are true riches *per se*, given that they suffice for life's necessities[36].

It is in the theological field, among authors revealing Aristotelian influences, where we find most of the references to barren money. Thomas Aquinas, for example, in II^{e}-II q. 61 a. 3 of his *Summa theologiae* described money as one of the things 'that bear no fruit'[37]; in II^{e}-II q. 78 a. 1 he quoted Aristotle stating that usury 'is exceedingly unnatural'[38]; and in *Sententia libri politicorum*, 1, lect. 8 he again formulated the thesis of sterility[39]. Here it is not relevant whether this argument is central or not in the broader context of the scholastic condemnation of usury[40]. What is important for us is that such infertility fitted a cosmology where artificial entities could not behave like living beings, which were gifted with generative virtue. Hence, the fact that usury often appeared connected with sexuality *contra naturam* in areas like law (in Panormitanus, for instance), literature (Dante's *Commedia*), or medieval painting (as in the work of Taddeo di Bartolo at the Collegiata di San Gimignano). All these examples linked usurers with sodomites[41].

Divergent Paths

Having stated the homology between the three *formulae*, we must recognize a main distinction between them. While the restrictive theory of fiction took hold

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36 J. Buridan, *Questiones Johannis Buridani super octo libros politicorum Aristotelis* (Paris, 1513), lib. 1 q. 11, fol. 15v.

37 ST II^{e}-II q.61 a.3: "Et si quidem gratis concedit usum rei, vocatur ususfructus in rebus quae aliquid fructificant; vel simpliciter mutuum seu accommodatum in rebus quae non fructificant, sicut sunt denarii, vasa et huiusmodi" ('If he grants the use of a thing gratuitously, it is called "usufruct" in things that bear fruit; and simply "borrowing" or "loan" in things that bear no fruit, such as money, pottery, etc.'), *Summa Theologiae*, in *Opera omnia iussu Leonis XIII P. M. edita* (Romae: Ex Typographia Polyglotta S. C. de Propaganda Fide, 1888-89), t. 4-12.

38 ST II^{e}-II q.78 a.1: "Et philosophus, naturali ratione ductus, dicit, in 1 Polit., quod *usuraria acquisitio pecuniarum est maxime praeter naturam*" ('Moreover the Philosopher, led by natural reason, says in Polit. 1 that the usurious acquisition of money is exceedingly unnatural').

39 *Sententia libri politicorum*, 1, lect. 8: "Quod autem aliquis acquirat pecuniam non ex rebus naturalibus, sed ab ipsis denariis, hoc non est secundum naturam" ('That someone acquires wealth, not from natural things but from the very *denarii*, that is not according to nature'), *Sententia libri politicorum* (Romae: Ad Sanctae Sabinae, 1971).

40 See D. Wood, *Medieval Economic Thought* (Cambridge: Cambridge University Press, 2002), pp. 84-88, and Gamba, *Licita usura*, cit.

41 Cf. Panormitanus, *Commentaria in quartum, et quintum librum decretalium* (Venetiis, 1588), *ad* X 5.31.4, fol. 71. On Dante, see S. Ravenscroft, 'Usury in the Inferno: auditing Dante's debt to the scholastics', in *Comitatus: A Journal of Medieval & Renaissance Studies* 42 (2011), pp. 89-114, pp. 97-100. See additionally L. Freinkel 'Inferno and the Poetics of Usura', in *Modern Language Notes* 107 (1992), 1, pp. 1-17; and also J. Ferrante, *The Political Vision of the Divine Comedy* (Princeton, NJ: Princeton University Press, 1993), chapter 6. Finally, on the artistic representation, see W. Fisher, 'Queer Money', in *English Literary History* 66.1 (1999), pp. 1-23. See also A. Derbes and M. Sandona, 'Barren Metal and the Fruitful Womb: The Program of Giotto's Arena Chapel in Padua', in *The Art Bulletin*, 80.2 (1998), pp. 274-91.

in western legal culture regarding fictions of law and affinity, the prohibition of money-begetting-money showed a very different tendency; it was eventually rejected. The final abandonment of the principle *pecunia pecuniam non parit* poses a logical question: why did the ban on fictional overlaying not inhibit the relaxation of the condemnation of usury, and, furthermore, why did it not discourage the allowing and regulation of the charging of interest? We can identify three types of reasons for this legalization of usury.

The first, the sociohistorical explanation, is the most widely known position and thus not worth dwelling on. This *realekonomik* vision pays attention to concrete processes (in particular, the expansion of trade from the eleventh century onwards and the growth of urban commercial capital in the Late Middle Ages) and pays little attention to legal or institutional constructions, which arguably must have either adapted or become obsolete. From that point of view, it is argued that if in practice money bore fruit, it was pointless to ignore it. It is in this way that historians posed a progressive "venialization" of the (previously serious) sin of usury during the late Middle Ages. This relaxation was based in practice on a proliferation of exceptions, the exploitation of legal and financial subterfuges, and argumentation taking advantage of discrepancies among canon law, theological postulates, and Roman law (which did not consider charging interest illegal)[42].

As the social situation changed, a plurality and heterogeneity of the arguments used in the condemnation of usury emerged. And this is the second set of reasons used to explain the relaxation and abandonment of the prohibition: the very inconsistencies of the condemnatory theory of usury. We should remember the wide variety of reasonings that converged in banning this practice; the infertility of money was not the only argument or even the most compelling one. Other arguments included the refusal of *caritas*, the perversion implied in the commercial use of a mere instrument of measure, the simoniacal sale of time, etc. Besides, usury was conceived as an unnatural practice mainly because of the separation of the concepts of possession and use in an expendable asset like money[43]. From this perspective, certain historians even deny

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42 A version of this perspective considers that the economic development generated a different social world that interpellated lawyers and theologians from other points of view; in particular, they pointed out the evident gap between the cases of the poor and desperate man who resorts to an usurer who exploits him, on the one hand, and that of the businessman who conceives credit as a working tool, on the other. See U. Santarelli, 'Il divieto delle usure da canone morale a regola giuridica. Modalità ed esiti di un "trapianto"', in RSDI 66 (1993), pp. 51-73, repr. in *Scritti in onore di Aldo d'Addario*, a cura di L. Borgia et al., II (Lecce: Conte, 1995), pp. 367-84, and now in U. Santarelli, *Ubi societas ibi ius. Scritti di storia del diritto*, II, a cura di A. Landi (Torino: Giappichelli, 2010), pp. 635-57; also in Spanish 'La prohibición de la usura, de canon moral a regla jurídica: Modalidades y éxitos de un "transplante"', in *Del ius mercatorum al derecho mercantil*, III, Seminario de Historia del Derecho Privado, Sitges, 28-30 de mayo 1992, ed. by C. Petit (Madrid: Marcial Pons, 1997), pp. 237-56; and D. Quaglioni, '*Standum canonistis*? Le usure nella dottrina civilistica medievale', in *Credito e usura fra teologia, diritto e amministrazione. Linguaggi a confronto (sec. XII-XVI)*, ed. by D. Quaglioni et al. (Roma: École Française de Rome, 2005), pp. 247-64.

43 This argument was relative, as evidenced by the custom of the loan *ad pompas* that some authors used in their analyses.

that there was a systematic prohibition of charging interest during the Middle Ages and reject a basic equivalence between usury and loan[44]. In fact, this equivalence cannot be found either in the work of Innocent III or in that of the Fourth Lateran Council[45]. Moreover, the relation between nature and artificiality regarding money got too complicated to construct a consistent condemnatory theory. When medieval authors argued the principle *pecunia pecuniam non parit*, were they talking about the sterility of metal (an inanimate object not gifted with generative power) or about the sterility of money as human artefact, as an institution? In fact, examples of both possibilities can be found. Thus, in the *Decretum Gratiani* D.47 c.8 it is said that usury is an aberrant technique by which gold is born from gold: "Interdum etiam usurae arte nequissima ex ipso auro aurum nascitur". By contrast, for Konrad von Megenberg two hundred years later, usurers "destestabile committunt et contra naturam, quoniam contra natura rerum artificalium est, ut a se ipsis multiplicentur. Sed hoc est proprium rerum naturalium, ut se mutuo permisceant et generative multiplicentur"[46].

These two types of reasons have already been dealt with in specialized historiography. I would like to formulate a third perspective to explain why the principle *pecunia pecuniam non parit* did not take hold in western law according to the ban on fictional overlaying. This stance rests upon the limits of the fictionalization of money in the medieval world. It is crucial to bear in mind the relevance of the metallic coinage system. Most medieval authors agreed in conceiving money as an artificial system established by an act of law that enabled people to equate incommensurable assets. In the same way, numerous historians have highlighted the acculturation produced by the monetization of social life during the Late Middle Ages; they have studied its effects on the generalization of a proportionality system and the development of formal and abstract thinking among European populations[47]. However, money

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44 For these historians, the condemnation of usury must be understood in terms of a non-public economy governed by individual relationships and excluded from the *ecclesia*'s network of exchanges. This condemnation could coexist with the legitimation of urban lending activity. Giacomo Todeschini stands out in this group. Among other works, see 'La razionalità monetaria cristiana fra polemica antisimoniaca e polemica antiusuraria: XII-XIV secolo', in *Moneda y monedas en la Europa medieval, siglos XII-XV*. Actas de la XXVI Semana de Estudios Medievales de Estella, 19 al 23 de julio de 1999 (Pamplona: Gobierno de Navarra, 2000), pp. 369-86.

45 See J. Moore, 'Pope Innocent III and Usury', in *Pope, Church and City. Essays in Honour of Brenda M. Bolton*, ed. by F. Andrews et al. (Leiden & Boston: Brill, 2004), pp. 59-75.

46 K. von Megenberg, *Yconomica*, ed. S. Krüger, (Stuttgart: A. Hiersemann, 1992, MGH SS 10, Staatsschriften des späteren Mittelalters 3), p. 348: "[they] commit something despicable and against nature because it is against nature that artificial things multiply by themselves. This is the distinctive feature of natural things and that is why they join together and multiply in a generative way". Finally, to complete the fragility of the condemnation of usury based on the sterility of money, it should be recalled that usury could be committed without involving money: the wrongful request of a *superabundantia* could involve "natural" assets gifted with a generative power, like cattle, as we can see in Giovanni d'Andrea.

47 See for instance A. Murray, *Reason and Society in the Middle Ages* (Oxford: Clarendon Press, 1978); S. Piron, 'Temps, mesure et monnaie', in *La Rationalisation du temps aux XIII^e et XIV^e siècles, musique et mentalités*. Actes des rencontres de Royaumont, 1-3 juillet 1991, ed. by M. Pérès (Grâne: Créaphis, 1998), pp. 48-63; J. Kaye, *Economy and Nature in the Fourteenth Century: Money, Market Exchange,*

in itself never became independent from its material support. Even the double system of real metallic money and account currency found its intersection points: the abstract character of account currency could become questionable in the case of the *denarius*, which referred both to an account currency and to a material coin. Money thus had a double condition as instrument of measure and as a commodity. For medieval men, as it is said by Dominique Ancelet-Netter, the value of money could not be but intrinsic[48].

In this sense, the success of metallism is not only theoretical but also practical. In fact, the late medieval monetary expansion resulted in the increase of the circulation of bullion used for important payments in local and international trade during the fourteenth century[49]. In practice, money did not completely replace metal as a bearer of value. From a doctrinal point of view, it is essential to take into consideration the opposition between two schools: the "conventionalist" one (with Thomas Aquinas as its main exponent) and the "metallist" one (where John Buridan and Nicholas Oresme stood out)[50]. One might think that the final success of the metallist position and its effects opposed to fictionalization can be counted among the reasons for the abandonment of the thesis of infertility.

After all, the double nature of money implies a complex and multiple legal status: on the one hand, it is a fiction of the sovereign (and authors remember Aristotle's observation that *nómisma* comes from *nomos*: money is primarily an institution); on the other hand, it is also a commodity whose commercial value fluctuates according to its intrinsic value as precious metal[51]. In any case, we can hypothesize that the legal

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and the Emergence of Scientific Thought (New York: Cambridge University Press, 2004). On other developments regarding abstraction simultaneous to the monetary one, see A. Boureau, 'Droit naturel et abstraction judiciaire. Hypothèses sur la nature du droit médiéval', in *Annales. H.S.S.* 57.6 (2002), pp. 1463-88.

48 See D. Ancelet-Netter, *La dette, la dime et le denier : une analyse sémantique du vocabulaire économique et financier au Moyen Âge* (Villeneuve d'Asq: Presses Universitaires du Septentrion, 2010, p. 91).

49 See J. Le Goff, *Le Moyen Âge et l'argent* (Paris: Perrin, 2010), p. 72.

50 Both theories coincide on the distinction between natural and artificial riches but differences arise when they make reference to the relation between money and its metallic support. For Thomas, when a metal-commodity turns into money, it becomes a mere instrument of measurement; as a result of human willingness, every link between money and gold or silver is broken. For Buridan and Oresme, the Prince's intervention is necessary for the institution of money, but this does not mean that the metallic support ceases to matter; when natural riches are chosen to be used as money, it is not because of an arbitrary decision of the authority but because they already bore certain necessary qualities to act as money, and certain value given by the material support which was in itself an object that meets the needs of men. See A. Lapidus, 'Metal, money, and the prince: John Buridan and Nicholas Oresme after Thomas Aquinas', in *History of Political Economy* 29.1 (1997), pp. 21-53.

51 We must note the difficulty in understanding the legal status of money in Roman law and *ius commune*. In this respect legal historians present different interpretations. Thus Nicolet remarks on the Aristotelian roots of Dig. 18.1.1 (Paulus), which deals with the origin of money and emphasizes its conventional and official nature. But Nicolet also says that Paulus's text reflects the fact that Aristotle proposed several definitions of money admitting, for instance, that the material support has value in itself and that money is a commodity with fluctuating value. On the contrary, by linking Dig. 18.1.1 with Dig. 46.1.42 where it is explicitly said that money is not a commodity, Marotta says that Paulus agrees with Aristotle in considering that the material support has nothing to do with money;

artifice behind money in this metallic system did not seem to belong in the field of fiction of law but rather in that of presumption. If the legal *fictio* constitutes itself by operating against truth (*contra veritatem*) and metal has a value *per se*, it is difficult to consider money as a pure fiction (unlike the regime of fiat money where its fictional character is evident). In the metallic system, the discordance between currency and weight is possible and relatively common due to political factors (which no author denies, as money is instituted by the prince or by the *res publica*). It is ultimately reasonable, however, to think that the concordance between them is eventually possible, just like in modern law where the presumption holding that nobody is thought to be ignorant of the law supposes the possibility that in fact somebody knows it[52]. Presumption works on a substratum of reality while the fiction of law operates against it. We might think that these factors, which sabotaged the fictionalization of money in the cultural universe of the Middle Ages, also enabled an explanation about the ephemeral character of the prohibition of money engendering money (a position that, as we know, was destined to be ridiculed over the centuries).

A very different fictional treatment altogether is that regarding the principle *affinitas non parit affinitatem*. Canon law could conceive the "extrinsic" operation that made the spouses "one flesh" in terms of a fiction of law. The relation is explicit in the *Ordinary Gloss* on the *Decretum Gratiani* for which *unitas carnis* was precisely produced by a fiction of law: "fictione iuris vir et uxor una caro sunt, vel erunt duo in carne sua"[53]. In the same way, in his commentary on Dig. 23.2.57, Baldus de Ubaldis explained the *fictio unitiva* with the example of the corporeal unity of the spouses and others, such as that uniting father and son in a same person[54].

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money is established as measure of value according to proportionality only. Finally, for Thomas legal dogmatics wrongly addressed the question from an ontological perspective (asking what a thing is in Roman law in the same way as we ask what money is) instead of stressing the essentially procedural nature of things; things are defined by cases and legal qualifications. Hence, Thomas recommends avoiding more "obviously economic" references and choosing alternative approaches. Cf. C. Nicolet, 'Pline, le juriste Paul et la théorie de la monnaie', in *Censeurs et publicains. Économie et fiscalité dans la Rome Antique* (Paris: Fayard, 2000), pp. 123-45; V. Marotta, 'Origine e natura della moneta in un testo di Paolo D. 18.1.1 (33 Ad Edictum)', in *Dogmengeschichte und historische Individualität der römischen Juristen. Storia dei dogmi e individualità storica dei giuristi romani.* Atti del Seminario internazionale (Montepulciano 14-17 giugno 2011), ed. by Chr. Baldus et al. (Trento: Università degli Studi di Trento, 2012), pp. 161-205, p. 181; and Y. Thomas, 'La valeur des choses. Le droit romain hors la religion', in *Annales. H.S.S.*, 57.6 (2002), pp. 1431-62.

52 See Thomas, 'Les artifices de la vérité en droit commun médiéval', cit., p. 128.

53 Glossa ordinaria, *Gratiani Decretum*, cit., *ad* C.27 q.2 c.19 *ad v. una*, col. 1997: 'by a fiction of law, husband and wife are one flesh or they will be two in their flesh'. See L. Mayali, '«*Duo erunt in carne una*» and the Medieval Canonists', in *Iuris Historia: Liber Amicorum Gero Dolezalek*, ed. by V. Colli and E. Conte (Berkeley: The Robbins Collection, 2008), pp. 161-75, pp. 173-74; and Madero, 'De la *unitas carnis* a la *commixtio seminum*', cit., p. 147.

54 Baldus de Ubaldis, *In secundam Digesti veteris partem Commentaria*, cit., *ad* Dig. 23.2.57, fol. 187: "Item est fictio vnitiua; quia duos dies fingit vnum, de ver. sig. cum bissextus, quae patres et filios fingit vnum corpus. C. de impu. & aliis subst. l. fin. quae virum & uxorem fingit unam carnem" ('Also there exists the unitive fiction because it pretends that two days are one -Dig. 50.16.98-, it pretends that fathers and sons are one body -Cod. 6.26.11.1- and husband and wife are one flesh').

In this respect Laurent Mayali has studied two interpretations of the *unitas carnis* of Genesis 2:24 corresponding to two different but complementary levels of analysis in twelfth-century canon law[55]. On the one hand, he identified a practical level in which the biblical text was read in terms of concrete sexual intercourse, the basic purpose of which was reproduction. This corresponded to the central role that sexual union had in the canonical legislation on marriage. On the other hand, he described a conceptual level in which Adam's words were understood as an expression of a fiction of law, a position that could have been more advantageous. In effect, according to the first interpretation, problems appeared because it underlined a merely factual aspect of *unitas carnis*: as this image also served as a platform for ecclesiological elaborations (the union of Christ and the Church, the community of the faithful, etc.), the implications of this kind of rhetoric could be embarrassing. For instance, this type of rhetoric results in an ecclesiology founded on sexual unions happening both inside and outside legitimate wedlock. Resorting to a fiction of law allowed canonists to surpass the limits of *imitatio naturae* while attributing a key function to the artefacts of law in creation. From this point of view, the constitution of *una caro* and the establishment of an affinity are two sides of the same fictional operation. Conceived as a blood union, sexual intercourse simultaneously turns the spouses into "one flesh" and the consanguineous into affines. Hence, many passages insist on indicating that spouses were not affines with each other but the "cause of affinity" itself[56].

In conclusion, if affinity was produced by a fiction of law (while consanguinity was thought to be the result of a "natural" propagation), turning the affines of affines also into affines would imply the presence of a second level of artificiality. As we have seen, that was incompatible with the rules of fictional construction in medieval law, which admitted only one stage of institutional operation over "nature". Finally, the principle introduced by c.50 of the Fourth Lateran Council, which held that affinity does not beget affinity, implied relevant modifications to canon law. Linking this principle with other *formulae* of the medieval learned world can allow scholars to detect a common paradigm about the ties between nature and the artifices of institutions, on the one hand, and on the limits of fictional construction in the Middle Ages, on the other.

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55 See Mayali, '*Duo erunt in carne una* and the medieval canonists', cit.

56 For instance, the *Declaratio arboris affinitatis* later attached to copies of Gratian's *Decretum*: "quia inter virum et mulierem non contrahitur affinitas, sed ipsi sunt affinitatis causa" ('because affinity is not contracted between husband and wife, but they are the cause of affinity'), *Corpus Iuris Canonici*, vol. 1, ed. by E. Friedberg (Leipzig: Tauchnitz, 1879 [repr. Graz, 1956]), col. 1434. Also cf. Guido de Baysio in his commentary to C.35 qq.2-3 c.3, *Rosarium decretorum* (Venetiis: Franciscus Moneliensis, 1481), p. 769.

CHRISTINE OAKLAND

The Legacy of Canon 62 in the Diocese of Sens in Northern France (1215-1469)

In a letter dated 14 March 1212, Pope Innocent III (1198-1216) addressed his agents in France, the abbot and prior of Saint-Victor in Paris and canon Master Cornutus, instructing them to investigate the complaint by the monks of Sainte-Colombe-lès-Sens that preachers from the priory of Saint-Loup-de-Naud near Provins, were falsely declaring far and wide that they held both the head and certain limbs of St Loup, the seventh-century bishop of Sens[1]. As, according to the Pope, deceit was not to be tolerated under the veil of piety, the abbot, prior and canon in Paris were ordered to warn the abbot and monks of Saint-Pierre-le-Vif to desist from this audacity and, if found guilty, were then to apply the appropriate ecclesiastical censure without right of appeal[2]. "For", wrote the Pope, "it ill accords with either their well-being or their reputation that they should obtain alms by the preaching of lies"[3].

This incident illustrates one of the consequences of the popularity of saints in the Middle Ages, namely the multiplication of their cults and the mishandling of their relics. Many voices inside and outside the Church had raised their concerns; there were various attempts to curb the abuses, to no avail. It may well have been, however, the quarrel between the monks of Sainte-Colombe and those of Saint-Pierre-le-Vif over the body of St Loup that moved Innocent to address the issue once and for all, not only of the use of relics but also of relic quests and those involved in such enterprises. A few years later, at the Fourth Lateran Council in November 1215, he sought to regulate in this arena, concerned as he was with the well-being and the reputation of the Christian Church. The resulting decree, c.62 *Cum ex eo*, dealt

1 The abbot of Saint-Victor is not named. PL 216, cols 549-50; C. R. Cheney, 'The Letters of Pope Innocent III', in Idem, *Medieval Texts and Studies* (Oxford: Clarendon Press, 1973), pp. 16-38, pp. 17-18. He was most probably John the Teuton, abbot of Saint-Victor (1203-29), according to Jessalyn Bird, 'The Wheat and the Tares: Peter the Chanter's Circle and the *Fama*-based Inquest against Heresy and Criminal Sins, c.1198-c.1235', in *Proceedings Washington*, pp. 763-856, p. 817.

2 Pope Innocent addressed the responsibility to Saint-Pierre-le-Vif, rather than their dependent priory, Saint-Loup-de-Naud.

3 Cheney, 'The Letters of Pope Innocent III', cit., p. 18.

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The Fourth Lateran Council and the Development of Canon Law and the ius commune, ed. Atria Larson and Andrea Massironi, Turnhout: Brepols, 2018 (EMI 7), pp. 187–204

10.1484/M.EMI-EB.5.116655

specifically with the enclosure of relics and their proper use directed and controlled by authorised clergy.

How effective was this constitution in stamping out abuses of saints' relics? How far were the new rules obeyed? What was achieved, and what were the main reasons for its partial failure? This article will attempt to answer these questions by looking at synodal statutes in France, particularly on the subject of relic quests, in the period running up to Lateran IV, then by explaining the rules dictated in Lateran IV's *Cum ex eo*, and finally by determining the legacy of their implementation in the diocese of Sens in Northern France through the curious case of the quarrel between the abbeys of Sainte-Colombe, of Saint-Pierre-le-Vif and the latter's priory of Saint-Loup-de-Naud.

Before Lateran IV

From the sixth century on, holy relics were the most precious commodities for religious communities in France, all the more for their rarity, so they were frequently broken up and moved, for their own protection in troubled times, or to bless the large popular assemblies which sprung up in the tenth century, remembered as the Peace of God and the Truce of God movements[4]. Relics were used to promote the church or monastery to which they belonged, and because they attracted gifts and donations, they soon became a ready and welcome source of income for the religious. *Quêtes de reliques*, or fund raising tours with relics, became popular practices in northern France soon after 1050[5]. The relics were often travelled as part of fund raising enterprises for the benefit of the construction or repair of ecclesiastical buildings. Thanks to the accounts by Guibert de Nogent (c.1060-c.1125) and Heriman de Tournai (c.1090-c.1147), we know of the example of the canons of Laon who travelled two summers in a row in 1112 and 1113 in order to seek funds to help with the reconstruction of their partly burnt cathedral building. The second summer, they toured northern France, crossed the channel and travelled as far as Glastonbury in southwest England[6]. Guibert de Nogent, also one of the first recorded critics of relic quests, bemoaned that, "in the

4 H. E. J. Cowdrey, 'The Peace and Truce of God in the Eleventh Century', in *Past and Present* 46 (1970), pp. 42-67; *Essays on the Peace of God: The Church and the People in Eleventh Century France*, ed. by T. Head and R. Landes, special edition of *Historical Reflections/Réflexions historiques* 14 (1987); R. Landes, 'Peace of God', in *Medieval France. An Encyclopaedia*, ed. by W. Kibbler and G. A. Zinn (New York & London: Garland Publishing, 1995, Garland encyclopedias of the Middle Ages 2, Garland reference library of the humanities 932), pp. 713-14.

5 P. Héliot and M.-L. Chastang, 'Quêtes et voyages de reliques au profit des églises françaises du moyen-âge', in RHE 59 (1964), pp. 789-822, p. 799. The authors list the names of seventy-eight religious communities who used their relics in fund-raising tours.

6 Guibert of Nogent, *Monodies* and *On the Relics of Saints. The Autobiography and a Manifesto of a French Monk from the Time of the Crusades*, trans. and ed. by J. McAlhany and J. Rubinstein (London: Penguin Classics, 2011), pp. 150-54; A. Saint-Denis, 'Édition des sources d'histoire médiévale: Les miracles de sainte Marie de Laon d'Hériman de Tournai', in *Bulletin du centre d'études médiévales d'Auxerre, Bucema* 13 (2009), pp. 435-50.

customary way, such as it is, for collecting money, they began to carry around the reliquaries and the saints' relics"[7]. Such tours were well established by the twelfth century, as the phrase, "according to the customs of the times", betrays[8]. They served other purposes, such as spreading the fame of a local saint or strengthening relationships between communities. Nevertheless, relic quests also attracted criticisms because of abuses such as presenting dubious relics, using uneducated lay servants to preach, or simply for using holy relics for venal gain.

Pope Innocent's actions against abuses by relic *questuarii* had a precedent in the Council of Poitiers (1100), which decided that clerics on relic tours would not be permitted to preach[9]. There is no mention of the problem at the Third Lateran Council in 1179, presumably because it had not yet attracted papal attention. However, by the year 1200, the first complete set of synodal statutes of Eudes de Sully, bishop of Paris (1196-1208) had included an article which forbade itinerant preachers from preaching in churches and presenting relics for the faithful to venerate[10]. The task of checking their credentials was to be left to the parish clergy who would examine their letters[11]. The rule requiring episcopal permission to preach was emphasized again in the same text[12]. The Fourth Lateran Council c.62 echoed the complaints and denunciations of Peter the Chanter (d. 1197) and Robert de Courson (d. 1219), masters in Paris, who decried preachers using relics to raise funds for personal gain and for crudely displaying relics outside of reliquaries, in full public view, in order to beg. Whereas Robert wanted all usage of relics in fund-raising campaigns to stop, the Lateran decree opted for regulation of the practice[13].

The circle which gravitated around Peter the Chanter consisted of students who went on to become eloquent preachers as well as future Church leaders such as Foulques de Neuilly (d. 1202), Jacques de Vitry (d. 1240), Stephen Langton

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7 Guibert of Nogent, *Monodies*, cit., p. 150; see S. Yarrow, 'The Canons of Laon and Their Tour of England', in *Saints and their Communities. Miracles Stories in Twelfth-century England* (Oxford: Clarendon, 2006), pp. 63-99, p. 65.

8 '*...suivant la coutume des temps*', H. Bouvier, 'Histoire de Saint-Pierre-le-Vif', in *Bulletin de la société des sciences historiques et naturelles de l'Yonne* 45 (1891), pp. 5-212, p. 147.

9 "Ut sanctorum reliquias causa pecuniae et questus circumferentes ad predicationem [monaci] non admittantur", Mansi, XX, col. 1124; C.-J. Hefele, *Histoire des conciles, d'après les documents originaux*, trans. by Dom. H. Leclercq (Paris: Letouzey et Ane, 1912), V.1, p. 471; *Les Statuts synodaux français du XIII^ème^ siècle. 1. Les statuts de Paris et le synodal de l'Ouest (XIII^ème^ siècle)*, ed. and trans. by O. Pontal (Paris: BN, 1971), p. 74; P. Héliot and M.-L. Chastang, 'Quêtes et voyages de reliques au profit des églises françaises du moyen-âge', in RHE 60 (1965), p. 14.

10 Possibly as early as 1197 according to Mansi, XXII, col. 681, item 9: "non permittantur praedicatores super arcas celebrare nec pullare campanas per vicos, nec loqui in ecclesis, nec praesentare reliquias, sed tantum deferant ferendas et sacerdotes pro illis loquantur".

11 Pontal (ed.), *Les Statuts synodaux français du XIII^ème^ siècle*, cit., 1, p. 74: [c.61] "Non permittantur predicatores ... nec presentare reliquias: sed tantum deferant brevia; et sacerdotes pro illis loquantur". Héliot and Chastang, 'Quêtes et voyages de reliques' (1965), cit., p. 15.

12 Pontal (ed.), *Les Statuts synodaux français du XIII^ème^ siècle*, cit., 1, p. 76: [c.68] "Nullus recipiatur ad predicandum, nisi sit authentica persona vel ab episcopo vel archidiacono missus".

13 J. W. Baldwin, *Masters, Princes and Merchants. The Social Views of Peter the Chanter and his Circle* (Princeton: University press, 1970), 1, p. 109.

(d. 1228) and Pierre de Corbeil, later archbishop of Sens (1200-22)[14]. In 1203, Innocent III ordered Pierre de Corbeil, his former teacher, to undertake a general reform of the clergy of his province, and Eudes's article on relics may well have been enforced[15]. At the same time, another influential figure of the circle, Robert de Courson (c.1160-1219), professor at the University of Paris and also former peer of Innocent, was appointed cardinal in 1212 and entrusted with a legation to France in April or June 1213. The papal legate headed several councils where his ideas for ecclesiastical reform were later worked out in the great ecumenical council[16]. On 9 April 1213, Innocent sent out letters of convocation for such a meeting to be gathered in November 1215 "for the reform of the universal Church"[17]. In June of the same year, Robert de Courson held a provincial synod in Paris for the purpose of tightening up ecclesiastical discipline[18]. It removed the power to preach from alms seekers, whether or not they were carrying relics, unless they were authorised by a bishop, and forbade farming the fund raising (receiving *ad firmam*, an annual income from preaching sermons)[19]. In August, he travelled to Sens to appease a conflict between the abbey of Saint-Pierre and the city commune[20]. He then handed the reins over to the abbot of Saint-Pierre in Auxerre (also dean of Troyes) for him to deal with the matter, as Robert was in a rush to proceed on his journeys[21]. The rules laid out in Paris in 1213 were repeated at the Rouen synod in February 1214[22]. Robert de Courson was adamant that relics should not be peddled for money, while Peter the Chanter hesitated on the matter[23].

All in all, the early synodal statutes show that, on the eve of Lateran IV, the major concerns were about holy relics being treated without care and respect, and being used for show or for financial profit. The pope was also troubled by the spontaneous and unchecked creation of new cults of saints. For example, the cult of St Theodechilde at Sens emerged as a mark of respect for the founder princess of Saint-Pierre-le-Vif and was a localised cult; it was at best tolerated by the ecclesiastical authorities and

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14 B. Bolton, 'Faithful to Whom? Jacques de Vitry and the French Bishops', in *Revue Mabillon*, Nouvelle série 9 (t. 70) (1998), pp. 53-72, pp. 56-57.

15 Pontal (ed.), *Les Statuts synodaux français du XIII^ème siècle*, cit., I, p. LXXV; Baldwin, *Masters, Princes and Merchants*, cit., I, p. 317.

16 M. Dickson and C. Dickson, 'Le cardinal Robert de Courson: sa vie', in *Archives d'histoire doctrinale et littéraire du moyen-âge* 9 (1934), pp. 53-142, p. 61; see Baldwin, *Masters, Princes and Merchants*, cit., I, p. 20, for the list of councils which included Paris, Rouen, Bordeaux, Clermont, Montpellier and Bourges from 1213 to 1215.

17 Hefele, *Histoire des conciles*, cit., V.2, p. 1316.

18 Some texts say 1212 rather than 1213: see Dickson and Dickson, 'Le cardinal Robert de Courson', cit., p. 90.

19 Mansi, XXII, col. 821, Item 8: "ne admittantur questuaris predicatores"; Hefele, *Histoire des conciles*, cit., V.2, p. 1308-09; Mansi dated the event in 1212 while Hefele allowed both dates; Héliot and Chastang, 'Quêtes et voyages de reliques' (1965), cit., p. 15.

20 Po. 17587; Dickson and Dickson, 'Le cardinal Robert de Courson', cit., p. 140.

21 Po. 4848; Dickson and Dickson, 'Le cardinal Robert de Courson', cit., p. 91.

22 Hefele, *Histoire des conciles*, cit., V.2, p. 1316.

23 Baldwin, *Masters, Princes and Merchants*, cit., I, p. 109.

not formally recognized until the seventeenth century[24]. Similarly, the behaviour of fundraisers had to be checked for propriety and honesty. Otherwise this could lead to the faithful being misled in order to, as Pope Innocent put it, "obtain alms with the preaching of lies"[25]. He was concerned with the outward appearance as well as the message; preaching also could not be left to just anyone without checks or control. Pope Innocent III was to assemble all these disparate elements into a single regulatory constitution at the council at the Lateran in November 1215.

Constitution 62, *Cum ex eo*, of the Fourth Lateran Council

Of the seventy decrees of the council, c.62 *Cum ex eo* is the one dealing with the treatment of holy relics. It laid down clear guidelines in order to curb abuses of the veneration of saints' relics, whether they were ancient or newly discovered[26]. Innocent began by expressing his concern that the Christian religion was undermined by the lack of care and indiscriminate sale of saints' relics by a minority. He then decreed that ancient relics should not be displayed outside a reliquary for financial reward; nor should they be put up for sale. Newly discovered relics must be approved by the authority of the pope, and worshippers coming to venerate relics must not be deceived by lies or false documents. Alms collectors were denied recognition unless they possessed authentic letters from the Holy See or the diocesan bishop; even then they were expected to read only what was contained in the letters. They must be modest and discreet; they were not to frequent taverns or other unsuitable places, and they should not incur excessive and wasteful expenses, or wear the "garb of false religion"[27]. Finally, indiscriminate and excessive indulgences were forbidden. No more than one year for the dedication of a basilica, and fewer than forty days for the anniversary of the dedication, the amount was to remain constant whatever the number of bishops attending[28]. Also inserted within the body of the canon was the formulary of the letter that diocesan bishops can

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24 Geoffroy de Courlon, *Le livre des reliques de l'abbaye de Saint-Pierre-le-Vif*, ed. and trans. by G. Julliot and M. Prou (Sens: Duchemin, 1887, Publications de la Société archéologique de Sens 4), p. xi.

25 Cheney, 'The Letters of Pope Innocent III', cit., p. 18.

26 COGD, II.1, pp. 195-97, pp. 195-96 (cf. Hefele, *Histoire des conciles*, cit., V.2, pp. 1381-82; COD, 1, pp. 263-64): "Cum ex eo quod quidam sanctorum reliquias venales exponunt et eas passim ostendunt, christiane religioni detractum sit sepius, et in posterum presenti decreto statuimus ut antique reliquie amodo extra capsam nullatenus ostendantur nec exponantur venales. Inventas autem de novo nemo publice venerari presumat, nisi prius auctoritate romani pontificis fuerint approbate. Prelate vero de cetero non permittant illos qui ad eorum ecclesias causa venerationis accedunt vanis figmentis aut falsis decipi documentis, sicut in plerisque locis occasione questus fieri consuevit. Eleemosynarum quoque questores, quorum quidam se alios mentendo abusiones nonnullas in sua predicatione proponunt, admitti, nisi apostolicas vel diocesani episcope litteras veras exhibeant, prohibemus. Et tunc preter id quod in ipsis continebitur litteris, nichil populo proponere permittantur".

27 COD, 1, p. 264; COGD, II.1, p. 196.

28 "...decernimus ut cum dedicatur basilica, non extendatur indulgentia ultra annum, sive ab uno solo sive a pluribus episcopis dedicetur, ac deinde in anniversario dedicationis tempore quadraginta dies de iniunctus penitentiis indulta remissio non excedat", COD, 1, p. 264; COGD, II.1, p. 196.

reproduce for alms-collectors to bear[29]. One can see the determined efforts exerted by the pope to present practical solutions and a framework in which to navigate.

Cum ex eo arguably mirrors the various transgressions recorded previously of priests and lay people who were employed to perform the fundraising tours. The desire of the people to venerate their saints certainly coincided with the religious readiness to meet those desires, and the treatment of relics was embedded in a long history of custom and tradition, developed through centuries[30]. Income and fame were added incentives to perpetuate the wishes of the people, and greed from unscrupulous individuals poisoned what could have started from pious goals. The purpose of these decrees was to gain order, to curb the excesses in the cult of saints' relics, to strengthen the faith and to control the tendency towards idolatry and even heresy, always present dangers as the people's faith sought free expression. Ultimately the pope meant to restore the reputation of the Christian religion[31]. Did Innocent present a new remedy? It is clear his contribution was to gather together the rules of various previous synods and to put into conciliar law his thinking on the issue already evident before Lateran IV. *Cum ex eo* was the end result of his and his Parisians colleagues' long reflections on an odious problem, not so much an innovation as a law-making exercise, drafting the state of affairs and forbidding its continuation[32]. So the question is how successful the application and implementation of all the prescriptions contained within the constitution was in the wake of the ecumenical council, and if it was only partially so, what were the reasons?

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29 "Quoniam ut ait apostolus *Omnes stabimus ante tribunal Christi* recepturi *prout* in corpore *gessimus sive bonum* fuerit *sive malum*, oportet nos diem messionis extreme misericordie operibus prevenire ac eternorum intuitu seminare in terris, quod reddente domino cum multiplicato fructu recolligere debeamus in celis, firmam spem fiduciamque tenentes, quoniam *qui parce seminat, parce et metet, et qui seminat in benedictionibus, de benedictionibus et metet vitam eternam.* Cum igitur ad sustentationem fratrum et egenorum ad tale confluentium hospitale, proprie non suppetant facultates, universitatem vestram monemus et exhortamur in domino atque in remissionem vobis iniungimus peccatorum, quatenus de bonis a Deo vobis collatis, pias eleemosynas et grata eis caritatis subsidia erogetis, ut per subventionem vestram ipsorum inopie consulatur, et vos per hec et alia bona que domino inspirante feceritis ad eterna possitis gaudia pervenire". COD, I, p. 263; COGD, II.1, p. 196.

30 About whether reform was successful in the face of traditional practices in France, see the work on confession by M. C. Mansfield, *The Humiliation of Sinners. Public Penance in Thirteenth-Century France* (Ithaca: Cornell University Press, 1995).

31 B. Bolton, 'Signs, Wonders, Miracles: Supporting the Faith in Medieval Rome', in *Signs, Wonders, Miracles: Representations of Divine Power in the Life of the Church*. Papers read at the 2003 Summer Meeting and the 2004 Winter Meeting of the Ecclesiastical History Society, ed. by K. Cooper and J. Gregory (Woodbridge: Boydell Press, 2005), pp. 157-78.

32 See similar stance taken by D. Summerlin, 'Papal Councils in the High Middle Ages', in *A Companion to the Medieval Papacy. Growth of an Ideology and Institution*, ed. by K. Sisson and A. A. Larson (Leiden: Brill, 2016, Brill's Companions to the Christian Tradition 70), pp. 174-96.

After Lateran IV

Following the Lateran Council, the provisions on relics and alms collectors in c.62 were disseminated throughout the universal Church by means of diocesan statutes. Pope Innocent III was keen on regular meetings of the Church, so Lateran IV c.6 renewed the ancient recommendation for metropolitans to gather with their suffragans at annual provincial councils and for appointed persons to report back to annual episcopal synods[33]. The prescriptions contained in c.62 were repeated at many councils and synods in France. As the historian John Van Engen had remarked, "synodical statutes reveal not only the practices normative for Christian observance but also, by implication and sometimes explicitly, the transgressions of that norm"[34]. The repetitive nature of the synodal rulings gave plenty of evidence that abuses were happening, but also that there was a real need and desire to curb those abuses. The problem was ever present, and it is at first difficult to determine how far the rules were observed. On the whole, they seemed mostly conveniently ignored – hence the repetitive nature of the ruling meetings – or unevenly registered and applied, differing from one community to another. Abuses were discouraged but when they happened, they were overlooked or justified, and certainly not dealt with severely[35]. The fact that they were repeated *ad nauseam* right up to the sixteenth century demonstrates that none of these measures seemed to have had any discernible effect.

Indeed not all the items raised, such as the treatment of relics, the behaviour of alms collectors, the abuses of indulgences, and the requirement for authorizations to beg for alms and to preach, were systematically included together in the synodal statutes. Among the councils and synods of the thirteenth century, possibly only the synod held in Ofen in Hungary in September 1279 published a canon repeating the first part of c.62 concerning relics and their treatment[36]. Instead, different diocesan synods adopted one or more of these elements, and sometimes, none. Admittedly not all reports survived in their entirety, so we do not have a complete picture. Furthermore the agenda fluctuated with different concerns according to the political and religious situation of the day. Some elements were considered to be more urgent than others. For example, the Melun synod in 1216 presided by Pierre Corbeil, archbishop of

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33 Lateran IV, c.6 (COGD, II.1, p. 170; cf. COD, I, p. 236): "Sicut olim a sanctis patribus noscitur institutum, metropolitan singulis annis cum suis suffraganeis provincialia non omittant concilia celebrare, in quibus de corrigendis excessibus et moribus reformandis, presertim in clero, diligentem habeant cum Dei timore tractatum, canonicas regulas et maxime que statute sunt in hoc generali concilio relegentes, ut eas faciant observari, debitam penam transgressoribus infligendo...".

34 J. van Engen, 'The Christian Middle Ages as an Historiographical Problem', in *The American Historical Review* 91.3 (June 1986), pp. 519-52, p. 543.

35 Specific punishment for questors infringing synodal ruling is seldom mentioned, except at the Council of Treves in 1227 which prescribed the public reprimand of questors who did not obey the advice of c.62. See Hefele, *Histoire des conciles*, cit., V.2, p. 1461.

36 C. 27 and c.28 forbade the removal of relics out of their reliquaries, except on holy and feast days; to peddle relics and to venerate newly discovered relics without papal permission; questors were not allowed to add anything other than what was contained in the authorization letters or to beg for alms without said documents. Hefele, *Histoire des conciles*, cit., VI.1, p. 250.

Sens (1200-22), did not mention relics or relic quests, possibly because it was more concerned with monastery reforms on one hand, and Anglo-French and papal politics on the other[37]. It sometimes seems that an assumption was in place that everyone was already aware of the rules. This was the case of the synod held in Arles in 1234 closing with twenty-four canons, the first of which stated that the prescriptions of Lateran IV had to be carefully observed[38]. Sometime later, in December 1253, the synod of Saumur, celebrated by Pierre de Lamballe, archbishop of Tours (1252-56), promulgated thirty-two rules, none of which related to c.62 *Cum ex eo*, but the last item on the list proclaimed that ancient provincial statutes must be scrupulously observed[39]. This may explain why the rules were absent from some synods and not others, and repeated only when deemed absolutely necessary[40].

Some synodal meetings mentioned relic quests. The synod of Angers (1219) statutes 40 and 41 forbade the show of relics without their reliquaries and for financial gains, and stipulated that newly discovered relics may not be offered to the people for veneration without the approval of the Pope in Rome and only approved preachers and episcopal officials were allowed to collect offerings[41]. In 1227, the provincial council of Narbonne presided over by its Archbishop Pierre Amelii (1226-45) produced twenty rules; c.19 acknowledged its origin in c.62 of Lateran IV and prohibited questors to preach in churches but allowed the reading of their official letters[42]. There was no trace of relics or of questors in the forty or so canons released at the provincial synod of Rouen in 1231 called by Archbishop Maurice (1231-37), but in the same year, the synod of the ecclesiastical province of Reims, celebrated at St-Quentin, under the presidency of Archbishop Henri (1227-40), forbade *des prédicateurs à gages*, or remunerated preachers[43]. Evidently the practice of holy relics offered for money, or preaching as a remunerated profession, was a constant concern for the Church.

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37 News of Prince Louis's plans to invade England and remove King John from the throne prompted Pope Innocent's excommunication of the prince, and threats to do likewise to his father, King Philippe of France. Mansi, XXII, col. 1088; Hefele, *Histoire des conciles*, cit., V.2, p. 1399.

38 C. 1: "Ut statuta concilii Lateranensis IV diligenter observantur", Mansi, XXIII, col. 335; Hefele, *Histoire des conciles*, cit., V.2, p. 1560.

39 C. 32: "Ut statuta provincialis praedecessorum suorum observentur", Mansi, XXIII, col. 809, Item 32: 'Les anciens statuts provinciaux doivent être scrupuleusement observés', Hefele, *Histoire des conciles*, cit., VI.1, p. 76.

40 Synodal rules were part of the training programme, as they were meant to be read out loud at regular intervals. At the council of Trèves (March 1227), the prescription that priests should read out synodal statutes monthly was reiterated. Hefele, *Histoire des conciles*, cit., V.2, p. 1456.

41 Pontal (ed.), *Les Statuts synodaux français du XIII^ème^ siècle*, cit., I, p. 164: [C. 40] "Item in concilio est statutum quod antique reliquie amodo extra capsam nullatenus non ostendatur nec exponantur venales; inventas [autem] de novo nemo publice venerari presumat, nisi prius auctoritate romani pontificis fuerint approbate. [C. 41] Ex concilio lateranense: nullus passim recipiatur ad predicandum nisi fuerit autentica persona vel ad hoc episcopo destinata. Questores quoque elemosinarum tantum ea dicant populo, que in litteris domini papa vel episcopi continentur".

42 Lent 1227, canon 19 (ed. Hefele, *Histoire des conciles*, cit., V.2, p. 1454): "conformément au canon 62 du IV^e^ synode de Latran, on ne laissera pas les prêtres prêcher dans les églises, mais seulement y lire leurs lettres, s'ils en ont".

43 C. 7. Hefele, *Histoire des conciles*, cit., V.2, p. 1529.

The southern provinces in France were more engrossed with fighting against heresy in the shape of Catharism than bothering with the treatment of relics[44]. For example, the council of Béziers in 1233 presided over by papal legate Gautier, bishop of Tournai, proposed twenty-six prescriptions necessary for the reform of the French Church; they were mainly about heretics, with a few on dress and behaviour of clerics; relics received no attention[45]. The council of Narbonne (1243), still focused on crushing the Cathar heresy, discussed the powers and procedure of the official inquisition courts[46]. However, in April 1246, after proclaiming the fight against heretics, the council of Béziers, opened by the archbishop of Narbonne, Guillaume de la Broue (1245-57), published forty-six canons inspired by Lateran IV and other French councils, and c.5 reiterated that *questors* could only preach what was contained in the letters from the pope or the bishop[47]. The council of the archbishop of Arles in November 1246 repeated the rules of the meeting which had taken place there in 1234. There is no mention of relics, but the first item emphasized for Lateran IV rulings to be observed[48].

On the whole, the four principal points addressed in Lateran IV's *Cum ex eo* (the treatment of relics, the behaviour of alms collectors, the abuses of indulgences, and the bi-fold requirement for the authorizations to beg for alms and to preach) failed to be represented together as originally intended. Their importance varied from synod to synod; the requirement to get authorization to preach and to make public the precise dictates of the letters authorizing it seems to have been reiterated the most. Pope Innocent III had been deeply concerned for the spiritual damage brought about by lies and deceit, false preaching and false documents, and misuse of legal authorizations, and he had made suggestions for how to deal with abusers. Lateran IV's c.7 had ordered ecclesiastical censure for offences committed by the clergy[49]. The council of Treves in March 1227 advised to reprimand publicly questors who did not follow the rules of *Cum ex eo*, particularly if they presented apocryphal papal letters; episcopal permissions were also required[50]. Other councils stressed the need for the highest power to authorize the touring of relics. In September 1258, Jacques, archbishop of Narbonne (1257-59) inaugurated a synod at Montpellier; it produced eight *capitula*, the sixth of which demanded that a suffragan bishop not to be allowed to give a questor written permission to beg for alms unless the individual had already been given authorization from his metropolitan archbishop; in short, the power must remain with the metropolitan[51]. In another instance, the provincial

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44 M. Lambert, *Medieval Heresy, Popular Movements from the Gregorian Reform to the Reformation* (Oxford: Blackwell Publishing, 2002³), pp. 115-57.

45 Hefele, *Histoire des conciles*, cit., V.2, pp. 1556-58.

46 Hefele, *Histoire des conciles*, cit., V.2, pp. 1630-33.

47 C. 5 (ed. Hefele, *Histoire des conciles*, cit., V.2, p. 1695): "Les quêteurs ne doivent prêcher que ce qui est contenu dans les lettres du pape ou de l'évêque".

48 Mansi, XXIII, col. 336, 731; Hefele, *Histoire des conciles*, cit., V.2, p. 1704.

49 C. 7: 'Irrefragabili ...'. COD, I, p. 237; COGD, II, 1, p. 170.

50 Hefele, *Histoire des conciles*, cit., V.2, p. 1461.

51 Hefele, *Histoire des conciles*, cit., VI.1, p. 90-91.

synod of Rouen of 1267 stipulated that clerics and crusaders must cease abusing the letters granted them by the pope or his legate[52]. It is not clear what this is precisely about, but genuine documents were evidently used for disingenuous purposes. It could be that they were presented even after their validity had run out. Matters visibly had worsened by then with various infringements, old and new alike. Straying into the fourteenth century allows a look at a 1312 decretal complaining of abuses such as distributing imaginary indulgences and promising to send the souls of family and friends on a fast track from purgatory to paradise[53].

There is evidence of an unintended consequence of Lateran IV c.62's ruling that permission to tour relics had to be sought and authorized by local ecclesiastical powers. Some prelates abused their power by sometimes imposing a fee for granting authorization to preach and show relics. Among those were the archbishops of Sens and of Reims. They also gave priority to their own alms collectors over any other, whether inside or outside the diocese. The most notorious example was dealt with in a decretal dated to March 17, 1246 (*Romana ecclesia*), not long after the First Council of Lyon in June 1245. No decree from the council mentions relics and quests, but part of *Romana ecclesia* spoke specifically of the dispute between the archbishop of Reims and his suffragans concerning fundraising tours for the cathedral fabric. It ruled that the archbishop must not give preference to his own collectors over those of suffragan churches[54]. This quarrel dated back to the 1220s when the cathedral was desperate for building funds. In spite of the ruling in early 1246, it took another three years to resolve the dispute[55]. In other places though, it was accepted as a *fait accompli* as in the case of the canons of Lens who, as late as 1518, agreed to pay a regular tax of eight *livres* to the bishop of Tournai for the privilege of touring relics[56].

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52 Mansi XXIII, col. 1165; Hefele, *Histoire des conciles*, cit., VI.1, p. 140.

53 Clem. 5.9.2 (*Corpus iuris canonici. II. Decretalium collectiones*, ed. by E. Friedberg [Lipsiae: ex officina Bernhardi Tauchnitz, 1881], col. 1190); Héliot and Chastang, 'Quêtes et voyages de reliques' (1965), cit., p. 30.

54 VI 5.10.1 (in title *De paenitentiis et remissionibus*, in *Corpus iuris canonici*, cit., II, col. 1093; cf. Mansi, XXIII, col. 671; Hefele, *Histoire des conciles*, cit., V.2, p. 1672, canon 11): "Quaestoribus autem fabricae Remensis ecclesiae Remensis archiepiscopus sive eius officiales citandi suffraganeorum ipsius ecclesiae subditos, quos iidem quaestores sibi resistere aut nolle parere dixerint, ut super hoc compareant coram ipsis, nequaquam tribuant potestatem. Super benigna vero ipsorum receptione ac subventione ipsi fabricae facienda possunt eosdem suffraganeos et alios Christi fideles Remensis provinciae caritative monere. In concedendis quoque indulgentiis non excedat Remensis archiepiscopus statutum concilii generalis". The text appears in the constitution *Romana ecclesia*, which the *Liber Sextus* states was issued at Lyon I. Later editions, until the COD, included all parts of *Romana ecclesia* among the decrees of the council, but subsequent scholarship has shown this to be incorrect. Rather *Romana ecclesia* was issued and sent to the school in ten parts in April 1246 and later included in Innocent IV's *Novellae* of 1253, which included 22 constitutions of the council, 11 decrees issued in April 1246 (10 from *Romana ecclesia* plus one more), and 8 additional decrees. See S. Kuttner, 'Die Konstitutionen des ersten allgemeinen Konzils von Lyon', in Idem, *Medieval Councils, Decretals and Collections of Canon Law* (London: Variorum, 1980, CSS 126), XI, with *Retractationes*.

55 Héliot and Chastang, 'Quêtes et voyages de reliques' (1965), cit., pp. 10-11.

56 Héliot and Chastang, 'Quêtes et voyages de reliques' (1965), cit., p. 6.

The Legacy of Canon 62 in the Diocese of Sens

With the case of the long-lasting quarrel between the Benedictine abbeys of Sainte-Colombe and of Saint-Pierre-le-Vif, and the latter's priory of Saint-Loup-de-Naud, the diocese of Sens provides a good case study for how Lateran IV c.62 *Cum ex eo* worked out in practice. Before delving in the details of the dispute, it would be useful to look briefly at the historical context of the case. Once the primacy of Gaul and Germania and served by an archbishop presiding over the seven suffragan bishoprics of Chartres, Auxerre, Meaux, Paris, Orleans, Nevers and Troyes (resulting in the acronym CAMPONT), the diocese is situated about eighty miles south-east of Paris, in the rich and fertile province of Burgundy. Its patron saints, St Savinian, St Potentian and St Altin were missionaries from Rome in the fourth century and numbered among the first official martyrs. After a period in the doldrums of the eleventh century, when it lost the primacy to Lyons, Sens regained its prestige in the next century with Archbishop Hugh de Toucy (1142-76), a prelate loved and respected by many. He crowned Constance, wife of King Louis VII at Orleans, in spite of the protestations of the archbishop of Reims, and played host to Alexander III (1159-81) and his court for eighteen months (October 1163-Easter 1165) during the Pope's exile from Rome. Hugh also welcomed Thomas Becket, the archbishop of Canterbury (1162-70) during his own flight from 1164 to 1170[57]. Hugh de Toucy's successor, Guillaume aux Blanches Mains (1168-76), related to both King Philip Augustus of France and King Henry II of England, was equally popular and ultimately appointed to the seat of Reims (1176-1202). Adding to the gallery of significant men Pope Innocent III nominated Peter of Corbeil, one of his theology teachers in Paris, as archbishop of Sens (1200-22) shortly after he became pope. The seat of the archbishop was the cathedral church of St-Etienne, which was damaged by fire in 1128, but rebuilt and remembered as the first Gothic cathedral (1140-75)[58].

The influence and prominence of the prelates of Sens continued in the thirteenth century, dominated by the Cornu dynasty, which produced no less than three archbishops. The noble family were servants to the French monarchy; a close relative, Robert Clement, was the private tutor to the future King Philip[59]. The 1225 and 1239 provincial synods were presided by Archbishop Gautier Cornu (1222-41), who was influential in his work for the Royal family. He attended King Louis VIII's death and supported the king's widow, Queen Blanche of Castile until the majority of her son, Louis IX. He was also instrumental in bringing the Crown of Thorns to Sens in 1239, where it was kept overnight before continuing onto Paris[60]. In short, the diocese was one of distinguished status and was important for its political connections as well as its cultural achievements.

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57 See *Pope Alexander III (1159-81), The Art of Survival*, ed. by A. J. Duggan and P. D. Clarke (Aldershot: Ashgate, 2010).

58 W. Vroom, *Financing Cathedral Building in the Middle Ages: The Generosity of the Faithful*, trans. by E. Manton (Amsterdam: Amsterdam University Press, 2010), pp. 434-36.

59 He was Gautier Cornu's maternal grandfather. V. Tabbagh, *Fasti ecclesiae gallicanae. Répertoire prosopographique des évêques, dignitaires et chanoines des diocèses de France de 1200 a 1500. XI. Diocèse de Sens.* (Turnhout: Brepols, 2009), p. 104.

60 Tabbagh, *Fasti ecclesiae gallicanae*, cit., pp. 106-07.

Inevitably, part of the business within the archdiocese had to do with relics. The synod of the province of Sens, celebrated in Sainte-Chapelle in Paris in November 1248, and headed by Gautier's brother, Gilon Cornu (1244-54), promulgated the following item: questors may neither preach nor exhibit holy relics without the diocesan bishop's permission[61]. Archbishop Gilon also presided over the synod of Provins in 1251 which renewed afresh the canons of the 1248 council of Paris[62]. In March 1255, a Paris Council, presided by Gautier and Gilon's nephew, Henri Cornu, archbishop of Sens (1254-57) grappled with King Louis IX's directive to deal with the conflict between the University and the mendicants over the right to teach demanded. Instead, a commission was created with the archbishops of Sens, Reims, Bourges and Rouen, who met on April 13, 1255 in Bordeaux[63]. This synod agreed not to allow questors to preach[64]. Henri Cornu's brother, another Gilon, was the archbishop of Sens (1274-92) who was most devoted to enlarging the fabric of the cathedral in order to finance building and repair works. Among many initiatives, he requested and was granted indulgences from Pope Martin IV for visitors to the cathedral to venerate a relic of Mary Magdalene in 1281[65]. A close relative of the Cornu archbishops was the abbot of Saint-Pierre-le-Vif, one of the monasteries with Sainte-Colombe on the outskirts of Sens and involved in the dispute over the body of St Loup. The dispute incensed Pope Innocent III in 1212 but was hardly resolved at that time.

Both communities claimed comparably ancient and venerable foundations by royalty and prelates. The oldest, Saint-Pierre-le-Vif, founded around the year 509 by Clovis's daughter (or grand-daughter – opinions are divided) Theodechilde, could boast of having the bodies of Savinian and Potentian, the two earliest missionaries sent to the Gauls[66]. The two saints were buried there, as well as their companion, Altin by 847[67]. At the Council of Sens in 1218, Peter of Corbeil, as archbishop of Sens, celebrated the elevation of their bodies and granted an indulgence to pilgrims who visited Saint-Pierre-le-Vif in order to venerate the relics of St Potentian and St Altin[68]. According to early sources, the abbey of Sainte-Colombe was founded by the king of the Franks, Clotaire II, in 620, and the Merovingian support continued when King Dagobert contributed a donation in 638[69]. The monastery also housed the remains of its eponymous saint who was martyred in 274. St Loup, a sixth century

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61 Canon 19: "Les quêteurs ne doivent ni prêcher ni exposer des reliques sans la permission de l'évêque diocésain", Hefele, *Histoire des conciles*, cit., v.2, p. 1706; Hélіot and Chastang, 'Quêtes et voyages de reliques' (1965), cit., pp. 5-32, p. 6; Tabbagh, *Fasti ecclesiae gallicanae*, XI, cit., p. 111.

62 Hefele, *Histoire des conciles*, cit., VI.1, p. 71; Mansi, XXIII, col. 794.

63 Hefele, *Histoire des conciles*, cit., VI.1, pp. 82-83; Mansi, XXIII, col. 857-58.

64 Hefele, *Histoire des conciles*, cit., VI.1, p. 83; Mansi, XXIII, col. 855.

65 Tabbagh, *Fasti ecclesiae gallicanae*, XI, cit., p. 121.

66 Geoffroy de Courlon, *Chronique de l'abbaye de Saint-Pierre-le-Vif de Sens*, ed. and trans. by G. Julliot (Sens: Duchemin, 1876), p. 193.

67 Courlon, *Chronique*, cit., p. 83.

68 Tabbagh, *Fasti ecclesiae gallicanae*, XI, cit., p. 101.

69 *Cartulaire général de l'Yonne. Recueil de documents authentiques pour servir à l'histoire du pays qui forment ce département*, ed. by M. Quantin (Auxerre: Perriquet et Rouillé, 1854), I, p. 570; Abbé L. Brullée, *Histoire de l'abbaye royale de Sainte-Colombe-lez-Sens* (Sens: Duchemin, 1852), p. 40.

confessor and bishop, was buried according to his wishes at the feet of the Virgin saint, and their tombs were opened on many occasions. Both communities had strong connections with the metropolitan of Sens. Custom and tradition required that each new archbishop was to spend the night before his consecration in the crypt of Saint-Pierre[70]. Geoffroy de Courlon (d. c.1295), a monk and chronicler of the abbey of Saint-Pierre-le-Vif revealed that the monks of both communities took the relics in procession to the cathedral to pray on various occasions, such as in 1085, when the monks of Sainte-Colombe carried the reliquary of St Loup to St Etienne to pray for much needed rain[71]. In another instance, in 1239, when the Crown of Thorns was on its way from Constantinople to Paris and Sainte-Chapelle, it stayed overnight at the abbey of Saint-Pierre-le-Vif before being carried the next day to the cathedral of St Etienne by King Louis IX and his brothers[72]. Those strong historical and religious bonds perhaps contributed to fierce rivalries between them.

The principal quarrel between the two over the remains of St Loup had been brewing since the twelfth century. Both Benedictine abbeys and Saint-Pierre-le-Vif's priory of Saint-Loup-de-Naud claimed ownership of his relics. In 1160, a charter by Hugh de Toucy, archbishop of Sens (1142-68) proclaimed that the abbey of Sainte-Colombe owned the complete remains of the saint and this was demonstrated at a service where his reliquary was opened in full view of the congregation and witnessed by the bishops of Orleans and of Auxerre[73]. Another document by the same Hugh de Toucy, however, proclaimed that, after the ceremony, the religious of Sainte-Colombe had gifted him body parts from the head and body of the saint, as well as one of his rings and other ornaments. He in turn had given those precious relics to the priory of Saint-Loup-de-Naud. The modern edition gives this document the date of 1162 with a question mark; one can question its veracity and authenticity[74]. The universal belief was that the abbey of Sainte-Colombe had sheltered the body of the confessor archbishop of Sens (609-623) since the early seventh century[75]. The claim therefore that parts of his body rested elsewhere provoked the inmates of Sainte-Colombe. They were further incensed when the monks of the priory of Saint-Loup travelled with the remains in their possession on a fundraising tour in the early thirteenth century; Sainte-Colombe responded with complaints. This dispute in Sens between the communities of Saint-Pierre-le-Vif, Sainte-Colombe and Saint-Loup-de-Naud continued unabated, without any indication of consideration of Lateran IV's decree in the decades immediately following the council.

Indeed the quarrel lasted right up to the fifteenth century, with various prelates taking one or the other side. In May 1259, Pope Alexander IV (1254-61) supported Sainte-Colombe by issuing instructions to his French representative, Master Pierre de Sergues, a canon of Chartres, to prevent the monks of Saint-Pierre-le-Vif from

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70 Bouvier, 'Histoire de l'abbaye de Saint-Pierre-le-Vif', cit., p. 6.

71 Courlon, *Chronique*, cit., p. 445.

72 Tabbagh, *Fasti ecclesiae gallicanae*, XI, cit., p. 107.

73 Geoffroy de Courlon, *Le livre des reliques*, cit., Appendix X, p. 288.

74 Courlon, *Le livre des reliques*, cit., Appendix XI, p. 290.

75 Courlon, *Chronique*, cit., p. 243.

exhibiting the dubious head of St Loup on a quest around the province of Sens[76]. The pope appeared satisfied with Hugh de Toucy's charter of 1160, witnessed by the bishops of Orleans and of Auxerre, certifying that the monastery of Sainte-Colombe held the whole body of St Loup. On the first day of June 1259, he granted indulgences of one hundred days to those who made offerings towards the repairs of the abbey church there[77]. Lateran IV's ruling only allowed for forty days' remissions of penances for the anniversary of a dedication and up to one year for the original dedication, so clearly it was up to the official of the day to apply *Cum ex eo* according to his own will and wishes[78]. The next papal intervention dates from the latter part of the fourteenth century. The monks of the priory of Saint-Loup-de-Naud addressed their complaints about the financial demands from the prelates in Reims and Sens to Pope Urban V (1362-70), who then granted them the right to tour their relics without being subjected to episcopal authority[79]. In a letter dated 11 February 1367, he forbade the archbishops of Reims and of Sens to press money from Saint-Pierre and Saint-Loup for their permission to collect alms in their provinces, though there is no mention of relics or indulgences[80]. The warring monks eventually took their case from the local court to the Paris Parliament at the dawn of the fifteenth century. No records have been found to ascertain what decision or judgement was reached, but local historians enjoy recalling the day when the royal sergeant hurled public insults towards Saint-Loup-de-Naud at *Parlement* in 1404 in the presence of the provost of Sens and declared that their reliquary contained nothing but hay![81] In the absence of reports or records of the outcome of the day, it can be safely assumed that matters carried on in a similar fashion.

On the whole, was Lateran IV's c.62 influential on the thinking and behaviour of the monks? Taking the four aspects of the canon one by one, we can see that there was a faithfulness of sorts. The first prescription about the treatment of relics, that they should be enclosed and not manhandled, broken up, sold, exchanged or gifted, seemed to have been solved very early on. Much has been written about the way relics of saints have been treated, especially in France[82]. Since all altars needed to be consecrated with relics, and since the supply of relics was small relative to the number of religious

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76 30 May 1259. Po. 17587.

77 1 June 1259. Po. 17589.

78 COGD, II.1, p. 196 (COD 1, p. 264): "...decernimus ut cum dedicatur basilica, non extendatur indulgentia ultra annum, sive ab uno solo sive a pluribus episcopis dedicetur, ac deinde in anniversario dedicationis tempore quadraginta dies de iniunctus penitentiis indulta remissio non excedat".

79 11 February 1367, Urban V (1362-70), *Lettres communes analysées d'après les registres dits d'Avignon et du Vatican*, ed. by M. Hayez and others, 6 (Roma: École française de Rome, 1979; Bibliothèque des écoles françaises d'Athènes et de Rome, 3e série-v bis), p. 176; Héliot et Chastang, 'Quêtes et voyages de reliques' (1965), cit., p. 6.

80 Urbain V, *Lettres communes*, cit., p. 176.

81 Bouvier, 'Histoire de l'abbaye de Saint-Pierre-le-Vif', cit., p. 147: "il s'était emporté jusqu'à dire qu'elle ne contenait que du foin!".

82 N. Herrmann-Mascard, *Les reliques des saints. Formation coutumière d'un droit* (Paris: Klincksiek, 1975); P. J. Geary, *Furta Sacra. Thefts of Relics in the Central Middle Ages* (Princeton: Princeton University Press, 1978); P. J. Geary, 'Sacred Commodities: the Circulation of Medieval Relics', in

buildings, there was a tendency to divide and scatter. Pope Innocent wanted an end to the practice of using the relics as commodities; he desired relics to be enclosed in reliquaries. This requirement was by far the most successful overall because the enclosure of relics had been traditional and customary for some time. Relics were from an early date encased in suitable containers, certainly for convenience and also in consideration of the respect due to the holy dead. For example, the monk Geoffroy de Courlon wrote that, in 1095, the relics were wrapped with silk and deposited in a receptacle described as a silver case (*écrin d'argent*)[83]. This continued after Lateran IV, allowing for the commissioning and making of sumptuous reliquaries crafted with precious materials and valuable gems in order to emphasize the value and the holiness of the relics within[84]. The innovation of using glass or rock crystal allowed glimpses of relics that would have otherwise been hidden to sight and touch. Relics were always kept and travelled in their own reliquary. However this did not prevent the occasional dipping into the reliquary by the clerics for various reasons. In the fifteenth century, there was a gift from the abbey of Sainte-Colombe-lès-Sens to its sister church of Sainte-Colombe-la-Petite of a rib of the eponymous saint, wrapped in silk and deposited in a box made of cypress wood[85]. In order to access the relic, the monks undoubtedly opened the saint's reliquary, which is precisely the practice that Pope Innocent III wanted to abolish, demonstrating the partial success of this prescription of c.62.

Other concerns touched on alms collectors in both their internal and external aspect. It was primordial that both their behaviour and their dress should be sober and inconspicuous. They must refrain from lavish expenditure by using, for example, an excessive number of horses for travel. Clerics lived and mingled in society therefore found it difficult not to be similar to their fellow parishioners[86]. As far as can be ascertained, it seems that the monks from all three communities behaved as was required and wore suitable attire; at the very least, nothing negative in this vein is mentioned. The other aim was to keep control over the handing out of indulgences. Seldom mentioned in the immediate wake of Lateran IV, it seems that their use was as yet not as excessive as later on in the fourteenth century and therefore not a cause for concern. They had nevertheless been in practice for some time and coincided with the burgeoning concept of purgatory[87]. The rise in their popularity went hand in hand with relics, as a powerful means to convince the faithful to donate to the Church[88]. Finally, Lateran IV's *Cum*

Living with the Dead in the Middle Ages (Ithaca: Cornell University Press, 1994), pp. 169-91; R. Bartlett, *Why Can the Dead Do Such Great Things? Saints and Worshipers from the Martyrs to the Reformation* (Princeton: Princeton University Press, 2013), pp. 239-50.

83 Geoffroy de Courlon, *Chronique*, cit., p. 37.

84 M.-M. Gauthier, *Highways of the Faith. Relics and Reliquaries from Jerusalem to Compostela*, trans. by J. A. Underwood (Secaucus: Wellfleet Press, 1983), p. 88.

85 Letter dated 9 March 1426 in Brullée, *Histoire de l'abbaye royale*, cit., pp. 136-37.

86 M. Miller, *Clothing the Clergy. Virtue and Power in Medieval Europe, c.800-1200* (Ithaca and London: Cornell University Press, 2014), pp. 37-50.

87 Indulgences were first offered in 1095 as recognition for the sacrifices by Crusaders. R. N. Swanson, *Indulgences in Late Medieval England: Passports to Paradise?* (Cambridge: Cambridge University Press, 2011), p. 11.

88 Swanson, *Indulgences*, cit., especially chapter 5, pp. 179-223.

ex eo was concerned about the movement of those seeking alms and stipulated that authorizing documents be delivered by the right ecclesiastical powers. What seemed to bother the Church authorities most was the freedom of collectors to come and go, do as they pleased, and arrive at a Church uninvited to present relics and to preach. Again it appears that our monks produced and procured the appropriate documents for their many enterprises. For example, in the beginning of the fifteenth century, the monks of Sainte-Colombe asked Jean de Nanton, the abbot of Saint-Germain d'Auxerre, later archbishop of Sens (1423-32) for permission to tour relics in his diocese[89]. There was a desire to carry out what was required by the ecclesiastical authorities, which can be perceived in a 1455 letter, appealing to the generosity of the faithful by listing all the precious relics and the indulgences on offer. It is a long document intended to be read aloud by their carriers since they were not allowed to preach[90].

More pressing matters arose such as the English advance in France, beginning with the victory at Agincourt in 1415 and ultimately the siege of Sens in 1420 by King Henry V of England. The French recovered the city in 1430, but the situation was certainly difficult for the monks. They were in dire straits according to a lengthy letter by the archbishop of Sens where he described the lamentable state of the monastery after years of occupation, civil war and looting; to help them raise funds, he granted permission to travel with the relics and to offer forty days' indulgences[91]. So desperate were they that in 1432 the heads of the communities decided to put an end to their discord by transporting their relics together on their habitual fundraising tours, and to share the proceeds equally[92]. Dreux de Montaudier, abbot of Saint-Pierre-le-Vif (1422-36), with Jean d'Apremont, prior of Saint-Loup-de-Naud, and François de Chigy, abbot of Sainte-Colombe (1421-39) came to a mutually satisfactory agreement, without actually solving the original problem, namely, who actually owned the body of St Loup? Both reliquaries always had to be carried together and, whether entrusted to procurators or farmers, guarded by religious from both monasteries. Receipts and expenses of the quests were to be divided in two unequal shares: two-thirds for Saint-Loup-de-Naud and Saint-Pierre-le-Vif, and the other third to Sainte-Colombe[93].

This arrangement truly marked the end of their quarrels because in 1453, Guichard de Bierne, abbot of Sainte-Colombe and Olivier Chapperon, abbot of Saint-Pierre-le-Vif (1450-70), confirmed the tenor of previous documents and agreed to participate together in two new relic quests outside the boundaries of the provinces of Reims and Sens[94]. This time, three reliquaries, those of St Potentien, St Gregory and St Colombe, joined

89 Brullée, *Histoire de l'abbaye royale*, cit., p. 129.

90 Courlon, *Le livre des reliques*, cit., Appendix VI, p. 261-68.

91 This letter granting archiepiscopal approbation was valid only for one year: Brullée, *Histoire de l'abbaye royale*, cit., p. 130-33.

92 Courlon, *Le livre des reliques*, cit., Appendix IV, pp. 249-55; Bouvier, 'Histoire de l'abbaye de St Pierre-le-Vif', cit., p. 148.

93 This document stated that there was a definite desire to end the dispute by a compromise, thereby that they will always roam the country side together.

94 'Accord', 19 et 26 février 1453, in Courlon, *Le livre des reliques*, cit., Appendix V, pp. 256-60; Bouvier, 'Histoire de l'abbaye de St Pierre-le-Vif', cit., p. 150.

the party. These enterprises must have been successful because another agreement was drawn up in 1469 for travelling further afield, across France[95]. Matters must have been difficult, even desperate, as can be surmised in a letter back in 1455 appealing to the generosity of the faithful[96]. It seemed that the income from the abbey could barely feed half a dozen monks[97]. Another effort was made in 1462 in the foundation of a fraternity, again listing the wealth of relics and contrasting it with the poverty of the community[98]. We know that the monks embarked on three journeys (in 1440, 1455 and 1469) which took them across the country as far as La Rochelle on the Atlantic coast, some three hundred miles from home, from a document reporting the theft, restitution and repair of the reliquary of St Loup[99]. There the casket of St Loup was stolen from a church overnight and recovered the next day, minus its silver plate and gold decorations. The thief, a miller, was condemned to hang.

Unfortunately, little documentation from these quests survives[100]. Their very existence, however, reveals that, over the long term, the dispute between the three monasteries cooled, not so much because they came to an agreement about who had the genuine relics, but more as a result of the need to raise income for their desperate communities. Lateran IV's c.62 required that relics be authenticated and that no false relics be used for raising money; by the fifteenth century, the *de facto* position of the monks of the three monasteries seems to have been that they all had authentic relics, and, at least in the early 1430s, they requested and received permission from the archbishop to travel with their relics and offer indulgences to raise money. The need to raise funds for failing communities stood in tension with the requirement to ensure that only authentic relics be claimed and presented to the public. At the same time, this financial need did not lead them to try to sell their relics. Perhaps that was a business-savvy move in the long term to ensure future relic quests, but in a medieval Church whose sense of morality regarding relics had been solidified by Lateran IV's c.62, such a sale would have been unthinkable on moral grounds as well as risky on canonical ones.

Conclusion

Relics were undoubtedly the greatest treasures for churches and religious communities, and the relationships between the medieval worshipper and his saints developed from simple veneration to the establishment of a mutually beneficial

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95 Lettres de créance, 20 janvier 1469, Courlon, *Le livre des reliques*, cit., Appendix VIII, pp. 276-84.

96 'Appel', 4 Septembre 1455, Courlon, *Le livre des reliques*, cit., Appendix VI, pp. 261-68.

97 Bouvier, 'Histoire de l'abbaye de St Pierre-le-Vif', cit., p. 151.

98 'Fondation d'une confrérie', 16 novembre 1462, Courlon, *Le livre des reliques*, cit., Appendix VII, pp. 269-75.

99 'Certification', 8 mai 1440, Courlon, *Le livre des reliques*, cit., Appendix IX, pp. 285-87.

100 The antiquarian Gustave Julliot lamented that, "Nous aurions voulu suivre ces quêteurs dans leurs pérégrinations diverses, signaler les nombreux miracles dont ils furent témoins, compter avec eux les aumônes rapportées dans leur monastère : nous n'avons rien trouvé". Courlon, *Le livre des reliques*, cit., p. XX.

contract. From a lively circulation of body parts to the creation of false documents, doubt over their authenticity constantly confronted the people. However because relics were the Church's most precious treasures, it was essential to maintain trust and credibility in all concerning parties. Popes and bishops had been on the whole most careful, and the most systematic in this duty was Pope Innocent III who addressed the issue at the Fourth Lateran Council by setting down clear guidelines, bringing together elements of his previous decisions about relics in c.62 *Cum ex eo*. His desire for authenticity and its associated preservation of relics enabled him to obtain a fundamental means of control and regulation of their cult. By so doing, he was able to further his all important aim of keeping the people's faith in line with the Church's teaching and preaching and maintaining that unity for which he as pope was responsible. If Innocent was not entirely successful in regulating the efforts of the alms seekers and fundraisers, he did manage to put in place rules for authentication and documentation and also to commend the enclosure of relics. The associated reliquaries and screens for relics are a lasting document to his patronage as well as his desire for security.

The example of the three Benedictine abbeys in the diocese of Sens shows the tension between the desire to satisfy the authorities and their ever pressing financial needs. The surviving documents demonstrate the faithful application of c.62 by having the relics travel in reliquaries, with prior papal or episcopal permission and documentation. The monks were, however, using the saints' relics for financial gain, sometimes farming the quests out and also tampering with holy relics, practices arguably against the spirit of Lateran IV. Such enterprises continued right up to the sixteenth century, in spite of the numerous entreaties by synodal statutes repeating the ruling against relic quests. For example by 1511, the statutes of the diocese of Meaux were still uttering the familiar refrain: they forbade questors to peddle relics[101]. The only explanation can be the popularity of the practice and the cooperation of parish priests while being frowned upon by the ecclesiastical authorities. Only a total ban would rid the Church of such pests. At the Council of Trent (1545-63), in answer to the criticism levelled against the Church about idolatry, attempts were made to maintain and justify the core Christian beliefs. Among these, it reaffirmed the intercession of saints and the *potentia* of relics but acknowledged the human tendency to superstition and excess. In order to deal with these, Trent confirmed the rules dictated in 1215 and forbade the worst of the trespasses. Simply put, corrupt relic quests were banned altogether at the end of Session Twenty-five in December 1563[102].

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101 T. du Plessis, *Histoire de l'église de Meaux avec des notes ou dissertations, et les pièces justificatives*, 2 vols (Paris: Gandouin et Giffard, 1731), II, pp. 551-52 (cited in Héliot and Chastang, 'Quêtes et voyages de reliques' [1965], cit., p. 31): "Pseudo autem Praedicatores, id est, Quaesturios indulgentiarum aut Confratriarium, aut reliquiarum affirmatores, qui suis abusionibus Ecclesiam Dei erroribus et scandalis decolorant, et quibus praedicatio jure prohibitur, nequaquam recipiant".

102 COGD, III, p. 150 (COD, II, p. 775): "De invocatione, veneratione et reliquiis sanctorum, et [de] sacris imaginibus ... Omnis porro superstitio in sanctorum invocatione, reliquiarum veneratione et imaginum sacro usu tollatur, omnis turpis quaestus eliminetur".

ANTHONY PERRON

Grave Concerns: Law, Miracles, and the Cemetery, 1100-1300*

The Fourth Lateran Council was a moment of profound and lasting significance for medieval ecclesiastical society. At the same time, we should not overlook the fact that Pope Innocent III's grand synod was part of a crescendo of lawmaking in the Roman Church, a long and sustained process whereby diocesan, provincial, and legatine councils articulated a vast *corpus* of canon law shaping the lives of both clerics and laypeople throughout western Europe. Indeed, notwithstanding the claims for its revolutionary impact, few of the constitutions promulgated in November 1215 would have been surprising to anyone familiar with the abundant reform statutes issued at the local and regional level in the decades before Lateran IV. What is more, the constitutions of 1215 represent but a selection and distillation of the concerns elaborated, and the norms imposed, at less prominent synods across the broader "Lateran Age". One example of this is the famous decree *Omnis utriusque sexus* (c.21) with its requirement that all Christians confess their sins and receive penance at least once a year and take communion at Easter. While the precise stipulations of the canon were novel, the sentiments they echoed had inspired earlier programs of pastoral rigor by, among others, Eudes de Sully, bishop of Paris, and Stephen Langton as archbishop of Canterbury[1].

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* The following elaborates on aspects of cemetery law I have outlined in an article entitled 'The Medieval Cemetery as Ecclesiastical Community: Regulation, Conflict, and Expulsion, 1000-1215', in *Dealing with the Dead. Mortality and Community in Medieval and Early Modern Europe*, ed. by T. Tomaini (Leiden: Brill, 2018, Explorations in Medieval Culture 5), pp. 253-73. In addition to presenting the essential arguments of the present essay at the Concilium lateranense IV conference in Rome (November 2015), drafts were also read before the Midwest Medieval History Conference (October 2016) and the annual meeting of the Medieval Association of the Pacific (March 2017). I am grateful to the Academy of Catholic Thought and Imagination at Loyola Marymount University for support during the fall term 2016, which allowed me to work further on the project.

1 Eudes de Sully issued a lengthy series of reform statutes for Paris between 1196 and 1208, which included a series of chapters on penance that loosely foreshadow *Omnis utriusque sexus*, for instance by asking priests to call their people to confession "especially from the beginning of Lent". See *Les Statuts synodaux français du XIII^ème siècle. 1. Les statuts de Paris et le synodal de l'Ouest (XIII^ème siècle)*, ed.

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The Fourth Lateran Council and the Development of Canon Law and the ius commune, ed. Atria Larson and Andrea Massironi, Turnhout: Brepols, 2018 (EMI 7), pp. 205–18

10.1484/M.EMI-EB.5.116656

If Lateran IV was part of a wider pattern of conciliar vitality, it likewise played a crucial role in what R. I. Moore has called the birth of a "persecuting society"[2]. Though the roots of oppression went back long before 1215, the council, in Moore's view, served to provide the "machinery" of social control. Decrees emanating from Fourth Lateran defined a clear set of enemies outside the Latin-Christian fold and prescribed more stringent norms of belief and conduct for those who remained on the inside.

Omnis utriusque sexus, with which Moore began his analysis, can in fact be viewed from the perspective of coercion. Though it is rarely commented on, the statute included an enforcement provision that those who failed to comply and therefore died in a state of recalcitrance were to be deprived of Christian burial[3]. The lines between who belonged in the ecclesiastical community and who did not were therefore extended from the realm of the living to that of the dead, and the bodies of the disobedient were to be excluded from the consecrated earth of the churchyard. The principle had already been articulated by none other than Innocent III in his decretal *Sacris est* (1200), which dictated "ut quibus non communicavimus vivis non communicemus defunctis"[4]. Mirroring that of the living, the society of the dead was the source of much anxiety for clerical reformers; they pondered inclusion and exclusion, purity and pollution, and their thinking was reflected in the legal treatment of burial grounds in the generations immediately before and after Lateran IV. While the constitutions of 1215 do not otherwise refer to Christian sepulture, *Omnis utriusque sexus* provides a window onto a broader preoccupation with cemeteries and their policing in the canon law of the twelfth and thirteenth centuries, particularly at the diocesan and provincial levels. We can better understand Fourth Lateran's deployment of burial as an instrument of discipline by looking at the ongoing concern of clerical elites to govern the boundaries of Christian identity within the churchyard.

This article will discuss two aspects of cemetery regulation in canon law from roughly 1140 to 1280, namely the use of exhumation as a judicial penalty and the

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and trans. by O. Pontal (Paris: BN, 1971), pp. 62-66, and especially c.36. Closer to the Fourth Lateran statute is Stephen Langton's demand from 1213/14 that the laity be warned to take communion, preceded by confession three times a year. Text in C &S II.1, p. 32 (c.43).

2 R. I. Moore, *The Formation of a Persecuting Society* (Malden: Blackwell, 2007²), pp. 6-10.

3 Lateran IV c.21, COGD, p. 178: "Omnis utriusque sexus fidelis, postquam ad annos discretionis pervenerit, omnia sua solus peccata confiteatur fideliter, saltem semel in anno, proprio sacerdoti, et iniunctam sibi penitentiam studeat pro viribus adimplere, suscipiens reverenter ad minus in pascha eucharistie sacramentum, nisi forte de consilio proprii sacerdotis ob aliquam rationabilem causam ad tempus ab eius perceptione duxerit abstinendum; *alioquin et vivens ab ingressu ecclesie arceatur et moriens christiana careat sepultura*. Unde hoc salutare statutum frequenter in ecclesiis publicetur, ne quisquam ex ignorantie cecitate velamen excusationis assumat." This is the first half of the constitution, the relevant portion (in italics) reading, 'otherwise [i.e. if someone does not confess to his own priest and commune annually], let him, while alive, be barred from entering church and, when dead, lack Christian burial'.

4 3Comp. 3.21.3 (X 3.28.12): 'That those with whom we did not communicate when they were alive, we are not to communicate with after they die'.

prohibition of dancing and singing (and associated revelry) in graveyards. Though seemingly unrelated, they are joined in statute law as prominent examples of how the Christian soil of the churchyard could be desecrated by the presence of iniquitous persons or the performance of blasphemous acts. Moreover, as I will suggest, these legal norms were closely connected to miraculous accounts of how those who defiled cemeteries by burying the unworthy or acting inappropriately were punished by God. The developing law on graveyards, in other words, was informed by the supernatural, with the result that canon law became an ever more powerful tool of repression, reaching even into the tomb.

While much research has been undertaken on medieval cemeteries, especially by archaeologists, relatively little attention has been devoted to the legal history of graveyards. This is surprising, given how central cemeteries were as sites of social interaction[5]. Children played in graveyards, and villagers and townsfolk gathered there to exchange gossip[6]. According to Rigord and Guillaume le Breton, moreover, King Philip Augustus decided to build a wall around "les Champeaux", as the cemetery of the church of les Saints-Innocents in Paris was known, because it was being used for commerce and, after dark, for prostitution[7]. Churchyards were also a stage for violence, both casual brawling, as Peter the Chanter noted, and more politically calculated unrest. To the consternation of Pope Celestine III, for example, the violent

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5 The archaeology of cemeteries has been the subject of numerous studies, among them C. Daniell, *Death and Burial in Medieval England, 1066-1550* (London & New York: Routledge, 1997), pp. 145-208; R. Gilchrist and B. Sloane, *Requiem: The Medieval Monastic Cemetery in Britain* (London: Museum of London Archaeology Service, 2005); and the volume of essays published as *Archéologie du cimetière chrétien, Supplément à la Revue archéologique du Centre de la France* 11 (Tours: Fédération pour l'édition de la Revue archéologique du Centre de la France, 1996). Concerning the canon law on cemeteries, A. Bernard, *La sépulture en droit canonique du Décret de Gratien au concile de Trente* (Paris: Domat-Montchrestien, 1933), remains the standard work, but it is outdated and based on a limited source base. For more recent scholarship on the history of cemeteries, including consideration of law, see most notably M. Lauwers, 'Le cimetière dans le Moyen Âge latin : Lieu sacré, saint et religieux', in *Annales : Histoire, Sciences Sociales* 54 (1999), pp. 1047-72, which previews arguments developed at greater length in M. Lauwers, *Naissance de cimetière : Lieux sacrés et terre des morts dans l'Occident médiéval* (Paris : Aubier, 2005, Collection historique). See also M. Vivas, '*Christiana sepultura priventur* : Privation de sépulture, distinction spatiale et inhumations atypiques à la lumière des pratiques funéraires (x^{e}-xiv^{e} s.)', in *De corps en corps : Traitement et devenir du cadavre.* Actes des séminaires de la Maison des sciences de l'homme d'Aquitaine (mars-juin 2008), éd. I. Cartron *et al.* (Pessac : Maison des Sciences de l'Homme d'Aquitaine, 2010), pp. 193-214; and the doctoral thesis of M. Vivas, *La privation de sépulture au Moyen Âge : L'exemple de la province ecclésiastique de Bordeaux (x^{e}-début du xiv^{e} siècles)*, Thèse Histoire et Archéologie du Moyen Âge (Poitiers : Université de Poitiers, 2012) (accessible online at http://theses.univ-poitiers.fr.).

6 For the cemetery as a place where rumors were spread, see Orderic Vitalis, *The Ecclesiastical History*, ed. by M. Chibnall, vol. v (Oxford: Clarendon Press, 1975), p. 284 (bk. x, ch. 15). Peter the Chanter told a story of children playing in a cemetery, with tragic consequences as one boy fatally shot another with an arrow (*Verbum abbreuiatum [textus alter]*, ed. by M. Boutry, CCCM 196, p. 326 (ch. 63).

7 See the *Œuvres de Rigord et de Guillaume le Breton, historiens de Philippe-Auguste*, ed. by H. F. Delaborde, vol. I (Paris: Société de l'histoire de France, 1882), pp. 70-71, 184-85; and vol. II (Paris: Société de l'histoire de France, 1885), p. 25 (lib. I, vv. 436-52).

"commune" of Rouen not only targeted the town's clerics (even castrating some of them) but destroyed the wall of the cathedral cemetery as well[8].

As social spaces, graveyards provided opportunities for the living to meet one another, but they were also, quite understandably, a venue where the quick were believed to encounter the dead. Such stories are scattered throughout the High Middle Ages. Raoul of Saint-Sépulcre related a tale about one late eleventh-century bishop of Cambrai who, while traversing a graveyard, commended the souls of the deceased to God; to the astonishment of those accompanying the bishop, the dead replied "Amen"[9]. A very similar story is included in the twelfth-century *Exordium magnum* of Cîteaux, this time concerning a Cluniac monk named Amo. Conrad of Eberbach, the author of the *Exordium*, was indeed deeply interested in the animate dead. In one of his tales, the departed rewarded the loyalty of a "certain man of the world" (*homo quidam saecularis*), who, despite running a busy household, never failed to offer a prayer for the dead when walking through a cemetery. When the man was himself on the verge of death and his parish priest was too lazy to get out of bed to conduct last rites, the deceased rose from their graves to say an office of commendation for their friend. In another story from the *Exordium magnum*, a knight who always said a *paternoster* for those buried in the churchyard was fleeing from his enemies into a cemetery. Faced with the decision whether to follow his pious habit or turn to fight his rivals, the warrior chose the former, only to find that the dead rose to protect him[10]. Such accounts were repeated in the commonplace literature of the thirteenth century, which offered further embellishments. In reprising the legend about the knight who was aided by a phalanx of the dead, for instance, both the *Collectio exemplorum* in Paris, Bibliothèque nationale, MS lat. 15912, and Stephen of Bourbon's *Tractatus de diuersis materiis predicabilibus* refer to the deceased appearing in the occupations (herding, farming, spinning) in which they were employed while alive[11]. Nor were the dead perforce benevolent. The Dominican compilations of Humbert of Romans and Jacob of Voragine both tell of a bishop who forbade one of his priests to say daily masses for the dead; when the same bishop was passing through a graveyard, the denizens confronted and threatened him with death if he did not rescind his order[12]. That stories of this nature appear with such regularity in the period under consideration here is no doubt related to the coalescing idea of purgatory, in the drama of which cemeteries played a significant role. The so-called "Purgatory of St. Patrick" in Ireland, for instance, believed to be an access point to the

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8 The theme of violence in cemeteries deserves its own fuller consideration. On brawling, see Petrus Cantor, *Verbum abbreuiatum (textus prior)*, ed. by M. Boutry, CCCM 196A, p. 448 (ch. 72). On the townsfolk of Rouen, see the letters of Pope Celestine III, nos. 229 and 230, in PL CCVI: 1116-18.

9 See Raoul of Saint-Sépulcre, *Vita Sancti Lietberti*, ch. 45, in MGH SS 30.2, p. 859.

10 *Exordium magnum cisterciense*, ed. by B. Griesser, CCCM 138, pp. 405-13.

11 *Collectio exemplorum cisterciensis in codice parisiensi 15912 asseruata*, ed. by J. Berlioz and M.A. Polo de Beaulieu, CCCM 243, p. 128 (ch. 33.1); Stephen of Bourbon, *Tractatus de diuersis materiis predicabilibus (prima pars de dono timoris)*, ed. by J. Berlioz and J.-L. Eichenlaub, CCCM 124, p. 174 (pt. I.v, ch. 7).

12 Humbert of Romans, *Tractatus de dono timoris*, ed. by C. Boyer, CCCM 218, p. 97.

realm of penitence, was located, according to twelfth-century legend, *in cimiterio*[13]. What is more, a remarkable story in the late thirteenth-century *Speculum laicorum* tells of a young pupil at Bury St. Edmund's who was diligently studying in a cemetery when he was raptured far away by divine power and led by a Cistercian monk "ad loca animarum penalia" before returning to the world eight days later[14].

At a time when clerical authorities were increasingly assertive in regulating spaces – be they clearly spiritual zones, like the church itself, or unambiguously secular ones, like taverns – cemeteries, as sites where living Christians congregated with one another and where they might encounter their departed brethren, clearly attracted legal attention. The earliest stratum of church law on graveyards, inherited from Late Antiquity and the Early Middle Ages and codified by Burchard of Worms and Ivo of Chartres, was preoccupied with extending the privilege of ecclesiastical sanctuary from the church proper to the surrounding churchyard. Under Gratian and the early decretists, the pressing question was freedom of burial, and, more particularly, the protection of an individual's right to be interred at a church of his or her choosing, balanced against the prerogatives of one's parish. At the same time, jurists from the middle of the twelfth century onward, echoing the pastoral theology of the period, betrayed a gnawing anxiety over who belonged in cemeteries and who should be excluded. As was the case with *Omnis utriusque sexus*, those who were considered ostracized from the community of the living were likewise barred from the congregation of the dead. The list provided by Hostiensis in his *Summa Aurea* encapsulates a general consensus of legal thinkers by the middle of the thirteenth century. Among the categories of people not to be buried in consecrated soil were some obvious ones (pagans, for instance, and schismatics) as well as those highlighted by Moore as targets of the "persecuting society": Jews and heretics, above all. Yet Hostiensis extended his roster of the proscribed to encompass usurers, impenitent blasphemers, those who died by suicide, any who made a will without a priest in attendance, thieves, notorious mortal sinners, and regular religious who died with secret property[15].

Above all, however, Christian sepulture was to be denied to persons who expired under sentence of interdict or, more pointedly, excommunication[16]. Some of these were buried elsewhere, a practice that might itself be subject to regulation. In 1282, Geoffrey of Saint-Brice, bishop of Saintes, decried a local *corruptela* according to which

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13 E. Mall, 'Zur Geschichte der Legende vom Purgatorium der heiligen Patricius', in *Romanische Forschungen* 6.2 (1889), p. 149.

14 *Speculum laicorum*, ed J. T. Welter, *Thesaurus exemplorum*, fasc. V (Paris: Picard, 1914), p. 62: 'To the places where souls are punished'.

15 See the Venice (1574) edition of Hostiensis, *Summa aurea*, *ad* X 3.28 (*De sepulturis*), coll. 1065-66 (*Quibus interdicatur ecclesiastica sepulture*). For more discussion of the categories of people to be excluded from the cemetery, see Vivas, *La privation*, cit. pp. 173-224 esp.

16 On the judicial and social aspects of excommunication in the Middle Ages, with special attention to the classical period of canon law, see E. Vodola, *Excommunication in the Middle Ages* (Berkeley: University of California Press, 1986). Vodola deals only tangentially with exclusion from Christian burial.

excommunicates were interred "prope coemeteria" and insisted that they be buried instead "per spatium duorum iugerum terrae circumquaque" from the holy graveyard[17]. The bishop also decreed that no more than two excommunicated bodies were to be placed together, lest people might come to regard the site as a proper cemetery. Other Church authorities were emphatic that guilty corpses were to be left unburied. Henry of Winchester, for example, acting as papal legate in England, ordered in 1143 that "excommunicatorum corpora insepulta maneant"[18]. Some statutes attempted to ensure that bodies were properly vetted before burial so that the unworthy were not laid to rest in sacred ground. The Council of Cognac in 1260 demanded that bodies be taken to the parish church and not directly to the place of burial "ut melius sciatur ibi quam alibi, an defunctus interdictus vel excommunicatus existat"[19]. Anecdotal evidence suggests that families and associates of those who died under such sentences turned on occasion to violence in order to get their friends and loved ones into sacred ground. In 1213, a Danish bishop, Niels of Schleswig, complained to Pope Innocent III about "caemeteria uerum, in quibus excommunicatorum corpora sepeliuntur per suorum uiolentiam propinquorum"[20]. In other cases, extreme measures of this sort would have been unnecessary; in the 1280s, Simon de Beaulieu, archbishop of Bourges, observed (with chagrin) that priests were reluctant to deny burial to excommunicates who may have repented at the moment of death[21].

Prelates did not, however, stop at merely excluding the excommunicated and interdicted from the cemetery. They also ordered the exhumation and expulsion of the unworthy dead[22]. A characteristic example is that of Heinrich von Hirschegg, a

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17 Mansi XXIV.465-66 (c.1, *De sepultura excommunicatorum*): 'At a distance of two *jugera* of land on all sides', or about 140 meters. On the *iugerum* as a Roman land measure, equivalent to roughly 70 meters, see E. Lugli, 'Squarely Built: An Inquiry into the Sources of *Ad Quadratum* Geography in Lombard Architecture between the Eleventh and Twelfth Century', in *Space in the Medieval West: Places, Territories, and Imagined Geographies*, ed. by M. Cohen and F. Madeline (Oxford: Routledge, 2016), pp. 21-36, p. 24. On Geoffrey, see Vivas, *La privation*, cit., pp. 314-15, 369-70.

18 See C & S 1.2, c.6, p. 801: 'The bodies of excommunicates are to be left unburied'.

19 Council of Cognac, c.15 (Mansi XXIII.1036): 'So that it might be known better there than elsewhere whether the deceased was under excommunication or interdict'.

20 *Diplomatarium Danicum*, ser. 1, vol. V, ed. by N. Skyum-Nielsen (Copenhagen: Einar Munksgaard, 1957), pp. 53-54 (no. 33): 'Cemeteries in which the bodies of the excommunicated are buried through the violence of their relatives'.

21 Since Innocent III's 1199 decretal *A nobis est saepe quaesitum* (which entered the *Liber Extra* as X 5.39.28), it was well established that, even if an excommunicate died under sentence, the deceased could be posthumously absolved and granted Christian burial if it could be shown that he or she showed signs of contrition *in extremis*. A prominent example of such an appeal was that launched in 1234 by Raymond VII of Toulouse (and renewed in 1247) on behalf of his father, Raymond VI, whom Raymond *fils* claimed had displayed "signa penitentie manifesta in fine". See *Les registres de Gregoire IX*, ed. by L. Auvray, vol. II (Paris: Albert Fontemoing, 1907), coll. 1199 and 1247 (nos. 2282 and 4758); and *Les registres d'Innocent IV*, ed. by É. Berger, vol. I (Paris: Ernest Thorin, 1884), p. 518 (no. 3443). According to Simon, however, priests often buried those who died under sentence with very flimsy evidence that they had been absolved on the point of death. See Mansi XXIV.634-35.

22 For an overview, see Vivas, *La privation*, cit., pp. 349-67, which deals chiefly with Bordeaux. The author's arguments here are reprised with some elaboration in his 'Déplacer les "mauvais morts" au Moyen Âge (fin VI^{e}-début XIV^{e} siècles)', in *Déplacer les morts : Voyages, funérailles, manipulations,*

German nobleman placed under sentence for his support of Frederick of Swabia's campaign against the church of Mainz in 1117. After his death, the archbishop of the city, Adalbert von Saarbrücken, "mandavit Oudalrico episcopo, ut proieceret corpus Heinrici de cymiterio" on account of his disobedience[23]. If exhumation can be found in practice during the early twelfth century, it was increasingly codified as law beginning in the 1140s, when Henry of Winchester commanded that the bodies of those excommunicated but buried in Christian cemeteries "inde exportentur" ("be removed from there"). A nearly identical ruling was issued by Pope Eugenius III at the Council of Reims (1148). In addition, both laws warn against subterfuge in the removal of the wrongly buried, suspecting that bodies of the innocent might be fraudulently disinterred in their stead[24]. In his legislation for the diocese of Liège, Bishop Rudolf (or Raoul) of Zähringen (d. 1191) suspended church services if any excommunicated person was interred in the adjacent cemetery, effective "usque ad eiectionem cadaveris eruti"[25]. In 1192, Eudes de Lorraine-Vaudémont, bishop of Toul, ordered that who had been buried in a cemetery under interdict was to be "eiectum" ("cast out") and "nec in illo, nec in alio cimeterio deinceps umquam sepeliatur"[26]. Presaging Niels of Schleswig's outcry, both Rudolph and Eudes, moreover, referred to such illicit burials as having been carried out by violence. Papal letters of the later twelfth and early thirteenth century often prescribed exhumation, and it was Innocent III's decretal *Sacris est* (cited above) that was used by Raymond of Pennaforte when he compiled the *Liber Extra* to establish the rule that the excommunicated "exhumari debent et procul ab ecclesiastica sepultura iactari", provided the remains of the guilty could be distinguished from those of the blameless[27]. The decretal was reproduced again and again, with local variations, in synodalia of the thirteenth century. As canonists like Hostiensis and Bernard of Parma reinforced, graveyards touched by excommunicated cadavers would have to be reconciled before being used again, a practice also found in synodalia[28]. By the 1270s, the process of judicial exhumation

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exhumations et réinhumations de corps au Moyen Âge, ed. D. Boyer-Gardner and M. Vivas (Bordeaux: Ausonius, 2014, Thanat'Os : Travaux d'archéologie funéraire 2), pp. 73-90.

23 *Casus monasterii petrihusensis*, bk. 4, ch. 6, in MGH SS 20, p. 662: '... commanded Bishop Ulrich (of Passau) to cast the body of Heinrich from the cemetery'.

24 For Henry of Winchester's decree, see c.17 in C & S 1.2, pp. 803-04. For the canons of Reims, see c.16 (Mansi XXI.720).

25 See c.5 (Mansi XXII.9): '... until the ejection of the exhumed cadaver'.

26 See c.4 (Mansi XXII.649): '... never to be buried in that nor any other cemetery'.

27 X 3.28.12: 'Ought to be unearthed and thrown far from the burial [sc. ground] of the church'. For other papal decretals dealing with exhumation, especially from Alexander III and Innocent III, see A. Perron, "The Medieval Cemetery as Ecclesiastical Community", pp. 271-2, in *Dealing with the Dead. Mortality and Community in Medieval and Early Modern Europe*, ed. T. Tomaini (Leiden: Brill, 2018, Explorations in Medieval Culture 5), pp. 253-73. It should be noted, in addition, that popes varied in their enthusiasm for judicial disinterment. Honorius III, for example, almost never referred to exhumation, whereas it appears regularly in the documentation from the reigns of his successors Gregory IX and Innocent IV.

28 See Hostiensis, *Summa aurea*, cit., *ad* X 3.40 (*De consecratione ecclesiae vel altaris*), col. 1177. See also Bernard of Parma's comment in the *Glossa ordinaria* to X 3.28.12 (*Sacris est*) (ed. Venice 1582, col. 1208) that "immo forte nec religiosum locum facit cadauer excommunicati" ('indeed, perhaps

was apparently routine enough that William Durand's *Speculum iuris* includes a formula for demanding it[29].

Exhumation of course inflicted considerable psychological torment on the living. Hildegard of Bingen once refused an injunction to disinter the body of an excommunicated knight buried at her cloister. After a vision that a dark cloud would envelop Hildegard and her fellow nuns, the abbess preferred to endure a sentence of interdict rather than comply[30]. In ordering exhumation, church elites understood the impact it would have. Indeed, as the Council of Riez in 1285 saw it, the whole point was to strike fear in others ("exhumatio ... sit aliis ad terrorem")[31]. The horror was heightened by provisions that the unearthing of damned bodies was to be undertaken quite literally by the very hands of those who had wrongly buried them in the first place[32].

The presence of an excommunicated corpse was counted amid an ever-growing catalog of phenomena that disturbed and polluted the cemetery. Starting in the eleventh century, clerical elites worked tirelessly to enforce a reverential quiet and hygiene at graveyards. Burchard of Worms warned his flock not to speak vainly when passing through a churchyard on the way to services, trampling the tombs of their relatives and neighbors without offering a prayer or thinking of their own fate[33]. Likewise, St. Wulfstan, bishop of Worcester from 1062 to 1095, was said to have prohibited horseback riding in the cemetery, prompting William of Malmesbury (d. 1143) to lament that in his own (allegedly) more decadent time the bodies of the saints were heedlessly trodden under foot[34]. By the thirteenth century, the list of offenses against the purity of the graveyard had grown to include the pasturing of

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the corpse of an excommunicated person renders a place non-religious'), on which account "ossa inde proiicienda sunt antequam consecretur" ('the bones must be cast forth from there before it is consecrated'). Notice that the first part of the quotation is actually a gloss from Laurentius Hispanus, to which Bernard of Parma himself added the operative conclusion. Examples of synodalia requiring reconsecration of burial grounds sullied by an excommunicated corpse can be found among Gui de la Tour's constitutions for the diocese of Clermont (both c.1.11 and 11.2), in Mansi XXIII.1201-2, 1205, and the *liber synodalis* of Bishop Bertrand of Nimes (Mansi XXIV.546).

29 The text is reprinted in Bernard, *La sépulture*, cit., p. 134. The formula can be found in William's *Speculum iuris*, lib. IV, partic. III, tit. *de sepulturis*, no. 8.

30 See letters 23 and 24 of Hildegard's *Epistolarium*, in CCCM 91.1, ed. by L. Van Acker, pp. 61-68.

31 See c.11 (Mansi XXIV.579-80): 'Let exhumation be a source of terror for others.'

32 For example, Pope Gregory IX's famous decree anathematizing heretics in February 1231 ordered as well that anyone who buried such heretics would be subject to excommunication until they unearthed the condemned bodies "propriis manibus publice" (*Les registres de Gregoire IX*, ed. by L. Auvray, vol. 1 [Paris: Albert Fontemoing, 1896], col. 352 [no. 539]). Similarly, the synodal statutes for Gerona from 1274 (Mansi XXIII.234-35) commanded that no lay person guilty of burying a body in a cemetery under interdict should be absolved of the crime before "corpus per ipsum laicum sepultum manibus et expensis propriis fuerit exhumatum" ('the body buried by such a layman should be exhumed by his own hand and at his own expense').

33 See book 19 of Burchard, *Decretorum libri XX*, ed. by G. Fransen and T. Kölzer (Aalen: Scientia Verlag, 1992; repr. of Cologne, 1548 *editio princeps*), fol. 201r.

34 William of Malmesbury, *The Life of Wulfstan*, ed. by M. Winterbottom and R. M. Thomson (Oxford: Clarendon Press, 2002), p. 124 (bk. III, ch. 11).

animals (and the collecting of their dung), as well as the spilling of blood and semen[35]. Perhaps the most regularly noted forms of cemetery desecration, however, involved dancing and singing, along with other species of revelry such as wrestling matches and theatrical plays. By the later twelfth century, spectacles of this sort drew the ire of ecclesiastical reformers. Reiner of Liège (d. 1182) thus rebuked priests who "penes cimiteria seu corpora defunctorum [...] nocturnis maxime vigiliis puellares choros aliaque execranda agi, dici, vel cantilari paterentur"[36]. The context of his remarks suggests that these dances formed part of popular death rituals, of a clearly gendered nature. Shortly before 1200, Gerald of Wales, in his *Gemma ecclesiastica*, told an instructive tale about a priest in the diocese of Worcester who was kept up at night by party-goers singing a ribald song with the refrain (in the vernacular) "lamman dhin are" (which Gerald glossed as "Dulcis amica, tuam poscit amator opem")[37]. During mass the following day, at the point when he should have chanted "Dominus vobiscum", the priest instead blurted out "lamman dhin are"! Gerald's conclusion was "quod [...] saltationibus et cantilenis in sanctorum solemnitatibus populi vacare non debeant circa ecclesias et coemeteria"[38]. Though the legal authorities Gerald cited, most notably the Council of Toledo of 633 (via Gratian, *De consecratione* D.3 c.2) did not in fact mention cemeteries, other late-antique and early-medieval statutes transmitted by Burchard and Ivo, but not included in the *Decretum Gratiani*, did outlaw any "canticum turpe atque luxuriosum" in churchyards[39].

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35 On the pasturing of animals, see, for instance, the statutes of Worcester from 1240, c.5 (C & S II.2, p. 297) and the statutes of Chichester (1292), c.1 (C & S II.2, pp. 1115-18). The related concern over dung is more prominent in French statutes. See, for instance, the 1231 provincial council of Reims, c.16 (Mansi XXIII.216), repeated at Rouen in 1235, c.34 (Mansi XXIII.378), and also found later among the canons of the legatine council of Budapest (1279) and the diocesan synod of Würzburg (1298) (Mansi XXIV.290 and 1190 respectively). On blood and semen, see the council of Fritzlar, c.3 (1246) (Mansi XXIII.725), which expressly linked bloodshed and ejaculation to the burial of an excommunicate in the cemetery, as well as the councils of Salzburg (1281), c.14, and Nîmes (1284) (Mansi XXIV.401 and 534). Innocent IV also addressed concerns over the staining of churches and cemeteries by blood and semen in Tournai and Reims. See *Les registres d'Innocent IV*, ed. by É. Berger, vol. III (Paris: Albert Fontemoing, 1897), pp. 173 and 361 (nos. 6315 and 7223). Lauwers deals briefly with the pollution of cemeteries in *Naissance de cimetière*, cit., pp. 197-201, 263-68, albeit with only passing reference to dancing.

36 Reiner of Liège, *De ineptiis cuiusdam idiotae ad amicum*, bk. 2, ch. 8 (in MGH SS 20, p. 602): '... allowed, with nighttime vigils especially, choruses of girls and other execrable things to be performed, said, and sung at cemeteries or before the bodies of the dead'. In this work, Reiner referred to a certain *libellus* he wrote "de reverentia sacrorum locorum", a text which unfortunately is no longer extant. For more on the possible purposes of dances with the dead, see N. Caciola, 'Wraiths, Revenants and Ritual in Medieval Culture', in *Past and Present* 152 (1996), pp. 37-44.

37 Gerald of Wales (Giraldus Cambrensis), *Gemma ecclesiastica*, in *Giraldi cambrensis opera omnia*, ed. J. S. Brewer, vol. II (London: Longman, 1862), pp. 119-20 (Dist. I, ch. 43): 'Sweet girlfriend, a lover demands your aid'.

38 Ibidem: 'People ought not attend dances and songs near churches and cemeteries on the feast days of saints'.

39 'Shameful or wanton song'. See lib. III, cap. 87 of Burchard, *Decretorum libri XX*, cit., fol. 65r, and Ivo of Chartres, *Decretum*, lib. III, cap. 77 (from the working edition by Martin Brett, https://ivo-of-chartres.github.io/decretum/ivodec_3.pdf, p. 25 [version last updated February 9, 2015, accessed August 12,

In the years leading up to the Fourth Lateran Council, these older canons were revived for a new generation. In his Paris statutes (dating from 1196 to 1208), Bishop Eudes de Sully ordered that priests prohibit dancing "maxime in tribus locis, in ecclesiis, in cimiteriis et processionibus"[40]. A few years later, Stephen Langton, in his legislation for the diocese of Canterbury (in 1213 or 1214), expressed concern "ne choree vel turpes et inhonesti ludi qui ad lasciviam invitent in cimiteriis vel ecclesiis agantur"[41]. Around the same time, Robert de Courson, at his legatine councils in both Paris and Rouen, harked back to the concern of Reiner of Liège that such dances were chiefly a problem of women, decrying "choreas mulierum in coemeteriis"[42].

Though Lateran IV did not deal with the question of revelry in graveyards, the tidal wave of synodal activity in the decades after the great council consistently reinforced the prohibition of dancing (and singing, wrestling, the staging of plays, and the like) within the churchyard. Between 1215 and 1300, some two dozen local and regional councils across Latin Christian Europe targeted activity of this nature in the presence of the dead, though the frequency of such regulations appears to have waned somewhat by the later thirteenth century, as more than three-quarters of the statutes in question were issued before 1260. Some of these canons, particularly from England, repeated earlier concerns, specifically those about women dancing in cemeteries. Notable examples can be found in the dioceses of Norwich and London in the early 1240s[43]. A Scottish rule (from Aberdeen), meanwhile, reveals distress over the folk-religious nature of burial customs involving singing and dancing (the text prohibited "laicorum cantus vel choreas fieri" specifically "ad funera et exsequias mortuorum"), taking as a given clerical ownership of the cemetery[44]. Indeed, perhaps because of fears that the clergy would be tainted by participation in an essentially lay ritual, a set of statutes from Trier expressly forbade priests from joining in such performances[45]. Many bans on dancing and singing in the graveyard were couched amid a broader effort to purge Christian ground of worldly activities, such as secular judgments (especially those involving capital punishment) or markets, fairs, and

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40 See c.88 (*Les statuts de Paris*, ed. Pontal, cit., p. 86): 'In three places especially, in churches, in cemeteries, and in processions'.

41 See c.60 (C & S II.1, pp. 35-36): 'That dances and dishonorable plays (or games), which might lead to wantonness, not be performed in cemeteries or churches'.

42 Paris c.IV.18 (Mansi XXII.843) and Rouen c.III.19 (Mansi XXII.910): 'Dances of women in cemeteries'.

43 See Norwich, c.47 and London II, c.73 (ed. C & S II.1, pp. 353 and 649).

44 See cc.75-76 (*Ecclesiae scoticanae statuta tam provincialia quam synodalia quae supersunt*, ed. by J. Robinson [Edinburgh: Bannatyne Club, 1886], p. 40): 'The performance of songs and dances by laypeople at the burial and funerals of the dead'. For the date and provenance of this collection of canons, see D. E. R. Watt, *Medieval Church Councils in Scotland* (Edinburgh: Clark, 2000), pp. 58-59. Regarding cemeteries as clerical property, see the 1287 statutes of Exeter declared that "the cemetery belongs wholly to the church", and "it is taught indisputably that the responsibility for overseeing it has been entrusted by God to the priests alone". See C & S II.2, p. 1010 (Exeter II, c.14).

45 The relevant statute (c.8) from Trier is in Mansi XXIII.31-33. Mansi assigned this synod a date of 1227, but Paul B. Pixton believes they are much later, probably from 1277. See *The German Episcopacy and the Implementation of the Decrees of the Fourth Lateran Council, 1216-45: Watchmen on the Tower* (Leiden: Brill, 1995), p. 356.

other business dealings[46]. Several regulations, on the other hand, framed the problem as one of liturgical disruption. In 1229, William of Blois, bishop of Worcester, thus condemned dancing near cemeteries while matins, mass, or vespers were being sung[47]. In the province of Rouen, it was likewise forbidden to dance in churches or cemeteries "maxime diebus dominicis et festivis", subject to a penance of three years[48]. Other collections added vigils to the list of sacred times when *choreas* were especially to be avoided[49]. Indeed, Bishop Andreu d'Albalat, in his constitutions for priests in the diocese of Valencia, hinted with disdain that people were engaging in such frivolity while on their way to church[50].

The confidence of spiritual elites in mandating and codifying in law that those improperly buried be disinterred or in sentencing those dancing and singing in cemeteries was no doubt augmented by the belief that similar punishments could be executed by divine intervention. Cemeteries were, as suggested above, places of numinous power, and there is no shortage of stories about people healed in graveyards. However, it is a curious feature of miracles set in the cemetery that so many of them were in fact punitive. In the final portion of this essay, I want to suggest a link between the legal regulation of cemeteries and miracle stories concerning graveyards. My contention here is more than simply that law was seen as an expression of God's plan, but that, in the specific case of cemeteries, tales of the marvelous provided both model and reinforcement for law by offering up cautionary tales of transgressions and their consequences. Take the regulations prohibiting animals from entering graveyards. Before these became commonplace in the laws of the thirteenth century, taboos warned people against such profanation. For example, in the first half of the twelfth century, according to William of Malmesbury, it was believed that anyone who brought hunting birds or livestock into the cemetery of Glastonbury would suffer harm to themselves or their goods[51].

More specifically, it is striking that even before exhumation became a widely assigned legal penalty, corpses were said to be disinterred through supernatural intervention. In a story from around 1015, the *Deeds of the Bishops of Cambrai* tells

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46 On markets and judgments of blood, see, for instance, statutes from Bishops Peter des Roches for Winchester (1224) and Richard de Wich for Chichester (1245-51) (C & S II.1, p. 135 [Winchester I, c.62], and 461 [Chichester I, c.51]). A set of synodalia from southern France (for the dioceses of Cahors, Rodez, and Tulle) dating to 1289 contains a provision outlawing, in addition to dancing and singing, the pronouncing of "edict, vel incanta [sc. inquanta]... sive banna" by laypeople. See Mansi XXIV.1020.

47 C & S II.1, p. 174 (c.22).

48 See c.33 (Mansi XXIII.377): 'Especially on Sundays and feast days.'

49 See c.13 of Bishop Peter Quivel's decrees for Exeter (1287), in C & S II.2, pp. 1008-09.

50 See tit. *Quod exhortari debet populus...* (Mansi XXIII.893): "[presbyteri] moneant populum, quod illi qui veniunt ad vigilias ecclesiarum, caute et honeste se habeant, nec permittant choreas facere in ecclesiis vel coemeteriis" ('Let the priests admonish the people that those who are going to the vigils of churches ought to behave carefully and honorably, and not permit them to conduct dances in churches or cemeteries').

51 In ch. 18 of William's *De antiquitate Glastonie ecclesie*, ed. by J. Scott as *The Early History of Glastonbury* (Woodbridge: Boydell, 1981), p. 66.

of one Aldo, a 'notorious plunderer' (*nominatissimus raptor*) of the church, who was buried in the cemetery after his death in accordance with his family's demands but without the bishop's permission. When Aldo's tomb was later opened to bury another body, "de toto certe corpore nullum vestigium praeter unum subtolarium reperitur", a sign, the chronicler thundered, of the punishment awaiting the impious in hell[52]. A similar report was made at the Council of Limoges in 1031 concerning a knight who had preyed upon the church and was later buried in consecrated soil, again without episcopal license. His body was found mysteriously cast out of the churchyard the next morning. He was reburied, but once again the corpse was expelled from the ground, only resting for good when it was interred far from the cemetery. In the words of Jordan of Limoges, the lesson was that "excommunicati sepultura Christianorum iuste ab episcopis segregantur"[53]. With reason then could Honorius of Autun aver that "multi [mali] leguntur saepe per daemones effossi, et a sacris locis longius proiecti"[54].

Additionally, prior to the thirteenth-century resurgence of statutes prohibiting song and dance in cemeteries, marvels worked to punish those who indulged in such revelry. Returning again to William of Malmesbury, we find a story from Germany about one Otbert who, in his own words,

> in cimiterio cum sodalibus octodecim, uiris quindecim feminis tribus, choreas ducens et cantilenas seculares perstrepens, ita sacerdotem impediebam ut ipsa uerba nostra inter sacrosancta missarum sollemnia resonarent. Quocirca, mandato nobis ut taceremus et neglecto, imprecatus est dicens: 'Placeat Deo et sancto Magno ut ita cantantes permaneatis usque ad annum!' Verba pondus habuerunt. Filius presbiteri Iohannes sororem suam nobiscum cantantem per brachium arripuit, statimque illud a corpore auulsit, sed gutta sanguinis non exiit. Ipsa quoque toto anno nobiscum permansit choros ducens et cantans. Pluuia non cecidit super nos; frigus nec calor nec fames nec sitis nec lassitudo nos affecit; indumenta nec calciamenta nostra attriuimus, sed quasi uecordes cantabamus. Primum ad genua, mox ad femora, terrae dimersi sumus. Fabrica tecti aliquando nutu Dei super nos erigebatur, ut pluuias arceret. Tandem euoluto anno Herbertus, ciuitatis Coloniensis episcopus, a nodo quo manus nostrae

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52 *Gesta episcoporum cameracensium* 3.20 (MGH SS 7, p. 472): 'No trace was left of his whole corpse except for one shoe.'

53 From the *acta* of the council (PL CXLII.1391-92): 'The excommunicated are justly separated from the burial (sc. ground) of Christians by the bishops.' The story told here bears a close resemblance to one originally found in Gregory the Great's *Dialogues* (2.24) about a young monk who sneaked out of St. Benedict's cloister to visit his family. While away from the monastery, he died. After his burial, he was found cast from the earth, a process repeated the following day and only halted when his parents received Benedict's blessing for their son and placed a communion wafer from the abbot in the monk's tomb. This tale was repeated in the twelfth and thirteenth century, most notably by Honorius of Autun in his *Speculum ecclesiae* (PL CLXXII.807-1108) and Stephen of Bourbon's *Tractatus*, pt. I. v, ch. 7 (cit., pp. 169-70).

54 Honorius Augustodunensis, *Elucidarium* 2.32 (PL CLXXII.1156): 'We read of many [wicked people] who were unearthed, often by demons, and thrown far from holy places.'

ligabantur nos absoluit et ante altare sancti Magni reconciliauit. Filia presbiteri cum aliis duobus continuo efflauit, ceteri continuis tribus diebus et noctibus dormiuimus. Aliqui postea obierunt et miraculis coruscant, ceteri penam suam tremore membrorum produnt[55].

Several features of this story deserve comment. First, we see a concern, familiar from subsequent legislation, over women dancing in the cemetery; though the group consisted of both sexes, the priest's daughter is singled out for her participation. Likewise, the story points to liturgical disruption as a prime reason why song and dance in the churchyard portended such danger. Finally, the story is phrased in a strikingly juridical way: an order is given and ignored; punishment ensues.

If statutes on cemeteries mimicked alarming tales of what would happen to those who violated the norms governing the churchyard, the provisions laid out in canon law regarding exhumation from and merriment in cemeteries continued to be reinforced through preaching exempla of the thirteenth century. Stephen of Bourbon thus included a pair of legends warning listeners against performances in graveyards, a malady he associated with pilgrims above all. In one tale from the diocese of Elne, a young man, following local custom whereby people donned masks and costumes and led dances in the cemetery, burst into flames upon entering the church. Likewise in Elne, a party of revelers who fell asleep in the cemetery and headed to church for morning mass were punished by divine retribution: "Fulgur, intrans ecclesiam, illos qui duces et capita in chorea illa fuerant, alios fetore occidit, aliorum brachia, aliorum crura fregit, alios aliter diuersimode afflixit"[56]. The *Speculum laicorum*, finally, includes several reports about the perils associated with burying the unworthy. In one, an innocent spirit appears to a pious matron complaining that he was forced to share his tomb with an excommunicated man, for which reason his bones would

55 William of Malmesbury, *Gesta regum Anglorum* 2.174, ed. by R. A. B. Mynors and others (Oxford: Clarendon Press, 1998), pp. 294-96: 'Along with eighteen companions (fifteen men and three women), conducting dances and belting out secular songs, I hindered the priest such that these words of ours rang out amid the holy solemnities of mass. On which account, after we ignored his order to be silent, the priest prayed, "May it please God and St. Magnus that you should remain singing in this way for a year!" His words had weight. Johannes, son of the priest, grabbed his sister by the arm as she was singing with us and immediately tore it off her body, though not a drop of blood came out. She remained with us the whole year, conducting dances and singing. Rain did not fall upon us; neither cold nor heat, neither hunger nor thirst nor fatigue afflicted us. We did not wear out our clothing or shoes, but we sang away like we were mad. We sunk into the ground, first up to knees, soon up to our thighs. At some point, by the will of God, a roof structure was raised up over us to keep the rain off. Finally, when the year had past, Herbert, bishop of Cologne, released us from the knot by which our hands were bound and reconciled us before the altar of St. Magnus. The priest's daughter and two others perished immediately; the others slept for three straight days and nights. Some died afterwards and shone with miracles, while the rest displayed their punishment by a tremor in their limbs'.

56 Stephen of Bourbon, *Tractatus de diuersis materiis predicabilibus (tertia pars)*, ed. by J. Berlioz CCCM 124B (Turnhout: Brepols, 2006), pp. 213-14 (pt. III.vi, ch. 1): 'A bolt of lightning, entering the church, smote some of those who had been the ringleaders of that dance with a foul stench, broke the arms of some, and the legs of still others, and afflicted different people in various different ways'.

not rest until the day of judgment. The woman spoke to the priest, who removed the troublesome body of the reprobate[57].

It has become scholarly consensus that the High Middle Ages represented a "legal revolution", aptly so given the increased volume and sophistication of jurisprudence in the twelfth and thirteenth centuries. Yet, despite the development of ideas of rights and due process evident in the period, law was also used as an instrument of repression[58]. As noted earlier in this essay, R. I. Moore saw Lateran IV as a watershed moment in the consolidation of social control across the Latin West, a point argued in more specifically legal terms by Richard Fraher[59]. It should be clear by now that the canon law on cemeteries, particularly as it was manifested at a local and regional level, testifies to an ever more aggressive policing of bodies and behaviors from the middle of the twelfth century to the later thirteenth. Such discipline crept into Fourth Lateran through *Omnis utriusque sexus* with its prescribed punishment for failure to confess annually and take communion, namely being banished from Christian burial. As the Church sought to implement a divine will revealed in the destructive power of miracles, the graveyard became yet another place where ecclesiastical authorities attempted to *ordonner et exclure*, as Dominque Iogna-Prat has argued[60]. As such, cemeteries were quite literally contested ground on which the boundaries between the clergy and the laity, men and women, obedient Christians and disobedient ones, were drawn more sharply and rigidly, and from which the unworthy were ostracized in a fashion both public and macabre. Over the course of the 'Lateran Age', the "persecuting society", well established among the living, came to encompass the dead as well.

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57 *Le speculum laicorum*, ed. by J. T. Welter, Thesaurus exemplorum, fasc. 5 (Paris: Picard, 1914), p. 57 (no. 280).

58 See A. Winroth, 'The Legal Revolution of the Twelfth Century', in *European Transformations: The Long Twelfth Century*, ed. by T. F. X. Noble and J. Van Engen (Notre Dame: University of Notre Dame Press, 2012), pp. 338-53.

59 For Fraher's discussion of Fourth Lateran's role in the development of a 'prosecuting' society, see his 'IV Lateran's Revolution in Criminal Procedure: The Birth of *Inquisitio*, the End of Ordeals, and Innocent III's Vision of Ecclesiastical Politics', in *Studia in honorem eminentissimi Cardinalis Alfonsi M. Stickler*, ed. by R. I. Card. Castillo Lara (Rome: LAS, 1992), pp. 97-111.

60 D. Iogna-Prat, *Order and Exclusion: Cluny and Christendom Face Heresy, Judaism, and Islam (1000-1150)*, trans. G. R. Edwards (Ithaca: Cornell University Press, 2002), p. 261 (see also p. 164).

PART IV

The *ius commune* of Contracts, Rights, and Procedure

PIOTR ALEXANDROWICZ

Canon *Plerique* (c.56) of the Fourth Lateran Council Within the Development of the Principle *Pacta Sunt Servanda**

The principle of freedom of contract seems to be one of the fundamental elements of the western legal tradition. This basic statement, however, has embedded within it several dimensions from the history of private law and the ongoing process of contemporary limitation of the freedom of contract. It has appeared in legal discussion in different times and contexts, and it has had many variations in practice.

This paper first outlines the so-called discovery of the "freedom of contract" achieved by canon law jurisprudence in the twelfth century[1]. Then it presents the possible role of constitution 56 (*Plerique*) of the Fourth Lateran Council in the development of the doctrine of the binding force of all agreements, especially on the matter of those elements that may be described as its limitations. To show the role of *Plerique* for contractual regulations in canon law, it seems proper to explain what the *status quaestionis* in the field of binding force of all agreements was when the Fourth Lateran Council convened.

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1 The term 'freedom of contract' is used in this context anachronistically. It was not used by canonists of the classical period and, as a leading concept in contract law, it was developed in the early modern time: see W. Decock, *Theologians and Contract Law. The Moral Transformation of the Ius Commune (c. 1500-1650)* (Leiden-Boston: Martinus Nijhoff publishers, 2013, Legal History Library 9, Studies in the History of Private Law 4), pp. 1-8. Moreover, contemporary contract law and doctrine also have a very specific meaning of this term and its limitations. In the present paper it is used to help acknowledge canonists' impact on contract law in the western legal tradition. Furthermore, the use of the word 'discovery' for describing the development of the doctrine of binding force of all agreements may be arguable. The justification of indicating this process as a 'discovery' rather than an 'invention' requires answers to more philosophical questions and will not be undertaken here.

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The Fourth Lateran Council and the Development of Canon Law and the ius commune, ed. Atria Larson and Andrea Massironi, Turnhout: Brepols, 2018 (EMI 7), pp. 221–33

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Binding Force of All Agreements in Canon Law Jurisprudence Before 1215

There are many ways to arrange contract law, ranging from freedom of contract to contractual nominalism. The contract law of the Middle Ages inherited the latter from Roman law[2]. In Roman private law the contract (*contractus*) was one of the sources of obligation. For the Romans it meant that from the contract arose the suit to execute one's rights. However, there were only a few contracts specified in Roman law and, because of this, only some agreements were actionable. Over the course of time the category of contracts was extended in many ways, e.g. the innominate contracts were given the action when one party performed his duty, or the contract of stipulation was turned from a strictly formal to a very flexible one. Apart of this, Roman law recognized other agreements which in general were not secured by actions. It was a procedural approach for building a contract system; in other words it was focused on the possibility of suing on the basis of the contract.

From the late eleventh century onward, the revived Roman law kept the approach toward agreements drawn from ancient times. It was based on the division between agreements for which the law granted legal suits (*actiones*), and other agreements for which the law did not. The former did not have any specified name, and the latter were simply called *pacta*. Furthermore, there were many ways of providing legal protection for unactionable agreements. The Romans did not develop a general contract law, and they paid attention to individual contracts rather than drawing general conclusions or principles. The medieval *ius commune* elaborated the ancient sources and tried to generalize its contractual ideas. An important part of this doctrine was the concept of naked and clothed agreements (*pacta nuda* and *pacta vestita*)[3]. The first group consisted of agreements from which no action arose. The latter group included diverse forms of agreements, all of which were actionable by law by various means (they were 'clothed'). This doctrine, called the theory of *vestimenta pactorum*, was sustained by civil law in the late Middle Ages, and over time it became highly

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2 The civil contract law of the late Middle Ages has been described extensively. Select literature: P. Vaccari, 'Pactum vestitur contractus cohaerentia. La concezione dei patti aggiunti nella dottrina dei glossatori', in *Conferenze romanistiche tenute nella R. Università di Pavia nell'anno 1939 a ricordo di Guglielmo Castelli* (Milano: Giuffrè, 1940), pp. 217-39, also in Idem, *Scritti di storia del diritto privato* (Padova: Cedam, 1956), pp. 233-54; H. Dilcher, 'Der Typenzwang im mittelalterlichen Vertragsrecht', in ZRG, Rom. Abt. 77/1 (1960), pp. 270-303; I. Birocchi, *Causa e categoria generale del contratto. Un problema dogmatico nella cultura privatistica dell'età moderna. I. Il Cinquecento* (Torino: Giappichelli, 1997), pp. 45-54 and 63-67; R. Volante, *Il sistema contrattuale del diritto comune classico. Struttura dei patti e individuazione del tipo: glossatori e ultramontani* (Milano: Giuffrè, 2001, Per la storia del pensiero giuridico moderno 60), pp. 99-194; Decock, *Theologians and Contract Law*, cit., pp. 122-30.

3 This achievement is traditionally attributed to Placentinus (*In Codicis Domini Iustiniani Summa*, Mainz: Schoeffer, 1536, *ad* Cod. 2.3 , p. 44); however it was also stated in another work from that time (*Incerti auctoris Ordo iudiciorum (Ulpianus de edendo)*, ed. G. Haenel [Leipzig: Hinrichs, 1838], *De Pactis*, pp. 38-39), and it was well-established by Azo (*Summa Azonis*, Lugduni: apud Ioannem et Franciscum Frellaeos, 1540, *ad* Cod. 2.3, fol. 17ra, n. 3).

nuanced. In all the nuance, the civil law never abandoned, however, the basic Roman distinction; it left naked agreements without judicial protection.

The beginning of canonistic jurisprudence on the binding force of all agreements dates back to the end of the twelfth century[4]. Around 1188, two great canonists reached similar conclusions based on different arguments. From this point forward, the attitude to the actionability of all agreements was one of the controversial issues dividing civil and canon lawyers[5].

The binding force of agreements was not the most important issue for canonists of that time. Gratian's *Decretum* said nothing about the obligation of fulfilling all forms of agreements. Nevertheless Gratian included in different places in his work a few passages that later canonists treated together when commenting on his text. The most important was c. *Iuramenti* (C.22 q.5 c.12) consisting of Chromatius' opinion on the difference between oath and plain speaking. In fact, the Church Father argued that, for a Christian, there should be no difference between these two types of communicating because both of the sins that follow their abuse (perjury and lying) are threatened with punishment. In God's eyes there is no difference between these merely human distinctions. For a Christian's speech, the truth should always be the primary concern.

The other canon that played a significant role on the issue was c. *Quicumque* (C.12 q.2 c.66) from the Fourth Council of Toledo. It served Gratian as one of the exceptions

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4 There is a vast literature on the subject. The most important works are as follows: L. Seuffert, *Zur Geschichte der obligatorischen Verträge* (Nordlingen: Beck, 1881); C. Karsten, *Die Lehre vom Verträge bei den italienischen Juristen des Mittelalters. Ein Beitrag zur inneren Geschichte der Reception des römischen Rechtes in Deutschland* (Rostock: Wilh. Werther's Verlag, 1882 = Amsterdam: Liberac, 1967); A. Esmein, *Le serment promissoire dans le droit canonique* (Paris: L. Larose et Forcel, 1888); F. Spies, *De l'observation des simple conventions en droit canonique* (Paris: Recueil Sirey, 1928); J. Roussier, *Le fondement de l'obligation contractuelle dans le droit classique de l'Église* (Paris: F. Loviton, 1933); M. Roberti, 'L'influenza cristiana nello svolgimento storico dei patti nudi', in *Cristianesimo e diritto romano*, ed. by M. Roberti et al. (Milano: Vita e Pensiero, 1935), pp. 85-116; P. Fedele, 'Considerazioni sull'efficacia dei patti nudi nel diritto canonico', in *Annali dell'Università di Macerata* 11 (1937), pp. 115-200; P. Bellini, *L'obbligazione da promessa con oggetto temporale nel sistema canonistico classico* (Milano: Giuffrè, 1964); R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Clarendon Press, 1996), pp. 542-44; F. Scigliano, 'Spunti per una riconsiderazione del principio canonistico *ex nudo pacto oritur actio*', in *Studi Urbinati, A - Scienze giuridiche, politiche ed economiche* 58/1 (2007), pp. 123-55; P. Landau, '*Pacta sunt servanda*. Zu den kanonistischen Grundlagen des Privatautonomie', in *"Ins Wasser geworfen und Ozeane durchquert". Festschrift für Knut Wolfgang Nörr*, hrsg. von M. Ascheri and others (Köln-Weimar-Wien: Böhlau, 2003), pp. 457-74, also in Idem, *Europäische Rechtsgeschichte und kanonisches Recht im Mittelalter. Ausgewählte Aufsätze aus den Jahren 1967 bis 2006 mit Addenda des Autors und Register versuchen* (Badenweiler: Bachmann, 2013), pp. 761-80.

5 The question of the binding force of all agreements may be classified as one in the interest of private law. However, the canonists also influenced the contractual basis of the public law doctrine later called the 'social contract': see A. Thier, 'Klassische Kanonistik und kontraktualistische Tradition', in *Der Einfluss der Kanonistik auf die europäische Rechtskultur. 11. Öffentliches Recht*, ed. O. Condorelli and others (Köln: Böhlau, 2011, Norm und Kultur 37.2), pp. 61-80.

to the general rule that ecclesiastical maintenance should not be alienated[6]. The council affirmed that if certain ecclesiastical officials made provision for someone to perform some ecclesiastical service and promised wages or some payment as compensation, they could be released from their promise only by fulfilling what they had said: "promissi solutionem eos absoluere oportebit"[7]. These two canons had nothing to do with the freedom of contract in Gratian's treatment, but for later authors they served as a source of a new doctrine.

By the end of the twelfth century the doctrine of the binding force of all agreements found its place in canonistic jurisprudence. In 1188, which Peter Landau has called "the year of the birth of the principle *pacta sunt servanda*"[8], two important works were in the process of being written. Huguccio was working on his monumental *Summa Decretorum*, and Bernard of Pavia was composing his *Breviarium extravagantium*, or *Compilatio prima*.

In his gloss on the words *oportebit absolvere* in C.12 q.2 c.66, Huguccio formulated a brilliant commentary that combined sources from different parts of the *Decretum* and formed the foundational elements of the canon law doctrine of bare agreements[9]. In his view, a person who makes a promise is obliged to fulfill his promise even if there was no solemn oath and even if the civil law does not require it: "licet stipulatio non intervenerit, obligatur enim nuda promissione saltem, et si non civiliter unde tenetur ad promissum persolvendum"[10]. Huguccio reiterated that God desires that no difference exist in a Christian's speaking. In God's eyes there is no difference between an oath and plain speaking or between an oath and a promise: "Deus nullam differentiam vult esse inter simplicem promissionem et juramentum vel aliter firmatam

6 The second *quaestio* dealt with the alienation of church property by clerics: "Nunc queritur, si sacerdotes aliqua de rebus ecclesiae dedisse noscuntur, an his qui eas acceperunt aliqua firmitate constabunt? Quod res ecclesiae nullo modo distrahi possunt et distractae possideri, multis auctoritatibus probatur" (C.12 q.2 d.a.c.1: 'Now the question is, if it is known that priests gave any church property, whether it will remain with a certain security with those who received it? It is proven by many authorities that church property cannot in any way be divided or possessed after division').

7 C.12 q.2 c.66: "Quicumque suffragio cuiuslibet aliquid ecclesiasticae utilitatis prouiderint, et pro eo quodcumque commodum in remuneratione promiserint, promissi solutionem eos absoluere oportebit". Gratian's rubric applied this directly to church property, stating that it should remain fixed if it was given as payment for some service: "Que de rebus ecclesiae in remuneratione obsequii prestantur rata permanebunt".

8 Landau, '*Pacta sunt servanda*', cit., p. 772.

9 On the role of Huguccio's gloss see apart provided literature also P. Alexandrowicz, 'Glosa Huguccia do C.12 q.2 c.66. Od obietnicy do zobowiązania' ['Huguccio's Gloss to C.12, q.2, c.66. From Promise to Obligation], in *Prawo i Kościół* 7 (2015), pp. 51-67. On Huguccio's *Summa* in general see W.P. Müller, *Huguccio: the Life, Works, and Thought of a Twelfth-Century Jurist* (Washington: The Catholic University of America Press, 1994), pp. 67-108.

10 Huguccio, *Summa Decretorum*, *ad* C.12 q.2 c.66, v. *oportebit absolvere*, MSS Paris, BN, lat. 3891, fol. 177v; lat. 3892, fol. 209r; lat. 15396, fol. 185r (cited in Roussier, *Le fondement de l'obligation contractuelle*, cit., p. 237): 'although there was not any stipulation, he is at any event obliged by the bare promise and is thence held to fulfil the promise, even if not by civil law'. See also Città del Vaticano, BAV, Vat. lat. 2280, fol. 194rb, cited in Bellini, *L'obbligazione da promessa*, cit., p. 282.

promissionem"[11]. However, Huguccio's main argument revolves around the threat of sin. Regardless of the words used in the speech, one cannot be freed from what one has promised except by fulfilling the promise; if one does not fulfill honorably even a *pactum nudum*, one sins. Regardless of whether or not there is a *stipulatio*, the one who makes the promise is not excused from sin unless he carries out the promise if he can. Huguccio does recognize a difference procedurally, however. He knows that a legal suit cannot arise from a *pactum nudum*; he recognizes a different sort of *actio*, namely that the facts of the case (*factum*) be set forth and a judge be requested to force the one making the promise to carry it out[12]. Huguccio claimed, then, that every agreement and contract should have the same end result, namely that what was promised be fulfilled. He said little about practical aspects of that approach but pointed to the main role of the *officium iudicis* in dealing with a case even if a full-fledged legal suit does not arise from a bare agreement[13].

Another text leading to the verbatim formulation of the well-known principle came from a conciliar canon from Carthage (348), incorporated by Bernard into the title he dedicated to contracts (1.26). In his *Breviarium extravagantium* he used a shortened version of the canon[14]. The case was a dispute between two bishops who made an agreement dealing with the range of their competences upon their people. Unfortunately, one of them broke the agreement and acted against the peace between them. The council proclaimed that the peace should be kept by following the agreements. The short final sentence ("Uniuersi dixerunt: pax seruetur, pacta custodiantur") is the predecessor of the formula *pacta quantumcunque nuda servanda sunt* in the much later rubric to this canon in the *Decretals of Gregory IX* (X 1.35.1)[15]. The main achievement of Bernard was finding this canon in the vast number of sources of canon law since this canon had not been used by Gratian[16]. Second, Bernard abbreviated the canon to underscore its main point, and its main purpose: all

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11 Huguccio, *Summa Decretorum*, *ad* C.12 q.2 c.66, v. *oportebit absolvere*, cit.: 'God wants no difference between a simple promise and an oath or a differently confirmed promise'.

12 Huguccio, *Summa*, Città del Vaticano, BAV, Vat. lat. 2280, fol. 194rb: "Siue ergo interueniat stipulatio siue non, promissor non excusatur a peccato nisi adimpleat promissum si potest... Sed quam accionem proponet cum ex nudo pacto non oriatur accio? Sed non exigitur ut semper proponatur accio, sed simpliciter proponatur factum et postuletur officium iudicis ut ille cogatur adsoluendum promissum".

13 Roussier, *Le fondement de l'obligation contractuelle*, cit., pp. 106-36; Bellini, *L'obbligazione da promessa*, cit., pp. 281-87.

14 Bernardus Papiensis, 'Breviarium extra', in *Antiquae collectiones Decretalium*, ed. by A. Agustin (Herdonia, 1576), 1.26.1. Since the abridgement takes out a middle section of the canon, which does not affect the incipit and explicit, the nature of the abridgement is impossible to detect from Emil Friedberg, ed., *Quinque compilationes antiquae nec non Collectio canonum Lipsiensis* (Leipzig: Tauchnitz, 1882; repr. Graz, Akademische Druck- u. Verlagsanstalt, 1956), 10. Friedberg's edition of the *Liber Extra*, however, shows the abridgement by reproducing the full canon (at X 1.35.1) and putting the removed sections in italics.

15 The final sentence of 1Comp. 1.26.1 may be translated, 'Everyone says: "Peace is to be preserved, agreements are to be protected"'. The later, decretalist interpretation in the rubric uses more technical language: 'Bare agreements are to be preserved in any way possible'.

16 Landau, '*Pacta sunt servanda*', cit., pp. 770-72.

agreements should be kept because of the need of peace in the Christian community. Bernard therefore supported the doctrine of the binding force of all agreements with a legal argumentation of high relevance for the ecclesiastical body as a whole.

These were the two main texts embodying the new way of thinking about contract law in the *ius commune* at the end of the twelfth century. The moral and legal argumentations were later combined and gave other authors the basis for deepening reflection on the freedom of contract.

Two other commentaries from just prior to the Fourth Lateran Council can be mentioned. In his gloss to c. *Quicumque*, Laurentius Hispanus argued that in that case the agreement is already clothed because it fits the schema *do ut des* (or *facio ut facies*, as he phrased it). Drawing on Huguccio's *Summa*, Laurentius utilized c. *Iuramenti* to help explain c. *Quicumque* but also distinguished between them. First he noted that the obligation to fulfill one's promise in c. *Quicumque* stands even without a *solemnitas uerborum* ("solemnity of words") or a vow; simple speech (*simplex loquela*) holds the same obligation on the basis of c. *Iuramenti*. Since c. *Iuramenti* does, however, mention vows or oaths, the condition of the vow from that canon forms a basis for taking legal action (*imploret iudicis officium*)[17]. In this canon (c. *Quicumque*), however, the occasion of the promise on its own is all that is needed. He formulated the possibility of granting *pactum nudum* a legal action called "conditio ex canone *Iuramenti*", but he did not apply it to the glossed canon. This invention was based on an analogous institution from Roman law, namely *condictio ex lege*[18]. Laurentius's solution remained rather hypothetical[19], but he asserted in no uncertain terms that, on the basis of this canon, a promise serves as one of the *vestimenta pactorum*: "hic sufficit causa promittendi et vestitum fuit pactum"[20]. In making this claim, Laurentius was advancing the thought developed by Huguccio, who had not asserted that a promise "clothed" an agreement – he had still only spoken about *pacta nuda* and how there could be some sort of legal recourse even for them.

Johannes Teutonicus utilized Laurentius's gloss in his own, which became the ordinary gloss on the *Decretum*, but he retreated from Laurentius's designation of a verbal promise as something that made an agreement "clothed", and therefore actionable. He preferred instead to resolve the tension by claiming that one could say that an action is appropriate on the basis of a "naked promise". He cited c. *Iuramenti* in support, just as Laurentius had: "et potest dici quod competit actio ex nuda promissione, scilicet conditio ex canone illo *Iuramenti*"[21]. By maintaining the *nuda*

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17 Laurentius Hispanus, *Glossa Palatina*, Città del Vaticano, BAV, Pal. lat. 658, fol. 51vb: "sic conditione ex illo canone [i.e., *Iuramenti*] iuramenti vel proponat factum et imploret iudicis officium".

18 Spies, *De l'observation des simple conventions*, cit., pp. 40-66; Roussier, *Le fondement de l'obligation contractuelle*, cit., pp. 137-48; Landau, '*Pacta sunt servanda*', cit., p. 773-74.

19 Landau, '*Pacta sunt servanda*', cit., p. 774.

20 Laurentius Hispanus, *Glossa Palatina*, Città del Vaticano, BAV, Pal. lat. 658, fol. 51vb (cited in Roussier, *Le fondement de l'obligation contractuelle*, cit., p. 239): 'here the occasion of promising suffices and the agreement has been clothed'.

21 Johannes Teutonicus, *Glossa ordinaria* (Venetiis: 1525), *ad* C.12 q.2 c.66, v. *promiserint*: 'there comes action and from the nude promise, namely condiction from this canon iuramenti'.

language, however, and affirming even these agreements as actionable, the ordinary gloss was affirming a canonistic jurisprudence that differed from the civilian one. Johannes' (and his decretist predecessors') solution was founded on a moral argument drawn from c. *Iuramenti*, and this became the main way of proceeding with regards to a breach of promise in ecclesiastical jurisdiction[22]. The legal remedy proposed by him was the one already mentioned by Laurentius, i.e. *condictio ex canone*.

C. *Plerique*

After these comments on the discovery of freedom of contract in the medieval canon law jurisprudence up to 1215, we can now focus on the possible role of c. *Plerique* in this development. In keeping with the emphases in the early canonistic jurisprudence, it and the first three *apparatus* on it underscore moral considerations.

> Plerique, sicut accepimus, regulares et clerici seculares interdum, cum vel domos locant vel feuda concedunt, in preiudicium parochialium ecclesiarum pactum adiciunt ut conductores et feudatarii decimas eis solvant et apud eosdem eligant sepulturam. Cum autem id de avaritie radice procedat, pactum huiusmodi penitus reprobamus, statuentes ut quicquid fuerit occasione huius pacti perceptum, ecclesie parochiali reddatur[23].

The canon was promulgated as the last of four canons on tithes (cc.53-56)[24]. It was the answer to the reprehensible practice of regulars and secular clerics who, when letting houses or granting fiefs, made an additional agreement in which they obliged the tenants and the vassals to pay the tithe to them, not the local parish church, and to choose to be buried on their ground[25]. Such an arrangement had, of course, an adverse effect on parish churches. Therefore, the council declared that this kind of agreement should not be made any longer. Even more, they were rejected in general

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22 Spies, *De l'observation des simple conventions*, cit., pp. 42-44.

23 COGD 2.1, p. 193. Translation in DEC 1, pp. 260-61: 'Many regulars, as we have learnt, and sometimes secular clerics, when letting houses or granting fiefs, add a pact, to the prejudice of the parish churches, to the effect that the tenants and vassals shall pay tithes to them and shall choose to be buried in their ground. We utterly reject pacts of this kind, since they are rooted in avarice, and we declare that whatever is received through them shall be returned to the parish churches'.

24 Special rules for tithes were also mentioned in cc.61 and 67. About medieval tithes see e.g.: P. Viard, *Histoire de la dîme ecclésiastique principalement en France jusqu'au Décret de Gratien* (Dijon: Jobard, 1909); Idem, *Histoire de la dîme ecclésiastique dans le royaume de France aux XII^e et XIII^e siècles (1150-1313)* (Paris: A. Picard, 1912); C. E. Boyd, *Tithes and Parishes in Medieval Italy* (Ithaca: Cornell University Press, 1952); G. Constable, *Monastic Tithes: from their Origins to the Twelfth Century* (Cambridge: Cambridge University Press, 1964); S. Wood, *The Proprietary Church in the Medieval West* (Oxford: Oxford University Press, 2006); *La dime, l'Église et la société féodale*, ed. by M. Lauwers (Turnhout: Brepols, 2012, Collection d'études médiévales de Nice 12).

25 In the context of the doctrine of the binding force of all contracts, it should be noted that the term *pactum* used in c. *Plerique* needs to be read with a proper verb, namely *adicere*. When it came to legal suits, *pactum adiectum* gave birth to *actio* as a contract. The Romans had already stated as much, and Azo later listed it as one of *vestimenta pactorum*; see Dilcher, 'Der Typenzwang', cit., pp. 271-77.

and whatever was received through them was to be returned to parish churches. It may be worth noting that the main motive for the practice of including the tithes in the lease contracts was the vast scope of ambiguities among owners – mentioning the tithe in the contract supported the owner's claim to the tithe[26]. In the case of ecclesiastical owners inclusion of tithes into the lease contracts was sometimes the only way of guaranteeing their possession of tithes[27].

A few points of that regulation may be underlined. The aim of c. *Plerique* seems to be obvious. The council noticed the practice regarded as problematic, and the council promulgated new provisions against it. The main argument for such regulation was the loss to parish churches, to which tithes should be affiliated as one of the sources of their upkeep. The solution of the conflict of interests between the private and the public was in favor of the public because of the legal purpose of tithes. Therefore, it was the parish church that should benefit from tithes and from burial places[28]. At this point one can see that tithes were not only a matter of ecclesiastical tax law but were always intertwined with moral issues, and in that context they served as a means of resolving many cases inside the Church[29].

There was certainly an extensive background in support of the council's decision. The council's dissent to any action against one's rights correlated well to one of the principles of classical canon law, namely to protect against harms to any ecclesiastical privileges[30]. The basic aim of the Church militant was to maintain the peace among Christians; the practical implication of this ecclesiological rule was to extirpate everything that violated the rights or privileges of someone else. There were many canons concerning the necessity of avoiding the harm, and c. *Plerique* followed this tradition[31]. The concern about peace in the Church maintained by avoiding harm is also the first common point of c. *Plerique* with contractual canons. The same was

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26 Boyd, *Tithes and Parishes*, cit., p. 225.

27 Boyd, *Tithes and Parishes*, cit., p. 226.

28 However, the relations between secular and ecclesiastical lords and the *decima* were often complicated: see e.g. Boyd, *Tithes and Parishes*, cit., pp. 165-77; Wood, *The Proprietary Church*, cit., pp. 459-518.

29 On the influence of almsgiving to the beginning of tithes see E. Shuler, 'Caesarius of Arles and the Origins of the Ecclesiastical Tithe: From a Theology of Almsgiving to Practical Obligations', in *Traditio* 67 (2012), pp. 43-69.

30 On canonistic thinking about privileges see R. Potz, 'Zur kanonistischen Privilegientheorie', in *Das Privileg im europäische Vergleich*, I, ed. B. Dölemeyer and H. Mohnhaupt (Frankfurt am Main: Klostermann, 1999, Studien zur Europäische Rechtsgeschichte 93), pp. 13-67. On the meaning of privileges in early *ius commune* jurisprudence, see A. Gouron, 'La notion de privilege dans la doctrine juridique du douzième siècle', in *Das Privileg im europäische Vergleich*, II, ed. B. Dölemeyer and H. Mohnhaupt (Frankfurt am Main: Klostermann, 1999, Studien zur Europäische Rechtsgeschichte 125), pp. 1-16, also in Idem, *Pionniers du droit occidental au Moyen Âge* (Aldershot: Variorum, 2006, CSS 865), XVIII.

31 Just to mention one example which was also related to the Roman law one can find the similar point in c. *Intelleximus* (X 5.32.1). Lucius III claimed in that canon that in the case of lacuna the canons may be supported by the secular constitutions and he allowed to use Roman *novi operis nuntiatio* to resolve the case. The dispute arose between the prior who was the superior of the baptismal church and the clerics who built the chapel causing the harm to the church. The application of Roman law in this case

the aim of conciliar fathers from Carthage, when they stated that 'Peace is to be preserved, agreements are to be protected'.

The argument focused on the common good is accompanied by the negative argument based on the critical evaluation of the motivation of clerics. The constitution states that they claim tithes and burials "de avaritie radice". The term was common in the Christian tradition and stems from one of the Pauline epistles to Timothy (1 Tim. 6.10)[32]. This part of the letter is a criticism of the conduct of some people to whom godliness became an opportunity for gain. Paul argued that godliness itself is a gain with contentment for what one has. The point of his message is that love of money is the root of all evil: "radix enim omnium malorum est cupiditas"[33]. The reference to greed, with its long-standing place in Christian Scriptures and the tradition, supported the reasoning about the common good of the Church and the nature of tithe, and together they formed a moral grounding for the conciliar regulation.

The essence of that regulation is a rejection of all agreements that have a root in the love of money. In the specific case of *Plerique*, in view are agreements on tithes and burial places made in favor of a particular cleric's interest. The very blunt ban of such agreements founded on both legal and moral arguments may serve as an example of the limitation of freedom of contract. On the one hand, it is clear that freedom of contract is not absolute, but on the other hand, it is not an easy task to draw the limits of such freedom. The very general and basic limits were, for example, expressed by Huguccio in his gloss to c. *Quicumque*. He pointed out that the fulfillment of the promise was obligatory only if the person making the promise was able to fulfill it[34]. It is hardly possible to find a more general limitation and is close to the statement that nobody is obliged to perform something that is impossible. Huguccio's comment nevertheless shows how the canonists had to develop limitations to the doctrine of the binding force of all agreements at the same time as they were formulating and affirming this basic rule. *Plerique*, however, prescribed another kind of limitation on the binding force of agreement, namely limitation expressed in a statute. An agreement that is against the ecclesiastical statute cannot be granted validity[35]. Such an agreement does not constitute an example of freedom of contract; rather, it is a case of abusing one's rights contrary to the common good of the Church and indulging greed, a major sin in biblical and ecclesiastical teaching. Because of that threat the council expressed this ban as unambiguously as it did.

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meant that the chapel must by destroyed. The same consequence pope drawn from the canon law according to which "nulla ecclesia in praeiudicium est alterius construenda" ('no church should be built with the harm to another').

32 It was well recognized in canon law as an argument in the reasoning: see e.g. *Decr. Grat.*, D.49 c.1; *De pen.* D.2 c.13.

33 'For the greed is the root of all evil'.

34 Huguccio, *Summa Decretorum*, *ad* C.12 q.2 c.66, v. *oportebit absolvere*: "promissor non excusatur a peccato nisi adimpleat promissum si potest" ('the maker of the promise is not excused from sin unless he fulfils the promise, if he can').

35 Similarly see e.g. Bernardus Papiensis, *Summa decretalium*, ed. by E. A. T. Laspeyres (Regensburg: Josef Manz, 1860 = Graz: Akademische Druck u. Verlagsantstalt, 1956), *ad* 1.26, *de pactis*, p. 21.

The First Apparatus to c. *Plerique*

Attention can now be turned to the three *apparatus* to c. *Plerique* of the Fourth Lateran Council for their attitude towards the binding force of all agreements[36]. They were the first interpretations of the conciliar decrees and therefore serve as testimony to the council's meaning for the canonists of that time. There were only three *apparatus* on the Fourth Lateran Council's constitutions because the latter were swiftly incorporated into *Compilatio quarta* and, twenty years later, into the *Liber Extra*; thereafter commentators referred to them in these collections[37].

The first *apparatus* to be examined is that of Johannes Teutonicus. In his gloss he commented on two phrases from c. *Plerique*: 'pactum huiusmodi penitus reprobamus' and 'ecclesie parochiali reddatur'. In the first comment he made reference another part of his gloss, namely to his *apparatus* on Lateran IV c.53 *In aliquibus*. He stated there in the general note about the Church's right to the tithe that, even if there was an agreement which seemingly may have led to the loss of the tithe by a parish church, this would not happen because the Church kept the right of requesting the tithe[38]. Furthermore, Johannes stated that the wording *reddatur* was obviously a clue pointing that such an agreement was not valid: "Et ex eo quod dicit 'reddatur', patet quod tale pactum non ualet"[39]. Then he invoked arguments for such a solution from the *Decretum* (C.16 q.1 c.42) and against it from the *Digest* (Dig. 2.14.52.2). The former text claims that the disposal of church tithes by a layman or a cleric who transfers the property is void. Ulpian's text from the *Digest* discussed the agreement on fees upon property between creditor and debtor and stated that such a legitimate agreement was to be fulfilled. When he commented on the second phrase from c. *Plerique*, about what should be returned to the parish church, Johannes said that such a situation was an ignominy for that church and mentioned two more sources (C.27 q.1 c.30, and 1Comp. 5.2.10), referring to the cases of seduced women and simony in episcopal election[40]. Despite the fact that they do not have much in common, they both stressed the right of the Church to particular goods transferred sinfully. It seems that Johannes' aim was to place c. *Plerique* in the same category of rules establishing the nullity of immoral deals involving church goods. In his very short gloss he pointed

36 On these *apparatus* see A. García y García, 'The Fourth Lateran Council and Canonists', in *The History of Medieval Canon Law in the Classical Period, 1140-1234. From Gratian to the Decretals of Pope Gregory IX*, ed. by W. Hartmann and K. Pennington (Washington D.C.: The Catholic University of America Press, 2008, History of Medieval Canon Law), pp. 367-78, pp. 371-78.

37 García y García, 'The Fourth Lateran Council', cit., p. 370.

38 Johannes Teutonicus, 'Apparatus in Concilium quartum lateranense', in *Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum*, ed. by A. García y García (Città del Vaticano: BAV, 1981, MIC Series A 2), *ad* c.53, v. *per censuram ecclesiasticam compellantur*, pp. 261-62: "Pactum enim non nocet ecclesie, quin a quolibet possessore petere possit decimas" ('However, the agreement does not harm the church as she can claim the tithe from any possessor').

39 Johannes Teutonicus, 'Apparatus', cit., *ad* c.56, v. *pactum huiusmodi penitus reprobamus*, p. 264: 'And from this, the fact that it says 'it is to be returned', it is evident that such an agreement is not valid'.

40 Johannes Teutonicus, 'Apparatus', cit., *ad* c.56, v. *ecclesie parochiali reddatur*, p. 264: "in cuius ignominiam id factum est" ('for whose ignominy it happened').

only to the mentioned issues and clarified them using precise legal phrases like *non valet, contrahentes, ignominia.*

What can be said about Johannes' attitude on the force of contract in that gloss? Johannes stressed that the agreement on tithes against the parish church could not be valid. He mentioned a few other sources that would seem to support or provide analogous cases to the conciliar decision, and he was thereby arguing that c. *Plerique* fit within the canon law of the time and was not against other regulations. Johannes used more technical legal language than the council to underline that an agreement depriving a parish church of its rightful tithes, as established by other canon law, is not valid.

The second *apparatus* was written by Vincentius Hispanus. His gloss was much less thorough, and he concentrated on explaining the particular formulas found in c. *Plerique*. According to him, letting houses and fiefs had to be situated in other parishes[41]. The more interesting part of the gloss appeared on the words "in preiudicium parochialium ecclesiarum pactum adiciunt". Vincentius stated that, even if tenants made an agreement with the lord to receive the tithe, it would not turn a profit for them. Such an agreement gave them literally nothing: "nichil prodest eis hoc pactum"[42]. In that point he also recalled Ulpian's text on the limits of *traditio* (Dig. 41.1.20), in which he explained that the delivery of property cannot transfer more rights to the new owner than the former possessor had. Probably Vincentius saw the agreement on tithes in the same light. When it was made by parties without authority to dispense of tithes, it had to be void. At the end of the gloss Vincentius dealt with the restitution of gains, and he referred to two other sources, 1Comp. 5.2.10 (which Johannes had also cited) and Auth. Coll. 9.15.2.1. Both texts forbid simoniacal practices in episcopal election. They also defined that everything that was transferred in such cases were to be returned.

The same question may be raised again: what did that gloss say about the force of contract? Vincentius explicitly stressed that the agreement made even with the proper person could not be valid. If it were valid, it would bring loss on parish churches, which was unacceptable. Therefore, for him such an agreement meant nothing because of its effects contrary to the common good of the Church.

Damasus Hungarus was the author of the last *apparatus* to the constitutions of the Fourth Lateran Council. Here the note on the fiefs in other parishes was repeated. Then he made an interesting observation that the same agreement could be viewed from two different perspectives. From the perspective of the Church the agreement was not valid, and so it did not bind the Church: "quantum enim ad ecclesiam non

41 Vincentius Hispanus, 'Apparatus in Concilium quartum lateranense', in *Constitutiones Concilii quarti Lateranensis*, cit., *ad* c.56, v. *domos locant*, p. 371: "sitas in parochiis alienis" ('situated in other parishes'); v. *vel feuda concedunt*, p. 371: "in aliena parochia sita" ('situated in another parish').

42 Vincentius Hispanus, 'Apparatus', cit., *ad* c.56, v. *in preiudicium parochialium ecclesiarum pactum adiciunt*, p. 371: "etsi coloni paciscantur cum dominis ut domini dent decimas pro eis, nichil prodest eis hoc pactum" ('although tenants arrange with the landlord the agreement that he will give the tithe for them, such an agreement is not useful for them').

tenet pactum, set tenet quantum ad paciscentes"[43]. Still, the agreement was in some sense binding because it gave the right of returning all gains obtained by it. It is an interesting distinction that Damasus supported with a text from *Compilatio prima* (1Comp. 3.26.28)[44]. In this short canon, Pope Alexander III instructs the addressee, a bishop, to compel Jews who cultivate certain (ecclesiastical) lands to pay the tithe or else fully to renounce those lands; whatever agreement was in place between the church and the Jews should give way to the rights of the church lest such an occasion lead to the church being defrauded of them[45]. In light of these comments it can be said that Damasus also underlined the legal *status* of concluding the agreement. According to him, any agreement on tithes against the parish church's rights was in general not binding. Nevertheless, the loss carried by the parish church had to be compensated somehow, and that is why in that sense the agreement should be treated as existing, as was probably suggested by the wording "non tenet" instead of "non valet".

The three glosses to c. *Plerique* from the first *apparatus* to the Fourth Lateran Council constitutions offer a window into how canonists of the time understood that regulation. All the glosses placed the conciliar provisions in the broader context of canon law by supporting c. *Plerique* with other sources of law. They all paid attention to the role of the conciliar ban on the agreements on tithes against the interests of parish churches. They focused on the practical consequences of such agreements and described their effects in varied ways. They expressed the invalidity of these agreements in different ways, but they all agreed about the lack of force of such arrangements. It can therefore be said that these glosses saw c. *Plerique* as a statute concerning contract law.

Conclusions

C. *Plerique* seems to constitute one of the limitations of freedom of contract expressed by ecclesiastical statutes in the period when the doctrine of the binding force of all agreements was being formed. The commentators of that regulation agreed about the lack of binding force of a particular type of agreement that deprived parish churches of their tithes. They also gave more references to other canon law sources, showing that such an agreement really could not be valid on the ground of canon law in general. Taking the glosses as a base, it can be stated that the glossators considered the principle of the freedom of contract to be limited. The binding force of an agreement was not absolute, and it could be limited in practice by various factors.

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43 Damasus Hungarus, 'Apparatus in Concilium quartum lateranense', in *Constitutiones Concilii quarti Lateranensis*, cit., *ad* c.56, v. *pactum huiusmodi penitus reprobamus*, p. 452: 'the agreement does not bind as for the church, but it binds as for the parties'.

44 Much of 1Comp. 3.26 'De decimis et primitiis et oblationibus' was not taken up into the *Liber Extra*. This particular canon was (as X 3.30.16).

45 X 3.30.16 (ed. Friedberg): "De terris uero, quas Iudaei colunt, tuae prudentiae respondemus, ut eos ad decimas persolvendas, vel ad possessiones penitus renunciandas cum omni districtione compellas, ne forte occasione illa ecclesiae valeant suo iure fraudari."

That did not mean that there were agreements that could be treated differently, namely with or without legal protection. It meant that not all agreements and contracts should be treated as sources of building peace among Christians. They were not in fact, then, agreements at all. They were simply nothing because they were presumably founded on sinful and uncanonical practices. Obviously, such an attitude could cause practical problems in evaluating all agreements, but these qualifications, exceptions, and limitations were necessary for the whole system in order to make it reasonable and legitimate.

The role of c. *Plerique* in the development of the principle *pacta sunt servanda* needs much more investigation in light of its later inclusion in *Compilatio Quarta* (4Comp. 1.15.1) and the *Liber Extra* (X 1.35.7). For many years it became part of the decretalist literature concerned with contract law, serving as a prominent example of the limitation of freedom of contract.

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Roman Law Behind the Decrees 39-41 of the Fourth Lateran Council (1215)

Introduction

The relationship of ancient Roman law and the law of the Church is an abundant field of scholarly research. The Fourth Lateran Council of 1215 had been convoked in the unique period of European history when two major legal systems of the Western world started to amalgamate so tightly that in the near future they became known as the *ius commune*. It is understandable then that Roman law could play some role during the discussions and proceedings of the council. For Roman legal scholars, evident recalls of the civil law occurred in three decrees of the Council – decree 39 *Saepe contingit*, decree 40 *Contingit interdum* and decree 41 *Quoniam omne*.

In this article I show the paths of these three canonical constitutions and their civilian heritage. This heritage sometimes is forgotten, but it sheds light on the processes of cultural and legal development in medieval society. To do so, I will discuss first briefly the position of Roman law and civilian study in the early thirteenth century, and then I will give attention to the three juridical concepts of (1) the possession of a stolen object, (2) the possession of the object as a consequence of contumacy by the opposing party and (3) good faith as a requirement of prescription.

Roman Law and Canon Law in Early Thirteenth Century

It is generally accepted that, since the collapse of the Western Roman Empire, only vulgar versions of the Roman laws gradually penetrated the barbaric legal and customary systems of the Germanic peoples. It was not systematic. It always looked more like a coincidence. Only some studies over this vulgar version of the Roman law were undertaken.

Everything changed in the mid-eleventh century when Justinian's Digest was rediscovered in Italy. Quite shortly the extensive studies over it were initiated in newly created universities like the one in Bologna. One of the first Bolognese civilians, Pepo, became famous because of his citation of passages from the Digest

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in a court decision already in 1076[1]. Additionally, in the mid-twelfth century the sudden outburst of canon law studies occurred. Gratian decided to "harmonize the discordant canons" and compiled his famous *Decretum*[2]. From around 1050 until 1150, Europe, or more precisely Italy, witnessed the birth of a new and largely closed group of specialists of law, which expanded rapidly over the next century[3]. Some of them specialized in Roman law, some others in canon law, but most of them mixed both areas of specialization to one degree or another.

Important, however, seems to be a fact that these major changes that occurred in eleventh and twelfth century were largely initiated within the context of the reforming climate of the epoch. The Gregorian Reforms changed the way of thinking about the world. This is one of the reasons, in my opinion, why the rediscovery of the Digest occurred in that epoch. As the late Peter Stein noticed: "There had been manuscripts [of Justinian's Digest] lurking in Italian libraries but their bulk and the difficulty of understanding them had hitherto deterred potential readers"[4]. The intellectual climate of the age, much of it directed toward ecclesiastical reforms and to an ecclesiology clearly situating the papacy at the head of the hierarchy (or to countering this movement), inspired a search for ancient precedents for positions taken by proponents of competing views. This enabled the undertaking of studies and the development of scientific disciplines that would eventually lead to modifications of the worldview dominant within *Christianitas*[5]. The key consequence of the aforementioned events in the realm of law was the creation of the law schools where the law could be studied in a systematic manner. The legal education of the earlier centuries concentrated mainly on practical issues. It was more like a master-apprentice relation, where the apprentice was observing his master during his work. It was a craft job. But the creation of the universities changed these craftsmen of law into the professionals of law. The cradle of all the medieval legal studies was Bologna, but quite shortly the University of Bologna was followed by the other universities located all over Europe[6]. The study of the so-called "learned laws", i.e. Roman and canon law, gained much attraction. In a relatively short amount of time, Italian universities released a group of well-educated lawyers. Many of them were clerics and with time they obtained

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1 W. P. Müller, 'The Recovery of Justinian's Digest in the Middle Ages', in BMCL 20 (1990), pp. 1-29.

2 A. Winroth, *The Making of Gratian's* Decretum (Cambridge: Cambridge University Press, 2004, Cambridge studies in medieval life and thought 4. ser. 49).

3 Among vast literature, see K. Pennington, 'The Big Bang: Roman Law in the Early Twelfth Century', in RIDC 18 (2007), pp. 43-70.

4 P. Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), p. 43.

5 See aged but still useful book by Ch. H. Haskins, *The Renaissance of the Twelfth Century* (Cambridge, MA: Harvard University Press, 1955), especially pp. 193-223.

6 About teaching law in medieval period see: H. J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Cambridge, MA-London: Harvard University Press, 1983), pp. 120-64; J. A. Brundage, *The Medieval Origins of the Legal Profession* (Chicago & London: Chicago University Press, 2008), pp. 219-82; A. Dębiński, *Church and Roman Law* (Lublin: Wydawnictwo KUL, 2010, Publications of the faculty of law, canon law and administration of the John Paul II Catholic University of Lublin 1), pp. 65-82. For the late medieval period see D. M. Owen, *The Medieval Canon Law: Teaching, Literature and Transmission* (Cambridge: Cambridge University Press, 1990), pp. 1-16.

key offices in church administration, including the papal curia. In such a situation, it is clear that those lawyers were responsible for shaping the new outlook of the Church. The activity of canon lawyers in the papal curia is well seen thanks to the increase of the number of the decretals that were issued by the popes of the twelfth and thirteenth century. Some of the canonists were even elected popes and became known as lawyer-popes ("papi giuristi")[7].

Against this 'legal' background, on 19 April 1213, Innocent III[8] called for the Fourth Lateran Council, which gathered on November 1215. The council became a recapitulation of Innocent's papacy. Lawyers who were involved in the daily work of the pope's curia prepared the general outline of the council's decrees[9]. Three of them deserves closer look due to their civilian heritage.

Possession of Stolen Objects

Constitution 39 of the Fourth Lateran Council (*Saepe contingit*) proclaimed that:

> Saepe contingit, quod, spoliatus iniuste, per spoliatorem in alium re translata, dum adversus possessorem non subvenitur per restitutionis beneficium spoliato, commodo possessionis amisso, propter difficultatem probationis ius proprietatis amittit effectum. Unde non obstante civilis iuris rigore sancimus ut, si quis de caetero scienter rem talem acceperit, cum spoliatori quasi succedat in vitium, eo quod non multum intersit, praesertim, quoad periculum animae, detinere iniuste ac invadere alienum, contra possessorem huiusmodi spoliator per restitutionis beneficium succurratur[10].

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7 A. Campitelli, *Europeenses. Presupposti storici e genesi del diritto comune* (Bari: Cacucci Editore, 1994²), p. 61.

8 About the connections of Innocent III with the law see especially K. Pennington, 'The Legal Education of Pope Innocent III', in BMCL 4 (1974), pp. 70-77, also in Idem, *Popes, Canonists, and Texts 1150-1550* (Aldershot: Variorum, 1993, CSS 142), I, and Idem, 'Innocent III and Canon Law', in *Innocent III. Vicar of Christ or Lord of the World?*, ed. by J. M. Powell (Washington D.C.: The Catholic University of America Press, 1994²), pp. 105-10. Generally about the pope see recently J. C. Moore, *Pope Innocent III (1160/61-1216): To Root Up and to Plant* (Leiden & Boston: Brill, 2003, The Medieval Mediterranean 47).

9 A. García y García, 'The Fourth Lateran Council and the Canonists', in *The History of Medieval Canon Law in the Classical Period, 1140-1234. From Gratian to the Decretals of Pope Gregory IX*, ed. by W. Hartmann and K. Pennington (Washington, D.C.: The Catholic University of America Press, 2008, History of Medieval Canon Law), pp. 367-78.

10 X 2.13.18: 'It often happens, when a person has been unjustly robbed and the object has been transferred by the robber to a third party, that he is not helped by an action of restitution against the new possessor because he has lost the advantage of possession, and he looses in effect the right of ownership on account of the difficulty of proving his case. We therefore decree, notwithstanding the force of civil law, that if anyone henceforth knowingly receives such a thing, then the one robbed shall be favoured by his being awarded restitution against the one in possession. For the latter as it were succeeds the robber in his vice, inasmuch as there is not much difference, especially as regards danger of the soul, between unjustly hanging on to another's property and seizing it.' English translations after DEC I, pp. 252-53.

The council's provision seems to be connected to the canonistic concept of an *actio spolii*. The origin of this legal action can be traced back to Pope John I and his letter to Archbishop Zacharias, dated 523. Gratian later inserted the document into the *Decretum*[11]. It is possible that the aforementioned decretal is a forgery[12], but still it entered the canonical world and influenced it. According to this canon, *Redintegranda*, the bishop who was deprived of his bishopric or property was protected until it had been returned to him. With time the canonists widened the scope of the rule; they created first the *exceptio spolii* and then *actio spolii*, that is to say, a legal objection to or act of litigation about an act of spoliation. As to the last one, Harold J. Berman described it in the following manner:

> The *actio spolii* was available for any kind of spoliation (including spoliation by fraud); it could be used to recover possession of incorporeal rights as well as of movable and immovable things; it was available against third persons, including persons not in possession of things claimed; and the plaintiff was not required to show title to the land or goods or rights which he claimed. Finally, the action was available even to one who was himself wrongfully in possession[13].

Historians of canon law have attempted to explain the evolution of the concept[14]. According to some authors canon *Redintegranda*, initially a disciplinary rule, evolved into the more juridical concept of *exceptio* and then *actio spolii* under the influence of Roman possessory interdict *unde vi*[15]. It is interesting also to notice that, in the opinion of ninenteenth-century scholars, *actio spolii* could influence the development of the English *assize of novel disseisin*[16]. The development of the concepts is not important

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11 C.3 q.1 c.3: "Redintegranda sunt omnia expoliatis vel eiectis episcopis presentialiter ordinatione pontificum, et in eo loco, unde abscesserant, funditus revocanda, quacumque conditione temporis, aut captivitate, aut dolo, aut violentia malorum, et per quascumque iniustas causas res ecclesiae, vel proprias, id est suas substantias perdidisse noscuntur" ('Presently, by the decree of the pope, all things are to be restored to despoiled or displaced bishops, and they are to be recalled completely in that place from which they had disappeared, in whatever circumstance of the time – whether by captivity or deceit or the violence of wicked men – and through whatever unjust causes ecclesiastical goods or their proper, that is their own, personal property were known to have been lost').

12 C. Dalla Villa, 'Sulla figura giuridica dell'*exceptio spolii*. Dalle sue prime apparizioni nelle consuetudini tardoantiche al *Decretum Gratiani*', in *Teoria e storia del diritto privato* 7 (2014), pp. 1-64, p. 4.

13 Berman, *Law and Revolution*, cit., p. 241. For Gratian's interest in *exceptio spolii*, see Dalla Villa, 'Sulla figura giuridica', cit., pp. 54-62.

14 The earliest work that dealt with the problem of the origins of *actio spolii* was F. Ruffini, *L'Actio spolii. Studio storico-giuridico* (Torino: F.lli Bocca, 1889, R. Università di Torino, Istituto di esercitazioni nelle scienze giuridico politiche 6). The survey of the literature that has appeared since may be found in D. B. Walters, 'Spoliation and Disseisin: Possession under Threat and Its Protection Before and After 1215', in *Vergentis* 1 (2015), pp. 21-69.

15 Such a concept was already presented by Ruffini. For more about the possible Roman origins of the *actio spolii*, see Walters, 'Spoliation and Disseisin', cit., pp. 34-35.

16 Roman and canonical origins of the *assize of novel disseisin* were suggested, e.g., by F. Pollock and F. W. Maitland in their famous *The History of English Law Before the Time of Edward I*, vol. II (Cambridge: Cambridge University Press, 1898), pp. 47-48, as well as in the twentieth century by D. W. Sutherland, *The Assize of Novel Disseisin* (Oxford: Oxford University Press, 1973), pp. 21 ff. This opinion was radically criticized, however, by R. C. Van Caenegem and other scholars. For a brief review of their

here, but it is important that the decree *Saepe contingit* appeared in a row with other provisions that specified the conditions of using an *actio spolii*.

There is one slight problem to viewing *Seape contingit* as influenced by Roman law. The decree states that 'notwithstanding the force of civil law' (*non obstante civilis iuris rigore*), the restitution action will be awarded to the person who was robbed. It is unclear, however, what Pope Innocent III and the participants of the council meant by these words. They were definitely not referring to the *actio spolii*, because it was commonly known that this construction had evolved in the canon lawyers' community. To what, then, did decree 39 refer? Due to the general character of the statement it is not easy to give a fully convincing answer. But it is possible – in my opinion – to suggest that the civilian regulations that were in mind with the *non obstante* clause of the decree could be: (1) the *actio Pauliana* – a remedy formed by Justinian's compilers[17], (2) the passage from the Digest that deals with the problem of selling *res furtiva*[18], or (3) the regulations concerning the usucaption of *res furtiva* in general.

In the case of an *actio Pauliana*, the creditor was enabled to demand the return of an estate from a third party who acquired it knowing that the debtor was disposing of the estate fraudulently. It was a way to secure the creditors' rights from dishonest actions by debtors[19]. There is no doubt that the action functioned in the sphere of the law of obligations. But it was closely connected to the problem of possession and property. The creditor was the one who was interested in a debtor's possession of goods that would allow him to satisfy the creditor's claim. In such a situation it is possible to suggest that the medieval lawyers did not limit the scope of the *actio* only to creditor-debtor-third party relations, but that they used it by analogy for other examples of "three parties (triangle) relations". It is important to notice that in both constructions the key actions undertaken by the parties were treated as against good morals (*contra bonos mores*). The *actio Pauliana* was part of what Romanists today call the delict fraud of creditors (*fraus creditorum*). The possibility of its use was connected with the appearance of the *eventus fraudis* – i.e. an insidious and mischievous event that harmed the creditor, whereas in *Saepe contingit* it is clearly stated that loss of goods occurred 'unjustly' (*iniuste*). The terms are different but nevertheless similarly represent a moral estimation of the actions of the thief and the debtor.

It has to be said, however, that the concept of fraudulent practices and the remedies based on the Justinianic *actio Pauliana* were not commonly discussed by

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views, see R. V. Turner, *Judges, Administrators and the Common Law in Angevin England* (London & Rio Grande: The Hambledon Press, 1994), p. 60, and J. Martínez-Torrón, *Anglo-American Law and Canon Law: Canonical Roots of the Common Law Tradition* (Berlin: Duncker & Humblot, 1998, Comparative Studies in Continental and Anglo-American Legal History 18), pp. 175-76.

17 Dig. 22.1.38.4 (*Paulus libro sexto ad Plautium*) and Dig. 42.8.

18 Dig. 18.1.34.3 (*Paulus libro 33 ad edictum*).

19 See e.g. W. W. Buckland, *A Text-book of Roman Law from Augustus to Justinian*, rev. by P. G. Stein (Cambridge: Cambridge University Press, 1966[1]), p. 596; G. Grevesmühl, *Die Gläubigeranfechtung nach klassischem römischen Recht* (Göttingen: Wallstein Verlag, 2003, Quellen und Forschungen zum Recht und seiner Geschichte 10), pp. 57-84.

medieval canon lawyers. A more extensive linking of these subjects can be dated since the fifteenth-century. At that time, for example, William Lyndwood discussed such terms as 'without fraud' (*sine dolo*) or 'deceit' (*fraude*) in his *Provinciale*[20]. Direct reference to the *actio Pauliana* can be discovered even later, in seventeenth-century, in *Reflectiones ex temporales Salmantinae* by Spanish lawyer Petrus (Pedro) Baio Arroyo[21]. Nevertheless, due to the similarities that can be observed between the canonical provisions and the *actio Pauliana*, it is unlikely that the Fathers at the council had this concept in mind when they included the *non obstante* clause.

The second possible inspiration for Innocent III and the members of the council for the *non obstante* clause could be a short passage attributed to the Roman jurist Paulus, which was inserted into the eighteenth book of Justinian's Digest. The passage reads:

> Item si et emptor et venditor scit furtivum esse quod venit, a neutra parte obligatio contrahitur: si emptor solus scit, non obligabitur venditor nec tamen ex vendito quicquam consequitur, nisi ultro quod convenerit praestet: quod si venditor scit, emptor ignoravit, utrinque obligatio contrahitur, et ita Pomponius quoque scribit[22].

The quoted passage treats three separate situations and configurations of the purchaser's and vendor's knowledge about the stolen object. In the case of a purchaser who knew about the legal defectiveness of the object the ruling is the same both in Paulus's opinion as well as in decree 39 of Fourth Lateran Council. Still, however there is possibility to observe a difference between both rulings. According to *Saepe contingit* the purchaser would be recognised as an abetter of the theft. This novelty could be understood as an explanation of the use of the statement "unde non obstante civilis iuris rigore". There is also another possibility. The discussed phrase could be recognised from the perspective of the two remaining situations presented by Paulus but not inserted into the decree. Nevertheless, Paulus's passage deals only with the relation of the vendor and purchaser. The jurist was not interested in the legal position of the party harmed by the theft. And in fact this is a potential candidate for what the conciliar Fathers had in mind in their *non obstante* phrase. For, in such situation Roman law did not recognize the rights of the original owner, but canon law would.

The third solution to which the council's Fathers could refer was the set of rules connected with the usucaption (acquisitive prescription) of stolen goods. The specific regulations that touched this matter were already inserted into the Twelve

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20 W. Lyndwood, *Provinciale* 1.3, *s.v. sine dolo* and *fraude*. About W. Lyndwood and his treaty see J. H. Baker, 'William Lyndwood, LL.D. (+ 1446). Bishop of St. David's', in *Ecclesiastical Law Journal* 2 (1992), pp. 268-72.

21 P. Baio, *Reflectiones ex temporales Salmantinae* (Salmanticae: Typographum Universitatis, 1633) pp. 28-31.

22 Dig. 18.1.34.3: 'Again, if both parties to a sale know that the object is stolen, no obligation is created on either side; if the purchaser alone knows, the vendor will incur no obligation, though he can obtain nothing under the contract unless he voluntarily performs what he agreed to do; but if the vendor knows and the purchaser does not, both parties are bound by the contract. Pomponius also wrote to the same effect'. Translation of the passage quoted after *The Digest of Justinian*, ed. by Th. Mommsen and others, vol. II (Philadelphia: University of Pennsylvania Press, 1985), p. 518.

Tables[23]. Later, around 149 BC, the same subject was legislated in the *Lex Atinia de usucapione*[24], which was later creatively developed by the jurists of the classical period. Their interpretations created the general concepts of the *usucapio* rules in Roman law. According to the general principle, stolen goods were not eligible to be acquired through *usucapio*. The classical Roman law, however, knew an exception to that rule, called "return into power" (*reversio in potestatem*), i.e. the situation when the *res furtivae* could be acquired only if they were physically returned earlier to the legal owner. It was important also that the owner had to be aware that he was obtaining his own possession. An owner who was buying his own things without recognizing them did not fulfill the condition of *reversio in potestatem*[25].

The law of Justinian's epoch supported the general rule of not acquiring stolen things through usucaption. The Code's committee enumerated requirements of prescription, such as thing capable of usucaption, title, faith, possession, and time (*res habilis, titulus, fides, possessio* and *tempus*). Stolen objects were excluded from the category of things capable of usucaption, but Justinian's constitution of 528 allowed an exception to that rule in the context of an extraordinary prescription known as "the prescription of the longest time" (*longissimi temporis praescriptio*)[26]. Because, however, the requirement of good faith was still in force, the thief himself could not acquire ownership of the stolen goods. The only person who could benefit from the extraordinary prescription was the purchaser who bought a stolen thing from the thief without knowing about its defectiveness. Essentially, then, the regulations introduced by Justinian did not differ so much from classical Roman law.

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23 *Lex XII tab.* 7, 17. See also R. Barber, 'Usucapion and Theft at the Time of the Twelve Tables', in *Sydney Law Review* 8.3 (1979), pp. 613-19.

24 *Gell.* 17.7.1 and Dig. 41.3.4.6 (*Paulus libro 54 ad edictum*).

25 See a detailed analyses of the subject by P. Bělovský, '*Usucapio* of Stolen Things and Slave Children', in *Revue Internationale des Droits de l'Antiquité* 49 (2002) pp. 57-99, pp. 57-82; M. Aránzazu Calzada González, '*Reversio in potestatem* de las *res furtivae et vi possessae*', in SDHI 78 (2012), pp. 167-96; M. Frunzio, '*Reversio in potestatem* delle *res furtivae* e *furtum suae rei* nel pensiero del giurista Paolo', in *Cultura giuridica e diritto vivente* 1 (2014) (http://ojs.uniurb.it/index.php/cgdv/article/view/388/375).

26 Cod. 7.39.8.1: "Quod si quis eam rem desierit possidere, cuius dominus vel is qui supposítam eam habebat exceptione triginta vel quadraginta annorum expulsus est, praedictum auxilium non indiscrete, sed cum moderata divisione ei praestare censemus, ut, si quidem bona fide ab initio eam rem tenuit, simili possit uti praesidio, sin vero mala fide eam adeptus est, indignus eo videatur, ita tamen, ut novus possessor, si quidem ipse rei dominus ab initio fuit vel supposítam eam habebat et memoratae exceptionis necessitate expulsus est, commodum detentionis sibi adquirat" ('But if a person ceases to possess that property, whose owner or whose mortgagee has lost it through the defense of thirty or fourty years, We decree that the aforementioned remedy should not be applied indiscriminately but should follow a moderate distinction: if the person held the property in good faith from the beginning, he shall enjoy that right, but if he acquired it in bad faith, he seems unworthy of it; thus if the new possessor was the original owner or mortgagee of the property and lost it by reason of the aforesaid defense (of prescription), he acquires the benefit of the occupation: translation quoted after *The Codex of Justinian. A New Annotated Translation with Parallel Latin and Greek* Text, ed. by B. W. Frier, vol. II, (Cambridge: Cambridge University Press, 2016), p. 1905.

In such a situation the regulations attributed to Justinian and to the council's Fathers were different. *Saepe contingit* stated that "contra possessorem huiusmodi spoliator per restitutionis beneficium succurratur", establishing that the original owner would be compensated no matter how many years or how many sales later. This difference may in fact been what Lateran IV's *Saepe contingit* had in view in its *non obstante* clause.

The above propositions certainly do not exhaust all the possibilities. It may be noted, for instance, that some decretalists[27] viewed this decree as well as the whole title *De restitutone spoliatorum* that was inserted into the *Liber Extra*, in light of Roman interdicts *de vi et vi armata*[28]. Such a solution can be connected with the general deliberations on the *actio spei*, which quite probably were inherited from the praetorian interdict. It does not mean necessarily that the *non obstante* phrase was referring to the interdicts.

It seems, however, reasonable to think that the authors of the decree *Saepe contingit* were referring not to one single provision of Roman law in the *non obstante* clause, but rather to its wider context – to the authority of Roman law as a whole. Still it is important to emphasize that such a form of referring to Roman law was based on the belief common among many people about its importance in the formation of the Church's legal tradition.

Possession of the Object as a Consequence of Contumacy of the Opposite Party

The second decree that reveals some civilian influence is decree 40 *Contingit interdum*, which states:

> Contingit interdum quod, cum actiori ob contumaciam partis adversae adiudicatur causa rei servandae possessio, propter rei potentiam sive dolum actor infra annum rem custodiendam nancisci non potest vel nactam amittit, et sic cum secundum assertionem multorum verus non efficeretur post lapsum anni possessor, reportat commodum de malitia sua reus. Ne igitur contumax melioris quam obediens conditionis exsistat, de canonica aequitate sancimus, ut in casu praemisso actor verus constituatur elapso anno possessor[29]. Ad haec generaliter prohibemus, ne

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27 Innocentius IV, *In Quinque Decretalium Libros* (Francofurti ad Moenum: per Martinum Lechler, impensis Hieronymi Feyerabend, 1570), f. 235v. Hostiensis, *Summa aurea*, *ad* X 2.13, *De restitutione spoliatorum* (Venetiis: apud Iacobum Vitalem, 1574), col. 547-48.

28 Dig. 43.16.

29 COGD II.1, p. 185 (X 2.14.9): 'It sometimes happens that when possession of something is awarded to the plaintiff in a suit, on account of the contumacy of the other party, yet because of force or fraud over the thing he is unable to obtain custody of it within a year, or having gained it he loses it. Thus the defendant profits from his own wickedness, because in the opinion of many the plaintiff does not qualify as the true possessor at the end of the year. Lest therefore a contumacious party is in a better position than an obedient one, we decree, in the name of canonical equity, that in the aforesaid case the plaintiff shall be established as the true possessor after the year has elapsed'.

super rebus spiritualibus compromittatur in laicum, quia non decet ut laicus in talibus arbitretur[30].

It deals with the problem of the possession of an object in dispute which was in detention of a plaintiff due to the contumacy of an opposing party. *Contumacia* was disobedience and refusal to appear before an ecclesiastical court. In a developed *ordo iudiciarius*, the party that did not appear after three summons would be tried in absence and an *interim* judgment in favor of a plaintiff would be given. After this, if the defendant did not appear for one year, the judgment would become final and the defendant could be excommunicated[31].

The concept of *contumacia* – making a judgment in the absence of one of the parties – had been taken up in canon law straight from post-classical Roman law. The earliest private law litigation in Rome (*legis actiones*) did not tolerate the absence of the parties. The absence of one of the parties caused, according to the Twelve Tables, an issuing of a judgment in favor of the party that was present[32]. It is important to remember, however, that it was a consequence of the impossibility of undertaking contradictory litigation. In this situation there could be no *interim* judgment in the full sense of that word. The later procedure, known as the formulary, accepted it only in a limited way. The formulary process acknowledged instruments that forced the defendant to participate in the litigation. Such procedural instruments certainly included the person of the *vindex* – guarantor of the appearance of the party or bail (*vadimonium*). The consequence of a party not appearing in court would be an authorization of the party in attendance to enter into possession of the property of the absent one (*missio in bona*). But only the *cognitio extra ordinem* acknowledged the possibility of giving an *interim* judgment more fully. The specific rules concerning the disobedient absence of a party changed over time, and the final form of such proceedings was not created before Justinian[33].

In general it may be said that in a situation where the defendant did not appear in court, it was necessary to summon him by edict. Usually it was repeated three times. After the third failure to appear, the judge issued an *edictum peremptorium* in which he declared the absence of the defendant, and he announced the possibility of issuing a default judgment. In most situations the plaintiff received a judgment in his favour, while the defendant lost most means of appeal. The party that was

30 COGD II.1, pp. 185-86 (X 1.43.8): 'Furthermore, we issue a general prohibition against promising to abide by the decision of a layman in spiritual matters, since it is not fitting for a layman to arbitrate in such matters'.

31 J. A. Brundage, *Medieval Canon Law* (London & New York: Routledge, 2013), pp. 129-30. On practical issues connected with *contumacia* and later excommunication in England see R. H. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford: Oxford University Press, 2004, The Oxford History of the Laws of England 1), pp. 163-64.

32 *Lex XII tab.* 1, 8.

33 See Buckland, *A Text-book*, cit., pp. 665-66, and M. Kaser, *Das römische Zivilprozessrecht* (München: Verlag C. H. Beck, 1966), pp. 379-83.

present could give their evidence and make their case, and the judge would render a decision on that basis[34].

Among the Roman emperors' constitutions that deal with the problem of contumacy one deserves closer attention. In 290 Emperors Diocletian and Maximianus issued a constitution that said: "A quo ter citatus si contumaciter praesentiam sui facere neglexerit, non abs re erit vel ad cogendum eum, ut se repraesentaret, possessionem bonorum cui incumbit ad te transferre et adversarium petitorem constituere, vel auditis defensionibus tuis id quod iuris ratio exegerit iudicar"[35]. The constitution allowed the judge to undertake the measure known as 'entrance into possession' (*missio in possessionem*), i.e. to give certain possessory rights over the disputed object to the plaintiff as well as to compel the absent party to participate, or else to hear the present party and give a judgment. The difference between the old formulary procedure and the new extraordinary one can be seen in the switch from declaring the *missio* to issuing a judgment to choose from the alternative instruments. In the fully evolved *cognitio extra ordinem* this development was finished. The judge was forced to issue a judgment, and afterwards he was entitled to declare the *missio in possessionem*.

In canon law the consequences of *contumacia* of both parties changed much over time[36]. Gratian collected a relatively vast number of sources in which the problem of contumacy was mentioned. Still, all those passages are diffused throughout the *Decretum*. Additionally it is worth noticing that Gratian frequently used the term *contumacia* in its popular and not technical sense, that is, as disobedience. It is possible to find, for instance, information about a disobedient priest[37] or disobedience in relation to the Apostolic See[38]. In the *Liber Extra*, however, it is possible to find a separate title known as *De dolo et contumacia*[39]. Raymond of Peñafort gathered there the decretals issued by the following popes: Alexander III (1159-81), Urban III (1185-87), Innocent III (1198-1216) and Gregory IX (1227-41). In the following title, *De eo, qui mittitur in possessionem causa rei servandae*[40], concerning the transfer of the possession of the disputed object to the plaintiff in the absence of the defendant, the pontifical line-up was similar. The decretals gathered in this title were issued by

34 For casuistic solutions of issuing a judgment during an absence of the defendant see the Code's title *Quomodo et quando iudex sententiam proferre debet praesentibus partibus vel una absente* (Cod. 7.43). For the contumacy of the plaintiff, see also Nov. 112.3.

35 Cod. 7.43.8: "[...] Wherefore, if the other party has been summoned three times and still obstinately refuses to appear, it will not be unreasonable for the judge to either compel him to do so, or transfer the possession of the property in dispute to you, and make your adversary the plaintiff, or, having heard your defence, render his decision as the law may require". The translation quoted after *The Civil Law*, vol. XIV, cit., http://droitromain.upmf-grenoble.fr/.

36 For in-depth analysis of the medieval canonists' opinions see W. Litewski, *Der römisch-kanonische Zivilprozeß nach den ältern ordines iudiciarii*, vol. I (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 1999), pp. 285-91.

37 D.32 c.9; D.50 c.21.

38 D.17 c.4.

39 X 2.14.

40 X 2.15.

Alexander III, Clement III (1187-91), Innocent III and Gregory IX. The development of canonical *contumacia* thus occurred largely in the second half of the twelfth century.

The canon lawyers adopted three characteristic elements of this procedural construction introduced in the times of Justinian. The first one was an expectation of the three successive summons of the plaintiff before it was possible to announce him *contumax*. The second element is a yearly date that had to elapse before any definitive solution could be undertaken. Third the usual consequence of the contumacy was *missio in possessionem*. All these procedural stages were taken straight from Justinian's law[41].

Contingit interdum is interesting also on account of the small phrase added near its end. It declares that "the plaintiff shall be established as the true possessor after the year has elapsed". It was stated that the foundation of this ruling was canonical equity (*aequitas canonica*). At first, this phrase seems to contradict the foregoing deliberations. The one-year term – as it was shown – had been used in the contumacy procedures since Justinian's times. In such a situation how could the constitution emphasise equity as the base of the ruling? Canonical equity, however, is mentioned by the decree's author not in the context of the one-year term but in connection with the force (*potentia*) or fraud (*dolus*) of the *contumax* who made it impossible for the plaintiff to obtain the possession of the object before the date. *Aequitas canonica* is an idea that is only moderately based on the Roman concept of *aequitas*. Its history cannot be traced earlier than the early twelfth century, when it is described as one of the methods of interpretation of the law in the teaching of Martinus in south France. Gratian, a couple decades later, does not use the term *aequitas canonica*[42]. Equity is used as a way to determine an issue of canon law for the first time by Pope Eugenius III in 1150[43].

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41 Many of the medieval canonical rulings connected with the failure of parties to appear in court have lasted until modern times and were inserted into the Code of Canon Law of 1983: see. C. A. Cox, 'The Contentious Trail [cc. 1501-1670]', in *New Commentary on the Code of Canon Law*, ed. by J. P. Beal and others (New York, NY & Mahwah, NJ: Paulist Press, 2000), pp. 1702-05.

42 For the meaning of the term *aequitas* in the writings of the early glossators see: A. Padoa-Schioppa, 'Equità nel diritto medievale e moderno: spunti della dottrina', in RSDI 87 (2014), pp. 5-44, pp. 6-14.

43 About the history of *aequitas canonica* and its origins see P. Landau, '*Aequitas* in the *Corpus Iuris Canonici*', in *Syracuse Journal of International Law & Commerce* 20 (1994), pp. 95-104, pp. 95-99 = Idem, '*Aequitas* in the *Corpus Iuris Canonici*', in *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdiction.* Papers presented at the Second International Conference on Aequitas and Equity, The Faculty of Law, The Hebrew University of Jerusalem, May 1993, ed. by A. M. Rebello (Jerusalem: Harry and Michael Sacher Institute for Legislative Research and Comparative Law, the Hebrew University of Jerusalem, 1997), pp. 128-39, as well as Idem, *Europäische Rechtsgeschichte und kanonisches Recht im Mittelalter* (Badenweiler: Bachmann, 2013), pp. 285-93. For a wider perspective of understanding the term *aequitas* both by the canonists and the legists see Ch. Lefebvre, 'Natural Equity and Canonical Equity', in *Natural Law Forum* 8 (1963), pp. 122-36. For the developed concept of *aequitas canonica* see G. Brugnotto, *L'«Aequitas canonica». Studio e analisi del concetto negli scritti di Enrico da Susa (Cardinal Ostiense)* (Roma: Editrice Pontificia Università Gregoriana, 1999). Finally, for the modern approach see P. Grossi, 'Aequitas canonica', in *Quaderni fiorentini per la storia del pensiero giuridico moderno* 27 (1998), pp. 379-96 = Idem, *Scritti canonistici*, a cura di C. Fantappiè (Milano: Giuffrè, 2013, Per la storia del pensiero giuridico moderno 100), pp. 211-28.

As Peter Landau noted, beginning with the papacy of Alexander III it is possible to observe an increasing usage of *aequitas canonica* to rearrange the procedural law that was inherited from the Romans. He observed, "*Aequitas* could be used as a general principal to give judges practical independence without breaking obedience to the letter of the law[44]". Additionally *aequitas* came to be used as an instrument to change the law and to fill legal gaps[45]. In *Contingit interdum* the appeal to *aequitas* fulfils the needs of Christian doctrine. It was used not only to rearrange the procedural law but also to prevent the sinful malpractice of the contumacious defendant who acted forcefully or fraudulently against the plaintiff who had been awarded the goods in dispute. Additionally one can note that such a ruling accepted a legal fiction. *Vera possessio*, which was granted to the plaintiff, did not necessarily mean he actually and physically was in possession of the object[46]. The protection of the obedient plaintiff, however, was more important for the Church than factual legal conditions.

Good Faith as a Requirement of Prescription

The concept of good faith (*bona fides*) in Roman law was already known by the jurists of the pre-classical[47] and classical period[48], but this requirement did not reach its real importance for the law of prescription prior to the Justinianic legislation. According to Justinian the requirements of prescription – as it was already pointed out – were: *res habilis, titulus, fides, possessio* and *tempus*[49]. It is interesting, however, that in fact this systematized enumeration was not formed prior to the medieval period, as E. J. H. Schrage has recently suggested[50].

It was required that the condition of good faith be attributed to the possessor from the start. Later bad faith (*mala fides*) was accepted in most situations according to the rule 'later bad faith does not harm' (*mala fides superveniens non nocet*). Justinian introduced the exception to that rule in 528 when the emperor passed a constitution that reformed the rules of prescription[51]. He introduced the special form of prescription

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44 Landau, '*Aequitas*', cit., p. 100.

45 Landau, '*Aequitas*', cit., p. 101.

46 Litewski, *Der römisch-kanonische*, cit., p. 288.

47 See e.g. R. Fiori, '*Fides* e bona *fides*. Gerarchia sociale e categorie giuridiche', in *Modelli teorici e metodologici nella storia del diritto privato*, a cura di R. Fiori, vol. III (Milano: Jovene Editore, 2008), pp. 237-59.

48 On the requirement of *bona fides* in *longi temporis praescriptio*, see J. Partsch, *Die longi temporis praescriptio im klassichen römischen Rechte* (Leipzig: Veit & Co., 1906), pp. 7-19. On the same in the context of *usucapio*, see L. Lombardi, *Dalla «fides» alla «bona fides»* (Milano: A. Giuffré, 1961, Fondazione Guglielmo Castelli 28), pp. 209-22.

49 On the evolution of the law of prescription in postclassical Roman law, see E. Levy, *West Roman Vulgar Law. The Law of Property* (Philadelphia: American Philosophical Society, 1951, Memoirs of the American philosophical society 29), pp. 176-97.

50 E. J. H. Schrage, '*Res habilis, titulus, fides, possessio, tempus*. A medieval mnemonic hexameter?', in *Liber Amicorum Guido Tsuno*, ed. by F. Sturm and others (Frankfurt am Main: Vico Verlag, 2013), pp. 341-55.

51 Cod. 7.39.8.

known as the *longissimi temporis praescriptio*, which lengthened the required *tempus* up to thirty or even forty years. With time Justinian set the rules upon which it was possible to acquire goods that belonged to churches and cloisters but with the requirement of a good faith during the whole process of acquisition[52]. A separate law was promulgated in 535 that extended the *tempus* needed for the prescription of the Holy See's belongings up to one hundred years[53]. Characteristically, however, the things that belonged to the Church could not be acquired with any sign of *mala fides*.

The time limits needed to obtain ownership by prescription fluctuated extensively already before Justinian's time[54]. There is an interesting provision issued by the Council of Chalcedon (451). It decided that a rural parish could obtain ownership of immobile property after thirty years of continuous possession *sine violentia*[55], which may be understood as parallel to, if not equivalent to, continuous possession without *mala fides*. The Fourth Council of Toledo of 633 decided that the period of thirty years must pass "sine aliqua interpellatione"[56], i.e. without any interruption. If interruption occurred, *mala fides* will have been manifested, and further possession would be impossible. If the bad faith, however, remained latent throughout the entire period, the acquisition would be valid.

Among the Church Fathers, there is an interesting passage from Augustine. In a letter (no. 414) addressed to Macedonius, the bishop of Hippo stated that the one who uses badly possesses badly ("male autem possidet, qui male utitur")[57]. Although Augustine was referring to the attitude of Christians toward fortunes or large amounts of money, the line also shows how legal rights or possession should be exercised. As to the law of prescription itself, Isidore explained briefly the term *usucapio*[58]. He mentioned that the acquiring of ownership by *usucapio* is subordinated to the continuation of the just possession (*continuationem iustae possessionis*). The term *iusta possessio* was a technical term used by the Roman jurists. It meant that the possession was not acquired by force, stealth, or *precarium*, and it might be understood that it was not acquired illegally, i.e. with *mala fides*. Nevertheless a problem existed for the Church. If Roman law accepted the rule *mala fides superveniens non nocet*, then it accepted the legal efficiency of a sinful act. And the "long continuation of a sin cannot make the act less sinful", as Richard Helmholz reminded in his book on classical canon law[59].

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52 Nov. 131.6.

53 Nov. 9.

54 For example, an imperial rescript from 349 bears information about an *annorum quadraginta praescriptio* (Cod. Th. 4.11.2). For more detailed analysis of the changes of the needed time limits, see Levy, *Western Roman Vulgar Law*, cit., pp. 180-93.

55 C.16 q.3 c.1.

56 C.16 q.3 c.4.

57 *Ep.* 153.26: *S. Aurelii Augustini Hipponiensis Episcopi Epistulae*, vol. III, ed. by A. Goldbacher (Vindobonae: F. Tempsky; Lipsiae: G. Freytag, 1904; CSEL 44), p. 426.

58 *The Etymologies of Isidore of Seville*, ed. by S. A. Barney and others (Cambridge: Cambridge University Press, 2006), 5.25.30, p. 122.

59 R. H. Helmholz, *The Spirit of Classical Canon Law* (Athens & London: The University of Georgia Press, 1996), p. 176.

A truly fascinating papal reference to prescription, if authentic[60], may be dated to the papacy of Eugenius II (824-27). The pope informed Archbishop Bernard of Vienne that he found Justinian's law referring to the thirty- and forty-year prescription requirement to acquire an ownership of *venerabiles loci*[61]. It seems that the papal archives staff had found remains of Justinian's codification[62].

But the real outburst of ecclesiastical attention to the problem of prescription can be dated to Gratian's compilation. Gratian gathered large numbers of earlier papal and conciliar solutions regarding prescription. Thanks to this collection, the canonists could undertake further analysis of the concept of prescription[63]. Already in 1180, Pope Alexander III rendered the first solemn decision regarding good faith in his decretal *Vigilanti*[64]. The pope had declared that divine law does not accept the longstanding possession of another's predial goods or ecclesiastical property in bad faith. Additionally he refused any practice contrary to this one. The person who possessed another's goods mistakenly even for thirty or forty years and then found out that the goods did not belong to him could not be treated as a rightful possessor. The pope concluded that he would not allow *mala fides* possession, either for cognized things or for latent ones.

It is not certain how effective Alexander III's decretal was. It is certain, however, that its promulgation initiated a scholarly discussion. As U. Navarrete mentioned, *Vigilanti* was discussed by such canonists as Simon Bisignano, Huguccio, Ricardus Anglicus, Alanus Anglicus and Bernardus Papiensis[65]. The question of *bona fides* was

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60 As to doubts concerning the authenticity see JL 2563.

61 Mansi, vol. XIV, coll. 414-15.

62 See A. Van Hove, *Prolegomena ad Codicem iuris canonici* (Mechliniae – Romae: Summi Pontificis SS. Congregationum Rituum et de Propaganda Fidei, 1945), p. 229; Dębiński, *Church and Roman Law*, cit., p. 84, n. 265.

63 For a detailed analysis of Gratian's work on prescription see Helmholz, *The Spirit of Classical*, cit., pp. 178-85.

64 1Comp. 2.18.7 (JL 14186; X 2.26.5): "Vigilanti studio cavendum est, quum summa dimensio divini iudicii ab initio censuerit propria dimittere, aliena non appetere, ne malae fidei possessores simus in praediis alienis, atque rebus [maxime] ecclesiasticis, quoniam nulla antiqua dierum possessio divino iure iuvat aliquem malae fidei possessorem, nisi resipuerit, postquam se noverit aliena possidere, quum iure etiam bonae fidei possessor dici non possit. Ephesinus enim legislator Origenis patruus solum propter vitandam miserorum segnitiem et longi temporis errorem et confusionem primus tricennali vel quadragenali praescriptioni vigorem legis imposuit. Nobis autem tam in rebus cognitis quam in rebus latentibus placuit non habere vigorem". ('There is to be provision for vigilant zeal since the highest level of divine judgment decreed from the beginning to give away one's own thing [and] not to seek the goods of another, lest, in the estates of another, we be possessors in bad faith, and especially in ecclesiastical property. For no long-term possession of days by divine right helps some possessor in bad faith, unless one comes to one's senses after he realizes that he is in possession of something belonging to another, since he cannot, even by law, be called a possessor in good faith. For the legislator Ephesinus, uncle of Origen, imposed the force of the law, first for thirty-year and then forth-year prescription, only in order to avoid having to deal with wretched people's sluggishness and the error and confusion of a long period of time. We, however, have not been pleased to have [such] force, either in known property or unknown property.')

65 U. Navarrete, *La buena fe de las personas juridicas en orden a la prescripcion adquisitiva. Estudio historico-canonico* (Roma: Libreria Editrice dell'Università Gregoriana, 1959, Analecta Gregoriana. Series Facultatis iuris canonici. Sectio B 7), pp. 48-53. Spanish canonists are enumerated among the canonists and Alanus Gallensis instead of Alanus Anglicus, but it shall be considered as a mistake.

also a subject of two decretals issued by Innocent III: *Si diligenti meditatione*[66] and *Veniens ad praesentiam*[67]. The gravity of the issue forced the pope and the conciliar Fathers to return to the subject once more in 1215. The rule introduced by Alexander III was eventually repeated in the council's decree *Quoniam omne*:

> Quoniam omne quod non est ex fide, peccatum est, synodali iudicio definimus, ut nulla valeat absque bona fide praescriptio tam canonica quam civilis, cum sit generaliter omni constitutioni atque consuetudini derogandum, quae absque mortali non potest observari peccato. Unde oportet ut, qui praescribit, in nulla temporis parte rei habeat conscientiam alienae[68].

The construction of the decree is strikingly similar to the decretal promulgated by Alexander III about thirty-five years earlier. Alexander's decretal stated that *mala fides possessio* is invalid according to divine law. *Quoniam omne*, instead, starts with the quotation taken from St. Paul's Epistle to the Romans[69]. Also the final part of the council's decree resembles the older one. While Alexander III decided that a person who found out that he is in the process of prescribing someone else's goods was not allowed to acquire them; similarly *Quoniam omne* ended with the provision that the person was not at any stage to be aware of another's right to the object ("in nulla temporis parte rei habeat conscientiam alienae").

These two solutions closed the canonical discussion about *mala fides*. Raymond of Peñafort incorporated both of them into the *Decretales* of 1234[70]. The true victory of the good faith rule, however, can be noticed in Boniface VIII's *Liber Sextus*. The second *regula iuris* stipulated that the possessor in bad faith does not prescribe under any amount of time ("possessor malae fidei ullo tempore non praescribit")[71].

It may be concluded that although the canonical requirement of good faith during the whole process of prescription was finally and directly proclaimed in 1215 during the Fourth Lateran Council, it was already accepted (though not universally) by the Church before that date. It is possible to notice already in ancient times that the Church required *sine violentia* possession, one that could not be labelled as a sinful act. Prescription is an entry into the sphere of another's rights. But, if it is done without

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66 3Comp. 2.17.7 (Po. 2769; X 2.26.17).

67 4Comp. 5.12.1 (Po. 4401; X 2.26.19).

68 Lat. IV c.41 (4Comp. 2.10.3; X 2.26.20). English translation (trans. Tanner, COD, p. 253): 'Since whatever does not proceed from faith is sin, and since in general any constitution or custom which cannot be observed without mortal sin is to be disregarded, we therefore define by this synodal judgment that no prescription, whether canonical or civil, is valid without good faith. It is therefore necessary that the person who prescribes should at no stage be aware that the object belongs to someone else'. On the relationship between good faith and prescription and on the interpretation of c.41 by medieval canonists, see also the essay by Andrea Massironi, below.

69 Romans 14:23.

70 See Helmholz, *The Spirit of Classical*, cit., pp. 188-89.

71 VI 5.12.2. See also VI 2.13.1. For the history of good faith in later centuries, see A. Földi, 'Traces of the Dualist Interpretation of Good Faith in the *Ius Commune* until the End of the Sixteenth Century', in *Meditationes de iure et historia. Essays in honour of Laurens Winkel*, ed. by R. van den Bergh and others (Pretoria: Unisa Press, 2014), pp. 312-21.

prejudice and with good faith, it can be treated as a legal practice. The concept of good faith during the whole required *tempus* is present in the Church law from its beginning, but not before the end of eleventh and early twelfth century did this rule become a widely accepted law[72].

Conclusions

The use of Roman law to develop canonical institutions is a well-known scholarly theme. It has been repeated by generations of legal historians, but many of them have contented themselves with the simple observation without delving into precisely how Roman law contributed to the development of canon law. The three decrees of the Fourth Lateran Council are good illustrations of the complexity of the phenomenon. They show that the process of interaction between Roman and canonical rules was quite complex. Usually it was connected to the creative modification of the civilian concept adjusted to canonical needs. Nevertheless the scope of these modifications differed. In the case of *Saepe contingit* it is possible to see the Roman law as a general authority that is good to be recalled. In the case of *Contingit interdum* it is possible to observe the stable development of the ideas derived from the law of the Romans. And finally in case of *Quoniam omne* it is possible to see a total refusal of the civilian concept.

Modern canon law of the Roman Catholic Church has lost some of its historical and civilian heritage. In the opinion of some canon lawyers, Roman law elements are harder to find in Church legislation today. This statement is not entirely true, however, in some cases. The Fourth Lateran Council's decrees formed the basis for a large number of modern canonical solutions that were inserted into the Codes, first in 1917 and later in 1983. Although we cannot find today in the Code's text direct references to the *civilis iuris rigor*, we still may find many civilian concepts clothed in the ecclesiastical outfit of the *canones*.

72 It is reasonable to assert that the Fourth Lateran Council's decision regarding good faith during the whole time of prescription lasted until modern times. It is currently set in can. 198 of the Code of Canon Law of 1983. See R. T. Kennedy, 'Prescription [cc. 197-199]', in *New Commentary on the Code*, cit., pp. 230-33.

ANDREA MASSIRONI

Prescrizione e buona fede acquisitiva: la costituzione *Quoniam omne* (c.41) nell'interpretazione della canonistica medievale

Tra le costituzioni del IV Concilio lateranense del 1215 diverse hanno direttamente o indirettamente un contenuto giuridico oppure producono effetti sul mondo giuridico[1]. Accanto a quelle in materia processuale penale, in tema di diritto di famiglia e matrimoniale, relative alle elezioni episcopali o all'usura e alla condizione giuridica degli ebrei, ce ne sono tre che trattano questioni di diritto privato, in particolare di possesso. È il terzetto, poi accolto nella *Compilatio quarta* e infine confluito nel *Liber Extra*, formato dalle c.39 (*Saepe contingit*, 4Comp. 2.3.3 = X 2.13.18), c.40 (*Contingit interdum*, 4Comp. 2.4.2 = X 2.14.9, ma l'ultimo capoverso 4Comp. 1.18.1 = X 1.43.8) e c.41 (*Quoniam omne*, 4Comp. 2.10.3 = X 2.26.20)[2].

Esse esemplificano in modo paradigmatico come il diritto canonico abbia fini spirituali, anche quando si occupa di una materia a prima vista lontana dalla salvezza come quella possessoria[3], poiché si fondano esplicitamente su concetti (il *periculum animae*, l'*aequitas*, la *bona fides*) che rimandano all'esistenza di un piano superiore di valori e di principî, che non solo non può essere trascurato, ma deve essere preso in considerazione primariamente e guidare lo sviluppo e lo svolgersi di tutte le vicende umane, incluse quindi quelle relative al possesso.

1 In particolare le costituzioni 35-48 "deal with technical aspects of the law": A. Duggan, 'Conciliar Law 1123-1215. The Legislation of the Four Lateran Councils', in *The History of Medieval Canon Law in the Classical Period, 1140-1234. From Gratian to the Decretals of Pope Gregory IX*, ed. by W. Hartmann and K. Pennington (Washington D.C.: The Catholic University of America Press, 2008, History of Medieval Canon Law), pp. 318-66, p. 349.

2 L'efficacia e la penetrazione dei canoni del IV Concilio lateranense si compiono anzi proprio attraverso il loro inserimento nella raccolta di Gregorio IX, che da un lato le priva di unità, distribuendole nei diversi libri a seconda della materia trattata, ma dall'altro ne assicura la trasmissione e il valore normativo a tutta la Chiesa: M. Maccarrone, 'Il IV Concilio lateranense', in *Divinitas* 5.2 (1961), pp. 270-98, pp. 297-98.

3 R. H. Helmholz, *The Spirit of Classical Canon Law* (Athens & London: The University of Georgia Press, 1996), p. 189.

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The Fourth Lateran Council and the Development of Canon Law and the ius commune, ed. Atria Larson and Andrea Massironi, Turnhout: Brepols, 2018 (EMI 7), pp. 251–80

10.1484/M.EMI-EB.5.116659

La costituzione *Quoniam omne* in particolare tenta di moralizzare la prescrizione acquisitiva[4], calandola in un rapporto necessario con la buona fede. Per questo motivo, essa si inserisce a pieno titolo nel quadro della missione pastorale della Chiesa che Innocenzo III si prefigge di realizzare con il Concilio[5].

Il suo testo si può scomporre in tre segmenti, che rappresentano tre unità concettuali collegate logicamente tra loro: la prescrizione vale solo se vi è la buona fede; il principio si applica sia alle prescrizioni civili sia a quelle canoniche e quindi le norme e le consuetudini a esso contrarie, che fanno incorrere in peccato mortale, non devono essere osservate; chi invoca la prescrizione non deve aver avuto in nessun momento contezza di possedere una cosa altrui e pertanto la buona fede deve perdurare per tutto il periodo necessario a far maturare la prescrizione: alla lotta contro il peccato non si possono imporre limiti temporali[6].

Non si tratta di un argomento inesplorato dal diritto canonico né di una soluzione completamente innovativa. Per lungo tempo la Chiesa – come testimoniano anche alcuni passi del *Decretum Gratiani* – ha modellato la prescrizione per le cose ecclesiastiche sui principî del diritto giustinianeo[7], pur temperandola con elementi etico-morali[8]. Tuttavia, tanto la decretistica (in particolare Rufino, Etienne de Tournai

4 R. Naz, 'Prescription', in DDC 7 (Paris: Letouzey et Ané, 1965), col. 178-94, col. 194.

5 Maccarrone, 'Il IV Concilio lateranense', cit., p. 296.

6 "Quoniam omne quod non est ex fide peccatum est, synodali iudicio diffinimus ut nulla valeat absque bona fide prescriptio tam canonica quam civilis, cum sit generaliter omni constitutioni atque consuetudini derogandum que absque mortali non potest observari peccato. Unde oportet ut qui prescribit in nulla temporis parte rei habeat conscientiam alienę" ('Poiché tutto quello che non viene dalla fede è peccato, con decisione sinodale sanciamo che nessuna prescrizione, sia canonica sia civile, valga senza la buona fede, dato che si deve derogare generalmente a ogni costituzione e consuetudine che non si può osservare senza peccato mortale. È quindi necessario che chi prescrive non abbia mai la consapevolezza di possedere una cosa d'altri'): 'Concilium Lateranense IV, 1215', éd. A. García y García et A. Melloni, in COGD, II.1, pp. 149-204, p. 186.

7 Vd., per esempio, C.13 q.2 c.1 (*Facultates*), C.16 q.3 c.1 (*Per singulas*), C.16 q.3 c.2 (*Presulum*), C.16 q.3 c.3 (*Sicut diocesim*), C.16 q.3 c.4 (*Quicumque episcopus*), C.16 q.3 c.6 (*Inter memoratos*), C.16 q.3 c.7 (*Dilectio*), C.16 q.3 c.17 (*Nemo*). Emblematico per la coincidenza con la disciplina romanistica è C.16 q.3 d.p.c.15 (*Potest etiam*): "Bona vero fides non ad tractum medii temporis, sed ad inicium possessionis refertur. Sufficit enim in inicio cuique bona fide possidere cepisse, etiamsi medio tempore conscientiam rei alienae habuerit" ('Tuttavia la buona fede non si riferisce all'intervallo di tempo intermedio, ma all'inizio del possesso. È infatti sufficiente che uno abbia iniziato a possedere in buona fede, anche se nel tempo intermedio ha avuto la consapevolezza che la cosa fosse di altri'). Tutti i capitoli compaiono già nella prima *recensio* del *Decretum Gratiani*, ad eccezione di C.16 q.3 c.2 (*Presulum*), presente solo in forma parziale, ma comunque nella parte relativa al principio che qui interessa: cfr. A. Winroth, *The Making of Gratian's* Decretum (Cambridge: Cambridge University Press, 2000, Cambridge Studies in Medieval Life and Thought. Fourth Series 49), pp. 213, 215-16. Alcuni di questi passi sarebbero addirittura il frutto della rinata dottrina civilistica del tempo, data la perfetta concordanza con la contemporanea produzione dei glossatori: F. Ruffini, *La buona fede in materia di prescrizione. Storia della teoria canonistica* (Torino: Fratelli Bocca editori, 1892), pp. 9-39.

8 S. Sanz Villalba, 'Los elementos éticos de la prescripción romana y su aceptación en el fuero eclesiástico hasta el Decreto de Graciano', in REDC 3 (1948), pp. 35-59, pp. 52-59.

e Uguccione da Pisa[9]) quanto alcune decretali pontificie in quel torno d'anni hanno cercato di elaborare per tale materia una disciplina autonoma che si discosti da quella di stampo romanistico[10].

Si afferma quindi un principio nettamente contrario al diritto romano, secondo cui *mala fides superveniens non nocet*[11]. Anzi, si dà apertamente il via all'introduzione dell'opposta regola *mala fides superveniens nocet*[12], come si ribadirà anche nel *Sextus*[13]. La canonistica medievale – studiando e interpretando direttamente la costituzione conciliare, soprattutto nella forma recepita dal *Liber Extra*[14] – approfondisce il concetto, calando le nuove disposizioni nel contesto, almeno teorico e ideale, nel quale devono operare. Alla dottrina spetta quindi di cercare di stabilire i termini e l'estensione delle modifiche apportate alla materia[15] da una costituzione nella quale, è stato osservato, sono evidenti le fondamenta morali del diritto canonico medievale[16].

Le riflessioni dei canonisti intorno alla costituzione *Quoniam omne* si indirizzano pertanto verso numerosi problemi, giacché essa si presta a dar luogo a svariate implicazioni. In questa sede si propone un breve e schematico esame di tre di essi, che sviluppano temi che possono essere considerati legati tra loro e che si possono riscontrare fin dalle prime analisi della scienza giuridica che studia attentamente il

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9 Ruffini, *La buona fede*, cit., pp. 81-84; N. Vilain, 'Prescription et bonne foi du Décret de Gratien (1140) à Jean d'André († 1348)', in *Traditio* 14 (1958), pp. 121-89, pp. 136-46; U. Navarrete, *La buena fe de las personas jurídicas en orden a la prescripción adquisitiva. Estudio histórico-canónico* (Roma: Libreria editrice dell'Università Gregoriana, 1959, Analecta Gregoriana 105), pp. 49-51.

10 Per esempio, X 2.26.5 (= 1Comp. 2.18.7, *Vigilanti*), sulla cui attribuzione ad Alessandro III si è a lungo dibattuto (Ruffini, *La buona fede*, cit., pp. 61-71; Vilain, 'Prescription et bonne foi', cit., pp. 136-38); X 2.26.17 (= 3Comp. 2.17.7, *Si diligenti*, Innocenzo III il 6 maggio 1206 da Roma in San Pietro all'arcivescovo di Pisa Ubaldo Lanfranchi; Po. 2769; vd. *Reg. Inn. III*, IX.63, pp. 114-17); X 2.26.19 (= 4Comp. 5.12.1, *Veniens*, Innocenzo III il 3 marzo 1212 dal Laterano a Bertoldo di Kalocsa e agli abati cistercensi di Bátaszék e di Tolna nella diocesi di Cinquechiese [Pécs]; Po. 4401; PL CCXVI, col. 545-48 [XV.7]). Tuttavia, la *Quoniam omne* ha esercitato un'influenza incalcolabile sulla dottrina in materia di buona fede come requisito della prescrizione, tanto che tutta la scienza giuridica successiva (canonistica, ma anche civilistica) che si occupa del tema concentra l'attenzione in particolare su questa costituzione: Navarrete, *La buena fe*, cit., p. 29.

11 Per esempio, in Cod. 7.31.1.3; Dig. 41.1.48.1. Sul rifiuto della regola romanistica da parte del diritto canonico, cfr. il saggio di Łukasz Jan Korporowicz in questo volume.

12 J. L. de los Mozos, 'Del aforismo 'mala fides superveniens nocet' a la 'bona fides' canonica', in *Estudios canónicos en homenaje al profesor D. Lamberto de Echeverría* (Salamanca: Universidad Pontificia, Biblioteca de la Caja de Ahorros y M.P., 1988, Bibliotheca Salmanticensis. Estudios 103), pp. 351-70, in particolare pp. 354-57.

13 *De regulis iuris*, *reg.* 11: "Possessor malae fidei ullo tempore non praescribit" ('il possessore di buona fede non prescriverà in alcun momento').

14 Fu destino comune a tutte le costituzioni del IV Concilio lateranense di essere oggetto di numerosi e raffinati commenti, direttamente o indirettamente, una volta entrate a far parte della *Compilatio quarta* o del *Liber Extra*: A. García y García, 'The Fourth Lateran Council and the Canonists', in *The History of Medieval Canon Law*, cit., pp. 367-78, p. 370.

15 A. Campitelli, 'Prescrizione (diritto intermedio)', in ED 35 (Milano: Giuffrè, 1986), pp. 46-56, p. 53.

16 R. Helmholz, 'Legal Formalism, Substantive Policy, and the Creation of a Canon Law of Prescription', in *Prescriptive Formality and Normative Rationality in Modern Legal Systems. Festschrift for Robert S. Summers*, ed. by W. Krawietz and others (Berlin: Duncker & Humblot, 1994), pp. 265-83, p. 275, e Idem, *The Spirit of Classical Canon Law*, cit., p. 189.

provvedimento conciliare: (1) la giustificazione dell'intervento papale in materia di prescrizione e l'applicabilità dei nuovi principî anche alle prescrizioni laiche; (2) la riflessione sulle caratteristiche che la prescrizione acquisitiva deve avere durante il suo svolgimento in virtù della centralità che assume la *fides*; (3) come le nuove previsioni influenzano l'approccio ad alcuni significativi casi e quali sono le soluzioni che la canonistica propone per essi.

Il papa e la prescrizione: un intervento necessario *ratione peccati*

La giustificazione della competenza papale in materia di prescrizione è la parte dell'interpretazione dottrinale più legata alla lettera della costituzione, ma anche quella che – inevitabilmente – soffre di più dal punto di vista argomentativo, giacché l'aderenza al dettato del testo non permette grandi margini di originalità. Ciononostante, è trattata e sviluppata ampiamente da tutti i canonisti, perché inserisce il tema nel rapporto – e nel contrasto – tra diritto civile e canonico[17]. D'altronde non vi si può prescindere, dal momento che questa premessa – che occupa circa i due terzi del testo della *Quoniam omne* – informa il prosieguo del discorso.

La prescrizione acquisitiva ruota intorno a un concetto, quello di *fides*, dalla vasta valenza, etica oltreché giuridica. È proprio perché è una questione di *fides* che il papa interviene per moralizzare la materia possessoria: la mancanza di *fides* porta al peccato. Chi non possiede in buona fede e quindi commette peccato – peccato mortale, perché in sostanza viola più di un comandamento del Decalogo (non rubare e non desiderare la roba d'altri) – "aedificat ad gehennam" ('costruisce per la Geenna'), come si esprimono le fonti riprendendo una suggestiva immagine evangelica per delineare la dannazione eterna[18].

Il pericolo che corre l'anima del fedele giustifica così la competenza del papa in materia di prescrizione acquisitiva del possesso; ne autorizza l'estensione anche alla prescrizione acquisitiva per i laici; ne impone la prevalenza a scapito delle *leges* romane[19]. È un *climax* ascendente, che emerge dalla costituzione e che si fonde in un

17 Anzi, per J. Gordley, *The Jurists. A Critical History* (Oxford: Oxford University Press, 2013), p. 55, il tema della buona fede in materia di prescrizione è il tipico esempio del contrasto tra le tradizioni del *ius civile* e quelle del *ius canonicum*.

18 Bernardus Parmensis, *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, v. *quoniam omne*, *casus*; Abbas Panormitanus, *Commentaria secundae partis in secundum Decretalium Librum* (Venetiis: apud Iuntas, 1591), *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, pr., fol. 45ra. La stessa espressione risuona anche in C.28 q.1 d.p.c.14 (*Omnes*), peraltro per interpretare le parole di Paolo che compaiono anche in apertura della costituzione *Quoniam omne* (i.e. Rm. 14.23).

19 K. W. Nörr, 'Il contributo del diritto canonico al diritto privato europeo: riflessioni dal punto di vista della identificazione del concetto di diritto', in *Diritto canonico e comparazione*. Giornate canonistiche di studio (Venezia, 22-23 maggio 1991), a cura di R. Bertolino e altri (Torino: Giappichelli, 1992, Collana di studi di diritto canonico ed ecclesiastico. Sezione canonistica 7), pp. 13-33, pp. 25-26 e 28, e Idem, 'Recht und Religion: über drei Schnittstellen im Recht der mittelalterlichen Kirche', in ZRG, Kan. Abt. 79 (1993), pp. 1-15, p. 8, ritiene che tale proclamazione possa essere messa sullo stesso

tutt'uno nelle risposte dei canonisti a chi oppone (o potrebbe opporre) argomenti a tale impostazione e all'ingerenza papale. I canonisti non fanno che ripetere che tutto questo è possibile *ratione peccati*. Troppo alta e troppo importante la posta in gioco perché il sommo pontefice non se ne occupi: il pastore ha a cuore la sorte del suo gregge, la cui salvezza passa anche attraverso questo aspetto della vita.

In questo modo, la *ratio peccati* diventa una sorta di *passpartout* che apre molte porte (e chiude senza diritto di replica molte obiezioni)[20]. Il pericolo dell'anima e la necessità di evitare il peccato sono d'altronde elementi che "condizionano lo svolgimento del diritto canonico medievale"[21]. Argomentazione forse debole dal punto di vista dialettico, ma che meglio di tutte rende l'idea della mentalità e della progettualità innocenziana, che catapulta la questione della prescrizione possessoria all'interno di un dibattito di più ampio respiro, nello scontro tra ciò che compete alla Chiesa e ciò che compete al potere laico (dentro al quale si possono far rientrare il noto fastidio di Odofredo verso il papa, che proprio *ratione peccati* ritiene di potersi intromettere in ogni questione[22], oppure l'osservazione di Pierre de Belleperche – tanto più significativa in considerazione del suo *status* di chierico – secondo cui per lo stesso motivo la Chiesa ai suoi tempi ha ormai avocato a sé gran parte della giurisdizione[23]).

La *Quoniam omne* diventa pertanto l'occasione – terreno d'elezione, verrebbe da dire – per i canonisti per sostenere il fondamento dell'intervento papale anche in campo temporale. Ogni causa *ratione peccati* spetta alla Chiesa, come non mancano

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piano di quanto stabilito nella decretale *Novit ille* del 1204 (X 2.1.13), con cui per lo stesso motivo il papa aveva rivendicato a sé poteri giurisdizionali su questioni di natura feudale (quindi relative alla struttura fondamentale del mondo e della società medievale). Si tratterebbe di pretese dai forti connotati politici: dietro allo scopo di preservare l'uomo dal peccato si può scorgere quindi anche il tentativo di riservare alla Chiesa il monopolio legislativo *ratione peccati* e di tutelare i beni ecclesiastici rendendo più difficili le prescrizioni in virtù della *bona fides continua*.

20 La *ratio peccati* rappresenta tutto sommato un criterio oggettivo per regolare i rapporti nei singoli casi e non solo un'arma per sottomettere in blocco la sfera temporale: E. Cortese, 'Lex, aequitas, utrumque ius nella prima civilistica', in *Lex et iustitia nell'utrumque ius: radici antiche e prospettive attuali*. Atti del VII Colloquio internazionale romanistico-canonistico (12-14 maggio 1988), a cura di A. Ciani e G. Diurni (Città del Vaticano: Libreria editrice Vaticana; Libreria editrice Lateranense, 1989), pp. 95-119, anche in Idem, *Scritti*, a cura di I. Birocchi e U. Petronio, I (Spoleto: Centro italiano di Studi sull'Alto Medioevo, 1999), pp. 1019-43, p. 1041.

21 P. Grossi, 'Somme penitenziali, diritto canonico, diritto comune', in *Annali della Facoltà giuridica. Università di Macerata* 1 (1966), pp. 94-134, anche in Idem, *Scritti canonistici*, a cura di C. Fantappiè (Milano: Giuffrè, 2013, Per la storia del pensiero giuridico moderno 100), pp. 115-53, p. 129.

22 Odofredus, *In primam Codicis partem ... praelectiones* (Lugduni, 1552; repr. Bologna: Forni, 1968, Opera iuridica rariora 5.1), *ad* Cod. 1.1.4, *De summa trinitate et de fide catholica* l. *Nemo clericus*, n. 3, fol. 6rb: "dominus Papa ratione peccati intromittit se de omnibus".

23 Petrus de Bellapertica, *ad* auth. *Clericus post* Cod. 1.3.32, ed. K. Bezemer, *Pierre de Belleperche. Portrait of a legal puritan* (Frankfurt am Main: V. Klostermann, 2005, Studien zur europäischen Rechtsgeschichte 194), p. 101 nt. 3: "[...] ecclesia usurpavit hodie magna iurisdictionem" ('la Chiesa ha usurpato gran parte della giurisdizione'). Le parole di Belleperche sono riprese e amplificate da Cynus Pistoriensis, *In Codicem, et aliquot titulos primi Pandectarum Tomi* (Francoforti ad Moenum: impensis Sigismundi Feyerabendt, 1578), *ad* auth. *Clericus post* Cod. 1.3.32, *De episcopis et clericis*: "ecclesia sibi usurpavit ratione peccati totam iurisdictionem" ('La Chiesa *ratione peccati* ha usurpato tutta la giurisdizione').

di sottolineare i più eminenti canonisti che si cimentano nell'esame di questa costituzione: così Giovanni Teutonico[24]; Vincenzo Ispano (in questa circostanza vi è un chiaro pericolo per l'anima)[25]; Damaso (il papa "misit manum in messem alienam" ['ha allungato le mani sulla messe altrui'] a causa del peccato mortale, benché a prima vista sembrerebbe che questa sia materia preclusa alle sue competenze)[26]; Goffredo da Trani (è una deroga espressa e consapevole al *ius civile* – come in altre circostanze – ben concepita in pregiudizio ai laici perché lo impone la *ratio peccati*)[27]; Innocenzo IV[28]; Enrico da Susa[29].

La canonistica individua quindi uno snodo cruciale dell'interpretazione del testo nella liceità e necessità dell'estensione anche al campo civile di un principio che ridisegna la prescrizione al fine della *salus animarum*, imponendo la necessità della buona fede durante tutto il decorso della prescrizione, contrariamente a quanto stabilito dal diritto romano.

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24 Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, ed. A. García y García, in *Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum* (Città del Vaticano: BAV, 1981, MIC Series A 2), *ad* c.41 (*Quoniam omne*), v. *tam canonica quam civilis*, pp. 244-45. Vd. anche l'apparato di Giovanni (*Scholia*) alla *Compilatio quarta*, in *Antiquae collectiones Decretalium* (Parisiis: ex officina Nivelliana, apud Sebastianum Cramoisy, via Iacobaea, sub Ciconiis, 1609), p. 817a. Giovanni sarebbe il primo decretalista a giustificare l'intervento pontificio in materia civile: Vilain, 'Prescription et bonne foi', cit., p. 152. Sul rapporto tra l'apparato di Giovanni alle costituzioni conciliari e quello alla *Compilatio quarta* vd. S. Kuttner, 'Johannes Teutonicus, das vierte Laterankonzil und die Compilatio quarta', in *Miscellanea Giovanni Mercati. 5. Storia ecclesiastica, Diritto* (Città del Vaticano: BAV, 1946, Studi e testi 125), pp. 608-34, anche in Idem, *Medieval Councils, Decretals, and Collections of Canon Law* (Ashgate: Variorum, 1992², CSS 126), X. Sugli apparati alle costituzioni conciliari vd. A. García y García, 'El Concilio IV de Letràn (1215) y sus comentarios', in *Traditio* 14 (1958), pp. 484-502; le introduzioni del medesimo autore agli apparati editi in *Constitutiones Concilii quarti Lateranensis*, cit. (pp. 175-84 per Giovanni Teutonico, 273-85 per Vincenzo Ispano, 387-416 per Damaso); Idem, 'The Fourth Lateran Council and the Canonists', cit., pp. 370-78.

25 Vincentius Hispanus, *Apparatus in Concilium quartum Lateranense*, ed. García y García, in *Constitutiones Concilii quarti Lateranensis*, cit., *ad* c.41 (*Quoniam omne*), v. *tam canonica quam civilis*, p. 347. Sull'apparato di Vincenzo Ispano, oltre a quanto scritto da García y García, vd. anche il più risalente F. Gillman, 'Der Kommentar des Vincentius Hispanus zu den Kanones des vierten Laterankonzils (1215)', in AKKR 109 (1929), pp. 223-74.

26 Damasus, *Apparatus in Concilium quartum Lateranense*, ed. García y García, in *Constitutiones Concilii quarti Lateranensis*, cit., *ad* c.41 (*Quoniam omne*), v. *prescriptio tam canonica quam civilis*, p. 441. L'intero commento di Damaso alla costituzione conciliare è impostato sul continuo ribadire le deroghe al *ius civile*, introdotte appositamente per evitare la commissione del peccato mortale: se fino a quel momento si è sempre opposto con vigore che il laico che ha maturato la prescrizione pur essendo in malafede (non dal principio del possesso) non ha commesso peccato, il canonista boemo sembra ora suggerire che, in virtù della legislazione del Lateranense IV, non è più possibile fare una simile osservazione.

27 Goffredus de Trano, *Summa super titulis Decretalium* (Lugduni: impensis Romani Morin, 1519; repr. Aalen: Scientia, 1968), *ad* X 2.26, *De praescriptionibus*, n. 7, fol. 117ra.

28 Innocentius IV, *Super libros quinque Decretalium* (Francofurti ad Moenum: per Martinum Lechler, impensis Hieronymi Feyerabend, 1570), *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, pr., fol. 303vb.

29 Hostiensis, *Summa* (Lugduni: ex officina Theobaldi Pagani, 1537), *ad* X 2.26, *De praescriptionibus*, n. 3, fol. 268ra; Hostiensis, *In secundum Decretalium librum commentaria* (Venetiis: apud Iuntas, 1581; repr. Torino: Bottega d'Erasmo, 1965), *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 5, fol. 156vb.

Il dettato della costituzione sembra lasciare poco spazio all'interpretazione sulla latitudine dell'applicabilità del nuovo principio. Poco, ma non nullo. La Glossa di Bernardo da Parma cerca infatti di conciliare *leges* e canoni, perché secondo la sua lettura essa ha voluto in realtà riferirsi – e quindi limitare il suo campo d'azione – ai beni spirituali (come le decime) o civili (per esempio, i diritti reali su un immobile) trattati nel foro canonico, mentre nel foro civile, tra laici, le cose stanno in modo diverso e si può continuare a seguire il diritto romano (che, come detto, ammette anche le prescrizioni in malafede). Un'interpretazione alternativa, ma sempre sulla stessa falsariga, può tenere distinti i contenuti della *lex* e dei canoni, che sono rivolti a disciplinare materie differenti: la legge, infatti, prende in considerazione la negligenza di chi non rivendica una cosa sua, mentre il canone il peccato di chi prescrive in malafede. È una questione di prospettive opposte, in cui è evidente come il diritto canonico concentri comunque l'attenzione sull'aspetto della salvezza eterna. In caso di peccato occorre pertanto rispettare i canoni, poiché la *lex* non ha la forza di scusare chi prescrive permanendo nel peccato: perciò il canone ha voluto, a causa del pericolo per l'anima, correggere su questo punto la *lex*, per quanto nei giudizi secolari questo non si osservi. Nei luoghi in cui la Chiesa detiene il potere temporale, però, si applica sempre la costituzione *Quoniam omne* (quel che si esige dagli altri molto più si deve esigere da se stessi, chiosa Bernardo)[30]. Questa interpretazione mira evidentemente a ridurre l'applicabilità della costituzione.

Una seconda posizione, che utilizza invece il tema della *ratio peccati* per giustificare pienamente l'intervento papale anche in materia civile, nasce in aperto e consapevole contrasto con Bernardo: l'Ostiense dissente infatti radicalmente con un secco "mihi non placet" ('non mi piace')[31]. Nella sua *Lectura* egli rimarca la superiorità della costituzione *Quoniam omne*, dato che è stata emanata dalla Chiesa riunita in un concilio generale, che non può errare[32]. Se è vero che diritto canonico e diritto civile sono separati, non si può pensare che questo valga quando il diritto temporale rischia di condurre al peccato: quel che è mortale nel foro canonico lo è anche in quello civile e come tale va corretto e sanzionato (ed è quanto si è voluto fare con l'emanazione di questa costituzione), benché vi sia chi asserisce il contrario e voglia interpretare restrittivamente la costituzione. In presenza di un rischio per la *salus animarum*, la norma canonica deve prevalere, sempre. La salvezza è più importante del vantaggio temporale, cioè della certezza acquisita nella proprietà del bene. Pertanto le parole *civilis*

30 Bernardus Parmensis, *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, v. *quam civilis*. Si tratta di un'interpretazione talmente inverosimile da non aver avuto alcun seguito: Navarrete, *La buena fe*, cit., p. 64.

31 Hostiensis, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 3, fol. 267va-vb. Sulla polemica tra Bernardo da Parma ed Enrico da Susa vd. anche Ruffini, *La buona fede*, cit., pp. 105-06.

32 Hostiensis, *In secundum Decretalium librum commentaria*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 2, fol. 156vb. La maggiore autorevolezza che un provvedimento acquista per essere il frutto di una deliberazione conciliare è sottolineata, richiamando proprio l'Ostiense, anche da Ioannes Andreae, *In secundum Decretalium librum Novella commentaria* (Venetiis: apud Franciscum Franciscium, senensem, 1581), *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 2, v. *iudicio*, fol. 226ra.

e *canonica*, che nel testo connotano la prescrizione, vanno intese come 'ecclesiastica' e 'secolare': per i cristiani cattolici deve valere lo stesso diritto ovunque[33].

Giovanni d'Andrea spiega come la negazione universale ("universale negativum") che si può leggere nella costituzione escluda ogni prescrizione in malafede anche tra i laici[34]. E a chi oppone che il papa non può intromettersi nelle questioni dei laici poiché è giudice incompetente nelle loro cause e se non è giudice non ha la giurisdizione e se non ha la giurisdizione non può statuire, dato che la potestà di statuire non può esistere senza la giurisdizione, Baldo degli Ubaldi, poco meno di due secoli dopo il Concilio, si sente autorizzato a rispondere in modo secco e sintetico, ancora una volta: *ratione peccati*, senza lasciare spazio a replica alcuna, nemmeno di fronte a un consequenziale e logico ragionamento condotto in punta di diritto[35].

Qual è dunque il destino delle norme di diritto romano in materia di prescrizione, dato che sono di segno opposto ai nuovi principî?[36] L'Ostiense riconosce una certa prudenza nella formulazione della costituzione, perché è stato usato il verbo *derogare*, anziché un altro dal significato più radicale, benché sicuramente, trattandosi di casi di malafede, le norme sulla prescrizione non vadano tenute in alcun conto[37]. Qualsiasi cosa dicano i legisti e taluni maestri, nessuno può acquisire una cosa corporale altrui attraverso la prescrizione senza buona fede continua: *ratione peccati* la Chiesa può correggere le *leges* e ascoltare e decidere le cause. Infatti, nella sua *Lectura* Enrico da Susa sintetizza il contenuto della prima parte della costituzione conciliare ponendo in evidenza come essa abbia la forza di correggere i diritti che consentono la prescrizione con malafede in qualunque foro si voglia intraprendere l'azione[38]. È una cosa di cui non

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33 Hostiensis, *In secundum Decretalium librum commentaria*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, nn. 4-5, fol. 156vb. La prevalenza dei canoni sulle leggi secolari nel pensiero dell'Ostiense, in generale e con riferimento al tema della prescrizione, è riferito anche da C. Lefebvre, '«Aequitas canonica» et «periculum animae» dans la doctrine de l'Hostiensis', in EIC 8.4 (1952), pp. 305-21, pp. 308-09 e 311-12, e da G. Brugnotto, *L'«aequitas canonica». Studio e analisi del concetto negli scritti di Enrico da Susa (Cardinal Ostiense)* (Roma: Editrice Pontificia Università Gregoriana, 1999, Tesi Gregoriana. Serie diritto canonico 40), pp. 182-87, 216-19.

34 Ioannes Andreae, *In secundum decretalium librum Novella commentaria*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 2, v. *nulla*, fol. 226ra.

35 Baldus de Ubaldis, *Super Decretalibus* (Lugduni: excudebat Claudius Servanius, 1564), *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 2, fol. 227ra.

36 La differenza e la contrapposizione tra *leges* e *canones* sono già evidenti anche nei decretisti, che sottolineano la diversa *ratio* (e le diverse conseguenze) tra prescrizioni secolari ed ecclesiastiche, senza però pretendere di trovare una regola che estenda la disciplina delle seconde alle prime: vd., per esempio, Rufinus, *Summa Decretorum*, hrsg. von H. Singer (Paderborn: F. Schöningh, 1902; repr. Aalen: Scientia, 1963), *ad* C.16 q.3, p. 359; Stephanus Tornacensis, *Summa*, hrsg. von J. F. von Schulte (Giessen: E. Roth, 1891; repr. Aalen: Scientia, 1965), *ad* C.14 q.6 c.1 (*Si res*), p. 220; Huguccio, *Summa*, *ad* C.16 q.3, ed. Ruffini, *La buona fede*, cit., pp. 82-83.

37 Hostiensis, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 3, fol. 267vb.

38 Idem, *In secundum Decretalium librum commentaria*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, pr., fol. 156va. Enrico da Susa è in termini generali il "sostenitore più tenace e convinto" della legittimità dell'estensione delle norme canoniche al diritto secolare (tanto da rimproverare le distinzioni di Innocenzo IV, che suonano troppo tiepide sul punto), soprattutto laddove vi sia il rischio che questo metta a repentaglio la salvezza dell'anima: A. Padoa Schioppa, 'Equità nel diritto medievale e moderno: spunti della dottrina', in RSDI 87 (2014), pp. 6-44, pp. 18-19.

ci si deve meravigliare, secondo Giovanni d'Andrea, che riferisce nel suo commento alle decretali gregoriane il pensiero dell'Ostiense: la prevalenza dei canoni su ogni costituzione, imperiale o di altro tipo, è la conseguenza del riconoscimento della preminenza dell'imperatore celeste e pertanto non rimane che eliminare la *lex* che ammette la prescrizione in malafede[39].

Pure Antonio da Budrio e in termini simili Baldo approvano *ratione peccati* prerogative molto estese al papa: "ut casset omnes leges, constitutiones, statuta et consuetudines peccatum nutrientes"[40], "papa potest cassare leges imperatorum, regum et populorum" le frasi che i due giuristi impiegano rispettivamente e che certo non hanno bisogno di ulteriori chiarimenti né forse vi lasciano alcun margine[41].

Niccolò dei Tedeschi sinteticamente giustifica così: poiché il papa può abrogare il *ius civile* nelle questioni relative all'anima o al peccato, una qualsiasi norma che per essere osservata porta a commettere peccato mortale deve essere abolita e cancellata. Da parte sua ("Ego dico") la ritiene nulla *ipso iure*, perché in contrasto con la sostanza della legge, che deve essere giusta e onesta. Se invece contiene peccato non può nemmeno dirsi legge: siamo al superamento della forma della *lex*, che è tale solo se rispetta rigidi criteri di contenuto. I sudditi non devono perciò obbedire all'inferiore (cioè all'imperatore!) contravvenendo alla legge del superiore (che in questo non è altri che Dio)[42].

La portata della costituzione conciliare è forse il suo tratto distintivo, come mettono in rilievo alcuni interpreti, che non trovano soddisfacente la sintesi che spesso si fa del suo contenuto, che consiste nell'affermare semplicemente che il possessore di malafede non prescrive in alcun momento (o non "valet praescriptio sine bona fides", come fanno i *Casus parisienses*[43] o "sine bona fide nulla currit praescriptio", come

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39 Ioannes Andreae, *In secundum Decretalium librum Novella commentaria*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, nn. 2-3, fol. 226ra-rb. Giovanni, commentando le *regulae iuris* del *Sextus*, approccia però la materia anche in modo più sofisticato, considerando ugualmente validi entrambi i diritti – civile e canonico – perché posti su differenti livelli: vd. Helmholz, 'Legal Formalism', pp. 281-82, e Idem, *The Spirit of Classical Canon Law*, cit., pp. 197-98.

40 Antonius a Butrio, *Super secunda secundi Decretalium commentarii* (Venetiis: apud Iuntas, 1578), *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam*, n. 3, fol. 115vb: 'perché cancelli tutte le leggi, costituzioni, statuti e consuetudini che alimentano il peccato'. Le parole di Antonio riecheggiano quelle di Giovanni d'Andrea, che ha sostenuto, argomentando proprio con la *Quoniam omne*, la regola generale secondo cui una costituzione che alimenta il peccato mortale non ha mai valore: Ioannes Andreae, *In primum Decretalium librum Novella commentaria* (Venetiis: apud Franciscum Franciscium, senensem, 1581), *ad* X 1.1.4, *De summa Trinitate et fide catholica* c. *Postquam Deus*, n. 11, fol. 11va. Peccato mortale o veniale che sia, non importa, perché si tratta comunque di una condizione deteriore dell'anima: così Ioannes de Imola, *Super secundo Decretalium* (Lugduni: excudebat Georgius Regnault, 1549), *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam*, n. 5, fol. 168vb.

41 Baldus de Ubaldis, *Super Decretalibus*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 1, fol. 227ra: 'il papa può cassare le leggi degli imperatori, dei re e dei popoli'. Baldo, inoltre, sostiene che gli statuti di un territorio che stabiliscono implicitamente o espressamente la possibilità di prescrivere in malafede non hanno valore.

42 Abbas Panormitanus, *Commentaria secundae partis in secundum Decretalium Librum*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, nn. 1-2, fol. 45ra.

43 *Casus Parisienses in Concilium quartum Lateranense (auctore forsan Vincentio)*, ed. García y García, in *Constitutiones Concilii quarti Lateranensis*, cit., p. 471: 'non vale la prescrizione senza buona fede'.

scrive l'Abbas Antiquus, Bernardo da Montmirat[44]). In questo modo dal punto di vista contenutistico non si aggiungerebbe peraltro nulla di nuovo rispetto a quanto affermato dalle precedenti decretali *Vigilanti*[45] o *Veniens*: lo notano sia la Glossa di Bernardo da Parma[46], che pure – come visto – cerca di limitare quella portata, sia Niccolò dei Tedeschi, che preferisce riassumere con "la prescrizione in malafede non vale né nel foro canonico né in quello civile"[47].

D'altronde, bisogna anche considerare il differente contesto in cui vedono la luce la *Quoniam omne* e, per esempio, la *Vigilanti*, dato che la seconda è una decisione emanata per un caso specifico, in cui è chiaro l'intento del papa di non abolire la prescrizione trentennale o quarantennale, ma solo di escluderne l'efficacia in quel particolare caso (in cui mancano gli estremi che la giustifichino) e di non imporre il principio canonistico ai rapporti civili, bensì di circoscriverlo ai soli rapporti ecclesiastici, in quanto questione di coscienza[48]. Scopo invece più ambizioso è sicuramente quello di Innocenzo III, che ritiene opportuno ribadire il concetto della necessità della buona fede durante tutto il decorso della prescrizione all'interno di una solenne occasione come il IV Concilio lateranense, per estendere a tutta la cristianità ciò che la *Vigilanti* aveva previsto per regolare il singolo caso. L'effettiva importanza del provvedimento innocenziano sta dunque più che nell'innovazione della disciplina nella sua generalizzazione[49].

Dal punto di vista teorico, quindi, i canonisti supportano pienamente l'intervento papale nei contenuti, ma anche nell'invasione di campo, sorretta da principî inderogabili, dalla *salus animarum*, che deve essere faro all'agire terreno della Chiesa, per la

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44 Abbas Antiquus, *Lectura aurea*, *ad* X 2.26.20 (Argentine: impensis, LU. Doctoris Georgii Maxilli, 1510), *De praescriptionibus* c. *Quoniam omne*, fol. 126ra: 'senza buona fede non matura alcuna prescrizione'.

45 La cui rubrica è infatti significativamente proprio "possessor malae fidei non praescribit" ('il possessore di malafede non prescrive'). La necessità della buona fede per tutta la durata della prescrizione sancita dalla *Vigilanti*, in consapevole contrasto con quanto voluto dal diritto giustinianeo, rientrerebbe nel tentativo di assicurare la libertà della Chiesa e l'indipendenza del diritto canonico da quello romano tanto sentito al tempo di Alessandro III: cfr. G. Lesage, 'La nature du droit canonique d'après Alexandre III', in *Miscellanea Rolando Bandinelli papa Alessandro III*, studi raccolti da F. Liotta (Siena: Accademia senese degli Intronati, 1986), pp. 301-35, p. 323.

46 Bernardus Parmensis, *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, v. *quoniam omne*.

47 Abbas Panormitanus, *Commentaria secundae partis in secundum Decretalium Librum*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, pr., fol. 45ra: "possessor male fidei, nullo tempore praescribit. Ita communiter summatur. Sed per hoc summarium nihil induceret de novo iste textus cum esset provisum supra eodem in c. vigilanti. Ideo plenius summo sic: nec in foro canonico, nec civili valet praescriptio cum mala fide" ('il possessore di malafede non prescrive mai. Comunemente il contenuto si riassume così. Ma con questa sintesi il testo non introdurrebbe niente di nuovo rispetto a quanto previsto dal precedente c. *Vigilanti*. Pertanto, riassumo più completamente in questo modo: la prescrizione in malafede non vale né nel foro civile né in quello canonico').

48 Ruffini, *La buona fede*, cit., pp. 78-79, 96.

49 L. Scavo Lombardo, *Il concetto di buona fede nel diritto canonico (contributo storico dogmatico)* (Roma: Tip. Failli, 1944, Monografie dell'Istituto di diritto pubblico della Facoltà di Giurisprudenza dell'Università di Roma 1), p. 80; A. Albisetti, *Contributo allo studio del matrimonio putativo in diritto canonico. Violenza e buona fede* (Milano: Giuffrè, 1980, Pubblicazioni dell'Istituto di diritto ecclesiastico 2), pp. 172-73.

necessità di eliminare il peccato in qualsiasi forma si presenti, anche, se necessario, correggendo norme canoniche e civili. Il diritto canonico assume il ruolo di pietra di paragone e metro di valutazione cristiana del diritto umano, al punto da riprovare ogni consuetudine o legge civile contraria a quella divina e imporre al giudice di derogare al diritto civile per non incorrere nel peccato. Uno scopo spirituale così rilevante permette alla Chiesa una penetrante ingerenza in una serie innumerevole di atti sia pubblici sia privati[50].

L'ostacolo più difficile da superare non è tuttavia quello di trovare un fondamento a tale invasione di campo, ma quello di riuscire effettivamente a metterla in pratica, a far sì che vengano assunte anche nel foro secolare la nuova concezione e la nuova operatività della buona fede in materia prescrittiva.

A questo fine un passaggio preliminare imprescindibile è la sua accettazione da parte degli esponenti della scienza giuridica civilistica. La Glossa accursiana quantomeno ne prende atto, senza tuttavia nulla aggiungere sulle conseguenze di una tale previsione[51]. Il principio col tempo sembra però che sia abbracciato anche da autorevolissimi legisti. Alberico da Rosciate, dopo aver brevemente riassunto i punti in cui la disciplina canonistica e quella civilistica si discostano, afferma che le *leges* sono state corrette proprio dalla costituzione *Quoniam omne*, uniformando in tal modo la disciplina da seguire in materia di prescrizione[52]. Bartolo da Sassoferrato arriva a dire che si deve rispettare il diritto canonico perché la materia implica la commissione di un peccato: è quanto ci aspetteremmo di leggere tra le riflessioni di un canonista[53]. E laddove perviene a soluzioni diverse (ma in realtà per fattispecie

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50 G. Chiodi, 'Cristianesimo medievale e diritto', in *Storia del cristianesimo. II. L'età medievale (secoli VIII-XV)*, a cura di M. Benedetti (Roma: Carocci, 2015), pp. 163-85, p. 180.

51 Gl. *ab initio ad* Cod. 7.31.1.3, *De usucapione transformanda et de sublata differentia rerum mancipi et nec mancipi* l. *Cum nostri* § *Tantummodo*: "nota quod sufficit bona fides ab initio [...] sed iure canonum debet esse continua bona fides: ut extra de praescrip. c. quoniam" ("nota che è sufficiente che ci sia buona fede all'inizio [...] ma per il diritto canonico la buona fede deve essere continua, come previsto dal c. quoniam"), su cui vd. U. Wolter, *Ius canonicum in iure civili. Studien zur Rechtsquellenlehre in der neueren Privatrechtsgeschichte* (Köln-Wien: Böhlau, 1975, Forschungen zur neueren Privatrechtsgeschichte 23), pp. 36-37. Vd. anche gl. *annorum ad* 2Coll. 4, auth. *Ut legum*.

52 Albericus de Rosate, *Dictionarium iuris utriusque* (Venetiis: apud Guerreos fratres, et socios), *Praescriptio* § *an una ecclesia*.

53 Bartolus de Saxoferrato, *Commentaria in primam Digesti novi partem* (Lugduni: excudebat Thomas Bertellus, 1547), *ad* Dig. 41.3.5, *De usucapionibus et usurpationibus* l. *Naturaliter*, n. 8, fol. 99rb: "de iure civili superveniens mala fides simpliciter nunquam interrumpit prescriptionem [...] de iure vero canonico superveniens mala fides usucapionem vel prescriptionem interrumpit. Cui iuri canonico est standum, ideo quia tangit peccatum" ("secondo il diritto civile la malafede sopraggiunta non interrompe mai la prescrizione [...] mentre per il diritto canonico la malafede sopraggiunta interrompe l'usucapione o la prescrizione. Bisogna rispettare il diritto canonico, poiché riguarda il peccato"). Questa risposta è assolutamente coerente con il più ampio discorso fatto da Bartolo sui casi di contrasto tra canoni e *leges*, per cui in materia spirituale o pertinente alla fede occorre seguire i canoni, mentre in materia temporale bisogna distinguere se la controversia avviene nelle terre soggette alla Chiesa – in cui prevalgono i canoni – o in quelle soggette all'Impero, in cui occorre ulteriormente distinguere, poiché se applicare la legge civile comporta il peccato, allora bisogna osservare i canoni (e qui Bartolo propone proprio l'esempio delle norme canonistiche relative alla malafede nella prescrizione), mentre se l'applicazione della legge civile non implica il peccato, allora

differenti) stempera le sue conclusioni condizionandole all'approvazione della Chiesa e dei teologi[54]. Non a caso il giurista marchigiano è richiamato da Niccolò dei Tedeschi proprio per sostenere che tutti i giuristi – siano essi canonisti o civilisti – concordano che ove sia in discussione il peccato si deve rispettare quanto previsto dai canoni[55].

Baldo, che per la certezza delle cose preferirebbe rimanere aderente al diritto romano, sa però che la cosa migliore sarebbe seguire i principî canonistici in quanto "aequum et salutare" ('equo e salutare'), ma deve ammettere che nei giudizi essi non si rispettano[56].

Nella pratica i tribunali laici e le corti ecclesiastiche applicano infatti al loro interno ciascuno il proprio diritto. Gradualmente comunque si afferma il principio canonistico, che diventa diritto comune. Nel XV secolo, infine, sembra che si impieghi la regola del diritto canonico indipendentemente dal foro scelto[57]. È tuttavia impossibile tracciare

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essa può essere osservata senza difficoltà: cfr. Bartolus de Saxoferrato, *Commentaria in primam Codicis partem* (Lugduni: apud Thomam Bertellum, 1547), *ad* Cod. 1.2.12, *De sacrosanctis ecclesiis et de rebus et privilegiis earum* l. *Privilegia*, n. 2, fol. 18ra. Su queste distinzioni bartoliane vd. O. Condorelli, 'Bartolo e il diritto canonico', in *Bartolo da Sassoferrato nel VII centenario della nascita: diritto, politica, società*. Atti del L Convegno storico internazionale (Todi-Perugia, 13-16 ottobre 2013) (Spoleto: Fondazione Centro italiano di studi sull'Alto Medioevo, 2014), pp. 463-557, pp. 478-79.

54 Bartolus de Saxoferrato, *Commentaria in primam Digesti novi partem*, ed. cit., *ad* Dig. 41.3.4.26(27), *De ususcapionibus et usurpationibus* l. *Sequitur* § *Si viam*, n. 3, fol. 98va. Su questo commento di Bartolo vd. Y. Sasaki, '*Praescriptio* in der Lehre des Bartolus', in *Miscellanea Domenico Maffei dicata. Historia – Ius – Studium*, curantibus A. García y García et P. Weimar, II (Goldbach: Keip, 1995), pp. 329-64, p. 343, e Condorelli, 'Bartolo e il diritto canonico', cit., pp. 510-12.

55 Abbas Panormitanus, *Commentaria secundae partis in secundum Decretalium Librum*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 7, fol. 45rb.

56 Baldus de Ubaldis, *Super Decretalibus*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 6, fol. 227va. Scavo Lombardo, *Il concetto di buona fede*, cit., p. 95, asserisce che con la sua affermazione Baldo si dimostra poco convinto della tesi da lui sostenuta. Sul passo vd. anche N. Horn, *Aequitas in den Lehren des Baldus* (Köln-Graz: Böhlau, 1968, Forschungen zur neueren Privatrechtsgeschichte 11), p. 61. Esso è citato pure da P. Landau, 'Aequitas in the Corpus Iuris Canonici', in *Syracuse Journal of International Law & Commerce* 20 (1994), pp. 95-104, anche in *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdiction*. Papers presented at the Second International Conference on Aequitas and Equity, The Faculty of Law, The Hebrew University of Jerusalem, May 1993, ed. by A. M. Rebello (Jerusalem: Harry and Michael Sacher Institute for Legislative Research and Comparative Law, the Hebrew University of Jerusalem, 1997), pp. 128-39, e in Idem, *Europäische Rechtsgeschichte und kanonisches Recht im Mittelalter* (Badenweiler: Bachmann, 2013), pp. 285-93, p. 293, come significativo esempio dell'influenza che le teorie canonistiche esercitavano sulle regole del *ius civile*; e da Padoa Schioppa, 'Equità nel diritto medievale e moderno', cit., pp. 19-20.

57 Helmholz, 'Legal Formalism', p. 283, e Idem, *The Spirit of Classical Canon Law*, cit., pp. 198-99. A. Wijffels, 'La bonne foi en droit savant médiéval: bona fides-mala fides dans les consilia d'Alexander Tartagnus (Imolensis), in *La bonne foi* (Bruxelles: Facultes Universitaires Saint-Louis, 1998, Cahiers du Centre de recherches en Histoire du droit et des institutions 10), pp. 23-51, constata l'espansione della pratica della *bona fides* nelle cause civili attraverso l'esame dell'attività consulente di Alessandro Tartagni. Naz, 'Prescription', cit., col. 194, invece, segnala che i tribunali secolari d'Antico regime si affidano ancora alle disposizioni del diritto romano. In generale, il predominio del diritto canonico nelle materie considerate spirituali a partire dal Trecento sarebbe ricollegabile anche a motivi di ordine politico, come la caduta degli Svevi e l'affermazione del guelfismo: vd. E. Cortese, 'Théologie, droit canonique et droit romain. Aux origines du droit savant (XI^{e}-XII^{e} s.)', in *Académie des Inscriptions et Belles Lettres. Comptes-rendus des séances de l'année 2002* (Paris: Durand, 2002), pp. 57-74, anche in

un'univoca linea di tendenza circa l'influenza esercitata dai principî canonistici sul diritto laico[58]. Capire e scandire le modalità di questa ricezione nella pratica secolare, pur estremamente interessante, esula però dai più ristretti confini di questa indagine.

I requisiti per la maturazione della prescrizione secondo il diritto canonico

La schematica enumerazione proposta da Goffredo da Trani, che individua quattro requisiti necessari perché la prescrizione acquisitiva maturi, fornisce un valido aiuto per la comprensione della materia: possesso nel tempo, possibilità della cosa di essere acquisita per prescrizione, titolo, buona fede[59].

Si richiede quindi innanzitutto da parte del diritto canonico che il possesso sia continuato, cioè che la cosa sia stata posseduta senza interruzione fino al completamento del tempo utile per prescrivere[60], e che la cosa sia prescrittibile, ossia che non rientri in quella categoria di beni che il trascorrere del tempo non può far mutare di proprietario[61].

Il giusto titolo necessario per ogni tipo di prescrizione è un'innovazione rispetto alla disciplina romanistica[62], che si può far risalire alle elaborazioni di Uguccione[63]. Non è tuttavia alla *Quoniam omne* – che non ne fa menzione – che occorre far riferimento per determinarne l'essenzialità ai fini della maturazione della prescrizione, ma al quadro complessivo che emerge dalla disciplina tratteggiata dalle decretali pontificie (*in primis* la *Si diligenti*[64]).

Idem, *Scritti*, III, a cura di A. e F. Cortese (Roma: Il Cigno, 2013), pp. 107-24, pp. 123-24, e Idem, 'La "mondanizzazione" del diritto canonico e la genesi della scienza civilistica', in *La cultura giuridico-canonica medioevale. Premesse per un dialogo ecumenico*, a cura di E. de Léon e N. Álvarez de las Asturias (Milano: Giuffrè, 2003), pp. 123-55, anche in Idem, *Scritti*, III, cit., pp. 137-59, pp. 157-58.

58 G. P. Massetto, 'Buona fede nel diritto medievale e moderno', in *Digesto delle discipline privatistiche. Sezione civile* 2 (Torino: UTET, 1988), pp. 133-54, p. 141.

59 E. J. H. Schrage, '*Res habilis, titulus, fides, possessio, tempus*. A medieval mnemonic hexameter?', in *Liber Amicorum Guido Tsuno*, ed. by F. Sturm and others (Frankfurt am Main: Vico Verlag, 2013), pp. 341-55.

60 Goffredus de Trano, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 3, fol. 115va.

61 Ivi, n. 6, fol. 116vb. Per esempio, le cose ecclesiastiche possono essere spirituali (come le offerte o le decime) o corporali (per esempio, i campi o le vigne): i laici non possono prescrivere le prime, ma solo le seconde, sempre che – mobili o immobili – esse non siano consacrate (per esempio, un calice o una patena; un monastero, un cimitero) e allora nemmeno per queste è loro possibile la prescrizione.

62 Per il diritto romano giustinianeo, al ricorrere dei requisiti necessari, la proprietà degli immobili si acquista con la *praescriptio longi temporis* (ormai fusa con l'*usucapio*) in 10 anni (tra presenti) o 20 (tra assenti) ovvero in 30 o 40 anni (*praescriptio longissimi temporis*) se il possesso non è sorretto dal titolo (essendo quindi sufficiente la buona fede iniziale): vd. M. Amelotti, 'Prescrizione (diritto romano)', in ED 35 (Milano: Giuffrè, 1986), pp. 36-46, p. 42; L. Vacca, 'Usucapione (diritto romano)', in ED 45 (Milano: Giuffrè, 1992), pp. 989-1022, pp. 1012-17.

63 Ruffini, *La buona fede*, cit., p. 100.

64 X 2.26.17: "[...] hoc locum praescriptio habere non posset, quum in praescriptione rerum ecclesiasticarum bona fides et iustus titulus exigantur" ('la prescrizione non può avere luogo, poiché nella prescrizione delle cose ecclesiastiche si richiedono la buona fede e il giusto titolo').

Il giusto titolo – al pari della buona fede, come si vedrà a breve – si presume una volta provato il tempo della prescrizione. Si tratta di una presunzione che ammette la prova contraria, addirittura – proprio in virtù della costituzione conciliare, annota Giovanni Teutonico – anche qualora sia maturata la prescrizione quarantennale, in seguito alla quale non è più di norma permessa alcuna eccezione (l'iniziale mancanza di titolo, infatti, sarebbe stata sanata dal perdurante tacito consenso dell'attore). La parte che ha completato la prescrizione, tuttavia, non è tenuta, come si potrebbe concludere, a provare il proprio titolo, poiché in questo caso è invece sufficiente provare il tempo, da cui si presume l'esistenza del titolo[65].

Cos'è il titolo del possesso? Rufino lo definisce come la causa d'acquisto con cui diventa nostro quel che prima non lo era, come per esempio una donazione o una vendita[66]. Per Goffredo da Trani è ciò che sta alla base del possesso, è la sua causa: agli esempi presentati dalla *Summa* di Rufino egli aggiunge la permuta "et consimiles"[67]. Secondo la Glossa al *Liber Extra* la connotazione di giusto al titolo deriva dal fatto che esso dà causa alla prescrizione, non importa se poi si fonda effettivamente sulla giustizia: anche un titolo 'meno giusto' può dar luogo alla prescrizione se si accompagna alla buona fede (cioè se il possessore crede che tale titolo sia sufficiente e che chi ha consegnato la cosa ne fosse il proprietario)[68]. Il titolo costituisce così per l'Ostiense il tratto distintivo della prescrizione *in rebus ecclesiasticis* insieme alla buona fede (mentre per le *res laicorum* possono bastare soltanto gli altri tre requisiti, escluso quindi il titolo)[69].

La buona fede viene illustrata come la condotta di chi possiede e crede che la cosa che possiede sia sua o che chi gliel'ha consegnata fosse il proprietario e avesse il diritto di alienarla, anche se si commette un errore di fatto[70]. La buona fede deve persistere per tutta la durata del possesso, cioè all'inizio, durante e al termine del periodo che

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65 Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, ed. cit., *ad* c.41 (*Quoniam omne*), v. *quoniam omne ... praescriptio*, p. 244. Così anche Vincentius Hispanus, *Apparatus in Concilium quartum Lateranense*, ed. cit., *ad* c.41 (*Quoniam omne*), v. *quoniam omne ... prescriptio*, p. 347, stringato nel riferire la soluzione finale. Bernardus Parmensis, *ad* X 2.26.17, *De praescriptionibus* c. *Si diligenti*, v. *iustus titulus*, riprende le conclusioni di Giovanni, così come gran parte del suo ragionamento è riprodotto anche da Idem, *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, v. *bona fide*, segno evidente dell'influenza che l'apparato del canonista tedesco alle costituzioni del IV Concilio lateranense ha esercitato su Bernardo da Parma, le cui glosse alle costituzioni conciliari contenute nel *Liber Extra* riprendono spesso letteralmente quelle dell'insigne autore della *Compilatio quarta*: García y García, 'The Fourth Lateran Council and the Canonists', cit., p. 372.

66 Rufinus, *Summa*, ed. cit., *ad* C.16 q.3, p. 359.

67 Goffredus de Trano, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 2, fol. 115rb.

68 Bernardus Parmensis, *ad* X 2.26.17, *De praescriptionibus* c. *Si diligenti*, v. *iustus titulus*.

69 Hostiensis, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 3, fol. 267rb e fol. 269rb-70va, dove sono citate anche le diverse teorie di Lorenzo Ispano, Tancredi, Goffredo da Trani e Bernardo Botone in materia.

70 Goffredus de Trano, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 2, fol. 115ra. Le stesse espressioni riecheggiano in Bernardus Parmensis, *ad* X 2.26.17, *De praescriptionibus* c. *Si diligenti*, v. *bona fides*, la cui importanza è desumibile dal fatto che Idem, *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, v. *bona fide*, quando deve dare una definizione di buona fede, rimanda direttamente ad esso senza spendere ulteriori parole.

deve trascorrere perché possa maturare la prescrizione: questo l'insegnamento che Bartolomeo da Brescia trae dalla costituzione *Quoniam omne* per escludere che la semplice durata del possesso di una cosa altrui possa mutarne il proprietario. Anzi, più uno tiene consapevolmente presso di sé una cosa di altri, più il suo peccato aumenta, e in questo modo non favorisce il completamento della prescrizione[71].

È interessante notare che la Glossa al *Liber Extra*, nel sottolineare come secondo i canoni la buona fede di chi prescrive sia necessaria in ogni caso, tanto per i beni spirituali quanto per quelli civili, argomenti con la costituzione *Quoniam omne* e la decretale *Vigilanti*[72]. La prima, tuttavia, parla di prescrizioni civili e canoniche, non di cose: sembra che qui Bernardo trovi il modo di ribadire la sua teoria – di scarso successo – sulla portata della costituzione conciliare.

La buona fede si presume sempre, a meno che si provi la malafede, che invece si presume a sua volta se si era avvisato il compratore di non comprare o se costui ha acquistato dal curatore colludendo con lui o se ha acquistato da un uomo moralmente discutibile perché incline alla dissolutezza, che si sapeva avrebbe presto sperperato il denaro. La presunzione della buona fede, se da un lato valorizza l'importanza dell'elemento all'interno della teorica della canonistica, dall'altro ha però come esito una limitazione degli effetti della *Quoniam omne*, poiché basta provare il possesso continuato e incontestato per un certo numero di anni per vedere riconosciuta la buona fede del possessore[73].

Benché molte siano le disquisizioni dei canonisti riguardo a ciascuno di questi punti, e in particolar modo intorno al titolo (per esempio quando sia *iustus*, come e se debba essere provato), è chiaro tuttavia che un ruolo da protagonista lo gioca

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Per avere un quadro di chi possa essere definito possessore di malafede (e quindi non possa prescrivere) e chi invece possa essere considerato possessore di buona fede, può essere utile leggere l'elenco esemplificativo fatto da Dynus Muxellanus, *Commentarius in Regulas iuris pontificii* (Coloniae Agrippinae: apud Ioannem Birckmannum et Theodorum Baumium, 1569), *ad reg.* II (*Possessor*), nn. 1-4, p. 43: è in malafede chi conclude affari consapevolmente contro i divieti imposti dai canoni e dalle leggi, chi acquista contro la volontà del proprietario, chi ha indotto con l'inganno il proprietario a vendere, chi ha comprato da uno che si sapeva non poteva vendere (come il pupillo senza il tutore); è invece in buona fede chi compra o acquista ad altro titolo da chi credeva fosse il proprietario della cosa o credeva che chi ha venduto avesse il diritto di vendere, poiché riteneva fosse il tutore o il procuratore (si tratta della definizione data da Modestino che si può leggere in Dig. 50.16.109).

71 Bartholomeus Brixiensis, *ad* C.14 q.6 c.1 (*Si res*), v. *nisi restituatur*. Queste considerazioni riprendono anche letteralmente le parole di Huguccio, *Summa*, *ad* C.16 q.3, ed. Ruffini, *La buona fede*, cit., p. 82, che auspicava di ricondurre ad equità le ingiustizie create dalla disciplina dei legisti, inevitabilmente orientata verso il peccato: cfr. W. P. Müller, *Huguccio. The Life, Works, and Thought of a Twelfth-Century Jurist* (Washington D.C.: The Catholic University of America Press, 1994, Studies in Medieval and Early Modern Canon Law 3), p. 130. Il principio per cui non si fa davvero penitenza se non si restituisce il maltolto, già contenuto nel *Decretum Gratiani*, viene poi sintetizzato anche in una *regula iuris* del *Sextus* (VI 5.13.4).

72 Bernardus Parmensis, *ad* X 2.26.17, *De praescriptionibus* c. *Si diligenti*, v. *bona fides*.

73 Sul tema della presunzione della buona fede nella prescrizione vd. H. Dondorp, 'Bona fides praesumitur in classical Canon law', in ZRG, Kan. Abt. 102 (2016), pp. 99-122, che indica anche come le eccezioni a tale presunzione siano un debito della canonistica (in primo luogo di Giovanni Teutonico, a cui i successivi autori si rifanno) verso Azzone (pp. 115-16).

la *fides*, se non altro per la previsione della sua necessità per tutto il corso del tempo richiesto a completare la prescrizione e il conseguente contrasto con la tradizione. Già nel diritto romano *fides* è termine polisemico, che racchiude in sé un concetto morale e sociale, che permette di instaurare relazioni improntate a fiducia tra i soggetti[74], anche al di fuori di vincoli giuridici, e che poi si specifica in buona fede contrattuale (cioè l'etica comportamentale da osservare nelle trattative precontrattuali e nei futuri patti) e possessoria (ossia la convinzione psicologica dell'agente)[75].

Nel diritto canonico la molteplicità di significati non si attenua, ma anzi si accentua[76]. La *fides*, concetto ancorato alla religione cristiana, poiché è ciò che unisce l'uomo a Dio[77], acquista infatti maggiore suggestione, dato che evoca ambiti altri rispetto a quelli strettamente giuridici e ha quindi una chiara connessione con i principî teologici[78]. Benché impiegata in un contesto, quello della *praescriptio*, non direttamente e necessariamente collegato con quello religioso, non è tuttavia possibile per l'uomo medievale espellere da quel vocabolo questo ulteriore significato chiave[79]. Anzi, la *bona fides* nella costituzione conciliare "raggiunge la sua più alta e completa significazione teologica"[80]. Basta il richiamo dell'*incipit* della *Quoniam omne*, con la citazione tratta direttamente dalla lettera di San Paolo ai Romani (Rm. 14.23), per introdurre a tale commistione di piani[81]. In questo modo, una

74 Sanz Villalba, 'Los elementos éticos de la prescripción romana', cit., pp. 42-45; L. Lombardi, *Dalla «fides» alla «bona fides»* (Milano: Giuffrè, 1961, Fondazione Guglielmo Castelli 28), pp. 3-40. Per un'origine più propriamente giuridica del concetto di *fides* vd. R. Fiori, '*Fides* et *bona fides*. Hiérarchie sociale et catégories juridiques', in RHD 86.4 (2008), pp. 465-81, anche in italiano con il titolo '*Fides* e *bona fides*. Gerarchia sociale e categorie giuridiche', in *Modelli teorici e metodologici nella storia del diritto privato* 3, a cura di R. Fiori (Napoli: Jovene, 2008), pp. 237-59.

75 G. Lagomarsino, 'Origine ed evoluzione della buona fede in diritto canonico', in *Apollinaris*, 67.3-4 (1994), pp. 565-89, pp. 577-81, che ricostruisce la rielaborazione della nozione romana di buona fede da parte del diritto canonico.

76 Johannes Teutonicus, *ad* C.22 q.1 c.16 (*Movet te*), v. *neque*: "Multipliciter enim dicitur fides". Cfr. S. Parini Vincenti, '*Omne, quod non est ex fide, peccatum est*. The Relevance of Good Faith in Canonical *Transactio*', in *Vergentis* 2 (2016), pp. 273-92, pp. 274-75 e 279-80.

77 Nörr, 'Il contributo del diritto canonico al diritto privato europeo', cit., pp. 23-24, e Idem, 'Recht und Religion', cit., p. 6.

78 Il concetto di *bona fides* introdotto dal diritto canonico è necessariamente contrario a quello del diritto romano, poiché si può rilevare l'esistenza di concetti interdipendenti ispirati al principio morale dell'esclusione di cosciente lesione altrui: Albisetti, *Contributo allo studio del matrimonio putativo*, cit., pp. 158-59.

79 Nörr, 'Il contributo del diritto canonico al diritto privato europeo', cit., p. 27, e Idem, 'Recht und Religion', cit., pp. 9-10.

80 Albisetti, *Contributo allo studio del matrimonio putativo*, cit., p. 172. L'elevazione dal piano etico a quello teologico del concetto di buona fede è opera dei decretisti: Navarrete, *La buena fe*, cit., pp. 42-54.

81 La citazione iniziale è peraltro un prestito dall'opera di Uguccione: Vilain, 'Prescription et bonne foi', cit., p. 140 e nt. 10. A. García y García, 'La Biblia en el Concilio 4 Lateranense', in *AHC* 18 (1986), pp. 91-103, anche in Idem, *Iglesia, sociedad y derecho*, II (Salamanca: Universidad Pontificia de Salamanca, 1987), pp. 237-49, p. 248, sottolinea come il richiamo di un principio generale è qui declinato e circoscritto in un ambito ben preciso, relativo sia alla buona fede civile sia a quella canonica. Il ricorso alle Scritture attesta che i precetti evangelici sono sempre presenti ed efficaci, nonostante la tecnicità delle situazioni da regolare: G. Fransen, 'Ecriture Sainte et droit canonique', in

dottrina che appartiene all'insegnamento cristiano si innesta sull'ordinamento giuridico[82].

Il testo della costituzione è costruito in modo sapiente, perché parte dal concetto di *fides* in senso decisamente e dichiaratamente teologico, passa attraverso l'affermazione della necessità della buona fede – e *bona* è un aggettivo con connotazione morale – per maturare validamente la prescrizione e approda alla spiegazione del significato della buona fede in questo contesto, cioè la consapevolezza che la cosa che si possiede non sia invece di altri. Buona fede è qui termine medio, che getta un ponte tra l'aspetto metafisico e quello psicologico soggettivo (e quindi giuridico): essa è sia l'assenza del peccato sia la non conoscenza dell'appartenenza ad altri del bene in questione (che è causa di interruzione della prescrizione, come specifica Vincenzo Ispano[83]). Tuttavia, i due estremi di questa relazione tenuta insieme dal concetto di buona fede hanno molto in comune. Infatti, il diritto canonico non impiega, come fa il diritto romano (Cod. 7.31.1.3), l'espressione *scientia rei alienae* per definire la conoscenza dell'altruità del bene, ma usa un altro termine, quello di *conscientia*, che nasconde al suo interno, se non la polisemia di *fides*, almeno qualche elemento di ambiguità. In forza di esso, l'aspetto giuridico finisce con il sovrapporsi a quello morale e *conscientia* acquista anche pregnanza etica: non può pertanto indicare solamente conoscenza dei fatti[84]. Il rapporto tra valori superiori e principî mutuati dall'ambito giuridico sembra sbilanciato in favore dei primi.

In tale contesto, l'equivalenza tra buona fede e coscienza emerge chiaramente dalle fonti canonistiche: così, per esempio, nella Glossa al *Liber Extra*, dove si dice che chiunque agisca contro coscienza firma – per così dire – la sua condanna all'inferno[85] e dove più semplicemente si usa il termine coscienza per spiegare il significato di *fides* usato dal legislatore canonico[86]. Anche Niccolò dei Tedeschi conferma che in questa

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REDC 43 (1986), pp. 7-22, anche in Idem, *Canones et quaestiones*. II. *Institutions canoniques* (Goldbach: Keip, 2002, Bibliotheca eruditorum 25), pp. 523-35, p. 17. Inoltre, esso fornisce la giustificazione necessaria per allontanarsi dalla disciplina della prescrizione del diritto romano, alla quale il diritto canonico si è sempre largamente ispirato: R. H. Helmholz, 'The Bible in the Service of the Canon Law', in *Chicago-Kent Law Review* 70 (1994), pp. 1557-81, p. 1571.

82 Nörr, 'Il contributo del diritto canonico al diritto privato europeo', cit., p. 25, e Idem, 'Recht und Religion', cit., p. 8.

83 Vincentius Hispanus, *Apparatus in Concilium quartum Lateranense*, ed. cit., *ad* c.41 (*Quoniam omne*), v. *quoniam omne ... bona fide prescriptio*, p. 347.

84 Chiodi, 'Cristianesimo medievale e diritto', cit., p. 180.

85 Bernardus Parmensis, *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, v. *quoniam omne, casus*. È difficile non vedere un richiamo a C.28 q.1 d.p.c.14 (*Omnes*), in cui l'interpretazione delle parole paoline che il IV Concilio lateranense pone al principio della costituzione 41 è così svolta: "non ita intelligendum est, ut quicquid ab infidelibus fit peccatum esse credatur, sed omne, quod contra conscientiam fit, edificat ad gehennam" ('non deve essere inteso nel senso che si creda che qualsiasi cosa provenga dagli infedeli è peccato, ma che tutto ciò che è fatto contro coscienza prepara alla dannazione').

86 Bernardus Parmensis, *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, v. *ex fide*. Così fa anche Hostiensis, *In secundum Decretalium librum commentaria*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 1, fol. 156va. Johannes Teutonicus, *ad* C.22 q.1 c.16 (*Movet te*), v. *neque*, facendo riferimento alla costituzione *Quoniam omne*, inserisce *conscientia* tra i significati che può assumere la parola *fides*.

prospettiva fede e coscienza si sovrappongono (poiché tutto quello che è contro la coscienza è peccato: un altro modo per parafrasare le parole paoline, che sottolinea tra l'altro la sinonimia di *fides* e *conscientia*)[87].

L'Ostiense fa cenno invece alla contrapposizione che può esserci tra *scientia* e *conscientia*, che è infatti irriducibile alla sola conoscenza dell'altrui diritto sulla cosa posseduta: non basta quindi sapere che la cosa è di altri, ma ci vuole la consapevolezza che si stia violando un diritto altrui[88]. L'elemento psicologico, quello più propriamente giuridico, si fonda con quello morale, perché la buona fede è anche – non bisogna mai dimenticarlo – assenza di peccato (e la malafede, di converso, è un pericolo per la salvezza eterna dell'anima). La buona fede unisce quindi tanto l'ignoranza che la cosa appartenga ad altri quanto l'onestà del prescrivente. La distinzione tra *scientia* e *conscientia* rende talvolta addirittura possibile in determinati casi maturare la prescrizione nonostante la *scientia rei alienae*, come per esempio quando si usucapisce per intervento di una decisione del giudice (come riportano Goffredo da Trani e il v. *bona fides ad* X 2.26.17[89]).

A conferma della relazione tra buona fede e *conscientia* sta il fatto che la malafede viene designata dai canonisti come *conscientia laesa*, cioè come coscienza intaccata nella sua integrità, ferita nel suo essere *bona* e quindi non più idonea a produrre effetti, in quanto intrisa di peccato. La malafede è ostacolo assoluto alla prescrizione[90]. La prescrizione si inquina perfino se la coscienza diventa cattiva l'ultimo giorno utile per prescrivere, dato che quel solo momento è atto a impedire il suo perfezionarsi. Il testo della *Quoniam omne* non può essere interpretato diversamente. Quanto l'aspetto etico-morale abbia peso è evidente dalla spiegazione fornita a chi oppone che per un piccolo istante non si può viziare un lungo tratto di tempo nel corso del quale sono stati rispettati tutti i parametri richiesti: è esattamente come il bene compiuto da un uomo durante tutto l'arco della sua vita, che non gli consente comunque di guadagnarsi la salvezza eterna se negli ultimi momenti della sua esistenza terrena egli commette peccato mortale[91].

Il rapporto tra buona fede e maturazione della prescrizione acquisitiva è quindi paradigmatico della simbiosi tra morale e giuridico (il *civis* è anche *fidelis*): l'esperienza giuridica è anche etica e il diritto è una derivazione di presupposti etici e religiosi.

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87 Abbas Panormitanus, *Commentaria secundae partis in secundum Decretalium Librum*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, pr., fol. 45ra: "omne quod contra conscientiam sit, est peccatum. Unde capitur hic fides pro conscientia" ('tutto ciò che è contro la coscienza è peccato. Per cui qui fede s'intende come coscienza').

88 Hostiensis, *In secundum Decretalium librum commentaria*, ed. cit., *ad* X 2.26.5, *De praescriptionibus* c. *Vigilanti*, n. 7, fol. 149rb. Vd. Ruffini, *La buona fede*, cit., p. 170.

89 Goffredus de Trano, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 2, fol. 115ra; Bernardus Parmensis, *ad* X 2.26.17, *De praescriptionibus* c. *Si diligenti*, v. *bona fides*.

90 F. Claeys-Bouuaert, 'Bonne foi', in *DDC* 2 (Paris: Letouzey et Ane, 1937), col. 956-67, col. 965.

91 Baldus de Ubaldis, *Super Decretalibus*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 3, fol. 227rb-va. Rufinus, *Summa*, ed. cit., *ad* C.16 q.3, p. 359, aveva messo in luce per i *canones* la necessità del perdurare della buona fede "usque ad novissimam horam prescriptionis" ('fino all'ultimissimo momento della prescrizione').

In materia di prescrizione il problema morale quindi diventa – coincide con – il problema giuridico[92].

Il dibattito della canonistica medievale sull'applicazione del principio di buona fede in alcuni casi di prescrizione acquisitiva

Il tema della coscienza lesa ritorna in alcuni casi che costellano le riflessioni dei canonisti, che cercano di risolverli. Quattro sono particolarmente interessanti per il dibattito suscitato tra gli esponenti della scienza giuridica e per le soluzioni prospettate all'interno del nuovo quadro che si è venuto a delineare con le scelte operate da Innocenzo III nel IV Concilio lateranense.

Il prelato in malafede e la chiesa in buona fede

Il primo dei problemi affrontati dalla canonistica medievale e che qui si propone è quello del prelato con la coscienza lesa, che è cioè consapevole di possedere una cosa ingiustamente, mentre tutta la chiesa, nel nome della quale la tiene, è in buona fede. La questione è infatti se debba restituire il bene al suo legittimo proprietario[93].

Uguccione consiglia di rendere la cosa sulla base del principio evangelico di fare agli altri quel che si desidera sia fatto a se stessi: nessun obbligo di natura giuridica sorge in capo al possessore, ma solo un dovere morale, giacché egli può ritenersi sicuro *ratione fori*, ma non *ratione poli*, *tutus* per quanto concerne il possesso, ma non per la salvezza della sua anima, al riparo secondo le leggi secolari, ma non secondo quelle ecclesiastiche[94].

La tendenza, come si può riscontrare leggendo le opinioni degli altri esponenti della scienza giuridica che cercano di fornire una soluzione al quesito, è però quella di consigliare di agire con cautela, per evitare di compromettere la situazione con scelte avventate. Per esempio, Giovanni Teutonico dice di limitarsi a comunicare la cosa al proprietario perché la richieda indietro, stimolandone l'inattiva negligenza, vera causa del perdurare di tale condizione[95]. In questo modo, non si permane nell'inganno e, aggiunge la Glossa al *Liber Extra*, ci si *purga* la coscienza[96]. Cauta pure la posizione di

92 Grossi, 'Somme penitenziali', cit., p. 133; Massetto, 'Buona fede nel diritto medievale e moderno', cit., pp. 137-38.

93 Alcune delle risposte di seguito riferite sono sinteticamente riportate anche da Navarrete, *La buena fe*, cit., pp. 179-85.

94 Huguccio, *Summa*, *ad* C.14. q.3 e *ad* C.14 q.6 c.1, ed. Ruffini, *La buona fede*, cit., p. 83, ricordato anche da Johannes Teutonicus, *ad* C.34 qq.1-2 c.5 (*Si virgo*), v. *possidere*.

95 Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, ed. cit., *ad* c.41 (*Quoniam omne*), v. *tam canonica quam civilis*, p. 245. La stessa soluzione compare anche in Idem, *ad* D.54 c.12 (*Generalis*), v. *reddantur*.

96 Bernardus Parmensis, *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, v. *nulla temporis*, dove è chiaro il parallelismo con la Glossa al *Decretum*.

Innocenzo IV[97], ma l'Ostiense mette sul piatto della bilancia anche gli interessi della chiesa, che non devono essere danneggiati, soprattutto da un prelato, che è tenuto anzi a tutelarli: ripulire la propria coscienza rendendo il proprietario edotto della situazione potrebbe non essere in quest'ottica la soluzione migliore. Ecco quindi che egli suggerisce come più prudente di chiedere consiglio al proprio capitolo. Se dal confronto emerge con sicurezza che la cosa è di altri, solo allora essa va resa, dato che rimane ovviamente valido il principio per cui non bisogna concludere contratti con frode né agire contro la propria coscienza[98]. Qualora il capitolo poi rifiuti la restituzione, allora il prelato può ritenere comunque di aver fatto il possibile e di non avere più la coscienza gravata dal peccato, poiché ormai la violazione non dipende da lui[99]. Guido da Baisio, inoltre, sostiene che il prelato in ogni caso possa difendere in giudizio la cosa, dal momento che, se personalmente sa di essere nel torto, tuttavia ricopre un ruolo e agisce come persona pubblica, cioè in nome della chiesa[100].

Giovanni da Imola introduce un'interessante distinzione: perché si possa davvero sviluppare un discorso che metta in contrapposizione il prelato in malafede con la chiesa in buona fede occorre verificare un presupposto, cioè che questa sia dotata di un capitolo, a cui guardare per riuscire a comprendere quale sia la reale situazione. Conseguentemente, la chiesa è da credersi in buona fede solo se esso esiste ed è in buona fede. Qualora invece il capitolo, pur presente, sia consapevole del fatto che la cosa appartiene ad altri, allora la chiesa è da ritenere del pari in malafede. Nell'eventualità in cui non vi sia un capitolo, infine, non si può immaginare alcuna opposizione tra il prelato e la chiesa: lo stato soggettivo del chierico è l'unico che può essere preso in considerazione e la chiesa è pertanto da reputare in malafede[101].

Niccolò dei Tedeschi, che riassume molte di queste opinioni, imposta un'altra distinzione: se è notorio che la cosa è altrui, allora il prelato deve restituirla (in questo caso non si può sostenere che egli alieni un bene della chiesa, perché tutti sanno che è di altri); altrimenti, se solo il prelato è a conoscenza della situazione e non esiste il modo di provarlo diversamente che con la sua parola, deve tacere, perché non verrebbe creduto (non vi è da parte sua la commissione di un peccato, giacché agisce come persona pubblica – l'insegnamento dell'Arcidiacono è qui ripreso nell'argomentazione del Panormitano –, mentre il problema che affligge la sua coscienza è una questione privata); se invece la prova della detenzione può venire anche da altri, allora è bene

97 Innocentius IV, *Super libros quinque Decretalium*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 1, fol. 303vb.

98 Hostiensis, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 3, fol. 268ra-rb. Nella *Summa* Enrico da Susa è quindi più esplicito che nella sua *Lectura*, dove si limita a dare al chierico l'indicazione di badare al contempo alla sua coscienza e al danno arrecato alla Chiesa (Idem, *In secundum Decretalium librum commentaria*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 7, fol. 157ra).

99 L'Ostiense cita a tal proposito la formula che si legge in D.43 c.4 (*Ephesiis*): "mundae sunt manus meae" ('le mie mani sono pulite').

100 Archidiaconus, *Super Decreto* (Lugduni: apud Hugonem a Porta, 1549), *ad* D.54 c.12 (*Generalis*), n. 3, fol. 72rb.

101 Ioannes de Imola, *Super secundo Decretalium*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam*, n. 36, fol. 175va.

seguire quanto dice la Glossa, cioè non restituire la cosa direttamente, ma fare una comunicazione al proprietario perché si attivi per riaverla indietro[102].

Baldo sottolinea che la chiesa può prescrivere se il capitolo è in buona fede, perché la coscienza del singolo prelato non impedisce in generale la conclusione di affari. L'obbligo di restituire per la cattiva coscienza del singolo chierico sorge soltanto purché in questo modo non si arrechi pregiudizio ad altri[103]. È evidente che nelle soluzioni prospettate entrano in gioco anche ulteriori interessi di cui si deve tener conto (per esempio, quello della Chiesa a conservare la proprietà di un bene), di fronte ai quali la *conscientia* di un solo individuo può passare in secondo piano, in considerazione del fatto che dal peccato, seppur mortale, ci si può liberare anche senza far seguire gli atti alle buone intenzioni.

Il dubbio durante la prescrizione

La dottrina dibatte sulla possibilità di escludere la facoltà di prescrivere se il prescrivente dubita che la cosa sia sua. Non si può infatti parlare in tale circostanze di una *conscientia laesa*, per quanto giusta sia la causa che provoca la titubanza. La buona fede continua anzi a sussistere: è molto chiaro Giovanni Teutonico, che da una parte riconosce il diritto di percepire e trattenere i frutti, dall'altra il dovere di svolgere delle indagini per arrivare alla verità[104]. È lui a dettare la linea da seguire: così dicono anche Goffredo da Trani[105], Innocenzo IV[106], la Glossa di Bernardo da Parma (secondo cui la ricerca della verità si può intraprendere per esempio rivolgendo domande ad altri)[107], l'Ostiense[108]. Niccolò dei Tedeschi, che riconosce in questa la *communis opinio*, spiega la scelta dicendo che chi dubita di fatto ignora se la cosa sia di altri: si tratta della condizione per definire correttamente un possessore di buona fede (almeno secondo C.34 qq.1-2 c.5, *Si virgo*) e quindi vi sono tutti gli elementi per valutare positivamente la maturazione della prescrizione[109]. In capo al prescrivente rimane quindi un solo obbligo: quello di cercare la *veritas* che gli consenta di dipanare il dubbio.

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102 Abbas Panormitanus, *Commentaria secundae partis in secundum Decretalium Librum*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, nn. 41-42, fol. 47va.

103 Baldus de Ubaldis, *Super Decretalibus*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, nn. 8-9, fol. 227va.

104 Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, ed. cit., *ad* c.41 (*Quoniam omne*), v. *in nulla temporis*, p. 245.

105 Goffredus de Trano, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 2, fol. 115rb.

106 Innocentius IV, *Super libros quinque Decretalium*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 2, fol. 303vb.

107 Bernardus Parmensis, *ad* X 2.26.17, *De praescriptionibus* c. *Si diligenti*, v. *bona fides*, ma soprattutto Idem, *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, v. *nulla temporis*.

108 Hostiensis, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 3, fol. 268ra; Idem, *In secundum Decretalium librum commentaria*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 7, fol. 157ra.

109 Abbas Panormitanus, *Commentaria secundae partis in secundum Decretalium Librum*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, nn. 39-40, fol. 47rb. Il c. *Si virgo* è un passo di Agostino in tema di adulterio, il quale a sua volta si riferisce al possessore che è a ragione considerato ingiusto nel momento stesso in cui viene a conoscenza del fatto che la cosa è di altri.

La coscienza del dubbioso o del titubante non può essere considerata né cattiva né buona, come ammettono anche Bartolo[110], che ripercorre questa e altre classiche questioni che impegnano le riflessioni dei canonisti[111], e Baldo[112]. Pertanto, tale stato non inficia la prescrizione: per interromperla, infatti, si richiede la salda convinzione e la piena consapevolezza del proprio essere in malafede. La teoria che si afferma e che diventa *communis* è quindi, sulla scorta di Bartolo, che il dubbio non interrompe in nessun modo la prescrizione (benché non permetta di iniziarla)[113].

La malafede momentanea in corso di prescrizione

Nella minuta casistica che tanto appassiona i giuristi medievali e che genera lunghe discussioni si inserisce anche la questione della malafede che dura solo per un tempo intermedio, mentre la prescrizione sta decorrendo. Sembra più che altro un esempio di scuola, vista la particolarità del caso. Infatti, dato per presupposto che per iniziare il computo della prescrizione il prescrivente debba essere in buona fede, si ipotizza qui che a un certo punto egli cominci a ritenere di non possedere più giustamente e decida quindi di approfittare della situazione, trovandosi così in uno stato di malafede. Costui, però, si rende successivamente conto di possedere in realtà correttamente la cosa, ritornando in una condizione di buona fede, necessaria per terminare il tempo richiesto per la prescrizione. Si pone quindi la domanda (e questo costituisce materia di dibattito) se la malafede intercorsa tra i due periodi di buona fede produca effetti interruttivi della prescrizione[114].

Giovanni Teutonico fornisce una risposta negativa al quesito, sulla base della considerazione che in questo caso la coscienza non sia davvero lesa, ma semplicemente erronea (non si spiegherebbe altrimenti il ritorno a una condizione di buona fede) e quindi l'unica strada da percorrere è quella di abbandonare l'errore[115]. In altre parole, non si può tecnicamente parlare di vera malafede. Il prescrivente si è creato uno stato soggettivo sbagliato, che lo ha portato a credere di essere nel torto e che ha comunque accettato. Tuttavia, un elemento esterno (Giovanni parla di "dicta aliquorum", di parole provenienti da altre persone) ha ristabilito l'ordine delle cose. Lo stesso pensano Innocenzo IV e la Glossa al *Liber Extra*[116].

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110 Bartolus de Saxoferrato, *Commentaria in primam Digesti novi partem*, ed. cit., *ad* Dig. 41.3.5, *De ususcapionibus et usurpationibus* l. *Naturaliter*, n. 9, fol. 99rb-va. È la medesima situazione in cui versa chi ignora, come messo in luce dalla gl. *invenerit*, *ad* Cod. 7.32.1, *De acquirenda et retinenda possessione* l. *per liberam*.

111 Condorelli, 'Bartolo e il diritto canonico', cit., p. 516.

112 Baldus de Ubaldis, *Super Decretalibus*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 5, fol. 227va.

113 Ruffini, *La buona fede*, cit., p. 160; Massetto, 'Buona fede', cit., p. 142.

114 Qualche cenno alla discussione anche in Ruffini, *La buona fede*, cit., pp. 128-29.

115 Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, ed. cit., *ad* c.41 (*Quoniam omne*), v. *in nulla temporis*, p. 245.

116 Innocentius IV, *Super libros quinque Decretalium*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 1, fol. 303vb; Bernardus Parmensis, *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, v. *nulla temporis*.

All'Ostiense sembra che questa conclusione, sposata in precedenza per esempio anche da Tancredi, sia in realtà contraria alla lettera del testo della *Quoniam omne*[117]. Sulla stessa linea possono essere posti quegli autori che insistono, richiamando la costituzione conciliare, nel dire che la buona fede ai fini della maturazione della prescrizione debba essere presente "a principio, et in medio, et in fine" ('all'inizio, in mezzo e alla fine')[118]. Tra essi figura Niccolò dei Tedeschi, che non ritiene si possa computare come un unico lasso di tempo quello che va dall'inizio (in buona fede) alla fine (parimenti in buona fede), giacché, a causa dell'intervento della malafede a metà di esso, seppur per un periodo limitato, la prescrizione è stata "conquassata" ('sconvolta'): l'espressione che usa il Panormitano per dare l'idea dell'interruzione della prescrizione sottolinea fortemente il concetto che quando la costituzione conciliare impone la buona fede per tutto il tempo intende escludere qualsiasi eccezione o un'interpretazione diversa da quella più strettamente letterale del testo[119].

Anche questo problema occupa le riflessioni dei civilisti. Bartolo e Baldo prendono come riferimento papa Fieschi. Il primo, partendo proprio dal commento innocenziano, conclude che la malafede *superveniens* per interrompere la prescrizione debba cambiare lo stato soggettivo del prescrivente in modo irrevocabile. Bartolo abbraccia l'idea che di semplice errore di valutazione si tratti, poiché per porvi rimedio è sufficiente colmare la mancanza di informazioni corrette che ha condotto al fraintendimento. Questa interpretazione, peraltro, limita anche l'influenza del *ius canonicum* sul *ius civile*, dato che conformemente a tale impostazione ogni tipo di malafede in cui non sia riscontrabile il carattere dell'irrevocabilità non pregiudica la maturazione della prescrizione[120]. Baldo ne sviluppa ulteriormente il ragionamento: la prescrizione può essere completata poiché la cattiva coscienza si è già esaurita e quindi non nuoce. Un espediente retorico aiuta a meglio comprendere questo meccanismo: quanto è dotato dei requisiti richiesti e giunge per ultimo all'interno di una serie di cose disposte secondo un ordine ha la capacità di sanare ciò che sta nel mezzo ed è affetto da qualche vizio. È quel che succede in questo caso, poiché la buona fede finale ha la forza di rimediare ai difetti che sono emersi nel corso della prescrizione, di qualsiasi natura essi siano. Tanto più se di semplici errori si è trattato. In questo modo, 'purgato' l'errore, non si rischia di incorrere nel peccato[121].

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117 Hostiensis, *In secundum Decretalium librum commentaria*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 7, fol. 156vb.

118 Per esempio, Johannes Teutonicus, *ad* C.14 q.6 c.1 (*Si res*), v. *nisi restituatur*.

119 Abbas Panormitanus, *Commentaria secundae partis in secundum Decretalium Librum*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 38, fol. 47ra. Il Panormitano argomenta richiamando C.34 qq.1-2 c.5 (*Si virgo*), su cui vd. la nota 109.

120 Bartolus de Saxoferrato, *Commentaria in primam Digesti novi partem*, ed. cit., *ad* Dig. 41.3.5, *De ususcapionibus et usurpationibus* l. *Naturaliter*, n. 10, fol. 99va.

121 Baldus de Ubaldis, *Super Decretalibus*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 4, fol. 227va.

La malafede sopraggiunta a prescrizione ultimata

Vi è infine un problema per lungo tempo discusso, ispirato da un'epistola di Agostino accolta nel *Decretum* (C.14 q.6 c.1, *Si res*), che esclude la remissione del peccato a chi non restituisca il maltolto: cosa si deve dunque fare se la consapevolezza che la cosa era di un altro emerge solo a prescrizione ultimata?[122] Ancora una volta la domanda è se essa debba essere restituita. Se il possesso è anche una questione di coscienza e ci si rende conto del reale stato delle cose possedute, non dovrebbe infatti influire il numero di anni trascorsi per portare a compimento la prescrizione. Il problema è quindi, com'è evidente, soprattutto di ordine morale, visto che dal punto di vista giuridico il diritto è già maturato grazie allo scorrere del tempo. Ma siccome morale e diritto nel *ius canonicum* sono avvinti in un abbraccio strettissimo, i canonisti si pongono questi interrogativi con una certa frequenza, anche per la pressione esercitata dalla risposta fornita dai teologi, che indicano come corretta la strada della restituzione della cosa, perché il peccato non cessa finché il maltolto non è riposto nelle mani del vero proprietario, indipendentemente dal numero di anni trascorso[123]. Si presenta quindi ai canonisti la necessità di conciliare le regole che consentono la prescrizione con il requisito ineludibile della *salus animarum*, apparentemente messa così in pericolo da una condotta che sembrerebbe non avere nulla di sbagliato sul piano strettamente formale.

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122 Il collegamento tra il quesito e il passo del Decreto grazianeo è sottolineato da Rufinus, *Summa*, ed. cit., *ad* C.14 q.6, p. 344. Del dibattito si è occupata più o meno diffusamente anche la storiografia: vd., per esempio, Ruffini, *La buona fede*, cit., pp. 125-28; Vilain, 'Prescription et bonne foi', cit., pp. 154-61; Helmholz, 'Legal Formalism', pp. 276-79, e Idem, *The Spirit of Classical Canon Law*, cit., pp. 191-94; Dondorp, 'Bona fides praesumitur', cit., pp. 99-108. Una variante del problema, testimoniata al pari di questa nel periodo precedente l'emanazione della *Quoniam omne*, riguarda il destino della cosa ormai prescritta in assenza di un altro elemento necessario, cioè del giusto titolo: vd. l'anonima *quaestio Quidam predium* edita da G. Fransen, 'Questionum fragmentum Sedunense', in BMCL 17 (1987), pp. 65-75, anche in Idem, *Canones et quaestiones. Evolution des doctrines et système du droit canonique.* 1, 2. *La littérature des "quaestiones" des canonistes et civilistes* (Goldbach: Keip, 2002, Bibliotheca eruditorum 25), pp. 371-81, pp. 67-69 (che Fransen data tra il 1176 e il 1179).

123 Ioannes Andreae, *In titulum De regulis iuris commentarii* (Lugduni: apud haeredes Iacobi Giunctae, 1550), *ad reg.* II (*Possessor*), nn. 39-40, fol. 155rb-va, riferisce la posizione del frate agostiniano Gerardo da Siena, che dedica al tema della restituzione della cosa acquisita per prescrizione in seguito a malafede sopraggiunta il sesto *articulus* della sua *Quaestio de prescriptione*: vd. ed. L. Armstrong, *The Idea of a Moral Economy. Gerard of Siena on Usury, Restitution, and Prescription* (Toronto-Buffalo-London: University of Toronto Press, 2016), pp. 222-311, pp. 300-11. Gerardo basa il suo ragionamento principalmente su tre argomenti: la prescrizione è nulla se viola lo scopo della legge, che è quello di premiare la buona fede; la malafede emergente cancella la prescrizione canonica, perché essa è fondata e trae la sua efficacia dalla buona fede; ciò che è sbagliato viene corretto dalla verità e quindi la malafede sopraggiunta dimostra che la prescrizione è stata frutto di errore e merita di essere corretta. Chi prescrive deve pertanto restituire, se non per un obbligo giuridico, almeno per un obbligo dettato dal foro della coscienza. Non si tratta tuttavia della soluzione prospettata da tutti i teologi in modo generalizzato: per esempio, come riportato sempre da Giovanni d'Andrea (Ioannes Andreae, *In titulum De regulis iuris commentarii*, ed. cit., *ad reg.* II [*Possessor*], n. 42, fol. 156ra-rb), Tommaso d'Aquino nel suo *Quodlibet* 12 (q. 16, art. 2), si schiera per la non restituzione, con argomentazioni, seppur riportate in modo sintetico, eminentemente giuridiche.

Sono i decretisti i primi ad affrontare la questione. Rufino abbozza una risposta, che però sembra tutt'altro che risolutiva, ed anzi lascia il campo ad altre discussioni: la restituzione è dovuta conformemente alla legge celeste, mentre secondo la legge secolare non si è tenuti a rendere nulla[124]. Etienne de Tournai – che peraltro ritiene che la prescrizione sia stata introdotta in violazione del diritto naturale e dell'equità, dato che è ad essi contrario che qualcuno perda una cosa per il semplice scorrere del tempo[125] – fornisce una risposta a metà strada tra diritto e morale, poiché sostiene che in queste occasioni sia proprio della perfezione restituire il bene, per quanto non renderlo non comporti peccato, sempre che questa seconda opzione non sia stata determinata dalla cupidigia, bensì dalla convinzione che il diritto in questione sia effettivamente di propria spettanza[126].

Con Alano Anglico (riportato, tra i molti, da Goffredo da Trani, dall'Ostiense e dalla Glossa di Bernardo da Parma, senza che però nessun autore prenda seriamente sul serio tale alternativa) abbiamo la proposizione di una distinzione basata su argomentazioni economico-giuridiche. Egli suggerisce, infatti, di distinguere se il possesso è a titolo gratuito (*ex causa lucrativa*) oppure oneroso: soltanto nel primo caso nascerebbe l'obbligo di restituire[127].

Giovanni Teutonico afferma che se dopo la prescrizione si apprende che la cosa era di altri, non si può dire che ci sia stata malafede né che ci sia stata coscienza della situazione, a meno che si voglia intendere che ci sia la consapevolezza che la cosa sia stata (in passato) di altri, perché ora non lo è più[128]. Ma questo è francamente andare ben oltre il dettato della costituzione *Quoniam omne*, la cui emanazione sembra fare un po' di chiarezza sul tema. La malafede nuoce mentre si prescrive, non a prescrizione conclusa, quando il diritto è stato prescritto e quindi acquisito[129]. La parte di tempo a cui fa riferimento il testo è quella in corso di prescrizione. La prospettiva con cui

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124 Rufinus, *Summa*, ed. cit., *ad* C.14 q.6, p. 344.

125 Stephanus Tornacensis, *Summa*, ed. cit., *ad* C.14 q.6 c.1 (*Si res*), p. 220, e *ad* C.16 q.3 c.2 (*Presulum*), p. 227. Sul primo dei due passi vd. G. Conklin, 'Stephen of Tournai and the development of *aequitas canonica*: the theory and practice of law after Gratian', in *Proceedings San Diego*, pp. 369-86, p. 381. Il tema della contrarietà della prescrizione al diritto naturale occupa notevole spazio nella trattazione della canonistica successiva: vd., per esempio, v. *legis ad* C.16 q.3 c.4 (*Quicumque episcopus*), secondo cui è iniquo che qualcuno tragga vantaggio provocando danno a un altro; Ioannes Andreae, *In titulum De regulis iuris commentarii*, ed. cit., *ad reg.* 11 (*Possessor*), nn. 11-17, fol. 147vb-50ra; Petrus de Ancharano, *In Sextum Decretalium* (Lugduni: ex officina Joannis de Cambray, 1531), *ad tit. De regulis iuris*, *reg.* 11 (*Possessor*), nn. 1-2, 6-8, fol. 168va-vb, 169ra.

126 Stephanus Tornacensis, *Summa*, ed. cit., *ad* C.16 q.3 c.2 (*Presulum*), p. 227. Di segno opposto, ovviamente, la risposta nel caso in cui la prescrizione sia maturata in uno stato di malafede, anche sopravvenuta: ivi, *ad* C.14 q.6 c.1 (*Si res*), p. 220.

127 Alanus, *ad* 1Comp. 2.18.7, ed. Vilain, 'Prescription et bonne foi', cit., p. 139 nt. 7. Vd. Goffredus de Trano, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 7, fol. 117rb; Hostiensis, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 3, fol. 268rb; Idem, *In secundum Decretalium librum commentaria*, ed. cit., *ad* X 2.26.5, *De praescriptionibus* c. *Vigilanti*, n. 7, fol. 149rb; Bernardus Parmensis, *ad* X 2.26.5, *De praescriptionibus* c. *Vigilanti*, v. *noverit*. Cfr. Ruffini, *La buona fede*, cit., p. 85.

128 Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, ed. cit., *ad* c.41 (*Quoniam omne*), v. *in nulla temporis*, p. 245.

129 Bernardus Parmensis, *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, v. *nulla temporis*.

si guarda alla questione si articola soprattutto sul piano morale, col rischio però di intaccare un diritto acquisito secondo le norme (civili o canoniche che siano).

Vincenzo Ispano non affronta direttamente il problema in questi termini, ma parla più genericamente del destino delle passate prescrizioni civili maturate in malafede, prima che fosse elaborata la *Quoniam omne*, sicuramente salve in forza della *praescriptio longi temporis*. Il canonista iberico esclude in questo modo l'irretroattività della disposizione conciliare, nonostante le situazioni in cui permaneva una situazione di grave peccato siano state di fatto il pretesto per l'emanazione della costituzione 41. Il consiglio che Vincenzo si sente di dare, tuttavia, è che, salvi gli effetti della prescrizione e senza che nasca alcun obbligo di restituzione della cosa, il possessore faccia penitenza e si riproponga di non prescrivere mai più in questo modo[130].

Raimondo di Peñafort per arrivare alla soluzione del problema imposta una distinzione imperniata sulla situazione soggettiva del possessore una volta che è maturata la prescrizione: costui può essere preda degli scrupoli di coscienza (può cioè essere avvolto dall'angoscia di rimanere in uno stato di peccato mortale) oppure no. Nel primo caso dovrebbe restituire la cosa per non fare violenza alla propria natura. Nel secondo, qualora dica di credere di possedere in modo corretto perché questo è quanto gli ha attribuito il diritto oppure abbia avuto dei rimorsi, svaniti però rapidamente, per sicurezza sarebbe bene che rendesse ugualmente la cosa: è difficile che si realizzino tutte le condizioni che garantiscono l'effettività della prescrizione (soprattutto perché, tra le righe, si può intravedere nella condotta del prescrivente una certa cupidigia). Comunque, in quest'ultimo caso, Raimondo non si sente in grado di sbilanciarsi sulle conseguenze dell'eventuale rifiuto di restituire il bene: egli non sa infatti dire se il possessore, tenendo tale comportamento, debba essere annoverato tra coloro che si guadagneranno la salvezza eterna o tra coloro che saranno dannati, poiché comunque questo, nonostante la potestà della Chiesa, è quanto si osserva in tutto il mondo[131].

La soluzione più ricorrente si basa però sul ruolo riconosciuto alla legge (e al legislatore), che, trascorso il tempo necessario nel rispetto delle condizioni previste, assegna al possessore un nuovo diritto, estinguendo quello del vecchio. La malafede successiva in questo modo non può nuocere in alcun modo, perché la legge ha estinto il vecchio titolo e ne ha creato uno nuovo. La Glossa di Bernardo da Parma, con espressione che invero tutti i canonisti mutuano e parafrasano da un passo agostiniano entrato a far parte del *Decretum* (D.8 c.1, *Quo iure*), afferma che il diritto può assegnare a uno un bene e a un altro un altro bene[132]. Non si può ritenere che il possessore sia in malafede o che abbia violato la sua coscienza una volta che il periodo richiesto per la maturazione della prescrizione sia trascorso. In questo modo,

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130 Vincentius Hispanus, *Apparatus in Concilium quartum Lateranense*, ed. cit., *ad* c.41 (*Quoniam omne*), v. *tam canonica quam civilis*, p. 347.

131 Raymundus de Peñafort, *Summa* (Avenione: sumptibus Franç. Mallard, Joan. Delorme, Jos. Car. Chastanier, 1715), lib. 2, *De praescriptionibus et usucapionibus*, § 33, p. 293.

132 Bernardus Parmensis, *ad* X 2.26.5, *De praescriptionibus* c. *Vigilanti*, v. *noverit*: "iura faciunt hoc meum, illud tuum" ('il diritto rende questo mio, quello tuo').

il diritto canonico sposa l'idea che a un certo punto, dopo un *iter* che si è svolto nel modo corretto e alle giuste condizioni, la certezza della proprietà di una cosa sia un valore. Di contro, il diritto su una cosa non può rimanere per sempre nell'incertezza, come accadrebbe proprio se si tenesse in considerazione la malafede sopravvenuta in qualsiasi momento, anche successivo al compimento della prescrizione.

Goffredo da Trani esprime logicamente in modo sintetico il concetto: terminata la prescrizione, uno è al sicuro sia secondo il diritto civile sia secondo il diritto canonico e pertanto possiede di diritto. Se possiede di diritto possiede giustamente, se possiede giustamente possiede bene ("si iure iuste, si iuste bene")[133]: niente può più essere rivendicato contro il possessore. Il legislatore canonico o civile può attribuire una cosa altrui e per questo solo ci si può ritenere al sicuro. In questa prospettiva l'affermazione dei teologi sfuma, si declassa a consiglio, proprio perché per diritto non si è obbligati, dal momento che la cosa non è più di un altro e si possiede giustificatamente. In quanto consiglio perde ogni crisma di coercizione morale e quindi sta alla discrezionalità del singolo eventualmente seguirlo. Fare altrimenti può significare forse compiere meno bene, ma non corrisponde necessariamente a fare del male: in questo modo Goffredo alleggerisce l'anima del prescrivente dalla pesante e incombente ombra del peccato mortale.

Addirittura Innocenzo IV prende le parti dei giuristi anziché dei teologi[134]. Ed Enrico da Susa rincara la dose, definendo l'opinione di questi ultimi troppo angelica (benché anche quella dei legisti presenti il difetto opposto di essere troppo *sensualis*, legata alla materialità delle cose: né le *leges* né i legisti possono infatti rendere gli uomini di buona fede, se la loro coscienza è di segno opposto e sono dunque destinati all'inferno)[135]. Bisogna semplicemente rispettare i canoni e rimettere alla coscienza del singolo la decisione sul da farsi: di fronte a una *conscientia remordens* non si può fare altrimenti, occorre seguirla per non andare contro di essa, per quanto sia erronea[136]. Ciononostante, l'Ostiense non si colloca tra coloro che in una simile situazione sarebbero tormentati dai rimorsi di coscienza, dal momento che, completata la prescrizione, la cosa è stata acquistata in forza dell'autorità del diritto[137]. 'È mia perché è stata resa mia' ("quia et mea facta est"), così come lo sarebbe se l'avesse assegnata il *princeps*, nonostante la consapevolezza che si trattava di una cosa altrui, la cui proprietà è cambiata semplicemente perché il *princeps* ha preso una decisione, che gli compete

133 Goffredus de Trano, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 7, fol. 117rb. Così anche Bernardus Parmensis, *ad* X 2.26.5, *De praescriptionibus* c. *Vigilanti*, v. *noverit*. L'espressione riprende in realtà quella di Agostino nella lettera a Macedonio accolta in C.14 q.4 c.11 (*Quid dicam*).

134 Innocentius IV, *Super libros quinque Decretalium*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, n. 1, fol. 303vb.

135 Hostiensis, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 3, fol. 268va.

136 Idem, *In secundum Decretalium librum commentaria*, ed. cit., *ad* X 2.26.5, *De praescriptionibus* c. *Vigilanti*, n. 7, fol. 156vb: si sa – chiosa Enrico – che esiste tuttavia chi si fa cogliere da trepidazione e timore anche laddove non ve ne sia motivo. Le premesse e il vocabolario sono quelli di Raimondo di Peñafort, ma le conclusioni sono in parte differenti. Il passo è richiamato da Brugnotto, *L'«aequitas canonica»*, cit., pp. 179-80.

137 Hostiensis, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 3, fol. 268va.

in quanto è il signore del mondo e può agire in tal modo[138]. È per *beneficium iuris* ('concessione del diritto') che il possessore ha ottenuto infine la proprietà della cosa, se è stato in buona fede per tutta la durata necessaria a completare la prescrizione. Non si può asserire che abbia avuto la consapevolezza che la cosa è di altri qualora ne sia venuto a conoscenza dopo che il tempo richiesto per prescrivere è maturato, a meno che si voglia interpretare il requisito della buona fede in una forma estensiva che va ben oltre quanto stabilito dalle norme canoniche, cioè che il possessore abbia conoscenza che la cosa è stata di altri (e qui riecheggiano chiaramente le riflessioni di Giovanni Teutonico). Perché ormai, trascorso il tempo dovuto, non si può più sostenere – sarebbe un'affermazione priva di fondamento – che la cosa sia di qualcuno di diverso dal nuovo proprietario[139].

Il dibattito sulla sopravvenuta malafede al termine della prescrizione è particolarmente significativo, perché mette in evidenza diversi aspetti emersi in tema di buona fede e di possesso grazie al lavorio sapiente della canonistica medievale. Anzi, si può affermare che in esso siano sintetizzati gli elementi salienti della questione della prescrizione nella nuova ottica inaugurata dalla costituzione *Quoniam omne* interpretata dalla scienza giuridica. L'importanza di questo dibattito emerge prendendo in considerazione il suo svolgimento e i risultati a cui approda[140].

Per quanto concerne lo sviluppo della discussione, ancora una volta si può notare l'importanza e la centralità della buona fede, intesa da un punto di vista etico e morale, oltreché psicologico, elemento costitutivo necessario della prescrizione, nel suo rapporto col fattore tempo. Che è ovviamente essenziale nel fenomeno prescrizione: per esempio, una definizione di prescrizione imperniata sull'elemento tempo è fornita sia da Goffredo da Trani[141] sia da Enrico da Susa[142], cioè i due autori che forse più degli altri hanno condizionato i progressi della canonistica successiva sul tema. Tuttavia, proprio la necessità della buona fede – di una buona fede che risponde alle caratteristiche che abbiamo visto – per tutta la durata della prescrizione fa in modo che esercitino un'influenza determinante sulla materia anche i teologi, che dettano in un

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138 Con i grandi canonisti del Duecento si esaurisce la fase originale e "creativa" nell'elaborazione di soluzioni a questo problema. I successivi autori si limitano sostanzialmente a riferire, pur con dovizia di particolari, le risposte dei loro predecessori e a ricostruire il dibattito: vd., per esempio, Antonius a Butrio, *Super secunda secundi Decretalium commentarii*, ed. cit., *ad* X 2.26.5, *De praescriptionibus* c. *Vigilanti*, n. 5, fol. 107va-vb; Petrus de Ancharano, *In Sextum Decretalium*, ed. cit., *ad tit. De regulis iuris*, *reg.* 11 (*Possessor*), nn. 9-10, fol. 169ra-va; Abbas Panormitanus, *Commentaria secundae partis in secundum Decretalium Librum*, ed. cit., *ad* X 2.26.20, *De praescriptionibus* c. *Quoniam omne*, nn. 37-38, fol. 47ra.

139 Questo è quanto si può ricavare da Johannes Teutonicus, *ad* C.14 q.6 c.1 (*Si res*), v. *nisi restituatur*.

140 Col tempo, e definitivamente nel XVI secolo, ci sarà l'affermazione delle teorie dei *doctores* su quelle dei teologi: Navarrete, *La buena fe*, cit., pp. 70-73.

141 Goffredus de Trano, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 1, fol. 115ra. Definizione molto simile è già riscontrabile in Bernardus Papiensis, *Summa Decretalium*, ed. E. A. T. Laspeyres (Regensburg: Josef Manz, 1860; repr. Graz: Akademische Druck- u. Verlagsanstalt, 1956), *ad* tit. 2.18, *De praescriptionibus*, § 1, pp. 53-54. Il tempo conferisce al diritto del prescrivente maggiore stabilità (*firmitas*) e sostanza (*substantia*), con un termine già usato da Stephanus Tornacensis, *Summa*, ed. cit., *ad* C.16 q.3, p. 224.

142 Hostiensis, *Summa*, ed. cit., *ad* X 2.26, *De praescriptionibus*, n. 1, fol. 266rb.

certo senso l'andamento del discorso: i canonisti con la posizione di costoro devono imbastire un confronto e alla fine lasciano sul campo anche qualche concessione (per esempio, lo spazio alla valutazione del singolo, ai suoi rimorsi di coscienza). La buona fede, la *conscientia*, è pertanto elemento fondamentale e il tempo è dimensione importante, ma in sé assolutamente non sufficiente, ai fini della prescrizione. Questi concetti la canonistica li comprende bene, li fa suoi, li approfondisce, li fa fruttare, li rende centrali nel trattare la prescrizione. Il dibattito è quindi esemplificativo dei problemi creati dalla sovrapposizione e dalla commistione dei piani, giuridico e morale-religioso, riguardo questo argomento.

In relazione all'esito finale – quello seguito dalla maggior parte dei canonisti, che poi si afferma – si può scorgere un altro aspetto altrettanto interessante, dettato dal fatto che i canonisti sono giuristi. Quando all'idea etico-teologica del peccato che tanto ha condizionato e indirizzato il tema della prescrizione, che ha contribuito a creare una nuova idea di buona fede, essi oppongono la certezza del risultato raggiunto, invocando la stabilità data dal tempo maturato alle condizioni idonee e sancita dall'autorità della legge (canonica e civile), allora la prescrizione è completamente restituita al giuridico. E a farlo è proprio quella scienza canonistica che, interpretando la costituzione 41 del IV Concilio lateranense alla luce della politica moralizzatrice di Innocenzo III, ne ha mutato le premesse, lontane da quelle romanistiche, e ne ha ridisegnato le caratteristiche.

GIOVANNI CHIODI

La costituzione *Qualiter et quando* (c.8) e l'*ordo inquisitionis* nella canonistica medievale*

La costituzione 8 *Qualiter et quando* è notissima agli studiosi e agli interpreti. È infatti la disposizione che regola l'*inquisitio*, il modo di procedere che Innocenzo III aveva già disciplinato in altre decretali e che ora riceveva conferma in sede conciliare. Essa segna l'apice di una politica di potenziamento della giustizia pontificia, attraverso l'uso dell'*inquisitio* come strumento di controllo degli *excessus* dei prelati e del clero, di cui sono espressione anche le decretali *Inter sollicitudines* (1199), *Licet Heli* (1199), *Per tuas* (1204), *Super his* (1203), *Qualiter et quando* 1 (1206) e *Inquisitionis negotium* (1212)[1]. All'affermazione dell'inquisizione corrisponde inoltre l'altrettanto noto divieto ai chierici di partecipare alle ordalie (c.18, *Sententiam sanguinis*) e l'imposizione della redazione scritta di tutti gli atti processuali (c.38, *Quoniam contra falsam*), quasi come pannelli di un unico trittico[2], che presto saranno arricchiti da nuovi registri. Se infatti l'inquisizione nel 1215 si presentava già definita in molti aspetti procedurali, ulteriori traguardi furono raggiunti per merito della dottrina canonistica, che nell'analisi della

* Dedicato a Mario Montorzi.

1 W. Trusen, 'Der Inquisitionprozess. Seine historische Grundlagen und frühen Formen', in ZRG, Kan. Abt. 74 (1988), pp. 168-230; L. Kéry, 'Inquisitio – Denunciatio – Exceptio: Möglichkeiten der Verfahrenseinleitung im Dekretalenrecht', in ZRG, Kan. Abt. 87 (2001), pp. 226-268. Vd. anche B. Lemesle, 'Corriger les excès. L'extension des infractions, des délits et des crimes, et les transformations de la procédure inquisitoire dans les lettres pontificales (milieu du XII[e] siècle-fin du pontificat d'Innocent III)', in *Revue historique* 313/4 n.° 660 (2011), pp. 747-79; A. Fiori, *Il giuramento di innocenza nel processo canonico medievale. Storia e disciplina della 'purgatio canonica'* (Frankfurt am Main: Klostermann, 2013, Studien zur europäischen Rechtsgeschichte 277), pp. 373-88; K. Pennington, 'The Fourth Lateran Council, its Legislation, and the Development of Legal Procedure', in *Texts and Contexts in Legal History: Essays in Honor of Charles Donahue*, ed. by J. Witte, Jr. and others (Berkeley: The Robbins Collection, 2016, Studies in comparative legal history), pp. 179-198; Idem, 'The Jurisprudence of Procedure', in *The History of Courts and Procedure in Medieval Canon Law*, ed. by W. Hartmann and K. Pennington (Washington D.C.: The Catholic University of America Press, 2016, History of Medieval Canon Law), pp. 140-143.

2 R. Fraher, 'IV Lateran's Revolution in Criminal Procedure: The Birth of Inquisitio, the End of Ordeals, and Innocent III's Vision of Ecclesiastical Politics', in *Studia in honorem eminentissimi cardinalis Alphonsi M. Stickler*, ed. R. I. Castillo Lara (Roma: Las, 1992, Studia et textus historiae

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The Fourth Lateran Council and the Development of Canon Law and the ius commune, ed. Atria Larson and Andrea Massironi, Turnhout: Brepols, 2018 (EMI 7), pp. 281–305

10.1484/M.EMI-EB.5.116660

norma conciliare curò di connetterla e coordinarla con le altre decretali in materia, fino a farle assumere il ruolo di *Grundnorm* del sistema processuale canonico.

Il risultato di questo intenso lavoro è già stato oggetto di indagini importanti da parte degli storici del diritto canonico. In particolare, sono fondamentali le ricerche di Antonio García y García, al quale si deve non solo l'edizione critica delle costituzioni del IV concilio (più di 66 manoscritti), ma anche degli apparati di glosse composti, oltre che da Damaso, da Giovanni Teutonico e Vincenzo Ispano, le punte di diamante della canonistica bolognese: il tutto è contenuto in un ricco volume dei *Monumenta iuris canonici* apparso nel 1981[3]. Entrambi gli apparati furono scritti in Italia, a Bologna, e completati nel medesimo periodo, subito dopo la chiusura del concilio[4]. Molto materiale di studio è poi contenuto negli apparati alla 3Comp., che vede impegnati di nuovo i due canonisti appena citati e Tancredi, autore anche di una notevole *Summula de criminibus* anteriore all'*Ordo iudiciarius*, pubblicata nel *Bulletin of medieval canon law* di Stephan Kuttner nel 1979 da Richard Fraher[5].

I canonisti compresero benissimo che il concilio, con la c. *Qualiter et quando*, segnava una tappa storica nell'affermazione del nuovo modo di procedere e non è possibile non riconoscere la ricchezza intellettuale di questa prima fase di riflessione, solo che si esplori con attenzione l'insegnamento che emerge da questi apparati. A quest'analisi si accinse, nel 1994, Pier Virginio Aimone, con ampio corredo di fonti inedite, indispensabili per ricostruire il pensiero dei primi canonisti[6].

Questi studi costituiscono la base sulla quale si sviluppa il presente saggio, nel quale vorrei soffermarmi su alcuni aspetti della riflessione dei primi maestri, vagliati alla luce degli apporti di altri esponenti della canonistica, in una cronologia che insiste soprattutto sui secoli XIII e XIV, con qualche incursione nella decretalistica quattrocentesca. Tale orizzonte consente di prendere in considerazione, dopo i pionieri che ho citato, il pensiero dei maggiori canonisti da Bernardo da Parma a Niccolò Tedeschi. Si tratta di giuristi che, ovviamente, leggono il testo del c. *Qualiter et quando* nel V libro del *Liber Extra*, tit. *de accusationibus*.

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juris canonici 7), pp. 96-111. Sulla scrittura del processo nel medioevo vd. ora *Als die Welt in die Akten kam. Prozeßschriftgut im europäischen Mittelalter*, ed. S. Lepsius – T. Wetzstein (Frankfurt am Main: Klostermann, 2008, Rechtsprechung. Materialien und Studien 27).

3 *Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum*, ed. A. García y García (Città del Vaticano: BAV, 1981, MIC Series A 2). La 'Introducción', pp. 3-38, è pubblicata anche in Idem, *Iglesia, sociedad y derecho*, II (Salamanca: Universidad Pontificia de Salamanca, 1987), pp. 15-59, con il titolo 'Tradicion manuscrita y editorial del Concilio 4 Lateranense'.

4 A. García y García, 'El Concilio IV de Letrán (1215) y sus comentarios', in *Traditio* 14 (1958), pp. 484-502; Idem, *Constitutiones Concilii quarti Lateranensis*, cit., p. 180 (Joannis Teutonici Apparatus, 'Introducción') e pp. 278-81 (Vincentii Hispani Apparatus, 'Introducción'); Idem, 'The Fourth Lateran Council and the Canonists', in *The History of Medieval Canon Law in the Classical Period, 1140-1234. From Gratian to the Decretals of Pope Gregory IX*, ed. by W. Hartmann and K. Pennington (Washington D.C.: The Catholic University of America Press, 2008, History of Medieval Canon Law), pp. 367-78.

5 R. M. Fraher, 'Tancred's 'Summula de criminibus': A new text and a key to the Ordo iudiciarius', in BMCL 9 (1979), pp. 23-35.

6 P. V. Aimone, 'Il processo inquisitorio: inizi e sviluppi secondo i primi decretalisti', in *Apollinaris* 67 (1994), pp. 591-634.

Quanto al dibattito scolastico, si può affermare che le sue fondamenta sono rappresentate dalle intuizioni della prima decretalistica, la cui importanza viene quindi ad essere esaltata anziché sminuita dal confronto con le voci dei maestri posteriori, che intrecciarono con essi una proficua dialettica, confermando, condividendo e talvolta anche superando le loro posizioni, ma sempre costruendo sulla base di quel precoce patrimonio di idee. Decisivo, perciò, fu il ruolo della dottrina canonistica, chiamata a elaborare l'*ordo* del nuovo *modus procedendi* sulla base delle direttive, non sempre precise ed esaurienti, suscettibili perciò di letture differenti, fornite dal concilio e dalle altre decretali. Gli strumenti dei quali i canonisti si servono, naturalmente, sono quelli tipici delle scuole giuridiche. Gli apparati di glosse, in particolare, contengono distinzioni e pongono un buon numero di questioni, che rimarranno attuali anche nel Trecento e nel Quattrocento.

Per quel che concerne i contenuti della discussione sul piano della storia delle procedure, ai decretalisti di questa generazione non sfugge la novità del modo inquisitorio. E non sfugge loro neanche la complessità dei percorsi processuali. Diverse sono le specie di inquisizione e diverse, di conseguenza, le regole procedurali. In questa sede mi concentrerò su alcuni problemi processuali, allo scopo di illustrare alcune particolarità dei discorsi dottrinali, che mi sembra opportuno mettere in rilievo.

Considero in primo luogo il confronto che i giuristi instaurano tra l'*inquisitio ex officio* e l'*inquisitio aliquo promovente* nell'ambito dell'*inquisitio super excessu alicuis personae* (o *specialis*, per usare le categorie dell'Ostiense[7]). Questa distinzione è uno dei pilastri del processo canonico, come è rivelato già dai primi interpreti della costituzione *Qualiter et quando* del concilio lateranense. La presenza del promotore, infatti, introduce nel modello inquisitorio una dimensione accusatoria che manca, almeno in certe fasi processuali, quando a procedere è il giudice *ex officio*.

Considero in secondo luogo le garanzie processuali offerte dall'*ordo*, indipendentemente dal fatto che si tratti di *inquisitio cum promovente* oppure *ex officio*. L'*ordo*, anche nell'*inquisitio*, ha un'importanza fondamentale: esso viene pertanto accuratamente delineato dai maestri, in modo più o meno compiuto, proprio partendo dagli spunti forniti dalla costituzione *Qualiter et quando* e da altre decretali innocenziane. Da questo punto di vista, mi sembra che si possa affermare che tra gli obiettivi di Innocenzo III, nell'emanare la c. *Qualiter et quando*, rientrasse non solo quello di confermare e ribadire i presupposti dei tre modi di procedere (accusa, denuncia, inquisizione), come in una sorta di sintesi in linea con altri interventi dello stesso pontefice, ma anche di integrare l'*ordo* del nuovo metodo processuale, specificando meglio alcuni aspetti procedurali e attribuendo espressamente determinate garanzie all'inquisito. In questo schema di *ordo*, ulteriore rispetto alle indicazioni già date in altre importanti decretali, consiste l'utilità e l'originalità della c. *Qualiter et quando*.

Il ruolo della *publica fama* come presupposto dell'*inquisitio*, in quanto modo di procedere distinto dall'accusa e dalla denuncia, era stato evidenziato dal pontefice fin dalla decretale *Licet Heli*: se nell'accusa era necessaria l'iscrizione e nella denuncia l'ammonizione caritatevole, nell'*inquisitio* era indispensabile la sussistenza di una

7 Hostiensis, *Summa aurea* (Lugduni: 1568), *De inquisitionibus, Et qualiter procedatur*, n. 5, fol. 340ra.

clamosa insinuatio che giungesse alle orecchie del superiore che, in tal caso, avrebbe dovuto recarsi sul luogo in cui la fama era sorta e indagare, *ex officio* e non in quanto accusatore e giudice, poiché era la fama ad assolvere la funzione di una denuncia ("quasi fama deferente vel denunciante clamore"[8]). Così letteralmente la decretale *Licet Heli*[9]. È in questa prospettiva che Julien Théry ha parlato di "rôle inédit de la *fama*" (e in particolare della fama negativa, che, nelle classificazioni dei giuristi, rientrava nell'*infamia facti*) e di "une rupture avec la tradition juridique romano-canonique"[10], a causa della corrispondente dilatazione dei poteri di controllo del pontefice. Il nuovo modo di procedere, inoltre, veniva fondato su un ordine giuridico divino, come già era accaduto per l'*ordo iudiciarius*[11]: il *redde rationem* rivolto all'amministratore diffamato del Vangelo di Luca e l'episodio di Sodoma e Gomorra nella Genesi.

I caratteri della *publica fama* – proveniente da persone non malevole e maldicenti, ma provvide e oneste (*non quidem a malevolis et maledicis, sed a providis et honestis*), ripetuta e frequente (*nec semel tantum, sed saepe*), non dissimulabile senza scandalo né tollerabile senza pericolo (*quod diutius sine scandalo dissimulari non possit, nec sine periculo tolerari*) – che rimandavano ai dibattiti sui presupposti del giuramento d'innocenza[12], erano già stati enunciati nella decretale *Qualiter et quando* I[13].

Ma poi il papa proseguiva delineando un altro *ordo procedendi* a tutela dell'inquisito, da osservarsi soprattutto quando si procedesse contro il clero secolare: presenza dell'inquisito; esposizione dei capitoli per consentire l'esercizio del diritto di difesa; pubblicazione non solo delle dichiarazioni, ma anche dei nomi dei testimoni, in modo che si potessero collegare le deposizioni ai loro autori; ammissione delle eccezioni, al fine di evitare ingiuste diffamazioni e inquinamenti della verità[14].

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8 Sulle origini scolastiche di questa formula vd. ora A. Fiori, '*Quasi denunciante fama*: note sull'introduzione del processo tra rito accusatorio e inquisitorio', in *Der Einfluss der Kanonistik auf die europäische Rechtskultur*. III. *Straf- und Strafprozessrecht*, ed. M. Schmoeckel et al. (Köln-Weimar-Wien: Böhlau, 2012, Norm und Struktur: Studien zum sozialen Wandel in Mittelalter und Früher Neuzeit 37.3), pp. 351-67, in particolare p. 367; Eadem, *Il giuramento di innocenza*, cit., pp. 373-88.

9 Innocentius III, *Licet Heli* (X 5.3.31: 1199, dic. 2), in *Reg. Inn. III*, 11.250 (260), pp. 477-80.

10 J. Théry, '*Fama*: L'opinion publique comme preuve judiciaire. Aperçu sur la revolution médiévale de l'inquisitoire', in *La Preuve en justice: de l'Antiquité à nos jours*, ed. B. Lemesle (Rennes: Presses universitaires de Rennes, 2003, Histoire), pp. 119-47.

11 Da ultimo: Pennington, 'Introduction to the Courts', cit., pp. 20-21; Idem, 'The Jurisprudence of Procedure', cit., pp. 137-40.

12 Anche su questo punto rimando alla dimostrazione di Fiori, '*Quasi denunciante fama*', cit., pp. 351-67; Eadem, *Il giuramento di innocenza*, cit., pp. 373-88.

13 Innocentius III, *Qualiter et quando* I (X 5.1.17: 1206, gen. 29), in *Reg. Inn. III*, IX.41, pp. 74-78.

14 "Debet igitur esse presens is contra quem facienda est inquisitio, nisi se per contumaciam absentaverit. Et exponenda sunt illi capitula de quibus fuerit inquirendum, ut facultatem habeat defendendi seipsum, et non solum dicta, set etiam ipsa nomina testium sunt ei, ut quid a quo sit dictum appareat, publicanda, necnon exceptiones et replicationes legitime admittende, ne per suppressionem nominum infamandi, per exceptionum vero exclusionem deponendi falsum audacia prebeatur" (ed. García y García, cit., p. 56). Vd. anche Innocentius III, *Inquisitionis* (X 5.1.21: *ex.* 1211), riguardante un'*inquisitio* ad istanza di parte (*ad petitionem*), contenente istruzioni per il giudice delegato. Il papa, oltre a ribadire le prescrizioni sulla pubblicazione dei nomi e delle dichiarazioni dei testimoni, conferma la necessità dell'esistenza di una pubblica infamia contro l'inquisito: "nullum esse pro crimine, super quo aliqua non laborat infamia, seu clamosa insinuatio non processerit,

L'inquisizione, tuttavia, non rappresentava, per lo meno in una delle sue forme, quella che i giuristi qualificarono come *inquisitio de excessu alicuius personae* e *cum promovente*, un modo di procedere sottratto all'intervento privato nel processo. Spesso erano i membri della comunità sociale e religiosa nella quale si era sparsa la fama a farsi promotori dell'*inquisitio* a carico del diffamato. Il papa riceveva numerose denunce di infrazioni gravi (*excessus*) da tutta la cristianità[15]. I promotori, che giuridicamente parlando non erano degli accusatori, rivestivano un ruolo attivo nell'inquisizione, avevano dei compiti importanti ed essenziali soprattutto nella fase di verifica della *publica fama*, ed erano tenuti a confrontarsi con l'inquisito in maniera differente rispetto a ciò che accadeva quando l'inquisizione avveniva per mero e puro dovere d'ufficio del giudice, senza petizione di terzi. Questa doppia prospettiva, a seconda che l'inquisizione fosse *cum promovente* oppure *ex officio*, è un aspetto che i maestri del diritto canonico misero fortemente in risalto.

La trama dei discorsi dottrinali che intendo sottoporre all'attenzione è la seguente: i canonisti scandiscono l'*inquisitio super excessu alicuius* lungo un doppio binario processuale, a seconda che l'inquisizione avvenga su istanza di un promotore (detto anche dai giuristi 'attore' o 'avversario', secondo il lessico dell'accusa) oppure *ex officio*. L'*ordo* inquisitorio non si presenta perciò unitario e "indifferenziato", ma flessibile e modulabile[16]. Nel primo caso, l'intervento dei denunciatori dà luogo ad un ordine simmetrico quanto all'*inquisitio famae* (onere della prova a carico dell'attore, contraddittorio), mentre nel secondo, quando predomina l'attività *ex officio*, liberata dai vincoli dell'iniziativa delle parti, ne deriva un ordine asimmetrico[17].

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propter dicta huiusmodi puniendum, quin immo super hoc depositiones contra eum recipi non debere, quum inquisitio fieri debeat solummodo super illis, de quibus clamores aliqui praecesserunt" ('nessuno deve essere punito sulla base di tali dichiarazioni per un crimine per il quale non ci sia infamia o non sia preceduta una diffamazione che abbia suscitato clamore, e anzi su questo crimine non devono essere accolte deposizioni contro di lui, poiché l'*inquisitio* deve svolgersi solamente contro coloro verso i quali vi sono state delle voci').

15 J. Théry-Astruc, '"Excès", "affaires d'enquête" et gouvernement de l'Église (v. 1150-v. 1350). Les procédures de la papauté contre les prélats "criminels": première approche', in *La pathologie du pouvoir: vices, crimes et délits des gouvernants. Antiquité, Moyen Age, époque moderne*, ed. P. Gilli (Leiden-Boston: Brill, 2015, Studies in medieval and reformation traditions 128), pp. 164-236; Idem, 'Judicial Inquiry as an Instrument of Centralized Government: The Papacy's Criminal Proceedings against Prelates in the Age of Theocracy (Mid-Twelfth to Mid-Fourteenth Century)', in *Proceedings Toronto 2012*, pp. 875-89.

16 Sulla flessibilità dell'*ordo* vd. M. Meccarelli, 'Le categorie dottrinali della procedura e l'"effettività" della giustizia penale nel tardo medioevo', in *Pratiques sociales et politiques judiciaires dans les villes de l'Occident à la fin du Moyen Âge*, ed. J. Chiffoleau et al. (Roma: École Française de Rome, 2007, Collection de l'École française de Rome 385), pp. 573-94, pp. 578-79; J. Théry, '*Atrocitas/enormitas*. Pour une histoire de la catégorie d'«énormité» ou «crime énorme» du Moyen Âge à l'époque moderne', in *Clio@Thémis* 4 (2011), pp. 1-45, in particolare pp. 32-34. Mette in evidenza come l'inquisitorio non fosse un rito penale indifferenziato M. Meccarelli, *Arbitrium. Un aspetto sistematico degli ordinamenti giuridici in età di diritto comune* (Milano: Giuffrè, 1998, Pubblicazioni della Facoltà di Giurisprudenza, Università di Macerata. 2a serie 93), p. 294.

17 Per questa terminologia: A. Giuliani, 'L'*ordo judiciarius* medioevale (Riflessioni su un modello puro di ordine isonomico)', in *Rivista di diritto processuale* 43 (1988), pp. 598-614; Meccarelli, 'Arbitrium', cit., pp. 285-86.

È interessante notare come la canonistica, sulla base del dettato delle decretali innocenziane e ragionando su questa dicotomia processuale, attui quella trasformazione in senso 'proattivo' del giudice, che agisce e non semplicemente reagisce[18], che è uno dei contrassegni del nuovo modo di procedere. Una trasformazione che i giuristi realizzano modellando i congegni della procedura. Nell'attività *ex officio* l'inquisito è tenuto sotto giuramento a rispondere al giudice; nella fase iniziale del processo manca il contraddittorio tra giudice e inquisito rispetto alla prova dell'infamia, dal momento che il giudice può procedere in modo sommario e non è tenuto pertanto a provare con testimoni l'infamia dell'inquisito, così che costui non è ammesso a provare la sua buona fama (a meno che non interponga appello); dopo la pubblicazione del processo, il giudice, a differenza del promotore, può ammettere nuovi testimoni.

L'inquisizione *ex officio*, infine e non da ultimo, pone ai giuristi un ulteriore e urgente quesito, in merito all'elaborazione del *debitus ordo inquisitionis*, per usare i termini della decretale *Qualiter et quando* 1: ci si chiede, infatti, se il giudice, in questa forma di *inquisitio*, caratterizzata dall'assenza di un accusatore, ma anche di un promotore, sia tenuto a fissare un termine, d'ufficio o su domanda dell'inquisito, per consentire ad altri di accusare. L'emersione dell'*inquisitio* come nuovo modo di procedere sollecita dunque la dottrina canonistica a discutere il rapporto tra accusa e inquisizione, a cominciare dalla fase iniziale del processo. L'esito, come vorrei dimostrare nelle pagine seguenti, è la rottura del monopolio dell'accusa, attraverso un tragitto compiuto dai canonisti tra il Duecento e il Trecento.

Quis ordo servandus sit

La distinzione tra inquisizione *ex officio* e inquisizione *cum promovente* emerge in forma particolarmente chiara nell'apparato al concilio lateranense composto da Giovanni Teutonico. I glossatori di queste norme sono tre: Giovanni Teutonico, Vincenzo Ispano e Damaso Ungaro. Mi sembra tuttavia che il canonista tedesco nelle sue glosse sia riuscito ad evidenziare con più completezza le differenze tra le due specie di inquisizione. Vediamo innanzitutto quali sono queste differenze; successivamente, cerchiamo di inserire il discorso nel quadro più ampio dell'*ordo* che si deve osservare quando si procede con il *modus inquisitionis*.

Secondo Giovanni Teutonico nell'*inquisitio ex officio* il giudice doveva deferire all'imputato il giuramento di rispondere all'interrogatorio. Nell'*inquisitio aliquo promovente*, invece, nella quale i testimoni erano prodotti dal promotore, significa-

18 M. Sbriccoli, '«Vidi communiter observari». L'emersione di un ordine penale pubblico nelle città italiane del secolo XIII', in *Quaderni fiorentini per la storia del pensiero giuridico moderno* 27 (1998), pp. 231-68, repr. in Idem, *Storia del diritto penale e della giustizia*. 1. *Scritti editi e inediti (1972-2007)* (Milano: Giuffrè, 2009, Per la storia del pensiero giuridico moderno 88.1), pp. 73-110, pp. 87-88.

tivamente definito "avversario", l'imputato non poteva essere costretto a giurare di rispondere alle domande del giudice, per evitate di istruire l'avversario[19].

Dopo la pubblicazione del processo, il giudice, se procedeva *ex officio*, poteva continuare l'inquisizione, interrogando altri testimoni: questa facoltà era invece preclusa al promotore e ciò per il timore che egli potesse corrompere i testimoni[20].

L'accento del glossatore, dunque, cade sui maggiori poteri che spettano al giudice, quando l'inquisizione è condotta *ex officio* senza l'ausilio di un promotore. Si tratta di due differenze che saranno recepite quasi senza discussione dalla successiva dottrina[21], salvo il profilo attinente al giuramento dell'inquisito[22].

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19 Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, ed. García y García, in *Constitutiones Concilii quarti Lateranensis*, cit., *ad* c.8 (*Qualiter et quando*), p. 197: "Item distinguendum est an iudex ex officio suo inquirat, scilicet ad clamorem fame, an aliquo promovente inquisitionem iudex cognoscat, quia si aliquo promovente inquisitionem cognoscat, non est cogendus reus ad iuramentum aliquod ut per illud possit instrui adversarius, set ipse inducet testes; et si defecerit actor, punietur, ut extra iii. de accus. c. ult. (3Comp. 5.1.6 = X 5.1.19). Si autem iudex ex officio suo inquirat, tunc ipse iudex inducet testes et faciet reum iurare, ut respondeat ad interrogata, ut extra iii. de accus. Cum dilecti (3Comp. 5.1.7 = X 5.1.18)". La glossa nella sua integralità è riprodotta anche nell'*Apparatus ad* 3Comp. 5.1.4, *de accusationibus*, *Qualiter et quando* (Città del Vaticano, BAV, Vat. lat. 2509, fol. 301r). Per le forme di giuramento vd. Innocentius III, *Cum dilecti* (1205, maggio 25), in *Reg. Inn. III*, VIII.243 (244), fine gen.-feb. 1204, pp. 407-09; VIII.77 (76), pp. 139-41. Analoga la posizione di Vincentius Hispanus, *Apparatus in Concilium quartum Lateranense*, ed. García y García, cit., *ad* c.8 (*Qualiter et quando*), p. 299, nell'esonerare l'inquisito dal giurare, "ubi unus contra alium impetrat singulariter inquisitionem" ('quando uno da solo chiede l'*inquisitio* contro un altro'). Ma il giurista portoghese si riferisce al giuramento *de veritate*, come più chiaramente risulta da Idem, *Apparatus ad* 3Comp. 5.1.4, *de accusationibus*, c. *Qualiter et quando*, ed. Aimone, 'Il processo inquisitorio', cit., p. 627.

20 Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, ed. García y García, cit., *ad* c.8 (*Qualiter et quando*), pp. 197-98: "Set numquid publicatis attestationibus, potest denuo ab aliis testibus inquiri et de eodem crimine? Sic, ut ii. q. i. Notum (C.2 q.1 c.10) et q.v. Habet et c. Mennam (C.2 q.5 cc.6-7). Set si non iudex set adversarius inducat testes, tunc non posset secundo inquiri de eodem crimine, quia timor esset ne vellet testes subornare".

21 Per il divieto di esaminare nuovi testi prodotti dal promotore: Roffredus Beneventanus, *Solemnis atque aureus tractatus libellorum ... super utraque censura* ([Avenio: Dominicus Anselmus, 1500]; repr. Augustae Taurinourm: ex Officina Erasmiana, 1968, Corpus Glossatorum Juris Civilis 6), *Qualiter sit ab inquisitoribus in inquisitione procedendum*, fol. 46vb; Goffredus de Trano, *Summa in titulos Decretalium* (Venetiis: apud Ioannem Baptistam Hugolinum, 1586), n. 16, fol. 190rb; Hostiensis, *Summa*, cit., *De inquisitionibus*, *Et qualiter procedatur*, n. 6, fol. 340va; Gulielmus Durandus, *Speculi ... pars tertia et quarta, una cum Io. Andreae, ac Baldi ... theorematibus* (Lugduni: 1547), III, *De inquisitione*, *Viso igitur*, n. 29, fol. 14va; Iohannes Andreae, *In quintum Decretalium librum Novella Commentaria* (Venetiis: apud Franciscum Franciscium Senensem, 1581), *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* 11, n. 14, fol. 17va; Antonius de Butrio, *In librum quintum Decretalium commentarii* (Venetiis: apud Iuntas, 1578; repr. Torino: Bottega d'Erasmo, 1967), *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* 11, n. 15, fol. 19ra; Franciscus Zabarella, *Super IIII et V Decretalium subtilissima Commentaria* (Venetiis: apud Iuntas, 1602), *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* 11, § *Hunc tamen*, n. 10, fol. 39ra, il quale considera "potissima" questa differenza.

22 Sia concesso in questa sede condensare in estrema sintesi un dibattito più complesso. Per la tesi che il giudice debba deferire all'inquisito il giuramento di rispondere *ad interrogata*, a meno che non proceda su impulso di un promotore, si pronunciano Goffredus de Trano, *Summa*, cit., n. 16, fol. 190rb; Iohannes Andreae, *In quintum Decretalium librum Novella Commentaria*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* 11, n. 14, fol. 17va; Antonius de Butrio, *In librum quintum*

Un'altra differenza attestata dall'apparato di Giovanni Teutonico è relativa ad una fase anteriore dell'*ordo*, riguardante l'accertamento dei presupposti dell'infamia contro l'inquisito. Giovanni afferma infatti che l'imputato, se l'*inquisitio* era *ex officio*, non poteva produrre testimoni per provare la sua buona fama. Viceversa, se l'*inquisitio* avveniva *cum promovente* e c'era quindi un avversario, l'inquisito, per elidere la prova dell'infamia, poteva ricorrere a testimoni che provassero la sua buona fama. Come diceva egli stesso, ciò era l'effetto di una presunzione a favore del giudice rispetto al promotore, definito ancora come avversario rispetto all'inquisito[23]. Qual era la

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Decretalium commentarii, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, n. 15, fol. 19ra. In realtà, il giudice, procedendo *ex officio*, avrebbe potuto imporre anche il ben più vincolante giuramento di verità. Di questa opinione sono infatti: Raymundus de Peniafort, *Summa de poenitentia et matrimonio*, cum glossis Ioannis de Friburgo (Romae: sumptibus Ioannis Tallini, 1603), l. III, *De inquisitionibus, et purgationibus*, § 9, p. 369; Roffredus Beneventanus, *Libelli iuris canonici*, cit., *Qualiter sit ab inquisitoribus in inquisitione procedendum*, fol. 46vb, il quale si richiama alla prassi di molti inquisitori; Egidius de Fuscarariis, *Ordo iudiciarius*, ed. L. Wahrmund (Innsbruck, Verlag der Wagner'schen K.K. Universitäts-Buchhandlung, 1916, Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter 3.1), LXXXIX, p. 158; Gulielmus Durandus, *Speculi ... pars tertia et quarta*, cit., III, *De inquisitione, Viso igitur*, n. 24, fol. 14ra. L'Ostiense, invece, in polemica con Goffredo da Trani, sosteneva che non vi fosse alcuna differenza tra le due forme di *inquisitio* e che inoltre l'inquisito dovesse sempre prestare il giuramento di verità. Hostiensis, *Summa*, cit., *De inquisitionibus, Et qualiter procedatur*, n. 6, fol. 340va: "ego tamen puto, quod in utroque cogatur iurare dicere veritatem [...] nec aliquod ius dicit, quod non cogatur iurare imo potius contrarium..." ('da parte mia tuttavia ritengo che in entrambi i casi sia costretto a giurare di dire la verità [...] né qualche diritto dice che non sia costretto a giurare, anzi piuttosto il contrario'). Vd. un cenno alla sua posizione in H. A. Kelly, 'The Right to Remain Silent. Before and After Joan of Arc', in *Speculum* 68 (1993), pp. 992-1026, repr. in Idem, *Inquisitions and Other Trial Procedures in the Medieval West* (Aldershot-Burlington USA-Singapore-Sydney: Ashgate, Variorum, 2001, CSS 708), III, p. 996. La sua opinione fu approvata da Franciscus Zabarella, *Super IIII et V Decretalium subtilissima Commentaria*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, § *Hunc tamen*, n. 11, fol. 39ra. Per altre riflessioni: D. Edigati, *Il giuramento de veritate degli imputati fra isonomia processuale e inquisizione istituzionale* (Milano: Giuffrè Editore, 2012, Università degli Studi di Bergamo, Facoltà di Giurisprudenza), pp. 27-35, 76-82.

23 Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, ed. García y García, cit., *ad* c.8 (*Qualiter et quando*), p. 200: "Item pone quod iudex vel adversarius induxit testes ad crimen rei probandum. Reus autem vult inducere testes ad probandam innocentiam suam. [...] Respondeo si adversarius induxit testes ad probandam infamiam vel crimen, tunc reus potest etiam inducere ad probandam famam vel innocentiam suam. Si vero iudex ex suo officio inducit testes, non potest, quia non ita presumitur contra iudicem sicut contra adversarium" ('Poni il caso che il giudice o l'avversario abbiano prodotto testimoni per provare il crimine. Il reo vuole produrre testimoni per provare la sua innocenza [...] Rispondo che se l'avversario ha prodotto testimoni per provare l'infamia o il crimine, allora il reo può produrne per provare la sua fama o la sua innocenza. Non può però farlo se il giudice ha prodotto testimoni d'ufficio, poiché contro il giudice non opera la stessa presunzione che opera contro l'avversario'). Nel testo ho considerato, di questa glossa, il profilo attinente alla prova dell'infamia. Ma il professore bolognese parla anche di prova dell'innocenza, che è tema diverso, che qui non è possibile approfondire. Mi limito a ricordare che in alcune opere si concede all'inquisito, anche nell'attività *ex officio*, di *probare contra articulos* (ad esempio, in una *inquisitio* per fornicazione, di essere casto e onesto; in una *inquisitio* di dilapidazione, di aver bene amministrato), nella fase iniziale del processo. Vd. Roffredus Beneventanus, *Libelli iuris canonici*, cit., *Qualiter sit ab inquisitoribus in inquisitione procedendum*, fol. 46vb; Gulielmus Durandus, *Speculi ... pars tertia et quarta*, cit., III, *De inquisitione, Viso igitur*, n. 29, fol. 14r-v.

ragione di questa ulteriore differenza, peraltro ampiamente condivisa? Credo che la risposta giusta risieda nella maggiore attitudine del giudice a soddisfare l'interesse pubblico rispetto alla parte privata[24].

Anche Tancredi, l'altro grande professore attivo nella scuola di Bologna nello stesso periodo di Giovanni Teutonico, asserisce che nell'inquisizione *cum promovente* l'imputato poteva opporre la prova della sua buona fama alla prova dell'infamia fornita dal promotore[25]. I due maestri dissentivano solo sul modo di risolvere il conflitto tra testimoni della buona fama e della cattiva fama: un punto sul quale si continuerà parecchio a discutere[26].

Giovanni Teutonico non cita decretali in appoggio a questa conclusione, ma Tancredi sì: si tratta di decretali innocenziane in materia di giuramento purgatorio. Il che ci consente di confermare il ruolo che le decretali sul giuramento di innocenza continuavano a rivestire nel risolvere problemi riguardanti il nuovo modo di procedere[27].

Nell'*inquisitio ex officio*, invece, questa facoltà era negata all'inquisito, almeno in questa fase del processo. Il privilegio della buona fama poteva essere fatto valere solo contro il promotore e non contro il giudice, come del resto rileverà anche la dottrina successiva[28]. Ne deriva perciò un ulteriore squilibrio della posizione dell'inquisito quando il giudice agiva *ex officio*.

La negazione dell'infamia: quali conseguenze?

A questo stadio della riflessione è possibile fare un passo ulteriore, ricollegandoci al punto appena evidenziato, relativo al presupposto dell'infamia e della sua prova. Perché, ancora prima di chiedersi se l'inquisito avesse facoltà di opporre al giudice

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24 Adotto la chiave di lettura proposta ad altro riguardo da M. Sbriccoli, '«Tormentum idest torquere mentem». Processo inquisitorio e interrogatorio per tortura nell'Italia comunale', in *La parola all'accusato*, ed. J.-C. Maire-Vigueur e A. Paravicini Bagliani (Palermo: Sellerio 1991, Prisma 139), pp. 17-32, repr. in Idem, *Storia del diritto penale e della giustizia*, I, cit., pp. 111-28, p. 116.

25 Tancredus, *Apparatus* 3Comp. 5.1.4, *de accusationibus*, c. *Qualiter et quando*, Città del Vaticano, BAV, Vat. lat. 2509, fol. 253v; Bernardus Parmensis, *Apparatus ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, v. *ad inquirendum* (Lugduni: apud Hugonem à Porta et Antonium Vincentium, 1559): "et si actor probet illum esse infamatum, reus potest probare, quod sit bonae famae, arg. i. de purga. ca. c. Cum in iuventute (3Comp. 5.17.3 = X 5.34.12), cum potius sit privilegium bonae famae quam infamiae, argumentum supra eodem Licet in fin (3Comp. 5.1.1 = X 5.1.14)".

26 La distinzione più completa al riguardo è quella proposta da Abbas Panormitanus, *Commentaria in quartum, et quintum Decretalium libros, tomus septimus* (Venetiis: apud Iuntas, 1617), *ad* X 5.1.19, *de accusationibus*, c. *Cum oporteat*, n. 10, fol. 75va (con la densa nota di Alessandro De Nevo).

27 Fiori, '*Quasi denunciante fama*', in particolare p. 367; Eadem, *Il giuramento di innocenza*, cit., pp. 373-88.

28 Henricus de Segusio, *In quintum Decretalium librum Commentaria* (Venetiis: apud Iuntas, 1581), *ad* X 5.1.19, *de accusationibus*, c. *Cum oporteat*, nn. 14-15, fol. 7vb; Iohannes Andreae, *In quintum Decretalium librum Novella Commentaria*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, n. 36, fol. 17vb: "cum ad sui instructionem summatim id cognoscat"; Antonius de Butrio, *In librum quintum Decretalium commentarii*, *ad* X 5.1.19, *de accusationibus*, c. *Cum oporteat*, n. 16, fol. 13ra; Abbas Panormitanus, *Commentaria in quartum, et quintum Decretalium libros*, cit., *ad* X 5.1.19, *de accusationibus*, c. *Cum oporteat*, n. 10, fol. 75va.

o al promotore la prova della sua buona fama, occorre verificare se il giudice o il promotore fossero obbligati, in questa fase del processo, a provare l'infamia, di fronte ad una contestazione dell'inquisito. Ed è proprio a tal riguardo che gli interpreti proposero un'ulteriore differenza tra *inquisitio ex officio* e *cum promotore*, che merita di essere sottolineata nella sua importanza. Tentiamo di farlo, utilizzando ancora una volta le parole di Tancredi, che appartiene alla generazione dei pionieri della costruzione dell'*ordo* inquisitorio.

Osserva dunque Tancredi, in una lunga glossa del suo apparato alla 3Comp. a margine della decretale *Qualiter et quando* I di Innocenzo III – un'annotazione talmente importante da meritare la trascrizione integrale nei *Libelli iuris canonici* di Roffredo –, che se l'*inquisitio* era condotta da un giudice *delegato*, egli doveva citare l'inquisito e interrogarlo innanzitutto sull'infamia. Se l'imputato confessava di essere infamato, il giudice poteva (e doveva) procedere all'*inquisitio* sul crimine. Se l'imputato negava l'infamia, il giudice, qualora vi fosse un promotore, doveva preliminarmente decidere la questione della fama, "ascoltando" le prove dell'infamia addotte dal promotore ed eventualmente "ascoltando" anche quelle della buona fama proposte dall'inquisito, instaurando quindi il contraddittorio tra attore e imputato[29]. A confortare questa soluzione era decisivo, in particolare, il tenore della decretale *Cum oporteat*[30].

Il punto fu ripreso da Bernardo da Parma nella Glossa ordinaria al *Liber Extra*. Egli, tuttavia, costruì diversamente la procedura da osservare rispetto a Tancredi. Secondo Bernardo, infatti, non si doveva distinguere tra giudice ordinario e delegato, ma tra *inquisitio ex officio* (cioè senza promotore) e *inquisitio cum promovente*. In questa seconda ipotesi, l'ordine da osservare, valido sia per il giudice ordinario sia per il delegato, prevedeva la citazione dell'inquisito, l'interrogatorio sull'infamia, la confessione o la negazione dell'infamia da parte dell'inquisito: in questo secondo

29 Tancredus, *Apparatus ad* 3Comp. 5.1.4, *de accusationibus*, c. *Qualiter et quando*, Città del Vaticano, BAV, Vat. lat. 2509, fol. 253v, *v. inquirendum*: "Sed si causa inquisitionis commissa fuerit iudici delegato, debet significare illi vel illis contra quem vel contra quos datus est inquisitor et accedere ad locum illum, si commode fieri potest, alias infamatum vocare ad se et presente illo et adversariis, si adversarios habet, legere illis litteras commissionis, ar. i.e. c. i. et ii. q. i. Deus omnipotens (C.2 q.1 c.20), s. de officio iudicis del. Cum in iure (3Comp. 1.18.10 = X 1.29.31), et querere ab illo vel ab illis si infamia processit de his que pape suggesta sunt. Et si hoc confiteatur, procedat ad inquisitionem faciendam. Si vero neget infamiam processisse, si est qui prosequitur inquisitionem, audiat probationes eius contra quem infamacio precessit et etiam audiat probationem illius, quod non sit infamatus, vel si infamatus, an habuit ortum ab inimicis vel vilibus, quoniam probatio bone fame preferenda est probationi infamationis, dummodo legitime probetur, ut hic probatur et i.e. t. Cum oporteat (3Comp. 5.1.6) et s. e. Licet in beato (3Comp. 5.1.1 = X 5.34.14) et i. de purg. ca. Cum in iuventute (3Comp. 5.17.3 = X 5.34.12). Et si probat exceptiones legitimas, non procedat iudex ad inquirendum, alioquin procedat sicut dictum est, s. puniat vel absolvat vel purgationem iniungat". La glossa è riprodotta anche da Roffredus Beneventanus, *Libelli iuris canonici*, cit., *Qualiter facienda est inquisitio super criminibus super quibus fama precessit*, fol. 48va.

30 Innocentius III, *Cum oporteat* (1206, sett. 1), in *Reg. Inn. III.*, IX.160, pp. 287-88 (*inquisitio* delegata e *cum promovente*): "Discretioni vestrae per apostolica scripta mandamus, quod, nisi super praedictis famam ipsius laesam esse noveritis, vos ad inquisitionem illorum non subito procedatis" ('Con scritto apostolico rimettiamo alla vostra discrezionalità che, se non avete saputo che la fama di costui è lesa circa i fatti sopracitati, voi non procediate immediatamente all'*inquisitio* su quei fatti').

caso, l'attore era obbligato a provare l'infamia e l'inquisito era ammesso a provare la sua buona fama. Tutto questo non era necessario quando l'*inquisitio* era senza promotore, perché il giudice, in questo percorso, non era obbligato a provare l'infamia contro l'inquisito, essendo sufficiente un'indagine sommaria, e poteva procedere a ricercare immediatamente la verità del crimine. L'inquisito aveva tuttavia diritto di appello e in quella sede il giudice avrebbe dovuto fornire la prova dell'infamia[31].

La distinzione incontrò successivamente l'approvazione di Bernard de Montmirat (Abbas antiquus), che ne offrì una giustificazione tecnica: il giudice, se l'*inquisitio* era *ex officio*, non poteva fare fede a se stesso e d'altra parte all'inquisito non si doveva dare il potere di impedire il processo, salvo sempre però il suo diritto di appellare contro la decisione del giudice di procedere all'*inquisitio veritatis*: e in quella sede, allora, il giudice era obbligato a provare per testimoni l'esistenza dell'infamia contro l'inquisito. Nella prima fase del processo, dunque, non si poteva presumere contro il giudice che procedeva *ex officio*, mentre nei confronti del promotore si richiedeva che egli, su richiesta dell'inquisito, provasse l'infamia[32].

Anche Enrico da Susa, il canonista forse più scrupoloso del suo tempo nell'esigere il rispetto dell'*ordo* inquisitorio[33], avrebbe mantenuto la distinzione tra le due specie di inquisizione, consigliando comunque al giudice inquisitore *ex officio* di assumere testimoni *super infamia* prima di procedere a indagare sulla verità del crimine[34]: e così comunemente si osservava, avrebbe in seguito assicurato Giovanni d'Andrea[35].

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31 Bernardus Parmensis, *Apparatus ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* 11, v. *ad inquirendum*: "Si vero procedat iudex ad petitionem alicuius procurantis inquisitionem sive sit ordinarius sive delegatus, ad locum accedat si potest et vocet illum contra quem procedere debet et tunc recipiat testes quos ille producet qui impetravit inquisitionem: tamen si ille negaret infamiam processisse, cognoscet primo iudex, utrum sit infamatus et postea procedet super iis, quae denuntiata sunt, alias non procedat nisi primo constet, quod infamatus sit s. eo. Cum oporteat (X 5.1.19) et c. Qualiter (X 5.1.17) [...]".

32 Bernardus de Montemirato, *Lectura aurea domini Abbatis antiqui super quinque libros Decretalium* ([Argentinae]: Ioannes Schottus pressit, 1510), *ad* X 5.1.21, *de accusationibus*, c. *Inquisitionis*, fol. 198va; Idem, *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* 11, fol. 199rb.

33 Vd. *infra*, § 'Duplex est ordo': *lo spazio delle garanzie*.

34 Henricus de Segusio, *In quintum Decretalium librum Commentaria*, cit., *ad* X 5.1.17, *de accusationibus*, c. *Qualiter et quando* 1, n. 2, fol. 5va: "licet tutius sit, quod ad cautelam aliquos testes recipiat [...] alioquin si appellari contingat, cum probationes rerum cadant de facili [...] in periculo est processus, quia ex quo negata est fama, nisi probetur coram superiore, cui non est notoria, quicquid contra non infamatum est actum est revocabile [...]"; *ad* X 5.1.19, *de accusationibus*, c. *Cum oporteat*: "quandoque inquirit ex officio non probata per testes infamia, sed sola publica fama deferente [...] sed ut appellationes evitet, consulimus quod adhibeat doctrinę traditae per hanc glossam, sic probata infamia inquiret de veritate criminis, et si probatum fuerit, dabit sententiam condemnatoriam [...]"; *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* 11, n. 5, fol. 11ra.

35 Iohannes Andreae, *In quintum Decretalium librum Novella Commentaria*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* 11, n. 36, fol. 17vb; Antonius de Butrio, *In librum quintum Decretalium commentarii*, cit., *ad* X 5.1.19, *de accusationibus*, c. *Cum oporteat*, n. 13, fol. 12vb. La distinzione più esauriente come avvertito dallo stesso autore ("ex praedictis habes practicam alibi non sic collectam"), è quella proposta da Abbas Panormitanus, *Commentaria in quartum, et quintum Decretalium libros*, *ad* X 5.1.19, *de accusationibus*, c. *Cum oporteat*, nn. 7-9, fol. 75rb-va, strutturata in due rami: giudice delegato e giudice ordinario (che procede *cum promovente* o *ex officio puro*). Il giudice

Il termine per accusare: un presupposto necessario all'*inquisitio ex officio*?

Un altro problema importante, anzi essenziale per l'elaborazione dell'*ordo inquisitionis*, fu affrontato già nei primi apparati e riguarda il rapporto tra *inquisitio* e *accusatio*. Il caso non era stato direttamente risolto dalle decretali e fu quindi oggetto di una *quaestio*. Ci si chiese innanzitutto se, ad instaurare validamente un'inquisizione *ex officio*, il giudice dovesse preliminarmente fissare un termine per consentire a una persona di accusare il soggetto contro il quale si intendeva procedere con il modo inquisitorio, permettendo all'inquisito, qualora non si presentasse un accusatore, di purgarsi dall'infamia con l'apposito giuramento di innocenza. Questo problema è stato singolarmente trascurato dalla storiografia, pur essendo di capitale importanza per comprendere il modo in cui i canonisti intesero il rapporto tra accusa e inquisizione in questa precoce stagione[36].

I primi a proporre tale questione furono Giovanni Teutonico e Tancredi.

Nell'apparato alla 3Comp., Giovanni sostenne che il giudice che intendeva procedere *ex officio* a *inquisitio* dovesse prima stabilire un termine per accusare. Trascorso il termine senza che nessuno si presentasse, il giudice doveva procedere all'*inquisitio*. Il problema si poneva quindi nell'*inquisitio* condotta *ex officio* e non in quella ad istanza di parte, in cui il privato era presente, seppure in veste di attore/promotore dell'*inquisitio* e non di accusatore[37].

Nell'apparato al concilio lateranense Giovanni sollevava una questione simile, ma diversa. Egli si domandava infatti se, avviata un'*inquisitio ex officio*, potesse essere accolta la richiesta dell'imputato di fissare un termine per chi volesse accusare, trascorso il quale – e in ciò stava la peculiarità del caso – egli fosse direttamente

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che procede *ex officio puro* senza promotore è più libero, come sintetizza efficacemente il canonista siciliano: "Aut ex officio puro, et tunc si vult, potest recipere testes super infamia, sed si non vult, quia constat sibi de infamia per investigationem extraiudicialiter factam, quantumcunque pars contradicat, potest procedere super veritate [...] Satis est enim quod ad eum pervenit insinuosa, et frequens reclamatio, nec habet alicui facere fidem [...]" ('o [procede] semplicemente d'ufficio, e allora se vuole può assumere testimoni sulla fama, ma se non vuole, poiché gli è nota l'infamia per indagini condotte stragiudizialmente, per quanto la parte si opponga, può procedere alla ricerca della verità [...] Infatti è sufficiente che gli giunga una diffamazione frequente, né deve dare credito a qualcuno').

36 Vd. però Aimone, 'Il processo inquisitorio', cit., pp. 595-96; G. Minnucci, 'Istituti di diritto processuale nella *Summa de poenitentia et de matrimonio* di San Raimondo di Penyafort', in *Magister Raimundus*. Atti del Convegno per il IV centenario della canonizzazione di San Raimondo de Penyafort (1601-2001) (Roma: Istituto storico domenicano, 2002), pp. 87-109, pp. 102-03; M. Vallerani, *La giustizia pubblica medievale* (Bologna: il Mulino, 2005, Il mulino Ricerca. Storia), p. 35.

37 Johannes Teutonicus, *Apparatus ad* 3Comp. 5.1.4, *de accusationibus*, c. *Qualiter et quando*, v. *clamor*, ed. Aimone, cit., p. 624-625: "Ut ergo intelligas qualiter iudex procedere debeat, notabis quod cum alicuius coram iudice suo est infamatus, primo prefiget iudex terminum accusare volentibus, ut supra de purgatione canonica, c. ult. (1Comp. 5.59.8) et si accusatores apparuerint canonice audiatur crimen [...] Si vero accusator non appareat et mala fama crebescit, tunc episcopus vocatis ecclesie sue canonicis procedat ad inquisitionem, ut hic dicitur [...]".

ammesso al giuramento di innocenza. La risposta era negativa, e perciò favorevole alla prosecuzione dell'*inquisitio*[38].

Si deve ora raccogliere un altro spunto notevole di questa glossa: tra le argomentazioni favorevoli alla richiesta di fissare un termine all'accusatore, Giovanni avanzava la tesi della natura straordinaria dell'*inquisitio*. L'argomento della natura del modo inquisitorio veniva così ad essere ufficialmente introdotto nel discorso giuridico, dove continuerà a svolgere un ruolo consistente. Giovanni concluse tuttavia contro la richiesta dell'inquisito, allegando la decretale innocenziana *Inter sollicitudines*, emessa qualche mese prima della *Licet Heli*, nello stesso anno 1199, in materia di giuramento d'innocenza. La domanda dell'inquisito non poteva essere accolta, perché non ci si poteva purgare prima dell'*inquisitio*, ma soltanto dopo che essa fosse stata svolta. Dalla decretale *Inter sollicitudines*, che non a caso fa parte del *dossier* delle lettere innocenziane rilevanti per l'emersione del modo inquisitorio, come evidenziato da Lotte Kéry[39], risultava infatti che il giudice potesse procedere all'inquisizione anche in assenza di accusatore e che il giuramento di purgazione dovesse essere deferito solo in caso di insuccesso dell'inquisizione[40]. Un'altra forte ragione a favore dell'inquisizione era stata avanzata da Giovanni nel suo apparato al *Decretum*, nel quale troviamo già sollevata la questione: l'inquisizione porta alla luce i crimini, consentendone la punizione, laddove la purgazione li occulta; una variante quindi del principio *ne crimina maneant impunita*[41].

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38 Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, ed. García y García, cit., *ad* c.8 (*Qualiter et quando*), p. 200: "Set quid si iudex vult inquirere de crimine et reus dicit ut prefigatur terminus volentibus accusare ut, si non apparuerit accusator, tunc audiatur expurgatio sua, numquid potius est audiendus iudex quam reus? Videtur quod potius reus sit audiendus, quia hoc quod reus petit ordinarium est et a iure illud habet. Id autem quod iudex petit extraordinarium videtur, et iudex potius ordinario quam extraordinario iudicio iudicabit [...]. Dico potius audiendum iudicem volentem inquirere quam reum se volentem purgare, quia expurgatio sequitur inquisitionem, ut extra iii. de purgat. canon. Inter (3Comp. 5.17.1 = X 5.34.10)".

39 Kéry, 'Inquisitio', cit., pp. 261-66; M. Vallerani, 'Modelli di verità. Le prove nei processi inquisitori', in *L'enquête au Moyen Âge*. Études réunies par Claude Gauvard (Roma: École française de Rome, 2008, Collection de l'École française de Rome 399.), pp. 123-42, p. 126.

40 Innocentius III, *Inter sollicitudines* (1199, maggio 7), in *Reg. Inn. III*, 11.60(63), pp. 111-14. *Inquisitio ex officio, nullo accusante*, approvata dal papa: "nec illud etiam improbamus, quod, licet contra eum nullus accusator legitimus appareret, ex officio tuo tamen, fama publica deferente, voluisti plenius inquirere veritatem".

41 Johannes Teutonicus, *Apparatus ad* C.2 q.5 c.6, *Habet*, v. *habet*: "sed quid si infamatus vult expurgare se, iudex autem vult inquirere de fama eius? Videtur quod iudex potius inquirere possit, ut hic et extra eod. c. Inter. Sed contra illud est ordinarium, quod infamatus se expurget: ergo beneficium illud non est ei auferendum [...] Sed dic, quod episcopus si vult potest inquirere, quia crimen quandoque per inquisitionem revelatur, quod per purgationem occultatur. Sol. si infamia orta est contra eum, iudex inquirere potest, extra de accusa. cap. Qualiter" ("che fare se l'infamato vuole il giuramento purgatorio, ma il giudice vuole indagare sulla sua fama? Sembra che il giudice possa piuttosto indagare [...] Ma al contrario la procedura ordinaria prevede che l'infamato acceda al giuramento purgatorio: pertanto quel beneficio non gli deve essere tolto [...] Ma considera che il vescovo se vuole può indagare, poiché il crimine talvolta con l'*inquisitio* è svelato, mentre con il giuramento purgatorio è occultato. Soluzione: se è stata sollevata l'infamia contro di lui, il giudice può indagare"). In questa glossa è già presente la contrapposizione tra modo ordinario e straordinario. L'autore,

Veniamo a Tancredi, il cui apporto, in queste pagine, ho voluto particolarmente evidenziare. Nell'apparato alla 3Comp., nella glossa precedentemente citata come una tappa rilevante nella configurazione dell'*ordo* inquisitorio, egli riprese la soluzione di Giovanni Teutonico, riferendola, nella distinzione da lui proposta, all'*inquisitio* condotta *ex officio* dal giudice ordinario, nella quale questi, secondo l'opinione a suo tempo espressa dal suo predecessore, aveva l'obbligo di fissare un termine per un eventuale accusatore. Se l'accusatore si fosse presentato, il giudice doveva ascoltarlo e quindi procedere con il modo accusatorio. Se non si presentava un accusatore, il giudice poteva procedere con l'*inquisitio ex officio*. Lo stesso avveniva se non si presentava un promotore. Ma se si presentava un promotore, a meno che non venisse respinto con qualche eccezione, allora si doveva procedere con l'*inquisitio ex promovente*[42].

Tancredi affrontò il problema anche nella *Summula de criminibus*, ma da una prospettiva che – il punto merita di essere sottolineato – aprì la strada ad una *quaestio* simile, ma a ben vedere diversa. In quella parte dell'opera infatti (non coincidente con il successivo *Ordo iudiciarius* e sul cui valore per la conoscenza dell'impatto del IV concilio lateranense concordo con il giudizio di Fraher[43]) egli si chiese se, delegata un'*inquisitio* contro un prelato, qualcuno potesse agire contro di lui (si sottintende: tramite accusa). Nella discussione della *quaestio* si contrappongono, come d'obbligo, due posizioni: una favorevole e l'altra contraria alla prosecuzione dell'*inquisitio*. Due gli argomenti a favore dell'*inquisitio*: 1) "fama gerit vicem accusatoris": se la fama fa le veci dell'accusatore, così ragiona Tancredi, vi è già un accusatore e quindi non c'è necessità di ammetterne un altro; 2) l'*inquisitio* ha anche un'origine divina, trovando le sue basi nelle Sacre Scritture, e può quindi aspirare al primato. Ci troviamo di fronte a due argomenti molto interessanti: il primo prende sul serio e porta fino alle sue estreme conseguenze la funzione surrogatoria della fama rispetto all'accusa. Il secondo, per dimostrarne la superiorità o per lo meno la parità rispetto all'accusa,

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infatti, alla soluzione basata sulla prevalenza dell'inquisizione (sempre ricavabile dalla decretale *Inter sollicitudines*) oppone il fatto che, in base all'*ordo*, l'infamato gode del beneficio di attestare la sua innocenza tramite il corrispondente giuramento di innocenza. Giovanni risponde a questa obiezione con l'argomento riportato sopra nel testo.

42 Tancredus, *Apparatus ad* 3Comp. 5.1.4, *de accusationibus*, c. *Qualiter et quando*, Città del Vaticano, BAV, Vat. lat. 2509, fol. 253v, *v. inquirendum*: "no. quod inquisitio facienda est super his dumtaxat criminibus de quibus frequens suspitio processit apud bonos et graves nec habet ortum ab inimicis. Et hoc modo procedendum est. Si quis infamatus est apud iudicem suum ordinarium, iudex debet prefigere terminum accusare volentibus, ut procedant ad accusandum, ar. s. de pur. ca. c. ult. l. i. (1Comp. 5.29.8). Et si accusatores appareant, qui velint et valeant infamatum accusare, canonice audiantur, s. ii. q. v. Omnibus (C.2 q.5 c.19), s. xv. q. v. c. i. (C.15 q.5 c.1) et s. de pur. ca. Ex tuarum l. i. (1Comp. 5.29.5 = X 5.34.8). Si vero accusator non appareat et fama mala crebescat, tunc episcopus vocatis canonicis suis senioribus procedat ad inquisitionem, ut hic et i. de symonia Licet Hely, s. lxxxvi. di. Si quid vero (D.86 c.23). Et si est aliquis qui <pro>sequatur inquisitionem, audiat eum et recipiat testes ab illo nominatos. Si vero nullus apparuerit prosecutor, vel apparuerit et repulsus est, quoniam potest excipi contra illum et probare etiam bonam famam suam, tunc iudex ex officio suo testes inducat i.e. Cum oporteat (3Comp. 5.1.6 = X 5.1.19), s. xi. q. iii. Precipue (C.11 q.3 c.3), ar. ii. q. v. Presbiter (C.2 q.5 c.13)". È il primo ramo della distinzione riportata integralmente anche da Roffredus Beneventanus, *Libelli iuris canonici*, cit., *Qualiter facienda est inquisitio super criminibus super quibus fama precessit*, fol. 48rb-va.

43 Fraher, "Tancred's 'Summula'", cit., p. 23.

aggancia l'*inquisitio* all'ordine giuridico più alto. Contro la prevalenza dell'inquisizione militava però la preminenza dell'*ordo accusatorius* e il rispetto della forma del giudizio: la regola fondamentale era che nessuno potesse essere condannato senza accusatore e che la forma del giudizio esigesse l'intervento di almeno tre persone nel processo: giudice, accusatore e reo. La soluzione di Tancredi concilia le opposte istanze, con un risultato – si noti – comunque favorevole al mantenimento dell'*inquisitio*: nel senso che, se si fosse presentato un terzo disposto ad agire contro l'inquisito gli si doveva dare la precedenza, ma in tal caso, secondo Tancredi, il terzo avrebbe assunto il ruolo di attore/promotore dell'*inquisitio* e non di accusatore. Di regola, anzi, egli dichiara che l'*inquisitio* richiede un *actor*; in mancanza di un prosecutore, il giudice ha tuttavia facoltà di *ex officio suo inquirere*[44].

Bernardo da Parma, nella Glossa ordinaria al c. *Qualiter et quando* II del *Liber Extra*, tornò a discutere la questione a suo tempo proposta da Giovanni Teutonico. Nella sua elaborazione dell'*ordo* inquisitorio, basata su una distinzione a due rami – a seconda che il giudice procedesse a inquisizione *ex officio* oppure ad istanza di parte – egli sostenne che nel primo caso il giudice, al quale fosse giunta voce che una persona fosse infamata, aveva la facoltà discrezionale di concedere un termine entro il quale potesse presentarsi un eventuale accusatore, trascorso il quale egli poteva procedere a inquisizione o anche deferire il giuramento di innocenza (ipotesi esclusa da Giovanni), anche se da ultimo riteneva che fosse preferibile che il giudice procedesse a *inquisitio*, poiché era facile che, dati i rischi, nessuno si presentasse ad accusare[45].

Benché l'autore della Glossa ordinaria al *Liber Extra*, in una glossa alla decretale *Inter sollicitudines*, non parlasse di facoltà ma di obbligo per il giudice di stabilire un termine per chi volesse accusare[46], nell'interpretare il c. *Qualiter et quando* II, come si è visto, egli riteneva più opportuno consigliare al giudice di non ritardare l'*inquisitio*, respingendo la richiesta di un termine per un eventuale accusatore. Per Goffredo da Trani e per l'Ostiense, invece, ciò era escluso non per motivi di opportunità, ma perché il giudice era effettivamente obbligato a proseguire l'inquisizione, come prescritto dalla decretale *Inter sollicitudines*[47].

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44 Tancredus, *Summula de criminibus*, cit., q. 1, pp. 32-33.

45 Bernardus Parmensis, *Apparatus ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, v. *ad inquirendum*: "Item et illud potest facere prelatus, cum infamia contra aliquem ad ipsum pervenit, ut prefigat terminum volentibus accusare, ut si aliquis apparuerit accusator audiat illum et procedat legitime in accusatione s. c. proxi. (X 5.1.23) et XV. q. v. cap. i., i. de pur. ca. Ex tuarum (X 5.34.8). Si autem non apparuerit, tunc potest procedere ad inquirendum, ut s. dicitur, vel indicere purgationem, in qua si defecerit puniatur ut s. c. proxi. (X 5.1.23). Sed melius est quod inquirat, quia periculosum est accusare, quia de facili nullus accusaret".

46 Bernardus Parmensis, *Apparatus ad* X 5.34.10, *de purgatione canonica*, c. *Inter sollicitudines*, v. *ecclesiastica constitutio*. Sulla stessa linea: Raymundus de Peniafort, *Summa de poenitentia et matrimonio*, cit., l. III, *De inquisitionibus, et purgationibus*, § 4, p. 366, su cui Minnucci, 'Istituti di diritto processuale', cit., pp. 102-03.

47 Goffredus de Trano, *Summa in titulos Decretalium*, cit., *ad* X 5.1, *de accusationibus*, n. 23, fol. 191ra: "puto potius inquirendum, quia purgatio sequitur inquisitione, ar. inf. de purga. cano. c. Inter sollicitudines (X 5.34.10)"; Hostiensis, *Summa aurea*, cit., *ad* X 5.1, *de inquisitionibus, Et qualiter procedatur*, n. 7, fol. 340va.

Nello *Speculum iudiciale*, sulla cui diffusione e autorevolezza è superfluo spendere parole, Guglielmo Durante discute entrambe le questioni già avanzate in dottrina, cumulandone le soluzioni, sulle tracce della Glossa ordinaria. Quanto alla seconda, che si è appena avuto modo di esporre, anch'egli ripete che è più sicuro per il giudice non fissare alcun termine per accusare, perché l'accusa è pericolosa ("tutius est quod inquirat quam quod predictum terminum prefigat")[48]. Nelle sue preziose *additiones* – nel suo genere un lavoro che supera il mero intento della compilazione – Giovanni d'Andrea rimprovera all'autore la poca chiarezza di questa motivazione, condivisa con Bernardo, e la precisa: il timore che il termine possa trascorrere inutilmente. Nei limiti in cui questo ritardo possa essere pericoloso, questa ragione lo soddisfa. Ritiene comunque che ci sia una spiegazione migliore per convincere dell'inopportunità che il giudice ritardi l'inquisizione: il rischio che si presenti un amico dell'accusato con cui quest'ultimo si sia messo d'accordo. È vero che a sventare questo tipo di frode soccorreva la pena del taglione: ma era anche vero che nelle città come Bologna, dove questa pena non era prevista dagli statuti, pullulavano le frodi e le inquisizioni del podestà venivano impedite da accuse concorrenti: a tal punto che le autorità locali avevano emanato uno statuto, allo scopo di non far cessare l'inquisizione e di consentire al podestà di procedere sopra entrambe. Meglio era dunque, anche ad avviso del canonista bolognese, avviare l'inquisizione piuttosto che attendere un accusatore[49].

Con l'articolata riflessione di Giovanni d'Andrea si chiude dunque un periodo in cui la dottrina canonistica, in una serie di *quaestiones*, tenta di conciliare accusa e inquisizione, ora ammettendo che l'accusa possa far cessare l'inquisizione, ma nello stesso tempo stabilendo che, se manca l'accusa, si deve procedere con l'inquisizione e non con il giuramento di innocenza (Giovanni Teutonico), ora ammettendo che la parte privata possa assumere le vesti di promotore piuttosto che di accusatore (Tancredi, *Summula*), ora ancora consigliando al giudice di avviare l'inquisizione, perché era probabile che nessun accusatore si presentasse (Bernardo da Parma). Giovanni d'Andrea, che si dimostra al corrente della prassi delle corti giudiziarie ecclesiastiche e secolari, mette in luce una variabile di contesto non di poco conto per la soluzione del problema: il rischio, tutt'altro che inesistente nella realtà, di accordi in malafede con l'accusato per sfuggire alla punizione, che fa arretrare la tesi della fungibilità dell'accusa rispetto all'inquisizione[50], in tutte le fasi del processo. Questa è, quanto meno, la soluzione preferita dal canonista bolognese. Sarà la tesi

48 Gulielmus Durandus, *Speculi ... pars tertia et quarta*, cit., III, *De inquisitione*, *Viso igitur*, n. 20, fol. 13vb.

49 Iohannes Andreae, *Additiones ad* Gulielmus Durandus, *Speculi ... pars tertia et quarta*, cit., III, *De inquisitione*, *Viso igitur*, n. 21, fol. 13va, v. *terminum prefigat*: "Praecedens ratio non concludit hoc dictum [...]. Puto autem quod author intellexit, quod quia poterat illud tempus inutiliter labi, ideo erat omittendum. Quod concedo, ubi mora esset periculosa. Sed aliam rationem meliorem poterat inducere author: quia posset submitti accusator amicus cum quo colluderetur. Sed timor talionis tollit hanc fraudem: sed in locis ubi non imponitur, pullulabat fraus illa. Bononię erat statutum, quod non probans accusam condemnabitur in viginti soli. Sepissime inquisitiones potestatum impediebantur per tales accusationes: propter quod superadditum est statutum, quod per accusationem non cesset inquisitio, sed procedatur super utraque".

50 Sulla fungibilità dell'accusa vd. Sbriccoli, '«Vidi communiter observari»', cit., p. 79.

difesa, alla fine del secolo, anche da Francesco Zabarella, sulla base di uno stringente argomento testuale: non era dubbio che il prelato potesse procedere liberamente ad *inquisitio*, senza alcuna necessità di fissare un termine per gli accusatori, perché ciò era quanto prevedeva letteralmente la costituzione *Qualiter et quando*[51]. Non a caso il canonista padovano definiva l'inquisizione "processus iudicis[52]". Si continuerà invece a discutere degli effetti di un processo iniziato con modo inquisitorio qualora sopraggiungesse un accusatore. E si continuerà a ragionare sulla vera natura dell'inquisizione, supposto che ne avesse una sola. Nel Duecento, alcuni canonisti davano ancora risposte contraddittorie, decidendo cioè sia per la natura ordinaria sia per la natura straordinaria dell'*inquisitio*, a seconda della prospettiva[53]. Ma forse, come noterà Niccolò Tedeschi, l'ambivalenza era insita in questo processo, al contempo ordinario e straordinario: ordinario perché si trattava di una via introdotta per tutti i crimini dal diritto canonico, soggetta inoltre all'osservanza dell'*ordo iuris*, benché con delle varianti; straordinario, perché mancava l'accusatore e l'*ordo iuris* subiva delle deroghe[54].

'Duplex est ordo': lo spazio delle garanzie

A controbilanciare i maggiori poteri che l'*inquisitio* innocenziana assegnava al giudice, la costituzione *Qualiter et quando* gli imponeva altresì degli obblighi, che si traducevano in garanzie nei confronti dell'imputato. Se il modello inqui-

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51 Franciscus Zabarella, *Super IIII et V Decretalium subtilissima Commentaria*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, § *Hunc tamen*, n. 4, fol. 38rb: "Ego dico quod de iure canonico certum est quod inquisitio est processus qui fieri potest libere a prelato non premisso termino predicto: pro hoc tex. hic in § Ad corrigendos et s. e. Super his in prin. (X 5.1.16)". Identica soluzione in Abbas Panormitanus, *Commentaria in quartum, et quintum Decretalium libros*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, n. 22, fol. 81va.

52 Franciscus Zabarella, *Super IIII et V Decretalium subtilissima Commentaria*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, § *Hunc tamen*, n. 4, fol. 38rb: "Dic quod est processus super crimine inveniendo vel puniendo ex officio iudicis effluens, quandoque nullo coadiuvante sed sola fama seu clamore precedente, quandoque aliquo coadiuvante non tamen se inscribente, nec proprie agente sed veluti ministro". Al dettato testuale della decretale *Qualiter et quando* aveva già fatto ricorso la Glossa ordinaria al *Decretum* (*supra*, nt. 41).

53 Un solo esempio importante: Innocentius IV, *In quinque libros Decretalium apparatus seu commentaria* (Lugduni: apud Carolum Pesnot, 1578), *ad* X 5.1.19, *de accusationibus*, c. *Cum oporteat*, n. 1, fol. 491rb: "Nec mireris quod ita exactas probationes exigo super infamia, quia non est sine causa, est enim extraordinarius modus agendi per inquisitionem" ('non ti meravigli il fatto che esiga prove così precise sulla fama, poiché non è senza motivo: infatti, il modo di procedere per inquisizione è straordinario').

54 Abbas Panormitanus, *Commentaria super prima parte secundi Decretalium libri, tomus tertius* (Venetiis: apud Iuntas, 1617), *ad* X 2.1, *de iudiciis*, rubr., n. 3, fol. 2va. Idem, *Commentaria in quartum, et quintum Decretalium libros, tomus septimus* (Venetiis: apud Iuntas, 1617), *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, n. 14, fol. 81ra. La distinzione si trova esposta anche nel commentario al c. *Qualiter et quando* II, *opus maius* del canonista senese Mariano Sozzini il Vecchio, che ne rivendica la priorità sul Panormitano, avendola "immaginata" per primo: Marianus Socinus senior, *Super quinto Decretalium* (Lugduni: 1559), *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, n. 47, fol. 58rb.

sitorio investiva sul giudice plenipotenziario e sulla sua presunta imparzialità, *ne crimina maneant impunita*, d'altro canto non rinunciava alla dimensione del giusto processo[55]. Passiamo allora brevemente in rassegna lo spazio delle garanzie contemplate dal papa.

Il giudice doveva citare l'inquisito e in sua presenza comunicargli i capitoli o gli articoli sui quali intendeva svolgere l'*inquisitio* (in altre parole: i crimini per i quali era inquisito). I capitoli sui quali il giudice intendeva indagare dovevano essere resi noti prima che egli compisse l'inquisizione e il giudice non poteva procedere all'*inquisitio veritatis* se prima non avesse verificato l'esistenza dell'infamia a carico dell'imputato: l'*inquisitio famae* doveva precedere l'*inquisitio veritatis*, come previsto anche dalle decretali *Cum oporteat* e *Inquisitionis*[56].

Dopo l'assunzione delle testimonianze doveva avvenire la pubblicazione del processo e dovevano essere pubblicati sia i *dicta* sia i nomi dei testimoni. La prescrizione è importante, perché serviva a dare effettività al diritto di difesa, emanazione del diritto naturale[57]. L'inquisito, infatti, non sarebbe stato in grado di difendersi pienamente, sollevando le opportune eccezioni e opposizioni, se non gli fosse stata nota l'identità dei testimoni, insieme al contenuto delle rispettive dichiarazioni.

Riguardo a queste prescrizioni, l'interrogativo più importante a cui i canonisti dovettero dare una risposta attiene al loro *quantum* di rigidità o di flessibilità. Quanto erano vincolanti le garanzie? Quali erano gli effetti dell'inosservanza dell'*ordo* prescritto o della *perversio ordinis*, per usare una categoria dell'Ostiense? I diritti a favore dell'inquisito erano disponibili oppure irrinunciabili? Le garanzie funzionavano *ex officio* oppure a istanza di parte? La fase dell'*inquisitio famae* che, data la concezione della *publica fama* innocenziana come preambolo dell'*inquisitio*, sembrava un segmento essenziale e non negoziabile del processo inquisitorio, poteva essere trascurata o eliminata?

Già l'apparato di Giovanni Teutonico al IV concilio lateranense rivela l'attenzione dei primi decretalisti per il rispetto di questo segmento dell'*ordo* da parte del giudice. Tralasciando la precisione con la quale tutti i vari stadi della procedura vengono illustrati, il grande canonista non manca di avvertire che l'imputato deve essere citato[58], deve essere messo al corrente delle imputazioni a suo carico "ut possit venire instructus" e può sollevare varie eccezioni contro la persona che conduce l'inquisizione: contro il

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55 Questa prospettiva è stata molto accentuata ad esempio negli studi di Kenneth Pennington. Da ultimo, 'The Jurisprudence of Procedure', cit. Per una sintesi di interventi storiografici di area americana vd. ora: M. H. Eichbauer, 'Medieval Inquisition Procedure: Procedural Rights and the Question of Due Process in the 13th Century', in *History Compass* 12/1 (2014), pp. 72-83. Vd. anche M. R. Damaška, 'The Quest for Due Process in the Age of Inquisition', in *American Journal of Comparative Law*, 60, n° 4, Fall 2012, pp. 919-54; trad. it. 'La ricerca del giusto processo nell'età dell'inquisizione', in *Criminalia* 2012, pp. 27-66.

56 Vd. *supra* nt. 14 (*Inquisitionis*) e nt. 30 (*Cum oporteat*).

57 Da ultimo: G. Chiodi, 'Crimini enormi e tortura ex processu informativo: una violazione del diritto di difesa dell'imputato?', in *Glossae. European Journal of Legal History* 13 (2016), pp. 71-107, con ulteriori indicazioni bibliografiche.

58 Vd. anche Tancredus, *Summula de criminibus*, cit., q. IV, p. 34.

giudice, contro il promotore, contro i testimoni[59]. È noto poi il compiacimento con cui Vincenzo Ispano accolse quel passo della costituzione *Qualiter et quando* in cui si stabiliva che l'*inquisitio* dovesse svolgersi in presenza dell'inquisito: sembrava infatti che il papa avesse voluto tradurre in norma una sua opinione dottrinale. Ma quel che più conta è che la presenza dell'imputato gli sembrava una garanzia essenziale per il buon esito dell'*inquisitio famae*, a tal punto che l'assenza del diretto interessato, in base alla sua esperienza, era sempre dannosa; perché se l'imputato fosse stato presente avrebbe potuto contribuire alla ricostruzione dei fatti, reagendo alle affermazioni del giudice o della controparte con le prove più opportune[60]. Infine, e il punto merita di essere sottolineato in vista degli ulteriori sviluppi dottrinali, anche Vincenzo esige che l'*inquisitio famae* preceda l'*inquisitio veritatis* e ai suoi occhi tutto ciò è anche giusto: se si deve procedere per inquisizione, infatti, si legge in una sua glossa, occorre prima sapere se è giusto, cioè se sussiste l'infamia a carico del sospettato[61]. A completare la visione dei pionieri dell'inquisizione, si può aggiungere la testimonianza di Tancredi, ricorrendo alla solita elaborata glossa *inquirendum* alla *Qualiter et quando* 1[62].

Nel Duecento il canonista più impegnato a salvaguardare le disposizioni della costituzione *Qualiter et quando* sembra essere stato Enrico da Susa, come rivelano

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59 Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, *ad* c.8 (*Qualiter et quando*), ed. García y García, cit., p. 198. Sulla tecnica delle eccezioni vd. anche un ottimo esempio in Vincentius Hispanus, *Apparatus in Concilium quartum Lateranense*, *ad* c.8 (*Qualiter et quando*), ed. García y García, cit., v. *a malevolis et maledicis*, p. 302.

60 Vincentius Hispanus, *Apparatus ad* 3Comp. 5.1.4, *de accusationibus*, *Qualiter et quando*, ed. Aimone, cit., v. *clamore*, p. 628: "queritur autem an absente aliquo possit fieri inquisitio super eum et concedunt hoc plerique magistri. Ego tamen didici experimento fuisse dampnosum. Si enim esset presens, de fama sua, quia tali die non erat presens, cum talis dicitur ab eo interfectus, supra de testibus Ex tenore (3Comp. 2.12.8 = X 2.20.35), et probaret unde fama ortum habuit quia ab inimicis". Idem, *Apparatus in Concilium quartum Lateranense*, *ad* c.8 (*Qualiter et quando*), ed. García y García, cit., p. 299; Johannes Teutonicus, *Apparatus in Concilium quartum Lateranense*, *ad* c.8 (*Qualiter et quando*), ed. García y García, cit., v. *debet*, p. 201.

61 Vincentius Hispanus, *Apparatus ad* 3Comp. 5.1.6, *de accusationibus*, *Cum oporteat*, ed. Aimone, cit., v. *clamore*, v. *inquisitionem*, p. 629: "Si ergo facienda est inquisitio, ante debet sciri si iustum est ut fiat, idest fama subest. Et ex quo constiterit de fama, procederetur ad inquisitionem".

62 Tancredus, *Apparatus ad* 3Comp. 5.1.4, *de accusationibus*, c. *Qualiter et quando*, Città del Vaticano, BAV, Vat. lat. 2509, fol. 253v, *v. inquirendum*: "Et no. quod certus debet esse contra quem sit inquisitio super quibus criminibus fieri debet, nec debet fieri secundum cartulam occulte datam, ut habeat copiam defendendi se et sciat super quibus fiat inquisitio contra eum, quoniam si probarentur aliqua contra eum de quibus non esset infamatum non esset propterea puniendum, ut probatur in const. Innocentii de ac. Qualiter et quando et in c. Inquisitionis (4Comp. 5.1.2 = X 5.1.21), qui rationabiliter explicat formam inquisitionis. Et receptis testibus debet fieri publicatio et dicta eorum et omnia nomina testium ei edenda sunt, ut habeat salvas exceptiones tam contra dicta testium quam contra personas eorum, et detur copia sibi defendendi seipsum, ut in preallegata dec. Inquisitionis (4Comp. 5.1.2)" ('Nota che deve essere certo contro chi sia l'*inquisitio*, su quali crimini deve essere fatta, né deve essere fatta sulla base di una carta data di nascosto, affinché [l'imputato] abbia la possibilità di difendersi e sappia su quali reati si indaga contro di lui, dal momento che se si prova contro di lui qualcosa di cui non è infamato non deve per questo essere punito, come provato dalla cost. di Innocenzo III *Qualiter et quando* e nel c. *Inquisitionis*, che in modo ragionato spiega come si svolge l'inquisizione. E accettati i testimoni, deve essere fatta la pubblicazione e le dichiarazioni e i nomi dei testimoni devono essere comunicati, per preservare le eccezioni sia contro le deposizioni sia contro le persone dei testimoni,

alcuni passi della sua *Lectura*[63]. L'Ostiense, ad esempio, è molto fermo sull'obbligo di comunicare all'inquisito i capitoli prima di procedere all'*inquisitio*, pena la nullità del processo, per *perversio ordinis*[64]. Egli si dimostra ancor più esigente nel pretendere il rispetto dell'obbligo di compiere preliminarmente l'*inquisitio famae* prima dell'*inquisitio veritatis*. "Duplex est inquisitio" ('l'*inquisitio* è duplice'), commenta infatti l'Ostiense: conseguenza della violazione dell'*ordo* anche in questo caso è la nullità del processo[65]. Enrico da Susa prende alla lettera Innocenzo III, secondo il quale nell'*inquisitio* il giudice non sostiene simultaneamente il ruolo di accusatore e di giudice, perché è la fama ad avere la funzione di avviare il processo, "quasi fama deferente vel denunciante clamore" come era scritto già nella decretale *Licet Heli*. Per l'Ostiense, anzi – e non era il solo a pensarla così – si poteva dire che la fama intervenisse indifferentemente "loco accusatoris seu denunciantis[66]".

Ma il luogo in cui l'Ostiense insiste con maggiore energia su questo tema è la *lectura* alla decretale *Qualiter et quando* I, che contiene un'ampia trattazione dedicata alla fase iniziale dell'*inquisitio famae*, con tutte le possibili varianti di quella che, per il grande canonista, era una sorta di atipica *litis contestatio* all'interno del *modus inquisitionis*[67]. Peraltro, in questo stadio del processo, l'Ostiense ricava un'ulteriore garanzia a favore dell'inquisito, essendo disposto a concedergli anche una dilazione per meglio riflettere sulle sue mosse successive (*tempus ad deliberandum*)[68].

Dove però il nostro autore lascia la traccia più incisiva è nella discussione del punto più delicato di tutta la questione: l'inquisito che non si attiva, che tace e non eccepisce, o che tace e non fa appello, quando il giudice non osserva l'ordine prescritto e procede all'*inquisitio veritatis*. L'opinione dell'Ostiense è a questo riguardo nettissima: il processo è nullo per inosservanza dell'ordine, e a poco vale sostenere che con il suo silenzio, con la sua mancata contraddizione, l'inquisito abbia tacitamente

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e gli deve essere data copia per difendersi, come nella preallegata *Inquisitionis*'). Cf. Roffredus Beneventanus, *Libelli iuris canonici*, cit., *Qualiter facienda est inquisitio super criminibus super quibus fama precessit*, fol. 48va.

63 H. A. Kelly, 'Inquisitorial Due Process and the Status of Secret Crimes', in *Proceedings San Diego*, pp. 407-27, repr. in Idem, *Inquisitions and Other Trial Procedures*, cit., II, p. 411; Idem,'The Right to Remain Silent', cit., p. 996.

64 Henricus de Segusio, *In quintum Decretalium librum Commentaria*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, n. 15, v. *fuerit*, fol. 11vb: "si igitur primo fiat inquisitio, et postea tradantur capitula, nihil agitur, quia ordo pervertitur, non servatur [...]".

65 Ivi, *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, n. 8, v. *Debet*, fol. 11rb: "[...] subaudi ex quo sibi de infamia constat, et non ante; si ergo ante ad hanc veritatem inquirendam processerit, ordinem inquisitionis quo ad tempus pervertit, unde nec est ex tali processu diffinitiva sententia promulganda, ut patet in integra. s. eod. Qualiter"; n. 9, v. *veritatem*, fol. 11rb: "ex quo de infamia constat, nam de illa primo est inquirendum etiam a senioribus [...] et sic duplex est inquisitio [...] nisi quando ecclesia ex puro et mero officio procedit".

66 Ivi, *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, n. 10, v. *deferente*, *fol. 11rb*: "quasi dicat hec fama loco accusatoris seu denunciatoris habetur, ut hic patet, unde et dici potest, quod cum ipsa quasi contestetur lis [...]".

67 Ivi, *ad* X 5.1.17, *de accusationibus*, c. *Qualiter et quando* I, nn. 1-2, fol. 5va.

68 Ivi, *ad* X 5.1.17, *de accusationibus*, c. *Qualiter et quando* I, n. 2 in fine, fol. 5vb. Vd. già Hostiensis, *Summa*, cit., *de inquisitionibus*, *Et qualiter procedatur*, n. 6, fol. 340rb.

rinunciato al suo diritto[69]. Non vi è che un'unica conseguenza possibile di fronte alla violazione dell'*ordo*: la nullità del processo[70]. Ne deriva che, come dirà commentando il c. *Qualiter et quando* II, un *ordo* da rispettare esiste non solo quando si procede per accusa, ma anche quando si agisce con il modo inquisitorio: in entrambi i casi non si deve "precipitare" la sentenza, ma si deve seguire un percorso strutturato in stadi[71].

Alquanto diversi, tuttavia, saranno gli sviluppi della questione. Alla fine del secolo, infatti, Bonifacio VIII compie un passo decisivo, che modificherà completamente l'assetto dottrinale. Con la decretale *Postquam*, infatti, il papa stabilisce che, dopo che un inquisito abbia confessato le sue colpe dinnanzi a un giudice inquisitore delegato, egli non possa eccepire né l'omesso accertamento dell'infamia a suo carico né l'omessa comunicazione dei capitoli: non è per questi motivi che egli può impugnare la confessione[72].

Ma gli effetti di una seconda decretale, *Si is cui*, sono ancora più dirompenti, perché con questo provvedimento il pontefice afferma che il processo è valido anche quando un giudice delegato procede all'*inquisitio veritatis*, omessa l'*inquisitio famae*, e l'imputato, presente, non abbia reclamato o eccepito alcunché[73]. Dunque, preciserà Giovanni d'Andrea, l'imputato ha l'onere di chiedere al giudice di verificare la fama o ha l'onere di fare appello: in caso contrario, non potrà più eccepire la nullità del processo. Questo è il motivo dell'insistente richiamo al rimedio dell'appello, che

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69 Henricus de Segusio, *In quintum Decretalium librum Commentaria*, cit., *ad* X 5.1.17, *de accusationibus*, c. *Qualiter et quando* I, n. 4, fol. 5vb: "Vult igitur haec constitutio, quod si ordo iste servatus non est, sed contra non infamatum inquisitum est, supersedeatur processui et de novo fiat inquisitio, in qua primo quaeratur de fama, qua probata de veritate quaeratur: et sic intellige ea, quae in hoc c. sequuntur. [...] Quid si inquisitor procedat ad inquisitionem veritatis et is contra quem fit inquisitio de inquisitione famae facienda nihil excipit, nunquid tacite videtur iuri suo renuntiare? Et dicunt quidam quod sic [...]. Alii contra [...], quibus assentimus. Nam iste est casus huius decre. si sane intelligatur: processum enim fuerat ad testes recipiendos super veritate criminum praesente episcopo et non contradicente, et tamen processus reprehenditur, quia hic ordo non fuit servatus [...]".

70 Ivi, *ad* X 5.1.17, *de accusationibus*, c. *Qualiter et quando* I, n. 6, fol. 6rb: "habet ergo inquisitio ordinem suum, ut s. non procedat nisi infamia praecedente, i. eo. Cum oporteat § Discretioni (X 5.1.19) et c. Inquisitionis § Tertiae respon. i. versi. ad hoc (X 5.1.21), et de isto loquitur haec decre. ut patet in integra. Habet et alium ordinem, qui servandus est, ut hic et i. eo. Qualiter § Debet et § fi. versi. et inquisitioni et versic. fi., qui si non servetur (X 5.1.24), nihil agitur, et ideo est corrigendum, ut i. sequitur [...]".

71 Ivi, *ad* X 5.1.19, *de accusationibus*, c. *Cum oporteat*, n. 5, fol. 7va: "Patet igitur hic, quod nedum cum agitur in modum accusationis de crimine, sed etiam quando agitur in modum inquisitionis, non est precipitanda sententia, vel processus, et dicitur praecipitari, quando non servatur iudiciarius ordo, ut leg. et no. s. eo. Qualiter r(espo)n. i. et § i. (X 5.1.17)".

72 Bonifacius VIII, VI 5.1.1, *de accusationibus*, c. *Postquam*. La norma è spesso ricordata dai decretalisti nei loro commenti al c. *Qualiter et quando* II. Vd. ad es. Franciscus Zabarella, *Super IIII et V Decretalium subtilissima Commentaria*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, § *Debet*, n. 2, fol. 37va; § *Hunc tamen*, n. 9, fol. 39ra.

73 Bonifacius VIII, VI 5.1.2, *de accusationibus*, c. *Si is*. Anche su queste vicende vd. Kelly, 'Inquisitorial Due Process', cit., pp. 410-14; Idem, 'The Right to Remain Silent', cit., pp. 996-97; Idem,'Inquisition, Public Fame and Confession: General Rules and English Practice', in *The Culture of Inquisition in Medieval England*, ed. by M. C. Flannery and K. T. Walter (Cambridge: D.S. Brewer, 2013, Westfield medieval studies 4), pp. 8-29, in particolare pp. 9-13.

troviamo in molte opere processuali: ad esempio, un canonista molto informato come Egidio Foscarari riporta con cura anche le formule dell'atto d'appello, nel caso in cui il giudice ometta di consegnare copia dei capitoli all'inquisito o di provare l'infamia nei suoi confronti[74].

Questi due interventi normativi, così espliciti nel legittimare due deviazioni dall'*ordo*, incidono inevitabilmente sul dibattito dottrinale. Vediamo brevemente come. Si potrebbe dire che si passa dal principio "duplex est inquisitio", così fortemente enunciato dall'Ostiense, al principio "duplex est ordo". Quest'ultimo nasce dalla riflessione del primo grande terzetto di commentatori del *Liber Extra*: Jean Lemoine, Giovanni d'Andrea e Guido da Baisio. Il punto del contendere è rilevantissimo: l'*ordo* è vincolante oppure disponibile? La risposta dei tre canonisti è sicura: non tutti gli stadi della procedura sono inderogabili; la comunicazione dei capitoli e l'accertamento della fama non sono tra questi. Spetta dunque all'inquisito di far valere i suoi diritti: se egli tace, perché non chiede al giudice i capitoli, perché non chiede di provare l'infamia a suo carico o perché non fa appello, il processo resta valido.

Jean Lemoine e Guido da Baisio sono i due canonisti trecenteschi che si incaricano di sistematizzare questo effetto, con l'ausilio delle categorie giuridiche.

Il primo ritiene che si possa distinguere un *ordo necessitatis* la cui omissione vizia irrimediabilmente la sentenza, e un *ordo congruitatis*. Per quanto paradossale possa sembrare, l'obbligo di procedere preliminarmente all'*inquisitio famae* è necessario solo se l'inquisito fa appello, mentre è solo congruo o conveniente, se l'inquisito non si attiva[75].

L'impostazione di Guido da Baisio è analoga, pur entro una maglia concettuale differente: qui la dicotomia è tra requisiti sostanziali e non sostanziali dell'*ordo*. Comunicazione dei capitoli e *inquisitio famae* non sono elementi sostanziali dell'*ordo*: per lo meno non sono così sostanziali, che se l'imputato ometta di far valere i propri diritti il processo possa ritenersi nullo[76]. Giovanni d'Andrea, nella Glossa ordinaria,

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74 Egidius de Fuscarariis, *Ordo iudiciarius*, cit., n. XCI, p. 161 e n. XCIII, p. 163. Vd. anche Gulielmus Durandus, *Speculi ... pars tertia et quarta*, cit., III, *De inquisitione*, *Viso igitur*, n. 32, fol. 14vb.

75 Ioannes Monachus, *In Sextum librum Decretalium dilucida commentaria Glossa aurea nuncupata, additionibus* clarissimi J.C. Philippi Probi Biturici (Venetiis: apud Iuntas, 1585), *ad* VI 5.1.1, *de accusationibus*, c. *Postquam*, n. 2, fol. 314rb: "Sol. est ordo necessitatis et iste omissus vitiat, ut hic [...] tamen propter hunc ordinem propositum et non admissum appellari potest, C. de appellat. l. i. (X 2.28.1) et hic, quia istum ordinem omittens, tacite eidem renunciare censetur i. eo. c. proximo. Est igitur ordo necessitatis, si suo tempore proponatur, sed est congruitatis ex post facto, ut hic et i. c. proximo". Idem, *ad* VI 5.1.2, *de accusationibus*, c. *Si is*, n. 1, fol. 314vb: "cum ordo, qui hic et s. c. proximo colligitur, sit introductus in favorem illius contra quem mandatur inquiri, iste, si omittat, sibi imputet. Cum quisque renunciare valeat his, quae pro se introducta sunt [...] et ille qui defensione suo ordine non utitur illam perdit [...]".

76 Guido de Baysio (Archidiaconus), *Egregia commentaria... super Sexto Decretalium* (Lugduni: per Ioannem Moylin alias De Chambray, 1534), *ad* VI 5.1.1, *de accusationibus*, c. *Postquam*, n. 2, fol. 106vb: "ad secundum dicas quod est duplex ordo iuris, prout no. ii. q. i. in sum.: unus qui est de substantia iuris, alius qui non est de sub., ut ibi dicitur. Si ille qui non est de substantia non servetur tacente reo bene valet, ut hic, alias potest appellari. At ubi non servatur ordo qui est de substantia iuris nil agitur, ut ibi dicitur in pre. c. cum dilectus in glo. si ordo ibi videas. Negari tamen non potest quin sit quadam substantia reo excipiente et negante se diffamatum et sic possunt intelligi prima dicta: sed

preferisce parlare di *substantia* dell'*ordo*; nella *Novella in Sextum* ricorderà però entrambe le posizioni dottrinali. Il massimo canonista del tempo ammette che le prescrizioni dell'*ordo* devono essere rispettate, ma aggiunge poi che compete all'inquisito di attivarsi per il rispetto della procedura. Se egli non agisce, vuol dire che rinuncia tacitamente ai suoi diritti: l'opinione contraria dell'Ostiense, che Giovanni ben conosce, è superata[77]. È evidente che queste conclusioni sono orientate in senso molto più sfavorevole all'inquisito, gravato di un vero e proprio onere di chiedere e di parlare: se tace deve imputare alla sua inerzia il fatto che il processo rimanga valido. Proprio il contrario di quello che aveva voluto l'Ostiense[78]. Proprio il contrario, si può aggiungere, di quello che, a proposito della comunicazione dei capitoli, aveva ribadito il IV concilio lateranense, con il tono imperativo e solenne delle sue disposizioni. È quello che, in età moderna, in una rilevante *Praxis criminalis canonica* (pubblicata nel 1561), obietterà a questa linea dottrinale, nel frattempo integrata da ulteriori adesioni di eminenti canonisti come Niccolò Tedeschi e Domenico da S. Gimignano[79], il giudice salernitano Pietro Follerio[80]. Il suo denso e meditato discorso, quasi una vera e propria allegazione *pro inquisito*, pur limitata alla produzione dei capitoli, che a suo avviso il giudice era sempre obbligato d'ufficio ad effettuare senza attendere l'istanza di parte, introduce una nota garantista che sembra stonata rispetto al coro dottrinale, così pronto, viceversa, a modulare in modo più flessibile l'*ordo* inquisitorio.

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non est adeo de substantia quin omitti possit, ut hinc patet et i. c. proxi. Et idem dicas in se. litera: nam licet capitula debuerint dari a iudice illi contra quem vult inquirere continentia super quibus vult inquirere, ut s. eo. Qualiter § Debet (X 5.1.24), tamen si non dentur et confessio fiat in iudicio talis omissio non obest, ut hic patet".

77 Iohannes Andreae, *Apparatus ad* VI 5.1.1, *de accusationibus*, c. *Postquam*, v. *fuerunt* (Venetiis: apud Iuntas, 1572): "si infamatus non erat, ad inquisitionem procedi non debuit veritatis, ut in predictis iuribus, sed ille debuit appellare et non respondere: unde imputet sibi. Idem dico de capitulis, quae tradi debuerunt, s. eo. Qualiter ii. § Debet (X 5.1.24), si petita non fuerunt et confessus est crimen, sibi imputet: potuit enim iuri pro se introducto renuntiare et tunc renuntiat [...]. Sed Host. contra in predicta decre. Qualiter i. (X 5.1.17) [...]". Per i capitoli vd. già Idem, *In quintum Decretalium librum Novella Commentaria*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* 11, n. 25, fol. 17ra.

78 Iohannes Andreae, *Apparatus ad* VI 5.1.2, *de accusationibus*, c. *Si is*, v. *reclamante*: "dicebat Hosti. in supradicta gl. quod taciturnitas habebatur hic pro dissensu et contradictione, quod non est verum, ut hic vides: imo tacendo tacite iuri suo renuntiat [...] reclamare igitur debuit et petere prius inquiri super inquisitione infamiae: et si hoc non fieret, debuit appellare, ut dixi s. c. prox."; v. *nequibis*: "non ergo ordo iste ita est de substantia, quod ei renuntiare non possit".

79 Abbas Panormitanus, *Commentaria in quartum, et quintum Decretalium libros*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* 11, n. 10, fol. 80va: l'inquisizione *non traditis capitulis* è valida se l'inquisito non fa opposizione. Quanto alla validità del processo in cui il giudice abbia proceduto all'*inquisitio veritatis* senza aver prima compiuto l'*inquisitio famae*: *ad* X 5.1.19, *de accusationibus*, c. *Cum oporteat*, n. 7, fol. 75ra. Per il Panormitano, la corrispondente eccezione che l'inquisito può sollevare è dilatoria e stabilita in suo favore: egli deve quindi imputare a se stesso il fatto di non aver eccepito. Dominicus a Sancto Geminiano, *In Sextum Decretalium volumen commentaria* (Venetiis: apud Iuntas, 1578), *ad* VI 5.1.1, *de accusationibus*, c. *Postquam*, n. 9, fol. 266vb.

80 Petrus Follerius, *Canonica criminalis praxis* (Venetiis: ex officina Marci de Maria Salernitani, 1561), cap. VI, *Aut inquisitione formata*, nn. 46-49, cc. 93-95.

Arriviamo così all'ultimo punto che vorrei trattare per completare il quadro delle peculiarità della costituzione *Qualiter et quando*: l'obbligo di pubblicare il processo, con i nomi dei testimoni associati alle rispettive deposizioni.

L'impatto di questa ulteriore prescrizione ordinamentale sembra chiaro. Il segreto, che in un primo tempo copriva la fase dell'*inquisitio generalis* e *specialis*, e quindi sia l'identità dei testimoni sia il contenuto delle loro dichiarazioni, doveva cadere con la formalità della pubblicazione del processo.

E tuttavia anche in questo caso non tardarono a palesarsi dei problemi interpretativi. Quando, ad esempio, l'inquisito poteva conoscere i nomi dei testimoni, così da poter presentare le proprie eccezioni o criticare le loro deposizioni? A questo problema diede una risposta, in seguito largamente condivisa, l'Ostiense: i nomi dei testimoni dovevano essere comunicati all'inquisito solo dopo la loro escussione e non prima, allo scopo di evitare corruzioni[81].

E ancora: la regola della simultanea consegna (*simul tradi*) dei nomi dei testimoni e delle loro dichiarazioni era intangibile o derogabile? Il problema per un certo tempo non fu discusso. L'Ostiense però, nella *Lectura*, affermò a chiare lettere che molti giudici prudenti, per consuetudine, non la rispettavano, consegnando all'inquisito i nomi senza deposizioni e le deposizioni senza i nomi, e osservò che questa *cautela* della dissociazione dei nomi dalle testimonianze era sorta "propter odia evitanda[82]".

Ed ecco comparire nuovamente sulla scena Bonifacio VIII, a legittimare l'eccezione, limitata stavolta ai soli processi contro gli eretici: la decretale *Statuta* autorizza infatti il vescovo o gli inquisitori a tenere segreti i nomi dei testimoni, in caso di grave pericolo per essi, quando gli inquisiti siano persone potenti[83]. La deroga dunque era stata dettata da una ragione (*causa finalis*) di sicurezza per i testimoni: una misura protettiva che avrebbe dovuto riguardare la persona o i beni dei testimoni (come precisato dalla Glossa ordinaria al *Liber Sextus*[84]) e consentire loro di deporre il vero senza timore e pericolo. L'ancoraggio ad un presupposto di fatto, che la prima dottrina

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81 Henricus de Segusio, *In quintum Decretalium librum Commentaria*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, v. *nomina*: "ex quo quod hic dicit dicta et nomina publicanda et quod statim sequitur [...] apparet, quod ante receptionem testium non sunt tradenda nomina testium, quod et omnino cavendum est, ut corruptioni occurratur et subornationi [...]". Per la conferma della regola "simul tradi/postea tradi": Iohannes Andreae, *In quintum Decretalium librum Novella Commentaria*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, n. 26, fol. 171ra; Franciscus Zabarella, *Super IIII et V Decretalium subtilissima Commentaria*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, § *Hunc tamen*, n. 9, fol. 39ra; Antonius de Butrio, *In librum quintum Decretalium commentarii*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, n. 40, fol. 19vb.

82 Henricus de Segusio, *In quintum Decretalium librum Commentaria*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, v. *nomina*: "cauti etiam iudices consueverunt tradere depositiones sine nominibus et nomina sine depositionibus propter odia evitanda".

83 VI 5.2.20, *de haereticis*, c. *Statuta*: vd. H. A. Kelly, 'Inquisition and the Prosecution of Heresy: Misconceptions and Abuses', in *Church History* 58 (1989), pp. 439-51, repr. in Idem, *Inquisitions and Other Trial Procedures*, cit., I, p. 444; J. Chiffoleau, '«Ecclesia de occultis non iudicat»? L'Église, le Secret et l'occulte du XII[e] au XV[e] siècle', in *Il Segreto. The Secret. Micrologus* 14 (2006), pp. 359-481, trad. it. *La Chiesa, il segreto e l'obbedienza. La costruzione del soggetto politico nel medioevo* (Bologna: il Mulino, 2010, Saggi 728), pp. 110-16.

84 Iohannes Andreae, *Apparatus ad* VI 5.2.20, *de haereticis*, c. *Statuta*, v. *periculum*.

a onor del vero raccomandò di intendere in modo stretto, trattandosi pur sempre di una deroga all'*ordo*, si inseriva in un quadro ormai tracciato e innescò, come al solito, un processo interpretativo che giunse a dilatare le eccezioni oltre i loro confini. È questo il senso di un'osservazione che si legge nell'apparato ordinario al *Sextum* di Giovanni d'Andrea, a margine del c. *Statuta*: mancando gli estremi di una situazione di pericolo per i testimoni (*cessante periculo*), il giudice è richiamato dallo stesso pontefice all'osservanza dell'*ordo*, e quindi alla pubblicazione integrale delle deposizioni dei testi e dei loro nomi. È vero però, precisa il canonista bolognese, che se il giudice non pubblica il processo e l'imputato non reagisce nei modi che sappiamo, la sentenza è valida. Anche la pubblicazione delle testimonianze e dei nomi dei testimoni poteva quindi ritenersi superflua, se l'inquisito non faceva opposizione[85].

A metà del Trecento la concezione dell'*ordo* era evidentemente cambiata e il giudice era autorizzato a procedere più speditamente, affrancato da alcuni vincoli che la costituzione da cui si sono prese le mosse sembrava invece aver ideato a maglia stretta.

85 Ivi, *ad* VI 5.2.20, *de haereticis*, c. *Statuta*, v. *iudiciis*: "s. de accusa. Qualiter et quando § Debet (X 5.1.24), et tradi debent nomina cum dictis, ut possit et de falso arguere, et se plene defendere, ut ibi: tamen si hoc omitteretur parte tacente, non puto vitiari processum, ad hoc s. e. lib. de accusa. c. i. et ii." La posizione è nuova rispetto a quanto affermato in Idem, *In quintum Decretalium librum Novella Commentaria*, cit., *ad* X 5.1.24, *de accusationibus*, c. *Qualiter et quando* II, n. 26, fol. 17ra. L'opinione dell'autore della Glossa ordinaria al *Sextum* è messa a frutto da Dominicus a Sancto Geminiano, *In Sextum Decretalium volumen commentaria* (Venetiis: apud Iuntas, 1578), *ad* VI 5.2.20, *de haereticis*, c. *Statuta*, n. 4, fol. 279ra: "No. bene istam gl. quod licet omittatur publicatio nominum parte non contradicente, valet processus: et sic facit ad dubium, an si iudex profert sententiam non publicatis dictis testium, partibus non contradicentibus, quod valet sententia, quod bene nota" ('Nota bene questa glossa che, benché si ometta la pubblicazione dei nomi senza che la parte si opponga, il processo è valido: e nel dubbio, se il giudice emana la sentenza senza pubblicare le deposizioni testimoniali senza l'opposizione della parte, la sentenza è valida, cosa che devi notare bene').

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Abbreviations: Ab: abbot; Abp: archbishop; Adn: archdeacon; Bp: Bishop; CB: cardinal-bishop; CP: cardinal-priest; dioc.: diocesis; Dn: deacon; patr: patriarch.

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COLLECTION ECCLESIA MILITANS. HISTOIRE DES HOMMES ET DES INSTITUTIONS DE L'ÉGLISE LATINE AU MOYEN ÂGE

This volume collects essays from an international group of scholars who treat various aspects of the Fourth Lateran Council's placement within the development of the *ius commune*. Topics include the canon law about armsbearing clergy, episcopal elections, heresy, degrees of affinity within marriage, the oversight of relic veneration; two essays highlight the council's reaction to the Fourth Crusade's sack of Constantinople in trying to incorporate the eastern church into the ecclesiastical structure and liturgical norms of the Roman Church; several essays concentrate on the usage of Roman or civil law in some of Lateran IV's constitutions and emphasize issues of private and procedural law. Collectively, and headed by an essay by Anne J. Duggan on the relationship of Pope Alexander III's pontificate to the Lateran IV constitutions, the essays create a fuller picture of Innocent III and his curia's reliance on developments within the jurisprudence of the preceding half century, but they also reveal the ways in which they forged new paths and made significant contributions to guide canon law in the years following the council.

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